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FOIA MARKER

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Record Group/Collection: Dan Quayle Vice Presidential Records
Collection/Office of Origin: Deputy Chief of Staff's Office
Series: Porter, Richard W., Files
Subseries: Subject Files

OA/ID Number: 21804
Folder ID Number: 21804-003

Folder Title:
Alaska, Anchorage 5/11/92

Stack:	Row:	Section:	Shelf:	Position:
G	34	6	5	1

Withdrawal/Redaction Sheet
(George Bush Library)

Doc. No. / Type	Subject/Title	Date	Restriction	Classification
01. Schedule	Trip of Vice President to Alaska; redactions. (7 pp.)	05/08/92	(b)(7)(e), (b)(7)(f)	
02. List	Vice President Quayle Guest List; contains Personally Identifiable Information. (6 pp.)	n.d.	(b)(6)	
03. Form	V.P. Quayle Guest Data Form; contains Personally Identifiable Information. (1 pp.)	05/11/92	(b)(6)	
04. Form	V.P. Quayle Guest Data Form; contains Personally Identifiable Information. (1 pp.)	05/11/92	(b)(6)	
05. Form	V.P. Quayle Guest Data Form; contains Personally Identifiable Information. (1 pp.)	05/11/92	(b)(6)	
06. List	Vice President Quayle Guest List; contains Personally Identifiable Information. (7 pp.)	n.d.	(b)(6)	

Collection:

Record Group: Quayle Vice Presidential Records
Office: Deputy Chief of Staff's Office
Series: Porter, Richard, Files
Subseries: Subject Files
WHORM Cat.:
File Location: Alaska, Anchorage 5/11/92

Pinksheet Number: RML16257
OA/ID Number: 21804-003
Date Closed: 8/15/2025
FOIA/Sys Case #: 2025-0878-F
Re-review Case #:
P-2/P-5 Review Case #:

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Schedule	Trip of Vice President to Alaska; redactions. (7 pp.)	05/08/92	(b)(7)(e), (b)(7)(f)	

Collection:

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WHORM Cat.:
File Location: Alaska, Anchorage 5/11/92

Date Closed:	8/15/2025	**OA/ID Number:**	21804-003
FOIA/SYS Case #:	2025-0878-F	**Appeal Case #:**	
Re-review Case #:		**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
AR Case #:		**MR Case #:**	
AR Disposition:		**MR Disposition:**	
AR Disposition Date:		**MR Disposition Date:**	

RESTRICTION CODES

Freedom of Information Act (FOIA) - [5 U.S.C. 552(b)]

(b)(1) National security classified information
(b)(2) Release would disclose internal personnel rules and practices of an agency
(b)(3) Release would violate a Federal statute
(b)(4) Release would disclose trade secrets or confidential or financial information
(b)(6) Release would constitute a clearly unwarranted invasion of personal privacy
(b)(7) Release would disclose information compiled for law enforcement purposes
(b)(8) Release would disclose information concerning the regulation of financial institutions
(b)(9) Release would disclose geological or geophysical information concerning wells

Deed of Gift Restrictions

C(1) Closed by Executive Order 13526, governing access to national security information
C(2) Closed by statute or by the agency which originated the information
C(3) Closed in accordance with restrictions contained in donor's deed of gift [formerly listed as only C]
PRM. Removed as a personal record misfile

Presidential Records Act - [44 U.S.C. 2204(a)]

P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]

GUEST AND STAFF INSTRUCTIONS

Sunday, May 10, 1992

6:00 p.m. **BAGGAGE CALL:** Please leave unlocked baggage outside Advance Office, Room 287. Hand carry all film.

Monday, May 11, 1992

8:30 a.m. **BAGGAGE CALL**

10:05 a.m. **BAGGAGE CALL** for those traveling directly to Andrews Air Force Base. Deliver unlocked baggage to the Distinguished Visitor's Lounge, Base Operations. Hand carry all film.

10:25 a.m. Proceed to motorcade for boarding.

MOTORCADE ASSIGNMENTS

(b) (7)(E), (b) (7)(F)

10:35 a.m. THE VICE PRESIDENT departs The White House en route Andrews Air Force Base.

Drive Time: 30 mins.

11:05 a.m. THE VICE PRESIDENT arrives Andrews Air Force Base and proceeds to Air Force Two for boarding.

CLOSED PRESS COVERAGE
CLOSED ARRIVAL/DEPARTURE

GUEST AND STAFF INSTRUCTIONS

Proceed to Air Force Two for boarding.

AIR FORCE TWO MANIFEST

(b) (7)(E), (b) (7)(F)

Guests Aboard

(b) (7)(E), (b) (7)(F)

5/08/92 5:19 pm

11:15 a.m. AIR FORCE TWO departs Andrews Air Force Base en route Anchorage, Alaska.

Flight Time: 7 hrs. 25 mins.
Time Change: - 4 hrs.
Food Service: Lunch

2:40 p.m. AIR FORCE TWO arrives Elmendorf Air Force Base, Anchorage, Alaska.

OPEN PRESS COVERAGE
CLOSED ARRIVAL

THE VICE PRESIDENT deplanes and proceeds to motorcade for boarding.

Met By:

Lieutenant General Tom McInerney,
Commander, Alaskan Command, Alaskan
Norad Region, 11th Air Force
Commander, Alaskan Norad Region
Colonel Rod Kelly, Commander, 3rd Wing
The Honorable Tom Fink, Mayor,
Anchorage, Alaska (R)
Mr. Eldon Ulmer, National Committeeman,
Republican Party of Alaska
Ms. Pauline Martens, Vice-Chair,
Republican Party of Alaska

OPEN PRESS COVERAGE

GUEST AND STAFF INSTRUCTIONS

Those listed below should DEPLANE via FRONT steps behind THE VICE PRESIDENT and proceed to motorcade for boarding:

(b) (7)(E), (b) (7)(F)

(b) (7)(E), (b) (7)(F)

Those listed below should DEPLANE via REAR steps and proceed to motorcade for boarding:

(b) (7)(E), (b) (7)(F)

MOTORCADE ASSIGNMENTS

(b) (7)(E), (b) (7)(F)

Note: (b) (7)(E), (b) (7)(F)

2:50 p.m. THE VICE PRESIDENT departs Elmendorf Air Force Base en route Captain Cook Hotel.

Drive Time: 15 mins.

3:05 p.m. THE VICE PRESIDENT arrives Captain Cook Hotel and proceeds inside to Crows Nest I Room, via elevator.

Met By:

Mr. Alan Budehl, Director of Operations, Captain Cook Hotel
Ms. Denise Lattery, Director of Sales, Captain Cook Hotel
Mr. Robert Doll, Director of Catering, Captain Cook Hotel
Mr. Walter Hickel Jr., Son of Governor Hickel

OFFICIAL PHOTOGRAPHER ONLY

GUEST AND STAFF INSTRUCTIONS

Guests and Staff will be escorted to Holding Room, 18th Floor.

EVENT: CIVIL JUSTICE REFORM ROUNDTABLE

* Press Pool Coverage (Beginning Only)
* 36 Attendees
* Photo Opportunity

3:15 p.m. THE VICE PRESIDENT arrives Crows Nest I Room and participates in Photo Opportunity.

3:30 p.m. THE VICE PRESIDENT concludes Photo Opportunity and participates in Roundtable.

4:05 p.m. THE VICE PRESIDENT concludes Roundtable and proceeds to Holding Room.

THE VICE PRESIDENT arrives Holding Room.

4:10 p.m. THE VICE PRESIDENT departs Holding Room en route Ballroom I.

GUEST AND STAFF INSTRUCTIONS

Those wishing to attend Vice President's Remarks will be escorted to Staff Viewing Area.

EVENT: VIP PHOTO OPPORTUNITY FOR SENATOR MURKOWSKI AND REPRESENTATIVE YOUNG

* Official Photographer Only
* 100 Attendees

4:15 p.m. THE VICE PRESIDENT arrives Ballroom I and participates in Photo Opportunity.

4:30 p.m. THE VICE PRESIDENT concludes Photo Opportunity and proceeds to off-stage announce position, Ballroom II.

EVENT: FUNDRAISING RECEPTION FOR SENATOR MURKOWSKI AND REPRESENTATIVE YOUNG

* Open Press Coverage
* 350 Attendees
* Off-Stage Announcement
* Brief Remarks
* Mix and Mingle

4:35 p.m. THE VICE PRESIDENT proceeds onto dais and remains standing.

Representative Young introduces Senator Murkowski.

Senator Murkowski makes welcoming remarks and introduces THE VICE PRESIDENT.

4:40 p.m. THE VICE PRESIDENT proceeds to toast lectern and begins Brief Remarks.

4:50 p.m. THE VICE PRESIDENT concludes Remarks and participates in Mix and Mingle.

5:00 p.m. THE VICE PRESIDENT concludes Mix and Mingle and proceeds to motorcade for boarding.

GUEST AND STAFF INSTRUCTIONS

Proceed to motorcade for boarding.

MOTORCADE ASSIGNMENTS

Same as on arrival with the following exceptions:

DELETE:

(b) (7)(E), (b) (7)(F)

5:10 p.m. THE VICE PRESIDENT departs Captain Cook Hotel en route Elmendorf Air Force Base.

Drive Time: 15 mins.

5:25 p.m. THE VICE PRESIDENT arrives Elmendorf Air Force Base and proceeds to Air Force Two for boarding.

OPEN PRESS COVERAGE
CLOSED ARRIVAL/DEPARTURE

GUEST AND STAFF INSTRUCTIONS

Proceed to Air Force Two
for boarding.

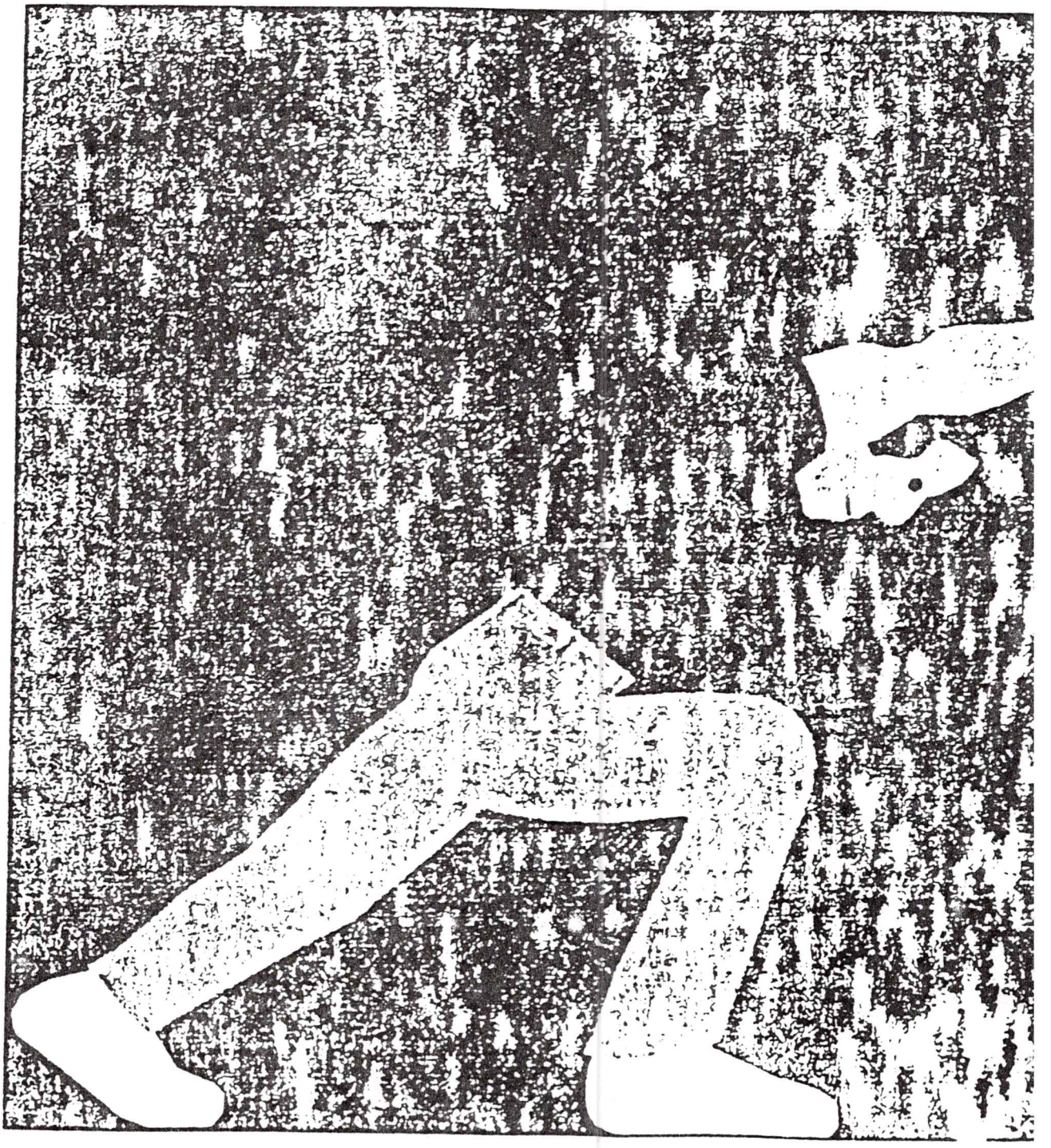
AIR FORCE TWO MANIFEST

(b) (7)(E), (b) (7)(F)

5:35 p.m. AIR FORCE TWO departs Anchorage, Alaska en route Tokyo, Japan.

Flight Time: 7 hrs. 25 mins.
Time Change: + 17 hrs.
Food Service: Dinner

Alaska
Where the Loser Pay
the Winner's Fee



Only one state has this provision (with an offer of judgment rule). How is it working?

By Andrew J. Kleinfeld



Alaska combines a federal-style Rule 6 offer of judgment rule with the Englis rule awarding attorneys' fees to the pre vailing party in civil litigation. This art cle summarizes the Alaska system an discusses its effect on litigation and se tlement.

Under Alaska Civil Rule 68, as unde the federal rule, a party, ordinarily th defendant, may at any time prior t judgment make a formal offer to allo judgment to be taken against himsel for a specified amount plus costs. If th plaintiff rejects the offer and subse quently wins a verdict lower than th amount of the offer plus interest, th defendant is deemed the prevailing pa ty from the time of the offer and is ent tled to costs from the time of the offe

Costs (other than attorneys' fees) a lowed under the rule are much less tha actual out-of-pocket costs. For exam ple, a party is likely to have to pay physician who testifies in court $500 t $1,500 for routine, brief testimony, bu will usually receive only the subpoen rate for expert witnesses—less than $5 in most cases—under Rule 68.

The Rule 68 offer would have littl force were it not for Alaska's use of th English rule on attorneys' fees. The ris that a few hundred, or at most, a fe thousand dollars in a costs award ma be shifted will ordinarily not affect th settlement evaluation of a plaintiff an ticipating an award ten or a thousan times as large.

The power of Rule 68 offers of judg ment in Alaska derives from Civil Rul 82, requiring that the prevailing part should ordinarily recover partial com



Andrew J. Kleinfeld
is an attorney
in Fairbanks, Alaska

pensation for attorneys' fees. The rule works slightly differently for plaintiffs and defendants. Rule 68 offers of judgment work mainly with defense awards, but both sides of the rule should be understood.

For successful plaintiffs, the courts ordinarily follow a schedule provided in the text of the rule. Cases are broken down into three categories: noncontested (defaulted); contested without trial (resolved after an answer or motion by defense but before trial); and contested through trial.

Awards on contested without trial cases are 20 percent of the first $2,000, 15 percent of the next $3,000, 12.5 percent of the next $5,000, and 7.5 percent of everything over $10,000. Thus, the substantial case entails an award of $1,475 plus 7.5 percent of everything over $10,000, if resolved before trial, as by acceptance of a Rule 68 offer of judgment—attorneys' fee awards being in addition to offer of judgment. If a case is tried, the Rule 82 award to a prevailing plaintiff is $1,850 plus 10 percent of the excess over $10,000.

Rule 82 computations are performed on the sum of the verdict and prejudgment interest. For example, a verdict of $100,000 three years after the accident yields a judgment of $131,500 with prejudgment interest at 10.5 percent and $145,500, including Rule 82 attorneys' fees at the contested rate of $1,850 plus 10 percent of the excess over $10,000. Thus, with costs, a $100,000 jury verdict yields about a $150,000 judgment after a typical lag.

On the defense side, the operative language of the rule is that the award should be "in a reasonable amount" which is "commensurate with the amount and value of legal services rendered." The Alaska Supreme Court has provided little guidance for trial judges on what this language means.

The Alaska Supreme Court has made it reversible error to award full or substantially full compensation for his attorney's fees to the prevailing party, if the unsuccessful party litigated in good faith. Awards are to "partially" compensate the prevailing party, not fully compensate him. *Malvo v. J.C. Penney Co., Inc.*, 512 P.2d 575 (Alaska 1973).

The Supreme Court will also reverse denial of attorneys' fees to the prevailing party without some good reason articulated by the trial judge. *Stordahl v. Government Employees Insurance Co.*, 564 P.2d 63 (Alaska 1977). The trial judge has broad discretion, but must award some partially compensatory amount based upon the actual work done and fees charged by the prevailing party's attorney.

Awards between 20 percent and 80 percent of actual defense fees are, as a practical matter, not reversible. These awards can amount to substantial four- or even five-figure judgments against unsuccessful plaintiffs.

Here is how Rule 68 and Rule 82 fit together.

The defendant offers to allow the plaintiff to take judgment against him for x dollars plus costs and attorney's fees.

If the plaintiff accepts the offer, he may file a Rule 79 costs bill and move for a Rule 82 attorney's fee award, which will ordinarily be the scheduled "contested without trial" amount. For example, a $45,000 Rule 68 offer is worth $49,100 plus allowable Rule 79 costs, for a total in the neighborhood of $50,000. Prejudgment interest is already accounted for in the amount of the offer. Usually plaintiff's and defendant's attorneys agree on these amounts over the telephone and avoid the extra filings.

If the plaintiff rejects the Rule 68 offer and the case is tried to a verdict, a little arithmetic must be performed to determine which party obtains a Rule 82 attorney's fees award. The court 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 judgment. This may be a great deal of money, since trial of a substantial case is likely to entail defense attorneys' fees of $10,000 to $50,000, or more, for protracted and complex litigation. The wise defendant will have made an offer of judgment early in the discovery process, so that most of the attorneys' fees will have been incurred after the Rule 68 offer and will be subject to Rule 82.

Thus, the plaintiff who wins an award lower than the Rule 68 offer plus interest faces an often catastrophic result. For example, in a personal injury case with a projected value in the $10,000 to $30,000 range, if the defendant makes a Rule 68 offer of $10,000, and the jury award with interest is less, the plaintiff will lose money on the litigation. The plaintiff will have to pay the defendant's attorney fees award—probably in the $5,000 to $10,000 range—and the plaintiff's own nonreimbursable costs for medical experts and so forth in the $1,000 to $5,000 range.

The knife also gets a little twist from a new Alaska statute on prejudgment interest. Under the statute, either side may make an offer of judgment within the first 60 days of the litigation, or five days after discovery ends. If the party does better than its offer

The rules do not substantially reduce the burden of attorneys' fees for successful plaintiffs

(lower for a defendant's offer, higher for a plaintiff's), then the prejudgment interest rate will be raised or lowered 2 percent for its benefit. Thus a plaintiff who wins a verdict higher than its offer is entitled to 12.5 percent prejudgment interest, and a successful defendant lowers the interest rate to 8.5 percent.

DO THESE RULES SERVE THEIR INTENDED PURPOSES?

This combination of rules is intended to serve two purposes—achieving more perfect justice between the litigants and encouraging settlement. They serve the latter objective better than the former.

The model villain, against whom the entire complex of rules is aimed, is the "bad man" who acknowledges the justice of the plaintiff's demand, but refuses to pay the obligation in order to profit from delay or use the plaintiff's anticipated litigation expenses as leverage to obtain an unjustly low settlement. The honest claimant, whom the rules are intended to benefit, is the person who demands what he is entitled to—and prevails. He is supposed to obtain sufficient interest and compensation for his attorneys' fees so that his victory is not Pyrrhic.

First, the rules do not substantially reduce the burden of attorneys' fees for successful plaintiffs. Here are the mechanics for typical contingent fee arrangements.

The scheduled percentages are much less than the percentages conventionally charged by plaintiffs' attorneys. Contingent fees in Alaska, as elsewhere, range from 25 percent to 50 percent. Most Alaska plaintiff attorneys' fee contracts, in my experience, provide that the Rule 82 award is rolled into the total recovery against which the contractual percentage is applied. Thus, if a case is settled, without trial, for the defendant's $100,000 liability insurance policy limit and Rule 82 attorneys' fees of $8,225, the usual one-third contingent fee will be applied to $108,225, yielding an actual fee of $36,075, and compensation to the plaintiff of only $72,150, a far cry from the $100,000 he should supposedly receive.

The obvious tinkering would be to limit attorneys' fees actually charged to the amount awarded, as in workers' compensation. But unless the scheduled percentages were raised to market levels, this might dry up the supply of attorneys willing to handle plaintiffs' personal injury claims, particularly the smaller ones.

Analogously, it has become extremely difficult during the last year or so for injured workers to hire attorneys in Alaska to prosecute moderately sized workers' compensation claims, because fees awarded by the workers' compensation board are below the amounts needed to make handling of the claims as profitable as alternative work.

If the Rule 82 schedule were raised to market rates liability insurance premiums would have to be increased substantially in order to spread the much higher cost. This might well increase the amount of evasion of Alaska's very loose new mandatory insurance law.

If the rules designated the Rule 82 award as the amount actually to be paid to the plaintiff's attorney an additional problem would develop around personal injury cases, resulting in judgments higher than the defendant's liability insurance policy limits. A line of Alaska cases holds that the Rule 82 award should be calculated on the total verdict plus interest not merely the policy limit. And unless the insurance policy clearly provides otherwise, the total verdict plus interest must be paid by the insurer as costs on top of its policy limit. If a defendant has a $100,000 policy limit, and the verdict plus prejudgment interest is $2 million, then the Rule 82 award is $200,850 (again, $1,850 + 10 percent of the excess over $10,000). Under current practice, the attorney would get his contingent fee percentage computed on the amount actually recovered from the insurance company—the $100,000 policy limit plus the $200,850 Rule 82 award and the Rule 79 costs would be rolled together, and the client would receive the rest. If the rules were changed so that the attorney received the Rule 82 award and nothing else, he would wind up with about twice as much as his client in this not extraordinary situation.

