Rule 82 Revisited: Attorney Fee Shifting in Alaska

In 1992, the Alaska Supreme Court amended Civil Rule 82, the state's unique attorney fee-shifting provision. The revision addresses some of the practical deficiencies of former Rule 82, as well as the supreme court's concern that the rule deterred a large segment of the population from access to the courts. In addition to increasing the complexity of the rule, the supreme court has further entrenched a fee-shifting regime that is not adequately justified by its official or perceived purposes. This note concludes that Civil Rule 82 should be subjected to critical, empirical reevaluation.

I. INTRODUCTION

The United States is nearly unique in the world in its approach to attorney fees; under the American rule, each side generally bears its own attorney fees in litigation.1 In contrast, the English "loser pays" rule, used by most other countries, requires the losing party to pay a substantial portion of the prevailing party's attorney fees.2 Alaska is unique in the United States, since it has abandoned the American rule in favor of a complex fee-shifting system that ordinarily requires the losing party to pay a portion of the winner's attorney fees.3

The "litigation explosion" in the United States has recently propelled attorney fee shifting into the public limelight. Segments of the business community and other tort reform advocates have called for modification or abandonment of the American rule.4

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4. During the Bush Administration, the President's Council on Competitiveness issued a report calling for the adoption of a modified form of the English rule as a method to control litigation. Bradley L. Smith, Note, Three Attorney Fee-
According to these critics, the American rule does little to discourage borderline cases and marginally motivated plaintiffs. They argue that requiring losing parties to pay the winners’ fees would deter plaintiffs from filing non-meritorious claims, and would encourage the settlement of other claims because of the higher stakes involved with losing. Defenders of the American rule, conversely, maintain that all Americans are entitled to their day in court. They strongly oppose a fee system that might discourage individuals of moderate means from instituting actions to vindicate their rights.

Amid this national debate surrounding the future of the American rule, Alaska has recently reevaluated the merits of its unique fee-shifting scheme. While there are now well over 100 federal and 2,000 state fee-shifting statutes in the United States, Alaska is the only jurisdiction that has entirely rejected the American rule. In its place, Alaska has fashioned a complex fee-shifting arrangement that combines a partial shift in favor of the prevailing litigant with a federal-style offer-of-judgment device. After a period of intense scrutiny, the Alaska Civil Rules Committee in 1992 recommended substantial revisions to Rule 82. The Alaska Supreme Court, despite input from a sizeable

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*Shifting Rules and Contingency Fees: Their Impact on Settlement Incentives, 90 Mich. L. Rev. 2154, 2156 (1992) (citing President’s Council on Competitiveness, Agenda for Civil Justice Reform in America 1, 24-25 (1991)).
6. Id.
8. Id. (citing Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967)).

A number of countries are considering reforms that would bring their legal systems closer to the American approach. Even England, despite its heavily tax-supported legal aid system, has considered modifying the English rule. A 1991 report of Britain’s Lord Chancellor called potential liability for an opponent’s litigation fees and costs “arguably the major deterrent against taking legal action.” Id. at 28 (quoting Lord Chancellor’s Dept’’ Review of Financial Conditions for Legal Aid: Eligibility for Civil Legal Aid 37 (1991)).

10. Id. at 32.
12. Alaska Civ. R. 68. This arrangement is often referred to as a “two-way” shift, whereas fee-shifting schemes that award fees only to prevailing plaintiffs employ a “one-way” shift.
contingent of the Alaska Bar to eliminate fee shifting entirely, implemented these changes in Order No. 1118, which took effect on July 15, 1993.

This note analyzes the Alaska fee-shifting system in detail and argues that the state should retain the prolix mechanism in its present form only if it improves the legal system in identifiable, desired ways. Part II presents an overview of fee shifting in Alaska, with particular emphasis on former Rule 82 and Rule 68. Part III discusses the events and criticism leading to Rule 82’s amendment. Part IV examines the amended version of Rule 82 and speculates as to its probable effects. Part V explores the possible policy rationales for Alaska’s fee-shifting system and argues that the mechanism employed is not the best means to achieve these results. Finally, part VI concludes that the usefulness of amended Rule 82 must be reexamined empirically.

II. OVERVIEW OF FEE SHIFTING IN ALASKA BEFORE THE AMENDMENT OF RULE 82

As there is not yet any reported case law discussing the operation of Rule 82 in its amended form, and since the new rule retains many of the basic provisions of the prior rule, familiarity with Alaska’s pre-amendment fee-shifting scheme is essential. Alaska’s well-established practice of fee shifting can be traced back to the territorial statutes of the early 1900’s.13 Today, Alaska Civil Rule 82 governs the allocation of attorney fees in conjunction with Rule 68, an offer of settlement device. The Alaska system, although functionally distinct from the fee taxation14 approach under a pure English rule, employs a similar two-way shift.

Alaska Civil Rule 82, supported by Alaska Statutes section 09.60.01015 and Civil Rule 54,16 sets the general framework for

14. The term "taxation," as it is used in this note, refers to the process of determining the portion of one party’s litigation expenses that may be charged to another party.
15. Alaska Statutes § 09.60.010 provides:
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, as defined in AS 09.17.900, unless the civil action is contested without trial, or fully
attorney fee shifting. Rule 82, before its amendment, provided in relevant part:

(a) Allowance to Prevailing Party
(1) Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such fees for the party recovering any money judgment therein:

ATTORNEY'S FEES IN AVERAGE CASES

<table>
<thead>
<tr>
<th>Judgment and, if awarded, prejudgment interest</th>
<th>Contested</th>
<th>Without trial</th>
<th>Non-_contested</th>
</tr>
</thead>
<tbody>
<tr>
<td>First $25,000</td>
<td>20%</td>
<td>18%</td>
<td>10%</td>
</tr>
<tr>
<td>Next $75,000</td>
<td>10%</td>
<td>8%</td>
<td>3%</td>
</tr>
<tr>
<td>Next $400,000</td>
<td>10%</td>
<td>6%</td>
<td>2%</td>
</tr>
<tr>
<td>Over $500,000</td>
<td>10%</td>
<td>2%</td>
<td>1%</td>
</tr>
</tbody>
</table>

Should no recovery be had, attorney's fees may be fixed by the court in its discretion in a reasonable amount.

(2) In actions where the money judgment is not an accurate criterion for determining the fee to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered. An application for attorney's fees in a default case exceeding $50,000 must specify actual fees.

(3) The allowance of attorney's fees by the court in conformance with the foregoing schedule is not to be construed as fixing the fees between attorney and client.

(4) Attorney's fees upon entry of judgment by default shall be determined by the clerk. In all other matters the court shall determine attorney's fees. Awards not pursuant to the schedule set forth in subparagraph (1) of this Rule shall be made only upon motion.

(5) A motion for attorney's fees must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment as defined by Civil Rule 58.1.
Failure to move for attorney's fees within 10 days or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees.\textsuperscript{17}

Alaska's two-way fee-shifting scheme was not designed to reimburse prevailing parties\textsuperscript{18} for the full amount of attorney fees incurred. Rule 82, rather, was intended to compensate a prevailing party partially for the productive work done by his or her attorney.\textsuperscript{19} The fact that, in practice, the actual bill for attorney fees may have been several times the size of the fee award was considered irrelevant.\textsuperscript{20} Because the schedule set out in Rule 82(a)(1) usually provided the basis for taxation when the prevailing party recovered a monetary judgment, partial compensation was the common outcome under Alaska law. In fact, Alaska trial judges estimated that the schedule determined the amount of taxation in over eighty percent of cases with monetary recovery.\textsuperscript{21} This percentage scheme allowed judges to expend minimal time and resources in administering schedule-based award cases.

Before the amendment of Rule 82, however, there were many situations in which the schedule was not used to determine the size of a fee award. When the prevailing party did not obtain a monetary remedy, judges had discretion to fix a reasonable fee award.\textsuperscript{22} If a judge determined that a schedule-based award did not accurately reflect the value of the legal services rendered, he or she could also depart from the schedule. Typically, this was a concern in equitable or mixed equity-law cases when an equitable remedy was sought, but some monetary relief might have been granted as well.\textsuperscript{23} Also, overcompensation was a concern when large monetary recoveries were obtained with a minimum of legal services. Likewise, undercompensation could have resulted from hard-fought cases yielding small recoveries. In such cases, a judge

\textsuperscript{17} Alaska Civ. R. 82(a) (repealed 1993).
\textsuperscript{18} The "prevailing party" is generally "considered to be the party who has successfully prosecuted or defended against the action, the one who is successful on the 'main issue' of the action and 'in whose favor the decision or verdict is rendered and the judgment entered.'" Adoption of V.M.C., 528 P.2d 788, 795 n.14 (Alaska 1974) (quoting Buza v. Columbia Lumber Co., 395 P.2d 511, 514 (Alaska 1964)).
\textsuperscript{20} Id.
\textsuperscript{21} TOMKINS & WILLGING, supra note 3, at 42.
\textsuperscript{22} Alaska Civ. R. 82(a)(1) (repealed 1993).
\textsuperscript{23} TOMKINS & WILLGING, supra note 3, at 34 n.130.
would then award "a fee commensurate with the amount and value of the legal services rendered." The current system, as amended, similarly allows judges to exercise their discretion when the schedule-based award is obviously inappropriate.

