ATTORNEY'S FEE SHIFTING:

PERCEPTIONS ON ITS IMPACT IN ALASKA

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By Nancy Meade

Abstract

The State of Alaska has in place a court rule that requires the loser to pay a portion of the winner's attorney's fees in most civil lawsuits that are resolved by a court, whether after a trial or via a motion. This practice, known as "attorney's fee shifting," is followed in England and numerous other developed countries, and Alaska has had a version of this rule in place since it became a state in 1959. The idea behind the rule is that the winning party in a lawsuit should be made whole by the losing party, and the judgment alone does not account for the funds that the winner expended in achieving the victory.

Periodically, other states and Congress debate whether to adopt an attorney's fee shifting rule, also called a "loser pays" rule, in an effort to discourage frivolous suits or to help compensate, for example, public interest litigants who may prevail but are discouraged from initiating a worthy case by the prospect of the looming attorney's fees. While numerous federal and state statutes require the loser to pay the winner's attorney's fees for particularized causes of action, no other American jurisdiction has adopted a true, generalized fee shifting rule as Alaska has.

This project reviews the history and development of attorney's fee shifting, including a description of the English and American rules, and notes the reasons for the different approaches. The project also reviews the current status of the

recent and ongoing debates about whether a "loser pays" or a "pay your own way" system would better serve civil justice.

Because Alaska is essentially a living laboratory for information that could inform the debate, the project explores and reports on the perceptions of attorneys who have worked with, and under, the attorney's fee shifting rule. Do Alaska's attorneys believe the rule is working well, or do they perceive problems with the rule that ought to be addressed? To answer this, an internet survey asking 30 questions about how the rule works and whether it should be rescinded or amended was sent to all active members of the Alaska Bar Association. The survey was drafted with input from a committee of judges and prominent civil attorneys, and the responses were analyzed and then reviewed and discussed by the same committee.

The findings from the survey and the committee discussions were not unexpected, yet were useful. In general, Alaska attorneys are satisfied that the fee shifting rule is beneficial, not because it necessarily discourages frivolous litigation or bad faith in litigation, but because it sometimes encourages settlements and generally operates as intended; that is, it helps to more fully compensate the winner in a civil case. Most attorneys would not like the rule to be rescinded.

A notable finding from the open-ended survey questions was that a number of respondents believe the rule may have a disparate impact on middle-income litigants. The expressed view was that the prospect of having to pay the winner's attorney's fee if a person loses is not meaningful for either very low-

income ("judgment-proof") litigants or for very wealthy (large corporations, such as insurance companies) litigants. This finding led the author to draw the conclusion that the noted problem may not be solvable by any change to the rule. That is because the disparate impact noted by several respondents, though perhaps unfair, appears grounded in the reality of a society with unequal distribution of wealth – the plain truth is that any economic sanction or required payment has less impact on those who will not, and cannot, pay it and those who will not notice the payment, than on those in the middle who will struggle to make the payment.

The findings and conclusions drawn from this project lead to the recommendation that Alaska's attorney fee shifting rule should certainly not be rescinded, and there is no strong support for making revisions at this time. Policy makers in jurisdictions who may be considering adopting an attorney's fee shifting rule or statute should take note that Alaska attorneys generally consider the rule to work well. It is a part of the accepted legal landscape, but is not considered to have a significant impact on the decision whether to file a suit, or on the number of frivolous suits, as some tort reform proponents assert it would.

Attorneys' perceptions about attorney's fee shifting are quite similar to what they were when they were last considered 19 years ago; they should be reassessed in the future at closer time intervals to help learn whether views have changed, and to help ensure that the state's rules are accepted and supported by the persons who work under them.

Introduction

When a party in a civil lawsuit wins the case, that person still "loses" in many ways: he or she has invested time in preparing and arguing the case, emotional energy in worrying about the case, and money in paying his or her attorney for helping achieve the "win." Though society has no way to give the party back his or her time or expended energy, the State of Alaska, alone among American jurisdictions, has an established system for at least partially helping that winning party retrieve money spent on attorneys, so that the winner is more fully "made whole" after the win. This system of attorney's fee shifting calls for the loser in most civil lawsuits[1] to pay a portion of the winner's attorney's fees. That is, the burden of paying for the winner's attorney's fees is "shifted," in part, to the party who lost the case.

This paper considers the effectiveness of the attorney's fee shifting policy, the consequences that flow from the policy, and the opinions of attorneys who operate in the system. A fee-shifting policy is periodically discussed and debated in other jurisdictions as a potential component of tort reform, and as a way to influence whether particular suits are brought in the first instance. Jurisdictions considering implementing an attorney's fee shifting policy may benefit from understanding how the long-standing rule is used, perceived, and, to some extent, criticized in Alaska.

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[1] The most significant category of civil cases to which Alaska's attorney's fee shifting rule does *not* apply is domestic relations cases (*Johnson v. Johnson*, 1977). In addition, in cases where a contract establishes how attorney's fees will be apportioned and paid in any dispute under the contract, Rule 82 does not apply. (*Tufco, Inc. v. Pacific Environmental Corp.*, 2005).

The Rule and How It Works

Alaska's fee-shifting policy is effectuated through Alaska Rule of Civil Procedure 82 (hereafter cited as Rule 82), which provides in part:[2]

Civil Rule 82.Attorney's Fees.

(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:

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

(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's reasonable 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.

* * * *

[2] Civil Rule 82 is reproduced in its entirety in Appendix A.

Determination of the fee award, then, is based on the stage of the litigation when the case ended. As an example of how subsection (b)(1) of the rule is applied, if a plaintiff slips and falls on the defendant's store floor and recovers $200,000 for the negligence claim after a jury trial, the plaintiff (the prevailing party) will also be awarded 20% of the first $25,000 of the verdict (= $5000), plus 10% of the next $75,000 (= $7500), plus 10% of the remaining $100,000 ($10,000), for a total attorney's fee award that the defendant (the loser) must pay of *$22,500* in addition to the $100,000 jury verdict. If instead the plaintiff recovers $50,000 on a motion for summary judgment, the judgment would include *$6500* for attorney's fees (18% of the first $25,000, plus 8% of the remaining $25,000).

To continue the example, if the defendant won the trial, and the jury determined that the plaintiff was not entitled to any recovery, the court would apply subsection (b)(2) of the rule. It would determine the "actual attorney's fees which were necessarily incurred" in defending the case, and order the plaintiff (the loser) to pay the defendant (the prevailing party) 30% of that amount. A defendant who prevailed on a motion for judgment before trial would be awarded 20% of actual attorney's fees incurred. Civil Rule 82(b)(2).

The calculation of the award amounts for prevailing plaintiffs and prevailing defendants, then, begins with dissimilar base amounts: a prevailing plaintiff's award is a percentage of the amount of the money judgment recovered, while the defendant who prevails (and thus recovers no money judgment, but typically prevents the plaintiff from recovering any sum) recovers a percentage of

actual attorney's fees. Because the base amounts of the calculations differ, the percentages applied in the second step also differ. Each calculation is nonetheless designed to reimburse the winner for a fair portion of the fees expended.

The rule applies to cases that are resolved by the court; if parties settle a dispute on their own, they can choose to account for attorney's fees, like any other portion of a potential judgment, in any manner they deem to be acceptable. The "prevailing party" under Rule 82 is the party that prevails on the merits, whether the victory is achieved after a trial, without a trial (for example, on a summary judgment motion), or in a non-contested case (for example, after a default judgment).

Rule 82 also lists eleven factors that the court may consider in determining whether to vary from the amount computed using the percentages in subsection (b) of the rule, including "other equitable factors deemed relevant."

Civil Rule 82(b)(3)(A)-(K)

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

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

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

In addition, subsection (f) of the rule makes clear that it is unrelated to the fee actually owed to an attorney by the client.

Civil Rule 82(f)

(f) **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.

Purpose of Paper

This paper assesses the perceptions, experience, and attitudes of Alaska attorneys concerning the impact of Civil Rule 82. Do attorneys believe that fee-shifting discourages frivolous cases? Does it impact an attorney's decision whether to represent people who "don't have a case"? Does the rule help only certain types of litigants – that is, does its impact vary depending on a party's economic status? Is it viewed as being more favorable to plaintiffs or to defendants?

Sixteen years ago, a comprehensive study of Civil Rule 82 (which included a survey of attorneys) concluded that the policy and rule were basically sound and supported by the legal community, and suggested limited changes for the court's consideration (DiPietro, Carns, & Kelley, 1995).[3] The study

[3] The study was conducted and published by the staff of the Alaska Judicial Council. The Alaska Judicial Council is a constitutionally-created organization, Alaska Const. art. IV, sec. 8, and one of its functions is to conduct studies and make recommendations to improve the administration of justice. (Mission Statement at http://www.ajc.state.ak.us/.) Its members are three attorneys and three non-attorneys; the Chief Justice is an ex officio member. Its staff researches and writes studies of matters of interest to the judicial branch. The name "judicial council" is used in Alaska unlike it is used in other jurisdictions; it is not a group of judges who make or review judicial administrative or legal policies.

recommended that the Supreme Court consider whether the recoverable amount for *both* plaintiffs and defendants should be computed similarly, as a percentage of the party's reasonable actual attorney's fees, and whether different methods of recovery should be developed for different case types, so that tort and contract cases would have different schedules (DiPietro et al., 1995, pp. 147-148).

The Alaska Supreme Court declined to adopt any changes to the rule based on that study. But recently the Court questioned, in an open and inviting manner,[4] whether the rule was working well. That is, the Court is concerned that "awards of attorney's fees not chill or otherwise negatively impact citizens' right to access the courts and that attorney fee litigation not be the driving force behind decisions whether to file suit or settle an existing civil action." Accordingly, this paper will assess attorneys' perceptions of whether the rule chills access to the courts, whether the rule is fair to both prevailing and non-prevailing parties, and what modifications, amendments, or elimination of provisions of the rule, if any, should be presented to the Supreme Court for consideration. In addition, this paper will recommend whether other jurisdictions considering attorney's fee shifting as a proposed improvement in civil justice ought to pursue that policy.

Literature Review

Two Systems for Paying Attorney's Fees – History and Evolution

Alaska's Civil Rule 82, whereby the losing party pays a portion of the prevailing party's attorney's fees, reflects what is known as "the English rule."

[4] Appendix B is the memorandum from the Supreme Court referring its request for a study of Rule 82 to the author.

The common law rule is applied currently throughout England, most other European countries, and Canada, and originated many hundreds of years ago with the basic concept that the winner should be made whole by the losing party in litigation (Tomkins & Willging, 1986, p. 5).

The English rule was not endorsed by the English colonists, however, where lawyers rejected any notion of having the government involved in setting fees (Leubsdorf, 1984, p. 12; Tomkins & Willging, 1986, p. 7). Leubsdorf (1984) provided a detailed history of this and the other historical reasons that a different approach, known as the "American rule," eventually took hold in this country (pp. 23-28). Under the American rule, which is now followed in all United States jurisdictions except for Alaska, each party assumes its own costs of litigation, including the cost of his or her attorney's fees (*Alyeska Pipeline Service Co. v. Wilderness Society*, 1975).

Over time, commentators, courts, legislatures, and Congress have debated the relative merits of "loser pays" versus "pay your own way" with respect to attorney's fees in civil litigation, with a particular focus on the effects of the rules. (Rowe, 1982; Rowe, 1984). This ongoing examination of the effects of fee shifting and its incentives or disincentives to parties in different categories of cases has resulted in much modification and tinkering with the American rule. In 1975, the United States Supreme Court ruled that federal courts may not shift a prevailing party's fees to a losing party absent specific statutory authority to do so (*Alyeska Pipeline Service Co. v. Wilderness Society*, 1975).

Since the *Alyeska Pipeline* decision, the number of federal statutes authorizing fee shifting has "proliferated" (Hirsch & Sheehey, 1994, p. 3). Congress has passed hundreds of statutes that make exceptions to the traditional American rule, and allow judges to order the loser to pay the prevailing party's attorney's fees in certain types of cases, such as environmental protection cases (Federal Water Pollution Control Act, 2006) and civil rights cases (Civil Rights Attorney's Fees Awards Act of 1976) (Hirsch & Sheehey, 1994, pp. 1-2). Most of these are "one-way" fee shifting statutes; that is, if the plaintiff prevails, he or she may seek some or all of the attorney's fees, but the same provision does not apply if the defendant prevails. This is different from the English rule and Alaska's rule, which authorize recovery of attorney's fees for either party ("two-way" fee shifting); the federal one-way shifting statutes generally reflect Congress' attempt to encourage, typically, public interest cases that a plaintiff would not otherwise file unless he knew his attorney's fees would be paid when he won (Rowe, 1982, p. 662; DiPietro et al., 1995, pp. 14-15). They are viewed as helping plaintiffs access the courts on matters that benefit society.

The gradual eroding of the American rule on attorney's fee shifting is evidenced not only at the federal level, but also at the state level. One commentator found thousands of state statutes that allow fee shifting in certain cases (Note, 1984, p. 323) (survey of 4-5,000 statutes that empowered "courts to require one party to pay the other party's attorney fees"). In general, statutory exceptions to the American Rule are based on reasoning

> that fee shifting (usually one-way) will encourage actions that benefit public policy – either private enforcement actions, as in the area of civil rights litigation and environmental legislation, or social policies such as consumer protection and equal access to justice. They also see fee shifting as a punitive measure on appropriate cases. (DiPietro et al., 1995, p. 14).

Though the American rule is riddled with statutory exceptions at the state and federal level, no system operates quite like Alaska's, which is two-way (*i.e.*, the loser pays the prevailing party's attorney's fees, whether it is the plaintiff or defendant), automatic (the rule applies in every contract and tort case; a denial of a request for fees would predictably be reversed on appeal, absent special circumstances), and given great deference on appeal (attorney's fee awards are reviewed by the Supreme Court under an abuse of discretion standard (*Law Project for Psychiatric Rights, Inc. v. State,* 2010)).

Reasons for and Intent of the English Rule

Theoretically, shifting the burden of paying the winning party's attorney's fees to the loser could have beneficial effects on caseloads in the courts. One benefit is that it should operate to discourage frivolous litigation by plaintiffs; if a person intends to file a doubtful or unjustifiable case in an attempt to extract a nuisance settlement award, the idea of having to pay the opposing party's attorney's fees if the case is dismissed may make the putative plaintiff think twice (Hughes, 1974. p. 163). The rule should similarly provide greater access to the courts for those who cannot afford to bring a meritorious action because of the

amount needed to pay an attorney (Rowe, 1982, pp. 652-653). Rowe (1982) listed the six most commonly-mentioned rationales for attorney fee shifting as simple fairness, making a litigant financially whole, deterring and punishing misconduct, the "private attorney general theory" (based on the public usefulness of advancing certain types of claims), a desire to affect the parties' relative strengths, and economic incentives (effect on pursuing claims, settling, and disposing of cases) (p. 653).

The Alaska Supreme Court has explained that Civil Rule 82 is intended to make winning parties whole by reimbursing them for the expenses incurred in winning the case (*Ferdinand v. City of Fairbanks*, 1979). This explanation of the rule's intent has not wavered, even as the court does recognize that other fee-shifting approaches have different purposes:

> The purpose of Rule 82 is to partially compensate a prevailing party for the expenses incurred in winning his case. It is not intended as a vehicle for accomplishing anything other than providing compensation where it is justified. In comparison, the explicit purpose of the fee shifting provision in the federal statute, 42 U.S.C. § 1988, is to encourage meritorious claims which might not otherwise be brought. (*Krone v. State, Dept. of Health and Social Services*, 2009).

The Alaska Supreme Court views the rule as a means of making the winning party whole, rather than a mechanism for encouraging, or discouraging, certain claims.

Modern Interest in Fee Shifting

A review of the literature reveals that proposals to expand attorney's fee shifting arise periodically, usually in the context of a discussion of tort reform. For example, during the mid-1980's, the Council on Competitiveness was created by then-President George Bush as policy makers cited excess litigation and high damage awards in civil cases as a reason for higher insurance costs. One of the Council's recommendations was to encourage Congress to "adopt a 'loser pays' rule in cases involving state law brought under the federals courts' diversity jurisdiction" (President's Council on Competitiveness, 1991, p. 24). The Council believed this would deter frivolous suits by plaintiffs and would deter defendants from putting forth a spurious defense (President's Council on Competitiveness, 1991, p. 24). The head of the Council, then-Vice President Dan Quayle (1992), explained that this "loser pays" rule was a "fairness rule" under which parties would evaluate their cases with greater care, because they would be "compelled to consider whether they have a realistic chance of prevailing" (p. 567). The recommendation was transmitted to Congress as part of the Access to Justice Act of 1992 (Quayle, 1992, p. 569), but it was opposed by attorneys and legal commentators, and did not pass.

Similarly, a "loser pays" rule was proposed to Congress in 1995 as a major plank in the Republican Party's "Contract with America," as a means to stop excessive legal claims (Wilson, 2005, p. 1481). It would have applied in federal diversity cases (but not in federal question cases), and would have required the district court to award the prevailing party an amount for reasonable

attorney's fees, with some limits (Olsen & Bernstein, 1996, p. 1173).[5] It was modified and discussed, but ultimately was not adopted (Olsen & Bernstein, 1996, pp. 1173-75; Rowe, 1998, p. 317)

Most recently, in his February 2011 State of the State address, Texas Governor Rick Perry "praised a 'loser pays' approach that would require 'those who sue' to pay lawyers' fees" (Smith, 2011, March 10). Proponents of tort reform, including the Governor, said that "loser-pays rules help keep junk lawsuits out of court," and asserted that the rule would "create a more streamlined judicial system and encourage reasonable and fair settlement negotiations" (Smith, 2011, May 9).

This idea of adopting the English rule in Texas was incorporated into a bill, authored by state Rep. Brandon Creighton, R-Conroe, that would have allowed a prevailing party to recover attorney's fees from the losing party in a breach of contract case (House Research Organization, 2011, p. 3). The bill's supporters stated that it

> would help prevent frivolous lawsuits . . . Only parties that knew they had a meritorious claim would bring them, and parties looking to extract a settlement out of defendants would be deterred from bringing meritless claims. This provision would do a great deal to improve business

[5] The bill was introduced on January 4, 1995 as an amendment to 28 U.S.C. § 1332, the law granting diversity jurisdiction to federal courts (Olsen & Bernstein, 1996, p. 1173).

> confidence in Texas and encourage investment. (House Research Organization, 2011, p. 5)[6]

These claims of the effect of the bill may have been overstated; according to the Texas Civil Justice League (2011), the bill was substantially modified after being introduced, and "despite the fact that 'loser pays' is a popular idea among many politicians and voters," that provision was replaced with changes concerning offers of settlement in litigation (Texas Civil Justice League, 2011, p. 1).

Texas Governor Rick Perry signed H.B. 274 into law on May 30, 2011; it became effective on September 1, 2011, but this "civil justice bill" is not a true "loser pays" law. The law instructs the Texas Supreme Court to adopt rules for courts to dismiss cases "that have no basis in law or fact" upon a motion to dismiss, and requires an award of reasonable and necessary attorney's fees to a party who prevails on such a motion to dismiss (Brogdon, 2011, p. 1). H.B. 274, sections 1.01, 1.02. This is a very narrow implementation of the English Rule, since it shifts fees only in cases dismissed upon motion on the grounds that they are, essentially, frivolous. It does provide for two-way fee shifting, which could limit how often a defendant will file a motion to dismiss under this provision, but could indeed be invoked and applied for at least some frivolous suits that are dismissed early in the litigation (Morris, 2011, p. 1).

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[6] One iteration of House Bill 274 read:

> Unless otherwise provided in a written contract, the prevailing party may recover reasonable attorney's fees from an individual, corporation, or other legal entity if the claim is for breach of an oral or written contract. (Proposed Sec. 38.0015, H.B. 247, Texas Legislature 2011).

Alaska's direct and long-standing experience with attorney's fee shifting could inform the debate that arises periodically in different jurisdictions, including in the federal arena, about adopting fee shifting as an aspect of tort reform. The perspectives of attorneys who have operated under the system for many years are described in the sections that follow.

Methods

This project was prompted by a request from the five Justices of the Alaska Supreme Court to have the author, working with the standing committee on civil rules, review the attorney's fee shifting rule. Specifically, the Justices asked "how, in everyday civil litigation life, the rules are working . . . and what modifications, amendments, or elimination of the rules, if any, might or should be considered." Appendix B.[7] This section of the paper describes how information about practitioners' views of the attorney's fee shifting rule in Alaska was collected, and how it was analyzed. Research methods included literature review, an attorney survey, discussions with a subcommittee of attorneys and judges, and data analysis.

Project Design

At the outset, the author performed general research of the history of Civil Rule 82 in Alaska, and presented the background information to a subcommittee for discussion. Then, the project used SurveyMonkey, a widely-used internet survey tool, to collect data, and also used information exchanged during

[7] The Supreme Court also asked about the operation of a related rule, Civil Rule 68 concerning offers of judgment. Questions about that rule were included in the survey and subsequent discussions of the subcommittee, but are outside the scope of this project and are therefore not discussed in this paper.

subcommittee meetings about the rule and its impact on litigation. Finally, the survey responses were discussed, analyzed, and categorized, so that conclusions could be drawn and supported.

Use of Prior Study

The comprehensive 1995 report on Alaska's fee shifting rule was presented to a subcommittee of the Alaska Standing Committee on Civil Rules, which comprised two superior court judges and four civil attorneys. The committee determined that one valid means of deciding whether the rule should be changed was to compare whether perceptions had changed in the time since the prior study. That study had cited a five-question questionnaire that had been distributed to attorneys in 1992, and the committee was interested to learn whether perceptions had changed since that time. Five of the six subcommittee members had been practicing civil law in Alaska in 1995, and each expressed the general view that it was unlikely that practitioners' perceptions of attorney's fee shifting had changed since that time. It was agreed that the five simple survey questions that had been asked of bar members in 1992 should be asked again, so that a valid comparison could be made.

Survey of Bar Members

Preparation and pretesting.

The author undertook the task of drafting a broad survey to collect data concerning perceptions of the fee shifting rule. Using SurveyMonkey, an on-line tool that allows users to create, format, distribute, and collect results of internet surveys, 31 questions were created and uploaded. The questions included the

five that had been asked in 1992, with only slight adjustments to the response options to maintain consistency with the other 25 survey questions.

Each of the four (non-judge) subcommittee members had agreed to test the questions and provide feedback, and each had also recruited a colleague to do so. Therefore, the SurveyMonkey temporary link was sent to the eight testers, who were asked to reply to the author about any problems with the survey. They were specifically asked to report whether questions were confusing or response options incomplete, and whether changes could be made to any aspect of the survey to improve clarity. In addition, the testers were asked to report how much time the survey had taken them to complete.

After giving the testers one week to complete the draft survey, the feedback was reviewed and several changes were made. These included deleting one question that testers thought was not meaningful, adding a "don't know" response option to four questions, and making very slight wording adjustments to approximately three questions. Notably, two of the testers remarked that one of the 1992 questions (which had not been identified in the survey as being duplicates of the older survey) was awkwardly worded; the author opted to nonetheless retain the "awkward" wording of that question to ensure that the comparison would be valid.[8]

[8] Since the decision was made to re-ask the 1992 questions without changes, Question 12 of the comprehensive bar survey was admittedly clumsy: "Is Rule 82 needed to discourage frivolous litigation, or do other factors (litigant's own attorney fees, litigation expenses, litigation's emotional toll) effectively discourage such cases?" The response options were "yes," "no," or "don't know," but the constraints inherent in those options were somewhat dissipated by the ability of respondents to also provide an open-ended response.

The author encountered one logistical glitch in the course of drafting and testing the survey: any particular computer on which the survey was tested could not later be used again to submit results of the survey. SurveyMonkey presumably uses this function to ensure that only one response can be submitted by any particular individual, so that responses cannot be purposefully submitted multiple times to skew results. For the drafter of the survey, however, it was problematic, because those who tested the survey could not thereafter take the survey again, unless they opened the web link on a different computer.

Next, the revised survey was provided to the subcommittee chair, a superior court judge, for approval. She opted to share the survey with the chair of the standing committee on civil rules, who is a Supreme Court Justice. That Justice and the judge reported back with a request that an additional question be asked, and a request for a minor change to the draft email message that would accompany and introduce the survey to the bar members.[9] Those changes were incorporated, and the survey was finalized and uploaded to the SurveyMonkey website.

Survey distribution.

The author worked with the Alaska Bar Association to obtain permission to acquire and use the Association's guarded list of attorney electronic mail addresses. The Alaska Bar Association (an integrated, or mandatory, bar association; all attorneys who practice law in Alaska are required to be members)

[9] The requests were to capitalize "Supreme Court" in the introductory email message, even though the court system's internal style preference is to use lower case, and to add Question 20, which related to the separate topic in the survey, the operation of Civil Rule 68.

has 2,866 active members; 743 of those do not use or do not provide to the Bar Association an email address. Therefore, the final distribution list provided by the Bar Association contained the remaining 2,123 active Bar members' email addresses.

On April 27, 2011, an email was sent to the 2,123 attorneys, with a brief explanation of the purpose of the survey, a link to the Survey Monkey website, and a request that the attorney take the brief survey within two weeks. The request read:

EMAIL TO BAR MEMBERS – APRIL 27, 2011

Dear Bar member:

The Supreme Court has asked a subcommittee of the Civil Rules Committee to review Civil Rules 82 and 68 to determine whether any changes are warranted. To help in that review, we would like to gather information about the experience, attitudes, and suggestions that bar members may have about the current rules and how they are working in practice.