Second, the rules do not effectively discourage nuisance claims. These are claims for which the plaintiff knows that in all likelihood, a jury will find no liability or no damages, but suit is filed in hope of a settlement. If the case is litigated through trial, the defendant will probably win an award of $5,000 to $10,000 against the plaintiff, but the cost to the defendant will exceed the award, and the award will probably be uncollectible, so most defendants will pay up to $5,000 or so, even on frivolous claims.

Third, the rules do not really promote settlement in the manner contemplated. Alaska Supreme Court opinions have suggested that defendants would be more eager to settle because the stakes at trial are raised to include prejudgment interest and attorneys' fees. But the plaintiffs' attorneys are equally aware of the "add-ons" and factor them into their settle-

(Please turn to page 52)

matters to the disciplinary counsel, is that the ABA Standing Committee on Professional Discipline is advocating referring every minor infringement of the ethical rules.

Obviously, that is not the case; nor is it the problem. If I have overemphasized the need to refer misconduct in this article, it is because judges as a group are not referring the misconduct they observe or become aware of. I have attempted to show why referral is appropriate and also ethically mandated by Canon 3B(3). I believe that for the judge referral is usually the most advantageous response to lawyer misconduct.

Judges and judicial organizations interested in further information on disciplinary agencies or other information in this article may contact the author, Timothy McPike, ABA Center for Professional Responsibility, 11th Floor, 750 N. Lake Shore Drive, Chicago, Illinois 60611.

Kleinfeld

(Continued from page 7)

ment demands. The arithmetic consequence is that if the plaintiff's and defendant's attorneys evaluate the case differently, the difference is magnified, not shrunk, by the "add-ons." Interest and attorney's fees are proportional, so if the parties are far apart, their mutual awareness of the rules pushes them further apart.

ECONOMIC DURESS ON PLAINTIFFS

A positive feature of the rules is that by making a small case larger, they make it easier for plaintiffs with small cases to induce attorneys to accept them. But this increasing of the stakes works both ways—and has a serious negative side effect.

The combination of Rule 68 offers, statutory adjustment of prejudgment interest rates, Rule 79 costs, and Rule 82 attorney's fees, greatly raises the stakes in litigation. As was shown above, if the defendant loses a $100,000 case, he pays about $150,000. If the plaintiff wins a $10,000 verdict after rejecting a higher offer of judgment, he winds up owing money to the defendant as well as to his own lawyer.

The economic effect is like doubling the stakes in a poker game. It drives out the players whose resources do not allow them to stay at the table for a long enough time for the probabilities to work themselves out beyond a few bad hands.

Plaintiffs suffer more from the increased stakes than defendants. To understand why, one must consider the varying abilities of persons and institutions to bear risk. An institutional defendant, such as a large business or an insurance company, can afford the risk of a single adverse judgment much more easily than the person or firm of moderate resources who rarely litigates.

Consider the plaintiffs in a clear liability but unpredictable damages case. Most typical are the preexisting condition plaintiffs. These individuals present themselves to the jury with substantial disabilities, but the defendant has a good opportunity to show that their disabilities should be attributed to conditions which preexisted the accident. It is not at all unusual in these cases to have an offer of judgment around $50,000, a demand around $100,000, and jury verdict substantially lower than the offer or higher than the demand.

Now consider the risks to each side. In order to try the case, the defendant must risk a judgment which, with interest and attorneys' fees, may be twice the demand. But a professional litigant, such as a liability insurer, would be wise to take this risk rather than pay the demanded amount, because the occasional high verdict will be more than offset by the general run of moderate verdicts and the occasional low one.

The real pressure on insurers to settle these cases arises not from the interest and attorneys' fees rules, but instead from the risk of a judgment in excess of insurance policy limits, leading to a bad faith claim. Many cases worth $40,000 have settled for $50,000 policy limits plus Rule 82 attorneys' fees because of the bad faith risk. But sophisticated insurers are now learning to take the cap off their policy limit rather than be forced by the risk of a bad faith claim to pay more than a claim is worth.

The plaintiff faces a much more brutal choice. This is probably the only lawsuit he will ever have, so he cannot balance the occasional low verdict against the occasional high one. His resources are probably limited, so the difference between collecting the offered settlement and perhaps collecting nothing—because of a verdict lower than the offer of judgment—matters more to him than the same dollar difference matters to the institutional defendant. A four-or five-figure judgment against him for attorneys' fees and costs, because he did not beat the defendant's offer of judgment or lost on liability, may be catastrophic.

As a practical matter, if the defendant makes an offer of judgment early in the litigation at the low end of the likely value of the case, or even 10 percent to 20 percent less, the plaintiff takes an imprudent and unaffordable risk if he rejects it. The risk is made unaffordable by the impact of Rule 68, Rule 82, Rule 79 costs, and the new interest statute. In effect, the defendant is empowered to turn the plaintiff's reasonable bet on the outcome into a double or nothing bet which the plaintiff cannot prudently risk. The chance of recovering his loss plus all the add-ons is not worth the risk of having defendant's add-ons set off against his recovery.

When a plaintiff runs the risk of trial against a moderate offer of judgment and loses, the defendant often has enough leverage to prevent appeal. Typically the defendant offers to drop his costs and attorneys' fee awards in exchange for the plaintiff's aban-

donment of his appeal. This promotes settlements, but not necessarily in a just manner.

SUPREME COURT INCONSISTENCY

An oddity of Alaska Supreme Court practice suggests an inference that the court does not really believe in the justice of the doctrines it has imposed.

Although the supreme court awards attorneys' fees to prevailing parties, it does not follow anything like Rule 82. Instead, it routinely awards $250 to $750. The prevailing party is ordinarily not allowed to submit evidence of his actual fees, and the court does not consider them. Actual attorney's fees on appeals in substantial civil cases are typically in the $5,000 to $15,000 range. If a trial court followed this practice, it would be reversed.

The Alaska Supreme Court has never explained its anomalous practice on attorney's fees awards to prevailing parties. Does the court wish to avoid discouraging appeals? Then why not similarly avoid discouraging trials? Delay is a more serious problem in Alaska at the appellate than at the trial level, so administrative considerations do not favor keeping the door open wider at the appellate level.

Supreme court results are unpredictable, but so are trial results. Trial results in similar cases may approximate a bell shaped curve, with most in a predictable range, but substantial tails on the low and high ends. In certain kinds of cases, such as the weak liability, high damages personal injury case, the results may be an even more unpredictable dumbbell curve, with clusters around zero, and at very high levels, and few in between. In some cases, a plaintiff or his lawyer may be unreasonable in going to trial, but in many, trial is as good a means as settlement to decide how much money, if any, ought to be taken from one party and given to the other.

ABOLISH RULE 82

I suppose the above criticism implies that the rules are too effective, rather than not effective enough, in promoting settlement. The plaintiff is forced to settle his case for less than it is worth because of his lesser ability than the defendant to try the case on a double or nothing basis.

Some may feel that encouraging settlement is of such great value as to justify this result. Where the stakes are so high, my own values place a greater weight on justice than administrative convenience, so I cannot accept this outcome as desirable.

The Alaska Bar Association passed a resolution more than a decade ago calling upon the supreme court to repeal Rule 82. The court has never acted, nor explained its inaction, regarding this resolution. I think the bar was correct. We have gone too far in the direction of threatening litigants with catastrophe to compel them to settle. We ought to use our luxuriously expensive system of courts to try cases, not frighten people of moderate means out of trying them.

Parrish

(Continued from page 11)

ous fairness of forcing an insurance company to share plaintiff's costs of counsel in bona fide litigated cases, Rule 82 provides an economic incentive to insurers to avoid involving counsel altogether. The rule promotes settlement of litigation before it starts, as much as after. Wise insurers should, and I believe do, take this cost into account in deciding upon prelitigation settlement policies.

RULE 82 PROVIDES PARTIAL COMPENSATION

Although the prospect of an adverse award does promote a more meaningful evaluation, I doubt that it discourages the filing of many bona fide claims. Clients as a class are self-righteous, especially when they have a good case.

I also question whether the system suffers that much when a plaintiff who lacks confidence in his position, even though it may be well-founded, elects not to pursue his claim. At least his decision is predominantly free, coerced only by fair risks which are beneficial to the integrity of the system. What detriment there is in this situation is small in comparison to the alternative. The greater injustice by far is the bona fide case which cannot, as a matter of economics, be brought at all. Without fee awards, the freedom to bring bona fide claims in the $20,000 range can be lost altogether. We should not attempt to avoid one injustice by imposing a larger one.

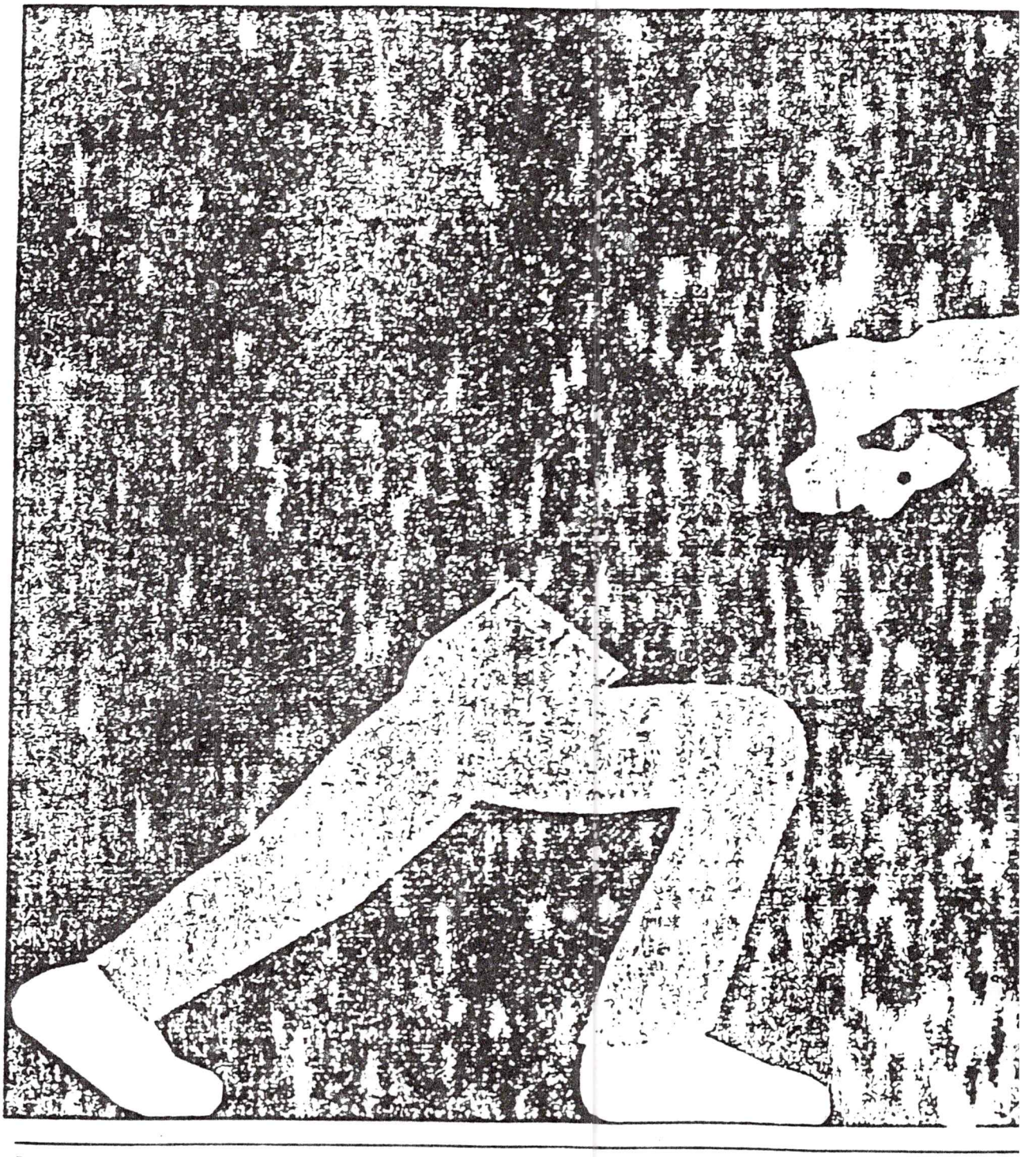
Of course, there is the occasional case where a plaintiff without a serious injury and a reasonably good liability position loses to a jury and suffers a fee award. This can be harsh, but the trial courts have sufficient discretion to temper the awards in light of the plaintiff's circumstances and the quality of the case.

Also, as Mr. Kleinfeld noted, marginal appellate grounds can be bargained against the fee award in most instances. But, by this mechanism, the rule again prompts realistic consideration of the merits of the case before proceeding into the appellate court. The plaintiff, who could otherwise not have anything to lose on appeal, suddenly does.

Average contingent fees in contested cases are one-third. As a result, plaintiffs, even with clearly bona fide claims, are rarely fairly compensated for their losses. Aside from the occasional run-away verdict, which is so often publicized, plaintiffs rarely come out ahead. To the extent Rule 82 covers approximately one-third (10 percent divided by 33⅓ percent) of fees actually paid, it reduces the under-compensation.

The successful defendant also is partially compensated. Thus, Rule 82 effects a redistribution of resources. Because both sides usually come out behind, it is better that the prevailing party suffers less.

Alaska
Where the Loser Pay
the Winner's Fee



Only one state has this provision (with an offer of judgment rule). How is it working?

By Andrew J. Kleinfeld



Alaska combines a federal-style Rule 6 offer of judgment rule with the Englis rule awarding attorneys' fees to the pr vailing party in civil litigation. This art cle summarizes the Alaska system an discusses its effect on litigation and se tlement.

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Costs (other than attorneys' fees) a lowed under the rule are much less tha actual out-of-pocket costs. For exam ple, a party is likely to have to pay physician who testifies in court $500 t $1,500 for routine, brief testimony, bu will usually receive only the subpoen rate for expert witnesses—less than $5 in most cases—under Rule 68.

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The power of Rule 68 offers of judg ment in Alaska derives from Civil Rul 82, requiring that the prevailing part should ordinarily recover partial com



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Awards on contested without trial cases are 20 percent of the first $2,000, 15 percent of the next $3,000, 12.5 percent of the next $5,000, and 7.5 percent of everything over $10,000. Thus, the substantial case entails an award of $1,475 plus 7.5 percent of everything over $10,000, if resolved before trial, as by acceptance of a Rule 68 offer of judgment—attorneys' fee awards being in addition to offer of judgment. If a case is tried, the Rule 82 award to a prevailing plaintiff is $1,850 plus 10 percent of the excess over $10,000.

Rule 82 computations are performed on the sum of the verdict and prejudgment interest. For example, a verdict of $100,000 three years after the accident yields a judgment of $131,500 with prejudgment interest at 10.5 percent and $145,500, including Rule 82 attorneys' fees at the contested rate of $1,850 plus 10 percent of the excess over $10,000. Thus, with costs, a $100,000 jury verdict yields about a $150,000 judgment after a typical lag.

On the defense side, the operative language of the rule is that the award should be "in a reasonable amount" which is "commensurate with the amount and value of legal services rendered." The Alaska Supreme Court has provided little guidance for trial judges on what this language means.

The Alaska Supreme Court has made it reversible error to award full or substantially full compensation for his attorney's fees to the prevailing party, if the unsuccessful party litigated in good faith. Awards are to "partially" compensate the prevailing party, not fully compensate him. *Malvo v. J.C. Penney Co., Inc.*, 512 P.2d 575 (Alaska 1973).

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Awards between 20 percent and 80 percent of actual defense fees are, as a practical matter, not reversible. These awards can amount to substantial four- or even five-figure judgments against unsuccessful plaintiffs.

Here is how Rule 68 and Rule 82 fit together.

The defendant offers to allow the plaintiff to take judgment against him for x dollars plus costs and attorney's fees.

If the plaintiff accepts the offer, he may file a Rule 79 costs bill and move for a Rule 82 attorney's fee award, which will ordinarily be the scheduled "contested without trial" amount. For example, a $45,000 Rule 68 offer is worth $49,100 plus allowable Rule 79 costs, for a total in the neighborhood of $50,000. Prejudgment interest is already accounted for in the amount of the offer. Usually plaintiff's and defendant's attorneys agree on these amounts over the telephone and avoid the extra filings.

If the plaintiff rejects the Rule 68 offer and the case is tried to a verdict, a little arithmetic must be performed to determine which party obtains a Rule 82 attorney's fees award. The court 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 judgment. This may be a great deal of money, since trial of a substantial case is likely to entail defense attorneys' fees of $10,000 to $50,000, or more, for protracted and complex litigation. The wise defendant will have made an offer of judgment early in the discovery process, so that most of the attorneys' fees will have been incurred after the Rule 68 offer and will be subject to Rule 82.

Thus, the plaintiff who wins an award lower than the Rule 68 offer plus interest faces an often catastrophic result. For example, in a personal injury case with a projected value in the $10,000 to $30,000 range, if the defendant makes a Rule 68 offer of $10,000, and the jury award with interest is less, the plaintiff will lose money on the litigation. The plaintiff will have to pay the defendant's attorney fees award—probably in the $5,000 to $10,000 range—and the plaintiff's own nonreimbursable costs for medical experts and so forth in the $1,000 to $5,000 range.

The knife also gets a little twist from a new Alaska statute on prejudgment interest. Under the statute, either side may make an offer of judgment within the first 60 days of the litigation, or five days after discovery ends. If the party does better than its offer

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(lower for a defendant's offer, higher for a plaintiff's), then the prejudgment interest rate will be raised or lowered 2 percent for its benefit. Thus a plaintiff who wins a verdict higher than its offer is entitled to 12.5 percent prejudgment interest, and a successful defendant lowers the interest rate to 8.5 percent.

DO THESE RULES SERVE THEIR INTENDED PURPOSES?

This combination of rules is intended to serve two purposes—achieving more perfect justice between the litigants and encouraging settlement. They serve the latter objective better than the former.

The model villain, against whom the entire complex of rules is aimed, is the "bad man" who acknowledges the justice of the plaintiff's demand, but refuses to pay the obligation in order to profit from delay or use the plaintiff's anticipated litigation expenses as leverage to obtain an unjustly low settlement. The honest claimant, whom the rules are intended to benefit, is the person who demands what he is entitled to—and prevails. He is supposed to obtain sufficient interest and compensation for his attorneys' fees so that his victory is not Pyrrhic.

First, the rules do not substantially reduce the burden of attorneys' fees for successful plaintiffs. Here are the mechanics for typical contingent fee arrangements.

The scheduled percentages are much less than the percentages conventionally charged by plaintiffs' attorneys. Contingent fees in Alaska, as elsewhere, range from 25 percent to 50 percent. Most Alaska plaintiff attorneys' fee contracts, in my experience, provide that the Rule 82 award is rolled into the total recovery against which the contractual percentage is applied. Thus, if a case is settled, without trial, for the defendant's $100,000 liability insurance policy limit and Rule 82 attorneys' fees of $8,225, the usual one-third contingent fee will be applied to $108,225, yielding an actual fee of $36,075, and compensation to the plaintiff of only $72,150, a far cry from the $100,000 he should supposedly receive.

The obvious tinkering would be to limit attorneys' fees actually charged to the amount awarded, as in workers' compensation. But unless the scheduled percentages were raised to market levels, this might dry up the supply of attorneys willing to handle plaintiffs' personal injury claims, particularly the smaller ones.

Analogously, it has become extremely difficult during the last year or so for injured workers to hire attorneys in Alaska to prosecute moderately sized workers' compensation claims, because fees awarded by the workers' compensation board are below the amounts needed to make handling of the claims as profitable as alternative work.

If the Rule 82 schedule were raised to market rates liability insurance premiums would have to be increased substantially in order to spread the much higher cost. This might well increase the amount of evasion of Alaska's very loose new mandatory insurance law.

If the rules designated the Rule 82 award as the amount actually to be paid to the plaintiff's attorney an additional problem would develop around personal injury cases, resulting in judgments higher than the defendant's liability insurance policy limits. A line of Alaska cases holds that the Rule 82 award should be calculated on the total verdict plus interest not merely the policy limit. And unless the insurance policy clearly provides otherwise, the total verdict plus interest must be paid by the insurer as costs on top of its policy limit. If a defendant has a $100,000 policy limit, and the verdict plus prejudgment interest is $2 million, then the Rule 82 award is $200,850 (again, $1,850 + 10 percent of the excess over $10,000). Under current practice, the attorney would get his contingent fee percentage computed on the amount actually recovered from the insurance company—the $100,000 policy limit plus the $200,850 Rule 82 award and the Rule 79 costs would be rolled together, and the client would receive the rest. If the rules were changed so that the attorney received the Rule 82 award and nothing else, he would wind up with about twice as much as his client in this no extraordinary situation.

Second, the rules do not effectively discourage nuisance claims. These are claims for which the plaintiff knows that in all likelihood, a jury will find no liability or no damages, but suit is filed in hope of a settlement. If the case is litigated through trial, the defendant will probably win an award of $5,000 to $10,000 against the plaintiff, but the cost to the defendant will exceed the award, and the award will probably be uncollectible, so most defendants will pay up to $5,000 or so, even on frivolous claims.

Third, the rules do not really promote settlement in the manner contemplated. Alaska Supreme Court opinions have suggested that defendants would be more eager to settle because the stakes at trial are raised to include prejudgment interest and attorneys' fees. But the plaintiffs' attorneys are equally aware of the "add-ons" and factor them into their settle-

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matters to the disciplinary counsel, is that the ABA Standing Committee on Professional Discipline is advocating referring every minor infringement of the ethical rules.

Obviously, that is not the case; nor is it the problem. If I have overemphasized the need to refer misconduct in this article, it is because judges as a group are not referring the misconduct they observe or become aware of. I have attempted to show why referral is appropriate and also ethically mandated by Canon 3B(3). I believe that for the judge referral is usually the most advantageous response to lawyer misconduct.

Judges and judicial organizations interested in further information on disciplinary agencies or other information in this article may contact the author, Timothy McPike, ABA Center for Professional Responsibility, 11th Floor, 750 N. Lake Shore Drive, Chicago, Illinois 60611.

Kleinfeld

(Continued from page 7)

ment demands. The arithmetic consequence is that if the plaintiff's and defendant's attorneys evaluate the case differently, the difference is magnified, not shrunk, by the "add-ons." Interest and attorney's fees are proportional, so if the parties are far apart, their mutual awareness of the rules pushes them further apart.

ECONOMIC DURESS ON PLAINTIFFS

A positive feature of the rules is that by making a small case larger, they make it easier for plaintiffs with small cases to induce attorneys to accept them. But this increasing of the stakes works both ways—and has a serious negative side effect.

