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

Executive Summary

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October 1995

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This project was developed under grant number SJI-94-08G-H-317 from the State Justice Institute. Points of view expressed here are those of the authors and do not necessarily represent the official position or policies of the State Justice Institute.

acknowledgments

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

table of contents

Alaska Rule of Civil Procedure 82. Attorney's Fees

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

(b) Amount of Award.

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

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

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

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

(A) the complexity of the litigation;

(B) the length of trial;

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

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

(E) the attorneys' efforts to minimize fees;

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

(G) vexatious or bad faith conduct;

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

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

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

(K) other equitable factors deemed relevant.

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

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

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

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

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

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

Note

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

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

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

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

Publishers Note

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

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

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

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

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

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

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

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

Executive Summary

In the past decade, various groups have proposed reforms to make the civil justice system more fair and efficient. One which has surfaced repeatedly, most recently in the Republican House majority's 1994 "Contract with America," would require the loser in a civil lawsuit to pay all or a portion of the winner's attorney's fees. The usual rationale of such proposals is that a party who might become liable for the other side's attorney's fees would less frequently abuse the justice system by bringing frivolous or marginal litigation.[1]

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

The Alaska Judicial Council received a grant from the State Justice Institute (SJI) to review the operation of Alaska's fee shifting rule: Alaska Civil Rule 82 (the rule is set out in the end of this executive summary). The goal of this executive summary is

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

to provide an overview of the findings, conclusions and recommendations contained in the full report.

A. Introduction

Alaska Civil Rule 82 provides that whichever party prevails in a civil lawsuit is entitled to partial compensation of the winner's attorney's fees from the loser.[2] The rule applies to the great majority of civil cases.[3]

The rule directs judges to calculate the amount of attorney's fees using several variables. A party recovering a money judgment receives a percentage of the judgment. For a case contested with a trial, the percentage is 20% for the first $25,000 and 10% for any additional amount. Percentages for non-contested cases and those contested without trial are less. The judge calculates attorney's fees for a party who prevails but does not recover a money judgment as a percentage of actual reasonable fees. The percentage is 30% for a tried case and 20% otherwise. In either situation, the court can vary the award based on factors listed in the rule.

Alaska's offer-of-judgment rule, Civil Rule 68, interacts with Rule 82. Rule 68 lets either party make an offer of judgment to settle the suit for a definite amount (typically, the defendant makes the offer). If the plaintiff rejects the offer and recovers less than the offer at trial, the defendant becomes the prevailing party and is entitled to Rule 82 attorney's fees from the date of the offer. This holds true even if the plaintiff recovers a substantial sum of money, as long as the plaintiff does not do better at trial than the Rule 68 offer.

Case law permits public interest litigants to collect full attorney's fees under Rule 82, and exempts them from paying attorney's fees if they do not prevail. The basis for the public interest rules lies in the court's inherent power, rather than in statute. The court also may award full fees under Rule 82 if the non-prevailing party's behavior was frivolous or vexatious, or the party acted in bad faith.

Rule 82 governs fee awards to the prevailing party only in the trial courts. In appeals, Appellate Rule 508 (e) governs most awards, whether in administrative

[2] The rule is supported by Alaska Statutes § 09.60.010: "The supreme court shall determine by rule or order the costs, if any, that may be allowed a prevailing party in a civil action. . . ."

[3] Domestic cases are the largest excluded category, along with cases in which a contract governs attorney's fees.

appeals handled by the superior court, or in civil appeals to the Alaska Supreme Court. Although that rule also awards partial attorney's fees to the prevailing party, the court usually awards a set amount not directly related to the actual fees. A typical award in a 1995 supreme court appeal came to about $1,000.

This study set out to empirically document the effects of two-way attorney's fee shifting on civil litigation in Anchorage, Alaska. Numerous scholars and observers have written about the probable effects of adopting two-way fee shifting in American jurisdictions, but few have examined the question empirically. Those who favor fee shifting argue that it would restrain frivolous or marginal litigation, and more fully compensate the prevailing party. Opponents warn that it would deter meritorious as well as frivolous claims and defenses, fail to distinguish between the real winners and losers in a lawsuit, and produce windfalls as well as draconian penalties.

Because fee shifting raises such complex issues, the study approached them from several angles. One perspective came from court case files, both federal and state.[4] Another view came from interviews with trial and appellate judges.[5] Practicing civil attorneys gave a third set of insights.[6] Although each perspective carried a bias, taken together they gave a good sense of how attorney fee shifting worked in practice, and how it affected Anchorage litigation practices. While the data cannot strictly be compared because of their different sources, we have juxtaposed them whenever possible to give the most complete picture. The study did not attempt to identify a control group of cases in which Rule 82 did not apply, because the rule applied to most civil cases in the state, to all federal diversity cases, and to other federal cases in which state questions were raised.[7]

B. Background

[4] For the state court case file sample, we identified all cases that had been closed in 1993, eliminated ones to which Rule 82 would not apply, and randomly sampled from that list. The state sample contained 737 files. For the federal cases, we gathered all cases closed in 1993 to which Rule 82 might apply. There were 339 federal cases.

[5] We interviewed all 20 state district and superior court judges in Anchorage, all five state supreme court justices, all five federal trial court judges in Anchorage, and three federal magistrates.

[6] We interviewed 161 experienced attorneys in Anchorage whose names were drawn at random from court litigation files. Each attorney was asked to discuss two of the cases they most recently had resolved within the past year. Data about the resulting 305 cases were entered into a separate database and analyzed.

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

In most European countries, civil litigation follows the general rule that the loser pays winner's attorney's fees (the "English rule"). The objective fact of defeat justifies a fee award against the loser, without requiring evidence of fault or bad faith. In both England and Europe, the rationale for this practice is that victory is not complete if it leaves substantial expenses unpaid.

