

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

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This Article presents an empirical study of Alaska Civil Rule 82, Alaska's attorney's fee shifting rule. It briefly describes the history of fee shifting before outlining how fee shifting became a common practice in Alaska, as well as the purposes of its adoption. The Article then traces the legal and procedural requirements of Rule 82, offering interview comments of Alaska attorneys and judges to illustrate how the rule works in practice. Next, the Article compares Alaska and national case filing statistics that demonstrate the rule's effects on the filing of various civil lawsuits. The Article concludes that Rule 82 influences Alaska's legal system in a variety of subtle, unexpected ways that proponents of such

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This Article contains multiple quotations from or summaries of interviews conducted by Alaska Judicial Council personnel with various Alaska attorneys and judges. In order to respect confidentiality of the interviewees, we have not insisted that the authors include the names of the persons interviewed. We have verified that the original publication contains information supporting the statements herein. However, we have not examined the Council's files. Accordingly, we rely on the authors' representations as to the authenticity of the statements in the original publication.

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schemes often do not envision. Finally, the Article offers recommendations to Alaskan and national policymakers on attorney's fee shifting regimes based on Alaska's experience.

I. INTRODUCTION

Proposals in the last decade to reform the civil justice system in the United States have attempted to make it fairer and more efficient. One proposal that has surfaced repeatedly, most recently on an ABC television special¹ and 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. Fee shifting proponents usually argue that a party who might have to pay for the other side's attorney's fees would be less likely to abuse the system by bringing frivolous or marginal litigation.² Fee shifting proposals have led to extensive discussion and press coverage, but that discussion has never included any significant recognition that Alaska already requires the loser in a lawsuit to pay a portion of the winner's attorney's fees in almost every category of civil cases. Indeed, fee shifting in Alaska has been the law since the nineteenth century.

Alaska Civil Rule 82 entitles the prevailing party in a civil lawsuit to partial compensation of his or her attorney's fees from the losing party.³ The rule applies to the great majority of civil cases⁴ and directs judges to calculate the amount of attorney's fees

1. *The Trouble With Lawyers* (ABC television broadcast, Jan. 2, 1996).

2. Commentators have identified several other rationales for attorney fee shifting. One argument 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. See generally Herbert M. Kritzer, *Searching for Winners in a Loser Pays System*, 78 A.B.A. J., Nov. 1992, at 55; Werner Pfennigstorf, *The European Experience With Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS., Winter 1984, at 37; Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 4 DUKE L.J. 651 (1982). A second argument is that fee shifting makes it economically feasible for private citizens to bring lawsuits that benefit the public interest but do not directly benefit their own financial interests. See generally Pfennigstorf, *supra*; Rowe, *supra*. A third argument is that fee shifting gives people of limited means better access to the courts by letting their attorneys collect their fees from the opposing party. See generally Albert A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966).

3. ALASKA R. CIV. P. 82 (1995).

4. Domestic cases are the largest excluded category, along with cases in which a contract governs attorney's fees. See, e.g., *Gudeneau v. Bierra*, 868 P.2d 907, 912-13 (Alaska 1994) (contract governing attorney's fees); *Hilliker v. Hilliker*, 828

awarded 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. Attorney's fees for a party who prevails but does not recover a money judgment are calculated as a percentage of actual reasonable fees. The percentage is 30% for cases that go to trial and 20% for cases that do not. In either situation, the court can vary the award based on factors listed in the rule.

Those who favor fee shifting argue that it would restrain frivolous or marginal litigation and more fully compensate the prevailing party.⁵ 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.⁶ While a number of scholars have written about the probable effects of adopting two-way fee shifting in American jurisdictions, few have studied the question empirically.

This Article empirically documents the effects of Rule 82's two-way fee shifting on civil litigation in Alaska. It addresses practical questions raised by opponents and advocates of fee shifting, such as how does the rule operate? How often are attorney's fees awarded in Alaska, to whom and in what amounts? The Article also addresses several broader questions, such as whether two-way fee shifting as it exists in Alaska encourages settlement of civil litigation. Does it help avoid protracted litigation? Does it deter the filing of "frivolous" or marginal lawsuits? Does the rule create inequities depending on the relative wealth of the parties? Does it have a "chilling effect" on access to the courts? Since fee shifting is of interest locally and nationally, the Article tries to present the answers in a form that is useful both to practitioners in Alaska and to policymakers in other jurisdictions who might be considering adopting fee shifting for the first time.⁷

P.2d 1205 (Alaska 1992) (domestic case).

5. See, e.g., John Stossel, *Protect Us From Legal Vultures*, WALL ST. J., Jan. 2, 1996, at A8.

6. See, e.g., Rowe, *supra* note 2; Andrew J. Kleinfeld, *On Shifting Attorneys' Fees in Alaska: A Rebuttal*, 24 JUDGES' J., Summer 1985, at 39.

7. Because these issues are extremely complex, the Article approaches them from a number of different angles. One perspective comes from federal and state

Part II of this Article sets the context for the data and findings by discussing fee shifting both inside and outside of Alaska. It briefly traces the history of the rule in England and in the United States. It then describes how Alaska's fee shifting rules have evolved and speculates why Alaska developed so differently from the rest of the country. Part III focuses on the legal issues surrounding the application of Alaska's Rule 82 by examining data from Alaska state and federal court case files and interviews with Alaska attorneys about how these legal issues work in practice. Part IV presents the bulk of the data and findings of the study, both by comparing Alaska and other states' case filing statistics and by examining recently closed state and federal cases in Anchorage that show how Rule 82 operates in practice. Part V offers conclusions and recommendations to Alaska and national policy-makers regarding the desirability of a two-way fee shifting system.

II. FEE SHIFTING—HISTORY AND PURPOSE

A. Historical Background

In most European countries, civil litigation follows the general rule that the losing party pays the winning party's attorney's fees, a practice that is loosely referred to as the "European Rule."⁸ The objective fact of defeat justifies a fee award against the loser without requiring evidence of fault or bad faith. In England and Continental Europe, the rationale for this practice is that victory is not complete if it leaves substantial expenses unpaid.⁹

During colonial times, the law of attorney fee recovery in

court case files. Another view comes from interviews with trial and appellate judges. A third outlook arises from interviews with practicing civil attorneys. While each perspective is skewed in some way, taken together they provide a balanced view of how attorney fee shifting works and how it affects civil litigation practice. Although the data from these different sources are not strictly comparable, we have tried to contrast them wherever possible to give the most complete picture. The Article does not attempt to identify a control group of cases in which Rule 82 did not apply because it applies to most state civil cases and to federal diversity cases. For a full description of the methodology used, the interview questions and answers and the case sample composition, see AJC, ALASKA'S ENGLISH RULE, *supra* note *, at app. A-D.

8. Pfennigstorf, *supra* note 2, at 37, 44.

9. *Id.* at 83.

America followed the European Rule.¹⁰ 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.¹¹ After the American Revolution, attorneys who opposed government regulation of their fees won repeal of these statutes, although legislation still permitted small fixed 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.¹² The term "American Rule" came into use in the early twentieth century to describe the practice of requiring each side to pay its own attorney's fees.¹³

In practice, numerous statutes provide for either one-way or two-way fee shifting in the United States today.¹⁴ Legislatures use fee shifting to encourage such public policies as civil rights, consumer protection and enforcement of 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.¹⁵ Despite these exceptions, the American Rule still applies to most civil litigation.

10. Arthur L. Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS., Winter 1984, at 9, 10.

11. *Id.*

12. *Id.* at 23 (citing *Hoffman v. Smith*, 61 Miss. 544 (1884); *Swartzwell v. Rogers*, 3 Kan. 375 (1866)).

13. The term is attributed to John Goodhart, *Costs*, 38 YALE L.J. 849 (1929). Leubsdorf, *supra* note 10, at 28 n.130.

14. Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS., Winter 1984, at 321, 323. The authors surveyed 4,000 to 5,000 existing statutes that empowered "courts to require one party to pay the other party's attorney fees." *Id.* (emphasis in original). They found 1,974 fee shifting statutes in the fifty states and the 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 Rule are two-way fee shifting in principle but sometimes become one-way fee shifting in practice. *See infra* Part III.E.

15. *See* 3 MARY FRANCIS DERFNER & ARTHUR D. WOLF, COURT AWARDED ATTORNEY FEES, tbl. of statutes (1983) (listing federal and state statutes that provide for attorney's fee awards).

During the 1980s and 1990s, several groups proposed two-way fee shifting as a tort or civil justice reform measure. The best-known of these groups, the Council on 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.¹⁶ In 1994, Republicans proposed a "Contract with America," providing for fee shifting in some types of cases as a "Common Sense Legal Reform." However, Congress has not yet passed legislation to implement fee shifting.

B. History of Fee Shifting in Alaska¹⁷

Fee shifting in Alaska can be traced back to the Field Codes of the mid-1800s, coming to Alaska through the application of Oregon law during territorial days. There is no clear answer why Alaska retained a more English approach to fee shifting than did the rest of the United States. It appears that Alaska followed its separate course more through historical accident than through a conscious decision to reject the American Rule.

1. *Pre-Statehood.* On March 30, 1867, Russia signed a treaty selling its claims to the territory known as Alaska to the United States. Congress made no provision for any sort of civil government in Alaska for the next seventeen years.¹⁸ In 1884, Congress designated Alaska as a civil and judicial district.¹⁹ Congress also provided that "the general laws of the State of Oregon now in

16. Executive Order No. 12,778, 3 C.F.R. 359 (1992), *reprinted in* 28 U.S.C. § 519 (1994). The order, which applies to civil suits initiated by the United States, provides: "[L]itigation 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 362.

17. Some of the information contained in this sub-Part comes from research performed by Ceceile Kay Richter in 1992 for the Alaska Court System's Court Rules Attorney.

18. Frederic E. Brown, *The Sources of the Alaska and Oregon Codes Part II: The Codes and Alaska, 1867-1901*, 2 UCLA-ALASKA L. REV. 87, 88 (1973).

19. *Id.* at 90. The legislation was known as the Alaska Government Act of 1884, ch. 53, 23 Stat. 24. The Act also created other governmental positions, including a governor to be appointed by the President and a district judge to hold court at Sitka. *Id.*

force are hereby declared to be the law in said district.”²⁰ Thus, Oregon’s statutes, including its provisions regarding attorney’s fees, became the law in Alaska. An 1862 Oregon statute permitted attorneys and their clients to negotiate their own fee arrangements and also allowed a prevailing party to recover certain costs of the action, including attorney’s fees, from the defeated party.²¹ Other Oregon laws provided that a prevailing plaintiff should receive costs as a matter of course in certain civil actions and that a party entitled to costs should also be allowed to recover all necessary disbursements in proving its case, including witness fees, court fees, deposition expenses and costs relating to the preparation of documents used as evidence at trial.²² Furthermore, the Oregon statutes provided procedures for applying for costs and disbursements from the clerk, subject to a right to an appeal to be heard by the judge.²³

20. *Id.* According to Brown, Congress’s choice of Oregon law was “fairly arbitrary.” Brown, *supra* note 18, at 91. Apparently, the congressional drafters had considered either Washington or Oregon laws for Alaska but chose Oregon’s as the more developed of the two. *Id.*

21. See THE CODE OF CIVIL PROCEDURE AND OTHER GENERAL STATUTES OF OREGON ch. 6, tit. V, § 538 (1863) (Code Commissioners: M. P. Deady, A. C. Gibbs, J. K. Kelly); GENERAL LAWS OF OREGON 1843-1872 ch. 6, tit. V, § 538 (1874) (compiled and annotated by M. P. Deady and L. Lane). Specifically, section 538 provided:

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

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

22. See GENERAL LAWS OF OREGON 1843-1872 ch. 6, tit. V, §§ 539, 543. In the late 1800s, judges began to disallow attorney’s fees as one of the permissible costs. Leubsdorf, *supra* note 10, at 23.

23. See *id.* §§ 539, 543, 546, 547, 548. Since territorial days, Oregon has kept laws on its books giving a small fee to the prevailing party as part of costs and disbursements. Court Rule 68 governed payment of the fees. However, in 1995, the Oregon Legislature revised its statutes, increasing the statutory prevailing party fees and permitting two-way attorney fee shifting in some cases. The legislature used Alaska’s Rule 82 as its source for some parts of the law. Telephone interviews with Max Williams and David Heynderickx, counsel to the Oregon Senate Judiciary Committee and Legislative Counsel (August 14, 1995), and Professor Maury Holland, University of Oregon School of Law (August 23, 1995).

Oregon statutes continued to govern court-awarded attorney's fees in Alaska's territorial courts until 1900, when Congress passed a code of civil procedure for the District of Alaska.²⁴ Fee shifting continued under the new code, which included a provision similar to Oregon's prevailing party fee shifting authorization.²⁵ In 1949, Congress amended the Alaska Government Act to apply the Federal Rules of Civil Procedure to the United States District Court for the Territory of Alaska.²⁶ Although the Federal Rules of Civil Procedure did not contain provisions for attorney fee shifting, the territorial fee shifting statute had not been repealed. To the best of our knowledge, because Congress had not repealed the earlier territorial statute, and because nothing in the federal rules prohibited court-awarded attorney's fees to the prevailing party, fee shifting continued to be the practice in Alaska.

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

The new legislation set a schedule of prevailing party fees not tied directly to attorney fees. Parties can automatically recover \$250 without trial or \$500 with a trial in the circuit court, and lesser amounts in the lower courts. OR. REV. STAT. § 20.190(2) (1995). The circuit court may award up to \$5,000 more after considering various factors, including "any award of attorney fees made to the prevailing party as part of the judgment." *Id.* § 20.190(3). Legislators modified about 115 existing statutes that mandatorily shifted fees for prevailing plaintiffs by permitting discretionary fee shifting to the prevailing party. Oregon S. 385, 68th Leg. Assembly, ch. 618 (1995). They also provided for shifting attorney's fees after arbitration if the appealing party does not better its position in the subsequent court proceedings. *Id.*

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

25. The Act provided:

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

Id. § 509. The Act differed from the Oregon statutes in that it did not set fees in specific amounts for specific courts.