Furthermore, in special instances full compensation was allowed under the pre-amendment rule, and this is permitted after the amendment as well. Bad faith actions are one such instance. Public interest plaintiffs are also permitted full recovery, while defendants who prevail in public interest litigation may be denied any attorney fee compensation.

Judges additionally had discretion to disallow any attorney fee award based upon the equities of the case or other valid reasons. Moreover, the trial court retained the option of not characterizing either party as "prevailing," thereby denying any fee recovery.

The Alaska Supreme Court granted broad discretion to trial court judges in making fee determinations under Rule 82. Upon appellate review, awards made pursuant to the schedule were presumptively valid. Thus, the prevailing party was not required

25. See Alaska Civ. R. 82(b)(3); text accompanying note 120.
26. See Alaska Civ. R. 82(b)(3); text accompanying note 120.
28. The four criteria that determine whether a suit qualifies as one of public interest are:
   (1) Is the case designed to effectuate strong public policies?
   (2) If the plaintiff succeeds will numerous people receive benefits from the lawsuit?
   (3) Can only a private party have been expected to bring the suit?
   (4) Would the purported public interest litigant have sufficient economic incentive to file suit even if the action involved only narrow issues lacking general importance?
to supply itemized records of counsel's services to justify such awards. A trial judge's failure to adhere to the schedule without stating the reasons for deviating, however, constituted reversible error. Upon reversal, the appellate court would ordinarily remand the fee determination, forcing the trial judge to apply the schedule or articulate an adequate explanation. But if the trial court specified in the record its reasons for departing from the schedule, it had broad discretion to award amounts greater than those permitted under the schedule. The Alaska courts' lenient abuse-of-discretion standard tended not to disturb trial court awards unless the determination was "arbitrary, capricious, manifestly unreasonable, or . . . stemmed from an improper motive." Moreover, "a trial judge need not [have made] formal findings of fact and conclusions of law to justify his decision denying attorney's fees. An oral explanation on the record . . . [was] sufficient." For example, an award exceeding fifty percent of the actual attorney expenses incurred was deemed reasonable, but one exceeding ninety percent of the amount requested by the prevailing party was held to be excessive when there was no evidence that the losing party's claims were "frivolous, vexatious, or devoid of good faith." An award based on claimed attorney fees that appeared to be clearly excessive required a remand for a new fee award based upon reasonable expenditures.

When the prevailing party recovered no monetary judgment, appellate review differed slightly. As with monetary recoveries, a sufficient explanation was required if the trial court refused to award attorney fees to the prevailing party. A mere statement

33. Id.
34. Stefano v. Coppock, 705 P.2d 443, 446 (Alaska 1985).
35. Id.
42. Pratt v. Kirkpatrick, 718 P.2d 962 (Alaska 1986); see supra note 34 and accompanying text.
that "[u]nder the circumstances justice will best be served if each party bears [its] own costs and attorney's fees" was not considered a sufficient explanation.\textsuperscript{43} Generally, courts also had to explain full attorney fee awards.\textsuperscript{44} If the trial court did award fees, however, it did not have to supply reasons for its judgment as long as the award was only for partial expenses.\textsuperscript{45}

In practice, Alaska's former fee-shifting regime based upon schedule-based taxation was deemed a "fast, uncomplicated, easily managed enterprise" that judges conducted within minutes.\textsuperscript{46} With schedule-based fee awards, taxation required nothing more than a simple motion request.\textsuperscript{47} The moving party submitted affidavits containing attorneys' billing rates and the number of hours worked on the particular aspects of the case. Since fee shifting had become an accepted institution in the Alaska legal system, schedule-based awards were generally not contested.\textsuperscript{48}

Not every case was so straightforward. In approximately twenty-five to thirty percent of the cases, the prevailing party claimed, under Rule 82(a)(2), that the schedule was not an accurate basis for taxation.\textsuperscript{49} In these instances, the parties would file briefs and the judge would decide whether or not to use the schedule. If a trial judge elected not to use the schedule, the taxation process became even more time-consuming. The judge had to determine what constituted a reasonable fee as well as what percentage of it would be awarded. This procedure often entailed longer briefs from the parties, and occasionally hearings and discovery.\textsuperscript{50} The judge engaged in a similar reasonable fee and percentage recovery determination when the prevailing party received no monetary judgment.

Alaska judges employed varying procedures for determining what constituted reasonable fees. Some judges carefully examined each entry of the fee petitions for acceptability, recalculating the number of reasonable hours after subtracting unnecessary expendi-

\begin{footnotes}
\item[46] TOMKINS & WILLGING, supra note 3, at 41-42.
\item[47] Id. at 41.
\item[48] Id.
\item[49] Id. at 41 & n.149.
\item[50] Id. at 42.
\end{footnotes}
tures of time and hours spent on non-prevailing issues. Eventually, the judges drafted a fee order containing brief findings of fact supporting the fee award.

Other judges relied on a more intuitive approach. They used their experience and general sense of the case to estimate an acceptable benchmark range for the total fee. These judges looked at the average hourly fees in their districts and multiplied this figure by an estimate of the number of hours required for the type of case at hand. They compared this estimate with the amount requested in the fee petition. A request well above the benchmark estimate would have received closer scrutiny; otherwise, judges often "rubber-stamped" the fee request. Using this methodology, judges completed the entire taxation process in minutes, compared with about an hour for the alternative process outlined above.

After calculating the total reasonable fee under either of the two methods, judges had to determine the appropriate fraction of this fee to shift. The Alaska Supreme Court, before amending Rule 82, provided no set guideline for doing so. The text of former Rule 82 called for a reasonable amount "commensurate with the amount and value of legal services rendered." Under this loose standard, trial judges applied widely varying percentages for similar types of cases, creating a high degree of unpredictability. The proportion of fees shifted would fall anywhere between twenty and eighty percent of the reasonable fees, and anything in this range would generally not be reversed on appeal. One practitioner observed that awards at the upper end of this range were more common: "[t]he prevailing party defendant typically receives between 40% and 80% of the actual attorney fees incurred." In sum, schedule-based taxation operated fairly smoothly and efficiently under former Rule 82. Few schedule-based awards were appealed, computation was a simple process, and the amount of the

51. Id. at 42-43.
52. Id. at 42, 44.
53. Id. at 44-45.
54. Id. at 44.
award was a predictable function of the size of the judgment. When schedule-based computation was inappropriate, however, greater judicial time and resources were required at the trial court level. Additionally, the ambiguity inherent in determining a reasonable fee resulted in a large number of appealed awards. According to a 1982 survey, more than one-fifth of the cases coming before the Alaska Supreme Court contained attorney fee issues.58

A complete discussion of the Alaska fee-shifting system also requires consideration of the interaction between Rule 82 and Rule 68, a federal-style offer-of-judgment rule. Singly and in combination, these rules profoundly shape litigation and settlement incentives. Rule 68 provides:

(a) At any time more than 10 days before the trial begins, either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for money or property or to the effect specified in the offer, with costs then accrued. The offer may not be revoked in the 10 day period following service of the offer. If within 10 days after service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. The fact that an offer is made but not accepted does not preclude a subsequent offer.

(b) If the judgment finally rendered by the court is not more favorable to the offeree than the offer, the prejudgment interest accrued up to the date judgment is entered shall be adjusted as follows:

(1) if the offeree is the party making the claim, the interest rate will be reduced by the amount specified in AS 09.30.065 [2% per year] and the offeree must pay the costs and attorney's fees incurred after the making of the offer (as would be calculated under Civil Rules 79 and 82 if the offeror were the prevailing party). The offeree may not be awarded costs or attorney's fees incurred after the making of the offer.

(2) if the offeree is the party defending against the claim, the interest rate will be increased by the amount specified in AS 09.30.065 [2% per year].

c) When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability. 59

Under Alaska Civil Rule 68, either party may make a formal offer of judgment to be entered for a specified amount plus costs. In practice, however, the defendant is usually the party that makes the offer. If the plaintiff rejects the offer and later obtains a recovery, which, including prejudgment interest, is less than the amount of the offer plus prejudgment interest, the defendant is treated as the “prevailing party.” Consequently, the defendant would be entitled to attorney fees and costs from the time of the offer since, unlike the relatively little-used Federal Rule 68, 60 Alaska Rule 68 permits partial compensation for attorney fees pursuant to Rule 82. Because costs are often minimal, the impact of Alaska Rule 68 stems primarily from its interaction with Rule 82. 61

The following example illustrates this relationship. 62 Defendant makes a settlement offer to Plaintiff for $50,000 plus costs and attorney fees. If Plaintiff chooses to accept this offer, she may file for Rule 82 attorney fees and Rule 79 costs. Using the “contested without trial” column of the schedule in Rule 82, the fee award equals $6,500. Adding in the minimal costs usually recoverable under Rule 79 (assume $1,500), the total offer is worth approximately $58,000.