During colonial times, the law of attorney fee recovery in America followed the English practice. An important difference was that colonial statutes that regulated the fees recoverable from a defeated adversary also regulated the maximum fees that lawyers could charge their clients. After the Revolution, attorneys who opposed government regulation of their fees won repeal of these statutes, although legislation still permitted small set awards to the prevailing party. By the late nineteenth century, courts began to interpret the statutes as excluding attorney's fees from the category of recoverable costs, and to deny recovery of attorney's fees as damages. The term, "American rule," for this practice of requiring each side to pay its own attorney's fees, came into use in the early twentieth century.[8]

In practice, numerous statutes provide for either one-way or two way fee shifting in the United States today.[9] Legislatures use fee shifting to encourage public policies such as civil rights, consumer protection, and enforcing environmental statutes. They also see fee shifting as an appropriate punitive measure, and authorize its use to discourage frivolous or bad faith litigation. Federal law includes over two hundred statutes that shift fees, for reasons similar to those underlying state statutes. Despite this, the American rule applies to most civil litigation in most states.

During the 1980s and 1990s, several groups proposed two-way fee shifting as a tort or civil justice reform measure. The best-known of the groups, the Council on

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

[9] Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?* 47 LAW & CONTEMP. PROBL 321, 323 (1984) (hereinafter Note, *State Attorney Fee Shifting Statutes*). The authors surveyed 4,000 to 5,000 existing statutes that empowered "*courts* (emphasis in original) to require one party to pay the other party's attorney fees." They found 1,974 fee-shifting statutes in the fifty states and District of Columbia. *Id.* One-way fee shifting awards attorney's fees to a specified party (usually the plaintiff) if that party prevails, but requires each side to pay its own fees if that party does not prevail. Two-way fee shifting requires the non-prevailing party, whether plaintiff or defendant, to pay the prevailing party's attorney's fees. Alaska's Rule 82, and the English and European practice, is two-way fee shifting in principle, although it may become one-way fee shifting in practice.

Competitiveness chaired by Vice President Dan Quayle, proposed fee shifting in 1991. Although the proposal generated substantial controversy, President Bush issued an Executive Order providing for limited fee shifting in some federal cases.[10] In 1994, Republicans proposed a "Contract with America," providing for fee shifting in some types of cases as a "Common Sense Legal Reform." Legislation introduced to implement fee shifting has not yet been passed.

C. Fee Shifting in Alaska

1. Development

Alaska's fee-shifting statute can be traced back to the Field Codes of the mid-1800s, which came to Oregon by way of New York, and then to Alaska through the application of Oregon law during Territorial days. Alaska apparently followed its separate course more through historical accident than through any conscious decision to reject the "American rule."

In 1884, Congress designated Alaska as a civil and judicial district, and provided that "the general laws of the State of Oregon now in force are hereby declared to be the law in said district."[11] From then until President Eisenhower proclaimed Alaska a state on January 3, 1959, the territorial codes and court rules provided for shifting attorney's fees to the prevailing party.[12] At statehood, the new Rules of Civil Procedure adopted by Alaska's Supreme Court included Rule 82 which gave the prevailing party partial attorney's fees as costs, unless the court used its discretion to direct otherwise.[13]

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[10] Executive Order No. 12,778, 56 Fed. Reg. 55, 195 (1991). The order applies to civil suits initiated by the United States, and says "Litigation counsel shall offer to enter into a two-way fee-shifting agreement with opposing parties to the dispute, whereby the losing party would pay the prevailing party's fees and costs, subject to reasonable terms and limitations." *Id.* at B78.

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

[12] The history of the various provisions is documented more fully in the main report.

[13] The text of the current rule is set out at the end of this executive summary. Essentially, the original rule provided that the court should award fees from a schedule to any party recovering a money judgment. The schedules set different amounts for liens and other claims, and varied the award by whether the claim was contested, partly contested, or non-contested. For parties who prevailed with a non-monetary judgment, the court was to set attorney's fees using its discretion.

The second session of the 1962 legislature approved a bulk formal revision of the state laws. As part of the complete revision of the Code of Civil Procedure, the legislature enacted the current attorney fee shifting statute.[14] The statute directs the supreme court to determine by rule or order whether or how attorney's fees would be awarded to the prevailing party.[15]

The fee-shifting statute remained relatively unchanged after statehood but the supreme court considered various challenges to Rule 82 and recommendations from local Bar associations. Most attorneys who commented to the court about the rule wanted to increase the awards for non-monetary judgments and make awards more uniform. The perception by the Bar of too much judicial discretion led to a 1973 resolution from the Alaska Bar Association Conference that called on the court to repeal Rule 82. Passage of time dampened the Bar's enthusiasm for repealing the rule, and relatively few concerns about Rule 82 appeared in the court's files between 1976 and 1992.[16]

A fee award in an employee's suit for wrongful discharge[17] led the Alaska Supreme Court in early 1992 to worry that "the costs of litigation have increased to such an extent that the prospect of an award of attorney's fees under Civil Rule 82 may deter a broad spectrum of litigants from voluntary use of the courts."[18] A committee subsequently appointed by the court examined access to the courts, lack of uniformity in fee awards when the prevailing party did not receive a monetary judgment, and lack of a requirement that trial judges state the reasons for an award when the schedule

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[14] *See* 1962 Alaska Sess. Laws ch. 101 § 5.14, codified at ALASKA STAT. § 09.60.010.

[15] The statute is set out *supra* at note 2.

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

[17] *Bozarth v. Atlantic Richfield Oil Co.*, 833 P.2d 2 (Alaska 1992). The plaintiff in that case lost a wrongful discharge suit against his former employer and was assessed $152,000 in attorney's fees under Rule 82. *Id.* at 2-3. Bozarth appealed the fee award to the supreme court. While the majority declined to grant Bozarth relief, they characterized the magnitude of the award as "nonetheless disturbing." *Id.* at 4 n.3.

[18] Minutes of Civil Rules Committee, March 29, 1992.

did not apply.[19] After surveying members of the Alaska Bar,[20] the committee recommended that the court change the procedure for fee awards in non-monetary judgment cases to a fixed percentage of reasonable fees incurred.[21] It also recommended that the rule list factors for the trial judge to consider in deviating from the schedule or the fixed percentage.[22]

Acting on the special subcommittee's report, the supreme court in 1993 repealed and reenacted Civil Rule 82.[23] The supreme court adopted most of the subcommittee's recommendations, but added a factor to address the *Bozarth* access issue.[24] The new rule for the first time specified a fixed percentage of actual attorney's fees for the trial judge to award in cases with no monetary judgment.[25] Under the current rule, the trial court multiplies the prevailing party's actual, necessarily incurred fees by 20% if the case was resolved without trial and 30% if it was resolved with trial.[26] The result still will vary in many cases, leaving inequities between plaintiff and defendant reimbursements that bother many attorneys.[27]

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[19] Kordziel, *Rule 82 Revisited: Attorney Fee Shifting in Alaska* 10 AK. L. REV. 429, 442 (1993).