26. Act of July 18, 1949, ch. 343, 63 Stat. 445.

the action, or defense thereto.”²⁷ By April 30, 1953, the local federal rules had been amended to give a schedule for lien, non-lien and divorce cases to “be adhered to in fixing such fees for the prevailing party as a part of the costs of action allowed by law.”²⁸ The rules in effect on January 28, 1956, kept the same schedules but added that “[i]n all other cases where the above schedule shall not be applicable, the court shall fix such fee in favor of the prevailing party as shall appear just and reasonable.”²⁹

2. *Statehood and After.* President Eisenhower proclaimed Alaska a state on January 3, 1959.³⁰ Territorial laws continued in effect until the new legislature could pass its own statutes. The new state’s constitution gave the Alaska Supreme Court the power to promulgate administrative rules and rules of civil and criminal procedure for the state courts.³¹ The three justices appointed to the Alaska Supreme Court adopted rules of civil and criminal procedure for the state court system³² that took effect on February 24, 1960, when the court system began to function.³³

The Alaska Rules of Civil Procedure included Rule 82, awarding partial attorney’s fees to the prevailing party as costs, unless the court in its discretion otherwise directed. Unlike most of the other civil rules adopted, Rule 82 had no federal counterpart. To guide the trial court in making fee awards, the rule set forth schedules of attorney’s fees to be followed in civil cases for any “party recovering any money judgment therein.”³⁴ These schedules set different amounts for liens and other claims and

27. LOCAL FED. R. CIV. P. 46 (1947). All former federal local rules are cited from a collection of Judge H. Russel Holland, United States District Court, District of Alaska.

28. LOCAL FED. R. CIV. P. 45 (1953).

29. LOCAL FED. R. CIV. P. 25 (1956).

30. Proclamation No. 3269, Jan. 3, 1959, 24 Fed. Reg. 81 (1959), *reprinted in* 73 Stat. c16 (1959).

31. ALASKA CONST. art. IV, § 15.

32. *See* Alaska Sup. Ct. Order Nos. 4-5 (1959). Most of the state court rules of civil procedure are derived from the Federal Rules of Civil Procedure. Brown, *supra* note 18, at 109. Those that do not are taken from the codes of procedure in the earlier Oregon law. *Id.*

33. *See* Alaska Sup. Ct. Order No. 17 (1960).

34. ALASKA R. CIV. P. 82(a)(1) (1959). The rule also permitted the court, in its discretion, to fix fees in a reasonable amount for cases in which no monetary recovery was awarded. The rule closely resembled the 1956 version of the territorial court’s rule.

varied the awards for "contested" cases, cases "without trial" or "noncontested" cases.³⁵

The second session of the 1962 legislature approved a bulk formal revision of the state laws, including a complete revision of the Code of Civil Procedure.³⁶ By repealing the old Code of Civil Procedure, the legislature also repealed all the existing statutory provisions pertaining to the allowance of attorney's fees and costs. The new Code of Civil Procedure codified the prevailing party's right to attorney's fees:

Costs Allowed Prevailing Party. Except as otherwise provided by statute, the supreme court [of Alaska] shall determine by rule or order what costs, if any, including attorney fees, shall be allowed the prevailing party in any case.³⁷

The statutes underlying Rule 82 have remained relatively unchanged since statehood.³⁸

More action on fee shifting occurred in the supreme court. New court rules in 1963 deleted the distinction between lien and non-lien cases.³⁹ The court also added a subsection that permitted judges to vary from the schedule when the money judgment was not an accurate criterion for deciding the fee to be allowed to the prevailing side.⁴⁰ The fee for those cases was to be commensurate

35. *Id.*

36. See 1962 Alaska Sess. Laws 101. This law promulgated a revised Alaska Code of Civil Procedure and repealed the old one, both effective January 1, 1963.

37. *Id.* § 5.14 (codified as ALASKA STAT. § 09.60.010 (1962)).

38. In 1986, a tort reform provision amended the basic statute to eliminate fee shifting in non-contested civil tort actions. 1986 Alaska Sess. Laws 139, § 4 (amending ALASKA STAT. § 09.60.010 (1962)). The statute currently provides in relevant part:

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

ALASKA STAT. § 09.60.010 (1994). Section 8 of the same act amended Rule 82 "by prohibiting the award of attorney fees in certain civil actions based on fault, unless allowed by statute or by agreement of the parties or unless the civil action is contested without trial or fully contested." 1986 Alaska Sess. Laws 139, § 8.

39. See Alaska Sup. Ct. Order No. 49 (1962). These changes became effective on January 1, 1963, and were published in ALASKA RULES OF COURT PROCEDURE AND ADMINISTRATION 1962.

40. See ALASKA. R. CIV. P. 82(a)(2) (1962).

with the amount and value of legal services rendered.⁴¹

From statehood until the early 1970s, the supreme court decided various challenges to Rule 82. The court also considered a series of recommendations from local bar associations. A 1962 letter from the Juneau Bar Association called for “a substantial increase in the amount allowed to the successful party.”⁴² Other local bar associations proposed changes in 1963, 1967 and 1970, all oriented toward increasing the awards for non-monetary judgments and creating more uniformity in awards. In 1972, the supreme court’s Civil Rules Committee directed a subcommittee to evaluate Rule 82. Concerns about the uncertainties created by what the Bar apparently saw as too much judicial discretion led to a 1973 resolution passed at the Alaska Bar Association Conference calling on the court to repeal Rule 82.

A 1974 law review article that summarized the history of Rule 82 as a follow-up to the 1973 Bar resolution said that

[t]he direct effect of Rule 82 is to give the trial judge complete freedom to award any amount as an attorney’s fee — or he can choose to deny an award altogether. . . . This vast discretion . . . is probably the principal problem with Rule 82, and one reason why it may be repealed in the near future.⁴³

The author characterized the numerous Rule 82 appeals primarily as allegations that trial judges abused their discretion and suggested that the supreme court had “little success in establishing standards for the exercise of [trial] court[s]’ discretion, possibly because every case must be considered individually.”⁴⁴

41. *Id.*

42. Letter from N. C. Banfield, President of the Juneau Bar Association, to Chief Justice Nesbett (Mar. 26, 1962) (on file with Court Rules Attorney). Mr. Banfield stated:

After the present schedule was adopted by the judges of the United States District Court for the Territory of Alaska, I personally discussed the low percentages provided in the schedule with one of the judges. He said that the schedule was purposely set very low to discourage litigation. We have found it encourages litigation by encouraging a man who has no defense to refuse to pay until after judgment.

Id.

43. Gregory Hughes, Comment, *Award of Attorney’s Fees in Alaska: An Analysis of Rule 82*, 4 UCLA-ALASKA L. REV. 129, 147 (1974).

44. *Id.* The author suggested changing Rule 82 so that it applied only to successful plaintiffs in a series of circumstances in which other states already practiced one-way fee shifting (e.g., small claims and public interest litigation). *Id.* at 170-72. He supported attorney’s fees awards as a sanction in bad faith cases and in Rule 68 offers of judgment situations. He also recommended that the court

Apparently, the passage of time dampened the Bar's enthusiasm for repealing the rule. On February 4, 1976, a letter from Keith Brown, President of the Alaska Bar Association, to Chief Justice Boochever cited a 1975 survey of the Bar's members as grounds for the conclusion that "[no] consensus (sic) [existed] among the Bar's membership" about Rule 82.⁴⁵ Of the attorneys responding to that survey, 121 (47%) favored repeal, and 136 (53%) did not.

In March 1992, the Alaska Supreme Court again asked the chief justice to appoint a subcommittee of the Civil Rules Committee to review Civil Rule 82. The members of the court were "concerned that the costs of litigation have increased to such an extent that the prospect of an award of attorney's fees under Civil Rule 82 may deter a broad spectrum of litigants from voluntary use of the courts."⁴⁶ The subcommittee studied three issues: (1) access to the courts; (2) lack of uniformity in fee awards when the prevailing party does not receive a monetary judgment and (3) absence of a requirement that trial judges articulate the reasons for an award when the schedule does not apply.⁴⁷ At the subcommittee's first meeting, a majority of its members voted not to recommend any changes to the existing rule. After the supreme court's request for reconsideration and a survey of members of the Alaska Bar,⁴⁸ the subcommittee recommended revising Rule 82. The

or legislature limit judges' discretion and base the award on actual hours worked multiplied by a competitive rate. *Id.* at 175-76.

45. Letter from Keith Brown, President of the Alaska Bar Association, to the Honorable Robert Boochever, Chief Justice, Alaska Supreme Court 4 (Feb. 4, 1976) (on file with Court Rules Attorney).

46. Minutes of Civil Rules Committee, Mar. 25, 1992. The court confronted this issue earlier in *Bozarth v. Atlantic Richfield Oil Co.*, 833 P.2d 2 (Alaska 1992). The plaintiff in that case had lost a wrongful discharge suit against his former employer and had been assessed \$76,000 in attorney's fees under Rule 82. *Id.* at 2-3. *Bozarth* appealed the fee award to the supreme court. While the majority declined to grant *Bozarth* relief, they characterized the magnitude of the award as "nonetheless disturbing." *Id.* at 4 n.3. The justices wondered whether large fee awards could deter access to the courts and called on the Civil Rules Committee to review the issue. *Id.*

47. Kevin M. Kordziel, Note, *Rule 82 Revisited: Attorney Fee Shifting in Alaska*, 10 ALASKA L. REV. 429, 441-42 (1993).

48. The survey found that 80% of the 527 attorneys responding favored keeping Rule 82; only 16% believed that the court should repeal it. *Id.* at 467. Our own survey of attorneys for this evaluation of Rule 82 found that 73% favored keeping the rule and 23% favored repeal, indicating that relatively little

subcommittee suggested that the court use a fixed percentage of reasonable fees incurred to calculate fee awards in non-monetary judgment cases.⁴⁹ It also recommended that the rule list factors that the trial judge should consider in deviating from the schedule or the fixed percentage.⁵⁰

Effective July 1993, the supreme court amended Rule 82 to require judges to consider eleven factors in deciding whether to depart from the schedule.⁵¹ The supreme court adopted most of the subcommittee's recommendations but also added a factor to address the *Bozarth* access issue.⁵² The current rule permits the trial judge to vary a fee award calculated under the schedules after considering "the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts."⁵³ While the rule does not specifically address a losing party's ability to pay, one observer believed that judges might consider financial impact in analyzing some cases.⁵⁴

The new rule contained other changes as well. For the first time, it specified a fixed percentage of actual reasonable attorney's

change in opinion has occurred in the three-year period. *See infra* Part V.C. The opinion of the Bar seems to have shifted toward a more positive view of Rule 82 over the two decades since the 1975 survey.

49. Kordziel, *supra* note 47, at 446.

50. *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.*

51. Alaska Sup. Ct. Order No. 1118 (1993). The factors are complexity of the litigation, length of trial, reasonableness of the attorneys' hourly rates and the number of hours expended, reasonableness of the number of attorneys used, attorneys' efforts to minimize fees, reasonableness of the claims and defenses on each side, vexatious or bad faith conduct, relationship between the amount of work performed and the significance of the matters at stake, extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts, extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar and other relevant equitable factors. ALASKA R. CIV. P. 82(b)(3). The court has said that the "change worked by the new version of the Rule is merely to provide a set of guidelines to aid the court in making its decisions, and to require that variations from the baseline award . . . be explained in writing." *Bishop v. Municipality of Anchorage*, 899 P.2d 149, 156 (Alaska 1995).

52. Kordziel, *supra* note 47, at 446; *see also supra* note 46 (discussing *Bozarth*).

53. *See* ALASKA R. CIV. P. 82(b)(3)(I).

54. Kordziel, *supra* note 47, at 451.

fees for the trial judge to award in cases with no monetary judgment.⁵⁵ Under the old version of the rule, the judge would first determine the total reasonable fee and then would choose a percentage by which to multiply the total reasonable fee.⁵⁶ The percentage multiplier could vary from 20% to 80%, depending on such case-specific factors as the nature of the case and the results achieved.⁵⁷

Under the new rule, the trial court multiplies the prevailing party's actual, necessarily incurred fees by 20% if the case was resolved without trial and 30% if it was resolved with trial.⁵⁸ The Civil Rules Subcommittee suggested these fixed percentages roughly to equalize the recovery available between plaintiffs and defendants in certain cases.⁵⁹ However, the result still will vary in many cases, leaving inequities between plaintiff and defendant reimbursements that bother many attorneys.⁶⁰

55. ALASKA R. CIV. P. 82(b)(2).

56. A.J. TOMKINS & T.E. WILLGING, *TAXATION OF ATTORNEYS' FEES: PRACTICES IN ENGLISH, ALASKAN, AND FEDERAL COURTS* 42-43 (1986).

57. *Id.* at 43 n.152. Commenting on the discretion afforded by this provision, one author observed that "[a]wards between 20 percent and 80 percent of actual defense fees are, as a practical matter, not reversible." Andrew J. Kleinfeld, *Alaska: Where the Loser Pays the Winner's Fees*, 24 *JUDGES' J.*, Spring 1985, at 4, 6 (1985).

58. ALASKA R. CIV. P. 82(b)(2).

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

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

It is not clear why the court has maintained the distinction between plaintiff and defendant as prevailing parties in calculating awards. One author says that "[o]ne 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

C. Purposes of Rule 82

The main purpose of Rule 82 is partially to compensate a prevailing party for the productive work done by his or her attorney.⁶¹ The Alaska Supreme Court first stated this purpose in 1964, noting that “[t]he rule was not designed to be used capriciously or arbitrarily, or as a vehicle for accomplishing any purpose other than providing compensation where it is justified.”⁶² The court viewed the risk that a plaintiff would become liable for “the full amount of attorney’s fees the other side sees fit to incur” as creating a situation in which “the size of a party’s bank account will have a major impact on his access to the courts.”⁶³ The court most recently acknowledged the tension between the purpose of partial compensation to the prevailing party and access to the courts in *Bozarth v. Atlantic Richfield Oil Co.*,⁶⁴ after which it revised Rule 82 in part to address the problem of large awards creating a chilling effect on access to the courts.⁶⁵

Soon after the rule’s adoption, the supreme court permitted trial courts to use it for other purposes, approving the possibility of full fee awards in some circumstances.⁶⁶ The losing party’s bad faith or vexatious conduct could warrant a full fee award,⁶⁷ as would frivolous claims.⁶⁸ It is not entirely clear from the court’s

methods of fee taxation for plaintiffs and defendants respectively.” Kordziel, *supra* note 47, at 450 (citation omitted).

61. *Stepanov v. Gavrilovich*, 594 P.2d 30, 37 (Alaska 1979); *Malvo v. J.C. Penney Co.*, 512 P.2d 575, 588 (Alaska 1973); *State v. Abbott*, 498 P.2d 712, 731 (Alaska 1972); *Preferred Gen. Agency of Alaska, Inc. v. Raffetto*, 391 P.2d 951, 954 (Alaska 1964).