Suppose, however, that Plaintiff rejects the offer, proceeds to trial and receives a judgment of only $10,000. Also, assume that the injury occurred three years before the judgment and that the

59. ALASKA CIV. R. 68.

60. The United States Supreme Court in Marek v. Chesny, 473 U.S. 1 (1985), held that a plaintiff who rejects a defendant's Federal Rule 68 offer and obtains a positive judgment less than the amount of the offer loses the right to collect post-offer attorney fees. Id. at 10. This rule applies only to cases governed by federal fee-shifting statutes, which are usually pro-plaintiff. Plaintiffs in the federal system, therefore, never risk having to pay the defendant's legal fees by turning down an offer of settlement, since there is no statutory basis for pro-defendant fee-shifts.

61. Kleinfeld, supra note 56, at 5.

62. See id. at 5-7 (providing the basis for the hypothetical used in this note).
relevant interest rate was 5%. Since the award plus prejudgment interest, approximately $11,500, is less than the $50,000 offer, Defendant will be considered the prevailing party under Rule 82. The result can be disastrous.

If Defendant’s reasonable attorney fees are approximately $60,000, and if he wisely made the settlement offer early in the discovery process so that the bulk of the fees were incurred afterwards, Plaintiff suffers a net loss from the litigation. For example, if the court shifts 30% of the reasonable fees, Plaintiff’s $11,500 judgment and prejudgment interest will be offset by an $18,000 fee award to the defendant and other costs allowable under Rule 68 (assume $200 for subpoena costs for witnesses). In addition, Plaintiff incurred her own non-reimbursable costs (assume $10,000 for expert witnesses) and pays her attorney whom she hired on a contingent fee basis (assume 30% of $11,500, or $3,450). As an end result of the litigation, Plaintiff’s net loss reaches $20,150.64 But for the interplay between Rule 68 and Rule 82, Plaintiff would have been considered the prevailing party and likely been spared any net out-of-pocket expense.

III. THE ROAD TOWARD AMENDING CIVIL RULE 82

In the spring of 1992, Chief Justice Rabinowitz of the Alaska Supreme Court appointed a subcommittee of the Civil Rules Standing Committee to consider possible changes to Rule 82. Specifically, the court requested that the subcommittee consider whether Rule 82 deterred a large segment of the population from voluntary access to the courts. This issue came to the court’s attention partly by virtue of the supreme court’s own decision in Bozarth v. Atlantic Richfield Oil Co.65 John Bozarth, a pilot employed by Atlantic Richfield ("ARCO"), was discharged for refusing to participate in his

63. Amended Rule 82 sets a 30% fixed rate for the portion of attorney fees that are recoverable from non-monetary judgments. ALASKA CIV. R. 82; see also text accompanying note 120.

64. Actually, the loss is even higher after accounting for the provision on prejudgment interest in Rule 68. See ALASKA CIV. R. 68 (b)(1), (2). If, as in the preceding example, Plaintiff’s judgment fails to exceed the amount of the offer, the prejudgment interest rate is lowered by 2%. This scenario would reduce her judgment plus interest from $11,500 to $10,900. Her net loss then rises by $420, after accounting for the contingent fee arrangement, to $20,570.

employer's random drug-testing program. Bozarth sued, claiming that he was fired in retaliation for "whistle-blowing" activities. The trial court granted ARCO's motion for summary judgment on two independent grounds. ARCO then moved for attorney fees equal to 70% of the $156,425 in expenses actually incurred. Finding a small overcharge, the court determined that the full amount of reasonable fees was $152,000. The court awarded 50% of this amount, some $76,000, as partial compensation pursuant to Rule 82.

On appeal, in addition to contesting the summary judgment, Bozarth opposed the attorney fee award. He argued that the $165 to $175 per hour rate charged by defense counsel was excessive. The supreme court found that Bozarth had failed to present evidence that such hourly fees were unreasonable, or that the work performed by the attorneys was unnecessary or inappropriate. Additionally, the majority reasoned that the 50% proportion "[fell] comfortably within the partially compensatory standard of Civil Rule 82." The court, therefore, held that the fee award was valid. However, the majority pointed out that the magnitude of the award was "nonetheless disturbing." The court speculated that the increased costs of litigation may have caused Rule 82 to deter "a broad spectrum of our populace from the voluntary use of our courts." Accordingly, the majority called for the Civil Rules Standing Committee to review this very question.

Justice Matthews desired stronger medicine; he would have reversed Bozarth as to the magnitude of the fees. The dissent found the $76,000 award to be fundamentally at odds with the Alaska Constitution's general protection of access to civil courts.
Justice Matthews analogized “substantial awards of partial fees against litigants of limited resources” to full fee awards against good-faith plaintiffs. He reasoned that “[i]f a $10,500 attorney's fee award is so great as to ‘foreclose a particular party's opportunity to be heard’ it has that effect independent of whether it represents the prevailing party's full, or merely partial, fees.” Since the Alaska Supreme Court has expressed a concern that full fee awards against good faith plaintiffs may offend plaintiffs' due process “right to be heard,” the dissent argued that a similar constitutional concern existed in this case as well. Accordingly, the dissent would have remanded the fee determination to the superior court for consideration of whether the award will “impair the constitutional right of access to the courts.”

In addition to the access issue, the subcommittee took a hard look at two other fee-shifting issues: the lack of uniformity in fee awards when the prevailing party did not receive a monetary judgment, and the absence of a requirement that trial judges articulate the reasons for an award when the schedule does not apply (absent full or nearly full fee-shifts). At the first meeting of the subcommittee, a majority voted that no changes to the existing fee-shifting regime were necessary. Interestingly, this initial result mirrored the prevailing opinion of the Alaska Bar.
According to a survey of the Bar conducted in March of 1992 by the Civil Rules Committee, a majority of the respondents opposed rescinding or substantially amending Rule 82. Surprisingly, the responses remained relatively consistent across lines of representation. In other words, although the strength of their support differed somewhat, both plaintiffs' and defense attorneys favored retention of the existing rule.

Specifically, seventy percent of survey respondents reported that Rule 82 did not deter plaintiffs of moderate means from filing claims. Common explanations were that attorneys sometimes failed to inform clients about the effect of Rule 82, that many plaintiffs did not initially consider the possibility of losing, and that often such plaintiffs remained unconcerned because they were ultimately judgment-proof. Many practitioners indicated that other factors, such as a plaintiff's own attorney fee obligation, acted as a greater deterrent than did Rule 82. Some wrote that Rule 82 had the positive effect of deterring only frivolous or non-meritorious claims. In contrast, the minority view generally asserted that Rule 82 deterred plaintiffs of moderate means from filing valid claims against the government or large business entities and contended that powerful defendants often exploited Rule 82 by consciously incurring large attorney fees to hurt private plaintiffs.

Over two-thirds of those surveyed indicated that former Rule 82 did not put excessive settlement pressure on moderate income

83. The survey presented “yes or no” questions with space for respondents to supplement their answers with written comments. A summary of these comments, in conjunction with the numerical percentages, provides a great deal of insight into the perceived effects of former Rule 82. See Memorandum from Douglas Phillips & David Greene, Law Clerks, to The Honorable Daniel A. Moore, Jr., Alaska Supreme Court (May 4, 1992) (on file with Alaska Law Review) [hereinafter “Phillips & Greene Memorandum”].

Although the questionnaire is a useful source of information regarding how Rule 82 functions in practice, it should be remembered that attorneys' interests are not always aligned with those of their clients, who bear the financial burden of Rule 82's sanctions. See infra notes 168-173, 196-197, and accompanying text.

84. See infra Appendix for a full summary of the survey's numerical results for “yes or no” questions.

85. See infra Appendix (referring to question one).

86. Phillips & Greene Memorandum, supra note 83, at 3.

87. Id.

88. Id.

89. Id.
Rather, many attorneys noted that Rule 82 required plaintiffs to assess their claims more realistically, which would often result in the settlement of weaker claims. Respondents who did feel that the settlement pressure was excessive frequently remarked that the amount of that pressure varied depending on the wealth of the opposing party. Thus, insurance companies and other large institutional defendants could exert tremendous pressure since they were able to spend more on their defense. Some such respondents commented that Rule 82 imposed devastating results in cases that did not settle.