[20] The survey found that 80% of the 543 attorneys responding favored keeping Rule 82; only 17% believed that the court should repeal it. Our survey of attorneys for this evaluation of Rule 82 found 73% favored keeping the rule and 23% favored repeal, indicating that relatively little change in opinion has occurred in the three-year period. The opinion of the Bar does seem to have shifted toward a more positive view of Rule 82 over the two decades between the 1975 Bar survey and the present. *Id.* at 445.

[21] *Id.* at 446.

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

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

[24] Kordziel, *supra* note 19, at 446. *See also,* AK. R. CIV. P. 82(b)(3)(I). The factor provides that the trial judge may vary a fee award from the schedule by considering "the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts."

[25] *See* AK. R. CIV. P. 82(b)(1) and (2). Under the old version of the rule, the judge determined the total reasonable fee, and then chose a reasonable percentage by which to multiply the total reasonable fee. TOMKINS & WILLGING, *Taxation of Attorneys' Fees: Practices in English,* Alaskan and Federal Courts 43 (Fed. Judicial Center 1986). Commenting on the discretion offered under the old rule, one author said that "Awards between 20 percent and 80 percent of actual defense fees are, as a practical matter, not reversible." Kleinfeld, *Alaska: Where the Loser Pays the Winner's Fees,* 24 THE JUDGES' JOURNAL 4, 6 (1985).

[26] *See* AK. R. CIV. P. 82(b)(2). The Civil Rules subcommittee suggested these fixed percentages to roughly equalize the recovery available between the plaintiff and defendant in the same case.

[27] For example, if the case resulted in money judgment of $100,000 after trial, the plaintiff would recover approximately $5,000 + $7,500 = $12,500 (20% of the first $25,000, and 10% of the next

2. Purposes

The supreme court has identified Rule 82's primary goal as partially reimbursing a prevailing party for attorney's fees, but has permitted courts to use the rule to discourage bad faith, frivolous claims or vexatious conduct. The court encourages plaintiffs to raise issues of public interest by prohibiting fee awards against unsuccessful good-faith public interest litigants and permitting successful public interest litigants to recover full attorney's fees.[28] Rule 82 also may encourage settlement and avoid protracted litigation, especially in the context of Alaska's Rule 68, which resembles the federal offer-of-judgment rule.[29]

3. Frequency and Size of Awards

Relatively few of the cases reviewed for this study had a Rule 82 fee award. About 10% of state cases contained a Rule 82 attorney's fee award,[30] and 6% of the federal

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$75,000) on a Rule 82 award from the schedule. If the plaintiff's attorney had taken the case on a standard one-third contingent fee contract, the plaintiff would owe the attorney $33,300 in fees, of which the non-prevailing party would presumably pay about one-third. If, in the same case, the defendant prevailed, the court would award the defendant 30% of the actual fees. If the defendant had spent $100,000 in defending the case, the court (following the schedule) would award $33,300, or nearly three times the award to the plaintiff. It is not clear why the court has maintained the distinction between plaintiff and defendant as prevailing parties in calculating awards. Another author notes, "One attorney estimated that in the vast majority of small cases, thirty percent of the actual defense fees will far exceed the amount of attorney fees the prevailing plaintiff can recoup under the schedule. . . . [T]he amendment may fail to redress adequately the inherent asymmetry between the schedule and fixed-rate methods of fee taxation for plaintiffs and defendants respectively." (cites omitted). Kordziel, *supra* note 19, at 450.

[28] *Anchorage v. McCabe*, 568 P.2d 986, 990 (Alaska 1977). Unlike many courts which interpreted public interest statutes as requiring fee awards to successful public interest litigants, the Alaska court created the public interest exception to Rule 82 through case law.

[29] *Miklautsch v. Dominick*, 452 P.2d 438, 441 (Alaska 1969). Under Rule 68, a party (in Alaska, either plaintiff or defendant) who refuses an offer of judgment and then fails to better the offer cannot recover costs and attorney's fees incurred after the offer was made, and also becomes liable for the offeror's post-offer attorney's fees. *See* ALASKA CIV. R. 68(b)(1); *Bohna v. Hughes, Thorsness, et al*, 828 P.2d 745, 749 n.6. (Alaska 1992). This holds true even if the claimant recovered a money judgment, as long as the money judgment amounts to less than the Rule 68 offer. *See* AK. R. CIV. P. 68(b)(2). *Wickwire v. State*, 725 P.2d 695, 704 (Alaska 1986) held that the non-prevailing party in a Rule 68 situation still remained liable for partial, not full, reimbursement of the opposing party's attorney's fees. A defendant who rejects an offer and fails to better it must pay increased prejudgment interest on the ultimate award. A party whose opponent's recovery does not exceed the Rule 68 offer becomes the "prevailing party" for Rule 82 purposes.

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

cases.[31] This finding was not surprising because few cases went to trial.[32] Cases that settled would be less likely than trial cases to have a fee award, because in most settlements neither party could be said to prevail. Attorneys told us that in a typical settlement, each party agreed to bear its own costs, including attorney's fees.

Much of the interest in fee shifting centers on tort cases, but in Alaska, the majority of cases in which fees actually shifted were contract and civil cases. The federal district court in Alaska made three quarters of its Rule 82 awards in federal civil and contract cases,[33] with only one (5%) in a personal injury case,[34] and one each in malpractice, injunctive relief, real estate and property damage cases. No awards occurred in a wrongful death case. In the state court sample, personal injury cases accounted for about 28% of all cases but only 16% of the Rule 82 awards.