62. *Preferred General Agency*, 391 P.2d at 954.

63. *Malvo*, 512 P.2d at 587.

64. 833 P.2d 2 (Alaska 1992).

65. *See supra* notes 46-54 and accompanying text.

66. *See, e.g., DeWitt v. Liberty Leasing Co. of Alaska*, 499 P.2d 599, 602 n.13 (Alaska 1972) (mentioning the possibility of partial denial of fees “in an extreme case of a vexatious prevailing party unreasonably prolonging the litigation and substantially increasing its costs” (emphasis added)).

67. *Horton v. Hansen*, 722 P.2d 211, 218 (1986) (affirming full fee award on trial court’s findings that defendant’s distortion of the facts was “abnormal” and that his misconduct caused plaintiff “to incur costly attorney’s fees in a wasteful effort to reconstruct . . . business records”).

68. *Steenmeyer Corp. v. Mortenson-Neal*, 731 P.2d 1221, 1226-27 (Alaska 1987) (upholding trial court award of 75% of actual fees because losing party’s defense “border[ed] on the frivolous”); *see also Estate of Brandon*, 902 P.2d 1299,

opinions in these areas whether the full fee awards are justified as a punishment for the bad conduct or frivolous filing, or whether they are intended merely to compensate the non-offending party fully for litigation costs incurred as a result of such behavior.⁶⁹ Under either rationale, the court has implicitly sanctioned full compensation as an additional effect of Rule 82.

The supreme court also has cited as a goal of Rule 82 the encouragement of settlements for attorney fee awards governed by Civil Rule 68, the offer of judgment rule.⁷⁰ In *Miklautsch v. Dominick*,⁷¹ the court first explained the purpose of fee awards in the context of Rule 68. The trial court in *Miklautsch* awarded attorney's fees to the plaintiff-appellee, who had rejected a \$2,500 offer of judgment and who, despite receiving a directed verdict on liability, was awarded no damages at trial.⁷² The supreme court overturned the fee award, holding that the plaintiff-appellee's failure to better the unaccepted Rule 68 offer precluded her from being the prevailing party under Rule 68, even though she had prevailed on liability.⁷³ The court said that "[t]he purpose of Civil Rule 68 is to encourage the settlement of civil litigation, as well as to avoid protracted litigation. In our view, adoption of [Rule 82's] 'prevailing party' criterion in the resolution of Rule 68 issues defeats the very purposes which led to the promulgation of the

1312 (Alaska 1995) (noting that failure of attorney to litigate a very strong claim might have deprived estate's young heiress of a potential award of full attorney's fees under Rule 82, because any defense to that claim would have been "frivolous"); *Crawford & Co. v. Vienna*, 744 P.2d 1175, 1178 (Alaska 1987) (reversing the superior court's denial of Rule 82 attorney's fees and instructing court to consider a full fee award on remand because suit was frivolous); *State v. University of Alaska*, 624 P.2d 807, 817-18 (Alaska 1981) (overturning trial court's award of 90% of what university requested because "there [wa]s no evidence that the state's claim was frivolous, vexatious or devoid of good faith").

69. In *Tobeluk v. Lind*, 589 P.2d 873, 876 (Alaska 1979), the court commented that it "intend[s] fee awards [under Rule 82] to be compensatory rather than punitive." However, in *Williams v. Eckert*, 643 P.2d 991, 997 (Alaska 1982), the court permitted a Rule 82 award in an admiralty case because the purpose of Rule 82 was "remedial." At the same time, the court has emphasized that Rule 82 was not intended to penalize a losing party for litigating a good faith claim. *Gilbert v. State*, 526 P.2d 1131, 1136 (Alaska 1974); *Malvo v. J.C. Penney Co.*, 512 P.2d 575, 588 (Alaska 1973).

70. ALASKA R. CIV. P. 68.

71. 452 P.2d 438 (Alaska 1969).

72. *Id.* at 438-39.

73. *Id.* at 440.

rule.”⁷⁴ In a subsequent Rule 68 case, *Continental Insurance Co. v. United States Fidelity & Guaranty Co.*,⁷⁵ the court again insisted that trial judges tailor fee awards in Rule 68 cases to encourage settlement. In that case, the supreme court declined to require trial court judges to award *pre-offer* attorney’s fees in all instances, because to do so would “encourage litigation and discourage settlement, thereby defeating the intent underlying Civil Rule 68.”⁷⁶

III. THE MECHANICS OF RULE 82

This Part describes the mechanics of Rule 82’s operation. It combines a discussion of the rule’s legal requirements with data taken from judge and attorney interviews and from state and federal case files. In addition, after each description of the rule’s legal requirements, it lists representative responses of attorneys and judges to questions about the practical effect of these requirements.⁷⁷

A. The Motion Requirement

Rule 82 requires that a party move for an award of fees no later than ten days after the date shown on the certificate of distribution on the judgment.⁷⁸ The opposing party has ten days to file an opposition to the motion.⁷⁹ Many attorneys described Rule 82 motion practice as routine, while others believed it was excessively contentious. Most practitioners described the motions themselves as “pro forma” or “cookbook” and were content simply to request the amounts set forth in the schedule. One noted, “I have the standard motion and the standard opposition.” Descrip-

74. *Id.* at 441.

75. 552 P.2d 1122 (Alaska 1976).

76. *Id.* at 1126.

77. We interviewed 161 attorneys about their practices in state and federal courts, seven attorneys who concentrated their practices in federal courts, all of the Anchorage trial court judges, the five Alaska Supreme Court Justices and seventeen attorneys with specialized practices in public interest law and insurance company representation. We also talked with five federal judges, one bankruptcy judge and two magistrates. For a full description of how attorneys and judges were selected to be interviewed, as well as the questions that were asked, see AJC, ALASKA’S ENGLISH RULE, *supra* note *, at app. A & B.

78. ALASKA R. CIV. P. 82(c). Failure to make a timely motion for attorney’s fees is construed as a waiver of the party’s right to recover. *Id.*

79. ALASKA R. CIV. P. 77(c).

tions of motion practice as routine were consistent with the results of a 1986 study that found that the losing party rarely opposed the fee request.⁸⁰

However, other attorneys reported that they routinely tried to “beat the schedule” or to “get a bump if you can.” An attorney who handled plaintiffs’ employment and wrongful termination cases said he regularly asked for more than the schedule permits in order to make up for the small recoveries available to plaintiffs who can mitigate their damages in wrongful termination cases. Those who asked for enhanced fees tended to agree with Justice Rabinowitz’s view that conscientious attorneys will seek variances.⁸¹ While few thought that explicitly enumerating the exceptions encouraged excessive litigation, one attorney believed that the court should eliminate the enhancement/variance process because it was “a large drain on attorney time.” He added, “the mudslinging that goes on post-trial is really pretty bad. One of the most unpleasant areas of practicing law is post-trial. Very unpleasant.” Another practitioner described the process as “vicious.”

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

Examination of Rule 82 motion practice in the federal and state courts supported the perception that fee shifting was fairly

80. See TOMKINS & WILLGING, *supra* note 56, at 41. This monograph discusses Alaska procedures in some detail, based on interviews with Alaska superior court judges, literature review and other sources. The authors note that “[f]ee shifting is such an accepted part of Alaskan legal culture that there is typically no opposition to schedule-based fee awards.” *Id.*

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

routine and occurred with relatively little written motion work. Although about 10% of state cases contained Rule 82 awards, only 6% had written motions asking for attorney's fees. Only about 3% of the state cases contained a Rule 82 request in a specific amount.⁸² Of the cases with motions for attorney's fees, the great majority (82%) had only one such motion.⁸³ All federal cases containing a Rule 82 award had at least one written motion requesting attorney's fees. The greater number of written motions in federal cases was expected, since the amount of written work generally is greater in federal than state court.⁸⁴

B. Calculating Fee Awards

One issue for jurisdictions considering fee shifting is how to calculate fees. For the prevailing party, Rule 82 uses a percentage of the judgment for cases involving a money judgment and a percentage of actual, reasonable fees for cases not involving a money judgment. The supreme court sets the Rule 82 schedules.

When a prevailing party recovers a money judgment, the judge usually calculates the award based on the schedule in Rule 82(b)(1). He or she computes schedule-based fee awards on net rather than gross recovery.⁸⁵ The amount of the "money judg-

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

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

84. See Herbert W. Kritzer et al., *Courts and Litigation Investment: Why Do Lawyers Spend More Time on Federal Cases?*, 9 JUST. SYS. J. 7, 8 (1984). The authors found that hourly fee attorneys spent considerably more time on cases that they took to federal court than on cases in state court. These differences did not hold true for lawyers working on a contingent fee basis. The authors note that "for these lawyers, their time is their money (rather than their clients' money) and it may well be that because of the economic incentives associated with their work they (successfully) resist the temptation to differentiate between the two types of courts in deciding how much effort to put into their cases." *Id.* at 17.

85. *Fairbanks Builders, Inc. v. Sandstrom Plumbing & Heating*, 555 P.2d 964, 967 (Alaska 1976); see also TOMKINS & WILLGING, *supra* note 56, at 42 (commenting that judges told them that computing a schedule-based fee award rarely took more than ten minutes and that more than 80% of their cases used the schedule).

ment” includes any prejudgment interest award.⁸⁶ The court can include punitive damages in the “amount recovered” for purposes of calculating Rule 82 attorney’s fees. If it does not, it must state the reason for not doing so on the record.⁸⁷ The supreme court presumes that attorney’s fee awards made pursuant to the schedule are correct⁸⁸ and does not require an explanation for these awards.⁸⁹ A prevailing party who asks for fees based on the schedule need not submit documents to support the request.⁹⁰

Interviews with judges also suggested that they found Rule 82 motions routine and applied the rule with little effort. For cases in which the prevailing party won a monetary judgment, almost all of the judges looked to the schedule and applied the appropriate multiplier without any further analysis. One judge reported that he also “glances at the list” of reasons allowing variance from the schedule in Rule 82(b)(3) before making the award. Another judge made an exception in collections cases where an attorney tries the case instead of moving for summary judgment. If the judge determined that the attorney had put in “very little work,” he awarded a percentage of actual fees instead of a percentage of the monetary judgment. If the trial court departs from the schedule in a contested case with a monetary judgment, it must state reasons for the departure.⁹¹ In cases with default judgments, the clerk of court may determine attorney’s fee awards,⁹² but for amounts over \$50,000, the prevailing party must specify actual fees.⁹³

Sometimes a prevailing party does not recover a monetary judgment. Occasionally, plaintiffs seek only injunctive relief. More often, if a defendant prevails, the court disposes of the case through dismissal or a verdict for the defendant without awarding monetary

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

87. *Sturm, Ruger & Co. v. Day*, 627 P.2d 204, 205 n.1 (Alaska 1981) (reasoning that denying attorney’s fees as to punitive damages would be unreasonable in tort cases, such as defamation, where actual damages are nominal but punitives are substantial).

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

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

90. *Babinec*, 799 P.2d at 1337; *Korean Air Lines v. State*, 779 P.2d 333, 340 (Alaska 1989). Tomkins & Willging found that the trial court handled most schedule-based fee awards as routine motions. TOMKINS & WILLGING, *supra* note 56, at 41.

91. *Patrick v. Sedwick*, 413 P.2d 169, 178-79 (Alaska 1966).

92. ALASKA R. CIV. P. 82(d).

93. ALASKA R. CIV. P. 82(c).

judgment. In these cases, the rule directs the trial court to compute the prevailing party's attorney's fee award as a percentage of the fees the prevailing party actually incurred.⁹⁴

Under the old version of the rule,⁹⁵ the judge first decided the total reasonable fee and then chose a reasonable percentage by which to multiply this amount.⁹⁶ Judges chose multipliers ranging from 20% to 80%, depending on the judge, the nature of the case and the results achieved.⁹⁷ The court first specified the percentage of actual fees to award to a prevailing party with a non-monetary judgment in the 1993 amendments. Currently, the judge must decide which of the prevailing party's fees were "necessarily incurred," excluding duplicative and unnecessary work, before applying the specified percentage.⁹⁸ The amount of damages sought by the unsuccessful plaintiff does not limit a prevailing defendant's fee recovery.⁹⁹

Judges generally reported spending more time and engaging in more analysis on non-monetary judgment fee awards. For example, eleven judges said they regularly analyzed the need for the legal services reported. Even the remaining seven judges in our study said they did analyze them "if the other side protests" or "if they appear on their face to be excessive."

The supreme court requires counsel for the prevailing party to submit accurate records of the hours expended and briefly to

94. The rule states:

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.

ALASKA R. CIV. P. 82(b)(2).

95. ALASKA R. CIV. P. 82(a)(2) (1982).

96. TOMKINS & WILLGING, *supra* note 56, at 43.

97. *Id.* at 43 n.152. This wide range of discretion probably led to an Alaska Bar resolution in 1973 calling for abolition of Rule 82. *See supra* notes 42-44 and accompanying text.

98. *State v. Fairbanks North Star Borough Sch. Dist.*, 621 P.2d 1329, 1335 (Alaska 1981).

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

describe the services provided.¹⁰⁰ Attorneys usually rely on affidavits that summarize billing rates, number of hours spent and who worked on which matters.¹⁰¹ Some attorneys also submit copies of the bills they sent to their clients.¹⁰² Ten judges said they required or preferred that the prevailing party submit copies of actual billings. Judges who did not require actual billings still scrutinized the affidavits submitted with the fee requests. They looked for "duplication of services," "padding," "hourly breakdowns" and "paralegals doing purely clerical tasks." Judges noted in interviews that they typically review these affidavits and make the fee decisions without the help of a court clerk or other assistant.¹⁰³

Despite the increased scrutiny that most judges applied to awards in nonmonetary cases, few complained that the work took up too much time or was unduly burdensome. One judge observed, "the motions seldom are long, because the parties are tired by then." However, another judge believed that Rule 82 took "a substantial amount of time" and stated that getting rid of it would "speed up the process."

As with fee awards based on money judgments, the trial court can exercise broad discretion, including not awarding attorney's fees to a prevailing party, but the court must state the reason for its decision.¹⁰⁴ The supreme court allows,¹⁰⁵ but does not require, the judge to apportion fees based on degree of success on specific issues, reasoning that Rule 82 "already takes into account the degree of success at the initial stage of determining prevailing

100. *Hayes v. Xerox Corp.*, 718 P.2d 929, 939 (Alaska 1986) (citing *Moses v. McGarvey*, 614 P.2d 1363, 1374 n.32 (Alaska 1980)).