The combination of Rule 68 offers, statutory adjustment of prejudgment interest rates, Rule 79 costs, and Rule 82 attorney's fees, greatly raises the stakes in litigation. As was shown above, if the defendant loses a $100,000 case, he pays about $150,000. If the plaintiff wins a $10,000 verdict after rejecting a higher offer of judgment, he winds up owing money to the defendant as well as to his own lawyer.

The economic effect is like doubling the stakes in a poker game. It drives out the players whose resources do not allow them to stay at the table for a long enough time for the probabilities to work themselves out beyond a few bad hands.

Plaintiffs suffer more from the increased stakes than defendants. To understand why, one must consider the varying abilities of persons and institutions to bear risk. An institutional defendant, such as a large business or an insurance company, can afford the risk of a single adverse judgment much more easily than the person or firm of moderate resources who rarely litigates.

Consider the plaintiffs in a clear liability but unpredictable damages case. Most typical are the preexisting condition plaintiffs. These individuals present themselves to the jury with substantial disabilities, but the defendant has a good opportunity to show that their disabilities should be attributed to conditions which preexisted the accident. It is not at all unusual in these cases to have an offer of judgment around $50,000, a demand around $100,000, and jury verdict substantially lower than the offer or higher than the demand.

Now consider the risks to each side. In order to try the case, the defendant must risk a judgment which, with interest and attorneys' fees, may be twice the demand. But a professional litigant, such as a liability insurer, would be wise to take this risk rather than pay the demanded amount, because the occasional high verdict will be more than offset by the general run of moderate verdicts and the occasional low one.

The real pressure on insurers to settle these cases arises not from the interest and attorneys' fees rules, but instead from the risk of a judgment in excess of insurance policy limits, leading to a bad faith claim. Many cases worth $40,000 have settled for $50,000 policy limits plus Rule 82 attorneys' fees because of the bad faith risk. But sophisticated insurers are now learning to take the cap off their policy limit rather than be forced by the risk of a bad faith claim to pay more than a claim is worth.

The plaintiff faces a much more brutal choice. This is probably the only lawsuit he will ever have, so he cannot balance the occasional low verdict against the occasional high one. His resources are probably limited, so the difference between collecting the offered settlement and perhaps collecting nothing—because of a verdict lower than the offer of judgment—matters more to him than the same dollar difference matters to the institutional defendant. A four- or five-figure judgment against him for attorneys' fees and costs, because he did not beat the defendant's offer of judgment or lost on liability, may be catastrophic.

As a practical matter, if the defendant makes an offer of judgment early in the litigation at the low end of the likely value of the case, or even 10 percent to 20 percent less, the plaintiff takes an imprudent and unaffordable risk if he rejects it. The risk is made unaffordable by the impact of Rule 68, Rule 82, Rule 79 costs, and the new interest statute. In effect, the defendant is empowered to turn the plaintiff's reasonable bet on the outcome into a double or nothing bet which the plaintiff cannot prudently risk. The chance of recovering his loss plus all the add-ons is not worth the risk of having defendant's add-ons set off against his recovery.

When a plaintiff runs the risk of trial against a moderate offer of judgment and loses, the defendant often has enough leverage to prevent appeal. Typically the defendant offers to drop his costs and attorneys' fee awards in exchange for the plaintiff's aban-

donment of his appeal. This promotes settlements, but not necessarily in a just manner.

SUPREME COURT INCONSISTENCY

An oddity of Alaska Supreme Court practice suggests an inference that the court does not really believe in the justice of the doctrines it has imposed.

Although the supreme court awards attorneys' fees to prevailing parties, it does not follow anything like Rule 82. Instead, it routinely awards $250 to $750. The prevailing party is ordinarily not allowed to submit evidence of his actual fees, and the court does not consider them. Actual attorney's fees on appeals in substantial civil cases are typically in the $5,000 to $15,000 range. If a trial court followed this practice, it would be reversed.

The Alaska Supreme Court has never explained its anomalous practice on attorney's fees awards to prevailing parties. Does the court wish to avoid discouraging appeals? Then why not similarly avoid discouraging trials? Delay is a more serious problem in Alaska at the appellate than at the trial level, so administrative considerations do not favor keeping the door open wider at the appellate level.

Supreme court results are unpredictable, but so are trial results. Trial results in similar cases may approximate a bell shaped curve, with most in a predictable range, but substantial tails on the low and high ends. In certain kinds of cases, such as the weak liability, high damages personal injury case, the results may be an even more unpredictable dumbbell curve, with clusters around zero, and at very high levels, and few in between. In some cases, a plaintiff or his lawyer may be unreasonable in going to trial, but in many, trial is as good a means as settlement to decide how much money, if any, ought to be taken from one party and given to the other.

ABOLISH RULE 82

I suppose the above criticism implies that the rules are too effective, rather than not effective enough, in promoting settlement. The plaintiff is forced to settle his case for less than it is worth because of his lesser ability than the defendant to try the case on a double or nothing basis.

Some may feel that encouraging settlement is of such great value as to justify this result. Where the stakes are so high, my own values place a greater weight on justice than administrative convenience, so I cannot accept this outcome as desirable.

The Alaska Bar Association passed a resolution more than a decade ago calling upon the supreme court to repeal Rule 82. The court has never acted, nor explained its inaction, regarding this resolution. I think the bar was correct. We have gone too far in the direction of threatening litigants with catastrophe to compel them to settle. We ought to use our luxuriously expensive system of courts to try cases, not frighten people of moderate means out of trying them.

Parrish

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ous fairness of forcing an insurance company to share plaintiff's costs of counsel in bona fide litigated cases, Rule 82 provides an economic incentive to insurers to avoid involving counsel altogether. The rule promotes settlement of litigation before it starts, as much as after. Wise insurers should, and I believe do, take this cost into account in deciding upon prelitigation settlement policies.

RULE 82 PROVIDES PARTIAL COMPENSATION

Although the prospect of an adverse award does promote a more meaningful evaluation, I doubt that it discourages the filing of many bona fide claims. Clients as a class are self-righteous, especially when they have a good case.

I also question whether the system suffers that much when a plaintiff who lacks confidence in his position, even though it may be well-founded, elects not to pursue his claim. At least his decision is predominantly free, coerced only by fair risks which are beneficial to the integrity of the system. What detriment there is in this situation is small in comparison to the alternative. The greater injustice by far is the bona fide case which cannot, as a matter of economics, be brought at all. Without fee awards, the freedom to bring bona fide claims in the $20,000 range can be lost altogether. We should not attempt to avoid one injustice by imposing a larger one.

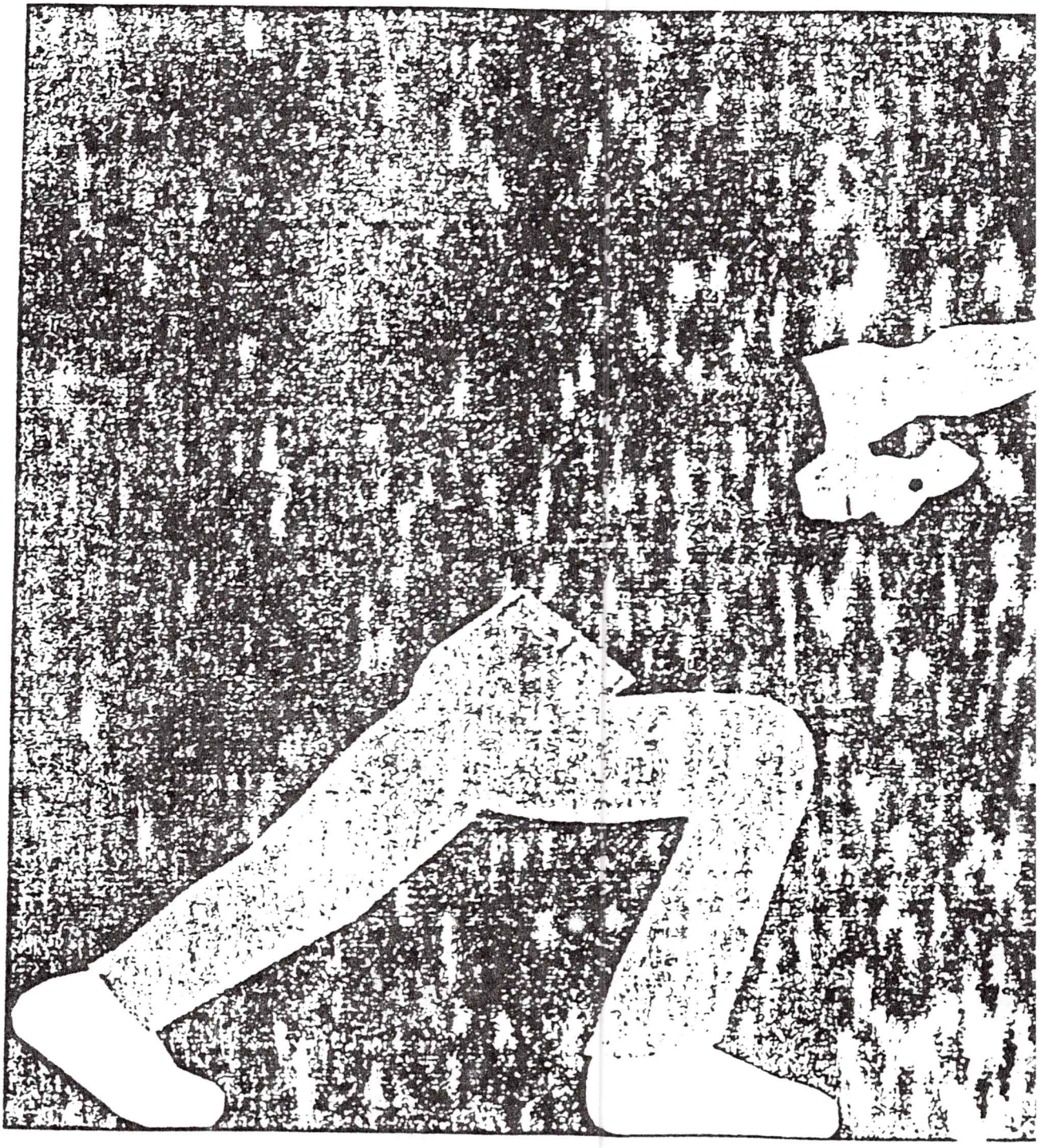
Of course, there is the occasional case where a plaintiff without a serious injury and a reasonably good liability position loses to a jury and suffers a fee award. This can be harsh, but the trial courts have sufficient discretion to temper the awards in light of the plaintiff's circumstances and the quality of the case.

Also, as Mr. Kleinfeld noted, marginal appellate grounds can be bargained against the fee award in most instances. But, by this mechanism, the rule again prompts realistic consideration of the merits of the case before proceeding into the appellate court. The plaintiff, who could otherwise not have anything to lose on appeal, suddenly does.

Average contingent fees in contested cases are one-third. As a result, plaintiffs, even with clearly bona fide claims, are rarely fairly compensated for their losses. Aside from the occasional run-away verdict, which is so often publicized, plaintiffs rarely come out ahead. To the extent Rule 82 covers approximately one-third (10 percent divided by 33⅓ percent) of fees actually paid, it reduces the under-compensation.

The successful defendant also is partially compensated. Thus, Rule 82 effects a redistribution of resources. Because both sides usually come out behind, it is better that the prevailing party suffers less.

Alaska
Where the Loser Pay
the Winner's Fee



Only one state has this provision (with an offer of judgment rule). How is it working?

By Andrew J. Kleinfeld



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The economic effect is like doubling the stakes in a poker game. It drives out the players whose resources do not allow them to stay at the table for a long enough time for the probabilities to work themselves out beyond a few bad hands.

Plaintiffs suffer more from the increased stakes than defendants. To understand why, one must consider the varying abilities of persons and institutions to bear risk. An institutional defendant, such as a large business or an insurance company, can afford the risk of a single adverse judgment much more easily than the person or firm of moderate resources who rarely litigates.

Consider the plaintiffs in a clear liability but unpredictable damages case. Most typical are the preexisting condition plaintiffs. These individuals present themselves to the jury with substantial disabilities, but the defendant has a good opportunity to show that their disabilities should be attributed to conditions which preexisted the accident. It is not at all unusual in these cases to have an offer of judgment around $50,000, a demand around $100,000, and jury verdict substantially lower than the offer or higher than the demand.

Now consider the risks to each side. In order to try the case, the defendant must risk a judgment which, with interest and attorneys' fees, may be twice the demand. But a professional litigant, such as a liability insurer, would be wise to take this risk rather than pay the demanded amount, because the occasional high verdict will be more than offset by the general run of moderate verdicts and the occasional low one.

The real pressure on insurers to settle these cases arises not from the interest and attorneys' fees rules, but instead from the risk of a judgment in excess of insurance policy limits, leading to a bad faith claim. Many cases worth $40,000 have settled for $50,000 policy limits plus Rule 82 attorneys' fees because of the bad faith risk. But sophisticated insurers are now learning to take the cap off their policy limit rather than be forced by the risk of a bad faith claim to pay more than a claim is worth.

The plaintiff faces a much more brutal choice. This is probably the only lawsuit he will ever have, so he cannot balance the occasional low verdict against the occasional high one. His resources are probably limited, so the difference between collecting the offered settlement and perhaps collecting nothing—because of a verdict lower than the offer of judgment—matters more to him than the same dollar difference matters to the institutional defendant. A four-or five-figure judgment against him for attorneys' fees and costs, because he did not beat the defendant's offer of judgment or lost on liability, may be catastrophic.

As a practical matter, if the defendant makes an offer of judgment early in the litigation at the low end of the likely value of the case, or even 10 percent to 20 percent less, the plaintiff takes an imprudent and unaffordable risk if he rejects it. The risk is made unaffordable by the impact of Rule 68, Rule 82, Rule 79 costs, and the new interest statute. In effect, the defendant is empowered to turn the plaintiff's reasonable bet on the outcome into a double or nothing bet which the plaintiff cannot prudently risk. The chance of recovering his loss plus all the add-ons is not worth the risk of having defendant's add-ons set off against his recovery.

When a plaintiff runs the risk of trial against a moderate offer of judgment and loses, the defendant often has enough leverage to prevent appeal. Typically the defendant offers to drop his costs and attorneys' fee awards in exchange for the plaintiff's aban-

donment of his appeal. This promotes settlements, but not necessarily in a just manner.

SUPREME COURT INCONSISTENCY

An oddity of Alaska Supreme Court practice suggests an inference that the court does not really believe in the justice of the doctrines it has imposed.

Although the supreme court awards attorneys' fees to prevailing parties, it does not follow anything like Rule 82. Instead, it routinely awards $250 to $750. The prevailing party is ordinarily not allowed to submit evidence of his actual fees, and the court does not consider them. Actual attorney's fees on appeals in substantial civil cases are typically in the $5,000 to $15,000 range. If a trial court followed this practice, it would be reversed.

The Alaska Supreme Court has never explained its anomalous practice on attorney's fees awards to prevailing parties. Does the court wish to avoid discouraging appeals? Then why not similarly avoid discouraging trials? Delay is a more serious problem in Alaska at the appellate than at the trial level, so administrative considerations do not favor keeping the door open wider at the appellate level.

Supreme court results are unpredictable, but so are trial results. Trial results in similar cases may approximate a bell shaped curve, with most in a predictable range, but substantial tails on the low and high ends. In certain kinds of cases, such as the weak liability, high damages personal injury case, the results may be an even more unpredictable dumbbell curve, with clusters around zero, and at very high levels, and few in between. In some cases, a plaintiff or his lawyer may be unreasonable in going to trial, but in many, trial is as good a means as settlement to decide how much money, if any, ought to be taken from one party and given to the other.

ABOLISH RULE 82

I suppose the above criticism implies that the rules are too effective, rather than not effective enough, in promoting settlement. The plaintiff is forced to settle his case for less than it is worth because of his lesser ability than the defendant to try the case on a double or nothing basis.

Some may feel that encouraging settlement is of such great value as to justify this result. Where the stakes are so high, my own values place a greater weight on justice than administrative convenience, so I cannot accept this outcome as desirable.

The Alaska Bar Association passed a resolution more than a decade ago calling upon the supreme court to repeal Rule 82. The court has never acted, nor explained its inaction, regarding this resolution. I think the bar was correct. We have gone too far in the direction of threatening litigants with catastrophe to compel them to settle. We ought to use our luxuriously expensive system of courts to try cases, not frighten people of moderate means out of trying them.

Parrish

(Continued from page 11)

ous fairness of forcing an insurance company to share plaintiff's costs of counsel in bona fide litigated cases, Rule 82 provides an economic incentive to insurers to avoid involving counsel altogether. The rule promotes settlement of litigation before it starts, as much as after. Wise insurers should, and I believe do, take this cost into account in deciding upon prelitigation settlement policies.

RULE 82 PROVIDES PARTIAL COMPENSATION

Although the prospect of an adverse award does promote a more meaningful evaluation, I doubt that it discourages the filing of many bona fide claims. Clients as a class are self-righteous, especially when they have a good case.

I also question whether the system suffers that much when a plaintiff who lacks confidence in his position, even though it may be well-founded, elects not to pursue his claim. At least his decision is predominantly free, coerced only by fair risks which are beneficial to the integrity of the system. What detriment there is in this situation is small in comparison to the alternative. The greater injustice by far is the bona fide case which cannot, as a matter of economics, be brought at all. Without fee awards, the freedom to bring bona fide claims in the $20,000 range can be lost altogether. We should not attempt to avoid one injustice by imposing a larger one.

Of course, there is the occasional case where a plaintiff without a serious injury and a reasonably good liability position loses to a jury and suffers a fee award. This can be harsh, but the trial courts have sufficient discretion to temper the awards in light of the plaintiff's circumstances and the quality of the case.

Also, as Mr. Kleinfeld noted, marginal appellate grounds can be bargained against the fee award in most instances. But, by this mechanism, the rule again prompts realistic consideration of the merits of the case before proceeding into the appellate court. The plaintiff, who could otherwise not have anything to lose on appeal, suddenly does.

Average contingent fees in contested cases are one-third. As a result, plaintiffs, even with clearly bona fide claims, are rarely fairly compensated for their losses. Aside from the occasional run-away verdict, which is so often publicized, plaintiffs rarely come out ahead. To the extent Rule 82 covers approximately one-third (10 percent divided by 33⅓ percent) of fees actually paid, it reduces the under-compensation.

The successful defendant also is partially compensated. Thus, Rule 82 effects a redistribution of resources. Because both sides usually come out behind, it is better that the prevailing party suffers less.

CITIZENS FOR CIVIL JUSTICE REFORM

May 5, 1992

MEMORANDUM FOR: John Howard

FROM: Helen Sanders

SUBJECT: Anchorage Roundtable

Enclosed is some information on the Citizens Coalition for Tort Reform in Alaska. Late yesterday I spoke to Al Tamangi about the possibility of a roundtable event with the Vice President in Anchorage. He was very receptive and said they could put together a good group with relatively short notice.

I have names of other contacts from the following organizations but will be unable to reach them until this afternoon because of the time difference:

- o Alaska State Medical Association
- o Medical Indemnity Corp.
- o Unit Construction Company

I'll be sure to keep you posted. And please let me know if you get any other details about the event.

Thanks.

c/o Valis Associates
1747 Pennsylvania Avenue, N.W. • Suite 850 • Washington, DC 20006
Tel: 202/833-5055 • Fax: 202/833-9265

Alaska for Liability Reform

ALASKA

CONVENES JANUARY 13 -- ADJOURNS MID-MAY

Mr. Al Tamagni, Sr.
Citizens Coalition for Tort Reform
Financial Diversified Services
1205 East International Airport Road
Suite 205
Anchorage, Alaska 99518
907-562-3938 Fax 907 562 1366

The Citizens Coalition for Tort Reform is working on a new report indicating that the revisions to the Federal Tort Claims Act have substantially reduced court filings and costs. According to Al Tamagni, the Coalition plans to keep a relatively low profile this year as the Governor has ordered a reapportionment of the legislature which will work to the advantage of tort reform advocates. They do plan, however, to petition the Alaska Supreme Court to control attorneys' fees by adopting the "recommendations on agreements" that are presented in the book by Kay Oberg and HALT, *How to Manage your Lawyer*, which features a model client-attorney fee agreement that would require disclosure of possible contingency fees versus the hourly rate an attorney might charge.

Legislation to lower the prejudgment interest rate, which is now at 10%, is planned. The bill will be designed to tie the prejudgment interest rate to the interest rates on US Treasury Bills.

Tort Reform:

A Comprehensive Solution To The Crisis in Civil Justice and Insurance

The Citizens Coalition for Tort Reform

Civil Justice: Unnecessarily Inefficient and Costly

A tort is literally a wrong. Tort actions seek to redress wrongs in a court of law. A close look at how the tort reparations system works in 1986 reveals that it's not working. The system is mired in inefficiency, punctuated with greed and demonstrably unable to deal with the great bulk of its caseload in a timely and fair manner.

It often takes three to five years to settle a case. Only 30 to 40 per cent of the costs of reaching a settlement go to victims, and that does not include costs of the court system.

The economic costs to society are staggering and difficult to precisely quantify. It is clear that the hefty increases in insurance rates affect the price of nearly every product or service we purchase. *It is a tax—a tax imposed by default, without full political and social evaluation of its impact.*

A society that can send men to the moon ought to be able to settle liability claims in a more effective way. Most other western countries do.

The Comprehensive Solution

The tort reparations system needs a thorough overhaul. Alaska can no longer afford the luxury of having its courts administer a giant lottery where a victim may win a fortune, but more likely will find the pot at the end of the rainbow empty.

Alaska and other states have been dabbling in tort reform for ten or 15 years and there is adequate evidence major changes in the tort reparations system are essential. The fundamental goal of tort reform is to restore predictability to the tort system.

All manner of solutions to the insurance crisis have been proposed including tighter regulation of insurance companies, state-backed insurance funds and reform of the tort system. More regulation may be useful and a state-supported fund may provide temporary relief to some. However, *without stopping the flagrant abuses of the tort system, liability will continue to be a serious problem for business, government and consumers.*

The following proposals address the major faults of the tort system. They are intended to restructure the process to allow more efficient and effective dispute resolution. These reforms would get a higher proportion of damage payments into the hands of plaintiffs while protecting the rights of defendants and the public which ultimately pays the bills.