Cases resolved at trial or on dispositive motion (a small fraction of the total civil caseload) would be expected to have a fee award, because in most of those cases, one party or the other prevailed. The case file data showed that even in these cases, judges made relatively few fee awards. Only about half (52%) of the state court trials and 22% of the federal trials had fee awards. Only 38% of default judgments in state court cases and only one of the twenty-four federal default cases, contained a fee award.[35] About 59% of the state cases with a judgment other than a default, and about one-quarter of the similar federal cases had a Rule 82 award. Attorneys accounted for the relatively infrequent awards by saying that cases settled before the fee award, neither party prevailed, both parties prevailed in some respect, or a contract provision or statute governed the fee award.[36] Judges also said they did not award Rule 82 fees

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[31] Twenty federal cases contained a Rule 82 fee award. This number represents all cases and thus is not subject to sampling error.

[32] Alaska reported a total trial rate in 1993 of 3.9% to the National Center for State Courts, excluding domestic relations and small claims cases. *See* ALASKA COURT SYSTEM ANNUAL REPORT: 1993, at S-30, S-34 (1994).

[33] Civil and contract cases comprised about 60% of our federal cases.

[34] Personal injury cases comprised about 21% of the federal cases.

[35] Most of the state court default judgments without Rule 82 fees were based on causes of action arising out of negligence, while those that did contain fee awards often involved other matters. This finding is explained by a 1986 amendment to the state statute authorizing attorney fee awards that prohibited fee awards to the prevailing party in uncontested negligence suits. ALASKA STAT. §09.60.010.

[36] While the attorneys interviewed for this study were not familiar with the particular cases we examined, their general litigation experience was relevant and helpful in explaining trends or areas of interest identified in the case sample.

when a party did not ask for them, where neither party prevailed or if both parties prevailed in some significant respect.[37]

Case files also shed light on the typical sizes of fee awards. In state court, over a third (39%) of the Rule 82 awards fell under $1,000. One third were between $1,000 and $5,000, and about 27% exceeded $5,000. Only two state court awards exceeded $50,000, with the median at $2,240.[38] Federal judges made larger Rule 82 awards. Most (60%) exceeded $5,000.[39] Thirty percent fell between $1,000 and $5,000, with only two less than $1,000. The median award for federal cases was $10,854.[40] This data suggested that large fee award cases are outnumbered by smaller award cases, at least in the representative case file sample.[41]

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

D. Conclusions

This study has made a detailed examination of attorney's fee shifting in Alaska, both by collecting extensive data from case files and by conducting thorough interviews with numerous attorneys, judges and others with knowledge of the operation of Civil Rule 82. From these data we have been able to describe the rule's operation in some detail. However, it is important to remember that the study could not compare these data to a control group of cases in which Rule 82 did not apply, because Rule 82 applies

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

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

[39] Our sample contained seven awards greater than $100,000. One reason for the difference was that cases in federal court may involve larger damages and judgments than the average state court case. Another was that attorneys may have spent more time on federal cases than on state court cases. *See* Kritzer, Grossman, McNichol, Trubek & Sarat, *Courts and Litigation Investment: Why Do Lawyers Spend More Time on Federal Cases?*, 9 JUSTICE SYSTEM J. 7,8 (1984).

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

[41] Awards in the attorney interview cases generally were larger; however the attorney interview case sample was biased towards trial or otherwise strongly contested cases.

to most civil cases in the state and to federal diversity cases.[42] Thus, we were not directly able to compare how cases would be litigated with and without the application of Rule 82. Nevertheless, the findings of this report should help Alaskans understand the effects of Rule 82, and assist policy makers nationwide to evaluate proposed fee-shifting rules or statutes in their jurisdictions.

1. Rule 82 Seldom Plays a Significant Role in Civil Litigation

The major conclusion of this report is that attorney fee shifting in Alaska seldom plays a significant role in civil litigation. An almost infinite number of factors structures the litigation of civil claims. These include, but certainly are not limited to, the type of dispute involved, the parties' personalities, the parties' financial resources, the strength of the legal claims involved, and the magnitude of the stakes. The possibility of having to pay the other side's attorney's fees is only a minor factor on this list.[43]

a. Awards were Relatively Infrequent - One measure of Rule 82's influence is the frequency with which fee awards occur. Rule 82 awards were made in only a small percentage of cases examined for this study: only 10% of the state court case sample and 6% of federal court cases. Even among cases resolved at trial or on dispositive motion (a small fraction of the total civil caseload), few fee awards were made, either because the case settled before the fee award, neither party prevailed, both parties prevailed in some respect, or a contract provision or statute governed the fee award.

b. Awards were Not Often Collected - Even in those few cases in which fee awards were made, they were not always paid. In only 40% of the 57 cases attorneys described that had a fee award[44] did the prevailing party collect the award. Parties did not collect awards because the person against whom the award was made was judgment-proof, declared bankruptcy, or because the prevailing party waived fees as part of a post-judgment settlement.

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

[43] Conversely, the possibility of being reimbursed for some attorney's fees at the end of the case also is a minor factor on this list, with the possible exception of debt cases discussed later.

[44] An additional 42 cases in the attorney interview database contained fee awards; however, attorneys did not know in those cases whether the award had been collected.

c. The Rule Did Not Often Affect Filing Decisions - In another example of the subtlety of Rule 82's effects, only 35% of the 161 experienced litigators we interviewed could remember *any* case in which the rule played a significant role in their clients' decisions to file a claim or assert a counterclaim. The overall cost of litigation and the attorney's assessment of the strength of the case played the largest role in the filing decision.

d. The Rule Did Not Often Affect Litigation or Settlement Strategies - Rule 82 influenced litigation strategy in only 34% of the 305 recently resolved civil litigation cases described by these attorneys. It affected settlement strategy in 37% of the cases. Attorneys said that they litigated and made decisions about settlements on the merits of the case, regardless of Rule 82. In some instances, Rule 82 played no role because the potential fee award was too small or was not collectible.

While Rule 82 applies to most civil litigation in Alaska, our data suggested that it influenced only a minority of cases. Among the cases it did influence, its effects were subtle. It was part of the legal landscape (virtually all of the attorneys we interviewed said that they made sure their clients knew about Rule 82 before filing a litigation case), but it seldom played more than a minor role in civil litigation strategies.