When asked straight-out whether they favored rescinding Rule 82, an overwhelming majority of respondents favored retention. In written comments, practitioners praised the rule for encouraging settlement and deterring frivolous litigation. They also remarked that the rule's official rationale, to compensate the prevailing party partially, was an inherently fair result. Abolitionists argued, conversely, that "Rule 82 is unfair to those of moderate means because it deters them from bringing valid claims." In one attorney's opinion, "[w]ealthy business corporations and insurance carriers are unfazed by the rule, while those of moderate means quake in their shoes at the thought of losing their homes." Some plaintiffs' attorneys indicated that the structure of former Rule 82 allowed defendants to receive more than plaintiffs, who could recoup attorney fees generally only to the extent that the schedule provided. Some additionally criticized the rule as being too subjective since it failed to provide guidance as to what constitutes an appropriate award. The judicially created public interest exception also received criticism for not comporting with the underlying rationale of Rule 82.

Although attorneys resoundingly favored retaining Rule 82, the most significant divergence of opinion between plaintiffs' and

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90. See infra Appendix (referring to question two).
91. See Phillips & Greene Memorandum, supra note 83, at 4.
92. Id.; see also supra notes 62-64 and accompanying text.
93. See infra Appendix (referring to question four).
94. See Phillips & Greene Memorandum, supra note 83, at 6.
95. Id.
96. Id.
97. Id.
98. Id.
99. Id.
100. Id. at 7; see infra text accompanying note 184.
defense lawyers occurred over the questions that specifically focused on elements of the Bozarth access issue. Two-thirds of the respondents felt that the courts should not consider a party's ability to pay when taxing fees. Many practitioners argued that fairness required the rule to be applied uniformly or not at all. Others worried that consideration of a party's ability to pay would have the following negative effects: add too much complexity to the system; "encourage perpetual litigants and spurious suits;" create too much uncertainty, thereby hampering settlements; or turn the proceedings into a "welfare contest." Proponents of the ability-to-pay criterion, on the other hand, generally indicated that this consideration was essential to preserving access to the courts. Several of these commentors noted that former Rule 82 had driven some plaintiffs into bankruptcy.

Finally, attorneys offered additional comments that focused on the underlying purposes of Rule 82. One frequent comment was that Rule 82 was not intended to be a weapon against frivolous litigation. Rule 82 was designed to compensate prevailing parties only partially, and if deterrence of frivolous litigation is desired, there should be a separate rule earmarked with this particular goal. Many respondents commented that any such rule aimed at deterring frivolous litigation should focus on attorneys, rather than on their clients. Since attorneys are better able to judge whether a claim has merit, Alaska Civil Rule 11 is the proper means for deterring frivolous litigation, according to many. Finally, some respondents remarked that the subjective and unpredictable application of Rule 82 precluded any deterrence effect whatsoever.

After reconsideration and weighing of the preceding concerns, the Civil Rules subcommittee recommended revising Rule 82. The

101. See infra Appendix (referring to question five).
102. Phillips & Greene Memorandum, supra note 83, at 8.
103. Id.
104. Id.
105. Id. at 9.
106. Id.
107. See infra Appendix (referring to question three) and note 212.
108. Phillips & Greene Memorandum, supra note 83, at 5.
109. Id.
110. Id.
111. Id.
112. Id.
proposed changes addressed two primary concerns: "(1) the lack of uniformity in fee awards when the prevailing party does not recover a money judgment; and (2) the absence of a requirement that trial judges articulate the reasons for an award." The subcommittee suggested applying a fixed percentage of reasonable fees incurred, either thirty or thirty-five percent, to calculate non-schedule based awards. Additionally, the subcommittee recommended the following set of factors to be considered by the trial court in deviating from the schedule or the fixed percentage: the complexity of the litigation, length of the trial, reasonableness of the attorneys' hourly rates, reasonableness of the number of attorneys used, diligence in efforts to minimize fees, willingness to reach a settlement agreement, reasonableness of claims and defenses pursued by each side, the relationship between the amount of work performed and significance of the matters at stake, as well as other relevant equitable factors. Any variation would have to be explained in reference to these factors.

The subcommittee specifically rejected adding an equitable factor to Rule 82 that would address the Bozarth access issue. Members speculated that an ability-to-pay factor would generate too much additional litigation and undermine the uniformity and fairness of Rule 82. The Civil Rules Committee then voted to recommend that the Alaska Supreme Court adopt the subcommittee's proposed changes.

On January 7, 1993, the Alaska Supreme Court issued Order No. 1118, which amended Civil Rule 82. While the court adopted most of the subcommittee's recommendations, it also introduced a factor allowing trial judges to consider the non-prevailing party's ability to pay the opponent's fees. The order provides in relevant part:

114. Id. at 2.
115. Id. at 2-3.
116. Id. at 3.
117. Id. at 1.
118. Id. This vote was not unanimous; several members voted to eliminate the rule entirely, and two members voted to exclude the list of equitable factors. Id.
119. Alaska Supreme Court Order No. 1118 (Jan. 7, 1993) (amending Civil Rule 82 and Civil Rule 79). Justice Rabinowitz alone did not support amending Rule 82. Id. at 5-6 (Rabinowitz, J., dissenting).
1. Civil Rule 82 is repealed and reenacted to provide:
   (a) Allowance to Prevailing Party.
   Except as otherwise provided by law or agreed to by the
   parties, the prevailing party in a civil case shall be awarded
   attorney's fees calculated under this rule.

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

   [Schedule identical to that in former Rule 82]

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

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

   (A) the complexity of the litigation;
   (B) the length of trial;
   (C) the reasonableness of the attorneys' hourly
   rates and the number of hours expended;
   (D) the reasonableness of the number of attorneys
   used;
   (E) the attorneys' efforts to minimize fees;
   (F) the reasonableness of the claims and defenses
   pursued by each side;
   (G) vexatious or bad faith conduct;
   (H) the relationship between the amount of work
   performed and the significance of the matters at
   stake;
   (I) the extent to which a given fee award may be
   so onerous to the non-prevailing party that it
   would deter similarly situated litigants from the
   voluntary use of the courts;
   (J) the extent to which the fees incurred by the
   prevailing party suggest that they had been influ-
   enced by considerations apart from the case at
   bar, such as a desire to discourage claims by
others against the prevailing party or its insurer;
and
(K) other equitable factors deemed relevant.

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

......

(e) Effect of Rule. The allowance of attorney's fees by the court in conformance with this rule shall not be construed as fixing the fees between attorney and client.

2. By adopting these amendments to Civil Rule 82, the court intends no change in existing Alaska law regarding the award of attorney's fees for or against a public interest litigant, . . . or in the law that an award of full attorney's fees is manifestly unreasonable in the absence of bad faith or vexatious conduct by the non-prevailing party. 120

IV. AMENDED RULE 82 AND ITS PROBABLE EFFECTS

Amended Rule 82, which became effective on July 15, 1993, changed the Alaska fee taxation scheme significantly. First, and perhaps foremost, the new rule dispenses with the wide flexibility that trial judges had to determine the appropriate percentage of fees to tax when the prevailing party did not recover a monetary judgment. Instead, amended Rule 82 fixes non-schedule based recovery at "30 percent of the prevailing party's actual attorney's fees which were necessarily incurred" for cases going to trial, and 20 percent for cases not going to trial. 121 Procedurally, Rule 82 still requires trial courts to scrutinize fee petitions to verify that the attorney's fee represents actual expenses necessarily incurred. 122 Although the language of the new rule is slightly modified, it appears that judges will engage in the same basic reasonableness determination that occurred under the pre-amendment rule. The real difference is that absent variation under subsection three, judges no longer estimate the appropriate fraction of the fee to shift.

The effect of this new standard clearly benefits plaintiffs vis-a-vis defendants. Prevailing plaintiffs, who receive monetary judgments, still receive their awards based on the schedule, which

120. ALASKA CIV. R. 82.
121. ALASKA CIV. R. 82(b)(2).
122. See supra text accompanying notes 50-54.
remains the same as under the pre-amendment rule. With this provision, plaintiffs will also be able to predict more accurately the size of the fee award that they will be responsible for should they lose. Prevailing defendants, on the other hand, no longer should receive awards in the range of forty to eighty percent of their actual fees, which was common under the former regime. One Alaska attorney observed that "a review of supreme court opinions reveals that the typical award of attorney's fees is usually closer to fifty percent than to thirty or thirty-five percent." Another defense practitioner argued that "creating a cap at anything less than 60% of actual attorneys' fees encourages non-meritorious litigation, reduces the chance of early settlement, and maximizes the chances of a full trial, at considerable expense to the parties and the court system." Although it seems improbable that the new standard tilts the balance of power far enough to have such drastic effects on the litigation process, the provision obviously is designed to address the Bozarth access issue by limiting the size of defense awards.