We would appreciate learning your views. Please click on this link http://www.surveymonkey.com/s/858F5PM. to take our short (approximately 5-10 minute) survey **before May 13, 2011.** The subcommittee will use the results to develop recommendations to the Supreme Court.

Thank you for your assistance.

Nancy Meade
State of Alaska Court Rules Attorney

A brief reminder email was sent to the same 2,123 addresses on May 12, 2011.

Distributing the survey to all active Alaska attorneys was over-inclusive. That is, it was sent to an identifiable subset of attorneys who would have no

opinions on, or never were subject to, the workings of Civil Rule 82. For example, attorneys who practice only criminal law (assistant district attorneys, assistant public defenders, and public advocates), or only child protection law would never handle cases that involve Civil Rule 82 attorney's fee shifting. No feasible alternative existed, however, because neither the Bar Association nor any other entity maintains any email lists grouped by practice areas. Subsets of attorneys could therefore not be excluded from the distribution reasonably.

Respondents were allotted an extra week beyond the announced deadline to take the survey. By May 19, 2011, 365 responses were submitted, for a response rate among those who could have responded of 20%.

DISTRIBUTION OF EMAIL REQUESTING INPUT ON ATTORNEY'S FEES AND OFFERS OF JUDGMENT, WITH SURVEY LINK

Total active bar members (in-state and out-of-state)	2866
Total bar members with no email (in-state and out-of-state)	(743)
Total bar members who were sent the survey	2123
Total out of office responses received	(46)
Total returned undeliverable	(12)
Total bar members who received survey	**2067**

(Minus) Bar Members who carry only caseloads that exclude Rules 68 and 82

Public Defenders	(102)
OPA	(47)
Child Protection (in AG's Office)	(22)
District Attorneys and OSPA	(114)

Total bar members who received survey and could respond: 1782

Total responses received as of May 19, 2011 365

RESPONSE RATE: 365/1782 = 20%

The 20% response rate was considered satisfactory to the subcommittee, and later to the Supreme Court.

Subcommittee Review

The subcommittee met and reviewed the raw survey results once again in June 2011. The author presented the data as compiled by SurveyMonkey, with a brief oral summary of the responses. The responses to each of the thirty questions were reviewed in bar graph form, with a "response percent" and "response count" for each of the possible response choices. The responses were reviewed to determine whether there were any irregularities or highly unusual results.

The two judges and six attorneys (two additional prominent civil attorneys had joined the group) considered and discussed the responses in some detail. The subcommittee determined that it would not recommend changes to the rule at that point in time, but that the Supreme Court should consider the results and ask for further review if warranted.

Analysis of Survey Results

For this project and for the benefit of the Supreme Court, the author further analyzed the raw data to determine whether they showed any trends or any areas of concern in terms of the operation of the rule. This analysis was done after the subcommittee meeting; though neither the subcommittee nor the Court requested it, the author determined that a more thorough evaluation and summary would be useful to the Supreme Court in its deliberations about the rule..

SurveyMonkey offers the survey creator numerous options for viewing and sorting results. For example, results could be sorted by certain demographic

groups – one could view only the responses of those who identified themselves (in demographic question number 29) as plaintiffs' attorneys, or who identified themselves (in demographic question number 30) as practicing law in Alaska for more than 15 years. Since the goal of this project was to assess and draw conclusions about the perceptions of all attorneys, no subcategorization or sorting of the results was necessary. It was noted, however, that the responses were nearly exactly split between those who consider themselves plaintiffs' (22.8%) and defendants' (21.6%) attorneys, and most respondents consider themselves to be both (33.6%). The remaining 21.9% marked the options for "neither" or "judge/judicial officer."

The most direct and relevant questions were readily identified, since they sought the respondents' views on the ultimate issue of how attorneys perceive the rule to be working in practice: should the rule be rescinded (Question 21), how often is the rule used (Questions 1 and 3), are fee awards made under the rule actually paid (Question 5), how often is the attorney's fee award resolved by settlement (Question 6), does the rule encourage settlement (Question 18), and should the rule require courts to consider the parties' relative abilities to pay (Question 26). The responses to these questions, displayed in bar graph form, were closely reviewed and then summarized in narrative form, for review and for presentation to and discussion with the Supreme Court.

The survey included three open-response questions, two of which related to Rule 82. To draw conclusions from the large number of written responses, they were all printed and reviewed, and then assigned a letter or letters to

correspond to their main point or points. For example, if the respondent's principal idea was that the rule should be eliminated, the response was marked with an "A;" each subsequent response that stated the view that the rule should be eliminated was also put in the "A" category. The master list of categories was created and supplemented as the responses identified new ideas.

The open-ended question that sought suggestions for ways the rule could be improved (Question 27) was considered crucial, since it directly elicited the views of practitioners that the survey was designed to collect. This question yielded 106 written responses; these were eventually grouped into fourteen suggestion "categories," labeled A through N. For each category, a tally mark was made so that the number of responses which conveyed that same main point could be counted, and then accorded weight depending on its frequency. The open-ended responses were then also summarized in narrative form, for presentation to the subcommittee.

Finally, the five questions that had comprised the 1992 attorney questionnaire, and which were repeated in this 2011 survey, were extracted and compared side-by-side, so that conclusions could be drawn about whether attitudes had changed materially in the nineteen intervening years.

Presentation to the Supreme Court

The author presented the status of the study of the fee shifting rule, including a discussion of the 1995 report, the survey questions, and the written summaries of the responses, to the Supreme Court on August 1, 2011. At that time, the Court did not adopt any changes to the rule.

Findings

The survey of all Alaska practitioners, and the discussions with the subcommittee of judges and attorneys with active and respected civil practices, showed that the majority believe that Alaska's fee shifting rule is well-grounded and should be retained. The data also established that perceptions have not changed materially since 1992, when attorneys initially provided information about their views of the rule.

Although the survey responses support the general finding that fee shifting is accepted and supported in Alaska, two closely-related significant issues were identified by respondents. These issues raise questions whether fee shifting's impact on litigants is dependent on the litigant's economic status. This finding is described more fully in this section.

Survey Responses

This section summarizes the responses gathered in the attorney survey for the questions that most clearly illuminate attorneys' perceptions about fee shifting in Alaska. The survey produced a nearly equal number of responses from civil attorneys who represent plaintiffs and who represent defendants (about 23% considered themselves plaintiffs' attorneys, 22% defendants' attorneys, and 33% identified as both), and therefore the findings can be considered to be reasonably representative of the civil bar as a whole.

Support for fee shifting rule.

Survey question number 21 sought attorneys' views on the most crucial issue that this project was designed to determine, which is whether the attorneys

in Alaska who operate under Civil Rule 82 believe that it is beneficial or detrimental. The question was straightforward: "Should Rule 82 be rescinded?"

Of the 337 responses that were submitted by Alaska attorneys, 218 said "no," 82 said "yes," and 37 checked the option for "don't know/no opinion," as shown in Figure 1. That is, 64.7% of all respondents on this critical question do *not* believe the rule should be rescinded, more than 2.5 times the number who believe it should.[10]

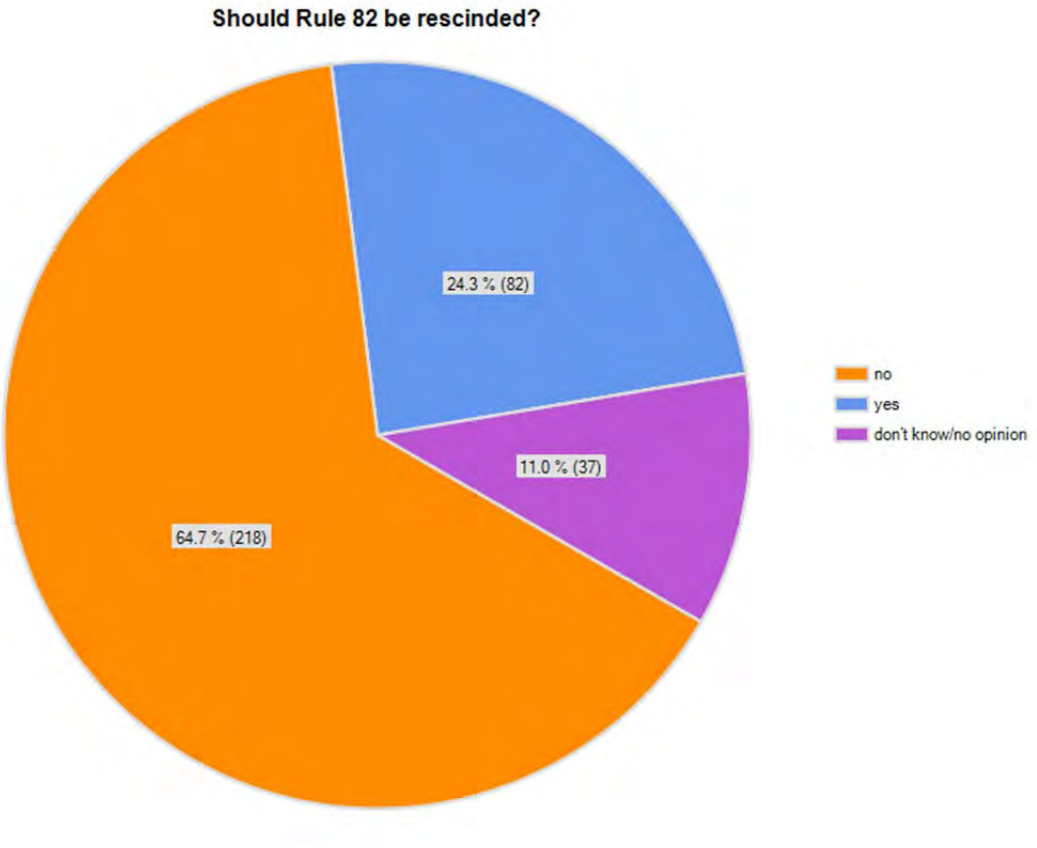

Figure 1. Survey Responses: Should Rule 82 be rescinded?

[10] The Findings in this paper include the respondents who answered "don't know/no opinion," because those responses may be helpful in assessing the overall question about the rule's impacts. For example, knowing that 11% of respondents have no opinion on whether the rule should be rescinded could be viewed as an indicator that for 11% of attorneys, the rule is not very meaningful.

The rule's impact on litigation.

Several survey questions were designed to elicit information about how attorney's fee shifting influences decisions whether to bring a lawsuit or settle an existing lawsuit. These questions aimed to test the assumptions made by those who may be proposing attorney's fee shifting in other jurisdictions, and to assess the impact in Alaska.

Because proponents of attorney's fee shifting often assert that it would, or does, operate to prevent those deciding whether to file a lawsuit from filing the suit if it lacks merit, survey question 8 asked directly "Does [Rule 82] prevent frivolous lawsuits?" Survey question 9 asked a similar question: "Does [Rule 82] discourage bad faith or vexatious conduct?"

The data showed that a low percentage of respondents believe that the fee shifting rule discourages frivolous or bad faith conduct in most cases, though approximately a third of respondents think that is "sometimes" does. Forty-seven percent of respondents believe that the rule "rarely" or "almost never" prevents frivolous lawsuits, as shown in Figure 2.

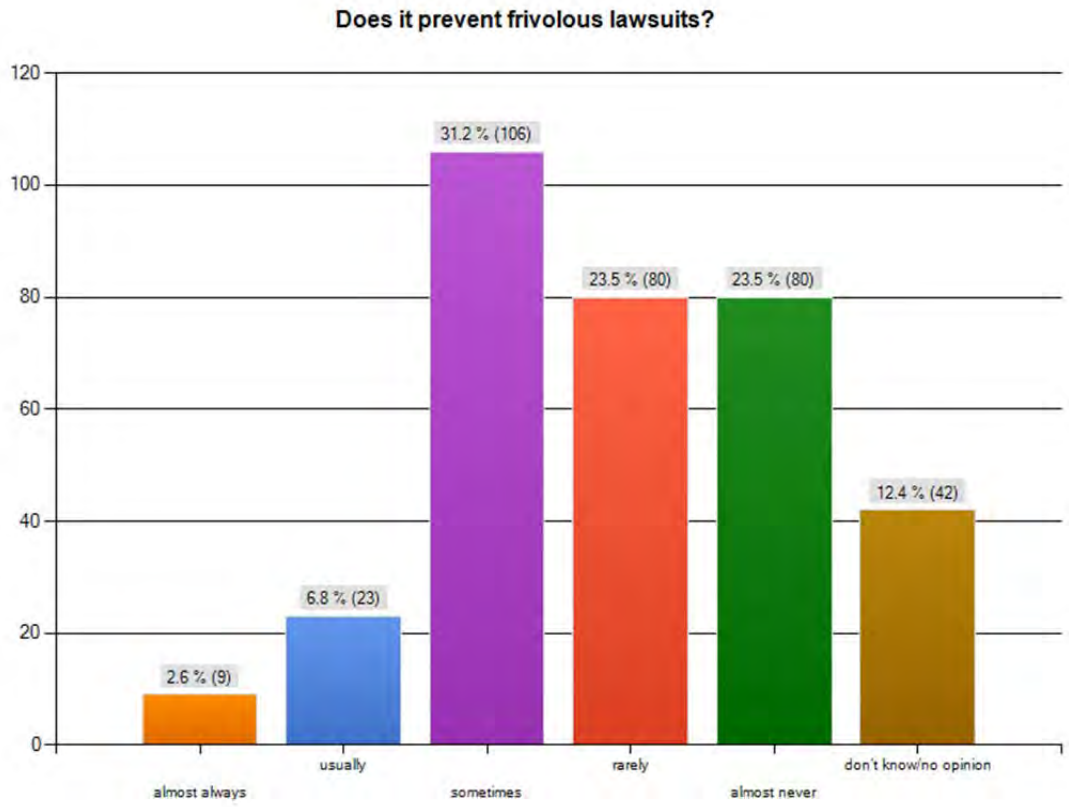

Figure 2. Survey Responses: Does [Rule 82] prevent frivolous lawsuits?

Similarly, the survey data showed that fewer than 9% of respondents believe that the fee shifting rule "almost always" or "usually" discourages bad faith or vexatious conduct, though about 30% believe it does so "sometimes." And nearly 50% of respondents believe the rule "rarely" or "almost never" discourages bad faith or vexatious conduct, as shown in Figure 3.

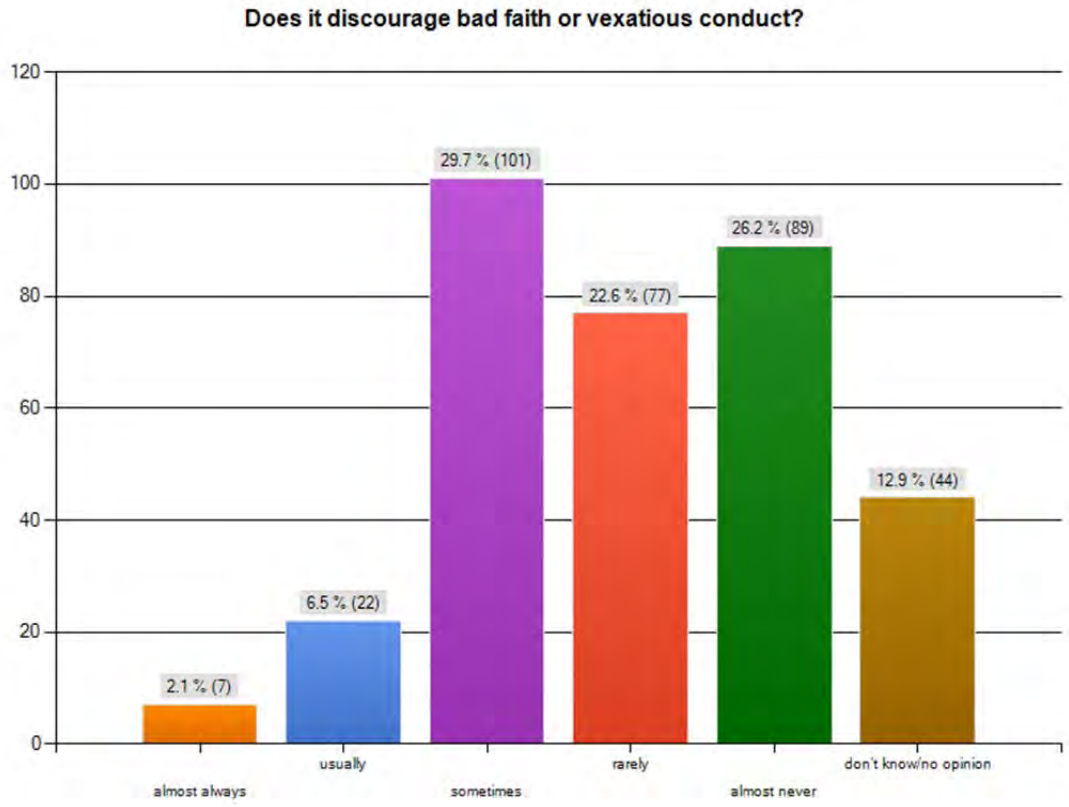

Figure 3. Survey Responses: Does [Rule 82] discourage bad faith or vexatious conduct?

Question number 7 yielded related responses. When asked "Does Rule 82 discourage weak claims," only 10.2% of respondents replied that it "almost always" or "usually" does so. As shown in Figure 4, over one-third responded that it "sometimes" does, and 136 of the 341 respondents (nearly 40%) thought that the rule "rarely" or "almost never" discourages weak claims.

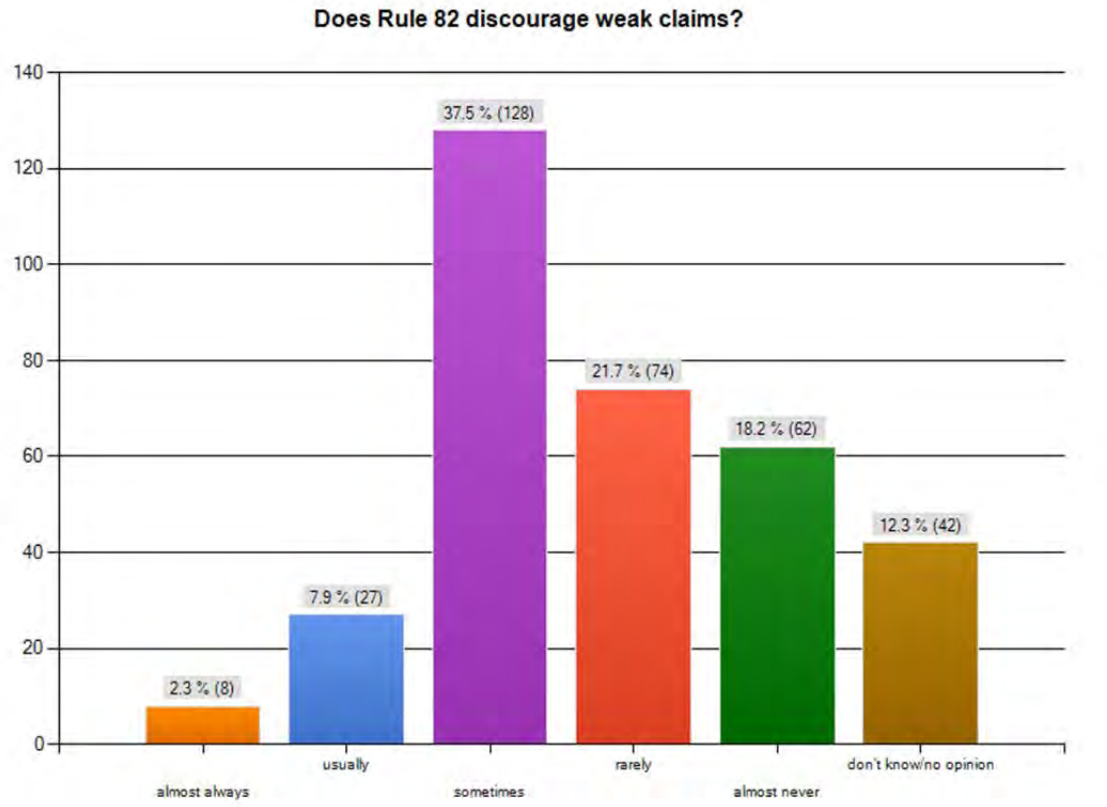

Figure 4. Survey Responses: Does Rule 82 discourage weak claims?

One additional survey question directly gauged the impact that the rule has on litigation practices. Question number 13 asked "Does Rule 82 encourage settlements?" More than half of the respondents believe that it "sometimes" does, while almost a quarter responded that it "rarely" or "almost never" encourages settlements. Forty-eight of the 338 respondents (14.5%) believe that the rule "usually" or "almost always" encourages settlements. Figure 5 displays the responses in graph form.

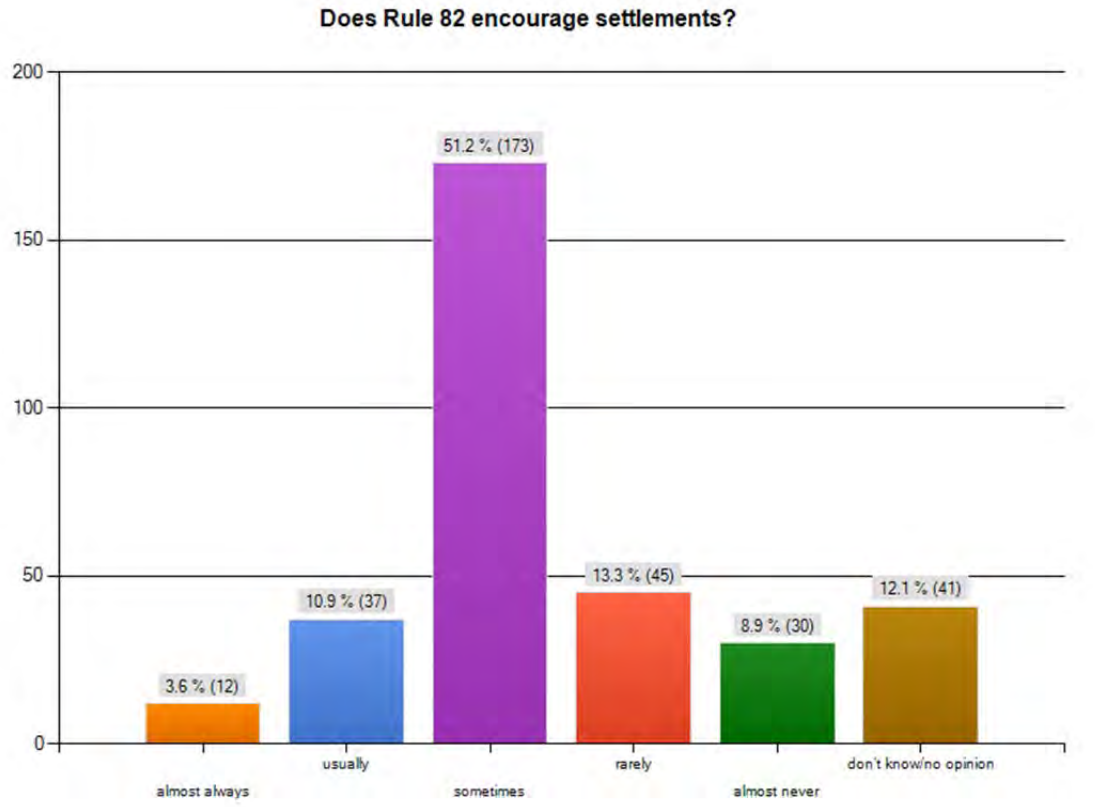

Figure 5. Survey Responses: Does Rule 82 encourage settlements?

How often the rule is used.

To help determine the frequency with which Rule 82 attorney's fees are awarded, question number 2 of the survey asked attorneys "In how many cases

over the last three years has your client been awarded or ordered to pay Rule 82 fees?" The great majority of respondents (78.8%) reported that Rule 82 fees were awarded in five or fewer of their cases in the last three years. Only 64 of the 359 responses (17.8%) reported that they had Rule 82 fee awards in six or more cases over the prior three-year period.

Further, the survey asked in question number 3 for a report of how many Rule 82 fee awards had been made in *tort* cases over the last three years. This question was included because commentators have invoked attorney's fee shifting as a possible tool for tort reform, theorizing that the rule would impact the number of tort cases that are brought and pursued. The responses to that question revealed that 62% of respondents' tort cases did not involve a Rule 82 attorney's fee award, and nearly 26% more respondents reported that Rule 82 fees were awarded in only one to five of their tort cases in the last three years.

The rule's impact as a factor of litigant's income level.

The 1995 study of Civil Rule 82 had reached the conclusion that the rule affected people of moderate means more significantly than others (DiPietro et al., 1995, p. 139), and several questions in the current survey were designed to test whether that conclusion is still supportable. Questions 10 and 11 were two of the five questions that were identical to questions asked in the 1992 attorney questionnaire: "Does [Rule 82] deter people of moderate means from filing valid claims?" and "Does [Rule 82] put excessive pressure on moderate income people to settle valid claims?"

Most respondents answered "sometimes" to both of these questions (approximately 36% did so). Fifteen percent believe that the rule "almost always" or "usually" deters people of moderate means from filing valid claims, and 23.4% believe that it "almost always" or "usually" puts excessive pressure on moderate income people to settle valid claims. Figures 6 and 7 illustrate the responses graphically.