Joint and Several Liability

If more than one defendant is found partly responsible for an injury, each can be held "jointly and severally" liable for all damages. This means that if one defendant is unable to pay, the other defendants must pay the entire award. *Responsibility should be apportioned according to the degree of fault and each defendant's requirement to pay damages should reflect his share of responsibility for the injury.*

Noneconomic Awards

Noneconomic awards compensate a victim for intangible losses— loss of consortium, pain and suffering, traumatic experiences and other things for which no established economic value exists. *A limit on this kind of arbitrary award will help establish consistency and fairness in this no-man's land. We suggest a maximum award of $250,000 per incident. The U.S. Supreme Court has upheld such a law in another state.*

Structured Settlements

Damages awarded for predicted future losses should be computed at their present economic value. The injured party would have an option to accept lump-sum payment at present value or accept structured payments running over a period of years and equal to the total award. *This guarantees financial support and care for a long time, often for life.*

Collateral Income Sources

Insurance payments which have been made to an injured party should be disclosed to the jury and should be protected from recovery in the event the victim receives an award. *Under current rules, juries cannot be told about existing medical or other insurance coverage.* If the injured party receives an award, the insurance companies which have fulfilled their obligations may sue for repayment from the victim.

Sliding Contingency Fees

Plaintiff attorneys today can take upwards of 40 percent of a total award verdict. A sliding scale will increase the proportion of the award which actually goes into the victim's pocket as the size of the award increases. *Where the sliding scale is now in effect, lawyers still work on contingency fees, but victims recover a greater share of awards. The U.S. Supreme Court has upheld this principle.*

Itemized Jury Awards

Jury awards for damages should specify amounts for monetary losses, noneconomic losses, future losses, past expenses and other losses. *This will help to eliminate arbitrary awards based upon showmanship or prejudice and introduce an element of rationality in award construction.* An itemized award which is grossly unfair to either the victim or defendant can be more effectively appealed than a lump-sum award.

Rule 82

Rule 82 is unique to Alaska. It is a device to increase attorneys' fees above the agreed level by order of the court. The rule was originally adopted to apply in certain public interest lawsuits, but it has been extended to cover most liability suits. *It simply adds up to 10 percent to the cost of awards without serving the originally intended public purpose.*

Arbitration

Tort litigation is time consuming and expensive. Claims under $50,000 should be required to go to arbitration before being heard in Superior Court. Either party would be free to appeal the arbitration decision to the courts, however the results of the arbitration could be admitted in evidence at any subsequent trial. *Experience indicates that the effect would be to reduce the number of cases going to court, lower the costs of resolution and ultimately get more money into the hands of victims without great delays.*

Notice of Policy Cancellation

Individuals, businesses and professionals have been suddenly cut off from their insurance programs. *Companies should be required to give 60-day notice of changes in coverage.* This would avoid drastic disruptions in people's ability to earn a living.

Pre-judgment Interest

Interest is often paid on awards. It should accrue from the date an action is filed. Currently, interest accrues in many cases from the date of the occurrence—even if no claim is filed for years. *A defendant should not be required to pay interest covering that period of time when he may have had no knowledge of his liability.*

Wrongful Death Statute

Where there are no dependents, wrongful death monetary awards should be limited to $25,000. *A wrongful death is always unfortunate, but it is questionable public policy which permits—even encourages—distant relatives and lawyers to reap a windfall at the expense of other policy holders and the public.*

Punitive Damages

Punitive damages is the civil justice system's way of punishing defendants for conduct particularly offensive to society, therefore, punitive damages should be paid to the State of Alaska. *Society as a whole should share the benefits of punitive damages (which are rarely covered by insurance).*

Statute of Limitations

The current statutes of limitation must be clarified to make sure that lawsuits are brought within a reasonable time. Recent court decisions make it possible to file suits in the distant future, making risks totally unpredictable. The alternatives to a functional statute of limitation are insurance devices which effectively establish these limits without benefit of public policy considerations. *These devices (claims-made policies) can cause severely reduced public protection and even reduced availability of some goods and services.*

Frivolous Suits/Untrue Allegations

An Indiana woman purchased a box of Cracker Jacks. The usual prize was not in the box, so she filed suit against the manufacturer. Someone had to defend the suit, even if it was only to ask for dismissal. A responsible legal system should require that plaintiff attorneys certify that the facts have been reviewed and there is reasonable and meritorious cause for filing the action. This certification should be made in writing. *Rules have been adopted by the U.S. Supreme Court and ten states to curb these abuses of our court system.*

Full Disclosure

Essential data should be made available to state regulatory authorities on a quarterly or semi-annual basis, to allow proper regulation of regulated companies regarding reserves, premium rates, loss ratio, investment and other data so as to properly protect people of Alaska.

Comparative Negligence v. Contributory Negligence

When the claimant has contributed to the accident, his or her degree of fault should diminish the award proportionate to the degree. This would reduce damages where the claimant contributed to the mishap. As an example, in single car-auto accidents, cities have been successfully sued by the drivers for faulty road design or maintenance, even where the drivers have been proven to have been drinking or using drugs.

Who is the Citizens Coalition for Tort Reform?

The Citizens Coalition for Tort Reform is an organization composed of representatives from a broad cross section of Alaskan businesses and professions.

They include these companies, associations and agencies:

Alaska Air Carriers
Alaska Broadcasters Association
Alaska Chapter, American Institute of Architects (AIA)
Alaska Dental Society
Alaska General Contractors
Alaska Chapter, American Optometric Association
Alaska Movers Association
Alaska Oil Marketers Association
Alaska Rental Association
Alaska Section, Fairbanks Branch, American Society of Civil Engineers
Alaska Society of Professional Engineers
Alaska State Health Association (Hospitals)
Alaska State Medical Association
Alaska Support Industry Alliance
Alaska Truckers Association
Alaska Visitors Association
Anchorage Board of Realtors
Anchorage Restaurant and Beverage Association (ARBA)
Cabaret Hotel and Restaurant Retailers (CHAR)
Childbirth Educators
Daycare Operators Association
Fairbanks North Star Borough
Financial Managers
Hotel and Motel Association
Insurance Brokers and Agents Association
Nurse Midwives Association
Pension Consultants
Professional Physical Therapists Association
Risk Management Association
Southern Alaska Association of Life Underwriters

Alaskans For Liability Reform

Ed McNally
James Ewing

907|5623938

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Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02. List	Vice President Quayle Guest List; contains Personally Identifiable Information. (6 pp.)	n.d.	(b)(6)	

Collection:

Record Group: Quayle Vice Presidential Records
Office: Deputy Chief of Staff's Office
Series: Porter, Richard, Files
Subseries: Subject Files
WHORM Cat.:
File Location: Alaska, Anchorage 5/11/92

Date Closed:	8/15/2025	**OA/ID Number:**	21804-003
FOIA/SYS Case #:	2025-0878-F	**Appeal Case #:**	
Re-review Case #:		**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
AR Case #:		**MR Case #:**	
AR Disposition:		**MR Disposition:**	
AR Disposition Date:		**MR Disposition Date:**	

RESTRICTION CODES

Freedom of Information Act (FOIA) - [5 U.S.C. 552(b)]

(b)(1) National security classified information
(b)(2) Release would disclose internal personnel rules and practices of an agency
(b)(3) Release would violate a Federal statute
(b)(4) Release would disclose trade secrets or confidential or financial information
(b)(6) Release would constitute a clearly unwarranted invasion of personal privacy
(b)(7) Release would disclose information compiled for law enforcement purposes
(b)(8) Release would disclose information concerning the regulation of financial institutions
(b)(9) Release would disclose geological or geophysical information concerning wells

Deed of Gift Restrictions

C(1) Closed by Executive Order 13526, governing access to national security information
C(2) Closed by statute or by the agency which originated the information
C(3) Closed in accordance with restrictions contained in donor's deed of gift [formerly listed as only C]
PRM. Removed as a personal record misfile

Presidential Records Act - [44 U.S.C. 2204(a)]

P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]

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Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
03. Form	V.P. Quayle Guest Data Form; contains Personally Identifiable Information. (1 pp.)	05/11/92	(b)(6)	

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Office: Deputy Chief of Staff's Office
Series: Porter, Richard, Files
Subseries: Subject Files
WHORM Cat.:
File Location: Alaska, Anchorage 5/11/92

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1986 - Legislation passed, signed into law
- change in prejudgement interest
- slight change in joint & several, collateral damages

Alaska
- Rule 82 - modified version of Eng. Rule
- sliding scale - allows loser to collect from winner
10% of first $100,000
8% of next $100,000
- Problem - attorney on contingent fee considers this as part of his recovery! Taking 40% of that too!

1988 Ran a state initiative of joint & several liability - person responsible only for their % of fault - approved by 73% of the vote!

Haven't introduced anything in the past year or two. Expecting major turnover in state legis. this election - redistricting - expecting some major changes.

More litigation on Rule 82 than on any other rules. ~~put together~~
Rule not written well - and interpreted by liberal court well

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Alaskans For Liability Reform

Richard - Here's the final list

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THIS IS OUR FINAL LIST AS PER OUR CONVERSATION. WE CALLED FOR JAMES SWING OF URS CONSULTANTS AND APPARENTLY HE IS OUT OF STATE FOR THE NEXT WEEK. LEFT A MESSAGE FOR HIM TO CONTACT US ASAP

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Presidential Records Act - [44 U.S.C. 2204(a)]

P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]

MEMO

DATE: 5/8/1992

FROM: A.L. Tamagni, Sr.
Alaskans for Liability Reform

SUBJECT: Civil Justice Round-Table
with V.P. Quayle

The Meeting is scheduled for Monday, May 11, 1992 in Anchorage at the Hotel Captain Cook in the Crow's Nest #1. Arrival Time has been requested to begin at 2:00 PM and be COMPLETED BY 2:45 PM. The Vice President will arrive at 3:05 PM. Tentative agenda as follows:

1. V.P. arrives with introduction and photos.

2. V.P. will give a brief 5 - 8 minute talk.

3. V.P. will then hear from participants with discussion on changes to Civil Justice System with some of the following as suggested topics:

    A. Loser pays winner Attorney Fees.
    B. Statutes of Limitations.
    C. Statutes of Repose.
    D. Alaska Rule 82.
    E. Multi-Door Court House.
    F. Quality Regulation of Legal Profession.
    G. Periodic Payments.
    H. Effects on your Businesses by State Tort Laws.
    I. Effects on your Business by Federal Tort Laws.
    J. Product Liability.

Please call 562-3938 to confirm receipt of this fax.

Thanks,

Al

Richard – Copy provided per John Howard.

Document Originally
Attached to
Following Page

Illinois--In 1990 the Illinois Supreme Court rejected market share liability, the doctrine which holds the defendant company liable for the proportion of a judgment represented by its share of the market for a defective product (Smith v. Eli Lilly.) The opposition following last year's unsuccessful effort to reinstate this doctrine is supporting SB 2332 (Berman), legislation which will be considered by the Senate Judiciary Committee on Friday, May 1. Contact your Illinois Senators immediately, urging them to oppose this measure. Letters should be directed to: The Honorable ___, State House, Springfield, IL 62706. For more information on this bill and market share liability in Illinois, contact Suzanne Reade of the Illinois Product Liability Project at (312) 822-7401.

Kansas--Heads up in Kansas. The Kansas legislature reconvened this week and the Senate Judiciary Committee heard HB 3054 (House Judiciary Committee) on April 29. The bill remains in that committee. HB 3054 would extend the current statute of limitations on product liability cases from 10 to 20 years. SB 662, which now contains the provisions of HB 3053, would alter the current Kansas law which caps punitive damages at the lesser of annual gross income or $5 million. SB 662 would allow a judge who feels annual gross income would not be a sufficient deterrent to look at 50% of the defendant's net assets, awarding the lesser of that amount or $5 million. For more information on the defensive effort in Kansas, contact Brad Smoot of the Kansas Civil Law Forum at (913) 233-0016.

Wisconsin--Action by the Governor is expected within two weeks on AB 388 (Krug), a measure that would raise the limit on non-economic damages in wrongful death actions from $50,000 to $150,000. The Wisconsin Coalition for Civil Justice (WCJC) is making every effort to obtain a veto of AB 388 (see Watch 7 for the bill's history). Join the coalition's effort by voicing your opposition to Governor Thompson. Letters and telegrams should be directed to: The Honorable Tommy Thompson, Room 115 East, State Capitol, Madison, WI 53702. For more information, contact Bill Smith of the WCJC at (608) 255-6083, or Nick George at (608) 258-4000.

California--Our contacts tell us that the expected May 5 hearing of the House Judiciary Subcommittee on the Administration of Justice on protective order bill, SB 711, has been delayed indefinitely. However, the threat that SB 711 could be the first protective order bill enacted since 1990 remains very real. Letters of opposition to the Subcommittee and the full committee are still needed. Direct your letters to: The Honorable ___, State Capitol, Sacramento, CA 95814. The Association for California Tort Reform (ACTR) asks that you forward a copy of your letter of opposition to Governor Wilson. For more information, interested parties should contact John Sullivan of ACTR at (916) 443-4900.

Alaska--Protective order bill HB 171 (House Judiciary Committee) has been referred to the House Finance Committee, but has not yet been scheduled for a hearing. From the Finance Committee, HB 171 would go to the Rules Committee Chairman, who would schedule the bill for the House floor. Your letters of opposition are urgently needed! Interested parties should contact House Finance Committee members, the Chairman of the Rules Committee and members of the full House today, voicing their opposition to this bill. Direct your letters to: The Honorable ____, State Capitol, Box V, Juneau, AK 99811. Fax numbers for the House members are available from ATRA.

5-1 edition

Anne Allen, Editor (202) 682-1163

ATRA
American Tort Reform Association
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Suite 515
Washington, D.C. 20005



Mr. John Howard
Counsel to the Vice President
The White House
Washington, DC 20500

OFFICE OF THE VICE PRESIDENT

WASHINGTON

May 11, 1992

Civil Justice Reform Roundtable
Anchorage, Alaska

DATE: May 11, 1992
LOCATION: Captain Cook Hotel
Anchorage, Alaska
TIME: 3:05 p.m.
FROM: Richard W. Porter RWP

I. PURPOSE

Present the Administration's Civil Justice Reform Model State Amendments and the Model State Punitive Damages Act, to a group of Alaska businesspeople and civic leaders.

This is also an opportunity to learn about Alaska's experience with a limited version of the "Fairness Rule" -- called Alaska Rule 82.

II. BACKGROUND

The Civil Justice Reform Roundtable is sponsored by Mr. Al Tamagni, Chairman of Alaskans for Liability Reform. Mr. Tamagni has been active in the liability reform movement in Alaska for a number of years.

In 1986, some "watered-down" tort reform legislation was enacted. It implemented some minor limits on joint and several liability and collateral damages. It also implemented some minor changes to the Alaska Rule 82 -- the state's limited Fairness Rule. The state legislature, however, frustrated efforts for more significant reform.

In 1988, a coalition for liability reform ran a statewide initiative to toughen the limits on joint and several liability. The initiative, which limited recovery from each defendant to their share of fault, passed with 73% of the vote.

The Alaskans for Liability Reform see this landslide vote as evidence of the popular support for legal reform in Alaska. However, they have not pursued any other significant reforms in the legislature, which remains hostile to legal reform. They believe that the redistricting this year should lead to significant turnover and they expect to rejuvenate reform efforts

next year.

Alaska Civil Rule 82

Alaska Civil Rule 82 requires that the prevailing party should ordinarily recover partial compensation for attorneys' fees. There is, as you might guess, divided opinion about how effective it has been. Some, such as the Alaskans for Liability Reform, do not believe the rule is tough enough. Others, such as the Alaska Bar Association -- which passed a resolution a decade ago urging the repeal of Rule 82 -- think it goes too far.

The rule works differently for plaintiffs and defendants. The plaintiff is entitled to 10% of the first $100,000 awarded, 8% of the next $100,000 and so on as attorneys fees. However, contingent fee lawyers usually treat the fees as part of the recovery -- thus only a portion of even this small fee is passed on to the winning plaintiff.

On the other hand, defendants that prevail are usually awarded only $5,000 to $10,000 -- far less than the fees a liability insurer would incur defending against the typical tort suit carried through to trial.

As the attached article suggests, Rule 82 has been successful at encouraging parties to settle more lawsuits sooner. On the other hand, the rules have not been completely successful at deterring frivolous claims -- often frivolous suits are brought by plaintiffs who are judgement-proof.

Summary of the Administration's proposals

The Civil Justice Reform Model State Amendments is a ten part proposal for state legislative action that is very similar to the federal Access to Justice Act of 1992. It includes:

1) Pre-Complaint Notice of Claims
2) Multi-Door Courthouse
3) Core Disclosure and Discovery
4) Offer of Settlement
5) Pretrial Settlement Conference
6) Facilitating Summary Judgement
7) Expert Testimony
8) The Fairness Rule -- Attorney's Fees to Prevailing Party
9) Accuracy in Pleading
10) Legislation and Regulation Drafting

The Model State Punitive Damages Act presents a six part proposal for state legislative action, including:

1) Pre-Complaint Notice of Claims
2) Eliminate Pleading for Specific Amounts of Punitive Damages
3) Establish "Clear and Convincing" Standard of Proof
4) Bifurcate Trials
5) Judicial Determination of Amount of Punitive Damages
6) Cap the Amount of Punitive Damages

III. PARTICIPANTS

The Vice President
Ed Tamagni -- Chairman, Alaskans for Liability Reform
Ed McNally -- Anchorage District Attorney and former Bush speechwriter
See attached sheet

IV. EVENT OUTLINE

3:05 p.m.	Arrive Captain Cook Hotel and proceed to Crows Nest I Room
3:15 p.m.	The Vice President arrives Crows Nest I Room and participates in Photo Opportunity
3:30 p.m.	The Vice President concludes Photo Opportunity and participates in Roundtable
4:05 p.m.	The Vice President concludes Roundtable and proceeds to Holding Room

V. PRESS PLAN

Open Press for beginning only

VI. ATTACHMENTS

List of Participants
Talking Points
Article on Civil Rule 82

CIVIL JUSTICE REFORM ROUNDTABLE PARTICIPANTS

Alfred L. Tamagni, Sr.
President
Financial Diversified Services
(Chairman, Alaskans for Liability Reform)

Douglas Arthur Stark
Owner
AK Engineering & Management Services
(Vice-Chairman, Alaskans for Liability Reform)

Frank L. Thomas-Mears
President
Multiple Risk Managers

Mary A. Pierce
Owner
Insurance & Management Svcs Consulting

James H. Gingerich
Administrator
Fairbanks Memorial Hospital

Raymond G. Schalow
Executive Director
AK State Medical Society

Arthur Roland Jacobs
Anderson, Bjornstad, Kane, Jacobs, Inc.

Richard Lewis Cattanach
Vice President
Unit Company

Michael James Lockwood
Administrator
Central Peninsula General Hospital

Dan M. Rowley
Regional Manager
CH2M Hill

Michael L. Lessmeier
Attorney
Hughes, Thorsness, Gantz, Powell & Brudin

Frank J. Dillon
Executive Director
Alaska Truckers Association, Inc.

William C. Bivin
President & CEO
Bethel Native Corp.

Tom E. Roy
President
AK State Chamber of Commerce

Edward Bernard Rasmuson
Chairman
National Bank of Alaska

Elmer E. Rasmuson
Consultant
National Bank of Alaska

Mark A. Anderson
President
Alaska West Express, Inc.

Harry W. McDonald
President/General Manager
Carlile Trucking Company

George N. Hayes
Attorney
Delaney, Wiles, Hayes, Reitman & Brubaker, Inc.

Bruce Eric Davison
Attorney

Kimberly Sarah Daniels
Executive Director
Alaska Air Carrier Association

Thomas Blaine Jensen
District Manager
Alascom, Inc.

James Edward Pfeifer
President
Alaska National Insurance Co.

Charles H. Selman
President
Club Paris

Edward E. McNally
Anchorage District Attorney

Rowe D. Redick
Associated General Contractors of Alaska

F. Atlee Dodge
President
F. Atlee Dodge Aircraft Services, Inc.

Eugene A. Parrish
President
Westmark Hotels, Inc.

Stephen L. Walsh
H2W Constructors, Inc.

Richard Earl Harding
Director of Operations
PenAir

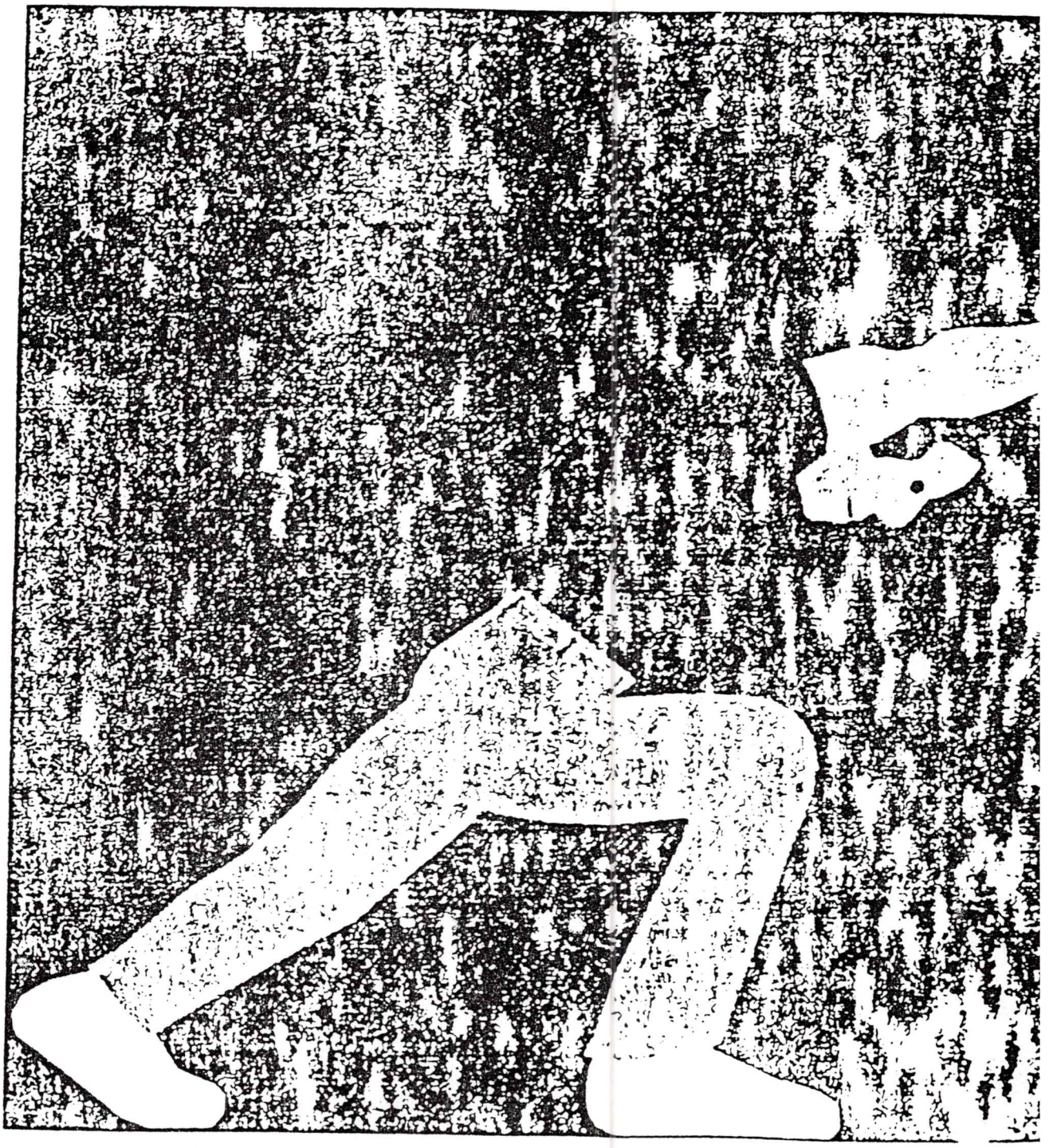
Richard James Waller
Associate Executive Director
Humana, Inc.