101. *See id.* at 939.

102. TOMKINS & WILLGING, *supra* note 56, at 41.

103. Judges interviewed by Tomkins & Willging concurred. *See id.* Judges' decisions about reasonable fees in non-monetary judgments have generated perhaps more controversy about the rule than any other specific aspect. In *Alvey v. Pioneer Oilfield Serv., Inc.*, 648 P.2d 599, 601 (Alaska 1982), the defendant, who prevailed on summary judgment, cross-appealed to the supreme court. The court said that "Pioneer claims that the superior court's award 'was apparently set at a very low rate to encourage this appeal' and to obtain thereby 'better defined guidelines' for the determination of costs and fees." *Id.* at 601 n.1.

104. *Stordahl v. Government Employees Ins. Co.*, 564 P.2d 63, 68 (Alaska 1977).

105. *Hickel v. Southeast Conference*, 868 P.2d 919, 926 (Alaska 1994); *Alaska State Bank v. General Ins. Co.*, 579 P.2d 1362, 1369 (Alaska 1978).

party status.”¹⁰⁶

C. Departures from Schedules

Before the 1993 amendments, the supreme court allowed the trial judge to vary the fee award at a party's request but did not require the judge to limit the award to the amount requested.¹⁰⁷ If the judge decided to vary an award, he or she calculated the award authorized by the schedule and then stated the reasons for deviating from that amount.¹⁰⁸ The supreme court required this procedure to assure a rational basis for departure and a sound record for review on appeal.¹⁰⁹

The supreme court's 1993 amendments to Rule 82 required consideration of eleven factors before the trial court could depart from the scheduled recovery rates.¹¹⁰ The subcommittee appointed to study the rule recommended these factors to increase uniformity by “codifying” some of the reasons most often argued by attorneys as justifying a variance. To date, the supreme court has published only one case interpreting the 1993 amendments,¹¹¹ so it remains unclear how the factors will affect existing case law.¹¹² Judges described the variance decision as a “party-

106. *Hickel*, 868 P.2d at 929; see also *Gold Bondholders Protective Council v. Atchison, Topeka & Santa Fe Ry.*, 658 P.2d 776, 779 (Alaska 1983).

107. *State v. Fairbanks North Star Borough Sch. Dist.*, 621 P.2d 1329, 1335 (Alaska 1981).

108. *Kowalski v. Kowalski*, 806 P.2d 1368, 1373 n.7 (Alaska 1991). In *Kowalski*, the supreme court overturned the trial court's award of full attorney's fees because the trial court had not first determined what fee award would be appropriate under the general rule before increasing the award to account for a party's misconduct. *Id.* at 1372-73. The supreme court instructed the trial court to use this two-step process on remand and added that “[i]ncreased attorney's fee awards under Alaska Civil Rule 82 are subject to the same requirements. The court must first calculate what award is authorized under the schedule . . . and then state its reasons for deviating from that award.” *Id.* at 1373 n.7.

109. *Fairbanks Builders, Inc. v. Sandstrom Plumbing & Heating*, 555 P.2d 964, 966 (Alaska 1976).

110. ALASKA R. CIV. P. 82(b)(3); see *supra* note 51 and accompanying text.

111. *Bishop v. Municipality of Anchorage*, 899 P.2d 149, 155-56 (Alaska 1995).

112. In a note to its order amending the rule, the court expressly denied that it intended by adopting the amendments to change the law regarding public interest litigants or the rule that full fees are manifestly unreasonable in the absence of bad faith or vexatious conduct. Alaska Sup. Ct. Order No. 1118, at 4. This note did not mention frivolous conduct as a reason to uphold full fee awards, despite the court's line of decisions permitting full fees in cases of frivolous conduct. See *supra* note 68 and accompanying text. Still, the amendments do

propelled issue;" they generally did not consider departing from the schedule unless a party so requested.

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

The data and interviews suggested that variances were uncommon. A few judges said that they had "never" diverged from the schedule in the past year, and others reported anywhere from six to twelve variances in the past year. In nearly 92% of the cases with fee awards from the state court sample, judges calculated fee awards according to the schedules set out in the rule.¹¹³ In only one of the federal cases did a judge vary from the schedule.¹¹⁴ However, the attorney interview data differed somewhat from the case file data on the frequency with which fee awards varied from the scheduled amounts; attorneys claimed that judges awarded fees according to the schedule only 64% of the time.¹¹⁵

In the past, the supreme court has emphasized the need for trial courts to state findings that support departures from the schedule.¹¹⁶ In *Bowman v. Blair*,¹¹⁷ the court held that when a

raise the question of whether the court will allow variations for reasons other than those explicitly mentioned in Rule 82(b)(3).

113. For detailed discussions of the data and analysis, see *infra* Part IV. The weighted state court case sample included all civil cases closed in 1993 in Anchorage except domestic relations and debt cases. Courts awarded Rule 82 fees in only 10% of those cases.

114. Fee awards were made in twenty of the 359 federal cases.

115. This may represent an important difference in how judges and attorneys see the rule in practice. Throughout the life of the rule, one of the Bar's primary complaints has been that judges have too much discretion. Many of the changes made by the supreme court have limited judicial discretion. Nonetheless, attorneys still believed that judges varied from the schedule more frequently than they actually did.

116. Under previous case law, judges had to state reasons for variation on the record. See, e.g., *Hayes v. Xerox Corp.*, 718 P.2d 929, 939 (Alaska 1986); *Stordahl v. Government Employees Ins. Co.*, 564 P.2d 63, 68 (Alaska 1977); *Patrick v. Sedwick*, 413 P.2d 169, 179 (Alaska 1966). In the past, the court accepted an oral explanation on the record, *Larry v. Dupree*, 580 P.2d 326, 327 (Alaska 1978), but

trial court varied the attorney's fee award from the standards prescribed in the rule, the judge must explain the variance.¹¹⁸

Data collected for this Article suggested that judges explained their decisions to grant variances and that they granted variances based only on the eleven factors set out in Rule 82(b)(3). Eleven judges said that within the past year, they had granted variances based on "other equitable factors," "reasonableness of defenses and claims" made by both sides and "vexatious or bad faith conduct."¹¹⁹ The next most common grounds for departure were "relationship between the amount of work and the significance of the matters at stake,"¹²⁰ "complexity of the case," "reasonableness of the hourly rate and the number of hours expended" and "attorneys' efforts to minimize fees." Five judges had varied an award based on "reasonableness of number of attorneys;" four had cited "outside considerations" and three had cited "length of trial."

In the thirty-three cases in which attorneys reported a departure from the schedule, they most often claimed that the variance was granted based on "other equitable factors," litigants'

that statement had to be specific. See *Curran v. Hastreiter*, 579 P.2d 524, 530-31 (Alaska 1978) (concluding that judge's statement that "[u]nder the circumstances, justice will best be served if each party bears [its] own costs and attorney's fees" was not sufficient). One case decided under the new version of the rule suggested that the court will continue to look for reasons for variation in the record. See *Bishop v. Municipality of Anchorage*, 899 P.2d 149, 156 (Alaska 1995) (stating that the change worked by the new rule requires "that variations from the baseline award . . . be explained in writing").

117. 889 P.2d 1069 (Alaska 1995).

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

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

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

vexatious conduct, complexity of the litigation and the reasonableness of the claims and defenses asserted. Length of trial was cited in one case. Variances from the schedule were somewhat related to whether the attorney represented plaintiff or defendant. Attorneys who represented defendants received awards not calculated from the schedules slightly more often than plaintiffs' attorneys.

The 1993 amendments are unlikely to affect the supreme court's refusal to allow the trial judge to depart from the schedule based on informal settlement offers. In *Myers v. Snow White Cleaners & Linen Supply*,¹²¹ the trial court used past settlement negotiations to justify reducing the amount of attorney's fees it awarded to the prevailing plaintiff.¹²² The supreme court reversed the fee award on appeal, holding that Civil Rule 68 exclusively "controls whether a trial court can penalize a party for its refusal to settle prior to trial when the jury verdict awards an amount of money virtually identical to the pre-trial offer."¹²³

D. Effect on Insurance Coverage Cases

Our interviews revealed that insurance coverage cases in Alaska are a type of litigation uniquely created by Rule 82.¹²⁴ The Alaska Supreme Court has held that insurance contracts covering unlimited court costs obligate the insurer to pay Rule 82 fees calculated on the full amount of a projected jury verdict rendered against an insured defendant.¹²⁵ Because Rule 82 fees

121. 770 P.2d 750 (Alaska 1989).

122. *Id.* at 751.

123. *Id.* at 752. The offer of judgment in this case was defective under Rule 68. *Id.* In a similar case, the supreme court reversed the trial court's fee award because the trial court relied on, among other things, the defendant's "ridiculously low" settlement offers to justify a fee award that exceeded the scheduled amount. *Van Dort v. Culliton*, 797 P.2d 642, 645 (Alaska 1990).

124. See Gerald Z. Marer & John F. Schuck, *Alaska's Rule 82 Fees: A Trap for Unwary Insurers*, 57 DEF. COUNSEL J. 214 (1990).

125. *Schultz v. Travelers Indem. Co.*, 754 P.2d 265, 267 (Alaska 1988); *Guin v. Ha*, 591 P.2d 1281, 1285-86 (Alaska 1979). The insurer's obligation to tender for settlement the maximum limits of insurance coverage is grounded in the insurer's legal duty to act in good faith to protect the interests of the insured. *Schultz*, 754 P.2d at 266-67. Marer & Schuck warn that "a company writing any type of liability policy in any of the other 49 states, can find itself paying many times the amount of policy limits if its insured is sued under Alaska law, depending on the jury's award of damages or even the amount of a settlement." Marer & Schuck, *supra* note 124, at 214.

can cause a claim to exceed the face value of the policy, insurance companies have sought to exclude attorney's fees from their policy coverage. Many claimants have challenged the validity of those exclusions. Attorneys identified policy coverage disputes as a significant source of litigation. A personal injury insurance defense attorney said, "We always have to consider: Does the policy limit Rule [82 fees] to the face value of the policy, and is the limitation effective?" Another attorney recognized the issue but said that "most insurance companies have figured out how to write effective exclusions by now."¹²⁶

Still, insurance defense attorneys consistently reported spending time researching and negotiating coverage issues. One insurance defense attorney reported spending 1% to 2% of his time researching and negotiating Rule 82 coverage issues and said that the rule created "big stakes problems" when interpreting policy limits, with policy limit issues "always a sticking point" in settlement negotiations. A personal injury attorney estimated that half of his Rule 82 practice centered on the insurance policy coverage question; another said coverage issues arose in his practice "twelve times a year." An attorney who handled both insurance defense and plaintiffs' personal injury cases reported that most of his federal practice involved diversity cases litigating the validity of the insurance company's Rule 82 endorsement.

In about four cases, attorneys told us how Rule 82 had increased the settlement value beyond the face value of the insurance policy limit. One case involved an injured plaintiff seeking to recover under an insurance policy that limited coverage to \$50,000. However, the plaintiff's damages equaled or exceeded the face value of the policy. If plaintiff's counsel had made a "policy limits" demand and the insurance company had accepted the settlement offer, the insurance company would have paid the

126. Under ALASKA ADMIN. CODE tit. 3, § 29.010 (July 1993), insurance companies could limit their Rule 82 exposure by making full disclosure to the insured. In the Fall of 1995, the Alaska Division of Insurance issued a proposed order to repeal section 29.010 and replace it with a regulation that seemed to be more specific as to exactly what language insurance companies could use to notify their insureds of limitation of Rule 82 coverage (Proposed Order on file with the Alaska Judicial Council). The Attorney General's office was reviewing the proposed order in September 1995. Telephone Conversation with Assistant Attorney General Signe Anderson, Sept. 11, 1995. The order was to become effective in January 1996, but the regulation has not yet been amended as of the date of this Article's publication.

policy limit (\$50,000) *plus* a Rule 82 award.¹²⁷ In this case, plaintiff's counsel demanded the face value of the policy (\$50,000) plus 10% of the projected verdict if the case had gone to trial (damages were estimated at \$250,000).¹²⁸ The case eventually settled for more than \$50,000.

Attorneys who represented insurance companies identified this scenario as an important way that Rule 82 affected their clients' decisions about when to settle a case and how much to offer. As one defense attorney recalled, "After I explained about Rule 82 and policy limits, [the insurance company] followed my recommendations to pay and settled." A plaintiff's attorney explained, "The insurance company pays Rule 82 fees on top of the policy, and they don't want to pay any more. The rule tells them they have to pay attention. It makes bad boys behave."

E. Collection of Rule 82 Awards—Transformation of Two-Way Shift into One-Way Shift

The most frequent criticism of Rule 82 by personal injury defense attorneys was that they could not collect fee awards from the losing plaintiffs. Insurance personal injury defense attorneys said that successful defendants rarely can collect fee awards from plaintiffs, while plaintiffs "always" get their fee awards paid by the "deep pocket" defendant. One attorney commented, "Plaintiffs don't pay, and so [the rule] only works one way. When we . . . try to collect our Rule 82 award, we're seen as ogres." A medical malpractice defense attorney with more than ten years experience could recall only one instance in which an unsuccessful plaintiff had the resources to warrant the defendant's attempt to collect a Rule 82 judgment. He said, "My client was so angry at the plaintiff's conduct in the case that he asked me to try to collect the judgment. The plaintiff ended up declaring bankruptcy." Another personal injury insurance defense attorney could not think of a single case in which liability was questionable and the plaintiff had any assets at all. Only twice in his eight-year career had he "bothered going after a plaintiff to satisfy a Rule 82 judgment." Yet another personal injury defense attorney said in almost twenty years of experience that he "had witnessed no more than five instances in

127. *Schultz*, 754 P.2d at 267; *Guin* 591 P.2d at 1285-86. If the plaintiff had accepted the offer, the court probably would have awarded about \$3,250 in Rule 82 fees. ALASKA R. CIV. P. 82(b)(1).

128. See ALASKA R. CIV. P. 82(b)(1).

which prevailing defendants have collected their Rule 82 awards.”

The attorney interview data supported the defense attorneys’ observations but revealed a variety of other reasons that made fee awards uncollectible. Of the 57 cases in the attorney interview sample in which fees were awarded and the attorneys knew whether they had been paid, in 40% the fees had been paid, and in 60% the fees had not been paid.¹²⁹ Twenty-one of the 57 cases were tort cases (malpractice, admiralty, personal injury, auto accidents and fraud), and defendants prevailed in fourteen of those twenty-one cases (67%). Of the fourteen cases in which the defendant prevailed, the fee award was collected in only four. In a fifth case, the losing plaintiff’s attorney reported that his client will pay the fee award to the defendant. Of the remaining nine cases, two settled with a waiver of fees, the judgment in one was assigned, two others were on appeal, and in the remaining four, the plaintiff was judgment-proof.