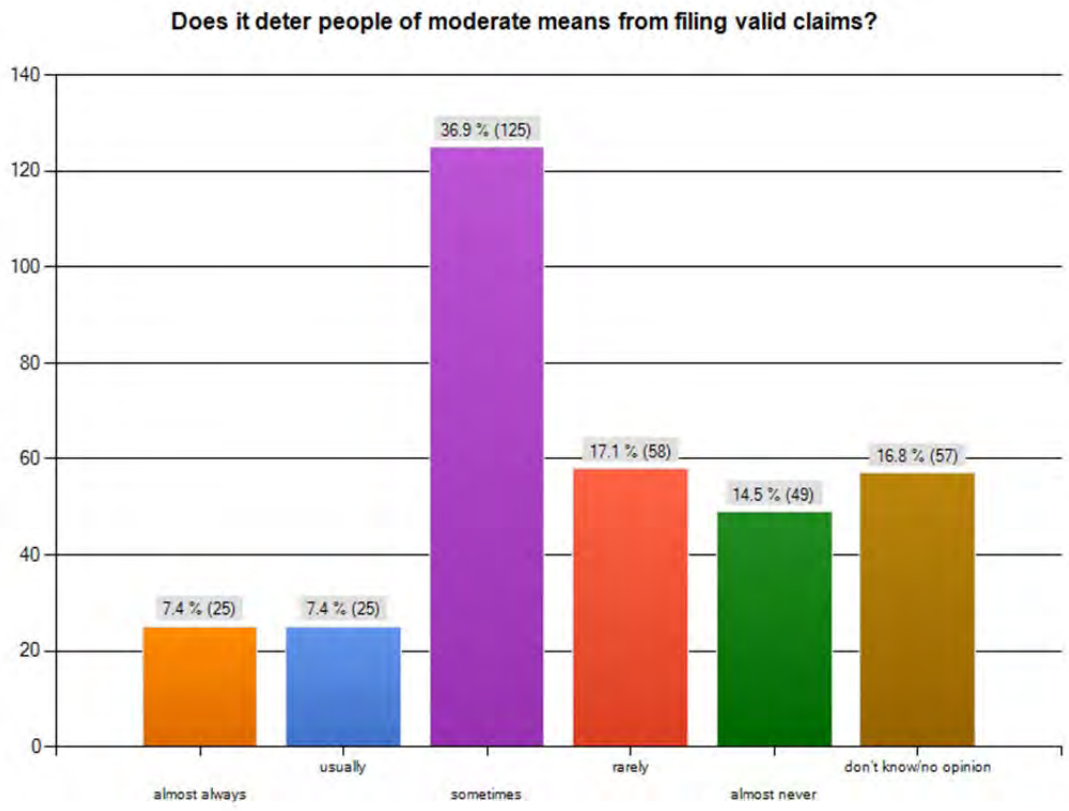

Figure 6. Survey Responses: Does [Rule 82] deter people of moderate means from filing valid claims?

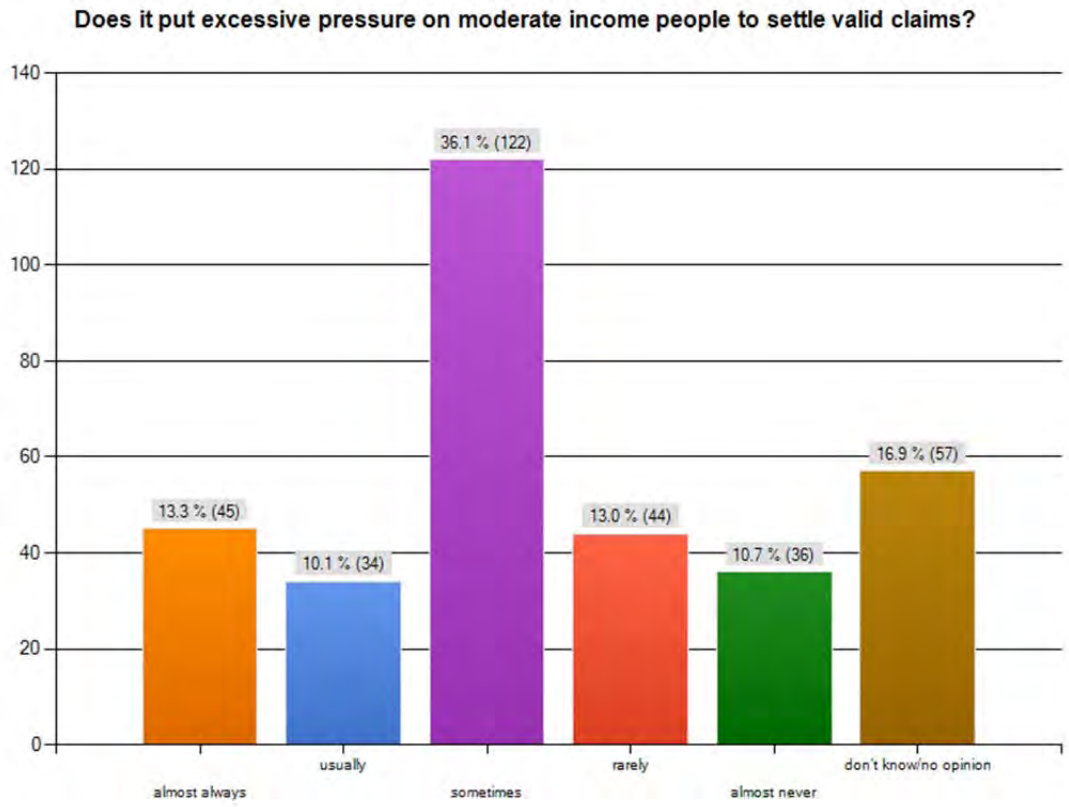

Figure 7. Survey Responses: Does [Rule 82] put excessive pressure on moderate income people to settle valid claims?

Finally, question 25, also included in the survey because a similar question was asked in the 1992 attorney questionnaire, asked whether Rule 82 should allow a court to vary the award depending on the parties' relative ability to pay attorney's fees. Just over half of the respondents thought not, but 37.6% responded with a "yes," as shown in Figure 8.

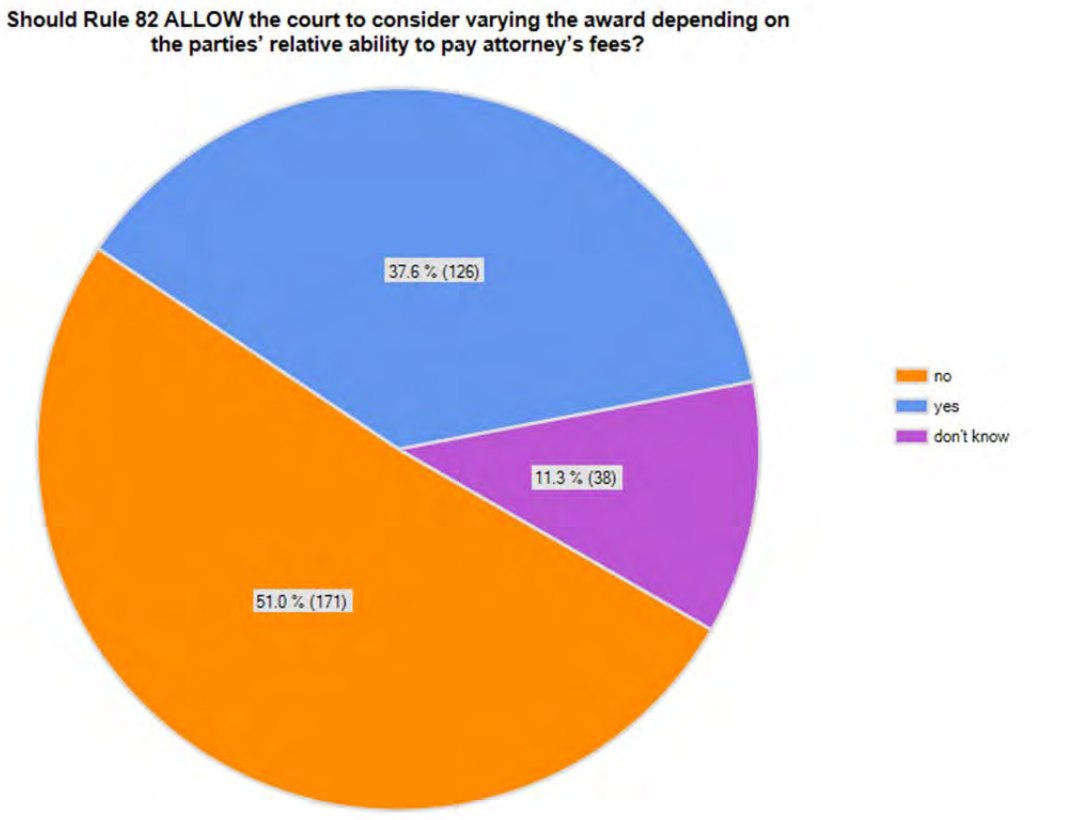

Figure 8. Survey Responses: Should Rule 82 allow the court to consider varying the award depending on the parties' relative ability to pay attorney's fees?

The necessity for the rule and possible revisions.

The survey included two "open-response" questions that provided valuable information about attorneys' views on Rule 82. Survey question 12 asked whether Rule 82 is needed to discourage frivolous litigation, or whether

other factors effectively discourage such cases. More respondents answered "yes" (142), that the rule is needed to discourage frivolous litigation, than answered "no" (121). The "comments" section added substantially to the value of this question; 155 comments were submitted, and they can be categorized as shown in Table 1 below.[11]

Table 1. Question 12: "Is Rule 82 needed to discourage frivolous litigation, or do other factors (litigant's own attorney fees, litigation expenses, litigation's emotional toll) effectively discourage such cases?"

COMMENT	NUMBER OF RESPONSES
Other factors, not Rule 82, discourage frivolous cases	22
Rule is meaningless to judgment-proof people and self-represented persons, who would not pay an attorney's fee award anyhow. It therefore does not deter people who will not ever have to pay the judgment or the fee award from filing claims, frivolous or not	15
Rule is generally helpful and good and serves valid purposes.	15
Frivolous litigation is not a true problem, because attorneys do not take those cases and litigation is too difficult to simply bring a frivolous case	14
Rule is a disincentive to people of moderate means to bring a case, because they might have to pay the fee award if they lose [Some of these responses were made in conjunction with the complaint about it not affecting judgment proof litigants.]	10
Alaska needs a public interest exception, so that public interest plaintiffs will not have the threat of having to pay a defendant's attorney fees; the rule discourages public interest litigation	9
Judges do not fairly apply the rule or enforce it	8

[11] Many respondents commented that the questions was awkward; this is true, but it was an exact duplicate of one of the questions asked of Bar members in 1992, and despite the wording, it was thought that it would be helpful to compare responses to identical questions to determine how and whether attitudes have changed in the 19 elapsed years. A comparison of the 1992 and 2011 questions and answers appears in Appendix C.

In addition, the survey asked respondents to provide "suggestions for ways that Rule 82 could be improved," and to suggest specific wording changes. This question was skipped more than any other question in the survey: of the 365 survey respondents, only 107 offered a suggestion in response to this question. In many instances, the answers mirrored those that were provided in response to other questions; for example, 17 respondents stated that the rule should be eliminated, although a prior question, number 21, asked whether the rule should be rescinded. A notable finding is that zero respondents suggested "specific word changes," as the question explicitly and purposefully invited. The comments submitted are categorized in Table 2 below.

Table 2. Question 27: "Do you have suggestions for ways that Rule 82 could be improved? What specific word changes would you suggest, and why would those be an improvement?"

COMMENT	NUMBER OF RESPONSES
the rule should be eliminated	17
the rule discourages public interest litigation; Alaska should adhere to the "private attorney general" rule in which the public interest plaintiffs can recoup all their attorney's fees when authorized by statutes	12
the rule should NOT be changed to allow full fees in public interest cases	4
the rule is sound and helpful	12
the percentage amounts should be increased	11
the rule favors defendants	10
the rule favors plaintiffs	2
the rule is too complex and difficult to apply	9
a party's ability to pay should not be a consideration at all	8

As Table 2 shows, responses were mixed and contradictory. The relatively small number of comments somewhat diminishes their value; the data indicates that five times as many respondents believe the rule favors defendants (10 respondents) as believe the rule favors plaintiffs (2 respondents), but the number of attorneys responding was extremely low, such that it would not be valid to extrapolate the percentages to a larger group of respondents. And the data shows a nearly equal number of respondents believe that a party's ability to pay *should not* be a consideration (8) as believe it *should* be (7). Again, the very low absolute numbers suggests that the responses cannot be validly extrapolated to a larger group.

Comparison to 1992 Questions and Responses

As previously mentioned, the 1995 report on Alaska's fee shifting rule was based in part on a five-question questionnaire sent to attorneys in 1992. The 2011 survey included the same five questions, so that the answers could be compared directly, as a way to determine whether the general view has shifted in the intervening 19 years. Appendix C shows the answers to the 1992 five-question questionnaire, as well as the 2011 answers to the same questions.

Overall, the responses were varied. For example, the responses to whether Rule 82 deters people of moderate means were as follows:

Table 3. Comparison of 1992 and 2011 Responses: "*Does Civil Rule 82 deter people of moderate means from filing valid claims?"*

1992		2011	
70%	No	31%	(rarely or almost never)
23%	Yes	15%	(usually or almost always)
[not an option]	Sometimes	36.7%	
7%	No answer	17%	

Though the results are not aligned because the current survey offered a "sometimes" option and the 1992 questionnaire did not, one reasonable conclusion is that more current respondents are uncertain as to the rule's deterrent effect on people of moderate means. This is shown by the rise from 7% to 17% who responded with "no answer" or "don't know/no opinion," and the large percentage (36.7%) of current responders who gave the indefinite answer that the rule deters people of moderate means "sometimes."

The ultimate question, whether Rule 82 should be rescinded, yielded results in 2011 that were slightly more critical than those tabulated in 1992. As shown in Figure 1 in this Findings section, 64.7% of current respondents indicated the rule should not be rescinded (that is, they generally supported retaining attorney's fee shifting in Alaska), while 80% of the 1992 respondents had thought that it should not be rescinded. In other words, 19% fewer attorneys support the rule now than did 19 years ago.

Discussion by Subcommittee

The subcommittee of attorneys and judges met twice to discuss the rule and the survey, as well as the survey results. At both meetings, the discussion led members to the overall conclusion that the rule was working satisfactorily. One view expressed, and then readily agreed to, was that Alaska attorneys had grown very accustomed to attorney's fee shifting, and a change in the long-standing application would be disruptive. In essence, the subcommittee concluded, the rule is imbedded in Alaska litigation, and attorneys build its impacts into their litigation and settlement strategies automatically. No

subcommittee member could articulate any reason that Civil Rule 82 was "broken," and therefore the group concluded that it did not need to be "fixed."

In reviewing the raw survey data at the second meeting, however, the subcommittee noted in particular the comments provided in response to question 12 that identified a party's economic status as a factor in how impactful Rule 82 is. See Table 1 above. That is, 15 commenters had pointed out that the rule has no impact on "judgment-proof" litigants (whom commenters generally equated with those who are self-represented, because those who cannot afford an attorney are often also unable to pay a judgment rendered against them), since those litigants do not truly put any financial resources at risk, and therefore the threat of an attorney's fee judgment against them is inconsequential.

The tenor of these comments was that those who are self-represented, and will never have to pay an attorney's fee award against them because they have no funds, are not deterred by the rule from filing any claims. The committee members fully understood these comments, concluding that attorneys have no incentive to bring frivolous cases if they may have to pay attorney's fees, but for self-represented parties, with a financial status that makes them effectively judgment-proof, the possibility of having an attorney's fee judgment against them is no disincentive to pursuing any claims.

The subcommittee linked these comments to those which stated that the rule is a disincentive to people of moderate means who may have to pay an attorney's fee award. As one member articulated, "the very poor don't have to worry about it [because they will not pay an award], and a fee award is

insignificant to very solvent litigants like insurance companies, but it is a factor for people in the middle."

Other than these two related concepts that emerged from the survey data, the subcommittee generally found the results to be unsurprising. The subcommittee members' perceptions, like the overall perceptions revealed in the survey responses, were not uniform, however. In fact, the meeting included a lively discussion about whether the rule favors defendants or plaintiffs, an idea that had been expressed one way or the other by some respondents. Also predictably, and as the subcommittee acknowledged, the attorneys took the position that the rule disfavors the type of client that they typically represent. Nonetheless, the views of the subcommittee were aligned with the general views expressed by the majority of the respondents.

Conclusions and Recommendations

The responses submitted by attorneys in the statewide survey and the discussion in the subcommittee of judges and civil attorneys provided useful information about the attorney fee shifting rule in Alaska.

Conclusion 1: Most Alaska attorneys believe the attorney fee shifting rule should be retained.

Nearly 64.7% of Alaska attorneys who responded to the survey question on whether Civil Rule 82 should be rescinded responded that it should not be. This perception was echoed by the members of the select subcommittee, which stated at one point in its discussion of what message it would like to convey to the Supreme Court that the message should be: "it ain't broke, so don't fix it."

Recommendation 1: The Alaska Supreme Court, which has rule-making authority, should not rescind Civil Rule 82.

The Supreme Court asked for a comprehensive review of the attorney fee shifting rule, including "what modifications, amendments, or elimination of provisions of the rule[ ], if any, might or should be considered." See Appendix B. The Court should be informed that although 82 attorneys responded to the survey question asking whether the rule should be rescinded with a "yes" answer, a much larger number, 218, said "no," and 37 had no opinion or did not know. Based on these responses, and the recommendation of the select subcommittee, the Supreme Court should not rescind the rule at this time.

Conclusion 2: The fee shifting rule does not have a strong impact on the course of litigation (except for possibly encouraging settlements), and is not viewed as preventing frivolous suits.

Only approximately 9% of survey respondents believe that the fee shifting rule usually or almost always prevents frivolous lawsuits, while over 47% think that it rarely or almost never does, and about 31% responded that it "sometimes" does. And only 10% believe the rule almost always or usually discourages weak claims. Even more telling, 22 attorneys, the largest category of response types, provided narrative comments stating that other factors, such as the litigant's own attorney fees, litigation expenses, and litigation's emotional toll, effectively discourage frivolous cases. In other words, the fee shifting rule is not perceived as preventing frivolous cases. Attorneys' views on whether the rule discourages

vexatious conduct were similar: only about 8.5% of respondents think it does, while 49% believe it rarely or almost never does.

The impact of the rule on settlement decisions, however, was perceived to be somewhat stronger. Over 50% of respondents said the rule "sometimes" encourages settlement, and nearly 15% more said it usually or almost always does.

Recommendation 2: Do not assume or presuppose that a fee shifting rule will greatly impact the types of cases being filed, but such a rule may help lower the number of trials.

As noted in the Literature Review, proposals to adopt attorney fee shifting rules in other jurisdictions (such as Texas), and as a part of the federal government's and the Republican Party's litigation reform agendas in recent years, are based on the assumption that such a rule would discourage frivolous lawsuits. This is sometimes presented as a self-evident and fully expected effect of having such a rule. But other jurisdictions should take note that this assumption has not been borne out in Alaska. The experience of attorneys who have operated under the fee shifting rule for decades might surprise those considering such a rule in other jurisdictions: for the most part, attorneys in Alaska do not believe attorney fee shifting prevents frivolous cases, or discourages bad faith or vexatious conduct, or discourages weak claims. Attorney fee shifting should not be viewed as the means of accomplishing those ends. Policy makers in other jurisdictions should carefully identify the results

they are seeking and consider the actual effects of attorney fee shifting before adopting it as a "reform."

The general perception is, however, that the rule encourages settlement. If increased settlement rates is a goal in a particular jurisdiction, either to lower the number of trials or to empower parties to resolve their disputes with less assistance from courts and judges, then the rule is helpful.

These impacts of attorney fee shifting on litigation should interest those considering whether to adopt a similar rule in their jurisdictions. It would be advisable to identify the precise issue sought to be addressed by such a rule, and then consider whether the hoped-for effect is borne out by the Alaska experience.

Conclusion 3: The fee shifting rule may impact those of moderate means more than very poor or very wealthy litigants.

The Literature Review referred to the conclusion in the 1995 study of attorney fee shifting in Alaska that the rule impacted moderate income people more significantly than others. The current data has some limitations that preclude drawing a definitive conclusion as to whether that is thought to be true today. That is, most attorneys (approximately 37%) responded that the rule "sometimes" deters people of moderate means from filing valid claims, but only 15% stated that it usually or almost always does. The large number of "sometimes" responses cloud the conclusion, but they seem to indicate that in a notable number of cases, moderate income people are deterred from bringing valid claims by this rule. This would generally be considered a negative,

unintended impact, since no rule or procedure should operate to deter claims that the courts are designed to resolve.

An additional conclusion from the data should also be considered a negative impact. The rule is viewed as putting excessive pressure on moderate income people to settle claims. Over 23% of respondents think it is almost always or usually true, another 36.1% believe it sometimes is, while about 24% stated that it was rarely or almost never true. Again, a procedural rule should not have a disparate impact on litigation depending on the party's economic status.

The data yielded numerous spontaneous comments expressing the view that the rule was meaningless for judgment-proof litigants (*i.e.*, persons with no assets such that a judgment against them would be uncollectable), and meaningless to wealthy litigants (often identified by commenters as corporations). That is, if the rule is intended to influence litigation decisions, whether that is the decision to bring a claim or settle a claim, it is not perceived to have the intended effect on those litigants at the far ends of the spectrum in terms of economic resources.

Recommendation 3: A future subcommittee may explore ways to alleviate this perceived disparate impact.

It was not apparent to the subcommittee how the fee shifting rule could potentially be revised to account for the perception that it has different impacts on differently-situated litigants. The problem in some ways appeared to be intractable; after all, every judgment in litigation, whether or not it includes attorney's fees, impacts the litigant disparately depending on his or her financial

means. The very wealthy, including large corporate litigants, can pay a judgment without undue burden, and the very poor are often "judgment proof" with respect to the principal owed, not just the fee award. Resolving the disparate impact of the fee rule may be unachievable.

Nevertheless, more thought could be devoted to the topic. For example, as noted in the Introduction, Civil Rule 82 includes eleven factors that a judge may consider in determining whether to vary from the amount of the fee award calculated under the rule. Consideration should be given to whether these factors should be expanded in some way. The recommendation is not that the court should consider a litigant's ability to pay the award, but consideration of whether the litigant's economic status, coupled with the potential award of attorney's fees in the case, caused him or her to make different litigation choices.

In addition, a future subcommittee may consider whether altering the types of cases in which the fee shifting rule is applicable would or could alleviate the concern that it is meaningless for those at the far ends of the economic spectrum. This would involve analysis of case types and litigants' status that may be beyond the scope of a volunteer subcommittee, but could be the subject of further discussion.

Finally, this problem may indeed not be addressable through revisions to the fee shifting rule, but with other reforms that recognize the complex issues inherent in a system that must treat wealthy and poor litigants equally. Litigants in fact do not have equal means or equal power, and certainly do not have an

equal ability to pay judgments, and the court's challenge is to give them all due process and treat them alike.

Conclusion 4: The attorney fee shifting rule is needed, but there is some support for including a "public interest" exception.

In response to the specific question seeking suggestions for improving the rule, 12 attorneys suggested that Alaska adopt the "private attorney general" concept, whereby public interest plaintiffs may recoup all of their attorney's fees in certain types of cases that, generally, benefit the public. As noted in the Literature Review, this concept is incorporated in other states' statutes and certain federal laws. The number of Alaska attorneys who expressed this idea is small, and is further diminished by the fact that four other attorneys expressed the opposite view: that the rule should *not* allow full fees for public interest litigants.

Recommendation 4: The court should not revise the rule to provide a public interest litigant exception.

Support for adopting a public interest exception to the rule is not strong enough to justify the change. If the Supreme Court is interested in such a revision, further study is appropriate, with the caveat that adopting that policy would very likely include revisions to statutes (by the legislature), not merely Civil Rule 82.

Conclusion 5: Attorneys' views of the fee shifting rule generally match those that were reported 19 years ago, with some additional support for rescinding the rule.

As noted in the Methods and Findings sections, five questions in the current survey were included because they mirrored those asked of attorneys in preparation for the 1995 report on fee shifting in Alaska (DiPietro et al., 1995). The responses collected in the 2011 survey establish that views of the fee shifting rule have not substantially changed. Notably, however, the percentage of attorney respondents who believe the rule should be rescinded increased from 16% in 1992 to nearly 25% in 2011. See Appendix C. This implies that attorneys still support the rule, but the uptick in those who would rescind leads to the conclusion that the trend could continue.

Recommendation 5: Members of the Bar should be surveyed again in five to ten years to determine whether views have changed in the interim time period.

The Supreme Court, either through a standing rules committee or by assignment to a member of the administrative staff, should conduct a survey of Bar members' perceptions of Civil Rule 82 on a systematic basis. The rule makes Alaska unique among American jurisdictions, new attorneys with more modern views are constantly being admitted to the Bar, and views evolve over time. The Supreme Court's goal is to have in place procedural rules that are beneficial and fair for attorneys, clients, and self-represented parties, and gauging whether Alaska's distinctive fee shifting policy is working well should be an important part of court's ongoing review of the rules.

The questions in the next survey should also mirror those in this 2011 survey as much as possible. Being able to compare results directly is a valuable

way to determine with more certainty what the changes and trends are. If, for example, the next survey shows yet another increase in the number of attorneys who believe the rule should be rescinded, careful thought should be given to the significance of that fact.

Conclusion 6: Determining how the attorney fee shifting rule is working is difficult to measure definitively.

This project centered on a survey of attorneys' perceptions and the discussions of a select subcommittee of judges and civil attorneys who work with Civil Rule 82, but the data gathered has some inherent limitations. That is, attorneys' perceptions, as expressed in responses to survey questions and in in-person meetings, may not address or answer all aspects of the rule and its impacts.