Roxanna M. Horschel
President
ACME Fence Company

Skip Bilhartz
President
ARCO Alaska

Bill Allen
President
VECO Alaska
Owner, Anchorage Times

Alaska
Where the Loser Pay
the Winner's Fee



Only one state has this provision (with an offer of judgment rule). How is it working?

By Andrew J. Kleinfeld



Alaska combines a federal-style Rule 6 offer of judgment rule with the Englis rule awarding attorneys' fees to the pr vailing party in civil litigation. This art cle summarizes the Alaska system an discusses its effect on litigation and se tlement.

Under Alaska Civil Rule 68, as unde the federal rule, a party, ordinarily th defendant, may at any time prior t judgment make a formal offer to allo judgment to be taken against himsel for a specified amount plus costs. If th plaintiff rejects the offer and subse quently wins a verdict lower than th amount of the offer plus interest, th defendant is deemed the prevailing pa ty from the time of the offer and is ent tled to costs from the time of the offe

Costs (other than attorneys' fees) a lowed under the rule are much less tha actual out-of-pocket costs. For exam ple, a party is likely to have to pay physician who testifies in court $500 t $1,500 for routine, brief testimony, bu will usually receive only the subpoen rate for expert witnesses—less than $5 in most cases—under Rule 68.

The Rule 68 offer would have littl force were it not for Alaska's use of th English rule on attorneys' fees. The risk that a few hundred, or at most, a fe thousand dollars in a costs award ma be shifted will ordinarily not affect th settlement evaluation of a plaintiff an ticipating an award ten or a thousan times as large.

The power of Rule 68 offers of judg ment in Alaska derives from Civil Rul 82, requiring that the prevailing part should ordinarily recover partial com



Andrew J. Kleinfeld
is an attorney
in Fairbanks, Alaska

pensation for attorneys' fees. The rule works slightly differently for plaintiffs and defendants. Rule 68 offers of judgment work mainly with defense awards, but both sides of the rule should be understood.

For successful plaintiffs, the courts ordinarily follow a schedule provided in the text of the rule. Cases are broken down into three categories: noncontested (defaulted); contested without trial (resolved after an answer or motion by defense but before trial); and contested through trial.

Awards on contested without trial cases are 20 percent of the first $2,000, 15 percent of the next $3,000, 12.5 percent of the next $5,000, and 7.5 percent of everything over $10,000. Thus, the substantial case entails an award of $1,475 plus 7.5 percent of everything over $10,000, if resolved before trial, as by acceptance of a Rule 68 offer of judgment—attorneys' fee awards being in addition to offer of judgment. If a case is tried, the Rule 82 award to a prevailing plaintiff is $1,850 plus 10 percent of the excess over $10,000.

Rule 82 computations are performed on the sum of the verdict and prejudgment interest. For example, a verdict of $100,000 three years after the accident yields a judgment of $131,500 with prejudgment interest at 10.5 percent and $145,500, including Rule 82 attorneys' fees at the contested rate of $1,850 plus 10 percent of the excess over $10,000. Thus, with costs, a $100,000 jury verdict yields about a $150,000 judgment after a typical lag.

On the defense side, the operative language of the rule is that the award should be "in a reasonable amount" which is "commensurate with the amount and value of legal services rendered." The Alaska Supreme Court has provided little guidance for trial judges on what this language means.

The Alaska Supreme Court has made it reversible error to award full or substantially full compensation for his attorney's fees to the prevailing party, if the unsuccessful party litigated in good faith. Awards are to "partially" compensate the prevailing party, not fully compensate him. *Malvo v. J.C. Penney Co., Inc.*, 512 P.2d 575 (Alaska 1973).

The Supreme Court will also reverse denial of attorneys' fees to the prevailing party without some good reason articulated by the trial judge. *Stordahl v. Government Employees Insurance Co.*, 564 P.2d 63 (Alaska 1977). The trial judge has broad discretion, but must award some partially compensatory amount based upon the actual work done and fees charged by the prevailing party's attorney.

Awards between 20 percent and 80 percent of actual defense fees are, as a practical matter, not reversible. These awards can amount to substantial four- or even five-figure judgments against unsuccessful plaintiffs.

Here is how Rule 68 and Rule 82 fit together.

The defendant offers to allow the plaintiff to take judgment against him for x dollars plus costs and attorney's fees.

If the plaintiff accepts the offer, he may file a Rule 79 costs bill and move for a Rule 82 attorney's fee award, which will ordinarily be the scheduled "contested without trial" amount. For example, a $45,000 Rule 68 offer is worth $49,100 plus allowable Rule 79 costs, for a total in the neighborhood of $50,000. Prejudgment interest is already accounted for in the amount of the offer. Usually plaintiff's and defendant's attorneys agree on these amounts over the telephone and avoid the extra filings.

If the plaintiff rejects the Rule 68 offer and the case is tried to a verdict, a little arithmetic must be performed to determine which party obtains a Rule 82 attorney's fees award. The court 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 judgment. This may be a great deal of money, since trial of a substantial case is likely to entail defense attorneys' fees of $10,000 to $50,000, or more, for protracted and complex litigation. The wise defendant will have made an offer of judgment early in the discovery process, so that most of the attorneys' fees will have been incurred after the Rule 68 offer and will be subject to Rule 82.

Thus, the plaintiff who wins an award lower than the Rule 68 offer plus interest faces an often catastrophic result. For example, in a personal injury case with a projected value in the $10,000 to $30,000 range, if the defendant makes a Rule 68 offer of $10,000, and the jury award with interest is less, the plaintiff will lose money on the litigation. The plaintiff will have to pay the defendant's attorney fees award—probably in the $5,000 to $10,000 range—and the plaintiff's own nonreimbursable costs for medical experts and so forth in the $1,000 to $5,000 range.

The knife also gets a little twist from a new Alaska statute on prejudgment interest. Under the statute, either side may make an offer of judgment within the first 60 days of the litigation, or five days after discovery ends. If the party does better than its offer

(lower for a defendant's offer, higher for a plaintiff's), then the prejudgment interest rate will be raised or lowered 2 percent for its benefit. Thus a plaintiff who wins a verdict higher than its offer is entitled to 12.5 percent prejudgment interest, and a successful defendant lowers the interest rate to 8.5 percent.

DO THESE RULES SERVE THEIR INTENDED PURPOSES?

This combination of rules is intended to serve two purposes—achieving more perfect justice between the litigants and encouraging settlement. They serve the latter objective better than the former.

The model villain, against whom the entire complex of rules is aimed, is the "bad man" who acknowledges the justice of the plaintiff's demand, but refuses to pay the obligation in order to profit from delay or use the plaintiff's anticipated litigation expenses as leverage to obtain an unjustly low settlement. The honest claimant, whom the rules are intended to benefit, is the person who demands what he is entitled to—and prevails. He is supposed to obtain sufficient interest and compensation for his attorneys' fees so that his victory is not Pyrrhic.

First, the rules do not substantially reduce the burden of attorneys' fees for successful plaintiffs. Here are the mechanics for typical contingent fee arrangements.

The scheduled percentages are much less than the percentages conventionally charged by plaintiffs' attorneys. Contingent fees in Alaska, as elsewhere, range from 25 percent to 50 percent. Most Alaska plaintiff attorneys' fee contracts, in my experience, provide that the Rule 82 award is rolled into the total recovery against which the contractual percentage is applied. Thus, if a case is settled, without trial, for the defendant's $100,000 liability insurance policy limit and Rule 82 attorneys' fees of $8,225, the usual one-third contingent fee will be applied to $108,225, yielding an actual fee of $36,075, and compensation to the plaintiff of only $72,150, a far cry from the $100,000 he should supposedly receive.

The obvious tinkering would be to limit attorneys' fees actually charged to the amount awarded, as in workers' compensation. But unless the scheduled percentages were raised to market levels, this might dry up the supply of attorneys willing to handle plaintiffs' personal injury claims, particularly the smaller ones.

Analogously, it has become extremely difficult during the last year or so for injured workers to hire attorneys in Alaska to prosecute moderately sized workers' compensation claims, because fees awarded by the workers' compensation board are below the amounts needed to make handling of the claims as profitable as alternative work.

If the Rule 82 schedule were raised to market rates, liability insurance premiums would have to be increased substantially in order to spread the much higher cost. This might well increase the amount of evasion of Alaska's very loose new mandatory insurance law.

If the rules designated the Rule 82 award as the amount actually to be paid to the plaintiff's attorney, an additional problem would develop around personal injury cases, resulting in judgments higher than the defendant's liability insurance policy limits. A line of Alaska cases holds that the Rule 82 award should be calculated on the total verdict plus interest, not merely the policy limit. And unless the insurance policy clearly provides otherwise, the total verdict plus interest must be paid by the insurer as costs on top of its policy limit. If a defendant has a $100,000 policy limit, and the verdict plus prejudgment interest is $2 million, then the Rule 82 award is $200,850 (again, $1,850 + 10 percent of the excess over $10,000). Under current practice, the attorney would get his contingent fee percentage computed on the amount actually recovered from the insurance company—the $100,000 policy limit plus the $200,850 Rule 82 award and the Rule 79 costs would be rolled together, and the client would receive the rest. If the rules were changed so that the attorney received the Rule 82 award and nothing else, he would wind up with about twice as much as his client in this not extraordinary situation.

Second, the rules do not effectively discourage nuisance claims. These are claims for which the plaintiff knows that in all likelihood, a jury will find no liability or no damages, but suit is filed in hope of a settlement. If the case is litigated through trial, the defendant will probably win an award of $5,000 to $10,000 against the plaintiff, but the cost to the defendant will exceed the award, and the award will probably be uncollectible, so most defendants will pay up to $5,000 or so, even on frivolous claims.

Third, the rules do not really promote settlement in the manner contemplated. Alaska Supreme Court opinions have suggested that defendants would be more eager to settle because the stakes at trial are raised to include prejudgment interest and attorneys' fees. But the plaintiffs' attorneys are equally aware of the "add-ons" and factor them into their settle-

(Please turn to page 52)

matters to the disciplinary counsel, is that the ABA Standing Committee on Professional Discipline is advocating referring every minor infringement of the ethical rules.

Obviously, that is not the case; nor is it the problem. If I have overemphasized the need to refer misconduct in this article, it is because judges as a group are not referring the misconduct they observe or become aware of. I have attempted to show why referral is appropriate and also ethically mandated by Canon 3B(3). I believe that for the judge referral is usually the most advantageous response to lawyer misconduct.

Judges and judicial organizations interested in further information on disciplinary agencies or other information in this article may contact the author, Timothy McPike, ABA Center for Professional Responsibility, 11th Floor, 750 N. Lake Shore Drive, Chicago, Illinois 60611.

Kleinfeld

(Continued from page 7)

ment demands. The arithmetic consequence is that if the plaintiff's and defendant's attorneys evaluate the case differently, the difference is magnified, not shrunk, by the "add-ons." Interest and attorney's fees are proportional, so if the parties are far apart, their mutual awareness of the rules pushes them further apart.

ECONOMIC DURESS ON PLAINTIFFS

A positive feature of the rules is that by making a small case larger, they make it easier for plaintiffs with small cases to induce attorneys to accept them. But this increasing of the stakes works both ways—and has a serious negative side effect.

The combination of Rule 68 offers, statutory adjustment of prejudgment interest rates, Rule 79 costs, and Rule 82 attorney's fees, greatly raises the stakes in litigation. As was shown above, if the defendant loses a $100,000 case, he pays about $150,000. If the plaintiff wins a $10,000 verdict after rejecting a higher offer of judgment, he winds up owing money to the defendant as well as to his own lawyer.

The economic effect is like doubling the stakes in a poker game. It drives out the players whose resources do not allow them to stay at the table for a long enough time for the probabilities to work themselves out beyond a few bad hands.

Plaintiffs suffer more from the increased stakes than defendants. To understand why, one must consider the varying abilities of persons and institutions to bear risk. An institutional defendant, such as a large business or an insurance company, can afford the risk of a single adverse judgment much more easily than the person or firm of moderate resources who rarely litigates.

Consider the plaintiffs in a clear liability but unpredictable damages case. Most typical are the preexisting condition plaintiffs. These individuals present themselves to the jury with substantial disabilities, but the defendant has a good opportunity to show that their disabilities should be attributed to conditions which preexisted the accident. It is not at all unusual in these cases to have an offer of judgment around $50,000, a demand around $100,000, and jury verdict substantially lower than the offer or higher than the demand.

Now consider the risks to each side. In order to try the case, the defendant must risk a judgment which, with interest and attorneys' fees, may be twice the demand. But a professional litigant, such as a liability insurer, would be wise to take this risk rather than pay the demanded amount, because the occasional high verdict will be more than offset by the general run of moderate verdicts and the occasional low one.

The real pressure on insurers to settle these cases arises not from the interest and attorneys' fees rules, but instead from the risk of a judgment in excess of insurance policy limits, leading to a bad faith claim. Many cases worth $40,000 have settled for $50,000 policy limits plus Rule 82 attorneys' fees because of the bad faith risk. But sophisticated insurers are now learning to take the cap off their policy limit rather than be forced by the risk of a bad faith claim to pay more than a claim is worth.

The plaintiff faces a much more brutal choice. This is probably the only lawsuit he will ever have, so he cannot balance the occasional low verdict against the occasional high one. His resources are probably limited, so the difference between collecting the offered settlement and perhaps collecting nothing—because of a verdict lower than the offer of judgment—matters more to him than the same dollar difference matters to the institutional defendant. A four-or five-figure judgment against him for attorneys' fees and costs, because he did not beat the defendant's offer of judgment or lost on liability, may be catastrophic.

As a practical matter, if the defendant makes an offer of judgment early in the litigation at the low end of the likely value of the case, or even 10 percent to 20 percent less, the plaintiff takes an imprudent and unaffordable risk if he rejects it. The risk is made unaffordable by the impact of Rule 68, Rule 82, Rule 79 costs, and the new interest statute. In effect, the defendant is empowered to turn the plaintiff's reasonable bet on the outcome into a double or nothing bet which the plaintiff cannot prudently risk. The chance of recovering his loss plus all the add-ons is not worth the risk of having defendant's add-ons set off against his recovery.

When a plaintiff runs the risk of trial against a moderate offer of judgment and loses, the defendant often has enough leverage to prevent appeal. Typically the defendant offers to drop his costs and attorneys' fee awards in exchange for the plaintiff's aban-

donment of his appeal. This promotes settlements, but not necessarily in a just manner.

SUPREME COURT INCONSISTENCY

An oddity of Alaska Supreme Court practice suggests an inference that the court does not really believe in the justice of the doctrines it has imposed.

Although the supreme court awards attorneys' fees to prevailing parties, it does not follow anything like Rule 82. Instead, it routinely awards $250 to $750. The prevailing party is ordinarily not allowed to submit evidence of his actual fees, and the court does not consider them. Actual attorney's fees on appeals in substantial civil cases are typically in the $5,000 to $15,000 range. If a trial court followed this practice, it would be reversed.

The Alaska Supreme Court has never explained its anomalous practice on attorney's fees awards to prevailing parties. Does the court wish to avoid discouraging appeals? Then why not similarly avoid discouraging trials? Delay is a more serious problem in Alaska at the appellate than at the trial level, so administrative considerations do not favor keeping the door open wider at the appellate level.

Supreme court results are unpredictable, but so are trial results. Trial results in similar cases may approximate a bell shaped curve, with most in a predictable range, but substantial tails on the low and high ends. In certain kinds of cases, such as the weak liability, high damages personal injury case, the results may be an even more unpredictable dumbbell curve, with clusters around zero, and at very high levels, and few in between. In some cases, a plaintiff or his lawyer may be unreasonable in going to trial, but in many, trial is as good a means as settlement to decide how much money, if any, ought to be taken from one party and given to the other.

ABOLISH RULE 82

I suppose the above criticism implies that the rules are too effective, rather than not effective enough, in promoting settlement. The plaintiff is forced to settle his case for less than it is worth because of his lesser ability than the defendant to try the case on a double or nothing basis.

Some may feel that encouraging settlement is of such great value as to justify this result. Where the stakes are so high, my own values place a greater weight on justice than administrative convenience, so I cannot accept this outcome as desirable.

The Alaska Bar Association passed a resolution more than a decade ago calling upon the supreme court to repeal Rule 82. The court has never acted, nor explained its inaction, regarding this resolution. I think the bar was correct. We have gone too far in the direction of threatening litigants with catastrophe to compel them to settle. We ought to use our luxuriously expensive system of courts to try cases, not frighten people of moderate means out of trying them.

Parrish

(Continued from page 11)

ous fairness of forcing an insurance company to share plaintiff's costs of counsel in bona fide litigated cases, Rule 82 provides an economic incentive to insurers to avoid involving counsel altogether. The rule promotes settlement of litigation before it starts, as much as after. Wise insurers should, and I believe do, take this cost into account in deciding upon prelitigation settlement policies.

RULE 82 PROVIDES PARTIAL COMPENSATION

Although the prospect of an adverse award does promote a more meaningful evaluation, I doubt that it discourages the filing of many bona fide claims. Clients as a class are self-righteous, especially when they have a good case.

I also question whether the system suffers that much when a plaintiff who lacks confidence in his position, even though it may be well-founded, elects not to pursue his claim. At least his decision is predominantly free, coerced only by fair risks which are beneficial to the integrity of the system. What detriment there is in this situation is small in comparison to the alternative. The greater injustice by far is the bona fide case which cannot, as a matter of economics, be brought at all. Without fee awards, the freedom to bring bona fide claims in the $20,000 range can be lost altogether. We should not attempt to avoid one injustice by imposing a larger one.

Of course, there is the occasional case where a plaintiff without a serious injury and a reasonably good liability position loses to a jury and suffers a fee award. This can be harsh, but the trial courts have sufficient discretion to temper the awards in light of the plaintiff's circumstances and the quality of the case.

Also, as Mr. Kleinfeld noted, marginal appellate grounds can be bargained against the fee award in most instances. But, by this mechanism, the rule again prompts realistic consideration of the merits of the case before proceeding into the appellate court. The plaintiff, who could otherwise not have anything to lose on appeal, suddenly does.

Average contingent fees in contested cases are one-third. As a result, plaintiffs, even with clearly bona fide claims, are rarely fairly compensated for their losses. Aside from the occasional run-away verdict, which is so often publicized, plaintiffs rarely come out ahead. To the extent Rule 82 covers approximately one-third (10 percent divided by 33⅓ percent) of fees actually paid, it reduces the under-compensation.

The successful defendant also is partially compensated. Thus, Rule 82 effects a redistribution of resources. Because both sides usually come out behind, it is better that the prevailing party suffers less.

REMARKS OF THE VICE PRESIDENT

CIVIL JUSTICE REFORM ROUNDTABLE MEETING

ANCHORAGE, ALASKA

MAY 11, 1992

Thank you, Senator Murkowski, Al Tamagni, and Alaskans for Liability Reform for hosting this meeting, and thank you all very much.

It's great to be here in Anchorage today.

You may know that I'm on my way to Japan. They are tough competitors, but America is still the world leader in the marketplace.

- Our economy is more than twice as large as any competitor.
- Still, we have some competitive disadvantages.
- Some come from trading partners; others from inside.

Unfortunately, we are also the world leader in lawsuits.

- o 70% of the world's lawyers - 5% of the population.
- o System costs an estimated $300 billion dollars a year.

Economic costs of excessive lawsuits are a self-inflicted competitive disadvantage.

- o Foreign companies have lower liability costs.
- o We also have higher prices for some everyday items.
- o Some needed products (drugs) never come to market.

Japan has a different approach to litigation -- they avoid it.

Civil Justice Reform can help level the playing field.

- o Remove incentive for frivolous lawsuits.
- o Restore rationality to punitive damages.

Agenda for Civil Justice Reform addresses these problems:

- o ADR - The Multidoor Courthouse
- o Discovery Reform
- o Expert Evidence - Widely Accepted Theories
- o Punitive Damage Reform
- o Fairness Rule

(We borrowed the Fairness Rule from Alaska, not England.)

I want to hear more about your approach to Attorney's Fees.

- o How does the system work?
- o Does it discourage frivolous litigation?

The Administration is committed to Civil Justice Reform.

- The President has signed an Executive Order.
- "Access to Justice Act of 1992" sent to Congress.
- Amendments to Federal Rules have been presented.
- Civil Justice Reform Model State Amendments and Model State Punitive Damages Act are here today.

I ask for your help with Civil Justice Reform.

- Most lawsuits are brought in state courts.
- Reducing costs and delay helps everyone.

Please work hard to make this happen in Alaska.

- The "litigation explosion" isn't just in Washington. The people of Alaska know that the legal system takes too long and costs too much.

- I look forward to working with you to make Alaska a model for the rest of the nation.

Thank you very much.

OFFICE OF THE VICE PRESIDENT

WASHINGTON

May 11, 1992

Civil Justice Reform Roundtable
Anchorage, Alaska

DATE: May 11, 1992
LOCATION: Captain Cook Hotel
Anchorage, Alaska
TIME: 3:05 p.m.
FROM: Richard W. Porter RWP

I. PURPOSE

Present the Administration's Civil Justice Reform Model State Amendments and the Model State Punitive Damages Act, to a group of Alaska businesspeople and civic leaders.