2. The Effects of Rule 82 Vary

Keeping in mind that Rule 82 played only a minor role in most civil litigation in Anchorage, we examined those cases in which fee shifting did have an effect. Understanding Rule 82's effects in these cases requires careful attention to the context in which the rule operates: the stage of the litigation, the type of case, the parties' financial resources, the strengths of the parties' claims and defenses, and the parties' relative approach to risk.

a. The Rule Affected Parties of Moderate Means more Significantly than Others - The two factors that interact most decisively with Rule 82 to influence litigation strategy are the parties' financial resources and the strength of their cases. Generally, the rule affects parties of moderate means more than it does parties with more resources, and much more than parties with few financial resources ("judgment-proof" parties). The rule tends to discourage filing and encourage settlement for parties who perceive weaknesses in their cases. Conversely, it may occasionally encourage a litigant to pursue more aggressively a case that he or she believes to be especially strong.

The rule tended to discourage potential litigants with moderate financial assets (middle-class people) in all types of cases from initial filing unless they had a strong

case. The weaker the case, the more likely the possibility of an adverse award. For those who had assets to lose to an adverse attorney fee award, Rule 82 assumed greater importance, along with the strength of case, in the decision whether to file.

We tried to measure the frequency with which Rule 82 played a role in discouraging potential litigants from using the courts. About half (52%) of the plaintiff's attorneys interviewed for this report could recall an instance in which Rule 82 played a significant role in their client's decision to assert a claim.[45] Cases described by these attorneys included tort, contract and real property cases. A few attorneys (mostly plaintiff's attorneys) thought the rule discouraged some plaintiffs of moderate means with "decent" or "average" cases from seeking redress in the courts, while most believed that the effect occurred only with plaintiffs who had below-average or weak cases.

Analysis of Alaska's civil litigation trends did not foreclose the possibility that Rule 82 discourages potential tort claimants from filing suit, although the picture is by no means clear. The rate at which tort cases are filed in Alaska's courts may be lower compared to other states, and torts seem to comprise a smaller proportion of the total civil caseload in Alaska than in other states.[46] Many factors could account for these data, including cultural, social and economic factors, local legal culture, lack of comparability of data, or Rule 82. Moreover, Alaska's overall civil filing rates are very close to the median for jurisdictions which do not shift fees. Attorneys interviewed for this study did not believe that Rule 82 discouraged indigent or otherwise judgment-proof plaintiffs from access to the courts. Further, over half (55%) of the attorneys denied that the rule discouraged potential plaintiffs with "frivolous" or extremely weak cases from filing, although some thought that it did.[47] Thus, if the rule plays a role in discouraging potential tort plaintiffs from using the courts, its impact is selective and depends heavily on case strength and parties' assets.

Contract and debt cases presented a slightly different picture. In some small collection actions, debt cases, and meritorious but uncomplicated small claims cases,

[45] Note that a few of these attorneys could have been referring to cases in which the rule encouraged filing.

[46] On the other hand, some evidence suggested that tort cases go to trial more often in Alaska than elsewhere. It may be that fee shifting discourages at least some plaintiffs from filing, but encourages those who do to pursue their cases more aggressively.

[47] Thirty-six percent said it did discourage frivolous claims, and 9% did not answer or had no opinion.

attorneys and judges believed that the rule actually encouraged filing. For at least some of these cases, the probability of a fee award at the end made filing economically feasible, where otherwise it may not have been.

b. The Rule Increased Filings in Some Cases - Rule 82 contributed to increased filings in other ways. Among the cases that would not be found in a jurisdiction that did not shift fees were insurance policy limits/bad faith cases[48] and appeals of fee awards. Parties may file too few of these cases to affect statewide trends,[49] but they did consume a substantial amount of time for some attorneys (insurance defense) and a small to moderate amount of time for attorneys with appellate practices. The supreme court justices did not seem to think fee award issues consumed undue judicial resources, although jurisdictions adopting fee shifting for the first time could probably expect appellate judges to spend a moderate amount of time at the front end establishing case law on fee-shifting issues.

c. The Rule Had Little Effect on the Filing of Frivolous Claims - Of particular note is our finding that the rule did not seem to affect the filing of "frivolous" claims.[50] One obvious problem with this finding is the difficulty of distinguishing a "frivolous" suit from one that is merely below average or weak in some aspect (it depends upon one's perspective). Another problem is a lack of information about the volume of frivolous cases.[51] Comments from attorneys and judges in the current study suggested that "frivolous" litigation is driven by factors generally outside the influence of Rule 82, particularly noneconomic factors. These factors include litigating for a principle or because of emotion. A few attorneys in the current study told about cases in which they thought their opponent had evaluated the case incorrectly at the beginning, had gotten the client's hopes up, and then felt obliged to follow through with litigation. Two

[48] Rule 82 increases an insurance company's duty to indemnify in every third-party suit, because Rule 82 attorney's fee awards are by law considered part of the policy limits, above the stated face value limits. Thus, a company sued under Alaska law can end up paying many times the amount of the policy limits, depending on the damage award or even the settlement amount. Because of this increased exposure, insurance companies have sought to write policies excluding Rule 82 fees from coverage, and insureds have challenged the sufficiency of those exclusions in court.

[49] The increased litigation in these areas may be offset by the chilling effect discussed previously.

[50] Recall that 55% of the attorneys interviewed for this study denied that the rule discouraged potential plaintiffs with "frivolous" or extremely weak cases from filing, although thirty-six percent thought that it did. Nine percent did not answer or had no opinion.

[51] An important topic for future study would be a systematic empirical evaluation of frivolous cases.

attorneys told about cases in which their clients "unreasonably" insisted on trying the case against the attorney's advice and lost badly.

d. The Rule's Effects on Settlement Strategy Often were Contradictory - The rule had moderate and often contradictory effects on settlement strategy. It increased the value of reasonable cases, pushed strong cases towards trial, and caused some plaintiffs to discount their claims. In tort cases where a claimant had a strong case and the damages were substantial, Rule 82 encouraged the defense to settle a case earlier than it otherwise might (the likelihood of a large adverse fee award after trial encouraged settlement short of trial). For optimistic plaintiffs, the likelihood of increasing total recovery with a fee award after trial discouraged early settlement, at least where the case was being handled under a contingent fee contract. It encouraged settlement in some cases by increasing the stakes, while it discouraged settlement in a few by driving the parties' offers further apart. The rule caused some litigants, most noticeably plaintiffs with assets who feared adverse awards, to discount their claims. It influenced some litigants with especially strong cases to inflate their claims (attorneys who represent insurance companies said they automatically add 10% to the value of claim because of Rule 82).