Developing a conclusive means of establishing how the rule impacts litigation is problematic. For example, to determine what precise impact the rule has in settlement decisions, one could attempt to compare trial rates for certain case types in jurisdictions without a fee shifting rule to the trial rate in Alaska. But that comparison would not likely yield particularly useful results, because so many factors, other than attorney fee shifting, influence decisions to settle in cases across different jurisdictions. Alternatively, one could explore whether fewer frivolous or bad faith lawsuits are initiated in Alaska than in jurisdictions without a fee shifting rule, in an effort to learn whether Alaska's rule in fact decreases the number of frivolous suits filed. Again, however, that study would be unduly complex given the lack of agreement on what constitutes a "frivolous"

action, and the results would be useless because so many factors other than attorney fee shifting impact a decision whether to file a case in Alaska or, say, California.

Recommendation 6: The Supreme Court, and policymakers in other jurisdictions, should be attentive to attorneys' perceptions of how the rule is working.

Because alternative means of measuring the impact of a fee shifting rule are not accessible or would not yield definitive results, this assessment of attorneys' perceptions should be considered a valuable assessment of the policy. Those who work with the fee shifting rule daily in their practices, and judges who make decisions under the rule, are in the best position to provide information about its impacts and make suggestions for improvement. Continued review and analysis of attorneys' perceptions of the rule's impact will ensure that the Court in Alaska and policy makers elsewhere have the information and background to decide whether to revise or adopt a rule that shifts the burden of paying attorney's fees from the party who prevails to the party who loses in a civil lawsuit.

Appendix A: Alaska Rule of Civil Procedure 82. Attorney's Fees.

Alaska Rule of Civil Procedure 82. Attorney's Fees.

(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:

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

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

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

(A) the complexity of the litigation;

(B) the length of trial;

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

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

(E) the attorneys' efforts to minimize fees;

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

(G) vexatious or bad faith conduct;

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

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

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

(K) other equitable factors deemed relevant.

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

(4) Upon entry of judgment by default, the plaintiff may recover an award calculated under subparagraph (b)(1) or its reasonable actual fees which were necessarily incurred, whichever is less. Actual fees include fees for legal work performed by an investigator, paralegal, or law clerk, as provided in subparagraph (b)(2).

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

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

(e) **Equitable Apportionment Under AS 09.17.080.** In a case in which damages are apportioned among the parties under AS 09.17.080, the fees awarded to the plaintiff under (b)(1) of this rule must also be apportioned among the parties according to their respective percentages of fault. If the plaintiff did not assert a direct claim against a third-party defendant brought into the action under Civil Rule 14(c), then

(1) the plaintiff is not entitled to recover the portion of the fee award apportioned to that party; and

(2) the court shall award attorney's fees between the third-party plaintiff and the third-party defendant as follows:

(A) if no fault was apportioned to the third-party defendant, the third-party defendant is entitled to recover attorney's fees calculated under (b)(2) of this rule;

(B) if fault was apportioned to the third-party defendant, the third-party plaintiff is entitled to recover under (b)(2) of this rule 30 or 20 percent of that party's actual attorney's fees incurred in asserting the claim against the third- party defendant.

(f) **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.

(Adopted by SCO 5 October 9, 1959; amended by SCO 497 effective January 18, 1982; by SCO 712 effective September 15, 1986; by SCO 921 effective January 15, 1989; by SCO 1006 effective January 15, 1990; by SCO 1066 effective July 15, 1991; repealed and reenacted by SCO 1118am effective July 15, 1993; amended by SCO 1195 effective July 15, 1995; by SCO 1200 effective July 15, 1995; by SCO 1241 effective July 15, 1996; by SCO 1246 effective July 15, 1996; by SCO 1281 effective August 7, 1997; by SCO 1340 effective January 15, 1999; and by SCO 1455 effective July 15, 1993)

Appendix B: Memorandum Referring Rule 82 to the Author for Study

MEMORANDUM February 7, 2011

TO: Nancy Meade, Civil Rules Committee

FROM: Chief Justice Carpeneti
Justice Fabe
Justice Winfree
Justice Christen
Justice Stowers

INFO: Marilyn May, Clerk of Court

SUBJECT: Civil Rules

The Supreme Court requests that the Civil Rules Committee consider the efficacy of our current civil rules for awards of attorney's fees to prevailing parties. Civil Rules 82 and 68 have not been evaluated recently, and the court is always concerned that awards of attorney's fees not chill or otherwise negatively impact citizens' right to access the courts and that attorney fee litigation not be the "tail that wags the dog."

We would appreciate it if the Civil Rules Committee would consider the Rules without any preconceived notions about the policies behind their adoption or the procedures currently in place for making fee awards. We are interested in the Committee's view of how, in every day civil litigation life, the Rules are working; whether the Rules chill access to our courts; whether the Rules are fair to both prevailing and non-prevailing parties; and what modifications, amendments, or elimination of provisions of the Rules, if any, might or should be considered.

Thank you. We recognize that this is a big task and we appreciate your help with it. We look forward to hearing from the Committee.

Appendix C: Comparison of 1992 Questions and Answers to Similar 2011 Questions and Answers

Question and Response from 2011 Survey

10. Does it deter people of moderate means from filing valid claims?

	Response Percent	Response Count
almost always	7.4%	25
usually	7.4%	25
sometimes	**36.9%**	**125**
rarely	17.1%	58
almost never	14.5%	49
don't know/no opinion	16.8%	57
	answered question	**339**
	skipped question	**26**

COMPARED TO: Question and Response from 1992 Questionnaire

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

	Yes	No	No Answer	Total
Plaintiffs' Attorney	69	127	9	205
Defendants' Attorney	16	136	12	164
Attorney for Both	36	108	14	158
TOTAL #1	121 (23%)	371 (70%)	35 (7%)	527

Appendix C, continued

Question and Response from 2011 Survey

11. Does it put excessive pressure on moderate income people to settle valid claims?

	Response Percent	Response Count
almost always	13.3%	45
usually	10.1%	34
sometimes	36.1%	122
rarely	13.0%	44
almost never	10.7%	36
don't know/no opinion	16.9%	57
answered question		338
skipped question		27

COMPARED TO: Question and Response from 1992 Questionnaire

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

	Yes	No	No Answer	Total
Plaintiffs' Attorney	70	124	11	205
Defendants' Attorney	21	133	10	164
Attorney for Both	35	106	17	158
TOTAL #2	126 (24%)	363 (69%)	38 (7%)	527

Appendix C, continued

Question and Response from 2011 Survey

12. Is Rule 82 needed to discourage frivolous litigation, or do other factors (litigant's own attorney fees, litigation expenses, litigation's emotional toll) effectively discourage such cases?

	Response Percent	Response Count
yes	44.0%	142
no	37.5%	121
don't know/no opinion	18.6%	60
Comment (please specify)		155
answered question		323
skipped question		42

COMPARED TO: Question and Response from 1992 Questionnaire

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?

	Yes	No	No Answer	Total
Plaintiffs' Attorney	90	81	34	205
Defendants' Attorney	90	57	17	164
Attorney for Both	70	64	24	158
TOTAL #3	250 (48%)	202 (38%)	75 (14%)	527

Appendix C, continued

Question and Response from 2011 Survey

21. Should Rule 82 be rescinded?

	Response Percent	Response Count
yes	24.3%	82
no	64.7%	218
don't know/no opinion	11.0%	37
answered question		337
skipped question		28

COMPARED TO: Question and Response from 1992 Questionnaire

4. Should Civil Rule 82 be rescinded?

	Yes	No	No Answer	Total
Plaintiffs' Attorney	32	169	4	205
Defendants' Attorney	29	132	3	164
Attorney for Both	26	120	12	158
TOTAL #4	87 (16%)	421 (80%)	19 (4%)	527

Appendix C, continued

Question and Response from 2011 Survey

25. Should Rule 82 ALLOW the court to consider varying the award depending on the parties' relative ability to pay attorney's fees?

	Response Percent	Response Count
yes	37.6%	126
no	51.0%	171
don't know	11.3%	38
answered question		335
skipped question		30

COMPARED TO: Question and Response from 1992 Questionnaire

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

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

	Yes	No	No Answer	Total
Plaintiffs' Attorney	87	107	11	205
Defendants' Attorney	15	142	7	164
Attorney for Both	45	97	16	158
TOTAL #5a	147 (28%)	346 (66%)	34 (6%)	527

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

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

	Yes	No	No Answer	Total
Plaintiffs' Attorney	79	106	20	205
Defendants' Attorney	13	143	8	164
Attorney for Both	37	105	16	158
TOTAL #5b	129 (25%)	354 (67%)	44 (8%)	527

Review of Civil Rules 82 and 68 and the Allocation and Awards of Attorney's

EXPERIENCE

1. In how many cases over the last three years have you filed or opposed a motion for Rule 82 fees?

- [ ] zero
- [ ] 1-5
- [ ] 6-10
- [ ] 11-15
- [ ] more than 15

2. In how many cases over the last three years has your client been awarded or ordered to pay Rule 82 fees?

- ◯ zero
- ◯ 1-5
- ◯ 6-10
- ◯ 11-15
- ◯ more than 15
- ◯ don't know/issue currently pending

3. In how many TORT cases over the last three years has your client been awarded or ordered to pay Rule 82 fees?

- ◯ zero
- ◯ 1-5
- ◯ 6-10
- ◯ 11-15
- ◯ more than 15
- ◯ don't know/issue currently pending

4. In your most recent case that resulted in a Rule 82 attorney fee award, what amount of attorney fees was actually awarded?

- ◯ less than $1,000
- ◯ $1,000 - 3,000
- ◯ $3,000 - 10,000
- ◯ more than $10,000

Review of Civil Rules 82 and 68 and the Allocation and Awards of Attorney's

5. In your most recent case that resulted in a Rule 82 attorney fee award, was the award collected/paid?

- ◯ yes, all of the award was collected/paid
- ◯ some was collected/paid
- ◯ none was collected/paid
- ◯ don't know/issue currently pending

6. In your most recent case that resulted in a Rule 82 attorney fee award, was any of the fee amount subsequently resolved by settlement?

- ◯ yes, all of the award was resolved through settlement
- ◯ a portion of the award was resolved by settlement
- ◯ none of the award was resolved by settlement
- ◯ don't know/issue currently pending

Review of Civil Rules 82 and 68 and the Allocation and Awards of Attorney's

ATTITUDES

Please respond using your experience with your own cases.

7. Does Rule 82 discourage weak claims?

- ◯ almost always
- ◯ sometimes
- ◯ almost never
- ◯ usually
- ◯ rarely
- ◯ don't know/no opinion

8. Does it prevent frivolous lawsuits?

- ◯ almost always
- ◯ sometimes
- ◯ almost never
- ◯ usually
- ◯ rarely
- ◯ don't know/no opinion

9. Does it discourage bad faith or vexatious conduct?

- ◯ almost always
- ◯ sometimes
- ◯ almost never
- ◯ usually
- ◯ rarely
- ◯ don't know/no opinion

10. Does it deter people of moderate means from filing valid claims?

- ◯ almost always
- ◯ sometimes
- ◯ almost never
- ◯ usually
- ◯ rarely
- ◯ don't know/no opinion

11. Does it put excessive pressure on moderate income people to settle valid claims?

- ◯ almost always
- ◯ sometimes
- ◯ almost never
- ◯ usually
- ◯ rarely
- ◯ don't know/no opinion

12. Is Rule 82 needed to discourage frivolous litigation, or do other factors (litigant's own attorney fees, litigation expenses, litigation's emotional toll) effectively discourage such cases?

- ◯ yes
- ◯ no
- ◯ don't know/no opinion

Comment (please specify)

13. Does Rule 82 encourage settlements?

- ◯ almost always
- ◯ sometimes
- ◯ almost never
- ◯ usually
- ◯ rarely
- ◯ don't know/no opinion

Review of Civil Rules 82 and 68 and the Allocation and Awards of Attorney's

14. To what extent does Rule 82 impact settlement discussions after a case is decided at the trial level but before an appellate court has resolved it?

- ◯ very much
- ◯ not at all
- ◯ somewhat
- ◯ don't know/no opinion

15. In your experience, have trial courts been consistent in applying the 11 factors (Rule 82 (b)(3)) that allow a variation from the fee schedule (Rule 82(b)(1)) in setting a fee award?

- ◯ very much
- ◯ not at all
- ◯ somewhat
- ◯ don't know/no opinion

Review of Civil Rules 82 and 68 and the Allocation and Awards of Attorney's

RULE 68

16. In how many cases over the last three years have you made or received a Rule 68 offer?

- ◯ zero
- ◯ 1-5
- ◯ 6-10
- ◯ 11-15
- ◯ more than 15

17. In your cases over the last three years in which you received a Rule 68 offer, what portion of those offers did you consider reasonable?

- ◯ all of the offers were reasonable
- ◯ some
- ◯ none
- ◯ not applicable

18. Does Rule 68 encourage settlements?

- ◯ yes
- ◯ no
- ◯ sometimes/it depends
- ◯ don't know/no opinion

19. Should Rule 68 be rescinded?

- ◯ yes
- ◯ no
- ◯ don't know/no opinion

20. Do you have suggestions for ways that Rule 68 could be improved? What specific word changes would you suggest, and why would those be an improvement?

Review of Civil Rules 82 and 68 and the Allocation and Awards of Attorney's

YOUR VIEWS AND SUGGESTIONS ON RULE 82

21. Should Rule 82 be rescinded?

◯ yes ◯ no ◯ don't know/no opinion

22. Does Rule 82 cause an increase in the number of appeals filed?

◯ yes ◯ no ◯ don't know

23. Should attorney fee awards be abolished in small claims cases (amounts in controversy up to $10,000)?

◯ yes ◯ no ◯ don't know

24. Should attorney fee awards be limited to $2,000 in small claims cases?

◯ yes ◯ no ◯ don't know

25. Should Rule 82 ALLOW the court to consider varying the award depending on the parties' relative ability to pay attorney's fees?

◯ yes ◯ no ◯ don't know

26. Should the rule REQUIRE the court to consider varying the award depending on the parties' relative ability to pay attorney's fees?

◯ yes ◯ no ◯ don't know

27. Do you have suggestions for ways that Rule 82 could be improved? What specific word changes would you suggest, and why would those be an improvement?

Review of Civil Rules 82 and 68 and the Allocation and Awards of Attorney's

DEMOGRAPHICS

28. What are the substantive areas in which you concentrate 25% or more of your practice?

- ☐ Admiralty/Marine
- ☐ Antitrust
- ☐ Administrative Law
- ☐ Appellate Practice
- ☐ Banking/S&L
- ☐ Bankruptcy
- ☐ Business & Corporate
- ☐ Commercial
- ☐ Consumer Law
- ☐ Criminal Law
- ☐ Debt Collection
- ☐ Domestic Relations
- ☐ General Practice
- ☐ Government
- ☐ Labor
- ☐ Land Use Law
- ☐ Mineral & Natural Resources
- ☐ Municipal/School Districts
- ☐ Negligence – Plaintiff
- ☐ Negligence - Defendant
- ☐ Real Estate
- ☐ Taxation
- ☐ Utilities & Communications
- ☐ Wills, Trusts & Estate Planning

Other (e.g. Native Civil Rights, Environmental, Securities, Military, Aviation)

29. Which do you consider yourself?

- ◯ plaintiff's attorney
- ◯ defendant's attorney
- ◯ both
- ◯ neither
- ◯ judge/judicial officer

30. How long have you practiced law in Alaska?

- ◯ fewer than five years
- ◯ six to ten years
- ◯ ten to fifteen years
- ◯ more than fifteen years

Thank you for taking this survey. The committee will use this information as it considers whether to recommend changes to Civil Rules 68 and 82.

Review of Civil Rules 82 and 68 and the Allocation and Awards of Attorney's Fees Generally

SurveyMonkey

1. In how many cases over the last three years have you filed or opposed a motion for Rule 82 fees?

	Response Percent	Response Count
zero	32.9%	119
1-5	**44.2%**	**160**
6-10	16.3%	59
11-15	1.1%	4
more than 15	6.4%	23
answered question		**362**
skipped question		**3**

2. In how many cases over the last three years has your client been awarded or ordered to pay Rule 82 fees?

	Response Percent	Response Count
zero	34.8%	125
1-5	**44.0%**	**158**
6-10	12.3%	44
11-15	0.8%	3
more than 15	4.7%	17
don't know/issue currently pending	3.3%	12
answered question		**359**
skipped question		**6**

3. In how many TORT cases over the last three years has your client been awarded or ordered to pay Rule 82 fees?

	Response Percent	Response Count
zero	**62.0%**	**220**
1-5	25.9%	92
6-10	6.8%	24
11-15	0.0%	0
more than 15	1.7%	6
don't know/issue currently pending	3.7%	13
	answered question	**355**
	skipped question	**10**

4. In your most recent case that resulted in a Rule 82 attorney fee award, what amount of attorney fees was actually awarded?

	Response Percent	Response Count
less than $1,000	15.3%	42
$1,000 - 3,000	15.6%	43
$3,000 - 10,000	22.2%	61
more than $10,000	**46.9%**	**129**
	answered question	**275**
	skipped question	**90**

5. In your most recent case that resulted in a Rule 82 attorney fee award, was the award collected/paid?

	Response Percent	Response Count
yes, all of the award was collected/paid	**34.9%**	**98**
some was collected/paid	12.1%	34
none was collected/paid	19.9%	56
don't know/issue currently pending	33.1%	93
answered question		**281**
skipped question		**84**

6. In your most recent case that resulted in a Rule 82 attorney fee award, was any of the fee amount subsequently resolved by settlement?

	Response Percent	Response Count
yes, all of the award was resolved through settlement	16.3%	46
a portion of the award was resolved by settlement	4.6%	13
none of the award was resolved by settlement	**54.8%**	**155**
don't know/issue currently pending	24.4%	69
answered question		**283**
skipped question		**82**

7. Does Rule 82 discourage weak claims?

	Response Percent	Response Count
almost always	2.3%	8
usually	7.9%	27
sometimes	**37.5%**	**128**
rarely	21.7%	74
almost never	18.2%	62
don't know/no opinion	12.3%	42
	answered question	**341**
	skipped question	**24**

8. Does it prevent frivolous lawsuits?

	Response Percent	Response Count
almost always	2.6%	9
usually	6.8%	23
sometimes	**31.2%**	**106**
rarely	23.5%	80
almost never	23.5%	80
don't know/no opinion	12.4%	42
	answered question	**340**
	skipped question	**25**

9. Does it discourage bad faith or vexatious conduct?

	Response Percent	Response Count
almost always	2.1%	7
usually	6.5%	22
sometimes	**29.7%**	**101**
rarely	22.6%	77
almost never	26.2%	89
don't know/no opinion	12.9%	44
	answered question	**340**
	skipped question	**25**

10. Does it deter people of moderate means from filing valid claims?

	Response Percent	Response Count
almost always	7.4%	25
usually	7.4%	25
sometimes	**36.9%**	**125**
rarely	17.1%	58
almost never	14.5%	49
don't know/no opinion	16.8%	57
	answered question	**339**
	skipped question	**26**

11. Does it put excessive pressure on moderate income people to settle valid claims?

	Response Percent	Response Count
almost always	13.3%	45
usually	10.1%	34
sometimes	**36.1%**	**122**
rarely	13.0%	44
almost never	10.7%	36
don't know/no opinion	16.9%	57
	answered question	**338**
	skipped question	**27**

12. Is Rule 82 needed to discourage frivolous litigation, or do other factors (litigant's own attorney fees, litigation expenses, litigation's emotional toll) effectively discourage such cases?

	Response Percent	Response Count
yes	**44.0%**	**142**
no	37.5%	121
don't know/no opinion	18.6%	60
	Comment (please specify)	155
	answered question	**323**
	skipped question	**42**

13. Does Rule 82 encourage settlements?

	Response Percent	Response Count
almost always	3.6%	12
usually	10.9%	37
sometimes	**51.2%**	**173**
rarely	13.3%	45
almost never	8.9%	30
don't know/no opinion	12.1%	41
	answered question	**338**
	skipped question	**27**

14. To what extent does Rule 82 impact settlement discussions after a case is decided at the trial level but before an appellate court has resolved it?

	Response Percent	Response Count
very much	16.9%	57
somewhat	**43.9%**	**148**
not at all	11.9%	40
don't know/no opinion	27.3%	92
	answered question	**337**
	skipped question	**28**

15. In your experience, have trial courts been consistent in applying the 11 factors (Rule 82 (b)(3)) that allow a variation from the fee schedule (Rule 82(b)(1)) in setting a fee award?

	Response Percent	Response Count
very much	7.1%	24
somewhat	29.6%	100
not at all	27.5%	93
don't know/no opinion	**35.8%**	**121**
	answered question	**338**
	skipped question	**27**

16. In how many cases over the last three years have you made or received a Rule 68 offer?

	Response Percent	Response Count
zero	31.4%	106
1-5	**32.2%**	**109**
6-10	16.6%	56
11-15	7.1%	24
more than 15	12.7%	43
	answered question	**338**
	skipped question	**27**

17. In your cases over the last three years in which you received a Rule 68 offer, what portion of those offers did you consider reasonable?

	Response Percent	Response Count
all of the offers were reasonable	4.6%	15
some	**40.1%**	**130**
none	24.1%	78
not applicable	31.2%	101
answered question		**324**
skipped question		**41**

18. Does Rule 68 encourage settlements?

	Response Percent	Response Count
yes	32.1%	107
no	10.8%	36
sometimes/it depends	**38.1%**	**127**
don't know/no opinion	18.9%	63
answered question		**333**
skipped question		**32**

19. Should Rule 68 be rescinded?

	Response Percent	Response Count
yes	16.9%	56
no	**59.5%**	**197**
don't know/no opinion	23.6%	78
answered question		**331**
skipped question		**34**

20. Do you have suggestions for ways that Rule 68 could be improved? What specific word changes would you suggest, and why would those be an improvement?

	Response Count
	137
answered question	**137**
skipped question	**228**

21. Should Rule 82 be rescinded?

	Response Percent	Response Count
yes	24.3%	82
no	**64.7%**	**218**
don't know/no opinion	11.0%	37
answered question		**337**
skipped question		**28**

22. Does Rule 82 cause an increase in the number of appeals filed?

	Response Percent	Response Count
yes	28.8%	97
no	34.4%	116
don't know	**36.8%**	**124**
	answered question	**337**
	skipped question	**28**

23. Should attorney fee awards be abolished in small claims cases (amounts in controversy up to $10,000)?

	Response Percent	Response Count
yes	31.6%	106
no	**48.7%**	**163**
don't know	19.7%	66
	answered question	**335**
	skipped question	**30**

24. Should attorney fee awards be limited to $2,000 in small claims cases?

	Response Percent	Response Count
yes	**40.2%**	**133**
no	33.5%	111
don't know	26.3%	87
	answered question	**331**
	skipped question	**34**

25. Should Rule 82 ALLOW the court to consider varying the award depending on the parties' relative ability to pay attorney's fees?

	Response Percent	Response Count
yes	37.6%	126
no	**51.0%**	**171**
don't know	11.3%	38
answered question		**335**
skipped question		**30**

26. Should the rule REQUIRE the court to consider varying the award depending on the parties' relative ability to pay attorney's fees?

	Response Percent	Response Count
yes	25.7%	87
no	**63.4%**	**215**
don't know	10.9%	37
answered question		**339**
skipped question		**26**

27. Do you have suggestions for ways that Rule 82 could be improved? What specific word changes would you suggest, and why would those be an improvement?

	Response Count
	107
answered question	**107**
skipped question	**258**

28. What are the substantive areas in which you concentrate 25% or more of your practice?

	Response Percent	Response Count
Admiralty/Marine	2.7%	9
Antitrust	0.0%	0
Administrative Law	14.6%	48
Appellate Practice	12.8%	42
Banking/S&L	0.6%	2
Bankruptcy	2.4%	8
Business & Corporate	18.0%	59
Commercial	18.9%	62
Consumer Law	2.4%	8
Criminal Law	9.8%	32
Debt Collection	5.5%	18
Domestic Relations	13.4%	44
General Practice	14.9%	49
Government	14.0%	46
Labor	8.5%	28
Land Use Law	5.5%	18
Mineral & Natural Resources	7.3%	24
Municipal/School Districts	6.4%	21
Negligence – Plaintiff	18.3%	60
Negligence - Defendant	**24.1%**	**79**
Real Estate	10.7%	35
Taxation	1.2%	4
Utilities & Communications	1.2%	4

Wills, Trusts & Estate Planning	5.8%	19
Other (e.g. Native Civil Rights, Environmental, Securities, Military, Aviation)		59
answered question		**328**
skipped question		**37**

29. Which do you consider yourself?

	Response Percent	Response Count
plaintiff's attorney	22.8%	78
defendant's attorney	21.6%	74
both	**33.6%**	**115**
neither	18.4%	63
judge/judicial officer	3.5%	12
answered question		**342**
skipped question		**23**

30. How long have you practiced law in Alaska?

	Response Percent	Response Count
fewer than five years	10.0%	34
six to ten years	11.4%	39
ten to fifteen years	13.5%	46
more than fifteen years	**65.1%**	**222**
answered question		**341**
skipped question		**24**

Page 2, Q12. Is Rule 82 needed to discourage frivolous litigation, or do other factors (litigant's own attorney fees, litigation expenses, litigation's emotional toll) effectively discourage such cases?