This is also an opportunity to learn about Alaska's experience with a limited version of the "Fairness Rule" -- called Alaska Rule 82.

II. BACKGROUND

The Civil Justice Reform Roundtable is sponsored by Mr. Al Tamagni, Chairman of Alaskans for Liability Reform. Mr. Tamagni has been active in the liability reform movement in Alaska for a number of years.

In 1986, some "watered-down" tort reform legislation was enacted. It implemented some minor limits on joint and several liability and collateral damages. It also implemented some minor changes to the Alaska Rule 82 -- the state's limited Fairness Rule. The state legislature, however, frustrated efforts for more significant reform.

In 1988, a coalition for liability reform ran a statewide initiative to toughen the limits on joint and several liability. The initiative, which limited recovery from each defendant to their share of fault, passed with 73% of the vote.

The Alaskans for Liability Reform see this landslide vote as evidence of the popular support for legal reform in Alaska. However, they have not pursued any other significant reforms in the legislature, which remains hostile to legal reform. They believe that the redistricting this year should lead to significant turnover and they expect to rejuvenate reform efforts

next year.

Alaska Civil Rule 82

Alaska Civil Rule 82 requires that the prevailing party should ordinarily recover partial compensation for attorneys' fees. There is, as you might guess, divided opinion about how effective it has been. Some, such as the Alaskans for Liability Reform, do not believe the rule is tough enough. Others, such as the Alaska Bar Association -- which passed a resolution a decade ago urging the repeal of Rule 82 -- think it goes too far.

The rule works differently for plaintiffs and defendants. The plaintiff is entitled to 10% of the first $100,000 awarded, 8% of the next $100,000 and so on as attorneys fees. However, contingent fee lawyers usually treat the fees as part of the recovery -- thus only a portion of even this small fee is passed on to the winning plaintiff.

On the other hand, defendants that prevail are usually awarded only $5,000 to $10,000 -- far less than the fees a liability insurer would incur defending against the typical tort suit carried through to trial.

As the attached article suggests, Rule 82 has been successful at encouraging parties to settle more lawsuits sooner. On the other hand, the rules have not been completely successful at deterring frivolous claims -- often frivolous suits are brought by plaintiffs who are judgement-proof.

Summary of the Administration's proposals

The Civil Justice Reform Model State Amendments is a ten part proposal for state legislative action that is very similar to the federal Access to Justice Act of 1992. It includes:

1) Pre-Complaint Notice of Claims
2) Multi-Door Courthouse
3) Core Disclosure and Discovery
4) Offer of Settlement
5) Pretrial Settlement Conference
6) Facilitating Summary Judgement
7) Expert Testimony
8) The Fairness Rule -- Attorney's Fees to Prevailing Party
9) Accuracy in Pleading
10) Legislation and Regulation Drafting

The Model State Punitive Damages Act presents a six part proposal for state legislative action, including:

1) Pre-Complaint Notice of Claims
2) Eliminate Pleading for Specific Amounts of Punitive Damages
3) Establish "Clear and Convincing" Standard of Proof
4) Bifurcate Trials
5) Judicial Determination of Amount of Punitive Damages
6) Cap the Amount of Punitive Damages

III. PARTICIPANTS

The Vice President
Ed Tamagni -- Chairman, Alaskans for Liability Reform
Ed McNally -- Anchorage District Attorney and former Bush speechwriter
See attached sheet

IV. EVENT OUTLINE

3:05 p.m. Arrive Captain Cook Hotel and proceed to Crows Nest I Room

3:15 p.m. The Vice President arrives Crows Nest I Room and participates in Photo Opportunity

3:30 p.m. The Vice President concludes Photo Opportunity and participates in Roundtable

4:05 p.m. The Vice President concludes Roundtable and proceeds to Holding Room

V. PRESS PLAN

Open Press for beginning only

VI. ATTACHMENTS

List of Participants
Talking Points
Article on Civil Rule 82

CIVIL JUSTICE REFORM ROUNDTABLE PARTICIPANTS

Alfred L. Tamagni, Sr.
President
Financial Diversified Services
(Chairman, Alaskans for Liability Reform)

Douglas Arthur Stark
Owner
AK Engineering & Management Services
(Vice-Chairman, Alaskans for Liability Reform)

Frank L. Thomas-Mears
President
Multiple Risk Managers

Mary A. Pierce
Owner
Insurance & Management Svcs Consulting

James H. Gingerich
Administrator
Fairbanks Memorial Hospital

Raymond G. Schalow
Executive Director
AK State Medical Society

Arthur Roland Jacobs
Anderson, Bjornstad, Kane, Jacobs, Inc.

Richard Lewis Cattanach
Vice President
Unit Company

Michael James Lockwood
Administrator
Central Peninsula General Hospital

Dan M. Rowley
Regional Manager
CH2M Hill

Michael L. Lessmeier
Attorney
Hughes, Thorsness, Gantz, Powell & Brudin

Frank J. Dillon
Executive Director
Alaska Truckers Association, Inc.

William C. Bivin
President & CEO
Bethel Native Corp.

Tom E. Roy
President
AK State Chamber of Commerce

Edward Bernard Rasmuson
Chairman
National Bank of Alaska

Elmer E. Rasmuson
Consultant
National Bank of Alaska

Mark A. Anderson
President
Alaska West Express, Inc.

Harry W. McDonald
President/General Manager
Carlile Trucking Company

George N. Hayes
Attorney
Delaney, Wiles, Hayes, Reitman & Brubaker, Inc.

Bruce Eric Davison
Attorney

Kimberly Sarah Daniels
Executive Director
Alaska Air Carrier Association

Thomas Blaine Jensen
District Manager
Alascom, Inc.

James Edward Pfeifer
President
Alaska National Insurance Co.

Charles H. Selman
President
Club Paris

Edward E. McNally
Anchorage District Attorney

Rowe D. Redick
Associated General Contractors of Alaska

F. Atlee Dodge
President
F. Atlee Dodge Aircraft Services, Inc.

Eugene A. Parrish
President
Westmark Hotels, Inc.

Stephen L. Walsh
H2W Constructors, Inc.

Richard Earl Harding
Director of Operations
PenAir

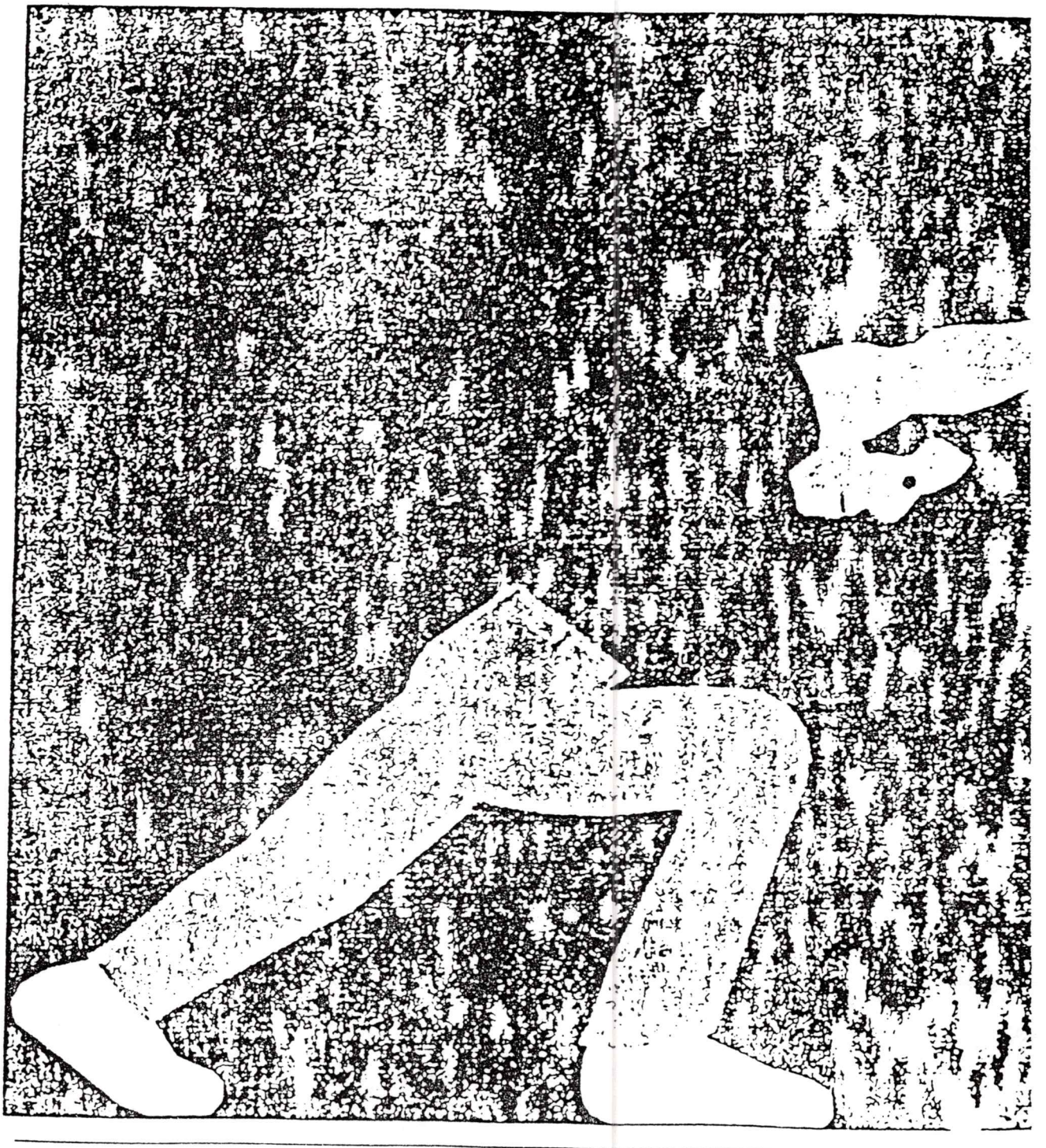
Richard James Waller
Associate Executive Director
Humana, Inc.

Roxanna M. Horschel
President
ACME Fence Company

Skip Bilhartz
President
ARCO Alaska

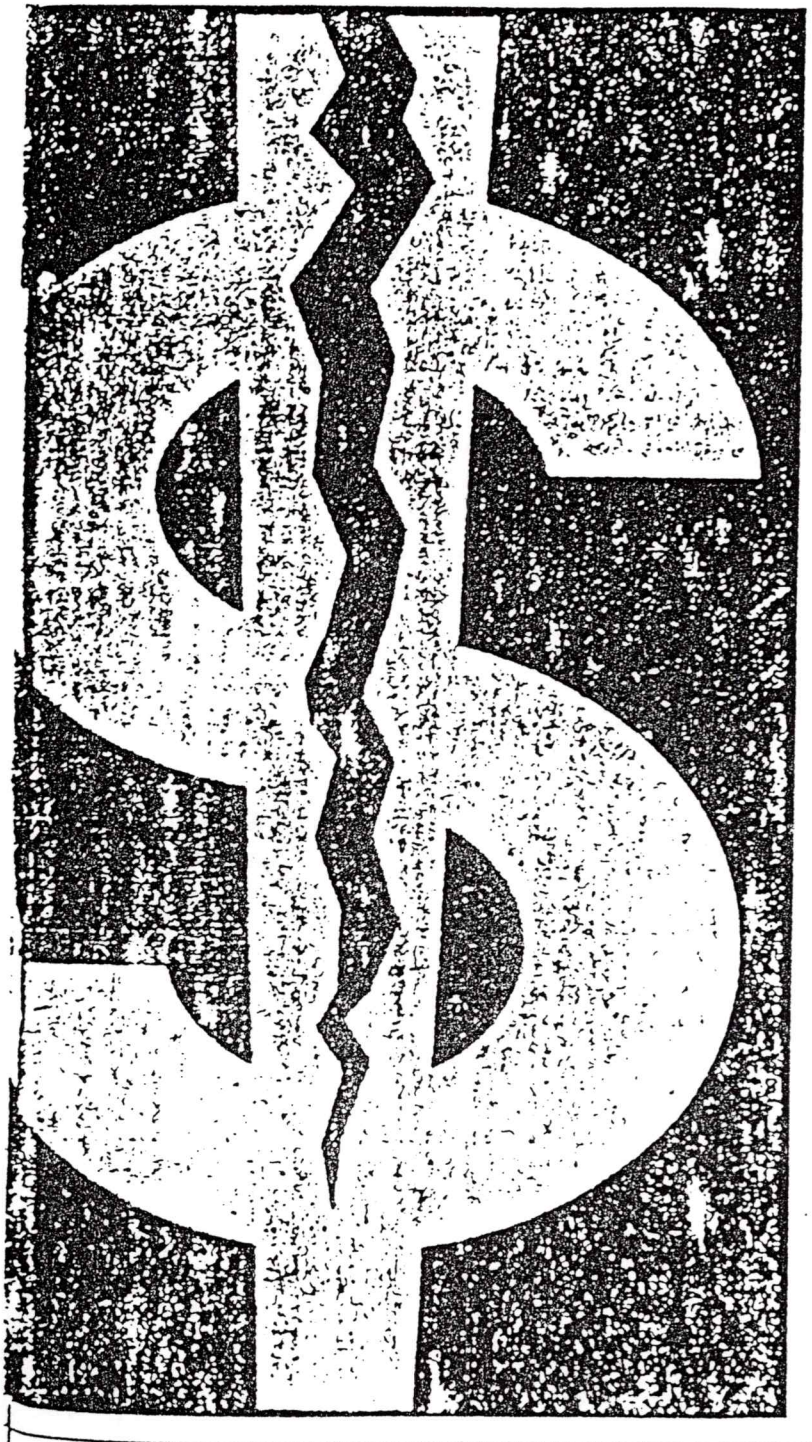
Bill Allen
President
VECO Alaska
Owner, Anchorage Times

Alaska
Where the Loser Pay
the Winner's Fee



Only one state has this provision (with an offer of judgment rule). How is it working?

By Andrew J. Kleinfeld



Alaska combines a federal-style Rule 6 offer of judgment rule with the Englis rule awarding attorneys' fees to the pr vailing party in civil litigation. This art cle summarizes the Alaska system an discusses its effect on litigation and se tlement.

Under Alaska Civil Rule 68, as unde the federal rule, a party, ordinarily th defendant, may at any time prior t judgment make a formal offer to allo judgment to be taken against himsel for a specified amount plus costs. If th plaintiff rejects the offer and subse quently wins a verdict lower than th amount of the offer plus interest, th defendant is deemed the prevailing pa ty from the time of the offer and is ent tled to costs from the time of the offe

Costs (other than attorneys' fees) a lowed under the rule are much less tha actual out-of-pocket costs. For exam ple, a party is likely to have to pay physician who testifies in court $500 t $1,500 for routine, brief testimony, bu will usually receive only the subpoen rate for expert witnesses—less than $5 in most cases—under Rule 68.

The Rule 68 offer would have littl force were it not for Alaska's use of th English rule on attorneys' fees. The risl that a few hundred, or at most, a fe thousand dollars in a costs award ma be shifted will ordinarily not affect th settlement evaluation of a plaintiff an ticipating an award ten or a thousan times as large.

The power of Rule 68 offers of judg ment in Alaska derives from Civil Rul 82, requiring that the prevailing part should ordinarily recover partial com



Andrew J. Kleinfeld
is an attorney
in Fairbanks, Alaska

pensation for attorneys' fees. The rule works slightly differently for plaintiffs and defendants. Rule 68 offers of judgment work mainly with defense awards, but both sides of the rule should be understood.

For successful plaintiffs, the courts ordinarily follow a schedule provided in the text of the rule. Cases are broken down into three categories: noncontested (defaulted); contested without trial (resolved after an answer or motion by defense but before trial); and contested through trial.

Awards on contested without trial cases are 20 percent of the first $2,000, 15 percent of the next $3,000, 12.5 percent of the next $5,000, and 7.5 percent of everything over $10,000. Thus, the substantial case entails an award of $1,475 plus 7.5 percent of everything over $10,000, if resolved before trial, as by acceptance of a Rule 68 offer of judgment—attorneys' fee awards being in addition to offer of judgment. If a case is tried, the Rule 82 award to a prevailing plaintiff is $1,850 plus 10 percent of the excess over $10,000.

Rule 82 computations are performed on the sum of the verdict and prejudgment interest. For example, a verdict of $100,000 three years after the accident yields a judgment of $131,500 with prejudgment interest at 10.5 percent and $145,500, including Rule 82 attorneys' fees at the contested rate of $1,850 plus 10 percent of the excess over $10,000. Thus, with costs, a $100,000 jury verdict yields about a $150,000 judgment after a typical lag.

On the defense side, the operative language of the rule is that the award should be "in a reasonable amount" which is "commensurate with the amount and value of legal services rendered." The Alaska Supreme Court has provided little guidance for trial judges on what this language means.

The Alaska Supreme Court has made it reversible error to award full or substantially full compensation for his attorney's fees to the prevailing party, if the unsuccessful party litigated in good faith. Awards are to "partially" compensate the prevailing party, not fully compensate him. *Malvo v. J.C. Penney Co., Inc.*, 512 P.2d 575 (Alaska 1973).

The Supreme Court will also reverse denial of attorneys' fees to the prevailing party without some good reason articulated by the trial judge. *Stordahl v. Government Employees Insurance Co.*, 564 P.2d 63 (Alaska 1977). The trial judge has broad discretion, but must award some partially compensatory amount based upon the actual work done and fees charged by the prevailing party's attorney.

Awards between 20 percent and 80 percent of actual defense fees are, as a practical matter, not reversible. These awards can amount to substantial four- or even five-figure judgments against unsuccessful plaintiffs.

Here is how Rule 68 and Rule 82 fit together.

The defendant offers to allow the plaintiff to take judgment against him for x dollars plus costs and attorney's fees.

If the plaintiff accepts the offer, he may file a Rule 79 costs bill and move for a Rule 82 attorney's fee award, which will ordinarily be the scheduled "contested without trial" amount. For example, a $45,000 Rule 68 offer is worth $49,100 plus allowable Rule 79 costs, for a total in the neighborhood of $50,000. Prejudgment interest is already accounted for in the amount of the offer. Usually plaintiff's and defendant's attorneys agree on these amounts over the telephone and avoid the extra filings.

If the plaintiff rejects the Rule 68 offer and the case is tried to a verdict, a little arithmetic must be performed to determine which party obtains a Rule 82 attorney's fees award. The court 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 judgment. This may be a great deal of money, since trial of a substantial case is likely to entail defense attorneys' fees of $10,000 to $50,000, or more, for protracted and complex litigation. The wise defendant will have made an offer of judgment early in the discovery process, so that most of the attorneys' fees will have been incurred after the Rule 68 offer and will be subject to Rule 82.

Thus, the plaintiff who wins an award lower than the Rule 68 offer plus interest faces an often catastrophic result. For example, in a personal injury case with a projected value in the $10,000 to $30,000 range, if the defendant makes a Rule 68 offer of $10,000, and the jury award with interest is less, the plaintiff will lose money on the litigation. The plaintiff will have to pay the defendant's attorney fees award—probably in the $5,000 to $10,000 range—and the plaintiff's own nonreimbursable costs for medical experts and so forth in the $1,000 to $5,000 range.

The knife also gets a little twist from a new Alaska statute on prejudgment interest. Under the statute, either side may make an offer of judgment within the first 60 days of the litigation, or five days after discovery ends. If the party does better than its offer

The rules do not substantially reduce the burden of attorneys' fees for successful plaintiffs

(lower for a defendant's offer, higher for a plaintiff's), then the prejudgment interest rate will be raised or lowered 2 percent for its benefit. Thus a plaintiff who wins a verdict higher than its offer is entitled to 12.5 percent prejudgment interest, and a successful defendant lowers the interest rate to 8.5 percent.

DO THESE RULES SERVE THEIR INTENDED PURPOSES?

This combination of rules is intended to serve two purposes—achieving more perfect justice between the litigants and encouraging settlement. They serve the latter objective better than the former.

The model villain, against whom the entire complex of rules is aimed, is the "bad man" who acknowledges the justice of the plaintiff's demand, but refuses to pay the obligation in order to profit from delay or use the plaintiff's anticipated litigation expenses as leverage to obtain an unjustly low settlement. The honest claimant, whom the rules are intended to benefit, is the person who demands what he is entitled to—and prevails. He is supposed to obtain sufficient interest and compensation for his attorneys' fees so that his victory is not Pyrrhic.

First, the rules do not substantially reduce the burden of attorneys' fees for successful plaintiffs. Here are the mechanics for typical contingent fee arrangements.

The scheduled percentages are much less than the percentages conventionally charged by plaintiffs' attorneys. Contingent fees in Alaska, as elsewhere, range from 25 percent to 50 percent. Most Alaska plaintiff attorneys' fee contracts, in my experience, provide that the Rule 82 award is rolled into the total recovery against which the contractual percentage is applied. Thus, if a case is settled, without trial, for the defendant's $100,000 liability insurance policy limit and Rule 82 attorneys' fees of $8,225, the usual one-third contingent fee will be applied to $108,225, yielding an actual fee of $36,075, and compensation to the plaintiff of only $72,150, a far cry from the $100,000 he should supposedly receive.

The obvious tinkering would be to limit attorneys' fees actually charged to the amount awarded, as in workers' compensation. But unless the scheduled percentages were raised to market levels, this might dry up the supply of attorneys willing to handle plaintiffs' personal injury claims, particularly the smaller ones.

Analogously, it has become extremely difficult during the last year or so for injured workers to hire attorneys in Alaska to prosecute moderately sized workers' compensation claims, because fees awarded by the workers' compensation board are below the amounts needed to make handling of the claims as profitable as alternative work.

If the Rule 82 schedule were raised to market rates, liability insurance premiums would have to be increased substantially in order to spread the much higher cost. This might well increase the amount of evasion of Alaska's very loose new mandatory insurance law.

If the rules designated the Rule 82 award as the amount actually to be paid to the plaintiff's attorney, an additional problem would develop around personal injury cases, resulting in judgments higher than the defendant's liability insurance policy limits. A line of Alaska cases holds that the Rule 82 award should be calculated on the total verdict plus interest, not merely the policy limit. And unless the insurance policy clearly provides otherwise, the total verdict plus interest must be paid by the insurer as costs on top of its policy limit. If a defendant has a $100,000 policy limit, and the verdict plus prejudgment interest is $2 million, then the Rule 82 award is $200,850 (again, $1,850 + 10 percent of the excess over $10,000). Under current practice, the attorney would get his contingent fee percentage computed on the amount actually recovered from the insurance company—the $100,000 policy limit plus the $200,850 Rule 82 award and the Rule 79 costs would be rolled together, and the client would receive the rest. If the rules were changed so that the attorney received the Rule 82 award and nothing else, he would wind up with about twice as much as his client in this not extraordinary situation.