Given the rule's ability to encourage settlement in many types of cases, does the rule put undue pressure on some litigants to settle?[52] The answer depends on the context. Plaintiff's attorneys thought that the rule sometimes unduly pressured clients of moderate means to settle for less than they otherwise felt they deserved. This seemed true in all types of cases, including contingent fee personal injury cases and contract cases. Some defense attorneys also claimed that the rule put undue pressure on their insurance company clients to settle in policy-limits cases and cases against judgment-proof plaintiffs. Some evidence suggested that cases in Alaska were filed and settled for "nuisance value," although these data did not permit us to say whether it happened less here than in American rule jurisdictions.

Judges were asked what changes they would expect to see in their courts if the supreme court revoked the rule. A slight majority said that "a few more cases would go to trial that currently settle," or "litigation might increase by a small percentage."

[52] In the 1992 survey of Bar members regarding Rule 82, 69% of respondents did not believe that Rule 82 put "excessive pressure on moderate income people to settle valid claims." Twenty-four percent thought that the rule did exert excessive pressure to settle on these clients.

One judge expected to see fewer parties filing fewer non-tort lawsuits, especially those in which they could recover little money.[53]

A large minority of the judges predicted that if the court revoked the rule the only change in their courts would be "less work ruling on fee motions." These judges either did not believe that Rule 82 promoted case settlement, or they made few fee awards because of the nature of their caseloads. The federal judges in particular reported making very few Rule 82 fee awards.

3. A Majority of Alaska Practitioners Like the Rule

Seventy-three percent of the attorneys in our interview sample, a representative cross-section of Alaska attorneys who used the rule, recommended that the court retain it.[54] Similarly, 80% of the 508 attorneys responding to the 1992 supreme court survey voted to retain the rule.

A notable minority (35%) of attorneys in the current study who spent half or more of their time defending negligence cases wanted to get rid of the rule. These attorneys believed that the disadvantages to their clients of increased payouts outweighed any advantages of recouping trial costs, using Rule 82 as a hammer (also with Rule 68 offers) to force settlement, or discouraging marginal or frivolous claims.

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[53] One criticism of the American rule is that "the little man" in small suits cannot afford to file justified suits because they recover only small damages if they prevail, not enough to cover the attorney's fees, and attorneys do not take these cases on contingency fees. *See* Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792, 795-96.

[54] Many of the attorneys who wanted to keep the rule suggested changing it. Most of their suggestions amounted to "tinkering," not fundamental changes. About a dozen attorneys wanted to increase the percentage recoveries for monetary and/or nonmonetary judgments. Other suggestions included: cap the nonmonetary judgment recovery amount; go back to the pre-1993 rule; make an exception in employment cases; increase to full fee recovery; change fees in default judgments to a percentage of actual fees; remove the distinction between "contested" and "contested with trial;" link the amount of the fee award to the parties' relative reasonableness in settlement negotiations [this approach currently is forbidden by case law. *See Van Dort v. Culliton*, 797 P.2d 642, 645 (1990); *Myers v. Snow White Cleaners*, 770 P.2d 750, 752 (Alaska 1989)]; eliminate attorney's fee awards for the defense in plaintiff personal injury cases absent a finding that the case was frivolous; require the plaintiff or the plaintiff's attorney to post an "attorney's fee bond" in personal injury cases; exempt smaller-value cases from the rule; give trial judges more discretion in making fee awards; give trial judges less discretion in making fee awards; and consider the relative wealth of the parties. The fact that so many wanted changes suggests that attorneys have different goals for the rule depending on their practices. They suggested the changes that would most benefit their clients or themselves.

On the other hand, 96% of the attorneys who spent half or more of their time handling business and corporate matters wanted to keep the rule. These attorneys, who often represented creditors and other "repeat players," believed that the advantages for case settlement and increased recoveries outweighed any disadvantages. Like the Bar as a whole, plaintiff's attorneys who favored keeping the rule (70%) thought that the advantages of higher recoveries outweighed any chilling effects or undue pressure to settle on their clients. It seemed that attorneys who had an adequate portfolio of cases to choose from—i.e., who could choose strong cases—believed the rule worked to their advantage more often than not.

To sum up, the three most apparent effects of Rule 82 were its effect of discouraging some middle class parties from filing cases that either wealthy or poor plaintiffs would file; its effect of discouraging some suits (or defenses) of questionable merit; and its effect of encouraging litigation in strong cases that might otherwise settle. The first effect appears negative, although its impact is minimized because it seldom occurs and because judges have the discretion to mitigate it under the current rule. The second effect seems positive, and the third may be positive or negative, depending on the observer's perspective. Increased litigation burdens the courts. On the other hand, certain legitimate suits may only be possible with the award of attorney's fees. Examples include the pursuit of relatively small debt cases, some types of public interest suits, and meritorious but uncomplicated small claims cases. Finally, a majority of attorneys and judges in Alaska believe the rule works in a positive way more often than not. The majority favor keeping the rule, although a significant minority of insurance defense practitioners favor repeal.

4. A Word About the Limitations of the Data

Any attempt to empirically isolate the effect of a specific factor on the conduct of civil litigation is difficult at best. Realizing this at the outset, we tried to design a study that would use information from a variety of sources, knowing that each would suffer from its own shortcoming. Examining overall filing trends or caseload composition gave part of the picture; but the data often were not available in a useful form, were not entirely comparable between jurisdictions, or may not have been comparable within a jurisdiction from one year to the next (for example, the court may have decided to count cases differently). Information gathered directly from court files yielded solid data on the most basic questions (Was there a fee award? How much was the fee award?), but did not begin to explain what happened outside of the courtroom, before the case was opened, or after the case was closed. (Why was there no fee award? Did the case settle, and if so why? What were the terms of the settlement?) Interviews

with practitioners answered many of the questions raised by the court data and shed light on how the litigation was conducted outside of the court, but practitioners' perspectives were limited and sharply shaped by their own experiences (for example, a practitioner who advocated only for insurance companies in negligence cases had a very different perspective on fee shifting from one who advocated primarily for business clients in debt cases.) Judges had a wider perspective but did not have access to information about what happened outside the court case. When interpreting the data from these various sources, we tried to be mindful of both their shortcomings and their strengths.