On the other hand, some attorneys are more creative in their collection attempts than others. One personal injury defense attorney with more than two decades of litigation experience reported that he collects at least some part of a Rule 82 award for his insurance clients “about 40% of the time.”¹³⁰ To illustrate, he gave the example of an unsuccessful plaintiff with “four or five kids” who is “sending [him] \$50 a month.”¹³¹

F. Public Interest Litigation

Fee shifting in public interest cases occurs in many jurisdictions through statutes.¹³² Many courts have interpreted statutory provisions for fee awards to public interest litigants as evincing legislative intent to create an exception to the American rule. The U.S. Supreme Court arrived at this conclusion with respect to the

129. Forty attorneys said they did not know whether the fee award had been satisfied. Some did not know because their motions were pending at the time of the interview and some because other attorneys or paralegals handled the collection of judgments.

130. This was the attorney who had assigned his fee award to a creditor of the losing plaintiff.

131. This attorney criticized the loser pays rule, among other reasons, because “when it does apply to plaintiffs it often causes personal tragedies.”

132. Note, *State Attorney Fee Shifting Statutes*, *supra* note 14, at 343 (noting that “80.5% of all public interest attorney fee shifting statutes have been enacted since 1960[, and] the percentage of public interest statutes as compared to the other statutes is growing”).

Civil Rights Act of 1964.¹³³ The Alaska Supreme Court first explicitly acknowledged a public interest exception to Rule 82 in *Gilbert v. State*,¹³⁴ in which it announced that attorney's fees will not be awarded against "a losing party who has in good faith raised a question of genuine public interest before the courts." The plaintiff in *Gilbert* unsuccessfully challenged the state's residency requirements for election to legislative office. On appeal, he argued that Rule 82 would deter citizens from litigating questions of general public concern for fear of having to pay the other party's attorney's fees.¹³⁵ The court agreed, reiterating that the purpose of Rule 82 is not to penalize a party for litigating a good faith claim.¹³⁶

In *Municipality of Anchorage v. McCabe*,¹³⁷ the supreme court established that prevailing public interest plaintiffs are entitled to full reasonable attorney's fees. In *McCabe*, homeowner plaintiffs prevailed in a suit against the Municipality of Anchorage

133. *Newman v. Piggie Park Enter.*, 390 U.S. 400, 401 (1968) (holding that Title II's provision of "a reasonable attorney's fee" to the prevailing party should not be limited to circumstances in which the losing party's "defenses had been advanced for purposes of delay and not in good faith" (citations omitted)); *see also* *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240, 263 (1975) (stating that by enacting fee shifting statutes, "[c]ongress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation").

134. 526 P.2d 1131, 1136 (Alaska 1974). A litigant must satisfy four criteria to qualify for the public interest attorney fee exception. First, the case must be designed to effectuate strong public policies; second, numerous people must be expected to benefit if the plaintiff succeeds; third, the suit must be expected to be brought by a private party; and, fourth, there must be sufficient economic incentive for the purported public interest litigant to file the suit even if the action involved only narrow issues lacking general importance. *Anchorage Daily News v. Anchorage Sch. Dist.*, 803 P.2d 402, 404 (Alaska 1990). The court articulated the first three points in *Municipality of Anchorage v. McCabe*, 568 P.2d 986 (Alaska 1977) and added the fourth in *Kenai Lumber Co., Inc. v. LeResche*, 646 P.2d 215, 223 (Alaska 1982) ("[T]he fourth criterion may be expressed as whether the litigant claiming public interest status would have had sufficient economic incentive to bring the lawsuit even if it involved only narrow issues lacking general importance. Such a litigant is less apt than a party lacking this incentive to be deterred from bringing a good faith claim by the prospect of an adverse award of attorney's fees."); *see also* *Murphy v. City of Wrangell*, 763 P.2d 229, 233 (Alaska 1988).

135. *Id.*

136. *Id.* (citing *Malvo v. J.C. Penney Co.*, 512 P.2d 575, 587 (Alaska 1973)).

137. 568 P.2d 986 (Alaska 1977).

and received full fees under Rule 82.¹³⁸ The court refused to overturn the trial court's award of full fees, reasoning that a full fee award was necessary to ensure that the public interest plaintiff, acting as "a 'private attorney general,'" is not "penalized by Rule 82 by failing to receive full compensation for the costs of litigating issues of public importance."¹³⁹ While trial courts retain the discretion to award less than all fees requested by a public interest plaintiff, they may not reduce the award in order to discourage public interest litigation or to penalize a plaintiff acting as a private attorney general.¹⁴⁰

IV. DATA ANALYSIS AND FINDINGS

A. Litigation Trends

One question addressed by this Article is how Alaska's system of civil litigation compares to litigation in states that do not shift attorney's fees. Does any evidence suggest that Alaskans go to court more or less often than people from states without fee shifting? This sub-part examines case filings, types of cases and trials in Alaska courts and nationwide to determine whether Alaska differs significantly on these measures from other states.

1. *Civil Case Filings.* Civil case filing rates in Alaska were compared to rates in states that do not shift fees to assess whether attorney fee shifting affects the rate of civil case filing. If fee shifting had strongly pronounced deterrent effects, one would expect a lower rate of civil case filings, on the hypothesis that fee shifting discouraged some potential plaintiffs from filing cases. Yet, Alaska's per capita civil filing rate did not seem to differ substantially from rates across the nation. For example, Alaska's 5,793 civil filings per 100,000 population in 1992 was only slightly below the national median of 6,610 for the same year.¹⁴¹ Alaska's rate

138. *Id.* at 993.

139. *Id.* at 994. In a later case, the court added that full fee awards "encourage meritorious claims which might otherwise not be brought." *Hickel v. Southeastern Conference*, 868 P.2d 919, 924 (Alaska 1994) (citations omitted).

140. *Hunsicker v. Thompson*, 717 P.2d 358, 359 (Alaska 1986). The court may reduce the award if, for example, it finds the hourly rate to be excessive or the total hours unreasonable. *Id.*

141. NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1992, at 11, Fig. 1.13 (1994) [hereinafter NCSC STATISTICS 1992].

in 1993 was also only slightly below the national median.¹⁴²

Tort filings represent a subset of civil filings that may be more closely related to fee shifting. Torts include high profile matters like legal and medical malpractice, products liability and wrongful death cases, which are at the center of debates about fee shifting and civil justice reform. Some observers caution that the prospect of an adverse fee award could chill access to the courts, at least for some plaintiffs in tort cases.¹⁴³

We also compared tort filing trends in Alaska to filings in states that did not shift fees. In 1993, the National Center for State Courts reported that the only substantial period of growth in tort filings nationwide had occurred between 1985 and 1986 and that tort filings actually had declined by about 2% since 1990.¹⁴⁴ In Alaska, tort filings increased modestly between 1985 and 1986, decreased drastically between 1986 and 1989¹⁴⁵ and decreased slightly or remained relatively constant until 1992.¹⁴⁶ Figure 1

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

143. See Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS., Winter 1984, at 139, 143.

144. NCSC STATISTICS 1992, *supra* note 141, at 17. This data come from twenty-two states that have reported comparable data from the 1985 to 1992 period. *Id.* at 16.

145. As Figure 1 shows, tort filings in Alaska statewide decreased by 29% between 1986 and 1987 and by 44% between 1987 and 1988. See *infra* Table Appendix. These drastic drops probably were related to changes in population caused by a severe economic downturn in Alaska from 1985 to 1988. During the period of most severe retrenchment in 1986 and 1987, the rate of population change dropped to -1.8%. "By 1989, however, net out-migration slowed enough to allow the natural increase of births over deaths to produce the first increase in population since 1985." ALASKA DEP'T OF LABOR, ALASKA POPULATION OVERVIEW 1988 & PROVISIONAL 1989 ESTIMATES 17 (1990). Another possible explanation for the decreases in tort filings after 1986 could be passage of "tort reform" legislation in Alaska in 1986. See 1986 Alaska Sess. Laws 139. Other civil filings statewide showed a slightly different trend than tort filings. While they increased steadily from 1982 to 1985 and fell between 1985 and 1986, the 1985-1986 drop was only 17%. By 1987, civil filings were on the increase again. The spike in 1989 could reflect judicial real estate foreclosure filings related to the bust. Although exact figures were not available from the court system, one of the co-authors of this Article, Susanne Di Pietro, was a superior court law clerk in 1987 and 1988 and confirmed that judicial foreclosures formed a large part of the case load during those years.

146. NCSC STATISTICS 1992, *supra* note 141, at 17.

depicts the trend graphically.¹⁴⁷ Thus, Alaska's statewide tort filing trends resemble those in jurisdictions that do not shift attorney's fees. The similarity suggests that fee shifting in Alaska does not cause differences between Alaska's trends and those elsewhere.

We further compared tort filings statewide and in Anchorage to other civil filings from mid-1985 through mid-1995. Figure 2¹⁴⁸ shows that tort filings in Anchorage dropped sharply from fiscal years 1986 through 1989 and remained flat compared to other types of civil filings, which were more volatile during the late 1980s. Figure 1 shows the same trend statewide. For the past few years, tort filings statewide and in Anchorage have been moving upward in numbers, but not as rapidly as other civil filings.

Tort trends can also be understood by examining filing rates in specific years rather than looking at actual numbers or percentages of filings. Figure 3¹⁴⁹ compares Alaska's population-adjusted tort filing rates to those in twenty-eight other states for which the National Center for State Courts had data. Alaska's rates consistently fell in the lowest group, fewer than 200 tort filings per 100,000 population.¹⁵⁰ The methods by which states count and classify civil cases affect filing rates, as do economic, social and cultural factors. Many of the states in the low group¹⁵¹ had significant rural populations and one or two large cities, as does Alaska.¹⁵² Many of the states in the higher groups, on the other

147. See *infra* Table Appendix. Data on "other civil filings" came from the court system's annual reports. Other civil filings included administrative review (primarily workers' compensation cases), "debt/contract" and "other" or "general" cases. Domestic relations, probate and children's matters do not appear on this graph.

148. *Id.*

149. *Id.*

150. See NCSC STATISTICS 1992, *supra* note 141, at 18; NCSC STATISTICS 1993, *supra* note 142, at 22. Between 1990 and 1994, Alaska's tort filing rates per 100,000 population hovered between 139 and 150. In 1990 and 1992, Alaska's population-adjusted rates were greater than the rates in five of the twenty-nine states reporting. NCSC STATISTICS 1992, *supra* note 141, at 18. In 1991, Alaska's rate was greater than the rates in six of the twenty-nine states reporting. *Id.* In 1993, Alaska's rate was higher than the rates in seven of the twenty-nine states reporting. NCSC STATISTICS 1993, *supra* note 142, at 22.

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

152. Approximately half of Alaska's residents live in the city of Anchorage. 1996 WORLD ALMANAC & BOOK OF FACTS 427. In 1994, Alaska's total

hand, had larger proportions of urban residents. Thus, Alaska did not seem demographically inconsistent with the other states in the lowest group. In short, although the available data cannot exclude the possibility that Alaska's relatively low tort filing rate is related to fee shifting, neither can one conclude from these data that Rule 82 perceptibly "chills" the filing of tort claims.

Although tort cases tend to take center stage in discussions of fee shifting, they do not reflect the complete civil litigation picture. Contract cases form a large part of the total civil caseload in most jurisdictions, including Alaska. Aggregate national trends for contract cases are difficult to pinpoint, since most states' contract filings have shown substantial year-to-year variation.¹⁵³ Research suggests that contract filing rates are tied to changes in the economy, with economic downturns leading to fewer contract filings over the next several years.¹⁵⁴ In Alaska, the number of contract cases filed in 1992 declined by 21% from the number filed in 1990,¹⁵⁵ a more rapid decline than that for tort filings in the same two-year period.

2. *Caseload Composition.* General filing trends do not reveal much about actual caseload composition. However, the National Center for State Courts has compiled data that help identify whether Alaska has relatively fewer tort cases compared to other states. The national data indicate that contract, tort and real property suits together are the second-largest component of total civil caseloads, after domestic relations cases.¹⁵⁶

Figure 4¹⁵⁷ shows that contract, tort and real property cases (general civil cases) made up approximately 32% of the total civil court caseloads in general jurisdiction trial courts in the United States in 1992.¹⁵⁸ Contract cases accounted for 12% of the national general civil total, while tort suits (including personal injury, malpractice, wrongful death and property damage cases) and

population was 606,276, while Anchorage Borough's was 253,647. *Id.*

153. NCSC STATISTICS 1992, *supra* note 141, at 20.

154. NCSC STATISTICS 1993, *supra* note 142, at 26.

155. *Id.*

156. NATIONAL CENTER FOR STATE COURTS, *Caseloads Rise in State Courts*, 1 NAT'L CENTER FOR ST. CTS. J. 1, 15 (1994) [hereinafter NCSC, *Caseloads Rise*]. To improve the comparison, small claims cases have been omitted from the national pie chart. *Id.*

157. *See infra* Table Appendix.

158. NCSC, *Caseloads Rise*, *supra* note 156, at 15.

real property cases each constituted about 10%.¹⁵⁹ Figure 5¹⁶⁰ shows Alaska's caseload composition in general jurisdiction trial courts. The main difference between Alaska's total civil caseload and the national caseload data is that domestic relations cases (including civil domestic violence cases) made up a larger percentage of the total caseload in Alaska (60%) than in the national data (38.5%).¹⁶¹

Taken together, Alaska courts had somewhat fewer "general civil" cases in the total caseload than other states. In Alaska, tort, contract, real property and other general civil cases made up about 23% of the total civil caseload.¹⁶² Within the category of general civil cases, tort cases (personal injury and premises liability) constituted only 5% of the total.¹⁶³ The differences between Alaska and national figures may well arise from differences in case definition. Yet, they also may reflect significant differences in the composition of Alaska's civil caseload, in which case, fee shifting may account for some or all of the difference.¹⁶⁴

3. *Trial Rates and Prevailing Parties.* Trial rates may vary as a result of fee shifting. Some have predicted that attorney fee

159. *Id.*

160. *See infra* Table Appendix.