Second, the rules do not effectively discourage nuisance claims. These are claims for which the plaintiff knows that in all likelihood, a jury will find no liability or no damages, but suit is filed in hope of a settlement. If the case is litigated through trial, the defendant will probably win an award of $5,000 to $10,000 against the plaintiff, but the cost to the defendant will exceed the award, and the award will probably be uncollectible, so most defendants will pay up to $5,000 or so, even on frivolous claims.

Third, the rules do not really promote settlement in the manner contemplated. Alaska Supreme Court opinions have suggested that defendants would be more eager to settle because the stakes at trial are raised to include prejudgment interest and attorneys' fees. But the plaintiffs' attorneys are equally aware of the "add-ons" and factor them into their settle-

(Please turn to page 52)

matters to the disciplinary counsel, is that the ABA Standing Committee on Professional Discipline is advocating referring every minor infringement of the ethical rules.

Obviously, that is not the case; nor is it the problem. If I have overemphasized the need to refer misconduct in this article, it is because judges as a group are not referring the misconduct they observe or become aware of. I have attempted to show why referral is appropriate and also ethically mandated by Canon 3B(3). I believe that for the judge referral is usually the most advantageous response to lawyer misconduct. ⁂

Judges and judicial organizations interested in further information on disciplinary agencies or other information in this article may contact the author, Timothy McPike, ABA Center for Professional Responsibility, 11th Floor, 750 N. Lake Shore Drive, Chicago, Illinois 60611.

Kleinfeld

(Continued from page 7)

ment demands. The arithmetic consequence is that if the plaintiff's and defendant's attorneys evaluate the case differently, the difference is magnified, not shrunk, by the "add-ons." Interest and attorney's fees are proportional, so if the parties are far apart, their mutual awareness of the rules pushes them further apart.

ECONOMIC DURESS ON PLAINTIFFS

A positive feature of the rules is that by making a small case larger, they make it easier for plaintiffs with small cases to induce attorneys to accept them. But this increasing of the stakes works both ways—and has a serious negative side effect.

The combination of Rule 68 offers, statutory adjustment of prejudgment interest rates, Rule 79 costs, and Rule 82 attorney's fees, greatly raises the stakes in litigation. As was shown above, if the defendant loses a $100,000 case, he pays about $150,000. If the plaintiff wins a $10,000 verdict after rejecting a higher offer of judgment, he winds up owing money to the defendant as well as to his own lawyer.

The economic effect is like doubling the stakes in a poker game. It drives out the players whose resources do not allow them to stay at the table for a long enough time for the probabilities to work themselves out beyond a few bad hands.

Plaintiffs suffer more from the increased stakes than defendants. To understand why, one must consider the varying abilities of persons and institutions to bear risk. An institutional defendant, such as a large business or an insurance company, can afford the risk of a single adverse judgment much more easily than the person or firm of moderate resources who rarely litigates.

Consider the plaintiffs in a clear liability but unpredictable damages case. Most typical are the preexisting condition plaintiffs. These individuals present themselves to the jury with substantial disabilities, but the defendant has a good opportunity to show that their disabilities should be attributed to conditions which preexisted the accident. It is not at all unusual in these cases to have an offer of judgment around $50,000, a demand around $100,000, and jury verdict substantially lower than the offer or higher than the demand.

Now consider the risks to each side. In order to try the case, the defendant must risk a judgment which, with interest and attorneys' fees, may be twice the demand. But a professional litigant, such as a liability insurer, would be wise to take this risk rather than pay the demanded amount, because the occasional high verdict will be more than offset by the general run of moderate verdicts and the occasional low one.

The real pressure on insurers to settle these cases arises not from the interest and attorneys' fees rules, but instead from the risk of a judgment in excess of insurance policy limits, leading to a bad faith claim. Many cases worth $40,000 have settled for $50,000 policy limits plus Rule 82 attorneys' fees because of the bad faith risk. But sophisticated insurers are now learning to take the cap off their policy limit rather than be forced by the risk of a bad faith claim to pay more than a claim is worth.

The plaintiff faces a much more brutal choice. This is probably the only lawsuit he will ever have, so he cannot balance the occasional low verdict against the occasional high one. His resources are probably limited, so the difference between collecting the offered settlement and perhaps collecting nothing—because of a verdict lower than the offer of judgment—matters more to him than the same dollar difference matters to the institutional defendant. A four- or five-figure judgment against him for attorneys' fees and costs, because he did not beat the defendant's offer of judgment or lost on liability, may be catastrophic.

As a practical matter, if the defendant makes an offer of judgment early in the litigation at the low end of the likely value of the case, or even 10 percent to 20 percent less, the plaintiff takes an imprudent and unaffordable risk if he rejects it. The risk is made unaffordable by the impact of Rule 68, Rule 82, Rule 79 costs, and the new interest statute. In effect, the defendant is empowered to turn the plaintiff's reasonable bet on the outcome into a double or nothing bet which the plaintiff cannot prudently risk. The chance of recovering his loss plus all the add-ons is not worth the risk of having defendant's add-ons set off against his recovery.

When a plaintiff runs the risk of trial against a moderate offer of judgment and loses, the defendant often has enough leverage to prevent appeal. Typically the defendant offers to drop his costs and attorneys' fee awards in exchange for the plaintiff's aban-

donment of his appeal. This promotes settlements, but not necessarily in a just manner.

SUPREME COURT INCONSISTENCY

An oddity of Alaska Supreme Court practice suggests an inference that the court does not really believe in the justice of the doctrines it has imposed.

Although the supreme court awards attorneys' fees to prevailing parties, it does not follow anything like Rule 82. Instead, it routinely awards $250 to $750. The prevailing party is ordinarily not allowed to submit evidence of his actual fees, and the court does not consider them. Actual attorney's fees on appeals in substantial civil cases are typically in the $5,000 to $15,000 range. If a trial court followed this practice, it would be reversed.

The Alaska Supreme Court has never explained its anomalous practice on attorney's fees awards to prevailing parties. Does the court wish to avoid discouraging appeals? Then why not similarly avoid discouraging trials? Delay is a more serious problem in Alaska at the appellate than at the trial level, so administrative considerations do not favor keeping the door open wider at the appellate level.

Supreme court results are unpredictable, but so are trial results. Trial results in similar cases may approximate a bell shaped curve, with most in a predictable range, but substantial tails on the low and high ends. In certain kinds of cases, such as the weak liability, high damages personal injury case, the results may be an even more unpredictable dumbbell curve, with clusters around zero, and at very high levels, and few in between. In some cases, a plaintiff or his lawyer may be unreasonable in going to trial, but in many, trial is as good a means as settlement to decide how much money, if any, ought to be taken from one party and given to the other.

ABOLISH RULE 82

I suppose the above criticism implies that the rules are too effective, rather than not effective enough, in promoting settlement. The plaintiff is forced to settle his case for less than it is worth because of his lesser ability than the defendant to try the case on a double or nothing basis.

Some may feel that encouraging settlement is of such great value as to justify this result. Where the stakes are so high, my own values place a greater weight on justice than administrative convenience, so I cannot accept this outcome as desirable.

The Alaska Bar Association passed a resolution more than a decade ago calling upon the supreme court to repeal Rule 82. The court has never acted, nor explained its inaction, regarding this resolution. I think the bar was correct. We have gone too far in the direction of threatening litigants with catastrophe to compel them to settle. We ought to use our luxuriously expensive system of courts to try cases, not frighten people of moderate means out of trying them.

Parrish

(Continued from page 11)

ous fairness of forcing an insurance company to share plaintiff's costs of counsel in bona fide litigated cases, Rule 82 provides an economic incentive to insurers to avoid involving counsel altogether. The rule promotes settlement of litigation before it starts, as much as after. Wise insurers should, and I believe do, take this cost into account in deciding upon prelitigation settlement policies.

RULE 82 PROVIDES PARTIAL COMPENSATION

Although the prospect of an adverse award does promote a more meaningful evaluation, I doubt that it discourages the filing of many bona fide claims. Clients as a class are self-righteous, especially when they have a good case.

I also question whether the system suffers that much when a plaintiff who lacks confidence in his position, even though it may be well-founded, elects not to pursue his claim. At least his decision is predominantly free, coerced only by fair risks which are beneficial to the integrity of the system. What detriment there is in this situation is small in comparison to the alternative. The greater injustice by far is the bona fide case which cannot, as a matter of economics, be brought at all. Without fee awards, the freedom to bring bona fide claims in the $20,000 range can be lost altogether. We should not attempt to avoid one injustice by imposing a larger one.

Of course, there is the occasional case where a plaintiff without a serious injury and a reasonably good liability position loses to a jury and suffers a fee award. This can be harsh, but the trial courts have sufficient discretion to temper the awards in light of the plaintiff's circumstances and the quality of the case.

Also, as Mr. Kleinfeld noted, marginal appellate grounds can be bargained against the fee award in most instances. But, by this mechanism, the rule again prompts realistic consideration of the merits of the case before proceeding into the appellate court. The plaintiff, who could otherwise not have anything to lose on appeal, suddenly does.

Average contingent fees in contested cases are one-third. As a result, plaintiffs, even with clearly bona fide claims, are rarely fairly compensated for their losses. Aside from the occasional run-away verdict, which is so often publicized, plaintiffs rarely come out ahead. To the extent Rule 82 covers approximately one-third (10 percent divided by 33 ⅓ percent) of fees actually paid, it reduces the under-compensation.

The successful defendant also is partially compensated. Thus, Rule 82 effects a redistribution of resources. Because both sides usually come out behind, it is better that the prevailing party suffers less.

REMARKS OF THE VICE PRESIDENT

CIVIL JUSTICE REFORM ROUNDTABLE MEETING

ANCHORAGE, ALASKA

MAY 11, 1992

Thank you, Senator Murkowski, Al Tamagni, and Alaskans for Liability Reform for hosting this meeting, and thank you all very much.

It's great to be here in Anchorage today.

You may know that I'm on my way to Japan. They are tough competitors, but America is still the world leader in the marketplace.

- Our economy is more than twice as large as any competitor.
- Still, we have some competitive disadvantages.
- Some come from trading partners; others from inside.

Unfortunately, we are also the world leader in lawsuits.

- o 70% of the world's lawyers - 5% of the population.
- o System costs an estimated $300 billion dollars a year.

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(We borrowed the Fairness Rule from Alaska, not England.)

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- Most lawsuits are brought in state courts.
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Please work hard to make this happen in Alaska.

- The "litigation explosion" isn't just in Washington. The people of Alaska know that the legal system takes too long and costs too much.

- I look forward to working with you to make Alaska a model for the rest of the nation.

Thank you very much.

May 11, 1992

Civil Justice Reform Roundtable
Anchorage, Alaska

DATE: May 11, 1992
LOCATION: Captain Cook Hotel
Anchorage, Alaska
TIME: 3:05 p.m.
FROM: Richard W. Porter

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This is also an opportunity to learn about Alaska's experience with a limited version of the "Fairness Rule" -- called Alaska Rule 82.

II. BACKGROUND

The Civil Justice Reform Roundtable is sponsored by Mr. Al Tamagni, Chairman of Alaskans for Liability Reform. Mr. Tamagni has been active in the liability reform movement in Alaska for a number of years.

In 1986, some "watered-down" tort reform legislation was enacted. It implemented some minor limits on joint and several liability and collateral damages. It also implemented some minor changes to the Alaska Rule 82 -- the state's limited Fairness Rule. The state legislature, however, frustrated efforts for more significant reform.

In 1988, a coalition for liability reform ran a statewide initiative to toughen the limits on joint and several liability. The initiative, which limited recovery from each defendant to their share of fault, passed with 73% of the vote.

The Alaskans for Liability Reform see this landslide vote as evidence of the popular support for legal reform in Alaska. However, they have not pursued any other significant reforms in the legislature, which remains hostile to legal reform. They believe that the redistricting this year should lead to significant turnover and they expect to rejuvenate reform efforts

next year.

Alaska Civil Rule 82

Alaska Civil Rule 82 requires that the prevailing party should ordinarily recover partial compensation for attorneys' fees. There is, as you might guess, divided opinion about how effective it has been. Some, such as the Alaskans for Liability Reform, do not believe the rule is tough enough. Others, such as the Alaska Bar Association -- which passed a resolution a decade ago urging the repeal of Rule 82 -- think it goes too far.

The rule works differently for plaintiffs and defendants. The plaintiff is entitled to 10% of the first $100,000 awarded, 8% of the next $100,000 and so on as attorneys fees. However, contingent fee lawyers usually treat the fees as part of the recovery -- thus only a portion of even this small fee is passed on to the winning plaintiff.

On the other hand, defendants that prevail are usually awarded only $5,000 to $10,000 -- far less than the fees a liability insurer would incur defending against the typical tort suit carried through to trial.

As the attached article suggests, Rule 82 has been successful at encouraging parties to settle more lawsuits sooner. On the other hand, the rules have not been completely successful at deterring frivolous claims -- often frivolous suits are brought by plaintiffs who are judgement-proof.

Summary of the Administration's proposals

The Civil Justice Reform Model State Amendments is a ten part proposal for state legislative action that is very similar to the federal Access to Justice Act of 1992. It includes:

1) Pre-Complaint Notice of Claims
2) Multi-Door Courthouse
3) Core Disclosure and Discovery
4) Offer of Settlement
5) Pretrial Settlement Conference
6) Facilitating Summary Judgement
7) Expert Testimony
8) The Fairness Rule -- Attorney's Fees to Prevailing Party
9) Accuracy in Pleading
10) Legislation and Regulation Drafting

The Model State Punitive Damages Act presents a six part proposal for state legislative action, including:

1) Pre-Complaint Notice of Claims
2) Eliminate Pleading for Specific Amounts of Punitive Damages
3) Establish "Clear and Convincing" Standard of Proof
4) Bifurcate Trials
5) Judicial Determination of Amount of Punitive Damages
6) Cap the Amount of Punitive Damages

III. PARTICIPANTS

The Vice President
Ed Tamagni -- Chairman, Alaskans for Liability Reform
Ed McNally -- Anchorage District Attorney and former Bush speechwriter
See attached sheet

IV. EVENT OUTLINE

3:05 p.m. Arrive Captain Cook Hotel and proceed to Crows Nest I Room

3:15 p.m. The Vice President arrives Crows Nest I Room and participates in Photo Opportunity

3:30 p.m. The Vice President concludes Photo Opportunity and participates in Roundtable

4:05 p.m. The Vice President concludes Roundtable and proceeds to Holding Room

V. PRESS PLAN

Open Press for beginning only

VI. ATTACHMENTS

List of Participants
Talking Points
Article on Civil Rule 82

REMARKS OF THE VICE PRESIDENT

CIVIL JUSTICE REFORM ROUNDTABLE MEETING

ANCHORAGE, ALASKA

MAY 11, 1992

Thank you, Senator Murkowski, Al Tamagni, and Alaskans for Liability Reform for hosting this meeting, and thank you all very much.

It's great to be here in Anchorage today.

You may know that I'm on my way to Japan. They are tough competitors, but America is still the world leader in the marketplace.

- Our economy is more than twice as large as any competitor.

- Still, we have some competitive disadvantages.

- Some come from trading partners; others from inside.

Unfortunately, we are also the world leader in lawsuits.

- 70% of the world's lawyers - 5% of the population.

- System costs an estimated $300 billion dollars a year.

Economic costs of excessive lawsuits are a self-inflicted competitive disadvantage.

- Foreign companies have lower liability costs.
- We also have higher prices for some everyday items.
- Some needed products (drugs) never come to market.

Japan has a different approach to litigation -- they avoid it.

Civil Justice Reform can help level the playing field.

- Remove incentive for frivolous lawsuits.
- Restore rationality to punitive damages.

<u>Agenda for Civil Justice Reform</u> addresses these problems:

- ADR - The Multidoor Courthouse

- o Discovery Reform
- o Expert Evidence - Widely Accepted Theories
- o Punitive Damage Reform
- o Fairness Rule

(We borrowed the Fairness Rule from Alaska, not England.)

I want to hear more about your approach to Attorney's Fees.

- o How does the system work?
- o Does it discourage frivolous litigation?

The Administration is committed to Civil Justice Reform.

- o The President has signed an Executive Order.
- o "Access to Justice Act of 1992" sent to Congress.
- o Amendments to Federal Rules have been presented.
- o Civil Justice Reform Model State Amendments and Model State Punitive Damages Act are here today.

I ask for your help with Civil Justice Reform.

- Most lawsuits are brought in state courts.
- Reducing costs and delay helps everyone.

Please work hard to make this happen in Alaska.

- The "litigation explosion" isn't just in Washington. The people of Alaska know that the legal system takes too long and costs too much.
- I look forward to working with you to make Alaska a model for the rest of the nation.

Thank you very much.

CIVIL JUSTICE REFORM ROUNDTABLE PARTICIPANTS

Alfred L. Tamagni, Sr.
President
Financial Diversified Services
(Chairman, Alaskans for Liability Reform)

Douglas Arthur Stark
Owner
AK Engineering & Management Services
(Vice-Chairman, Alaskans for Liability Reform)

Frank L. Thomas-Mears
President
Multiple Risk Managers

Mary A. Pierce
Owner
Insurance & Management Svcs Consulting

James H. Gingerich
Administrator
Fairbanks Memorial Hospital

Raymond G. Schalow
Executive Director
AK State Medical Society

Arthur Roland Jacobs
Anderson, Bjornstad, Kane, Jacobs, Inc.

Richard Lewis Cattanach
Vice President
Unit Company

Michael James Lockwood
Administrator
Central Peninsula General Hospital

Dan M. Rowley
Regional Manager
CH2M Hill

Michael L. Lessmeier
Attorney
Hughes, Thorsness, Gantz, Powell & Brudin

Frank J. Dillon
Executive Director
Alaska Truckers Association, Inc.

William C. Bivin
President & CEO
Bethel Native Corp.

Tom E. Roy
President
AK State Chamber of Commerce

Edward Bernard Rasmuson
Chairman
National Bank of Alaska

Elmer E. Rasmuson
Consultant
National Bank of Alaska

Mark A. Anderson
President
Alaska West Express, Inc.

Harry W. McDonald
President/General Manager
Carlile Trucking Company

George N. Hayes
Attorney
Delaney, Wiles, Hayes, Reitman & Brubaker, Inc.

Bruce Eric Davison
Attorney

Kimberly Sarah Daniels
Executive Director
Alaska Air Carrier Association

Thomas Blaine Jensen
District Manager
Alascom, Inc.

James Edward Pfeifer
President
Alaska National Insurance Co.

Charles H. Selman
President
Club Paris

Edward E. McNally
Anchorage District Attorney

Rowe D. Redick
Associated General Contractors of Alaska

F. Atlee Dodge
President
F. Atlee Dodge Aircraft Services, Inc.

Eugene A. Parrish
President
Westmark Hotels, Inc.

Stephen L. Walsh
H2W Constructors, Inc.

Richard Earl Harding
Director of Operations
PenAir

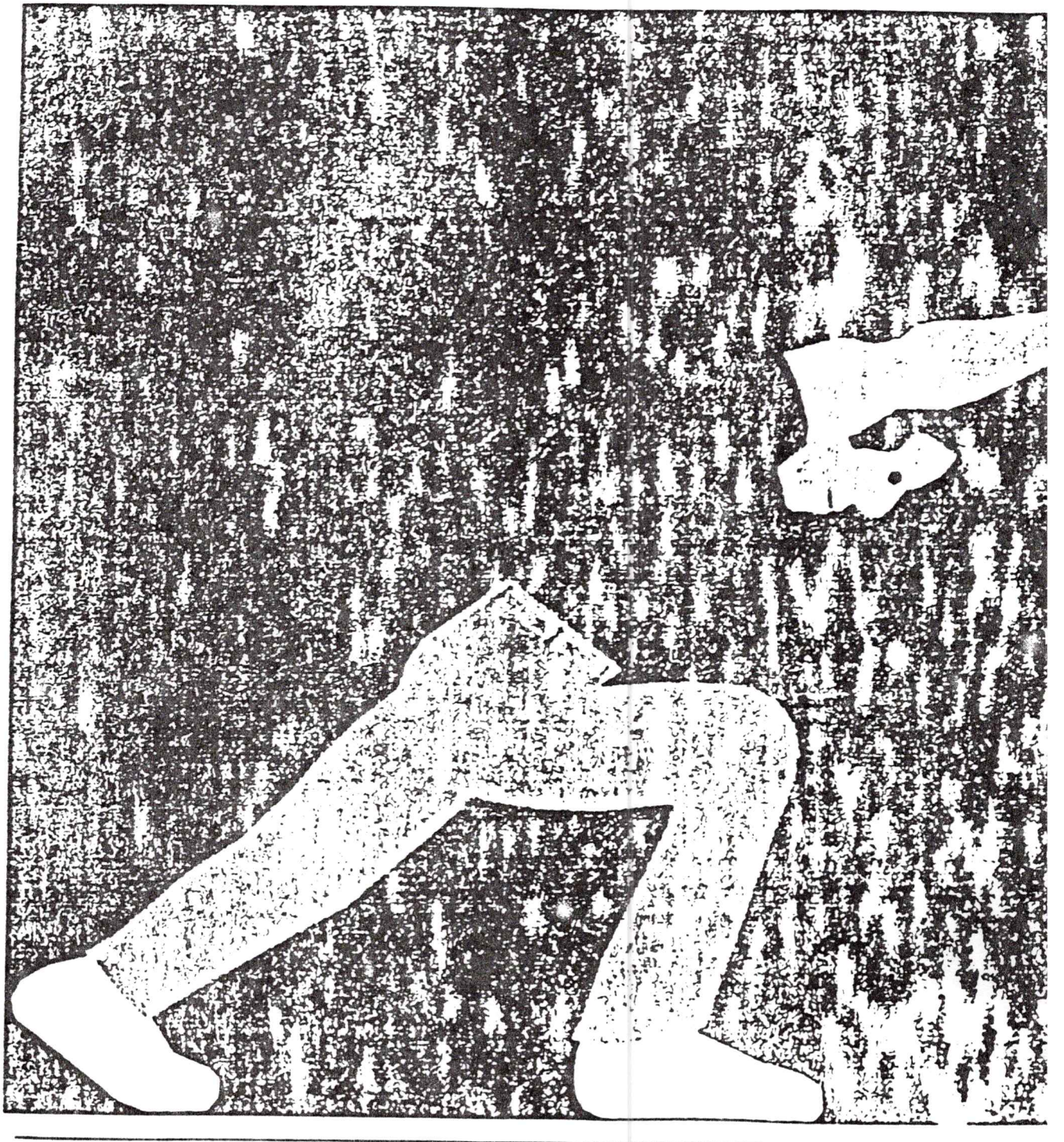
Richard James Waller
Associate Executive Director
Humana, Inc.