The theoretical framework established by others who have thought and written about fee shifting greatly assisted in interpretation.[55] In general, many of the findings of this study were consistent with predictions made by the most thoughtful of the commentators—those who predicted that the effects of two-way fee shifting would be subtle, complex and often contradictory, and would vary depending on case characteristics and disputant characteristics.

E. Recommendations

Our recommendations have two parts: recommendations to Alaska and recommendations to jurisdictions that do not shift fees. The Alaska recommendations focus on how the rule works and how to improve it. The national recommendations focus on factors other jurisdictions might consider when thinking about two-way fee shifting in most cases.

1. Recommendations to Alaska Policymakers

We recommend that Alaska retain Civil Rule 82, with limited changes. Perhaps the best reason for this is that more often than not, Alaska practitioners like the rule and think that it benefits them and their clients more than it harms or has no effect. Also, judges more often than not like the rule and are comfortable with its operation.

Rule 82 seemed, for the most part, to positively affect the processing and resolution of cases, even though this effect was subtle and varied depending on the factors discussed above. The negative effects of the rule, when tempered by the judicial

[55] Specifically, Thomas D. Rowe, Jr. has written two thoughtful articles upon which our report relies: *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139 (1984), and *The Legal Theory of Attorney's Fee Shifting: A Critical Overview*, 4 DUKE L. J. 651 (1982).

discretion available under the 1993 amendments, were relatively minor and were offset by the rule's benefits.

The Alaska Supreme Court should consider at least a few possible changes to Rule 82 or the case law surrounding its application. A number of attorneys questioned why plaintiff and defendant recovery schedules differed. While the origins of the dual recovery system remained unclear, we did learn that the defendant percentages were set at a level intended to give the defendant an amount proportionate to what the plaintiff's attorney would recover in a one-third contingent fee tort case. The assumption behind this structure presents a problem, because it is based on contingent fee cases, although most fee awards in state court occur in contract or other non-personal injury cases.

If the Alaska Supreme Court intended to set defendant and plaintiff recoveries the same, it would be more effective to hold them both to a percentage of actuals. Another possibility is to base fee awards on the amount of recovery (and in the event of no recovery, on the amount in controversy).[56] This approach would ensure that both plaintiffs and defendants recovered fees based on the same schedule, and it would increase the predictability of the defendant's fee award. Drawbacks are that plaintiff's attorneys would have to estimate time spent and document it with affidavits or time sheets (in certain cases, like contingent fee and high-volume collections cases, they do not keep time sheets); and parties probably would disagree about the amount in controversy in the event of a defense verdict, requiring parties and judges to spend more time than they currently do settling the amount of fees. Also, because the amount of an attorney's fee award to a successful plaintiff might be less predictable, Rule 82's influence in settling cases might decrease.

Another possibility is to develop different methods of recovery for different types of cases. One schedule, based on a percentage of actuals, could apply to some cases (torts), while another schedule, based on the amount in controversy, could apply to others (debt/contract and real estate cases). Advantages to this approach are that the rule can be better tailored to meet its goals. Drawbacks are that the process initially might be more complicated and more time-consuming.

[56] We note that this system is used successfully elsewhere. In Germany, the parties name the damages up front and the amount of the fee award is set as a percentage of that amount. Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 37, 63 (1984).

Our interviews with attorneys and judges did not suggest that the 1993 amendments had increased litigation at the trial court level.[57] While the factors seldom were invoked, they seemed to fit when they were invoked.[58] Our data do not support a recommendation that the factors be revoked.

Next, we see no real reason why attorney's fees in appellate cases should be awarded based on a usually standard and arguably arbitrary amount. Attorney's fees for appellate cases could equally well be set at 30% of the reasonable fees spent on the appeal.

Finally, the distinction made by the Alaska Supreme Court in case law between *pro se* litigants who are attorneys and those who are not seems unjustified. The supreme court has held that non-attorney *pro se* litigants can not recover attorney's fees, while attorney *pro se* litigants can. The court supported this distinction by reasoning that non-attorneys were more likely than attorneys to spend time unnecessarily on legal issues, and also that the court would not know at what rate to compensate the *pro se* litigant. Neither of these rationales strongly supports the result. Litigants who spend excessive time do not pose a problem if a money judgment is recovered, because the attorney's fee award is based on the amount awarded, not on the time spent. If the prevailing party did not recover a money judgment, interviews with judges for the current study suggested that the defeated adversary usually alerted the trial judge of excessive legal work or hourly fees. Even without the defeated party's help, judges were comfortable reviewing billings for reasonableness. The court should reconsider whether the inequity, and economic detriment suffered by *pro se* litigants does not warrant making them eligible for attorney's fee awards.[59]

2. Recommendations to National Policy makers

Our primary recommendation to national policy makers is to carefully think through the often-conflicting effects of shifting attorney's fees before adopting wholesale reforms. The subtle and complex interactions of fee shifting with other aspects of the civil justice system urge caution. Just as Alaskans should exercise

[57] Litigation at the appellate level may increase if cases involving the factors make their way up to the supreme court. We did not hear of many challenges to the factors.

[58] Note that Oregon recently incorporated them into its fee-shifting statute.

[59] Note that litigants represented free of charge by Legal Services or another provider are entitled to attorney's fees, even though they are not paying for the legal services. *See Gregory v. Sauser*, 574 P.2d 445, 445 (Alaska 1978).

caution in considering changes to the present system, other policy makers should approach overall change in fee-shifting practices with great caution.

A primary reason for this recommendation is that attorneys and judges in state courts nationally are neither familiar nor comfortable with an attorney's fee-shifting rule. Adopting a totally new system inevitably brings substantial disruption and added work to the justice system. Given the two-sided and often minor nature of Rule 82's effects, any substantial disruption is arguably unjustified.

Any reforms that involve attorney's fees nationally or in other states should carefully analyze the effects of fee shifting on different types of cases (tort vs. contract vs. debt collection), on parties with different financial resources, and on the other factors discussed in this report. The current study clearly shows that the effects of attorney's fee shifting vary greatly depending on the situation. Particular caution is urged towards those who support fee shifting because of expected economic incentive effects, such as decreasing claims, speeding dispositions, or inducing settlement. In Alaska's experience, the rule's effects in these areas have been very complex, subtle and often contradictory.