1	It is harder on defendants than on plaintiffs, and pro pers never understand	May 20, 2011 8:58 AM
2	It depends on how deep the pocket - for those with lots to spend, litigation is an option no matter the cost if the litigation serves another purpose - pressure, publicity etc	May 19, 2011 11:01 AM
3	Rule 82 is not needed to discourage frivolous behavior.Litigants make legal decisions based on their own view of the case. What we need is a private attorney general that allows for recovery of fees in public interest cases, while also providing a shield for plaintiffs in public interest cases from having fees awarded against them in all but frivolous cases.	May 13, 2011 3:46 PM
4	no decent plaintiff's attorney takes frivolous cases. The risks are far too high. The costs are way too high, the juries way too conservative, and no one wants to waste his or her time on a case that will damage her credibility and most likely be lost.	May 13, 2011 2:07 PM
5	It is probably effective as a deterrent when the plaintiff retains counsel, but not as effective with pro se plaintiffs.	May 13, 2011 10:21 AM
6	Rule 82 really only works to give institutional clients leverage in settlement or to discourage legitimate claims. In some cases, R. 82 encourages institutions to press weak claims/defenses because of modern risk management principles. Judgement proof individuals with weak claims bring the cases for emotional reasons unrelated to costs. I believe that R. 82 needs to be reformed to adjust to these realities and level the playing field between moderate income individuals and institutions. Additionally, the Court should reconsider public interest claims and move more toward a federal-like standard for non-constitutional public interest claims. The frivolous standard was too lenient, but the current rule is too strict and is actually deterring serious and valid claims that have nothing to do with the purpose of the change.	May 13, 2011 9:08 AM
7	There are other factors and standards that discourage frivolous litigation (competent legal advice and professional standards of conduct).	May 13, 2011 8:31 AM
8	Rule 82 benefits plaintiffs more often than defendants, since they increase a defendant's exposure. Since defendants are often sued because they are believed to be capable of responding, the financial effects of Rule 82 have more effect on defendants, behavior than plaintiffs' behavior. If a plaintiff is judgment proof, the threat of Rule 82 is meaningless.	May 13, 2011 8:28 AM
9	Plaintiffs should have to bond for attorney fees so they can't hold people of means hostage through litigation without having the threat of rule 82 hanging over them. Many plaintiffs can't pay rule 82, so ithas no impact on them during the litigation. If a plaintiff has a good case, there will be no problem getting a financial guarantee when their lawsuit is filed.	May 13, 2011 8:26 AM
10	Other factors are more apparent and immediate in discouraging unwarranted litigation	May 13, 2011 5:14 AM
11	This is a compound question. Rule 82 is not needed to discourage frivolous litigation. Litigants moderate their own behavior in bringing cases based upon	May 12, 2011 3:59 PM

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	their own perspectives. What is needed is a private attorney general rule that allows recovery of fees in public interest cases while providing a shield for plaintiffs in all but frivolous cases.	
12	Virtually every party believes in their own case. They rarely contemplate the consequences of losing, even when properly counseled. Clients see Rule 82 as a way to recoup the attorney fees they are paying. Consequently, I've never thought that it encourages settlement of cases. Instead I think it continues to fuel litigation because parties think they will eventually be reimbursed thier attorney fees. If parties understood that each party is expected to bear thier own attorney fees, they would be more likely to analize their case on a cost/benefit analysis and try to settle more often. Frivolous lawsuits would also tend to go away because a litigant who wants to recover $1 in damages and then seek attorney fees wouldn't have any incentive to continue. Moreover, when one considers the amount of litigation that surrounds Rule 82 in almost every case, I've always thought that the negatives far outweight the positives of Rule 82.	May 12, 2011 3:52 PM
13	Attorney screening and the cost of litigation are sufficient deterrents.	May 12, 2011 3:51 PM
14	To clarify, I believe it's needed to discourage frivolous litigation, even if it's not particularly effective in doing so in its current form.	May 12, 2011 2:47 PM
15	This question is worded badly, it is compound. The answer to the first question is it doesn't matter because people who file lawsuits don't think they can lose or don't care if they do lose (judgment proof). I don't think there is much "frivolous" litigation. Most cases have some merits. The other factors are far more likely to discourage litigation in general.	May 12, 2011 12:05 PM
16	Until recently I did not do a lot of litigation, so I do not have a lot of experience upon which to draw as to the effect of Rule 82 on either frivolous or valid claims. I do know from what I have seen that it does not seem to deter frivolous claims by claimants who are essentially judgment-proof or by pro se litigants (often the same group). It may discourage corporate clients from presenting meritorious defenses.	May 12, 2011 11:53 AM
17	Rule 11 is designed specifically to deter frivolous suits placing the blame of the right people.	May 12, 2011 11:47 AM
18	Terrible question! Other factors are far more important.	May 12, 2011 11:35 AM
19	If a person has brought a frivolous lawsuit and is ordered to pay Rule 82 fees, they are less likely to do the same in the future.	May 12, 2011 11:16 AM
20	See 13.	May 12, 2011 11:08 AM
21	The potential application of enhanced awards of fees for frivolous and/or vexatious conduct is a very effective tool for persuasive purposes. In application, however, it seems that a significant number of judges are unmindful of the policies behind the rule (including deterence of frivolous or vexatious claims). I have seen judges specifically find that a claim was unfounded in law and in fact, then award only 8% of the fees incurred to get rid of the unfounded claims. My clients did not feel justice was done, and such results tend to reward	May 12, 2011 11:03 AM

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	misconduct.	
22	By having a judicial exception for public interest litigants the rule actually fosters frivolous and vexatious litigation.	May 12, 2011 10:39 AM
23	It's not really possible to answer this question yes or no. I think that people who bring frivolous lawsuits are either angry or crazy, so I don't think that Rule 82 discourages them. I do think that the cost of their upfront fees might discourage them, but if they are angry or crazy, they're likely to do it anyway.	May 12, 2011 10:27 AM
24	With a limited number of litigants, it can be a factor in convincing them to settle a claim or not bring a claim	May 12, 2011 9:45 AM
25	frivolous litigation rarely occurs in the tort litigaiton arena in my opinion. for and attorney to file a "frivolous" law suit is unethical. Therefore, most claims which are truely frivolous should never be filed.	May 12, 2011 9:29 AM
26	Having Rule 82, which can apply to either party, is highly effective in negotiating settlement of cases, and is a fair cost shifting mechanism in favor of the prevailing party, for a part of the fees, for those cases which go to trial.	May 12, 2011 9:19 AM
27	Rule 82 is grossly unfair because it leave Plaintiff's to recover a small percentage of their actual fee (and seldom is exceeded) while giving the Court the option of awarding Defendants a substantial portion of theirs. Additionally I've seen insurance defense counsel for co-defendants "milk" this by sending low run associates to attend dozens of depositions that only have relevance to their co-defendants for the sole purpose of running up hour. Likewise they file dozens of last minute motions (in violation of the PTO) to purposefully disrupt trial preparations. In short this rule (which which appeared to have so much merit at Statehood only works to the benifit of insurance defense counsel now that the state has abolished joint and several liability and one must carefully judge each individual defendant's % of fault leat Plaintiff win but still not be the "prevailing party"!	May 12, 2011 9:17 AM
28	Question is defectively worded. My answer: YES, it is needed. NO, other factors do not effectively discourage frivolous claims.	May 12, 2011 9:12 AM
29	It helps, but skilled plaintiffs attorneys seem adept at finding judgment proof plaintiffs. So the plaintiff gets the benefit of rule 82, but doesn't take on much risk.	May 12, 2011 9:09 AM
30	In my view, one of the biggest problems with the rule is that it discourages normal middle class people from filing valid claims. It does not cause the same pressure on people who are judgment proof.	May 12, 2011 9:03 AM
31	No, Other factors sufficiently deter litigants and their attorneys. The defense interests are almost totally undaunted by Rule 82 in personal injury cases	May 12, 2011 9:01 AM
32	Rule 82 has a chilling effect on valid claims.	May 12, 2011 8:59 AM
33	I have practiced tort law on the defense side for 25 years. The amount of frivolous claims (as opposed to weak claims) is really quite low. Te threat of a	May 12, 2011 8:58 AM

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	fee award allows many of those claims to be settled on a walk away basis.	
34	The problem has always been the one-sided application of Rule 82 by our trial courts. It is not uncommon for prevailing plaintiffs to obtain enhanced attorneys whereas prevailing defendants in demonstrably nonmeritorioius cases almost never get enhanced fees and sometimes get diminished fees. People of means, professionals, middle-incoee folks are often bludgeoned into settlements because of the threat of an award of attorneys fees whereas those who are penniless have no such concerns. This is a very unhealthy situation which has been allowed to fester for a number of years. Rule 82 arguably helps discourage frivolous litigation involving parties of moderate and above means but does not opearte to discourage frivolous litigation in a broader sense.	May 12, 2011 8:54 AM
35	competent attorneys should be an effective bar to frivolous claims	May 12, 2011 8:48 AM
36	I believe the rule plays a valid role in our system. I've seen some pretty weak claims which makes me think it does not have much of a deterrent effect -- but then we don't know how many weak or frivolous claims that are never filed b/c of the rule's deterrent effect. I don't believe it discourages valid claims.	May 12, 2011 8:43 AM
37	I don't think so. I think people file frivolous litigation on a regular basis and those that do often, but not always, are judgment proof and therefore a potential award of attorney fees does not discourage them from filing the lawsuit. In my experience, Rule 82 is very harmful to the majority of my clients (non-profit, public interest organizations) and moderate to lower income folks.	May 12, 2011 8:38 AM
38	Needs to be applied uniformly, strictly and used in public interest cases brought by well financed litigants	May 12, 2011 8:37 AM
39	I don't know where else I'll have a chance to say this, so here goes: there should no increased attorney's fees award (in the fee schedule) when a typical debt collection case is resolved on a motion for judgment on the pleadings. The defendant is under the impression that she should file an answer; she does; she admits that she owes the bill, usually with an explanation of financial distress; we voluntarily do not ask for more than the default award and the judge in Palmer are sensitive to this issue, but it needs to be resolved in the rule. Thanks. peter@alolaw.com	May 12, 2011 8:31 AM
40	In my experience, Rule 82 fees is just one factor in whether or not a case is filed, settled or tried. I think Rule 68 generally has a much bigger impact, but the supreme court is taking some of that away through its recent interpretations.	May 12, 2011 8:28 AM
41	I'm not sure that Rule should function to discourage frivilous litigation (Rule 11 should do that), but it should serve to mitigate the costs of defending against frivolous or not-quite-frivilous claims	May 12, 2011 8:27 AM
42	Other factors, such as litigation expenses effectively deter such cases.	May 12, 2011 8:23 AM
43	Rule 82 helps mainly in personal injury, policy limits types of scenarios in enhancing the recovery, but does not really have any effect in the actual litigtion.	May 12, 2011 8:23 AM
44	The inability to collect expert costs by plaintiffs is the biggest hurdle to fairly	May 12, 2011 8:16 AM

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	litigating cases for people vs. corporations (insurance companies).	
45	not needed other factors discourage filing	May 12, 2011 8:12 AM
46	Because insurance generally renders Rule 82 fees "collectible," the availability of Rule 82 at times acturally encourages civil claims. In practice, the Rule 82 fees are paid far more frequently by defendants than by plaikntiffs.	May 12, 2011 8:11 AM
47	Litigation that would otherwise be solvable on the merits linger on because of fees.	May 12, 2011 8:05 AM
48	judgment proof people usually are the only persons who will risk filing major litigation against a monied defendant. Rule 82 and 68 usualy will prolong the litigation for months after a case, and causes people to settle for the worng reasons.	May 12, 2011 8:02 AM
49	This is a poorly crafted question. My "Yes" is as to the first part - R82 is helpful to discourage frivolous litigation.	May 12, 2011 8:02 AM
50	Question phrased poorly. I think "other factors" discourage litigation, more than Rule 82 does. Should I answer this Yes or No?	May 12, 2011 8:01 AM
51	In my experience people that bring truly frivolous claims do so because they they lack the ability, for whatever reason, to appreciate that their claims lack merit. To people with such a lack of judgment, the additional potential sanction of rule 82 seems unlikely to prove much of a deterrent.	May 12, 2011 7:58 AM
52	this question is not asked in a "yes" or "no" format	May 12, 2011 7:57 AM
53	I've never had to collect because I am new to the Bar Association and because I am a law clerk and cannot represent anyone until I am finished with the clerkship.	May 12, 2011 7:53 AM
54	This is a badly worded question. Other factors discourage frivolous litigation. Rule 82 quells people of moderate means from bringing suit.	May 12, 2011 7:53 AM
55	Yes, but the problem lies in how it applies to public interest litigation. Access to the court system -- the only independent branch of government -- to pursue valid public interest clams is chilled by the potential liability of a plaintiff/appellant to Rule 982 fees. The COurt System should survey how other state jurisdictions around the United States assess costs and fees, including in public interest cases, and then make recommendations to the Court or, if necessary, the legislature, to fix this problem.	May 12, 2011 7:52 AM
56	Need to dump this rule, or at least add a strong public interest exception.	May 12, 2011 7:51 AM
57	Rule 82 is needed to recognize the tremendous transactional costs imposed upon litigants, even litigants who have the better case and who prevail at trial. Without Rule 82, a person with a valid claim can be discouraged from filing litigation, knowing that the transactional costs of prosecuting the claim are simply lost. And without Rule 82, anyone can be summoned and forced to pay attorney fees to defend a claim, no matter how weak. People who have questionable claims or questionable defenses SHOULD be discouraged from pursuing such	May 12, 2011 7:48 AM

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	claims or defenses. In practice, Rule 82 is insufficient because it does not award actual -- or even close to actual -- attorneys fees. The compensatory goal of Rule 82, as well as the goal of discouraging pursuit of weak claims or defenses, should be enhanced by simplification of the rule and by enhancing the fees which are recoverable. The 11-factor test in Rule 82 is a distraction and is so subjective as to create great uncertainty at the trial level and a quagmire of language at the appellate level.	
58	I think the focus of this survey is much more oriented towards the thoughts of insurance defense, who are most anxious to claim a lawsuit is frivolous. I think the question should be whether R. 82 is needed to discourage bad faith defense, and the answer to that question is yes.	May 12, 2011 7:46 AM
59	If the parties are familiar with Rule 82, the rule does encourage responsible decision making.	May 12, 2011 7:44 AM
60	The high expense and risk of litigation is discouraging enough for most people including but not limited those of moderate means. For the most part the civil justice system is geared toward handling disputes among business, commercial and governmental litigants, with the exception of domestic relations cases. Rule 82, as such, is a disincentive to people of moderate means, even if they understand it or are aware of it, which most are not.	May 12, 2011 7:42 AM
61	While Rule 82 will not deter those vexatious or frivolous litigants with an ax to grind, it does help bring folks to the table. I think the loser pays approach Alaska takes, compared to the "American Rule" regarding attorneys fees, evens the playing field for those vexatious plaintiffs because being vexatious/frivolous and proving vexatiousness/frivolousness are two entirely different things.	May 12, 2011 7:41 AM
62	In my plaintiffs personal injury practice, there is no time or place for filing a frivolous lawsuit. Frivolous claims do not pass my screening efforts and don't become clients.	May 12, 2011 7:41 AM
63	Wiould be more beneficial at a higher rate and/or if the judges would apply consistently. In my experience judges with primarily criminal background tend to go very light on atty fee awards in civil cases without considering the complexity of the litigation or the actions of opposing parties - one judge announced on the record that we should have settled our case and not "run up" attorneys fees - where we had three different negotiated settlements over the course of litigation and the other party would refuse to execute after coming to agreement.	May 12, 2011 7:41 AM
64	Most frivolous litigation is deterred just by the litigation process and by decent advice to the client. Rule 82 just makes it too risky to bring an otherwise valid claim for people who can barely afford their own atty fees. Those who bring public interest cases need to be protected from having to pay opposing parties fees unless the claim really is baseless. Otherwise judicial review of government action is severely restricted.	May 11, 2011 3:36 PM
65	Like most policy choices that society makes, Rule 82 is not a panacea. Rule 82 contributes to the discouragement of for frivolous suits and vexatious conduct, and the encouragement of settlements. While Rule 82 is not a cure-all, it is better policy than not having a fee-shifting provision at all.	May 9, 2011 3:04 PM

Page 2, Q12. Is Rule 82 needed to discourage frivolous litigation, or do other factors (litigant's own attorney fees, litigation expenses, litigation's emotional toll) effectively discourage such cases?

66	It strikes a good balance between the competing goals of keeping the courthouse open to legitimate complaints while ensuring that there is a penalty for frivolous or weak claims.	May 9, 2011 8:24 AM
67	In my opinion. Rule 82 rarely facilitates settlements. I do both defense and plaintiff cases. On the defense side, it is just an additional cost, it is a surecharge on damages. But, I have not found that it influences insurance companes at all as to settlements. On the plaintiff's side, if the plaintiff is indigent, it doesn't matter, he/she doesn't care. If the plaintiff is wealthy, it similiarly doesn't really matter. However, if the plaintiff is "middle class," I have found that it definitely has caused clients to settle for less than a case is worth. That is particularly true when there are close liability issues and bad damages. Also, if damages are not very large, it deters persons from bringing legitimate cases because Rule 82 exposure can far exceed the damages sought. In short, I feel quite strongly that Rule 82 increases the cost of cases for everyone by increasing damages and it unfairly deters and punishes plaintiffs with moderate incomes, without providing any real benefits. I have found that the best deterent of frivolous litigation is when those cases are tried to a defense verdict. Settlement of such cases causes more to be filed because the plaintiff lawyer takes questionable cases hoping for a nuisance settlement. It doesn't take too many defense verdicts to curtail such cases. Experienced plaintiff lawyers know this and screen cases accordingly. Rule 82 has no deterent value, in my experience.	May 8, 2011 3:45 PM
68	This is not a yes ir no question. Badly worded.	May 8, 2011 1:02 PM
69	People hate the thought of paying the other side's fees, so Rule 82 is a greater "discourager" than a litigant's own fees and costs. Rule 82 is also helpful to a lawyer trying to discourage a frivolous claim.	May 5, 2011 7:39 PM
70	the courts need to get some backbone and rule on frivolous litigation. once they begin to enforce all the civil rules, frivolous lit will slow down. now the attitude is: might as well give it a try.....	May 5, 2011 11:45 AM
71	If Rule 11 does not discourage frivolous litigaion when it is directed at the lawyer then Rule 82, that is directed at the client, will certainly not do it. Frivolous law suits are almost non-existent in my experience.	May 5, 2011 9:07 AM
72	Your question 12 is confusing. Yes we need Rule 82 to discourage frivolous litigation. And no, the other factors do not necessarily discourage those cases	May 4, 2011 11:43 AM
73	The former proposition is true: Rule 82 is needed and useful to discourage frivolous litigation. This question is poorly worded, as a yes answer could support opposite propositions.	May 3, 2011 4:12 PM
74	Yes, in certain cases it is an effective tool. In other cases, e.g., litigation from pro se plaintiffs who are also incarcerated, it seems to have little effect because they have nothing to lose and lots of time on their hands	May 3, 2011 3:49 PM
75	Rule 82 (combined with what used to be Rule 68)is virtually the only factor that limits or prevents frivolous litigation. Until the Supreme Court ruined Rule 68 with it's disingenuous and obtuse holdings on so called 'sham' offers, the combination	May 3, 2011 3:21 PM

Page 2, Q12. Is Rule 82 needed to discourage frivolous litigation, or do other factors (litigant's own attorney fees, litigation expenses, litigation's emotional toll) effectively discourage such cases?

	of the two rules was a fair and effective way of discouraging some, but by no means all, frivolous lawsuits. It also forced defendants to realistically evaluate their cases.	
76	While it may not discourage the filing of a meritless claim, it is helpful when attempting to resolve a claim.	May 2, 2011 4:04 PM
77	The rule causes more problems (and attorney/court effort) than it solves.	May 2, 2011 2:40 PM
78	Keep Rule 82, it works.	May 2, 2011 12:47 PM
79	Rule 82 does not discourage frivilous lawsuits in contingent fee cases as attorneys will not accept a case that does not have merit because they are unlikely in such cases to get paid. Rule 82 may discourage defendants from scorched earth/bad faith tactics and may be needed in such cases to offset the extra work dealing with frivilous defense tactics that well healed defendants can afford.	May 2, 2011 12:07 PM
80	From my experience, many attorneys that I've worked against file B.S. pleadings just to run up a client's invoice. I have to respond to these pleadings which costs my client $$. It appears the the frivolity in litigation is primarily manifest by attorneys with questionable scruples.	Apr 29, 2011 10:40 PM
81	This is a compound question. Rule 82 does not discourage frivolous litigation.	Apr 29, 2011 10:24 AM
82	Really poorly worded question.	Apr 29, 2011 9:10 AM
83	I believe that Rule 82 is needed, although it has helped me at times, and been a reason to settle otherwise valid claims for less than the actual amount at other times.	Apr 29, 2011 8:55 AM
84	The implementation of rule 82 is the problem. Most often judges use it in family law cases to discourage a settlement from women. Men most often make it difficult to collect and judges do nothing to assist in the collection of the award of attorney fees.	Apr 29, 2011 6:26 AM
85	"Frivolous litigation" is a poor choice of terms. The factors which influence litigation are many and are dynamic, i.e, changing with time as litigation progresses. Since Rule 82 only applies to cases that go all the way to trial or summary judgment, it is only a small factor in influencing what happens in litigation. On the other hand, 10% of reported opinions involve Civil Rule 82/Civil Rule 68 issues.	Apr 28, 2011 4:27 PM
86	In my experience, if a case is frivolous, attorneys will not represent the party and prosecute the case. When individuals go forward pro se, the individuals are not familiar with Rule 82, do not grasp its consequences, or are intellectually immune from caring about the risk.	Apr 28, 2011 3:07 PM
87	Rule 82 is often not the primary consideration, but it can discourage cases that are very weak adn brought more for political, emotional or spite reasons.	Apr 28, 2011 1:56 PM
88	Most clients are discouraged without even knowing about Rule 82. The actual costs plus time and emotion rule out most claims. When face with lengthy	Apr 28, 2011 1:18 PM

Page 2, Q12. Is Rule 82 needed to discourage frivolous litigation, or do other factors (litigant's own attorney fees, litigation expenses, litigation's emotional toll) effectively discourage such cases?

	litigation they fold.	
89	It doesn't discourage frivolous litigation because frequently the actual parties filing the frivolous litigation are judgment proof and end up exchanging their appeal rights when they lose for waiver of the attorney's fees awarded.	Apr 28, 2011 12:42 PM
90	Not sure it will work, but I think it helps discourage frivolous litigation. Reducing the scope of the public interest litigant exception seems to have helped as well.	Apr 28, 2011 12:35 PM
91	I think sanctions would be more likely to deter bad faith or vexatious conduct.	Apr 28, 2011 11:27 AM
92	The problem is R82 is not a factor for insurance companies and other wealthy corporations but is a major consideration for middle class plaintiffs with some assets that would be exposed to a R82 award. It exacerbates the inequality and empowers big corporations, doing nothing to inhibit their overbearing litigation conduct.	Apr 28, 2011 10:35 AM
93	the rule has some effect in discouraging cases, but it is difficult to distinguish between the effect of rule 82 and the other factors.	Apr 28, 2011 9:39 AM
94	prevailing party should be entitled to larger percentage or full fees.	Apr 28, 2011 9:38 AM
95	This rule has succeeded in its primary objectives.	Apr 28, 2011 9:27 AM
96	My clients are sometimes pressured not to bring a meritorious case b/c of the risk of losing and paying attorney fees.	Apr 28, 2011 9:23 AM
97	Courts can already punish attorneys and complainants for frivolous and vexatious filings. Rule 82 punishes moderate means people from pursuing valid smaller cases that insurance companies purposely try to minimize recovery.	Apr 28, 2011 9:16 AM
98	The question is compound and can't be answered yes or no. Rule 82 is somewhat helpful in discouraging (or at least, punishing) vexatious conduct, but is really needed is more vigorous application of Rule 11.	Apr 28, 2011 9:04 AM
99	I believe most civil attornies do not consider rule 82 in either filing or defendng claims.	Apr 28, 2011 9:04 AM
100	For cases in which lawyers represent the plaintif on a contingent fee, rule 82 is not needed to discourage frivolous claims because the lawyer has no interest in such claims. Where lawyer is being paid, client may want to pursue claim so much that doesn't recognize risk of fees. Similarly, defense often pursue frivolous defenses because can still settle and avoid rule 82 and rarely punished. When no lawyer is involved for party bringing frivolous claim or defense, rule 82 probably does not matter.	Apr 28, 2011 8:32 AM
101	The length of litigation and attendant cost is now so great as to render Rule 82 moot. This cost means that courts are now closed to all but corporations, governmental agencies, insurance companies and pro-se litigants.	Apr 28, 2011 8:20 AM
102	Ultimately the practical effect of the threat of a Rule 82 award is that it causes adverse rulings not to be appealed when the plaintiff is of moderate means, whether or not the ruling was meritorious. In my experience it has very little	Apr 28, 2011 8:13 AM

Page 2, Q12. Is Rule 82 needed to discourage frivolous litigation, or do other factors (litigant's own attorney fees, litigation expenses, litigation's emotional toll) effectively discourage such cases?

	effect on whether the suit is actually brought in the initial instance.	
103	This is a compound question inherently requiring different answers to each half. To the first half, no, Rule 82 is not needed to discourage frivolous litigation. To the second half, yes, other factors effectively discourage such cases.	Apr 28, 2011 7:47 AM
104	From my perspective, frivolous claims are still filed despite the existence of Rule 82. When it comes to settlement discusions, the threat of a Rule 82 award is used as a means of encouraging settlement. So, I do not think that the Rule helps to avoid frivolous lawsuits, but it does encourage settlement.	Apr 28, 2011 7:42 AM
105	frivolous litigation is virtually non-existent to begin with. Anyone sued thinks the claim is frivolous, but claims are almost always based on legitimte factual and legal disputes.	Apr 28, 2011 7:40 AM
106	Rule 82 is a huge benefit in discouraging frivolous litigation. While Rule 82 does not prevent frivolous litigation entirely, it nevertheless helps immensely in that regard. In my practice I have almost never seen Rule 82 work to discourage anyone from bringing legitimate claims. Application of Rule 82 has virtually all positive consequences and no negatives.	Apr 28, 2011 7:36 AM
107	Compound question. As to first question: a stronger Rule 82 might help to discourage frivolous litigation, but if the attorney filing a frivilous suit is not accountable then Rule 82 alone will not achieve that purpose. As to the second question, most litigants don't realize until it is too late that they received bad advice in filing a questionable suit.	Apr 28, 2011 7:26 AM
108	Rule 82 is one of many tools that discourages frivolous litigation. Like the other facts listed, that is not its primary purpose - Rule 82 exists not to discourage litigation, but to shift the costs of litigation (whether or not frivolous) away from the party who was forced to litigate despite having been factually and legally correct in their position. It is uniquely effective at doing so.	Apr 28, 2011 7:16 AM
109	It is just one factor.	Apr 28, 2011 5:03 AM
110	The question is compound and contradicts itself. To answer what it appears was trying to be asked: Rule 82 is not needed. Other factors discourage frivolous litigation. Frivolous litigation is only a problem in the minds of political ideologues whose real intent is to discourage people of modest means from attempting to assert their rights. I believe it violates due process.	Apr 28, 2011 12:31 AM
111	I have been both a plaintiff's lawyer and an insurance defense lawyer. My experience is that plaintiffs that want to pursue frivolous claims have no assets aren't concerned with rule 82 fees. In contrast, plaintiffs with valid claims are dissuaded from filing suit because they don't want to lose what they have if the suit comes out bad. And Rule 82 fees do nothing to disused vexatious litigation which is almost always the attorney's fault, whether plaintiff or defense.	Apr 27, 2011 10:21 PM
112	This question is poorly worded. Rule 82 keeps the middle class from seeking justice as they have the greatest exposure versus the property and or resources they have available to pay. Rule 82 Is not needed to discourage frivolous litigation.	Apr 27, 2011 9:55 PM

Page 2, Q12. Is Rule 82 needed to discourage frivolous litigation, or do other factors (litigant's own attorney fees, litigation expenses, litigation's emotional toll) effectively discourage such cases?