Roxanna M. Horschel
President
ACME Fence Company

Skip Bilhartz
President
ARCO Alaska

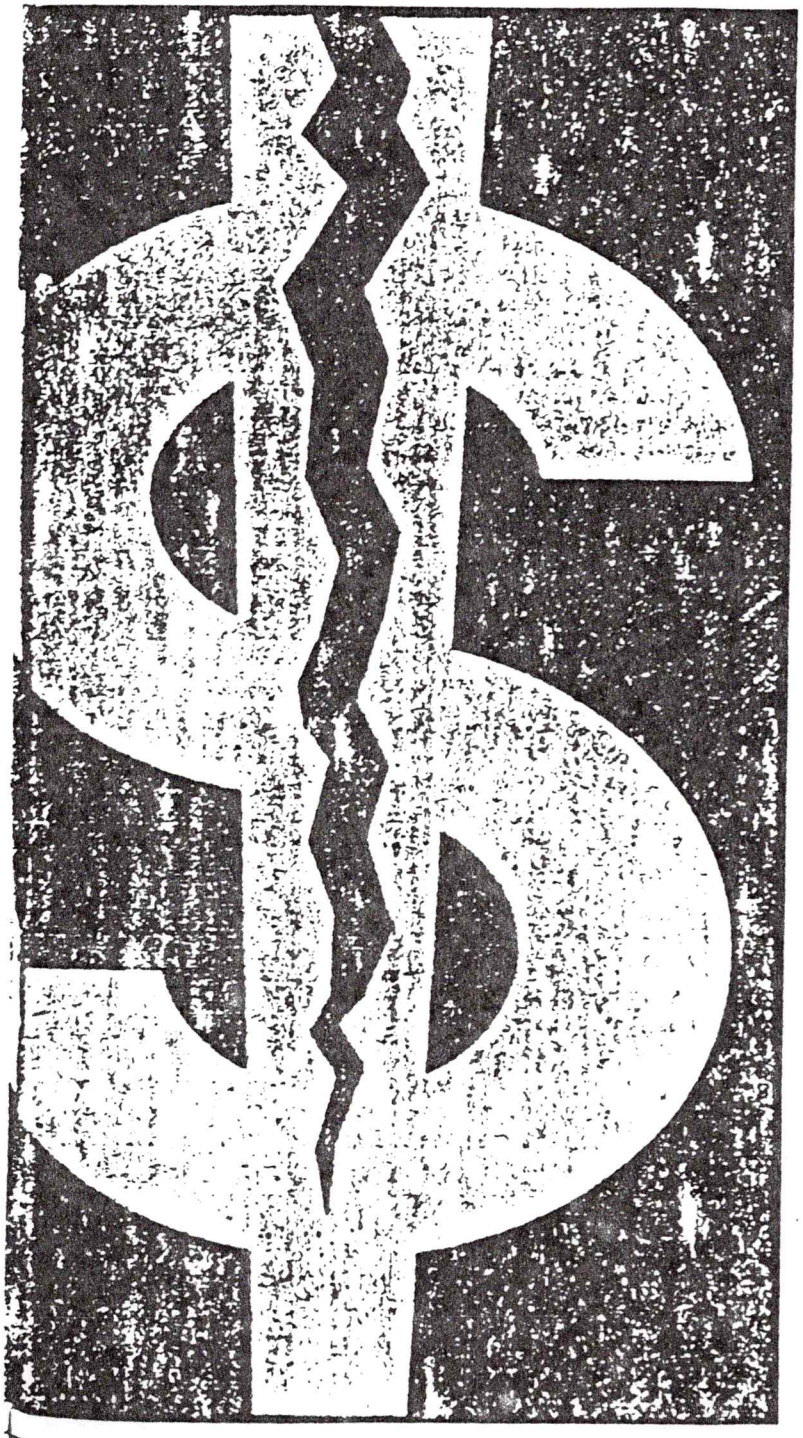
Bill Allen
President
VECO Alaska
Owner, Anchorage Times

Alaska: Where the Loser Pays the Winner's Fees



Only one state has this provision (with an offer of judgment rule). How is it working?

By Andrew J. Kleinfeld



Alaska combines a federal-style Rule 68 offer of judgment rule with the English rule awarding attorneys' fees to the prevailing party in civil litigation. This article summarizes the Alaska system and discusses its effect on litigation and settlement.

Under Alaska Civil Rule 68, as under the federal rule, a party, ordinarily the defendant, may at any time prior to judgment make a formal offer to allow judgment to be taken against himself for a specified amount plus costs. If the plaintiff rejects the offer and subsequently wins a verdict lower than the amount of the offer plus interest, the defendant is deemed the prevailing party from the time of the offer and is entitled to costs from the time of the offer.

Costs (other than attorneys' fees) allowed under the rule are much less than actual out-of-pocket costs. For example, a party is likely to have to pay a physician who testifies in court $500 to $1,500 for routine, brief testimony, but will usually receive only the subpoena rate for expert witnesses—less than $50 in most cases—under Rule 68.

The Rule 68 offer would have little force were it not for Alaska's use of the English rule on attorneys' fees. The risk that a few hundred, or at most, a few thousand dollars in a costs award may be shifted will ordinarily not affect the settlement evaluation of a plaintiff anticipating an award ten or a thousand times as large.

The power of Rule 68 offers of judgment in Alaska derives from Civil Rule 82, requiring that the prevailing party should ordinarily recover partial com-



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is an attorney
in Fairbanks, Alaska

pensation for attorneys' fees. The rule works slightly differently for plaintiffs and defendants. Rule 68 offers of judgment work mainly with defense awards, but both sides of the rule should be understood.

For successful plaintiffs, the courts ordinarily follow a schedule provided in the text of the rule. Cases are broken down into three categories: noncontested (defaulted); contested without trial (resolved after an answer or motion by defense but before trial); and contested through trial.

Awards on contested without trial cases are 20 percent of the first $2,000, 15 percent of the next $3,000, 12.5 percent of the next $5,000, and 7.5 percent of everything over $10,000. Thus, the substantial case entails an award of $1,475 plus 7.5 percent of everything over $10,000, if resolved before trial, as by acceptance of a Rule 68 offer of judgment—attorneys' fee awards being in addition to offer of judgment. If a case is tried, the Rule 82 award to a prevailing plaintiff is $1,850 plus 10 percent of the excess over $10,000.

Rule 82 computations are performed on the sum of the verdict and prejudgment interest. For example, a verdict of $100,000 three years after the accident yields a judgment of $131,500 with prejudgment interest at 10.5 percent and $145,500, including Rule 82 attorneys' fees at the contested rate of $1,850 plus 10 percent of the excess over $10,000. Thus, with costs, a $100,000 jury verdict yields about a $150,000 judgment after a typical lag.

On the defense side, the operative language of the rule is that the award should be "in a reasonable amount" which is "commensurate with the amount and value of legal services rendered." The Alaska Supreme Court has provided little guidance for trial judges on what this language means.

The Alaska Supreme Court has made it reversible error to award full or substantially full compensation for his attorney's fees to the prevailing party, if the unsuccessful party litigated in good faith. Awards are to "partially" compensate the prevailing party, not fully compensate him. *Malvo v. J.C. Penney Co., Inc.*, 512 P.2d 575 (Alaska 1973).

The Supreme Court will also reverse denial of attorneys' fees to the prevailing party without some good reason articulated by the trial judge. *Stordahl v. Government Employees Insurance Co.*, 564 P.2d 63 (Alaska 1977). The trial judge has broad discretion, but must award some partially compensatory amount based upon the actual work done and fees charged by the prevailing party's attorney.

Awards between 20 percent and 80 percent of actual defense fees are, as a practical matter, not reversible. These awards can amount to substantial four- or even five-figure judgments against unsuccessful plaintiffs.

Here is how Rule 68 and Rule 82 fit together.

The defendant offers to allow the plaintiff to take judgment against him for x dollars plus costs and attorney's fees.

If the plaintiff accepts the offer, he may file a Rule 79 costs bill and move for a Rule 82 attorney's fee award, which will ordinarily be the scheduled "contested without trial" amount. For example, a $45,000 Rule 68 offer is worth $49,100 plus allowable Rule 79 costs, for a total in the neighborhood of $50,000. Prejudgment interest is already accounted for in the amount of the offer. Usually plaintiff's and defendant's attorneys agree on these amounts over the telephone and avoid the extra filings.

If the plaintiff rejects the Rule 68 offer and the case is tried to a verdict, a little arithmetic must be performed to determine which party obtains a Rule 82 attorney's fees award. The court 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 judgment. This may be a great deal of money, since trial of a substantial case is likely to entail defense attorneys' fees of $10,000 to $50,000, or more, for protracted and complex litigation. The wise defendant will have made an offer of judgment early in the discovery process, so that most of the attorneys' fees will have been incurred after the Rule 68 offer and will be subject to Rule 82.

Thus, the plaintiff who wins an award lower than the Rule 68 offer plus interest faces an often catastrophic result. For example, in a personal injury case with a projected value in the $10,000 to $30,000 range, if the defendant makes a Rule 68 offer of $10,000, and the jury award with interest is less, the plaintiff will lose money on the litigation. The plaintiff will have to pay the defendant's attorney fees award—probably in the $5,000 to $10,000 range—and the plaintiff's own nonreimbursable costs for medical experts and so forth in the $1,000 to $5,000 range.

The knife also gets a little twist from a new Alaska statute on prejudgment interest. Under the statute, either side may make an offer of judgment within the first 60 days of the litigation, or five days after discovery ends. If the party does better than its offer

(lower for a defendant's offer, higher for a plaintiff's), then the prejudgment interest rate will be raised or lowered 2 percent for its benefit. Thus a plaintiff who wins a verdict higher than its offer is entitled to 12.5 percent prejudgment interest, and a successful defendant lowers the interest rate to 8.5 percent.

DO THESE RULES SERVE THEIR INTENDED PURPOSES?

This combination of rules is intended to serve two purposes—achieving more perfect justice between the litigants and encouraging settlement. They serve the latter objective better than the former.

The model villain, against whom the entire complex of rules is aimed, is the "bad man" who acknowledges the justice of the plaintiff's demand, but refuses to pay the obligation in order to profit from delay or use the plaintiff's anticipated litigation expenses as leverage to obtain an unjustly low settlement. The honest claimant, whom the rules are intended to benefit, is the person who demands what he is entitled to—and prevails. He is supposed to obtain sufficient interest and compensation for his attorneys' fees so that his victory is not Pyrrhic.

First, the rules do not substantially reduce the burden of attorneys' fees for successful plaintiffs. Here are the mechanics for typical contingent fee arrangements.

The scheduled percentages are much less than the percentages conventionally charged by plaintiffs' attorneys. Contingent fees in Alaska, as elsewhere, range from 25 percent to 50 percent. Most Alaska plaintiff attorneys' fee contracts, in my experience, provide that the Rule 82 award is rolled into the total recovery against which the contractual percentage is applied. Thus, if a case is settled, without trial, for the defendant's $100,000 liability insurance policy limit and Rule 82 attorneys' fees of $8,225, the usual one-third contingent fee will be applied to $108,225, yielding an actual fee of $36,075, and compensation to the plaintiff of only $72,150, a far cry from the $100,000 he should supposedly receive.

The obvious tinkering would be to limit attorneys' fees actually charged to the amount awarded, as in workers' compensation. But unless the scheduled percentages were raised to market levels, this might dry up the supply of attorneys willing to handle plaintiffs' personal injury claims, particularly the smaller ones.

Analogously, it has become extremely difficult during the last year or so for injured workers to hire attorneys in Alaska to prosecute moderately sized workers' compensation claims, because fees awarded by the workers' compensation board are below the amounts needed to make handling of the claims as profitable as alternative work.

If the Rule 82 schedule were raised to market rates, liability insurance premiums would have to be increased substantially in order to spread the much higher cost. This might well increase the amount of evasion of Alaska's very loose new mandatory insurance law.

If the rules designated the Rule 82 award as the amount actually to be paid to the plaintiff's attorney, an additional problem would develop around personal injury cases, resulting in judgments higher than the defendant's liability insurance policy limits. A line of Alaska cases holds that the Rule 82 award should be calculated on the total verdict plus interest, not merely the policy limit. And unless the insurance policy clearly provides otherwise, the total verdict plus interest must be paid by the insurer as costs on top of its policy limit. If a defendant has a $100,000 policy limit, and the verdict plus prejudgment interest is $2 million, then the Rule 82 award is $200,850 (again, $1,850 + 10 percent of the excess over $10,000). Under current practice, the attorney would get his contingent fee percentage computed on the amount actually recovered from the insurance company—the $100,000 policy limit plus the $200,850 Rule 82 award and the Rule 79 costs would be rolled together, and the client would receive the rest. If the rules were changed so that the attorney received the Rule 82 award and nothing else, he would wind up with about twice as much as his client in this not extraordinary situation.

Second, the rules do not effectively discourage nuisance claims. These are claims for which the plaintiff knows that in all likelihood, a jury will find no liability or no damages, but suit is filed in hope of a settlement. If the case is litigated through trial, the defendant will probably win an award of $5,000 to $10,000 against the plaintiff, but the cost to the defendant will exceed the award, and the award will probably be uncollectible, so most defendants will pay up to $5,000 or so, even on frivolous claims.

Third, the rules do not really promote settlement in the manner contemplated. Alaska Supreme Court opinions have suggested that defendants would be more eager to settle because the stakes at trial are raised to include prejudgment interest and attorneys' fees. But the plaintiffs' attorneys are equally aware of the "add-ons" and factor them into their settle-

(Please turn to page 52)

matters to the disciplinary counsel, is that the ABA Standing Committee on Professional Discipline is advocating referring every minor infringement of the ethical rules.

Obviously, that is not the case; nor is it the problem. If I have overemphasized the need to refer misconduct in this article, it is because judges as a group are not referring the misconduct they observe or become aware of. I have attempted to show why referral is appropriate and also ethically mandated by Canon 3B(3). I believe that for the judge referral is usually the most advantageous response to lawyer misconduct. ⚖

Judges and judicial organizations interested in further information on disciplinary agencies or other information in this article may contact the author, Timothy McPike, ABA Center for Professional Responsibility, 11th Floor, 750 N. Lake Shore Drive, Chicago, Illinois 60611.

Kleinfeld

(Continued from page 7)

ment demands. The arithmetic consequence is that if the plaintiff's and defendant's attorneys evaluate the case differently, the difference is magnified, not shrunk, by the "add-ons." Interest and attorney's fees are proportional, so if the parties are far apart, their mutual awareness of the rules pushes them further apart.

ECONOMIC DURESS ON PLAINTIFFS

A positive feature of the rules is that by making a small case larger, they make it easier for plaintiffs with small cases to induce attorneys to accept them. But this increasing of the stakes works both ways—and has a serious negative side effect.

The combination of Rule 68 offers, statutory adjustment of prejudgment interest rates, Rule 79 costs, and Rule 82 attorney's fees, greatly raises the stakes in litigation. As was shown above, if the defendant loses a $100,000 case, he pays about $150,000. If the plaintiff wins a $10,000 verdict after rejecting a higher offer of judgment, he winds up owing money to the defendant as well as to his own lawyer.

The economic effect is like doubling the stakes in a poker game. It drives out the players whose resources do not allow them to stay at the table for a long enough time for the probabilities to work themselves out beyond a few bad hands.

Plaintiffs suffer more from the increased stakes than defendants. To understand why, one must consider the varying abilities of persons and institutions to bear risk. An institutional defendant, such as a large business or an insurance company, can afford the risk of a single adverse judgment much more easily than the person or firm of moderate resources who rarely litigates.

Consider the plaintiffs in a clear liability but unpredictable damages case. Most typical are the preexisting condition plaintiffs. These individuals present themselves to the jury with substantial disabilities, but the defendant has a good opportunity to show that their disabilities should be attributed to conditions which preexisted the accident. It is not at all unusual in these cases to have an offer of judgment around $50,000, a demand around $100,000, and jury verdict substantially lower than the offer or higher than the demand.

Now consider the risks to each side. In order to try the case, the defendant must risk a judgment which, with interest and attorneys' fees, may be twice the demand. But a professional litigant, such as a liability insurer, would be wise to take this risk rather than pay the demanded amount, because the occasional high verdict will be more than offset by the general run of moderate verdicts and the occasional low one.

The real pressure on insurers to settle these cases arises not from the interest and attorneys' fees rules, but instead from the risk of a judgment in excess of insurance policy limits, leading to a bad faith claim. Many cases worth $40,000 have settled for $50,000 policy limits plus Rule 82 attorneys' fees because of the bad faith risk. But sophisticated insurers are now learning to take the cap off their policy limit rather than be forced by the risk of a bad faith claim to pay more than a claim is worth.

The plaintiff faces a much more brutal choice. This is probably the only lawsuit he will ever have, so he cannot balance the occasional low verdict against the occasional high one. His resources are probably limited, so the difference between collecting the offered settlement and perhaps collecting nothing—because of a verdict lower than the offer of judgment—matters more to him than the same dollar difference matters to the institutional defendant. A four- or five-figure judgment against him for attorneys' fees and costs, because he did not beat the defendant's offer of judgment or lost on liability, may be catastrophic.

As a practical matter, if the defendant makes an offer of judgment early in the litigation at the low end of the likely value of the case, or even 10 percent to 20 percent less, the plaintiff takes an imprudent and unaffordable risk if he rejects it. The risk is made unaffordable by the impact of Rule 68, Rule 82, Rule 79 costs, and the new interest statute. In effect, the defendant is empowered to turn the plaintiff's reasonable bet on the outcome into a double or nothing bet which the plaintiff cannot prudently risk. The chance of recovering his loss plus all the add-ons is not worth the risk of having defendant's add-ons set off against his recovery.

When a plaintiff runs the risk of trial against a moderate offer of judgment and loses, the defendant often has enough leverage to prevent appeal. Typically the defendant offers to drop his costs and attorneys' fee awards in exchange for the plaintiff's aban-

donment of his appeal. This promotes settlements, but not necessarily in a just manner.

SUPREME COURT INCONSISTENCY

An oddity of Alaska Supreme Court practice suggests an inference that the court does not really believe in the justice of the doctrines it has imposed.

Although the supreme court awards attorneys' fees to prevailing parties, it does not follow anything like Rule 82. Instead, it routinely awards $250 to $750. The prevailing party is ordinarily not allowed to submit evidence of his actual fees, and the court does not consider them. Actual attorney's fees on appeals in substantial civil cases are typically in the $5,000 to $15,000 range. If a trial court followed this practice, it would be reversed.

The Alaska Supreme Court has never explained its anomalous practice on attorney's fees awards to prevailing parties. Does the court wish to avoid discouraging appeals? Then why not similarly avoid discouraging trials? Delay is a more serious problem in Alaska at the appellate than at the trial level, so administrative considerations do not favor keeping the door open wider at the appellate level.

Supreme court results are unpredictable, but so are trial results. Trial results in similar cases may approximate a bell shaped curve, with most in a predictable range, but substantial tails on the low and high ends. In certain kinds of cases, such as the weak liability, high damages personal injury case, the results may be an even more unpredictable dumbbell curve, with clusters around zero, and at very high levels, and few in between. In some cases, a plaintiff or his lawyer may be unreasonable in going to trial, but in many, trial is as good a means as settlement to decide how much money, if any, ought to be taken from one party and given to the other.

ABOLISH RULE 82

I suppose the above criticism implies that the rules are too effective, rather than not effective enough, in promoting settlement. The plaintiff is forced to settle his case for less than it is worth because of his lesser ability than the defendant to try the case on a double or nothing basis.

Some may feel that encouraging settlement is of such great value as to justify this result. Where the stakes are so high, my own values place a greater weight on justice than administrative convenience, so I cannot accept this outcome as desirable.

The Alaska Bar Association passed a resolution more than a decade ago calling upon the supreme court to repeal Rule 82. The court has never acted, nor explained its inaction, regarding this resolution. I think the bar was correct. We have gone too far in the direction of threatening litigants with catastrophe to compel them to settle. We ought to use our luxuriously expensive system of courts to try cases, not frighten people of moderate means out of trying them.

Parrish

(Continued from page 11)

ous fairness of forcing an insurance company to share plaintiff's costs of counsel in bona fide litigated cases, Rule 82 provides an economic incentive to insurers to avoid involving counsel altogether. The rule promotes settlement of litigation before it starts, as much as after. Wise insurers should, and I believe do, take this cost into account in deciding upon prelitigation settlement policies.

RULE 82 PROVIDES PARTIAL COMPENSATION

Although the prospect of an adverse award does promote a more meaningful evaluation, I doubt that it discourages the filing of many bona fide claims. Clients as a class are self-righteous, especially when they have a good case.

I also question whether the system suffers that much when a plaintiff who lacks confidence in his position, even though it may be well-founded, elects not to pursue his claim. At least his decision is predominantly free, coerced only by fair risks which are beneficial to the integrity of the system. What detriment there is in this situation is small in comparison to the alternative. The greater injustice by far is the bona fide case which cannot, as a matter of economics, be brought at all. Without fee awards, the freedom to bring bona fide claims in the $20,000 range can be lost altogether. We should not attempt to avoid one injustice by imposing a larger one.

Of course, there is the occasional case where a plaintiff without a serious injury and a reasonably good liability position loses to a jury and suffers a fee award. This can be harsh, but the trial courts have sufficient discretion to temper the awards in light of the plaintiff's circumstances and the quality of the case.

Also, as Mr. Kleinfeld noted, marginal appellate grounds can be bargained against the fee award in most instances. But, by this mechanism, the rule again prompts realistic consideration of the merits of the case before proceeding into the appellate court. The plaintiff, who could otherwise not have anything to lose on appeal, suddenly does.

Average contingent fees in contested cases are one-third. As a result, plaintiffs, even with clearly bona fide claims, are rarely fairly compensated for their losses. Aside from the occasional run-away verdict, which is so often publicized, plaintiffs rarely come out ahead. To the extent Rule 82 covers approximately one-third (10 percent divided by 33⅓ percent) of fees actually paid, it reduces the under-compensation.

The successful defendant also is partially compensated. Thus, Rule 82 effects a redistribution of resources. Because both sides usually come out behind, it is better that the prevailing party suffers less.