161. ALASKA COURT SYSTEM: 1993 ANNUAL REPORT S-18 (1994) [hereinafter ALASKA COURT SYSTEM 1993]; NCSC, *Caseloads Rise*, *supra* note 156, at 15. Probate (estate) cases also comprised a larger proportion in Alaska (18%) than nationally (10%). *Id.* However, because of methodological differences in data collection, the Alaska data from ALASKA COURT SYSTEM 1993 may not be identical to Alaska data from national sources.

162. ALASKA COURT SYSTEM 1993, *supra* note 161, at S-18.

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

164. This evaluation did not consider all of the possible factors that could create a caseload in which domestic relations and probate cases constitute a relatively large percentage of the general trial court's work and civil and tort cases make up a smaller than typical proportion of civil cases. For instance, the types of cases that constitute the caseloads vary significantly from state to state. Alaska's caseload does not include enforcement/collection proceedings or temporary injunctions, which many states do include. Because neither these nor small claims cases, which Alaska handles in the district court, are counted in Alaska's superior court totals, the data may sufficiently skew the proportions of types of cases handled in the various courts so that it appears that Alaska has a lower than average rate of tort filings.

shifting would encourage earlier settlement.¹⁶⁵ Data collected by the National Center for State Courts showed that trial rates for civil caseloads (including domestic relations and small claims cases) in general jurisdiction courts in twenty-seven states in 1993 averaged 7.6%, with bench trials accounting for 6.4% of the total.¹⁶⁶ Alaska reported a total trial rate of 3.9% for that time period, excluding domestic relations and "other" cases.¹⁶⁷ Figure 6 shows how Anchorage superior court disposition methods have varied over time.¹⁶⁸ Trials, both jury and non-jury, have constituted a small percentage of case dispositions, remaining stable as a percentage of the overall caseload. As in most other jurisdictions, jury trial rates vary little from year to year.¹⁶⁹ Courts in most jurisdictions try tort cases less frequently than other civil cases. Data collected from the nation's seventy-five most populous counties from 1991 to 1992 showed that courts resolved only 3% of tort cases at trial.¹⁷⁰ Although more medical malpractice, premises liability and product liability torts went to trial,¹⁷¹ only 2% of

165. This is one of the purposes frequently stated for Alaska's Rule 82. See *supra* notes 70-76 and accompanying text.

166. NCSC STATISTICS 1993, *supra* note 142, at 14.

167. *Id.* Because Alaska's total trial rates did not include domestic relations and small claims trials, they probably are skewed toward the low end of the trial rate scale. For the disposition of domestic relations and "other" civil cases, see ALASKA COURT SYSTEM 1993, *supra* note 161, at S-30, S-34. For example, in Anchorage in 1993, the state's general jurisdiction trial court resolved about 7% of its domestic relations cases by trial, and about 3% of its "other civil" cases by trial (other civil cases exclude domestic relations, probate and children's cases). Alaska's limited jurisdiction trial court, which hears small claims cases, resolved about 8% by trial in the higher-volume locations. *Id.* at S-48.

168. See *infra* Table Appendix. Much of the variation in methods of disposition other than trials may result from changing methods of categorizing cases or from changes in training for clerks entering data.

169. NCSC STATISTICS 1993, *supra* note 142, at 14 ("Unlike bench trial rates . . . there is little variation in jury trial rates.").

170. Roger Hanson et al., *Tort Change is Thorny*, NAT'L L.J., Jan. 30, 1995, at A21, A23; see also Barbara Franklin, *Learning Curve: Lawyers Must Confront Impact of Changes on Litigation Strategies*, A.B.A. J., Aug. 1995, at 62, 65 (including data from National Center for State Courts from a project sponsored by Department of Justice Bureau of Justice Statistics). Another source provided data indicating that 4% of tort cases went to jury trial. *Taking the "Pulse" of Tort Litigation*, 1 STATE CT. REPORTER 3 (1995).

171. Franklin, *supra* note 170, at 65. Medical malpractice cases were resolved at trial 6.9% of the time, premises liability cases 3.8% of the time and product liability cases 3.3% of the time. *Id.*

auto accident cases (the largest category of tort case) went to trial.¹⁷²

In our sample of state court cases, 3% of the civil cases concluded with a trial.¹⁷³ More tort cases in the sample—about 4%—went to trial than did other types of civil cases.¹⁷⁴ Nine percent of wrongful death cases in the sample and 28% of malpractice cases went to trial.¹⁷⁵ This finding shows the complexity of the possible effects of Rule 82. Alaska may have fewer tort filings than other states, but it has more tort trials. Even a few trials can make substantial work for the court and increase costs to parties and to the justice system. It may be that fee shifting discourages some plaintiffs from filing tort cases but encourages at least a few of those who do file tort claims to pursue their cases more aggressively. Any savings made because fewer cases enter the courts may be offset by increased resources devoted to trials.

Nationally, 16% of cases tried in 1993 were malpractice cases,¹⁷⁶ compared with 11% in Alaska.¹⁷⁷ Plaintiffs' attorneys said that they did not take as many malpractice cases to trial

172. *Id.*

173. About 67% of the 85 trials in the Anchorage state court case sample were non-jury trials. The sample was designed to be representative of cases to which Rule 82 would apply.

174. The sample was drawn from all civil cases closed in Anchorage in 1993. The database was weighted and included 40 tort jury and non-jury trials, of 737 cases. Included were all cases described as malpractice, property damage, wrongful death and personal injury. Data provided by the supreme court to the legislature as a fiscal note for 1995 tort reform legislation also cited a trial rate of 4% for tort cases in Alaska in Fiscal Year 1994. H.R. 158, 19th Leg. (1995).

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

176. NCSC STATISTICS 1993, *supra* note 142, at 24. Another source said that 6.9% of medical malpractice cases were resolved at trial. Franklin, *supra* note 170, at 65. Other national data indicate that medical malpractice cases account for 11% of all jury trials and that jury trials are twice as prevalent among medical malpractice cases as among civil dispositions in general. John A. Goerdts et al., *Litigation Dimensions: Torts and Contracts in Large Urban Courts*, 19 STATE CT. J. 23, 24 (1995).

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

because about 75% of malpractice trial verdicts were for defendants.¹⁷⁸ None mentioned Rule 82 as a major factor in their decision. In fact, we found that the defendants and plaintiffs each prevailed 50% of the time in the handful of Alaska malpractice trials.

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

Plaintiffs fared better in non-jury trials for civil/contract cases, with ten of sixteen plaintiffs winning at trial (63%).¹⁷⁹ Plaintiffs fared better in non-jury personal injury trials, with all four of the plaintiffs prevailing (100%). Defendants prevailed in two-thirds of the injunctive relief suits, and in non-jury malpractice and property damage trials, plaintiffs and defendants split evenly. These small numbers cannot state with statistical accuracy the likelihood that any particular case will result in a certain outcome, but they suggest that civil trials in Alaska may not favor either plaintiffs or defendants with any certainty.¹⁸⁰

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

4. *Federal District Court Data.* Alaska's federal district courts apply fee shifting to some federal cases under the District's

178. National data supported this perception. One source said that 30% of malpractice verdicts were for plaintiffs. NCSC STATISTICS 1993, *supra* note 142, at 25. Overall, plaintiffs won about 50% of the time in jury trials, *id.*, consistent with Alaska's experience.

179. These data take into account only the cases in which one or the other party clearly prevailed. Nineteen of the 53 non-jury trials ended in a dismissal as the final action.

180. Again, this finding is consistent with national data that suggest that plaintiffs and defendants prevail in about equal numbers in civil trials. *See supra* note 178 and accompanying text.

Local Rules.¹⁸¹ We reviewed all federal cases closed in 1993 to which Rule 82 might have applied, either because they were diversity cases¹⁸² or because the district court's local rules apply Rule 82. Three hundred and fifty-nine cases met these criteria. We reviewed the composition of this group of cases, as well as data from the district courts' and Ninth Circuit's reports.

Figure 7¹⁸³ shows the composition of the federal cases. Tort cases made up about 28% (96) of the group of civil cases closed in 1993 in the Anchorage federal district court that we reviewed. Within this group, the seventy-five personal injury cases constituted the largest group (78%), with small numbers of malpractice (2), property damage (7) and wrongful death (12) cases. For comparison, the Anchorage civil court caseload had 19% tort cases, and the national data showed an average of 32% tort cases in civil caseloads for selected jurisdictions.¹⁸⁴

Among Anchorage federal district court cases examined, 5% concluded with a trial.¹⁸⁵ As did the Anchorage state courts, the federal district court appeared to try a larger percentage of tort cases than other civil cases. About 7% of federal personal injury cases went to trial, as did about 8% of wrongful death cases¹⁸⁶ and 5% of the "other contract" cases.¹⁸⁷ This pattern of relatively low tort filings and higher tort trial rates resembles that found for state court cases in the 1993 Anchorage database and in the statewide data.

Overall, comparing Alaska's filing trends and caseload composition to those in other states was difficult because the data often were not strictly comparable. The comparison suggested that Alaska's tort filing trends resembled trends in jurisdictions that did

181. D. ALASKA LOCAL R. 54.3.

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

183. See *infra* Table Appendix.

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

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

186. Neither of the two federal malpractice cases went to trial.

187. Three of the four federal jury trials in 1993 were civil and contract cases.

not shift fees. However, the data supported a different conclusion for caseload composition. Alaska state courts may have had a lower rate of tort filings than other state courts, although we could not say whether lack of data comparability, fee shifting or other factors caused the differences in caseload.

The finding that other jurisdictions had lower rates of tort trials than other civil trials while Anchorage had higher rates of tort trials emphasized the need to consider all aspects of case processing when looking for effects of fee shifting. Taken as a whole, these data suggest that if fee shifting affects case filing trends and trial rates in Alaska, the effects are complex and may result in a net situation little different from that found in states that do not shift fees.

B. Amount and Frequency of Attorney Fee Awards in Anchorage Cases

Another question raised by a fee-shifting scheme is how it operates in practice. How often are attorney's fee awards made, and how much money typically is awarded? To answer these questions, we sampled groups of recently closed state and federal court cases in Anchorage to which Rule 82 would apply.¹⁸⁸ We also interviewed 161 litigation attorneys licensed to practice in Alaska and asked them to answer a series of questions about two of their most recently resolved civil cases.¹⁸⁹

1. *Frequency of Attorney's Fee Awards.* How often do courts award attorney's fees? Although Rule 82 applies in principle to most state court civil cases and to all federal diversity cases,¹⁹⁰ we did not expect to find many fee awards in the court case files. Until a case progresses to judgment, one party has not prevailed, and courts would not make a fee award. We know from experience that most cases settle before that point. The data confirmed this hypothesis: Only about 10% of state cases contained a Rule

188. For an explanation of how we sampled the cases, see AJC, ALASKA'S ENGLISH RULE, *supra* note *, at app. A. For a description of the types of cases in the sample, see *id.* at app. D.

189. The attorneys' names were drawn at random from a list of 240 attorneys whose names appeared in litigated cases filed with the state court system in Anchorage. For the interview questions we asked attorneys, see *id.* at app. C.

190. See *supra* note 182 and accompanying text.

82 attorney's fee award,¹⁹¹ and only 6% of the federal cases included a Rule 82 attorney's fee award.¹⁹²

While we anticipated finding few fee awards in cases settled short of judgment, we were surprised that relatively few of the trial cases contained a fee award. Fee awards were made in only about half (52%) of the state court trials and only in 22% of the federal cases resolved at trial.¹⁹³ One possible explanation might have been that bench trials and hearings were difficult to distinguish in the case files. However, a review of the state court cases failed to support the hypothesis that hearings had been mistakenly coded as trials.

Because the court files contained little explanation for the relatively low number of fee awards in trial cases, we asked the judges and attorneys chosen for this study about situations in which a Rule 82 award would not occur after trial.¹⁹⁴ Eight of the twenty-nine trial judges interviewed stated that they did not make fee awards where neither party prevailed. Six said they did not make fee awards if both parties prevailed in some significant respect, that is, if the case were "a wash." Eleven judges reported that they did not make fee awards if the prevailing party "forgot to file the motion" or "didn't bother to file a motion."¹⁹⁵

The attorney interviews supported the judges' observations. Of the adjudicated¹⁹⁶ cases attorneys described, Rule 82 awards occurred in slightly more than half (57%). The most common reason attorneys gave for lack of a Rule 82 award in adjudicated cases was post-judgment settlement (about one-third of the cases). Attorneys reported that perhaps the most common form of settlement involved the prevailing party's agreement not to apply for fees in exchange for the loser's promise not to file a notice of

191. The 93 cases in our state court sample that contained a fee award served as the basis of our description of attorney fee awards.

192. Twenty of the 359 federal cases contained a Rule 82 fee award.

193. The federal court made fee awards in all four of the jury trials. The extremely low incidence of fee awards in federal non-jury trials could reflect the ambiguity of a "trial" versus a "hearing."

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

195. The current version of the state rule requires that the party asking for a fee award file a motion "within 10 days after the date shown in the clerk's certificate of distribution on the judgment." ALASKA R. CIV. P. 82(c).

196. Adjudicated cases include those resolved by trial or dispositive motion.

appeal or to dismiss the appeal. Attorneys reported that about 12% of the adjudicated cases lacking a Rule 82 award had settled for this trade. The next most common reason attorneys gave for lack of a Rule 82 attorney's fee award in an adjudicated case was that a state or federal statute precluded operation of Rule 82. Other reasons, in order of frequency, were that neither party prevailed, that a contract provision governed the attorney's fee award, that the prevailing party failed to request a fee award for a reason other than post-judgment settlement and that the losing party declared bankruptcy.

Similarly, we were surprised at how few of the default judgments contained a fee award. Fee awards appeared in only 38% of the state cases that ended with a default judgment, and in only one of the twenty-four federal default judgment cases. Further analysis of the state court default judgments without Rule 82 awards showed that almost all of these were based on causes of action arising out of negligence, while those that did contain fee awards involved other matters. This finding is not surprising, as 1986 tort reform legislation prohibited fee awards to the prevailing party in uncontested negligence suits.¹⁹⁷

Cases ending in a judgment other than a default were more likely to contain Rule 82 awards than cases ending in dismissal or settlement; however, not all the judgments contained fee awards. About 59% of the state cases with a judgment other than a default had a Rule 82 award. Only about one quarter of the federal cases that concluded with a non-default judgment contained a Rule 82 award. Again, the case files contained little information to explain the absence of an award.¹⁹⁸ In less than 1% of the state cases and in one federal case, the file contained a ruling by the judge that the parties must bear their own fees.