113	Question 12 is a compound question which is impossible to effectively answer with a yes or no answer.	Apr 27, 2011 8:54 PM
114	Terrible question! Other factors deter such cases.	Apr 27, 2011 7:42 PM
115	As a judge, my answers are limited to the cases where I have been involved. The theory behind Rule 82 was a good one. It has become, unfortunately, a huge stand-alone issue in many cases where it does not serve its intended purpose. The people who file frivolous suits generally have no money. It has little impact on pro se litigants or rich litigants - who either don't know or don't care about it. Their goals are not always logical or are so complex that this issue is a non-issue. With the general loss of the public interest exception to the rule and limits on judicial discretion in applying the rule, it can discourage good faith claims of government malfeasance. The rule has outlived its usefulness.	Apr 27, 2011 7:12 PM
116	Rule 82 has a detrimental effect on public interest litigation.	Apr 27, 2011 6:51 PM
117	What a horribly awkward question. CR 82 is a bad rule. Get rid of it.	Apr 27, 2011 6:46 PM
118	rule 82 isn't needed to discourage frivolous litigation because processing costs, whether paid by the client or born by the cont. fee attorney are such a much bigger factor.	Apr 27, 2011 6:32 PM
119	The biggest discouragement to frivolous litigation is the fact that hiring a lawyer costs a fortune. Who is going to pay a lawyer a fat retainer to do a frivolous case? And, what lawyer will take a case on contingency if it is frivilous?	Apr 27, 2011 5:18 PM
120	IN its currenet form, Rule 82 discourages important public interest litigaiton by concerned citizens who have no direct financial stake in the outcome of a public dispute.	Apr 27, 2011 4:43 PM
121	This question is worded oddly. In saying yes, I mean Rule 82 is needed to discourage frivolous litigation.	Apr 27, 2011 4:26 PM
122	The prevailing party should, in my opinion, receive some attorneys fees, but I do not think litigants think about payment of the other party's fees when they decide to file an action. The losing party's attorney is often responsible for the frivilous lawsuit. This is particularly true of Alaska Legal Services, yet the attorneys who have created the problem leave their clients high and dry. Judges are, in my opinion, not active enough in sanctioning bad faith conduct in lawyers.	Apr 27, 2011 4:11 PM
123	I do not believe there is very much frivolous litigation in superior court with the potential exception of family law cases	Apr 27, 2011 4:02 PM
124	Rule 82 doesn't really deter frivolous or bad claims. In contingent cases, the overall evaulation of a case will have a much greater effect. Rule 68 has a greater impact on PI cases, 98% of which settle pretrial in any event.	Apr 27, 2011 3:50 PM
125	Compound question: Is rule 82 needed to discourage frivolous litigation - NO; do other factors effectively discourage such cases - YES.	Apr 27, 2011 3:49 PM
126	it doesn't appear that anything stops frivolous lawsuits because the person filing clearly believes their allegations have merit.	Apr 27, 2011 3:41 PM

Page 2, Q12. Is Rule 82 needed to discourage frivolous litigation, or do other factors (litigant's own attorney fees, litigation expenses, litigation's emotional toll) effectively discourage such cases?

127	Bad question. It is needed to discourage frivolous litigation. Other factors do not sufficiently do so, as some litigants enjoy the stresses, etc., of litigation.	Apr 27, 2011 3:40 PM
128	The Rule is needed, but enforcement by the courts and especially support from the Supreme Court is needed.	Apr 27, 2011 3:35 PM
129	There are no certain outcomes in litigation. Even righteous cases with strong evidence can fail. Forcing the loser to pay in those circumstances is an is an unjust result for people who are exercising their right to the justice system.	Apr 27, 2011 3:32 PM
130	Rule 82 fees do not discourage the poor or the rich. Only the middle class (persons with some but not a lot of assets) are affected. It seems to be highly unjust that persons with valid claims, should have to pay attorneys fees, simply because they lost a trial, which could have gone either way, especially in cases where no reasonable offer was made by the opposing party. How does an award of attorneys fees under those circumstances encourage settlements?	Apr 27, 2011 3:30 PM
131	2 part question. CR 82 not needed for currently stated purposes.	Apr 27, 2011 3:29 PM
132	People are going to sue if they are going to sue. The advantage of Rule 82 is that it makes frivolous litigation costly to the loser in individual cases.	Apr 27, 2011 3:22 PM
133	Most people with weak claims don't think they will lose and the costs of litigation is a much larger factor in whether claims are brought, both weak claims and stronger claims	Apr 27, 2011 3:10 PM
134	It is unclear that the figures currently awarded do much to deter or encourage lawsuits, settlements, or impacts litigation much at all.	Apr 27, 2011 3:07 PM
135	It only beneifts insurance companies, who can use it as a threat against plaintiffs. If they get hit with an award, they simply pay it and move on. They have more money than God, so it doesn't really matter to them.	Apr 27, 2011 3:07 PM
136	It is my opinion that Rule 82 results in an egregious waste of resources and in some truly perverse instances can prevent plaintiffs from releasing unnecessary defendants from litigation because of the threat of the releasing party being automatically liable for Rule 82 fees. In addition, as your survey itself indicates, Rule 82 does not discourage either wealthy or indigent clients. Rather, it discourages that vast middle. I strongly believe that Rule 82 is both unfair, wasteful and unnecessarily complex.	Apr 27, 2011 3:06 PM
137	I believe that the rule can deter frivolous litigation and encourage settlement but not as much as I would have assumed. My practice was litigation defense for an institutional client so my perspective is from folks who were not deterred.	Apr 27, 2011 3:05 PM
138	I don't know of any plaintiff's attorney that willingly files a frivolous suit. If they do the court has the power to sanction appropriately.	Apr 27, 2011 3:04 PM
139	do not handle tort cases in State courts, so have no opinion	Apr 27, 2011 3:03 PM
140	With all respect, this is not a yes or no question. The costs of litigation, followed by Civil Rule 11, followed by Rule 82 are the factors that discourage frivolous litigation.	Apr 27, 2011 3:01 PM

Page 2, Q12. Is Rule 82 needed to discourage frivolous litigation, or do other factors (litigant's own attorney fees, litigation expenses, litigation's emotional toll) effectively discourage such cases?

141	I have never had a case where a Rule 82 judgment was issued. I am a criminal practitioner.	Apr 27, 2011 2:57 PM
142	Not only is the rule needed, but the judges need to start enforcing it, rather than trying to come up with creative ways around Rule 82.	Apr 27, 2011 2:53 PM
143	People who want to litigate frivolous claims generally have nothing to lose, and are dishonest and irresponsible. Responsible, honest people are reluctant to bring any claim, and will certainly not participate in frivolous litigation. They are also the ones who may chose not to file meritorious litigation, because if they are middle income and lose, the Rule 82 award will bankrupt them. And honest people generally feel an obligation to pay their debtts,however generated.	Apr 27, 2011 2:53 PM
144	Factors other than the fear of a Rule 82 attorney fees award do a much better job of discouraging frivolous litigation. Remember, the defending party has to spend a lot of money defending a case through trial or dispositive motion practice before an award will be made. And, that award will not be "actual" attorney fees. 40 years of experience as a litigator has convinced me that Rule 82 is useless as a disincentive to frivolous litigation.	Apr 27, 2011 2:52 PM
145	Nothing seems to discourage frivolous litigation, especially since the Alaska Supreme Court started ruling that nominal offers of judgment will not be enforced	Apr 27, 2011 2:50 PM
146	This is not written as a yes or no question. It is either/or.	Apr 27, 2011 2:49 PM
147	Nothing seems to discourage frivolous litigation.	Apr 27, 2011 2:49 PM
148	I do not think it is necessary or even useful	Apr 27, 2011 2:49 PM
149	This is a two-party question so the answer is to the first part... (consider revising this question to get accurate responses). I do not believe that the other factors discourage such cases particularly since it is difficult (and often impossible) to dispose of such cases through other means.	Apr 27, 2011 2:49 PM
150	This question doesn't make sense as presented. But, in response, other factors, and especially litigation expense, does more to discourage valid claims than Rule 82.	Apr 27, 2011 2:46 PM
151	This question is not a yes or no question as phrased. I think Rule 82 is not needed and is an impediment to justice for a lot of regular folks.	Apr 27, 2011 2:45 PM
152	You can not discourage such cases, but Rule 82 limits prevent nonwealthy clients from fair representation.	Apr 27, 2011 2:45 PM
153	Rule 82 also serves an important purpose of compensating defendants who are subjected to frivolous lawsuits, regardless of whether it is an effective deterrent to such lawsuits	Apr 27, 2011 2:44 PM
154	I'm not sure there is a better way to do it, and I've seen it have positive and negative impacts . . . it does deter some claimants from taking a good case to trial, and it also deters weak claims from getting too far.	Apr 27, 2011 2:44 PM
155	It is sometimes the only leverage agaist a vexatious lawsuit.	Apr 27, 2011 2:43 PM

Page 3, Q20. Do you have suggestions for ways that Rule 68 could be improved? What specific word changes would you suggest, and why would those be an improvement?

1	Too often the defendants in automobile tort cases do not have insurance and defend themselves. They don't care about this or understand it or anything else, because they don't have assets or have hidden them and don't plan to pay, anyway.	May 20, 2011 8:59 AM
2	Rule 68 needs to be amended to deal with Third Party practice, particularly in the area of fault allocation.	May 18, 2011 2:09 PM
3	Without better guidance on how to deternine a good faith offer, it is a less useful order.	May 13, 2011 2:13 PM
4	The court's movement to require reasonable offers has helped, but it is very unclear what constitutes a reasonable offer. I think it would help to strengthen the requirements to disclose damage calculations in the initial disclosures (including the basis for the calculations) and the reasonability standard as a presumptive standard tied to a percentage of these disclosed damage calculations. Additionally, costs of defense need to be a factor in reasonability, particularly where insurance companies with high deductibles that include insurance defense costs are an issue. Often the insurance company refuses to consider any settlement offer prior to the exhaustion of the deductibles, which undercuts the value of the insurance to the insured, and increases the costs to the claimant. In recent cases involving institutions, claims that could be settled for substantially less than the defense costs, or the deductible have lingered because of disputes between the insured and the insurance company over the treatment of defense costs and the deductible.	May 13, 2011 9:20 AM
5	The Supreme Court has undercut the Rule with its rulings that offers to allow a dismissal or nominal damages are somehow not in good faith when the party making the offer has proved that the offer accurately valued a claim with little or no merit. The idea that a defendant must offer a sum in excess of the case's value in order to get the benefit of Rule 68 is nonsense.	May 13, 2011 8:31 AM
6	Get that bullshit SC decision reversed so if a rule 68 offer for a nominal amount is beaten, the plaintiff pays. Right now rule 68 is useless and forces defendants to pay for frivilous claims because the SC has eseentially determined that every case that is filed has morethan a nominal value.	May 13, 2011 8:29 AM
7	I believe Rule 68 could be improved by incorporating the Rule 82(b)(3) factors as a means of moderating the awards where circumstances merit. It is extremely important for both sides that formal offers of judgment be certain and not simply voidable for public policy reasons. Any unfairness in the application of such awards can be addressed when the court determines the amount of the award. Rule 68 has been exceptionally helpful in resolving cases, and is used by both sides.	May 13, 2011 6:08 AM
8	I think we need a separate Rule 68 format for settlement offers in non-monetary and non-single issue cases;to wit family law.	May 12, 2011 9:42 PM
9	I believe that Rule 68, like Rule 82 leads to gamesmenship and extended litigation. I don't think that it encourages settlement. I would prefer to see each case litigated on its own merits with a finacial cost/benefit analysis rather than fee shifting strategies and litigation tactics.	May 12, 2011 3:54 PM

Page 3, Q20. Do you have suggestions for ways that Rule 68 could be improved? What specific word changes would you suggest, and why would those be an improvement?

10	I have much more of a problem with Rule 82 than Rule 68.	May 12, 2011 3:53 PM
11	There has to be some way to discourage offers that are arguably not frivolous but are so low that no one with substantial positions would consider accepting them; it amounts to coerced settlement on unfair terms.	May 12, 2011 3:39 PM
12	I'm troubled by the recent cases striking down nominal offers of judgment. In many cases an offer to "walk away" is a reasonable, even generous, offer, in light of our ability to recover prevailing party fees in a completely frivolous case. Rule 68 could be improved by making it clear that it covers all good faith settlement offers, including offers to walk away.	May 12, 2011 2:50 PM
13	Take away the draconian changes last enacted; they make litigation like gambling.	May 12, 2011 12:22 PM
14	It is hard to understand it, and I suspect even more difficult for my clients. I refer in particular to the 10% variation from what is offered.	May 12, 2011 12:19 PM
15	Provisions of Rule 68 should apply to all offers, even nominal offers.	May 12, 2011 12:10 PM
16	Don't have time to consider this question.	May 12, 2011 12:06 PM
17	The Supreme Court has effectively gutted Rule 68 by holding that only an offer that the offeror should expect to be accepted may be considered in awarding fees under the rule. This means that a reasonable offer will have no effect if the other side is litigating on "principle" or is simply irrational. But because the court has also held that bad faith or vexatious settlement positions can only be addressed under Rule 68, there is little deterrent against such conduct.	May 12, 2011 11:59 AM
18	Rule 68 favors defendants and those with wealth over middle-class citizens. Even the Alaska rule allowing both sides to make offers does not much cure the problem. There is Alaska precedent under Rule 68 that allows for recovery of fees when losing a case on the law only, including those cases where the issue was close. This is not what Rule 68 was ever intended to cover. The subject is already covered by Rule 11 with a proper standard of liability and with the responsible parties paying the fine. Why should clients be fined under these circumstances under Rule 68? It must be made clear Rul 68 is not invoked when a party loses a case on contested facts or when a party loses a close question of law leading to dismissal. It only applies when a verdict awarding money is significantly more favorable than the earlier Rule 68 offer made. Rule 68 is about deterring unreasonable settlement positions and thereby encouraging settlement. It is not intended as a leverage advantage for defendants only in cases presenting close questions of law.	May 12, 2011 11:58 AM
19	Rule 68 is properly worded, and has a wonderfully easy bright-line test built into it (i.e., simple math calculations). Unfortunately the Alaska Supreme Court wrote in lots of uncretainty and grayness in its recent McGuire v. Beal case, by inserting a "good faith" test that is neither in the rule nor needed.	May 12, 2011 10:54 AM
20	I think it works very well. I think it would help to cap the hourly fee at $225.00, so that you don't have insurance defenders charging $200 and plaintiff's lawyer who are working on a contingency claiming that they are charging $350.00 an hour,	May 12, 2011 10:30 AM

Page 3, Q20. Do you have suggestions for ways that Rule 68 could be improved? What specific word changes would you suggest, and why would those be an improvement?

	especially when they have no true billing system in their office to even reflect hourly billings.	
21	Rule should be clarified to make sure any offer for any amount is valid	May 12, 2011 10:03 AM
22	The % over the principal amount is not helpful. The earlier version, which required that the judgment finally awarded only be more than the amount of the offer was easier.	May 12, 2011 10:03 AM
23	Application of the rule has become too complicated, technical, and riddled with loopholes and exceptions. To be effective, the rule needs to be rewritten AND a model form included with the civil rules that is easy to use and eliminates all the loopholes--so that a person who uses the model form will have more certainty about what the offer means.	May 12, 2011 9:47 AM
24	1) eliminate its reference to attorney fees. This throws an uncertainty into the decision to accept that is hard to evaluate particularly in a complex case where its hard to tell what future fees will be. The failure to beet an offer should be strictly enforced by a simple unavoidable graduated penalty from 5-20% of the judgement obtained +/- depending on whether and by what % you beat the offer or not. Attorneys fees (especially actually fees) simply motivates Defense counsel to "run them up" once they've made an offer that the Plaintiff rejects. A penalty avoids that. Either you made a good offer or you didn't. If you did and the other side refused it you get a bump on or off the judgment. This takes away the incentive to "milk" and puts a Plaintiff's counsel (who are on a contingent and can't "milk" (and only get a rule 82 schedule award if they will on equal footing. 2) The % should also be larger the earlier you make the offer but 60 days after the initial disclosures is too soon. It should be 90-120 days to allow the parties a meaningful chance to have a couple rounds of discovery and depositions and also have the provision that the trail judge can extend the date if he finds that additional time for preliminary discovery is needed (i.e. if motions to compel must be brought). 3) the last offer should not be permitted 10 days before trial. By then all the attorney prep work is done and there will be little incentive by the defense to throw it away by making a reasonable offer. 30 days after the close of discovery should be the last date to make any offer. 4) Plaintiff should have the chance to make a joint offer to all defendants and have it prevail on those that remain if some defendant's skate (or beat individual offers of judgment). In several liability cases, Plaintiffs often have to keep marginal defendants in just to avoid "empty chair" defenses. This is ultimately occasioned by the Defendants conduct. If the "empty chair" defense is an issue, if Plaintiff's total verdict beats a joint offer to all Defendants the Defendants held liable should have to pay the penalty. Or just avoid the foolishness as it seldom works anyway and abolish rule 68 entirely.	May 12, 2011 9:42 AM
25	I think that R.68 should require that actual costs be recoverable under R.79 if you are the prevailing party. That would encourage resolution. Currently, there is no teeth in the cost rule.	May 12, 2011 9:39 AM
26	I think Rule 68 works just fine.	May 12, 2011 9:33 AM
27	Rule 68 works very well shoudl be be applied by the courts as written. The Rule is clear and is not ambiguous. Any problems with Rule 68 are due to the fact	May 12, 2011 9:26 AM

Page 3, Q20. Do you have suggestions for ways that Rule 68 could be improved? What specific word changes would you suggest, and why would those be an improvement?

	that the Alaska Supreme court has interfered with the operation and the clear language of the rule, and has made the application of Rule 68 more uncertain, and subjective, and unpredictable. I would strongly object to rescinding the rule. The rule is effective and a powerful tool in settlement, and appropriate cost shifting in favor of the party which has correctly analyzed and evaluated a case. I would advocate reversing the Supreme court decisions which in effect modify the rule from the specific language as written. The Supreme court has done a disservice to the trial judges , counsel and parties in its misguided attempts to interpret the rule.	
28	I just wish the Supreme Court would enforce it more as it is written!	May 12, 2011 9:13 AM
29	No Rule 68 offers until after exchange of initial disclosures.	May 12, 2011 9:10 AM
30	Rule 68 encourages settlements by putting undue pressure on plaintiffs to abandon a fight over 25 000, for example, when they stand to have to pay a paper/motion happy defense firms bill of tens of thousands of dollars.	May 12, 2011 9:04 AM
31	Rule 68 is a very useful tool to encourage settlement, and require attorneys to discuss settlement and discuss likely outcomes with their clients. One concern is that the plaintiff's bar is inconsistent with respect to sharing rule 68 offers with their clients. One suggested improvement would be to clarify the application of Rule 68 in cases where there is third party practice. I would suggest the rule specifically allow the third party defendant (e.g., in tort allocation cases) to make an offer of judgment directly to the plaintiff.	May 12, 2011 9:04 AM
32	Rule 68 offers have to be made so early in a case that it is often just a guess. A Rule 68 can also discourage settlement if the opposing party fails to appreciate the purpose of Rule 68 and treats the Rule 68 as a starting position for settlement negotiation.	May 12, 2011 9:03 AM
33	I believe the supreme court has grafted some uncertainty now about what constitutes a valid offer that would trigger the rule's penal effect. I believe Justice Morgan wrote a persuasive dissent in the case I'm thinking of which involved, as I recall, the statutory employer defense under AS.23.30.055.	May 12, 2011 8:48 AM
34	I think it needs to be more carefully worded -- as it is now, i find it confusing and difficult to explain to clients about the judgment #s that are needed to succeed/defeat a Rule 68 offer.	May 12, 2011 8:40 AM
35	The major difference between state and federal practice is that in federal court, an offeree can move to strike the typical ($1 or $500) nuisance offer which is not made in good faith. The Alaska Supreme Court has addressed the issue of these offers, but no state court (that I know of) has approved the procedure I reference. Further citations or development at your request. peter@alolaw.com	May 12, 2011 8:34 AM
36	I don't have any specific word changes, but something should be changed to account for the supreme court's interpretation that a one dollar Rule 68 offer is not a valid offer to invoke the penalties. If a party expects a defense verdict, why should it be forced to pay anything to settle a case in order to invoke the penalties? That just encourages frivolous filings made just to force a settlement. If the court thinks there should be a minimum offer that represents a "fair"	May 12, 2011 8:34 AM

Page 3, Q20. Do you have suggestions for ways that Rule 68 could be improved? What specific word changes would you suggest, and why would those be an improvement?

	settlement of a defensible case, then the rule should somehow state that.	
37	Rule 68 is decidely lopsided in favor of the defendant. No real teeth for the plaintiff.	May 12, 2011 8:23 AM
38	Rule 68 does little to put pressure on corporate defendants to settle, but puts great pressure on plaintiffs to settle.	May 12, 2011 8:17 AM
39	Clarification of when an offer is valid. Recent cases have invalidated offers deemed too low, but no real standards apply to that determination.	May 12, 2011 8:13 AM
40	There should be some mechanism for third-party defendants to serve offers of judgment with an eye towards settlement. Current system leaves a third-party defendant in limbo.	May 12, 2011 8:08 AM
41	Delete the rule and the entire fee shifting regime. All this does is create and encourage litigation over who gets fees, long after the merits of the initial complaint have been resolved. These two rules (coupled with Trial Judges' increased unwillingness to decide cases on motions) are corrupting the entire civil litigation regime.	May 12, 2011 8:08 AM
42	Get rid of the 5% less favorable language - its confusing. The rule should be that if you reject an offer you must obtain a judgment that beats the offer.	May 12, 2011 8:07 AM
43	No changes are necessary.	May 12, 2011 8:06 AM
44	needs to be consistently applied and enforced. the supremes need to define which ones will be enforced. their last decision on this issue was less than clear.	May 12, 2011 8:03 AM
45	Not really - in my experience the impact of rule 68 on settlement is not that significant. Typically, each party has made an offer of judgment and the reciprocal contingent liabilities tend to cancel one another out in terms of impacting the valuation of the case. The addition of the "reasonableness" requirement through caselaw seems only to add another item to squabble over.	May 12, 2011 8:02 AM
46	Rule 68 is an important tool, whether I am representing a plaintiff or a defendant. It has predictable, real consequences and forces all parties to realistically evaluate their case. It is not perfect, as our system is not perfectly predictable. But it does serve a very useful purpose in that there is a predictable consequence to litigation decisions--as there should be. Of all the versions of Rule 82 that have been in effect in the 30 years or so I have been practicing, the current version is the best because the consequence is directly related to the work on the case in question. Not the case when Rule 68 penalty was an interest deviation.	May 12, 2011 7:51 AM
47	I think the best way Rule 68 can be improved is to have the Supreme Court avoid placing a dollar amount on what constitutes a good faith offer under the rule. The recent Anderson v. Alyeska Pipeline case may result in a slippery slope which deters parties from using the rule if an appellate court will reverse for a sympathetic plaintiff and not on the law. Not that I don't disagree with the outcome per se in Anderson, but if that case establishes a general precedent wherein the appellate court will look at the intent of the party making an offer	May 12, 2011 7:51 AM