Plaintiffs have a bona fide complaint, however, that the structure of the amended rule continues to institutionalize inequitable fee awards favoring defendants. By confining prevailing plaintiffs to the schedule while allowing prevailing defendants to recover a fixed, albeit lower than pre-amendment, percentage of their actual fees, gross disparity can result between the two parties' potential fee recoveries. Consider the following hypothetical posed by a practitioner:

For instance in a personal injury case where there was a $50,000.00 judgment, a prevailing plaintiff would receive . . . a total award of about $7,500.00. In the same hypothetical, if a plaintiff's verdict did not exceed defense offers of judgment, the trial court [would] award defendant prevailing party attorney fees based on [thirty percent] of actual [post-offer] fees. In my experience, actual defense costs in a moderate-size personal injury case start at $30,000.00 and escalate rapidly. In this example, I cannot foresee an instance where a prevailing

123. See supra text accompanying note 57.
125. Memorandum from Mark E. Wilkerson, supra note 57, at 2.
defendant would not obtain a substantially larger award than a prevailing plaintiff.¹²⁶

The imbalance appears especially acute in the preceding hypothetical since there is both a monetary award, from which a schedule-based calculation can be made, and a prevailing defendant, requiring application of the new fixed-rate standard. This imbalance also exists independently of Rule 68. One attorney estimated that in the vast majority of small cases, thirty percent of the actual defense fees will far exceed the amount of attorney fees the prevailing plaintiff can recoup under the schedule.¹²⁷ While the ideology behind the new fixed rate for non-monetary judgments is a valid consideration, the amendment may fail to redress adequately the inherent asymmetry between the schedule and fixed-rate methods of fee taxation for plaintiffs and defendants respectively.

Another major change to Rule 82 is the addition of a list of factors under which trial courts may vary awards calculated under either the schedule or the fixed-rate approach.¹²⁸ The Civil Rules Committee recommended the inclusion of many of these factors as a means of guiding judges when the schedule or fixed percentage seems inappropriate.¹²⁹ The factors generally address the unique aspects of the litigation at issue, the reasonableness of the parties' behavior, and the considerations of vexatiousness, bad faith, or other improper motive—all legitimate bases for deviating from the schedule according to the case law surrounding former Rule 82.¹³⁰

The amended rule also contains a more controversial factor that allows trial judges to consider "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."¹³¹ The rule's wording targets the Bozarth access issue, but it does not articulate any specific standard for trial judges to apply. This vagueness may be intended to avoid the criticism that the "relative ability to pay" and "ability to pay" criteria garnered

¹²⁸ ALASKA CIV. R. 82(b)(3).
¹²⁹ See supra text accompanying notes 115-116.
¹³⁰ See supra notes 22-31 and accompanying text.
¹³¹ ALASKA CIV. R. 82(b)(3)(I).
from the Alaska Bar. However, the Civil Rules Committee rejected even the spirit of the Bozarth criteria for the reasons that they would create an unfair lack of uniformity and “would generate too much additional litigation.”

Indeed, how will a trial judge be able to determine when an award will have a deterrent effect on subsequent plaintiffs without engaging in an in-depth review of the parties’ individual ability to pay? In all likelihood, future adjudicators will need to look at financial statements of losing plaintiffs. As a result, the relative financial strength of such plaintiffs compared to large institutional defendants may be used as a proxy for identifying particular situations where future litigants are likely to be deterred (e.g., the employment law context). This provision is sure to generate a considerable amount of spin-off litigation.

The inclusion of a laundry list of other equitable factors is also certain to generate a new body of case law. On the positive side, setting out the factors in the text of the rule could increase the uniformity of the reasoning process among judges exercising their equitable powers. Accordingly, fee awards might become more predictable. Common sense, however, dictates that subparagraph (b)(3) will spawn numerous appeals where trial judges “failed to take into consideration one factor or another, or placed too much emphasis on some factor or considered a factor which was not truly an ‘equitable factor’ under [subpart (K)].” Given the sheer number of these factors and their vague wording, virtually any prevailing party will be able to find an avenue to request enhanced fees. Justice Rabinowitz, in his dissent from the court’s amendments of Rule 82, foresaw that these new provisions “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 request variations from either the schedule or the fixed rate.

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132. See supra text accompanying notes 101-104.
133. Memorandum from Christine Johnson, supra note 113, at 1.
135. Memorandum from Loren Domke, supra note 126, at 2.
137. Id. at 6 n.2 (Rabinowitz, J., dissenting).
An additional noteworthy change to Rule 82 involves the addition of a provision that allows the parties to "contract around" the rule privately. The amended rule states that a prevailing party is generally awarded attorney fees "[e]xcept as otherwise provided by law or agreed to by the parties." Therefore, parties now can decide to adopt the American rule, or some other alternative, if it better serves their mutual purposes. The reasoning behind this provision appears to be that parties are aware of the peculiarities of their transaction or relationship and are therefore better able to tailor a fee arrangement to fit the nature of their anticipated litigation. Assuming that transaction costs are not prohibitively high, and that parties will contract around Rule 82 on occasion, settlement rates will theoretically approach those of jurisdictions with different legal rules. This provision should encourage the Alaska Bar to develop a highly refined body of contractual language that would be widely used and, in some circumstances, more efficient than the existing rule.

Finally, the amended version of Rule 82 alters the treatment of paralegal expenses. Previously, several opinions of the Alaska Supreme Court held that paralegal expenses are a cost item treated under Civil Rule 79(b). Consequently, trial judges often had to handle appeals concerning paralegal costs in a proceeding separate from the attorney fee taxation under Rule 82. Rule 82(b)(2) rectifies this situation by including "fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk" as actual fees. This new provision will streamline the process for computing paralegal expenses by treating them as a portion of normal

138. ALASKA CIV. R. 82(a) (emphasis added).
139. See John J. Donohue III, Opting for the British Rule, or if Posner and Shavell Can't Remember the Coase Theorem, Who Will?, 104 HARV. L. REV. 1093, 1095 (1991) (discussing the Coase Theorem, which implies that litigants will select a fee-allocation rule that generates greater total expected wealth).
141. Memorandum from Ed Husted, supra note 140, at 3.
142. ALASKA CIV. R. 82(b)(2).
legal fees; trial judges will engage in a single review of all legal services rendered to the prevailing party.\textsuperscript{143} In addition to producing greater administrative efficiency, this provision may well reduce the size of legal fees by encouraging firms to use paralegals for genuine surrogate attorney work—at a greatly reduced cost.\textsuperscript{144} Finally, as one attorney noted, this revision will eliminate the practice of using paralegals for needless administrative tasks, since it will no longer be possible to obtain reimbursement for these overhead clerical services under Rule 79.\textsuperscript{145}

\section*{V. THE UNDERLYING RATIONALES FOR FEE SHIFTING IN ALASKA—IS RULE 82 THE PROPER MECHANISM FOR ACHIEVING THESE GOALS?}

Although Alaska's fee-shifting system has grown more complex over the years, with a vast body of case law and several amendments, the official purpose of Rule 82 has remained the same: partial compensation of the prevailing party's attorney expenses.\textsuperscript{146} The debate preceding the recent amendment to Rule 82, however, confirms that fee shifting remains in effect in Alaska not merely because of its stated purpose, but rather because of its total perceived beneficial effects on the litigation process: a greater level of fairness, indemnity of the winner, a punitive function, a "private attorney general" effect, and a settlement incentive.\textsuperscript{147} Despite the desirability of each of these rationales, Rule 82, in its past or present form, is not the most effective mechanism for achieving these results.

\begin{itemize}
  \item \textsuperscript{143} Memorandum from Ed Husted, \textit{supra} note 140, at 3.
  \item \textsuperscript{144} \textit{Id.}
  \item \textsuperscript{145} Memorandum from John Suddock, Esq., to Christine Johnson, Esq., Court Rules Attorney, Alaska Court System 1-2 (Oct. 3, 1992) (on file with \textit{Alaska Law Review}).
  \item \textsuperscript{146} See \textit{supra} notes 18-19 and accompanying text.
  \item \textsuperscript{147} The author has arrived at these rationales by consulting written responses from the Civil Rules Committee Rule 82 questionnaire, see Phillips & Greene Memorandum, \textit{supra} note 83; comments of the Civil Rules Subcommittee, see Memorandum from Christine Johnson, \textit{supra} note 113; and memoranda from the Alaska Bar which helped shape the amended version of Rule 82, see, e.g., Memorandum from Robert M. Libbey, \textit{infra} note 153; Memorandum from Allison Mendel, \textit{infra} note 167. The categories represent the fee-shifting goals most frequently articulated by these sources. See also generally Thomas D. Rowe, Jr., \textit{The Legal Theory of Attorney Fee Shifting: A Critical Overview}, 1982 DUKE L.J. 651 (1982).
\end{itemize}
A. Fairness and Indemnity

Rule 82 was not designed to punish the losing party for pursuing a good faith claim or defense, but rather to indemnify the winner partially. The purpose articulated by the Alaska Supreme Court, on its face, is tautological—justice simply requires partial indemnity. The most persuasive underlying argument for indemnity is that the prevailing party, by virtue of being adjudged legally in the right, should not be required to absorb all of the costs incurred in vindicating his or her position. The problem with this rationale, however, is that the funds used to indemnify come from the losing party's pocket. While the winner may have an equitable justification for reimbursement, the loser often has a cogent conflicting equity: "[a] defeated party . . . may frequently appear to have been justified and reasonable in pressing a strong but ultimately unsuccessful claim or defense." Although the Alaska scheme attempts to accommodate this tension by allowing only partial indemnity, even a fraction of a large corporate defendant's fees is sizeable enough to deter small plaintiffs from using the courts or, in the alternative, to drive them into bankruptcy.