Judges suggested other reasons why cases with a judgment might not contain a fee award. Almost all of the judges said they would not make a fee award if the prevailing party did not request one. They speculated that these cases might have settled post-judgment, with the prevailing party agreeing to forego a fee award in exchange for some concession from the loser as to an appeal, a

197. 1986 Alaska Sess. Laws 139 § 4 (amending ALASKA STAT. § 09.60.010); *see supra* note 38.

198. One hypothesis as to why so few judgments contained fee awards is that some were stipulated lump-sum judgments that did not separately list attorney's fees.

payment plan or other terms. As discussed above, interviews with attorneys for this study suggested that Rule 82 awards do play a significant role in post-judgment settlements, although it seems unlikely that post-judgment settlements accounted for all the judgments in which no fee award was made.

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

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

In a few instances, cases that settled contained a Rule 82 award (39 of the 439 state cases coded as “settled” and two of the eleven federal cases coded as “settled”). An explanation was described by two judges (one state and one federal) for cases in which the parties reach settlement on everything except fees. These judges instruct the parties to submit the fees to be decided on motion. Another explanation was suggested by our interviews with attorneys. Some attorneys described cases in which the judge had granted a partial or full summary judgment motion that resolved the major part of the case and then awarded attorney’s fees on the motion. The attorneys were left to settle the remaining issues.¹⁹⁹

Most discussions about attorney’s fees occur in the context of tort cases. However, tort cases do not comprise the majority of

199. The settlement usually involved waivers of attorney’s fees.

cases in which fees are shifted. For example, the federal court made three quarters of its Rule 82 awards in federal civil and contract cases.²⁰⁰ Only one award was made in a federal personal injury case,²⁰¹ and one award occurred in each group of cases involving malpractice, injunctive relief, real estate and property damage. No awards occurred in a wrongful death case. In the state court sample, personal injury cases accounted for about 28% of total cases and 16% of the Rule 82 awards.

2. *Amounts of Attorney's Fee Awards.* A second issue is the size of attorney's fee awards. How often does the prevailing party win a large fee award? In state court, about 39% of the Rule 82 awards were under \$1,000. One third fell between \$1,000 and \$5,000, and about 27% exceeded \$5,000.²⁰² The median Rule 82 award was \$2,240.²⁰³ The federal Rule 82 awards were larger. A majority (60%) of the federal Rule 82 awards exceeded \$5,000.²⁰⁴ Thirty percent fell between \$1,000 and \$5,000, and only two were less than \$1,000. The median Rule 82 award for federal cases was \$10,854.²⁰⁵

Eighty-seven cases described by attorneys involved a fee award for which they knew the amount. Of these, 15% were less than \$1,000. About 27% fell between \$1,000 and \$5,000, and 58% exceeded \$5,000. Eight of the awards described by attorneys exceeded \$50,000. The median Rule 82 award described by attorneys was \$9,000.²⁰⁶ Fee awards in cases described to us by attorneys probably were larger than those in the case files because we asked attorneys specifically to tell us about recent trials or contested cases, thus biasing the attorney case sample toward the higher end of the case value range. Also, attorneys may have included court costs with attorney's fees.

The data from attorney interviews suggested that fee awards

200. Civil and contract cases accounted for about 60% of our federal cases.

201. These cases comprised about 21% of the total federal cases.

202. Our state court sample contained only two awards greater than \$50,000.

203. The largest state court award was \$120,846; the smallest was \$120.

204. The federal cases contained seven awards greater than \$100,000. One reason for the difference may be that cases in federal court may involve larger damages and judgments than the average state court case. Another may be that attorneys spend more time on federal cases than on state court cases. See Kritzer et al., *supra* note 84, at 8.

205. The largest award was \$654,913; the smallest was \$375.

206. The largest award was \$650,000; the smallest was \$74.

in cases that went to trial or were otherwise strongly contested often climbed into the tens of thousands of dollars. However, the more representative data from the state and federal court files confirmed that cases with small awards outnumbered those containing large fee awards.²⁰⁷ In the cases reported to us by attorneys, differences between the values of plaintiffs' awards and defendants' awards emerged with cross-tabulations. Calculations showed that 31% of defendants, versus only 14% of plaintiffs, received awards of \$5,000 to \$150,000. In other words, defendants told us about cases that resulted in larger awards more often than did plaintiffs' attorneys.

V. CONCLUSION

This Article has examined attorney's fee shifting in Alaska, both by collecting extensive data from case files and by conducting thorough interviews with numerous attorneys and judges with knowledge of the operation of Civil Rule 82. From these data we have described the rule's operation in some detail. However, it is important to remember that we could not compare these data to a control group of cases in which Rule 82 did not apply because the rule applies to most state civil cases, to federal diversity cases and to some other federal cases through local court rules.²⁰⁸ Thus, we could not directly compare how cases would be litigated with and without the application of Rule 82. Nevertheless, our findings should help Alaskans understand the effects of Rule 82 and assist policymakers nationwide to evaluate proposed fee-shifting rules or statutes in their jurisdictions.

A. Rule 82 Seldom Played a Significant Role in Civil Litigation

The major conclusion of this Article is that attorney's fee shifting in Alaska seldom played a significant role in civil litigation. An almost infinite number of factors structured the litigation of civil claims. These included, but certainly were not limited to, the type of dispute involved, the parties' personalities, the parties' financial resources, the strength of the legal claims involved and the

207. Although fee awards in the hundreds of thousands of dollars were not the norm, attorneys' and litigants' knowledge that they could occur might have nevertheless affected their behavior.

208. The rule does not apply to divorce and a few other types of cases, which either could not be compared because they differed in nature or were too few in number to make a valid analysis.

magnitude of the stakes. The possibility of having to pay the other side's attorney's fees was only a minor factor on this list.²⁰⁹

One measure of Rule 82's influence was the frequency with which fee awards occurred. Rule 82 awards were made in only a small percentage of cases examined: only 10% of the state court case sample and 6% of federal court cases contained a fee award. Even among cases resolved at trial or on dispositive motion, a small fraction of the total civil caseload, few fee awards were made. Such awards were rare for several reasons: (1) the case may have settled before the fee award; (2) neither party may have "prevailed;" (3) both parties may have prevailed in some respect; or (4) a contract provision or statute may have governed fee awards.

Even when fee awards were made, parties actually paid the award less than half of the time. The prevailing party collected the award in only 40% of the fifty-seven cases attorneys identified as having a fee award.²¹⁰ Parties were unable to collect awards because the person against whom the award was made was judgment-proof or had declared bankruptcy, or because the prevailing party waived fees as part of a post-judgment settlement.

Surprisingly, the rule did not often affect filing decisions either. 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 roles in the filing decision.

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 those 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 uncollectible.

While Rule 82 applies to most civil litigation in Alaska, our data suggested that it influenced only a minority of cases. Among

209. On the other hand, the possibility of being reimbursed for some attorney's fees at the end of the case also was a minor factor in most cases.

210. 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.

the cases it did influence, its effects were subtle. It was part of the legal landscape—virtually all of the attorneys 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.

B. The Effects of Rule 82 Varied

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 required 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.

The two factors that interacted most decisively with Rule 82 to influence litigation strategy were the parties' financial resources and the strength of their cases. Generally, the rule affected parties of moderate means more than it did parties with more resources, and much more than parties with few financial resources. As one attorney noted, "the people who don't go to court are those who just can't afford to lose [a Rule 82 award]." 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 strength of a case is inversely proportional to the likelihood of an adverse fee award. For those who had assets to lose to an adverse attorney fee award, Rule 82 assumed greater importance, along with the strength of the case, in the decision whether to file.

The rule also discouraged filing and encouraged settlement for parties who perceived weaknesses in their cases. One attorney said that Rule 82 affected clients' decisions "regularly when liability is looking weak and the client is of modest means (ie, \$10,000 in the bank)." Conversely, it occasionally encouraged a litigant to pursue more aggressively a case that he or she believed to be especially strong. A defense attorney in a real estate case who thought the plaintiff had a strong case said that "Rule 82 was the reason the plaintiff filed before looking into settlement possibilities."

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 could recall an instance in which Rule 82 played a significant role in their

client's decision to assert a claim.²¹¹ Cases described by these attorneys included tort, contract and real property cases. A few attorneys (mostly plaintiffs' 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 discouraged potential tort claimants from filing suit, although the picture was by no means clear. The rate at which tort cases were filed in Alaska's courts may be lower compared to other states, and torts seemed to constitute a smaller proportion of the total civil caseload in Alaska than in other states.²¹² Many factors other than Rule 82 could account for these data, such as cultural, social and economic factors, local legal culture or lack of comparability of data. Moreover, Alaska's overall civil filing rates were very close to the median for jurisdictions that did not shift fees. Attorneys did not believe that Rule 82 obstructed indigent plaintiffs' access to the courts. Further, more than 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.²¹³ Thus, if the rule played a role in discouraging potential tort plaintiffs from using the courts, it had a selective impact that depended heavily on case strength and parties' assets.

Contract and debt cases presented a slightly different picture. In some small collection actions, debt cases and meritorious but uncomplicated small claims cases, attorneys and judges believed that the rule actually encouraged filing. For at least some of these cases, the probability of a fee award at the end made filing economically feasible where otherwise it may not have been.

However, Rule 82 contributed to increased filings in other ways. Among the cases that would not be found in a jurisdiction

211. Note that a few of these attorneys could have been referring to cases in which the rule encouraged rather than discouraged filing.

212. On the other hand, some evidence suggested that tort cases went to trial more often in Alaska than elsewhere. It may be that fee shifting discouraged at least some plaintiffs from filing but encouraged those who do file to pursue their cases more aggressively.

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

that did not shift fees were insurance policy limits/bad faith cases and appeals of fee awards. Parties may file too few of these cases to affect statewide trends,²¹⁴ 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 Alaska 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.

Of particular note, the rule did not seem to affect the filing of frivolous claims. Sixty-four percent of attorneys interviewed said that Rule 82 did not deter frivolous litigation.²¹⁵ Comments from attorneys and judges suggested that “frivolous” litigation was driven by factors generally outside the influence of Rule 82, particularly non-economic factors. These factors included litigating for a principle or because of emotion. A few attorneys described cases in which they thought their opponents had evaluated the cases incorrectly at the beginning, giving their clients unrealistic expectations, and then felt obliged to follow through with litigation. Two attorneys told about cases in which their clients “unreasonably” insisted on trying the case against their advice and lost badly.

The rule had moderate and often contradictory effects on settlement strategy. It increased the value of reasonable cases, pushed strong cases toward 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, due to the likelihood of a large adverse fee award after trial. A defense attorney confirmed that where the plaintiff has a “valid” cause of action, the defendant’s “Rule 82 exposure is more clear,” and the defense will probably “pursue settlement earlier.”

For optimistic plaintiffs, the likelihood of increasing total recovery with a fee award after trial discouraged early settlement,

214. The increased litigation in these areas may be offset by the chilling effect discussed previously. See *supra* text accompanying notes 65 and 143.

215. One obvious problem with this finding was the difficulty of distinguishing a “frivolous” suit from one that was merely below average or weak in some aspect. Another problem was a lack of information about the volume of frivolous cases. An important future study would be a systematic empirical evaluation of frivolous cases.

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 farther apart. The rule caused some litigants, most noticeably plaintiffs with assets who feared adverse awards, to discount their claims. One plaintiff's personal injury attorney stated that fear of Rule 82 exposure caused a client with some assets and a good claim to settle for "less than the case was worth" three or four times within the previous year. The rule influenced some litigants with especially strong cases to inflate their claims; one insurance defense attorney said, "It's just an extra 10% added to the amount my client will pay in the end."

Given the rule's ability to encourage settlement in many types of cases, does it put undue pressure on some litigants to settle?²¹⁶ 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. There was evidence suggesting that some cases in Alaska were filed and settled for "nuisance value," although these data did not permit us to say whether it happened less in other 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 that "litigation might increase by a small percentage." One judge expected to see fewer parties filing non-tort lawsuits, especially those in which they could recover little money.²¹⁷ A large minority of the judges predicted that if the court revoked the rule, the only change in their courts would be

216. In the 1992 survey of Bar members regarding Rule 82, 68% of the 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.

217. One criticism of the American rule is that "the little man" in small value lawsuits cannot afford to file justified suits because he will not recover enough damages to cover attorney's fees and that attorneys do not take these cases on contingency fees. See Ehrenzweig, *supra* note 2, at 795-96.

“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.

C. 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 it be retained.²¹⁸ Thirty-six percent of the attorneys wanted to keep the rule but modify it in some way. Some suggested specific amounts: one attorney wanted to increase all percentages by 10%; another wanted to increase them to 25%; a third suggested increasing the percentage on judgments greater than \$100,000; a fourth wanted to front-load the first \$25,000 more heavily and decrease the percentages as the judgment amounts increased; and two others suggested increasing the percentages on the “lower-end” cases (from \$25,000 to \$100,000).²¹⁹ Similarly, 80% of the 508 attorneys responding to the 1992 supreme court survey voted to retain the rule.

Only a notable minority (35%) of attorneys in the current

218. Many of the attorneys who wanted to keep the rule suggested changing it. Most of their suggestions were not fundamental changes. About a dozen attorneys wanted to increase the percentage recoveries for monetary and/or nonmonetary judgments. Other suggestions included: (1) capping the nonmonetary judgment recovery amount; (2) going back to the pre-1993 rule; (3) making an exception in employment cases; (4) increasing to full fee recovery; (5) changing fees in default judgments to a percentage of actual fees; (6) removing the distinction between “contested” and “contested with trial;” (7) linking the amount of the fee award to the parties’ relative reasonableness in settlement negotiations [Case law currently forbids this approach. See *Van Dort v. Culliton*, 797 P.2d 642, 645 (Alaska 1990); *Myers v. Snow White Cleaners*, 770 P.2d 750, 752 (Alaska 1989)]; (8) eliminating attorney’s fee awards for the defense in plaintiff personal injury cases absent a finding that the case was frivolous; (9) requiring the plaintiff or the plaintiff’s attorney to post an “attorney’s fee bond” in personal injury cases; (10) exempting smaller-value cases from the rule; (11) giving trial judges more discretion in making fee awards; (12) giving trial judges less discretion in making fee awards; and (13) considering the relative wealth of the parties. The fact that so many wanted change 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.