Page 3, Q20. Do you have suggestions for ways that Rule 68 could be improved? What specific word changes would you suggest, and why would those be an improvement?

	then that is a question of fact not proper for the appellate court. Keep 68 as is.	
48	It ought to be made clear that actual attorneys fees means the lodestar ammount in cases of contingent fees.	May 12, 2011 7:48 AM
49	It seems like Rule 68 OOJs should be reserved for cases in which a defendant makes a prima facie case that the plaintiff's claim is frivolous.	May 12, 2011 7:48 AM
50	The rule and the corresponding statute in Title 9 should be revised and restored to what they were before so-called "tort reform" legislation was passed making Rule 68 and Title 9 far too complex, unwieldy and burdensome.	May 12, 2011 7:44 AM
51	The recent line of Alaska Supreme Court cases that establishes a review of the reasonableness of Rule 68 offers, while not completely making Rule 68 unworkable, makes its application immensely more difficult. When making an offer of judgment, the parties themselves are in the best position to evaluate the merits of their claims and defenses, and what potential liabilities may be. Adding a post-hoc reasonableness analysis - one that benefits from hindsight unavailable to parties when making an offer - adds another element to consider when deciding whether, and what amount, to make an offer for. Further, the Supreme Court's cases have focused on low-dollar offers, indicating that these are disfavored, which all but negates the utility of Rule 68 in defending against frivolous claims. To be blunt, the Supreme Court's new reasonableness review (aside from finding no support in Rule 68's language) is a terrible idea, and Rule 68 should be amended to restore its original understanding and eliminate any subjective review by the courts.	May 9, 2011 3:20 PM
52	The rule as it now stands has been substantially weakened by the recent Supreme Court decisions that require an "objectively" reasonable offer. It makes the impact of an offer of judgment much less predictable and thus much less likely to encourage settlement. I don't think the language of the rule needs changing so much as that it needs to be applied as written.	May 9, 2011 8:49 AM
53	I don't like the 5% rule because it is very confusing and in small cases it can have unfair results. It simply isn't helpful or needed. I also don't think an offer should be effective if it is made before initial disclosures are made. A party should be able to make an informed decision as to whether or not to accept an offer. I think the graduated schedule should be abandoned. There should not be an award of more that 30% except in exceptioonal (such as frivolous) cases. As it is, in a case with uncertain liability but large damages, the plaintiff will almost always be faced with a 75% attorney's fee award if he/she doesn't prevail on liability. That is because the defendant will (should) make a small offer right away. With large damages, such an offer will never be accepted because it will not net the plaintiff anything. Rule 68 works well with cases where liability is not at issue, but damages are. I think it is too punitve in cases where there are good faith liability arguments on both sides. I also think Rule 68 would be improved if the defense fees were limited to 30% of plaintiff's lowest Rule 68 offer. That would deter excessive defense costs in small cases and would prevent unfair exposure to plaintiffs in small cases.	May 8, 2011 4:05 PM
54	Rule 68 should be restrcited to the period prior to the close of discovery. [This is because defendants sometimes wait until just before trial to make a reasonable	May 8, 2011 1:18 PM

Page 3, Q20. Do you have suggestions for ways that Rule 68 could be improved? What specific word changes would you suggest, and why would those be an improvement?

	offer when one could have been made much sooner. Plaintiff -- who has by then expended significant funds in trial prepartion -- is forced to decide whether to take a reasonable offer that after attorneyfees and expenses result in a small recovery, or go to trial in the hope of getting his costs back which are significant.]	
55	I have wrestled with Rule 68 for 35 years. Are the policies of encouraging settlement of claims and compensating the winner for his fees incurred worth the chilling effect on litigation? I think not. Those with money do not really worry about it. Those without money do not really worry about it. But the majority of cases involve real working people with legitimate claims that are scarred into resolving them at amounts below adequatre compensation because the down side risk is too great. Lawyers are expensive-too expensive for most people to deal with in litigation situations.	May 5, 2011 9:22 AM
56	Overturn the result of Okagawa by rule. It can result in a windfall to a claimant. Follow the Federal model	May 4, 2011 11:46 AM
57	Clarify the application of Rule 68 in a multi-party case. The Pagenkopf decision needs to be overruled by court rule amendment.	May 3, 2011 4:13 PM
58	Insert language that an offer of judgment for "one dollar, or more" is a valid and enforceable offer, regardless of the amount of the demand or alleged damages. The "law," as it now purports to be, is a mess and needs to be clarified.	May 3, 2011 3:21 PM
59	The recent ruling that negligible Rule 68 offers are invalid discourages settlement of frivilous lawsuits/claims. It effectively requires a defendant to pay substantial money to get rid of a frivilous claim.	May 3, 2011 11:03 AM
60	Rule 68 is fine as written. Recent appellate opinion effectively requiring omnipotent hindsight with regard to the 'reasonableness' of a Rule 68 offer should be rescinded, or at least drafted into Rule 68 so attorneys have a clear, written legal standard.	May 3, 2011 8:43 AM
61	Supreme Court should lay off their unreasonable interpretations and applications	May 3, 2011 8:28 AM
62	A lawyer working on a contingency fee should not be able to change his/her fee agreement to hourly to punish the opposing party. An award of fees should be the actual fees the attorney would receive and not some hypothetical number. A "nominal" offer made on a case which results in a defense verdict should not be discounted by the court as it was an accurate reflection of the value of the case. Recognizing nominal offers as valid would assist in the realistic assessment of case value and settlement.	May 2, 2011 4:07 PM
63	Besides rescinding, federal rule could be adopted (defendants, not plaintiffs, can make ooj, or give defendants option to serve ooj without time limitation, but give defendants six months from service to obtain info about plaintiffs claims before plaintiffs allowed to serve ooj); percentages are backward in current Rule 68 language--party who may have little info within 60 days of initial disclosures could be asked to pay 75% of offerer's fees--encourages overworking of case after early offer which subsequently becomes reasonable as more info is known; or early offer which is still debatable and just needs a jury or judge to resolve liability and/or damage issues; early offers should be at the 30% rate--or maybe	May 2, 2011 2:56 PM

	Page 3, Q20. Do you have suggestions for ways that Rule 68 could be improved? What specific word changes would you suggest, and why would those be an improvement?	
	they should all be at 30%, but 75% is not reasonable for a routine matter, for either a plaintiff or defendant, see, eg, Okagawa; the award of attorney fees should not be the primary driver of parties going to trial, but current Alaska law creates this negative incentive/ reward structure;	
64	Zero or very low offers of judgment should be allowed early in the case to discourage frivilous or nuisance value suits	May 2, 2011 12:00 PM
65	The rule needs to be amended to provide clarity regarding 1) how and 2) to whom, a third-party defendant can issue an effective Rule 68 offer when the only reason for the third-party defendant's presence in the suit is for allocation of fault for Plaintiff's damages. I will have to think further on specific changes which might work.	May 2, 2011 11:10 AM
66	I had a case recently where Rule 68 became a bar to settlement. I represented a plaintiff in a case against multiple defendants where it was not clear at the outset which defendant was primarily liable. One of the defendants made an offer of judgment early in the case before much discovery had been completed which we rejected. It later became clear that the claims against that defendant were pretty weak, and we offered to dismiss them but they refused because they had a potentially substantially attorney fee award under Rule 68. The same type of gaming can happen from plaintiff's side too. It can really be an advantage to give as little information as possible to the other side before making that first offer of judgment. One possible solution would be to allow the parties some time to conduct discovery before either of them can make an offer of judgment. Another possibility might be to allow a subsequent offer of judgment to nullify a prior offer of judgment. For example, suppose the defendant offers $1,000 which plaintiff rejects. Plaintiff later discovers that his claims are substantially weaker than previously thought and makes an offer of judgment of $500. This substantially less subsequent offer would supersede the first.	Apr 29, 2011 10:45 AM
67	It is really only used by wealthy clients -- insurance companies - to punish moderate income folks by exposing them to enhanced attoreny fees they can't possibly afford and forcing them out of legitimate litigation. In federal court, fee shifting statutes such as Rule 68 and 82 are construed to include as a factor in an award "the ability to pay". This is missing in our state jurisprudence. Why does a court award $300K against a person with no assets, what is the point?	Apr 29, 2011 10:29 AM
68	Rule 82 needs rescinded because it discourages valid appeals	Apr 29, 2011 9:12 AM
69	Rule 68 in family law cases does not first require that the judge assess all assets of both parties. Where assets are hidden or not provided, as in most cases, the offers are based upon a partial marital estate, There should be an automatic increase of one parties award of the marital estate when one party fails to report assets in excess of 5,000 or 5 of the marital estate where the estate is potentially valued at 1 million based upon appraisals or recent comparables provided by the parties from the internet.	Apr 29, 2011 6:31 AM
70	By definition, Rule 68 offers do nothing to change the underlying legal and factual issues. As a result, absent the opposing lawyer already recommending settlement for the amount of the offer, Rule 68 does not advance a settlement dialogue. With most cases having a number of legal and factual issues that could	Apr 28, 2011 4:32 PM

Page 3, Q20. Do you have suggestions for ways that Rule 68 could be improved? What specific word changes would you suggest, and why would those be an improvement?

	change the litigation, it is impossible to quantify the risk. As a result, absent the Rule 68 offer being in the already recognized range of settlement, parties proceed to trial. Rather than encouraging settlement, Rule 68 offers are most often used to publicly announce the "winner" and "loser," with the winner gloating over his victory one last time and the loser scrambling to argue how fees were excessive or the offer defectively ambiguous. The end result is "sport litigation" for the lawyers at the expense of the civil justice system.	
71	Rule 68's interplay with Rule 82 is overly complicated and unnecessary. Rule 68 is especially meaningless and provides almost no guidance to parties following the Court's recent ruling in the McGuire case. If Rule 68 is kept, provision must be made for consistency with Rule 14(c). There must be clarification regarding to whom a third party defendant or a plaintiff can make an effective Rule 68 offer. In other words, does the 3P Defendant make an offer to the Defendant/3P Plaintiff or to the Plaintiff and vice versa? Based on Rule 14(c) Rule 68 offers should not be exchanged between Defendant/3P Plaintiff and 3P Defendant. However, this creates substantially greater problems with Rule 82. Can a 3P Defendant obtain Rule 82 fees against the Plaintiff that did not sue it? These are the most significant issues that I believe need to be addressed regarding these two rules. They look good on paper and probably made great political soundbites when they were adopted, but they are nothing but trouble and added litigation in context.	Apr 28, 2011 3:18 PM
72	The most difficulty I have with the rule is having clear expression of what is or is not included to determine how th eoffer relates to recovery. Specifically, when it comes to costs and attorneys fees, determination of exactly what the costs and attorneys fees of the offeree are at the point of time of the offer is difficult, and in order for rule 68 to shift responsibility there can be a dispute as to what the amount of the offer actually was in terms of if it included or excluded costs and fees and if so in what amounts. I woudl prefer a presumption of the amount being a rule 68 rule offfer which says it includes attorneys fees being determined as an amount and that th eincluded attorneys fees portion be based on the mathematical calculation of attorneys fees based on rule 82. Further, costs of the oferee in excess of filing fees should not tip the scale in terms of whether an offer has been met or not, but shoudl be addressed outside of the rule 68 determination of whether a party has met an offer of judgment.	Apr 28, 2011 2:36 PM
73	1. Allowing multiple parties to make an offer to multiple parties on the other side if the offer resolves the entire litigation between all the parties. I believe this would encourage offers and settlements in multi-party cases rather than piecemeal offers and settlements. 2. Clarifying what is required for a valid with a non-monetary offer to better effect settlement in cases where monetary damages are not really the issue, i.e., injunctions, quiet title matters, estates matters. 3. Allowing minimal (~$500-1,000) offers because there are cases out there that are truly frivolous and do not deserve any more. Really, no offer should be too low. If a plaintiff does not accept a $500 offer and the defendant beats it at trial, then it should be obvious the plaintiff's case was frivolous and the court should not decline to enforce Rule 68 on the grounds that the offer was too low.	Apr 28, 2011 12:49 PM
74	I think the court should prohibit offers of judgment until later in the case, at least initial disclosures have been made. In other words, the court should consider overruling Cook Schuhman & Groseclose v. Brown & Root. If a case is so totally	Apr 28, 2011 11:38 AM

Page 3, Q20. Do you have suggestions for ways that Rule 68 could be improved? What specific word changes would you suggest, and why would those be an improvement?

	devoid of merit that it should be dismissed before any discovery is done, then courts should look more toward sanctioning the party that brings the lawsuit instead of leaving everyone open to very low offers of judgment made at the beginning of a case. The low offers of judgment can potentially subject a party to large fee awards when the merits of the case are still not really clear.	
75	Rule 68 can serve a valid purpose if reasonable offers are made. The main problem is where it is used as an economic weapon by defendants against middle class plaintiffs of modest means but have something to lose. Defendant makes de minimis offer or offer of significant amount but not reasonable value of claims. At trial, plaintiff does not beat the offer, and defendant seeks almost $500,000 in fees. This is not a hypothetical.	Apr 28, 2011 10:40 AM
76	Provide an escape clause for good faith or reasonable basis for claim or defense. Similar language to the award of fees or liquidated damages under Alaska Wage & Hour Act.	Apr 28, 2011 9:51 AM
77	The recent Supreme Court decisions have basically gutted the certainty of the rule. It appears to have gone from an objective test based on actual recovery, to a subjective "reasonableness" test.	Apr 28, 2011 9:44 AM
78	Clearly specify that offers of judgment can be served upon initiating the lawsuit, to ensure the proper advantage goes to the plaintiff.	Apr 28, 2011 9:40 AM
79	Rule 68 is one of the best rules that forces both sides to realistically assess the merits of the case or defense. It puts pressure on the receiving party. We need judges and the appellate court to strictly enforce the rule. The Court has done a disservice by undermining the clarity of the rule by now evaluating the "good faith" of the offer. An offer's value and validity is determinined by the numbers. Did the ultimate result exceed the offer or not. One need not evaluate motives or good faith. It is an objective test, or should be.	Apr 28, 2011 9:31 AM
80	Bring down the percentages of attorney fees.	Apr 28, 2011 9:26 AM
81	Ability to pay should be addressed especially when difference between award and offer can be as little as a few hundred dollars but an insurance company can then demand a $100,000 in fees and costs for beating a Rule 68 offer.	Apr 28, 2011 9:18 AM
82	Rule 68, 82, 79 and the award of interest and amount should be one rule, or perhaps statutory.	Apr 28, 2011 9:11 AM
83	The Supreme Court ought to re-think its recent decision holding, in essence, that it will ignore well-founded Rule 68 offers unless it likes you.	Apr 28, 2011 9:06 AM
84	Reasonableness requirement should be made a part of the rule, and there should be a limit so that fees made on an early offer do not overwhelm middle class defendants. Fees should also be subject to a much more stringent reasonableness / proportionate to the case test.	Apr 28, 2011 8:41 AM
85	The supreme court's recent interpretations of Rule 68 tilted the field between plaintiffs and defendants. Rule 68 is no longer a neutral tool between parties, but a bludgeon to hold over one's opponants. To say that a $1,000 offer to a	Apr 28, 2011 8:27 AM

Page 3, Q20. Do you have suggestions for ways that Rule 68 could be improved? What specific word changes would you suggest, and why would those be an improvement?

	plaintiff is so low as to be unenforceable suggests that those wearing black gowns have forgotten how difficult it is for most people to lawfullly obtain $1,000.	
86	While I think that Rule 68 should perhaps be modified, it serves a far more useful purpose than Rule 82. It tends to start a settlement discussion even if it is not accepted. The court's decisional law on whether a Rule 68 offer is valid should perhaps be incorporated directly into the rule to discourage flagrantly low offers of judgment and perhaps to quantify when this should all occur. But, otherwise it is a useful tool for both plaintiffs and defendants.	Apr 28, 2011 8:18 AM
87	A party should be allowed to make an offer of judgment for any amount (overruling the Beal v. McGuire decision). If a party wants to make an offer for $1, he or she should be allowed to do so. There should be some expressed clarity provided when dealing with offers of judgement in third party claims. For example, there should be some clarity as to what happens when a third party defendant makes an offer of jugdment. Should it be directed to the Plaintiff or the Defendant that filed the third party complaint.	Apr 28, 2011 7:47 AM
88	The pre-1997 rule was stronger and put more pressure on parties to settle. If people are concerned about early, low-ball offers, the current rule could be changed to say that a Rule 68 offer can't be made until 2 months after the case is filed to give people time to understand the strengths and weaknesses of their claims.	Apr 28, 2011 7:43 AM
89	Neither Rule 68 nor Rule 82 should be modified in any way shape or form. If it is not broke, don't try and fix it. Both rules are a huge advantage to practicing law in Alaska. Both encourage settlement and good faith. DO NOT CHANGE THESE RULES.	Apr 28, 2011 7:38 AM
90	Rule 68 should be changed to address the Beal v. McGuire case. The time limit in subsection (b)(1) should be expanded to 120 days in order to allow the parties more time to evaluate their cases in light of the opponent's disclosures and discovery. I don't know how the language of the rule can be changed to acknowledge this fact, but a $100 or even a $1 OOJ should be enforceable when a plaintiff's suit is completely meritless.	Apr 28, 2011 7:31 AM
91	Repeal Beal v. McGuire	Apr 28, 2011 7:28 AM
92	Clarify how the rule handles contingent fees for fee shifting purposes. Can beating an OJ result in shifting a contingent fee to the defendant? The rule should be automatic, one way or the other. Either the shift should always be based upon hours times reasonable rate, or the shift should be based upon the fee actually charged to the client even if that fee is contingent.Right now, the situation seems unclear.	Apr 28, 2011 5:11 AM
93	Rule 68 should only be rescinded if it is accompanied by the departure of Rule 82. I believe that would require the involvement of the legislature. Good luck with that one. Rule 68 could be improved by running the penalty fees from the initial disclosure are actually produced if a party against whom Rule 68 is being imposed was dilatory in producing them.	Apr 28, 2011 12:38 AM
94	I have been both a plaintiff's lawyer and a defense lawyer, and I think that rule	Apr 27, 2011 10:25 PM

Page 3, Q20. Do you have suggestions for ways that Rule 68 could be improved? What specific word changes would you suggest, and why would those be an improvement?

	68 serves no purpose other than to provide lawyers with a weapon. In my experience, Rule 68 is not used to further a settlement. It's used to gain a tactical advantage.	
95	The S. Ct. recent rulings have made it little more than a litigation magnet. The lack of predictability deprives it of value.	Apr 27, 2011 8:02 PM
96	Unlike Rule 82, Rule 68 can really help with settlement. It will not make a difference for most frivolous suits, since those litigants generally are pro se and judgment proof, but it can affect business suits.	Apr 27, 2011 7:15 PM
97	Get rid of it. Keep track of insurance carriers who abuse this tool and allow third-party bad faith claims. It works in CA. As for Cr 68, if a claimant has any heel on his/her shoe, they are strong-armed by a CR 68 threat. Poor people have nothing to lose, so it doesn't affect them. Rich people don't care. Basically, CR 68 closes the Courthouse for the middle class, blue-collar workers. BTW, the most recent Supreme Court case nuking "tactical" CR 68 offers ($1) was a good decision. Thank you.	Apr 27, 2011 6:52 PM
98	Rule 68 has two big problems. First, the rule itself, along with the case law interpreting it, have made it such a mess that every Rule 68 offer now leads to a lot of motion practice and no one knows if the Rule 68 offer was beaten or not. This is the precise opposite result that Rule 68 is supposed to bring about. Second, Rule 68 has an implicit bias for big defendants, against "public interest" plaintiffs. For example, if a plaintiff sues a big defendant for consumer protection violations, wage and hour violations, landlord-tenant act violations, or constitutional violations, does Rule 68 help the plaintiff? No, bc the plaintiff is already suing on a full fee statute.	Apr 27, 2011 5:23 PM
99	connect amount of max atty fee to amount in controversy to prevent risk of def's $60-70k atty fee awards in cases where amount in controversy is $10k-$30k and pl has to accept $10k offer or risk paying $70k.	Apr 27, 2011 4:54 PM
100	Rule 68 should be amended to make clear how an offer under the rule is compared to the jury award - are fees and costs included, or not? As it is, parties don't know, and Rule 68 offers are difficult to make definitively.	Apr 27, 2011 4:28 PM
101	The problem with the rule is that it operates asymetrically. When the plaintiff makes a Rule 68 offer he is typically offering a real discount from his full potential recovery. That offer also has the drawback of typically setting a ceiling on his future negotiating position. The defendent, on the other hand, can make a small token offer just above zero thereby increasing the fee rate from 30% to 70%. One can always hope that the judge will rule it was not a good faith offer but you would never tell your client to rely on that occuring. Thus there is huge pressure on middle class individuals with modest assets (as distinguished from broke plaintiffs who practically have no assets at risk) to accept unfair settlement offers to avoid a potential ruinous Rule 68 award. I don't see how to fix this problem and would scrap Rule 68.	Apr 27, 2011 4:20 PM
102	Sanction lawyers for bad faith litigation. Too often litigants get truly bad advice from their attorneys.	Apr 27, 2011 4:13 PM

Page 3, Q20. Do you have suggestions for ways that Rule 68 could be improved? What specific word changes would you suggest, and why would those be an improvement?

103	Rule 68 should be limited to true costs (not attorneys fees) incurred after the offer is made only, just as it is in the Federal version of the rule.	Apr 27, 2011 4:09 PM
104	I represent consumers who, unless they are judgment proof, see Rule 82 & 68 as major discouragement to attaining a fair adjudication of their claims. Banks are not affected at all by the potential for attorney fee awards against them. Such awards can impoverish working Alaskans. While some judges do attempt to be fair I can never promise a client that they won't be hit with an onerous award. These rules as applied in Alaska are increasingly making the courts merely a play ground for the rich. All others only enter at great peril.	Apr 27, 2011 3:58 PM
105	Rule 68 should not be rescinded but it should be modified so that the impact does not fall so disproportionately upon moderate income people with a valid claim but who might be bankrupted by a high attorney fee award. I have have that occur to personal injury clients. Insurance carriers are not nerarly as deterred nor impacted by the occasional Rule 68 problem. Over the past three years, I have received a fair number of low-ball Rule 68 offers in personal injury cases that averaged 10-20% of the final settlement, and typically for 20% or so of actual medical biils/special damages, even in obvious 100% liability cases. Such Rule 68 offers are of no real value - they are principally harassment of moderate income plaintiffs. Rule 68 has a valid place in civil litigation. I fear that I am better at observing negative circumstances rather than making positive suggestions for improvement.	Apr 27, 2011 3:57 PM
106	The rule is generally okay, although I would get rid of the 10%/5% nonsense in part (b). Either you beat the offer or you didn't. This language is hard to explain and adds nothing to the effect of the rule. Also, I would like to see it strictly enforced. There is nothing in the rule that requires offers to be reasonable or in good faith or that forbids nominal offers. The rule is valuable as a mechanical device and should be treated that way. If you offer $1.00 and the plaintiff gets $0, he did not beat the offer. There is no reason to discuss whether the $1.00 offer hurt the plaintiff's feelings, or was not based on adequate analysis. I am concerned that there may be some effort to make the rule less mechanical and to subject offers to a reasonableness test. This effort should be resisted.	Apr 27, 2011 3:55 PM
107	I would work to overturn the Supreme court's ruling that requires an undisclosed value in order to make a valid offer of judgment. If one believes they have a defensible case, they should be allowed to assert such a position. It forces a defendant to offer more money than is warranted, and precludes defendants from getting the full benefit of the rule, which should apply equally to plaintiffs and defendants.	Apr 27, 2011 3:54 PM
108	It would help if it could be made clearer how it works in cases where it's not just a simple dollar amount.	Apr 27, 2011 3:52 PM
109	The tender of "nominal" Rule 68 offers (which by Alaska Supreme Court decison have been rendered non-viable) were, prior to such decision by the Court, a common and effective way to cause plaintiffs and their counsel to reflect on the merits and likely outcome of continuing to litigate actions which at times are filed in a moment of temper or due to an imminent limitations deadline. I have had very capable plaintiff's PI counsel dismiss wrongful death and catastrophic injury cases, or dismiss some defendants from multi-party litigation, for "nominal"	Apr 27, 2011 3:38 PM

Page 3, Q20. Do you have suggestions for ways that Rule 68 could be improved? What specific word changes would you suggest, and why would those be an improvement?