Litigation outcomes are often unpredictable, and the right to have one's day in court is a central concern of the American legal system. Ninth Circuit Judge Andrew Kleinfeld, while still a plaintiffs' attorney in Alaska, observed: "Attorneys' fee awards imply that the loser should have recognized that the winner was right, and not fought the claim. The implication is often unfair in contract (and tort) claims where considerable justice can be found on both sides." The following commentary provided by another Alaska attorney describes the resulting inequity:

[T]he harshness of the rule as it falls on some persons with legitimate claims for relief, is an inequity that the judicial system can do without. I have seen a number of people driven into

148. "The purpose of Civil Rule 82 is to partially compensate a prevailing party for the costs and fees incurred where such compensation is justified and not to penalize a party for litigating a good faith claim." Malvo v. J. C. Penney Co., 512 P.2d 575, 588 (Alaska 1973) (emphasis added).
149. Rowe, supra note 147, at 654.
150. Id.
151. Id. at 655.
bankruptcy by an adverse ruling in a case that clearly deserved a determination of the merits. Yet, the cost judgment drove a middle class family with modest means into bankruptcy. Such harsh results inevitably lead to a restriction on the access to our judicial system.\textsuperscript{153}

Amended Rule 82 addresses the access issue by fixing the non-monetary judgment recovery at thirty percent of the actual fees and by including a deterrence factor via equitable variation. As discussed previously, however, there still seems to be an imbalance between the size of schedule-based awards, which usually go to prevailing plaintiffs, and fixed-rate awards, which are typically recoverable by prevailing defendants.\textsuperscript{154} Moreover, it is questionable to what extent the Bozarth access factor\textsuperscript{155} will succeed in preventing the prospect of large fee awards from deterring plaintiffs of moderate means from using the courts. There also remains a strong possibility that non-prevailing parties will be forced into bankruptcy merely by bringing a losing claim or defense in good faith. Accordingly, it is debatable whether Rule 82, even as amended, leads to litigation outcomes fairer than those which typically occur under the American rule.\textsuperscript{156}

The indemnity argument further breaks down when a party who receives a favorable court judgment becomes a “losing” party because the size of the award does not exceed the amount of a Rule 68 settlement offer.\textsuperscript{157} Rule 68 is designed as a settlement device, but to the extent that it shifts attorney fees in addition to costs, it should comport with the articulated partial-indemnity rationale of Rule 82 as well. While one may plausibly assert that trials usually achieve the fair result as to liability, it is a stretch to argue that the amount of monetary judgment accurately gauges the legitimacy of the claim or defense. “It is arbitrary to penalize litigants who made offers within the average [or rejected offers outside the average], but lost because their particular case did not

\textsuperscript{154} See supra text accompanying notes 126-127.
\textsuperscript{155} See ALASKA CIV. R. 82(b)(3)(I).
\textsuperscript{157} See supra notes 59-64 and accompanying text.
produce the average result."\textsuperscript{158} Often, the amount of the offer barely exceeds the judgment, but being close makes no difference. "It is like a sporting contest where one side gets the trophy whether the score was 7 to 6 or 7 to 1."\textsuperscript{159} Moreover, litigants rely on their attorneys' advice in valuing their claims; but it is the client, not the attorney, who shoulders the burden when the judgment falls short of the Rule 68 offer.

In sum, partial indemnity of the prevailing party is unconvincing as the articulated purpose of Rule 82. Even the Alaska Supreme Court realizes this, since it has carved out exceptions to the rule for public interest litigants,\textsuperscript{160} decreased the percentage of actual fees that prevailing defendants are entitled to recover,\textsuperscript{161} and added language that allows trial judges to consider equitable factors such as the access issue in setting fee awards.\textsuperscript{162}

B. Punitive Function and Deterrence of Frivolous Litigation

Alaska recognizes a common law exception to the precept that only partial fees may be shifted under Rule 82: "[f]ull or substantially full attorney's fees may be awarded if the trial court finds that the losing party acted in bad faith in asserting a claim or defense."\textsuperscript{163} This policy resembles the federal courts' bad faith exception to the American rule, which applies when "a party refuses to recognize a clear legal right or engages in bad faith conduct in litigation."\textsuperscript{164}

While penalizing bad faith litigation seems justified, it is not clear that fee shifting provides the optimal measure of deterrence or punishment. The strongest scenario supporting this policy is when the misconduct itself causes unnecessary legal expenses. Often, however, even if no additional legal expenses are incurred,

\textsuperscript{158} Memorandum from Paul W. Waggoner, Esq., to Christine Johnson, Esq., Court Rules Attorney, Alaska Court System 1 (Oct. 6, 1992) (on file with \textit{Alaska Law Review}).

\textsuperscript{159} Id.


\textsuperscript{161} \textit{ALASKA} Civ. R. 82 (b)(2).

\textsuperscript{162} \textit{ALASKA} Civ. R. 82 (b)(3).


\textsuperscript{164} See Rowe, supra note 147, at 661.
vexatious litigation imposes a host of external costs such as delaying other litigants' cases and burdening the court system. Moreover, Rule 82's deterrence effect may depend more on the wealth of the party than on the strength of the claim or defense.165 The rule will not deter parties who are judgment-proof, no matter how misguided the suit.166 Similarly, wealthy parties are likely to remain undaunted. However, "[m]iddle income plaintiffs who may have viable and well-founded lawsuits may be deterred because of the potentially disastrous consequences of a fee award against them."167 Therefore, Alaska's fee-shifting regime may not provide the most effective means of punishment in many contexts.

Another significant problem with the deterrence rationale is that punitive fee shifts under Rule 82 punish the losing party for conduct that is the attorney's responsibility. It is the attorney, not the client, who is trained to decide whether or not a claim has merit. Alaska Civil Rule 11, which directs sanctions at the attorney, is the proper means to combat frivolous litigation.168

The purpose of Rule 11 is to encourage the good faith behavior of counsel "by holding them strictly accountable for all

165. An empirical study of the effects of a two-way fee-shifting statute applied to medical malpractice cases in Florida concluded that plaintiffs dropped more claims under the English rule than under the American rule, but that the tendency of the former to increase defense expenditures suggests that risk aversion, rather than lack of merit, might be the primary incentive for abandoning these claims. Edward A. Snyder & James W. Hughes, The English Rule for Allocating Legal Costs: Evidence Confronts Theory, 6 J.L. ECON. & ORG. 345, 377-78 (1990); see also infra note 185.

166. One author observes that since successful defendants are unable to collect their fees from insolvent plaintiffs, the Alaska system, in practice, results in a one-way shift in favor of bankrupt complainants. Vargo, supra note 156, at 1624.


168. Rule 11 provides in pertinent part:

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record .... The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless expense in the cost of litigation.

ALASKA CIV. R. 11.
allegations contained in the complaint."169 Before 1989, the rule mandated that the trial court impose "an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleadings, motion, or other paper, including a reasonable attorney's fee."170 This language is identical to that contained in the federal version of Rule 11.171 The 1989 amendment to Alaska's Rule 11, however, diluted the strength of this already weak rule by removing the mandatory sanction provision.

Currently, when bad faith litigation occurs, the client typically bears the brunt of the penalty in the form of full attorney fees under Rule 82. In contrast, the attorney often receives a token penalty.172 In the Civil Rules Committee questionnaire, many respondents commented that deterrence of frivolous litigation was an inappropriate goal of Rule 82 and instead advocated the use of stronger sanctions under Rule 11.173 The fact that a number of respondents favored more stringent sanctions on themselves, combined with the obvious reality that attorneys are more accountable for the methods of litigation than are their clients, demonstrates that a stronger Rule 11 is a better weapon against frivolous or bad faith litigation than imposing full attorney fee expenses on the hapless client.