Because the data suggested that the rule affected different types of cases in identifiably different ways, policy-makers should clarify the rationales underlying fee shifting, and the desired effects and goals. For example, if the primary rationale for fee shifting is fairness to both sides (either the make-whole or general indemnity rationale), recoveries for both defendants and plaintiffs might be a percentage of actual fees. Judges interviewed for the present study said that they were very comfortable reviewing billings for excessive time or hourly rates, and that these reviews were somewhat tedious but rarely too time consuming.

Policy makers whose rationales include discouraging frivolous or meritless litigation probably should not adopt a scheme similar to Alaska's.[60] Our data did not show that Alaska's system significantly deterred frivolous litigation. The cost to another

[60] To the extent that policy makers wish to discourage litigation, we also recommend against shifting full fees. First, the prospect of full fees could create the problem of "the tail wagging the dog," where the fee amount at stake exceeds the amount in controversy and begins to control the litigation. Also, the specter of full fees probably would magnify the "chilling" effect identified in this report on plaintiffs of moderate means with average or weaker cases. Full fees also would magnify the effect identified in this report of encouraging protracted litigation and case filings for parties with strong claims.

jurisdiction of implementing the new system probably would outweigh any benefits.[61] However, policy makers who believe that a punitive or deterrent rationale justifies fee shifting could consider a rule permitting fee awards in cases where the judge found the claim or defense to be frivolous. Interviews from the current study suggest that by the time the trial judge has seen the case through to disposition, the judge has a fairly strong opinion as to the merits of the litigation. To limit the judge's discretion, however, the law should set guidelines for determining the amount of the award. Our preference would be to see the fee award related to a percentage of the amount the loser's unreasonable conduct caused the winner to expend in fees.[62]

We do recommend including some factors similar to the ones in Alaska's 82(b)(3) to build some flexibility into the system. These factors seem broad enough to give judges and litigants leeway in appropriate cases, but specific enough to create needed uniformity in decisions.

Policy-makers considering adopting fee shifting should keep in mind two potential problems highlighted by attorneys interviewed for the present study. The first issue was the potential large adverse fee award that chilled access to the courts or put undue pressure to settle on litigants of moderate means.[63] This phenomenon did not seem to be widespread in our data, but occurred relatively often in certain kinds of cases (cases suffering from some legal weakness such as unclear liability or "soft" damages, plaintiffs who were very risk-averse, or insurance companies facing "unlimited"

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[61] One author noted that any rule aimed at deterring frivolous litigation should focus on attorneys, rather than on their clients, because the attorneys are better able to judge whether a claim has merit than are lay persons. Kordziel, *supra* note 19, at 445. This author suggested, as did a handful of attorneys interviewed for the present report, that Alaska Civil Rule 11 (or its federal counterpart) is the proper means for deterring frivolous litigation. *Id*. Two attorneys interviewed for this study wished that state judges would weed out weak and marginal claims by granting summary judgment more often.

[62] Setting the award as a percentage of the amount in controversy or at some arbitrary amount could result in fee awards out of proportion to the amount spent.

[63] One commentator has suggested that the contingent fee lawyer, not his or her plaintiff client, be put at risk for costs. Kritzer, *Searching for Winners in a Loser Pays* System, 78 A.B.A. J. 55, 57 (1992). He predicts that "this type of cost-shifting arrangement probably would discourage speculative litigation....[and] encourage plaintiff lawyers to take on the kinds of smaller cases that are not as attractive under the contingent fee system." *Id.* Another approach is suggested by the Legal Society of England, which has created a special kind of insurance, called Accident Line Protect, to protect the client from having to pay his or her own solicitor's fees and the opponent's fees in the event of a loss. Also, Europeans have developed legal insurance which pays the claimant's own attorney without diminishing the claimant's damage award, *and* pays the costs due the opponent in the event of defeat. Pfennigstorf, *supra* note 55, at 60.

Rule 82 exposure exceeding the face value of policy). Some national proposals that would shift total instead of only partial attorney's fees would exaggerate this effect.

The second issue was the two-way fee shift that becomes a one-way shift in practice, as has happened in most jurisdictions.[64] A recurring criticism of Rule 82 was that it was "unfair" or "biased" because of this one-way shift phenomenon.[65] A lawyer within the insurance industry who had experience with two-way fee shifting in Alaska reported that the fee-shifting rule rarely benefited the successful insurer, that insurers rarely collected awards from unsuccessful plaintiffs, and that the insurance industry did not believe that fewer people filed "nuisance lawsuits" in Alaska than in jurisdictions without fee shifting.

F. Conclusion

In conclusion, Alaska's rule requiring the loser in a lawsuit to pay part of the winner's attorney's fees has not dramatically changed the legal system in Alaska. Its effects are both complex and subtle, and can only be understood in the context of the particular situations in which they arise. We hope this report provides the basis for policy makers in Alaska and elsewhere to acquire a better understanding of this complex but important issue. We also hope that jurisdictions considering experimenting with fee shifting will encourage further study of any new fee-shifting schemes.

[64] We note, however, one argument that it is not unfair to deny fees to prevailing defendants in non-frivolous lawsuits. Rowe reasoned that a defendant who prevails against a plaintiff's good-faith claim has suffered no legal "wrong" that would entitle him or her to compensation. Rowe, *Legal Theory of Attorney Fee Shifting*, *supra* note 54, at 658-59.

[65] This view was consistent with the outcome of fee shifting in the early 1980s in Florida medical malpractice cases studied by Snyder and Hughes. The Florida Legislature passed the fee-shifting law in an effort to "restrain the growth in medical malpractice litigation," and repealed it five years later following "a series of expensive cases lost by physicians and hospitals." Snyder & Hughes, *the English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J. LAW ECON. & ORG. 345, 356 (1990). The study also concluded that "optimistic litigants anticipate shifting their fees to their opponent," which increased the chance that they would go to trial. They say the study found that more plaintiffs dropped their claims, and cases that reached the settle/litigate decision settled more often. The net effect seemed to be a possible reduction in litigation. *Id*. at 377-78.