219. This suggestion refers to *Bozarth v. Atlantic Richfield*, 883 P.2d 2 (Alaska 1992), in which the supreme court upheld a large fee award against a plaintiff who sued his employer.

study who spent half or more of their time defending negligence cases wanted to eliminate the rule. These attorneys believed that the disadvantages to their clients of increased payouts outweighed the advantages of recouping trial costs, using Rule 82 as a hammer (along with Rule 68 offers) to force settlement or to discourage marginal or frivolous claims.

On the other hand, 96% of the attorneys who spent half or more of their time handling business and corporate matters wanted to keep the rule. These attorneys, who often represented creditors and other “repeat players,” believed that the advantages for case settlement and increased recoveries outweighed any disadvantages. Like the Bar as a whole, plaintiff’s attorneys who favored keeping the rule (70%) thought that the advantages of higher recoveries outweighed any chilling effects or undue pressure to settle. It seemed that attorneys who had an adequate portfolio of cases to choose from—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 that it (1) discouraged some middle class parties from filing cases that either wealthy or poor plaintiffs would file, (2) discouraged some suits (or defenses) of questionable merit and (3) encouraged 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 believed that the rule worked in a positive way more often than not. The majority favored keeping the rule, although a significant minority of insurance defense practitioners favored its repeal.

D. Recommendations

Our recommendations have two parts: (1) recommendations to Alaska and (2) 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.

1. *Recommendations to Alaska Policymakers.* We recommend that Alaska retain Civil Rule 82, with limited changes. Perhaps the best reason to do so is that, more often than not, Alaska practitioners like the rule and think that it benefits them and their clients more than it harms them or has no effect. Judges also like the rule more often than not and are comfortable with its operation. For the most part, Rule 82 seemed to affect the processing and resolution of cases positively, even though this effect was subtle and varied. The negative effects of the rule, when tempered by the judicial discretion available under the 1993 amendments, were relatively minor and were offset by the rule's benefits.

The Alaska Supreme Court should consider at least a few possible changes to Rule 82 or the case law surrounding its application. A number of attorneys questioned why plaintiff and defendant recovery schedules differed. While the origins of the dual recovery system remained unclear, we did learn that defendants' 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 despite the fact that 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 actual fees incurred. Another possibility is to base fee awards on the amount of recovery, or, in the event of no recovery, on the amount in controversy.²²⁰ 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. One drawback is that plaintiff's attorneys would have to estimate time spent and document it with affidavits or time sheets, and in cases such as contingent fee and high-volume collections cases, they often do not keep time sheets. Moreover, parties probably would disagree about the amount in controversy in the event of a defense verdict,

220. This system is used successfully elsewhere. In Germany, the parties name the damages up front, and the amount of the fee award is set as a percentage of that amount. Pfennigstorf, *supra* note 2, at 63.

requiring parties and judges to spend more time than is currently spent settling the amount of fees. Finally, 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 actual fees, could apply to some cases (such as tort cases), while another schedule, based on the amount in controversy, could apply to others (such as debt/contract and real estate cases). The advantage of this approach is that the rule could be better tailored to meet its goals, although the process initially might be more complicated and time-consuming.

Our interviews with attorneys and judges did not suggest that the 1993 amendments had increased litigation at the trial court level.²²¹ Our data do not support a recommendation that the factors in the amendments be revoked. While the factors seldom were invoked, they seemed to fit when invoked.²²² We also see no real reason why attorney's fees in appellate cases should be awarded based on a 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 in Alaska Supreme Court caselaw 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.²²³ 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.²²⁴ 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

221. Litigation at the appellate level may increase if cases involving the eleven statutory factors make their way up to the supreme court, although we did not hear of many challenges to the factors.

222. Furthermore, Oregon recently incorporated them into its fee shifting statute. See *supra* note 23.

223. *Gates v. Tenakee Springs*, 822 P.2d 455, 463 (Alaska 1991); *Alaska Fed. Sav. & Loan v. Bernhardt*, 794 P.2d 579, 581-82 (Alaska 1990).

224. *Alaska Fed. Sav. & Loan*, 794 P.2d at 581.

not recover a money judgment, our interviews with judges suggested that the defeated adversary usually alerted the trial judge to 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 warrants making them eligible for attorney's fee awards.²²⁵

2. *Recommendations to National Policymakers.* Our primary recommendation to national policymakers is to think carefully 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 care in considering changes to the present system, other policymakers should approach overall change in fee shifting practices with great prudence.

The primary reason for this recommendation is that attorneys and judges in state courts 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 unjustified.

Any reforms that involve attorney's fees on either the federal or state level should carefully analyze the effects of fee shifting on different types of cases (tort versus contract versus debt collection), on parties with different financial resources and on the other factors discussed in this Article. These effects of attorney's fee shifting vary greatly depending on the situation. Those who support fee shifting in hopes of decreasing claims, speeding up the disposition of cases or inducing settlement should be advised of the effects of Rule 82. In Alaska's experience, the rule's impact in these areas has been complex, subtle and often contradictory.

Because the data suggested that the rule affected different types of cases in identifiably different ways, policymakers should clarify the rationales, desired effects and goals underlying fee shifting. For example, if the primary rationale for fee shifting is fairness to both sides, recovery for both defendants and plaintiffs

225. 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 (Alaska 1978).

might be a percentage of actual fees. Judges 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.

Policymakers whose rationales include discouraging frivolous or meritless litigation probably should not adopt a scheme similar to Alaska's.²²⁶ Our data did not show that Alaska's system significantly deterred frivolous litigation. The cost to another jurisdiction of implementing the new system probably would outweigh any benefits.²²⁷ However, policymakers 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. Our interviews 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. However, to limit the judge's discretion, the law should set guidelines for determining the amount of the award. Our preference would be to tie the fee award to a percentage of the amount the loser's unreasonable conduct caused the winner to expend in fees.²²⁸ In order to build some flexibility into the system, we recommend including some factors similar to the ones in Rule 82(b)(3). These factors are broad enough to give judges and litigants leeway in appropriate cases, yet specific enough to create needed uniformity in decisions.

Policymakers considering adopting fee shifting should keep in mind two potential problems highlighted by attorneys interviewed

226. To the extent that policymakers 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 on plaintiffs of moderate means with average or weaker cases. Full fees also would magnify the effect of encouraging protracted litigation and case filings for parties with strong claims.

227. 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 47, at 445. This author suggested, as did a handful of attorneys that we interviewed, that Alaska Civil Rule 11 (or its federal counterpart) is the proper means for deterring frivolous litigation. *Id.* Two attorneys that we interviewed wished that state judges would weed out weak and marginal claims by granting summary judgment more often.

228. 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.

for this Article. The first issue is the potentially large adverse fee award that chills access to the courts or puts undue pressure to settle on litigants of moderate means.²²⁹ This phenomenon was not widespread in our data but occurred relatively often in cases with unclear liability or “soft” damages, with risk-averse plaintiffs or with insurance companies facing Rule 82 exposure exceeding the face value of the policy. Proposals that shift total rather than only partial attorney’s fees would exaggerate this effect.

The second issue is the two-way fee shift that becomes a one-way shift in practice, as has happened in most jurisdictions.²³⁰ A recurring criticism of Rule 82 was that it was “unfair” or “biased” because of the one-way shift phenomenon. A lawyer within the insurance industry who had experience with two-way fee shifting in Alaska reported that the fee shifting rule rarely benefitted 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.

In conclusion, Rule 82 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.

229. One commentator has suggested that the contingent fee lawyer, not his or her plaintiff client, be put at risk for costs. Herbert M. Kritzer, *Searching for Winners in a Loser Pays System*, A.B.A. J., Nov. 1992, at 54, 57. He predicts that “[t]his 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. Europeans have also developed legal insurance that 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 2, at 60.

230. However, one commentator has argued that it is fair to deny fees to prevailing defendants in non-frivolous lawsuits because 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, *supra* note 2, at 658-59.

Table Appendix

Figure 1

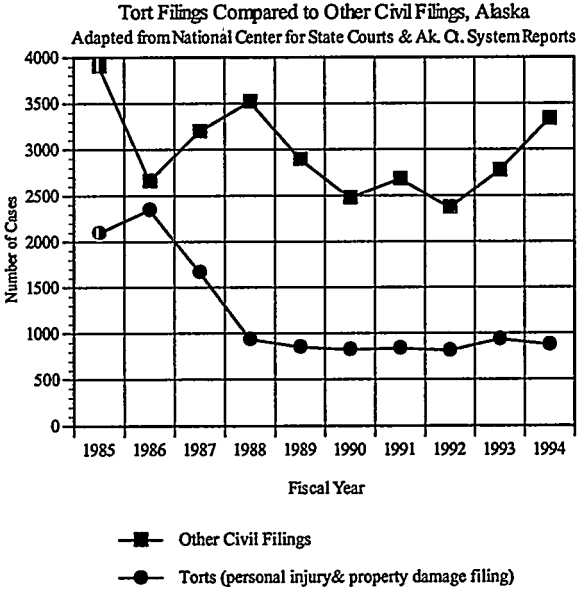


Figure 2

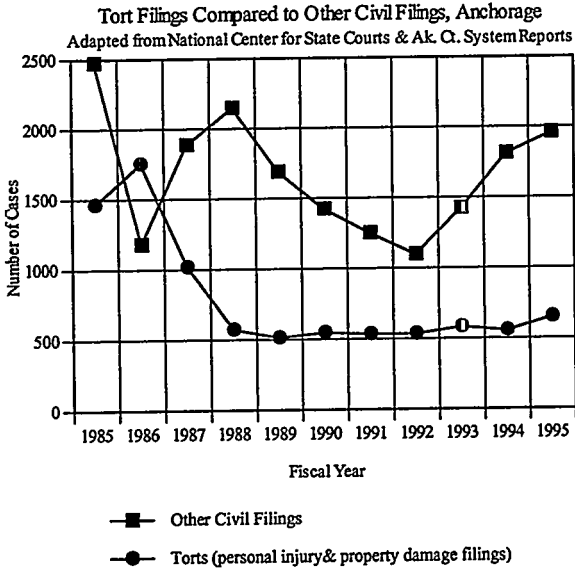


Figure 3

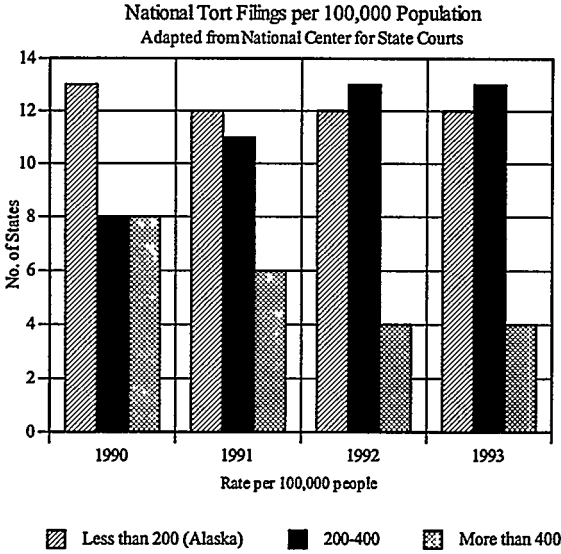


Figure 4

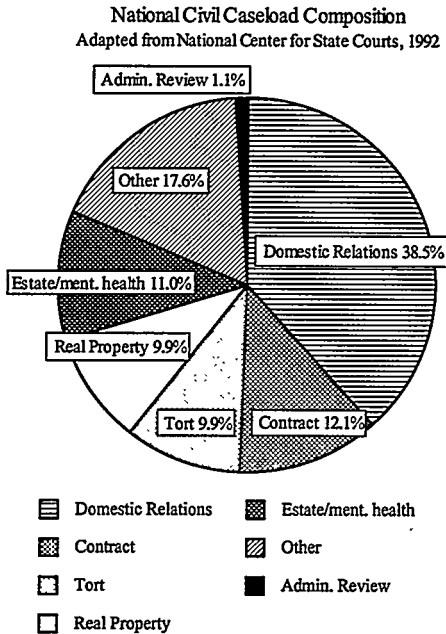


Figure 5

Superior Court Civil Cases, Alaska 1992-93
Adapted from Alaska Court System Annual Report (1993)

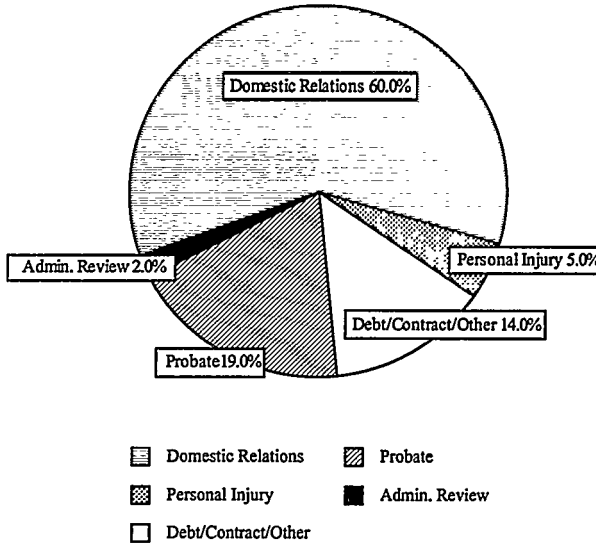


Figure 6

Other Civil Case Dispositions, 1989-95
Anchorage Cases, Alaska Court Reports, 1989-95

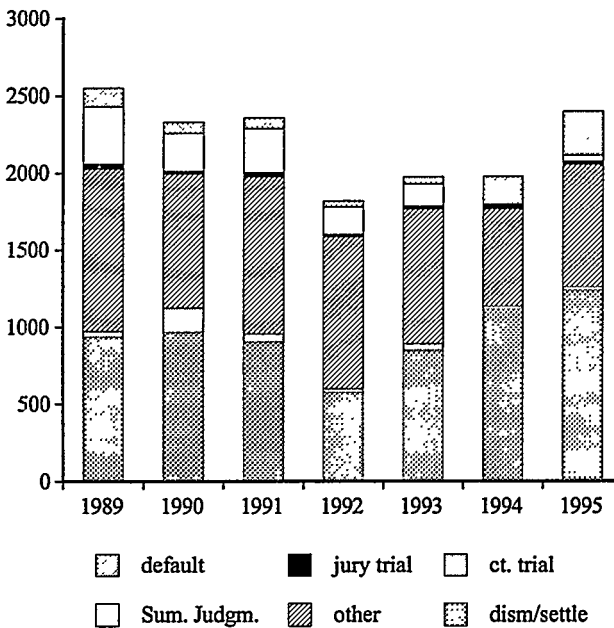


Figure 7