C. Private Attorney General Effect

Public interest litigation is another common law exception to the norm of partial fee recovery by the prevailing party. The amendment to Rule 82 preserves this exception,174 which allows full recovery of fees to prevailing public interest plaintiffs (even if they prevail only on one of many theories) and denies any reimbursement to defendants who win in public interest litiga-

171. See FED. R. CIV. P. 11.
172. See Keen v. Ruddy, 784 P.2d 653, 659 (Alaska 1989) (rejecting an argument that a $100 Rule 11 sanction was too low compared to the attorney fees imposed against the attorney's client; sanction carried with it a stigma and a message of disapproval, and the trial court reasonably could have considered this penalty sufficient to punish the attorney for his conduct).
173. See supra text accompanying notes 108-111.
The evolution of this doctrine began with the policy decision in *Gilbert v. State* that "it is an abuse of discretion to award attorneys' fees against a losing party who has in good faith raised a question of genuine public interest before the courts." The court reasoned that this holding flowed from the articulated purpose of the rule: "[i]t is not the purpose of Rule 82 to penalize a party for litigating a good faith claim but rather partially to compensate the prevailing party where such compensation is justified." The *Gilbert* decision, however, rests on infirm ground because virtually all litigants, except those found to be acting in bad faith, perceive that they are advancing their claim or defense in good faith and that other parties stand to benefit from their litigation in the future. Nevertheless, in a subsequent case, the supreme court relied upon the questionable logical foundation of *Gilbert* as a basis to authorize full compensation of attorney fees to successful public interest plaintiffs.

The court's reasoning that the private attorney general principle logically flows from the rationale behind Rule 82 fails to support adequately the public interest exception. A more appropriate rationale is that public interest litigants need a financial incentive to bring socially beneficial suits when the cost of the litigation exceeds the plaintiff's expected private benefit. If the public interest plaintiff must bear the full cost of the proceeding, the right will be under-enforced. Examples include cases seeking to enforce rights with special social value, occasions when government agencies lack adequate resources to promote the public interest, and claims that will benefit a large number of people if successful. One-way pro-plaintiff fee shifting in civil rights claims at the federal level promotes this private attorney general function.

175. See supra notes 28-29 and accompanying text.
177. Id. at 1136.
178. Id. (citing Malvo v. J. C. Penney Co., 512 P.2d 575, 587 (Alaska 1973)).
180. Id.
181. See Rowe, supra note 147, at 662-63.
182. Id. at 662.
183. The United States Supreme Court has stated that the central purpose of the one-way pro-plaintiff fee shifting under Title VII is "to vindicate the national policy against wrongful discrimination by encouraging the victims to make the wrongdoers pay at law—assuring that the incentive to such suits will not be
The problem with public interest fee shifting in Alaska, however, is that the exemption fundamentally conflicts with the spirit of the rule. Why should prevailing defendants be denied the partial attorney fees to which they are entitled under Rule 82, simply because the case is deemed in the "public interest"? One alternative approach would be to burden the public treasury with both the partial fee award owed to prevailing public interest defendants as well as the difference between the partial and full-fee award owed to prevailing public interest plaintiffs. However, as to the latter, it would be both unfair and impractical to collect the fees from the public rather than the defendants whose very conduct warrants deterrence.  

In sum, although the stated purpose of Rule 82 fails to justify the one-sided protection given to special interest plaintiffs, the public interest exception serves an important function—providing a financial incentive for certain types of litigation. Therefore, this "exception" should be retained, but the rule or its stated purpose should be modified to achieve greater consistency.

D. Settlement Incentive

Alaska's fee-shifting arrangement combines partial two-way fee shifting, contingency fee arrangements, and an offer-of-settlement device. The precise impact of Alaska's rules on settlement rates, therefore, differs from that of a pure "loser pays" system, which has been the subject of numerous articles. In order to estimate the possible settlement incentives created by Alaska's unique rules, one can refer to current economic models. However, the complexity of Alaska's fee-shifting scheme makes it virtually impossible, using models that assume risk neutrality, to determine the effect of Rule 82 on the rate of settlement. One point that does emerge is that risk aversion may be a crucial factor contributing to higher settlement rates among middle-income plaintiffs.

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184. See Rowe, supra note 147, at 673.
185. "Risk aversion," the preference for a certain outcome over a risky one of equal or greater expected value, is a trait common to plaintiffs, while defendants often exhibit "risk neutrality" or "risk affinity." See Vargo, supra note 156, at 1593.
Law-and-economics scholars have analyzed the theoretical impact of full fee shifting on settlement rates and timing. Circuit Judge Richard Posner and Professor Steven Shavell have developed an economic settlement model which shows how the English rule leads "to the counterintuitive result of lower settlement rates."\(^{186}\) The model illustrates that fee shifting adds more factors about which the parties can disagree during settlement negotiations. Accordingly, assuming risk neutrality, the parties' bargaining span will change, pushing them farther apart in their settlement effort.\(^{187}\)

Professor John Hause reaches the opposite result with his own more recent model, which assumes that cases tend to cost more in a fee-shifting jurisdiction.\(^{188}\) Since fee shifting raises the stakes of the litigation, it follows that parties will spend more on legal costs to influence the outcome.\(^{189}\) Hause finds that settlement becomes more attractive under a fee-shifting rule because the prospect of higher trial expenditures increases the cost savings from settling, offsetting the increased number of factors upon which the parties potentially may disagree.\(^{190}\) As legal expenditures increase, parties may also change their predictions regarding their chances of prevailing in court. It is possible that parties may adopt more realistic estimates of the likelihood of success at trial, since the increased legal expenditures will make more information available to them. These more reasonable expectations will bring the parties closer together despite the fact that increased expenditures tend to widen the gap between them. Conversely, the parties may become more optimistic about their chances of success at trial, thereby encouraging them to litigate rather than to settle.\(^{191}\)

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190. Hause, supra note 188, at 176.
191. Rowe, supra note 187, at 158.
These highly speculative and conflicting effects render an accurate prediction of the net effect of increased spending rather difficult. The current prevailing opinion among law-and-economics scholars is that the English rule generally leads to higher settlement rates because of the expected increase in trial expenditures and the parties' natural risk aversity. This prediction has only a weak applicability to the Alaska scheme. Since partial indemnity, rather than full taxation of fees, is the standard practice in Alaska, it follows that the increase in trial expenditures will be less than under a pure English rule, thereby reducing the settlement incentive. Consequently, no definitive conclusion can be drawn about the magnitude or direction of the settlement effect of the Alaska system, assuming risk neutrality.

Alaska attorneys also regularly employ contingency fee arrangements, which, to some extent, further complicate settlement incentives. Often, plaintiffs' attorneys will contract for one-third of the judgment, plus the attorney fee expenses obtained. Judge Kleinfeld, while still a practitioner, suggested that the broad support for Rule 82 among plaintiffs' attorneys indicates that they have interests different from those of their clients. Kleinfeld maintained, in other words, that "attorneys on contingent fees almost always benefit economically from settlement rather than trial." Kleinfeld's argument, however, applies to jurisdictions under the American rule as well. The only difference is that under their retainer agreements, Alaska attorneys may receive a small additional settlement bonus in the form of one-third of the schedule-based fee award for settled cases.

Economic modeling also supports the assertion that contingency fee arrangements do not alter the settlement incentive calculus. One commentator predicts the same result of increased settlements in two-way fee shifting in a contingency fee context, assuming that the parties bear the risk of indemnification, rather than their

192. Id.
193. A recent empirical study in Florida, however, concluded that the settlement rate decreases under the English rule, despite the fact that more claims are initially dropped. See Snyder & Hughes, supra note 165, at 377. The authors attribute this increased preference for litigation vis-a-vis settlement to the theory that "optimistic litigants anticipate shifting their fees to their opponents." Id.
194. See Hause, supra note 188, at 176-77; Smith, supra note 186, at 2162.
195. Hause, supra note 188, at 177.
197. Id.
This conclusion assumes that the client, not the attorney, bears the risk of paying the opposing party's attorney fees—an assumption which coincides with the current practice in Alaska. Consequently, it is doubtful that the contingency fee arrangement has any greater impact on the settlement incentive in Alaska than it does in jurisdictions using the American rule.

Rule 68, the offer-of-settlement device, certainly affects the settlement process in the Alaska system. While the primary purpose of Rule 68 is to encourage the out-of-court resolution of cases, the offer device could, ironically, have the opposite effect when the parties agree about the odds of finding liability but disagree as to the proper amount of damages. Professor Thomas Rowe observes that such offer devices under an English system introduce a new element of disagreement between the parties; fee shifting becomes linked to the issue of damages rather than simply to the liability result. Although it is uncertain whether Rule 68 increases the rate of settlement, it does provide an incentive to make realistic offers as early as possible in the litigation process, since the offeror may recover fees incurred after the date of the offer. Moreover, the offer device should keep the parties honest in settlement negotiations by encouraging the defendant to estimate a reasonable offer that the plaintiff would have little chance of exceeding at trial, and by allowing the plaintiff to "hold out" for a settlement closer to his or her expected judgment. Earlier and more reasonable settlements, therefore, may be Rule 68's primary contribution to the efficiency of the legal process.

198. Smith, supra note 186, at 2186.
199. Strong arguments exist for placing the indemnification responsibility on the attorney. In addition to the deterrence rationale, see supra notes 168-173 and accompanying text, attorneys are able to diversify this risk over their pool of clients, while individual clients are typically one-time players in litigation who cannot bear the risk of indemnification adequately. See Note, Fee Simple: A Proposal to Adopt a Two-way Fee Shift for Low-income Litigants, 101 HARV. L. REV. 1231 (1988); Smith, supra note 186, at 2165.

In contrast, an added burden of attorney indemnification would exacerbate the already strong settlement incentive which attorneys have in contingency fee arrangements. Id. at 2166. Additionally, absolving the client of the responsibility for his or her decisions inverts the role of the attorney as an adviser who must ultimately abide by a client's decision to accept an offer of settlement. Id. at 2165 (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1984)).
200. Rowe, supra note 187, at 167-68.
201. Id. at 169.
202. Id.
Since the combined effect of Rule 82 and Rule 68 on the rate of settlement is clouded by offsetting effects on both sides, the individual characteristics of the plaintiff and defendant assume overriding significance. In other words, the risk aversion and the marginal utility of wealth of the respective parties become crucial considerations.\(^{203}\) By increasing the magnitude of parties' potential gains or losses, Rule 82, Rule 79 and Rule 68 combine to raise the stakes of litigation in Alaska. While "upping the ante" may make it easier for plaintiffs to retain attorneys in small cases, it may also "drive out the players whose resources do not allow them to stay at the table for a long enough time for the probabilities to work themselves out beyond a few bad hands."\(^{204}\) Repeat players, such as large institutional defendants, are able to insulate themselves from loss by diversification, but individual plaintiffs are often one-time participants in the litigation process.\(^{205}\) Consequently, plaintiffs, especially those of moderate means, are likely to be risk-averse. Fearing a harsh result,\(^{206}\) risk-averse plaintiffs cannot prudently turn down defendants’ offers, even if they are significantly less than the face value of the claim. Amended Rule 82 mitigates this result if the judge varies from the schedule or the fixed rate pursuant to one or more of the listed factors.\(^{207}\) But if judges do in fact exercise their equitable powers in future cases, thereby causing risk-averse players to feel less compelled to settle, it is difficult to make any general prediction regarding the effect of Rules 82 and 68 on the rate of settlement.

VI. CONCLUSION

Although problems were evident, the pre-amendment form of Alaska Civil Rule 82 enjoyed strong attorney support. The amended version of the rule specifically addresses the rule’s harsh effects on parties of limited means, but the new list of equitable factors adds an additional layer of complexity to a rule that already has been the source of numerous appeals.

To justify its considerable administrative expense, Rule 82 must prove its utility as a vehicle for accomplishing important

\(^{203}\) See id. at 168.
\(^{204}\) Kleinfeld, supra note 56, at 52.
\(^{205}\) Rowe, supra note 187, at 142-43.
\(^{206}\) See Bozarth v. Atlantic Richfield Co., 833 P.2d 2 (Alaska 1992); see also supra text accompanying notes 62-64.
\(^{207}\) See ALASKA CIV. R. 82(b)(3).
policy objectives. The rule’s articulated purpose, partial indemnification of the prevailing party, is unconvincing. Moreover, there are more appropriate means for punishing bad faith litigants, and it is unclear whether any significant increase in settlement occurs, aside from that attributable to risk aversity. Although the rule may reduce the number of claims filed regardless of merit, this result hardly justifies its existence.

The numerous exceptions and factors allowing for equitable variation now overshadow Rule 82’s schedule-based simplicity, its most attractive aspect. As a result of attempts to retain some perceived benefits from fee shifting while simultaneously mitigating its harsh effects, the rule has evolved into such a prolix mechanism that it is no longer possible to theorize about its effects on the litigation process with any degree of accuracy. A thorough empirical study of the effects of amended Rule 82 should be conducted as soon as possible. If the rule cannot be shown to achieve any useful purpose, it should either be abandoned or returned to a simpler form that explicitly states its purposes and justifies its policy tradeoffs.

Kevin Michael Kordziel

208. "[I]t is true that a body of law is more rational and more civilized when every rule it contains is referred articulately and definitively to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words." O.W. Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 469 (1897).

209. See Vargo, supra note 156, at 1635-36.

210. Apparently, the Alaska Judicial Council is scheduled to conduct just such a study. See Alaska Supreme Court Order No. 1118, at 6 n.1 (Jan. 7, 1993) (Rabinowitz, J., dissenting).
APPENDIX

EXCERPTS FROM THE CIVIL RULE 82 QUESTIONNAIRE

(Responses received as of March 15, 1992)

1. Does Civil Rule 82 deter people of moderate means from filing valid claims?

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>No Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiffs' Attorney</td>
<td>69</td>
<td>127</td>
<td>9</td>
</tr>
<tr>
<td>Defendants' Attorney</td>
<td>16</td>
<td>136</td>
<td>12</td>
</tr>
<tr>
<td>Attorney for Both</td>
<td>36</td>
<td>108</td>
<td>14</td>
</tr>
<tr>
<td>TOTAL</td>
<td>121</td>
<td>371</td>
<td>35 (7%)</td>
</tr>
</tbody>
</table>

2. Does Civil Rule 82 put excessive pressure on moderate income people to settle valid claims?

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>No Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiffs' Attorney</td>
<td>70</td>
<td>124</td>
<td>11</td>
</tr>
<tr>
<td>Defendants' Attorney</td>
<td>21</td>
<td>133</td>
<td>10</td>
</tr>
<tr>
<td>Attorney for Both</td>
<td>35</td>
<td>106</td>
<td>17</td>
</tr>
<tr>
<td>TOTAL</td>
<td>126</td>
<td>363</td>
<td>38 (7%)</td>
</tr>
</tbody>
</table>

3. Is Civil Rule 82 needed in order to discourage frivolous litigation or do other factors, such as the litigant's own attorney's fees, litigation expenses, and the emotional stress of participating in a lawsuit, effectively discourage such cases?

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>No Answer</th>
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<tbody>
<tr>
<td>Plaintiffs' Attorney</td>
<td>90</td>
<td>81</td>
<td>34</td>
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<tr>
<td>Defendants' Attorney</td>
<td>90</td>
<td>57</td>
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<tr>
<td>Attorney for Both</td>
<td>70</td>
<td>64</td>
<td>24</td>
</tr>
<tr>
<td>TOTAL</td>
<td>250</td>
<td>202</td>
<td>75 (14%)</td>
</tr>
</tbody>
</table>

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211. The tabular data summarize the results of the "yes or no" questions from a survey of the Alaska Bar conducted by the Civil Rules Committee in March of 1992. The Alaska Bar Association includes approximately 3,000 members. Full questionnaire results are on file with the Alaska Judicial Council.

212. The numerical results of question three should be disregarded, since the question is written somewhat ambiguously. The high number of "no answer" responses seems to support this conclusion.
4. Should Civil Rule 82 be rescinded?

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>No Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiffs' Attorney</td>
<td>32</td>
<td>169</td>
<td>4</td>
</tr>
<tr>
<td>Defendants' Attorney</td>
<td>29</td>
<td>132</td>
<td>3</td>
</tr>
<tr>
<td>Attorney for Both</td>
<td>26</td>
<td>120</td>
<td>12</td>
</tr>
<tr>
<td>TOTAL</td>
<td>87</td>
<td>421</td>
<td>19 (4%)</td>
</tr>
</tbody>
</table>

5. Should Civil Rule 82 be amended to allow the court to consider:

a. the non-prevailing party's ability to pay the prevailing party's attorney's fees?

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>No Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiffs' Attorney</td>
<td>87</td>
<td>107</td>
<td>11</td>
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<tr>
<td>Defendants' Attorney</td>
<td>15</td>
<td>142</td>
<td>7</td>
</tr>
<tr>
<td>Attorney for Both</td>
<td>45</td>
<td>97</td>
<td>16</td>
</tr>
<tr>
<td>TOTAL</td>
<td>147</td>
<td>346</td>
<td>34 (6%)</td>
</tr>
</tbody>
</table>

b. the parties' relative ability to pay attorney's fees?

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>No Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiffs' Attorney</td>
<td>79</td>
<td>106</td>
<td>20</td>
</tr>
<tr>
<td>Defendants' Attorney</td>
<td>13</td>
<td>143</td>
<td>8</td>
</tr>
<tr>
<td>Attorney for Both</td>
<td>37</td>
<td>105</td>
<td>16</td>
</tr>
<tr>
<td>TOTAL</td>
<td>129</td>
<td>354</td>
<td>44 (8%)</td>
</tr>
</tbody>
</table>