	amounts. Rule 68 served one of its purposes - causing parties to evaluate their claims and defenses and purge the court docket of ill-advised claims. That tool has been eliminated and those extremely weak cases now stay in the system and may go to trial as there is no longer a high cost to rolling the dice, with resulting economic waste to the court system and opposing parties.	
110	If the Rule is going to be there, it needs to be enforced even handedly against plaintiffs as well as defendants, and the Supreme Court should reverse its recent line of cases which gut the Rule. Either that, or the whole Rule should be rescinded. Otherwise it is not a useful tool.	Apr 27, 2011 3:37 PM
111	It should not be rescinded if the Rule 82 stays in place.	Apr 27, 2011 3:35 PM
112	Revise to make the application more understandable, to litigants AND lawyers.	Apr 27, 2011 3:30 PM
113	Courts don't enforce or take it seriously.	Apr 27, 2011 3:15 PM
114	Rule 68 has been a device by the defense to hedge their bets in case they win. It is used as an intimidation tool, rather then a bona fide settlement tool. I have never received a bona fide offer of judgment. It should be abolished, or else changed to add or delete from the standard interest rate like it used to be. There are so many variables in a lawsuit to accurately gauge how a verdict will come out: The make up of the jury, the Judge, the capability of the attorney, the capability of opposing counsel, and to be honest, the likability of the client.	Apr 27, 2011 3:14 PM
115	I do not have specific changes to the language, but I do agree wtih the trend requiring that the offer be reasonable in order to trigger the rule's fee shifitng provisions. It would be disturbing indeed if Rule 68 simply became another way that affluent defendants could bully moderate income plaintiffs into unreasonable settlements.	Apr 27, 2011 3:12 PM
116	Minimum amount included	Apr 27, 2011 3:11 PM
117	Insert a deadline for settlement offers. Percentage decreases (or increases) of awards depending upon the timing of the offer of judgment. E.g. the earlier the offer, the greater the disparity between the offer and the actual award: an offer within the first 90 days of complaint has to be within 75% of the actual award; within 90 days of trial, then the award has to be within the actual offer amount.	Apr 27, 2011 3:11 PM
118	Dump it in personal injury cases. It only benefits insurers who can use it as a threat against plaintiffs. If the insurer guesses wrong, they just pay it and move on. I've been practicing personal injury since 1990, and defense attorneys always file low-ball offers of judgment (i.e. even below cost of defense) that have nothing to do with the real value of the case. Plaintiffs' attorneys don't file many, because they really aren't a threat to the insurance company, and because they can backfire.	Apr 27, 2011 3:11 PM
119	Rule 68 needs to be clarified. Offers of judgment of any amount should be considered valid. There is no reason to conclude that an offer of even $1 is invalid if the party making it has a good faith belief that the case filed against them is frivolous or lacks merit. In order to gain the protections of Civil Rule 68, a party should not be subject to what is effectively extortion (i.e. making a	Apr 27, 2011 3:09 PM

Page 3, Q20. Do you have suggestions for ways that Rule 68 could be improved? What specific word changes would you suggest, and why would those be an improvement?

	sufficiently high offer of judgment to satisfy the court) when they have no liability and/or the case is frivolous. Further, actual attorneys fees should mean actual attorneys fees in the contingency fee setting, not some hypothetical number arrived at by multiplying a hyptothetical hourly rate against hours spent on the case. As the case law has developed over the last three years, the application and interpretation of Rule 68 is unclear and inconsistent.	
120	do away with the 5% less favorable, so that you either beat the amount offered or you do not.	Apr 27, 2011 3:07 PM
121	I found the rule to be valid in my defense practice. However, I am retired and do not have any recent experience with the rule.	Apr 27, 2011 3:07 PM
122	For the first 30 days following a lawsuit, the Rule 68 penalty/award should be 75% of actual, reasonable attorneys' fees. For the next 90 days it should be 100%. And it hsould then taper down as it does now.	Apr 27, 2011 3:03 PM
123	The "no joint offeree" rule needs to be modified. If a defendant is defending claims from a tort victim that also includes related loss of consortium/NIED claims and a single attorney is representing all plaintiffs, a defendant should be allowed to make a single Rule 68 offer to all plaintiffs. The same rationale can apply to defendants (like when a plaintiff sues both the tortfeasor and the tortfeasor's employer and the tortfeasor's empoyer has agreed to defend/indemnify the employee - you really have a single defendant).	Apr 27, 2011 2:57 PM
124	The rule should be rescinded. It is currently used as a club to threated middle-class litigants out of their meritorious claims by threatening them with bankruptcy. If it isn't rescinded, it should be applied as written. The Court's current interpretation viirtually guarantees litigation over every unaccepted offer.	Apr 27, 2011 2:57 PM
125	It should be changed so that attorney's working under a contingency fee can only earn a percentage of the actual fees charged. There should be clear guidelines for how to effectuate a valid offer in the context where there is a third-party defendant.	Apr 27, 2011 2:53 PM
126	It works pretty good as is.	Apr 27, 2011 2:53 PM
127	Since the Court will not enforce nominal offers of judgment, even when made in good faith, the rule should be revised to provide clarity regarding the minimum amount that must be offered to achieve an offer of judgment for which the penalties will actually apply	Apr 27, 2011 2:53 PM
128	There needs to be a more specific requirement that the offer be reasonable and made in good faith	Apr 27, 2011 2:51 PM
129	You should have quoted them at the start of this survey. I do not have a rules book at hand.	Apr 27, 2011 2:49 PM
130	When Defendant's offer will be good faith should be objectively clarified. Recent Alaska Supreme Court decisions are likely to make extensive motion practice necessary for every rule 68 offer by Defendant.	Apr 27, 2011 2:49 PM

Page 3, Q20. Do you have suggestions for ways that Rule 68 could be improved? What specific word changes would you suggest, and why would those be an improvement?

131	68(b)(1) should be limited to after initial disclosures have been made.	Apr 27, 2011 2:48 PM
132	I think Rule 68 works pretty well. Some of the court's cases interpreting the rule might be worked into a revised rule. The rule as it applies to non-monetary offers, and what it takes to beat them, might also be clarified. I do not have specific language suggestions at this moment.	Apr 27, 2011 2:48 PM
133	I believe that Rule 68 is almost always used for tactical advantage, sometimes against unsophisticated pro se litigants. I'd like to see it rescinded completely.	Apr 27, 2011 2:47 PM
134	The Alaska Supreme Court's Rule 68 law has really decreased the impact of the rule and its usefulness, especially for defendants and in multi-party cases. Defendants who truly believe the case has no or minimal value should be able to take advantage of the rule's benefits.	Apr 27, 2011 2:45 PM
135	Yes, have the Supreme court reverse their decision which, as a practical matter, makes Rule 68 worhtless for encouraging early settlement of litigation.	Apr 27, 2011 2:45 PM
136	The Alaska Supreme court could allow for full enforcement of the Rule.	Apr 27, 2011 2:44 PM
137	Add a "good faith" exception.	Apr 27, 2011 2:43 PM

Page 4, Q27. Do you have suggestions for ways that Rule 82 could be improved? What specific word changes would you suggest, and why would those be an improvement?

1	The defendants who ignore complaints are rewarded because they have a special rate. It punishes those who file an answer and then lose immediately on summary judgment. It is bad enough that pro pers seem to disrespect the court. But rewarding them for refusing to pay bills, and then refusing to answer or respond to discovery or anything else but giving them either less in attorney fees or NO attorney fees if it is a tort or subrogation case is just wrong.	May 20, 2011 10:08 AM
2	Abandon the English Rule. Alaska is the only state that adheres to it. All other states have adopted the American Rule and also have private attorney general statutes to provide fees for plaintiffs in public interest cases. The English Rule, with no explicit protection for public interest litigants, discourages public interest cases from ever being brought. Rule 82 should be revised to incorporate this important element.	May 13, 2011 3:49 PM
3	similar to above discussion on R. 68	May 13, 2011 9:21 AM
4	Rule 82 should not be rescinded but it should be substantially amended to adopt the American Rule that each party bears its own fees unless fee recovery is specifically provided by statute (i.e., statutes that provide for private attorneys general and allow plaintiff's to recover fees). If we continue to adhere to the English Rule, the Rule should expressly provide an exception for public interest litigants. Without some protection from having to pay the other sides fees, Rule 82 discourages meritorious public interest litigation and discourages parties with limited means for bringing meritorious claims.	May 13, 2011 8:38 AM
5	Make all plaintiffs prove financial responsibility for rule 82 as a condition of filing a lawsuit. That way they don't have economic leverage over defendants who are paying defense costs for baseless lawsuits.	May 13, 2011 8:31 AM
6	The English Rule is not good policy. Alaska is the only state that adheres to the rule. Other states follow the American Rule, and have adopted private attorney general statutes to provide fees for prevailing plaintiffs in public interest cases. This approach is much more equitable. With no protection for public interest litigants, the English Rule discourages public interest litigation and also deters parties with limited financial means from bringing meritorious claims. Rule 82 should be rehauled to reflect these concepts.	May 12, 2011 4:03 PM
7	As it stands right now, the disparity between successful Plaintiff's awards vs awards against losing Plaintiffs are highly inequitable. A successful Plaintiff gets a very small % of fees paid by the losing party, probably an average of 10 - 12% of recovery. A losing Plaintiff has to pay up to 30% of the defendant's actual fees. The defendant companies in litigation have deep pockets and are usually willing and able to spend money on fees totally out of proportion to the matter at hand. The defense usually spends twice or more in fees and time than what the Plaintiff's atty spends. On a $100,000 claim, a winning Plaintiff could get $12k in fees. A defendant may spend $100k to avoid paying $100k, and would receive $30k in fees if the matter went to trial. Fees should be varied based on ability to pay and both parties should receive fees based on a percentage of actual fees, like the current provision for successful defendants, as it stands right now. There also could be consideration regarding the risk, the attorney's abilities, the work the attorney forgoes to take the case, a lodestar award as is provided under Federal civil rights attorneys' fee awards.	May 12, 2011 4:02 PM

Page 4, Q27. Do you have suggestions for ways that Rule 82 could be improved? What specific word changes would you suggest, and why would those be an improvement?

8	See prior comments. Let each case move ahead or settle based upon it relative merits and the amoutn of money at stake, not based upon tactical and fee shifting strategies of Rule 68 and Rule 82. Some will claim this is unfair because one litigant might have deeper pockets than another. But I'm not convinced that Rule 68 and Rule 82 actually help a litigant with shallow pockets and they may hurt them more than the litigant with deep pockets.	May 12, 2011 3:58 PM
9	Some change needs to be done to avoid an award that exceeds a good faith litigant's ability to pay, i.e., that really prevents making use of the justice system.	May 12, 2011 3:40 PM
10	Reverse recent foolish Sup. Ct. Dec. which gut it for effectivness on frivolous tort suits.	May 12, 2011 1:52 PM
11	No, but I feel it can be a very unfair rule because some attorneys specialize is charging their own clients as much as possible which, if the other side loses, means the loser now pays to much. In my limited experience the courts don't really look very deeply into the reasonableness of fees and would rather give their colleagues the benefit of the doubt than make objective inquiries.	May 12, 2011 1:04 PM
12	Rule 82 works an injustice in those family law cases to which it applies. I have been involved in custody cases which were dropped because of fear of Rule 82 fees. For instance, a claim by a non-parent to custody of a child being abused by her father, who had custody following the mother's accidental death. Subsequently, after three years of abuse, the OCS took the abused child and placed the child with relatives. And I represented grandparents in a different case who settled their claims on terms unfavorable to their grandchild because of fear of Rule 82 attorneys fees. The focus of this questionaire is on tort cases, contract disputes, and money. Things happen in the court system that are not about money. For instance good people trying to do the right thing for children. This questionaire reflects a failure of the questioners to understand that children are important and need a court system that truly cares.	May 12, 2011 12:32 PM
13	I would suggest that you have a different format for this question, than this survey. Surveys like this should not require us to write a brief on Rule 68 or Rule 82 issues. You should have some kind of forum like a legislative hearing for lawyers to discuss this.	May 12, 2011 12:08 PM
14	Abolition. Whenever David takes on Goliath under Rule 82 he must risk going bankrupt just paying Goliath's overpaid lawyers, even when David's case had great merit.	May 12, 2011 12:00 PM
15	Drop full fees in public interest cases. Fees should be awarded (if at all) on the basis of the claims on which the public interest party prevailed. And, if there are attorney fee awards, losing public interest parties should pay fees to the public entity.	May 12, 2011 11:38 AM
16	It is properly worded now, and easy to apply.	May 12, 2011 10:55 AM
17	Rule 82, if retained, should apply to so-called "public interest" litigants on the same basis as other litigants. Also, courts should decide cases, not promote the judges' vision of public policy. Rule 82 is structured and has been applied to advance a various policies that are unrelated to deciding cases.	May 12, 2011 10:44 AM

Page 4, Q27. Do you have suggestions for ways that Rule 82 could be improved? What specific word changes would you suggest, and why would those be an improvement?

18	No	May 12, 2011 10:31 AM
19	If the Court determines a claim has been frivolous,the attorney must pay if party is unable to do so	May 12, 2011 10:05 AM
20	Rule 82 most certainly should be based only on the parties ability to pay their attorney. A PI victim is already usually destitute due to his work disabling injury. And he invariably must give up 33%+ of is award to obtain what is "due' him. A liability insurance company on the other hand is in the business of defending claims. They have in house counsel, they have the ability to negotiate defense fee discounts and if they chose they can stall and cost a small PI victim (or his small PI attorney out). Accordingly if the PI victim prevails he should recover his actual % attorney fee (if reasonable to the nature of the case) + costs. If the defense prevails (in the absence of a frivolous suit) they should consider themselves lucky and that the fees they were out as part of the cost of doing business. Our trial court have too little time to hear the merits of a claim let alone award in insurance company fees against some middle income workman who happens to have an equity in a home or some other asset that he worked his life to obtain and whose only crime was being in an accident the insured defendant's fault for which was at least colorable! Same is true for big business that sticks it to middle income people. Exxon, consumer fraud etc, etc, In 40 of practicing law I've never seen a rule that wastes more time and benefits those who need it least. Has anyone ever seen a Plaintiff's rule 82 award approaching 33%? Why not?	May 12, 2011 10:00 AM
21	I favor the"public interest" exception to Rule 82 fee liability, but the legislature has unjustifiably (in my opinion) removed the Court's ability to weigh this factor in most cases..	May 12, 2011 9:48 AM
22	I think that Defense awards for attorney fees in cases where mandatory auto insurance, or, similiar insurance interests are funding the defense should be limited to 10% of the Plaintiff's lowest settlement offer made in writing in the case after an answer has been filed. Defendant will be the prevailing party only when their liability is less than their lowest written offer.	May 12, 2011 9:16 AM
23	The suggestion to make rule 82 dependent upon ability to pay is ridiculous. It encourages lawsuits by judgment proof plaintiffs. If a plaintiff gets the benefit of rule 82, they should also be exposed to the risk of fees.	May 12, 2011 9:12 AM
24	If the rule is to be retained, make it as ministerial as possible. There is too much litigation over attorney's fees awards.	May 12, 2011 9:08 AM
25	Rule 82 should be rescinded.	May 12, 2011 9:06 AM
26	Look at the preceding quesions 25 and 26 specifically---does that sound like equal treatment under the law? Do the indigent (or the wealthy) get a free ride? This is nuts!!!! If you're going to tinker with Rule 82 may I respectfully suggest that some of your superior court judges consider that even defendants ought to be treated fairly when they prevail. In case you think I have a practice in which I lose frequently and have seen inequities in the application of the rule let me simply state I do not. I represent professionals in the defense of professional negligence cases and my clients rarely lose but when they prevail as is most	May 12, 2011 8:59 AM

	Page 4, Q27. Do you have suggestions for ways that Rule 82 could be improved? What specific word changes would you suggest, and why would those be an improvement?	
	often is the case, they truly get shafted for their efforts. In my judgment Rule 82 has outlived any perceived usefulness it may once have had. It should be repealed as a not-so-noble experiment which has failed gloriously and repeatedly.	
27	In cases where the prevailing party receives a money judgment rule 82 should be amended to provide that the prevailing plaintiff will receive the greater of the percentage of the judgment set out in the schedule or 30% of his or her actual reasonable fees. this would give more leverage to the rule in small cases and would, as a result, encourage settlements in such cases.	May 12, 2011 8:54 AM
28	I frankly don't see a problem that needs to be fixed. I believe the rule works relatively well w/in our system and see no reason why it should be tweaked.	May 12, 2011 8:52 AM
29	Rule 82 is most effective at the end of the case rather than at the beginning, at least for the cases filed. Rule 82 most often comes into play at the end of the trial court phase (whether resolved by motion or trial) and has considerable impact on settlement and deciding whether the case will be appealed as it is often at this decision point that the cost of litigation becomes real. Whether because the case is on contingency or an attorney has not enforced collections, it is only when faced with an adverse judgment for attorney fees that many litigants truly engage in a cost-benefit analysis.	May 12, 2011 8:47 AM
30	Public Interest organizations and non-profit groups should be exempted from having to pay an award.	May 12, 2011 8:41 AM
31	appply to publice interest litigants that can afford to pay	May 12, 2011 8:40 AM
32	Aside from the comment earlier about MJPs, Rule 82 needs to reference this point: there are no post-judgment attorney's fees. The award reflects the effort likely to be involved in collecting the entire award given its Bohna dimensions. So a larger award in a case resolved by default judgment makes sense because more effort is going to be involved in collecting the judgment, even if, as a practical matter, it makes little difference to the law firm that obtains a $1,000 or $100,000 default judgment. The former can be resolved on one PFD hit. This clarification is based on my attempts to explain the basis of the rule to judges who sincerely want to know how much they should award in default cases.	May 12, 2011 8:38 AM
33	Rule 82 can be sometimes used to bully litigants into not filing claims or settling. The court needs flexibility, but I do not think that it should be modified simply to account for a party's ability to pay or not to pay fees.	May 12, 2011 8:26 AM
34	I would increase the percentage for the recovery of attorney's fees. Especially in the case of public interest litigation, 30% seems unfair. I would suggest the percentage be increased to 50% so that citizens without means though interested in justice and improving the public interest would not be discouraged from bringing lawsuits.	May 12, 2011 8:21 AM
35	The court should consider how much the losing party spent on attorney's fees before awarding the prevailing party their fees.	May 12, 2011 8:19 AM
36	I am generally oppossed to the rule but I recognize I am in the minority.	May 12, 2011 8:17 AM

Page 4, Q27. Do you have suggestions for ways that Rule 82 could be improved? What specific word changes would you suggest, and why would those be an improvement?

	Elimination of the provisions which permit variations might reduce litigation, and perhaps some uper limit on rercovery in the event of an extremely high verdict.	
37	Abolish this rule. When people think they can get a "cheap" shot at winning in litigation ("No recovery, no fee" coupled with Rules 68 & 82) those people are much more likely to "roll the dice" in court. If they know they must bear all fees they will be more circumspect. Over the past 15 years I have become more and more disenchanted with civil litigation in Alaska State Courts because fees tend to drive the matter rather than the merits.	May 12, 2011 8:13 AM
38	Not really. The fundamental underlying problem is that litigation is expensive, and there will always be difficulty dealing with the cost of process in smaller cases. Shifting part of that cost from one party to the other does not really seem to address that problem, in my experience. I understand the perceived need for a mechanism to deter vexatious conduct, but, overall, the current iteration of rule 82 seems to add an even greater burden to well-meaning but unsuccessful litigants, while only rarely meting out a firm sanction to those who use litigation inappropriately.	May 12, 2011 8:07 AM
39	judges dont like neforcing it and find dubious reaons not to. Plaintiffs with assets are deterred from filing good cases. Institutional defendants absue the rule.	May 12, 2011 8:05 AM
40	Judges already have the ability to vary a Rule 82 attorney fee award based on a variety of factors. Judges can already discourage excessive litigation expenses by not compensating a party under Rule 82 for those expenses. Rule 82 decisions are important decisions and should be carefully made given the facts of the case before the court.	May 12, 2011 7:56 AM
41	See comment above re chilling effect on court access.	May 12, 2011 7:53 AM
42	As noted above, Rule 82 should be retained and should be strengthened to fulfill its purposes of compensating winning litigants and discouraging the pursuit of weak claims and defenses. The Rule should allow recovery of all reasonable fees incurred by the winning litigant. No adjustment should be made on subjective bases. And certainly no adjustment for "ability to pay." With respect to small claims cases, that may be where Rule 82 is needed the most. Often such litigants are of lesser means, and denying recovery of full fees discourages them from consulting counsel. Early consultation with counsel is the best way to get effective evaluation of the strenght of one's position.	May 12, 2011 7:52 AM
43	Generally, I think that the "loser pays" premise behind Rule 82 is a philosophical travesty and a practical nightmare for the average person. It really only operates to benefit insurance companies in tort litigation and well-financed actors in business and commerical litigation, in my opinion. Most of the time average individuals and their lawyers (if they have a lawyer) try to find ways to work around it.	May 12, 2011 7:46 AM
44	Substantially increase the amount of the fee awards (i.e. double present amounts).	May 12, 2011 7:44 AM
45	There should be a limit of $2,000 for small claims court. Rule 82 is very	May 12, 2011 7:42 AM

Page 4, Q27. Do you have suggestions for ways that Rule 82 could be improved? What specific word changes would you suggest, and why would those be an improvement?

	intimidating for most individuals, especially responsible individuals that would in fact pay the attorney fees if the court were to order them.	
46	Rule 82 should ban any award of atty fees to opposing parties in litigation that is brought to further public interest goals. The Alaska rule deters citizens groups from filing cases to obtain judicial review of government action and sometimes leaves them with no recourse in the face of illegal executive agency action.	May 11, 2011 3:43 PM
47	Rule 82 is a useful tool in discouraging frivolous and abusive lawsuits, and needs to be retained. Attorney fees should not be limited in Small Claims cases. In the interest of unanimity, small claims cases should be governed by Rule 82 in the same manner as regular civil cases. By definition, small claims cases will involve only discretionary review by the Alaska Supreme Court, and thus there is limited ability to develop a body of case law interpreting variant attorneys fees rules in the small claims setting. Rule 82 is straightforward, and our courts are familiar with its application, making it easy to administer in small claims settings. There is no moral reason to limit attorneys fees to a set amount in small claims cases either - small claims cases simply operate under a separate set of procedural rules, but are the same as other cases in all other regards. Like other cases, small claims cases occasionally take on larger issues and are the cause of increased attorneys fees. There is no reason to limit a party's recovery of attorneys fees based on what set of procedural rules were applied to the case. Finally, Rule 82 awards should not be based on, or consider as a factor, a party's ability to pay the award. Alaska has already provided protections for indigent parties in the form of exemptions to executions and garnishments when attempting to enforce final judgments. The Alaska exemption scheme is designed to balance the interests of judgment creditors in enforcing judgments against a judgment debtors ability to pay while maintaining a certain standard of living. By factoring a party's ability to pay into Rule 82 decisions, the balance struck in the exemptions statutes are disrupted to the detriment of the judgment creditor, and another factor is added to the Rule 82 decision process, increasing the burden of administering the rule for both the courts and the parties.	May 9, 2011 3:38 PM
48	I think it should be eliminated. I think it wrongly deters moderate income persons from bringing legitimate cases and improperly pressures them to settle cases. It has virtually no settlement impact on insurers. It has no impact on detering frivolous lawsuits. It is too punitive on plaintiffs who bring small claims. And it raises the cost of all cases in Alaska because it essentialy adds a 10% tax to all cases. I don't think allowing a variance in the award depending on ability to pay is a good idea because the people who are most adversely affected are those who have the ability to pay. Also, such a change would mean that low income persons would have greater access to the courts. If it is going to remain in effect, I would suggest allowing the court to modify or eliminate an award if the action was brought in good faith and there were substantial merits on the losing side. That woould be fairer for persons who have serious damages but close liability issues. The current Rule is too punitive in such cases and, thuys wrongly deters such persons from accessing the courts. As to appeals, I am personnally aware of several cases that were appealed only because of the Rule 82 award. Also, while some cases are not appealed in exchange for waiving rule 82, again, that is usually only in the cases where the plaintff has a moderate income. And, I have been involved in cases where there were substantial issues that warranted appellate review that wer enot brought because of rule 82.	May 8, 2011 4:21 PM

Page 4, Q27. Do you have suggestions for ways that Rule 82 could be improved? What specific word changes would you suggest, and why would those be an improvement?

49	It is fine as it is. Leave it alone. The same for Rule 68. The aspect of Rule 68 which provides for a greater percentage of actual fees and costs, the earlier in the litigation the offer is made, is genius. It compels parties (not just plaintiffs) to realistically evaluate their cases and accept reasonable offers and forego the onerous expense and emotional travail of protracted litigation and the 'crapshoot' of an appeal.	May 3, 2011 3:22 PM
50	Revise to provide that a court may hold that no attorney fees will be required to be paid to a losing plaintiff if the court concludes that the circumstances of the case show that the complaint/action was frivolous.	May 3, 2011 3:14 PM
51	My cases have seen an exponential increase in unwarranted constitutional claims in the hopes of having one of the constitutional claims addressed by the court (so the litigant can attempt to recover FULL attorney fees).	May 3, 2011 2:56 PM
52	increase the percentages and standardize (between Plaintiff and Defendant) the way fees are determined	May 3, 2011 11:05 AM
53	Sort of Rule 82 related - My experience is that predicting whether a court will award Rule 82 fees or actual fees under a non-Rule 82 statute is generally difficult to predict. For example, courts will sometimes award actual fees under District Court Rule 20; other times actual fees. I recently did a lien contest and my client was awarded Rule 82 fees of $100 when the statute provided for reasonable fees. Error on attorney fees issues - at least for minor legal matters - is generally not worth appealing. As the attorney, I accept some repsonsibility for, perhaps, not properly briefing the various attorney fee cases regarding actual v. reasonable v. full v. whatever, but Rule 82 could be amended to clarify what statutory language with regard to recovery of attorney fees is, or is not, within the scope of the rule.	May 3, 2011 8:53 AM
54	Rule 82 can be improved by rescinding it. It imposes additional pressures on those of modest means who can be subject to an unrealistically large award; it is unfair to those who purchase insurance because it increases the cost of insurance due to the tremendous amount of attorney and court work dealing with attorney fee issues. Some attorneys have received huge sums from a cottage industry arguing about attorney fees, suggesting insurers' policy limits no longer applied because they did not properly calculate policy limits (something the Alaska Supreme Court indicated it had trouble doing itself in the Coughlin v Geico case). (Many of those issues are old history now, with subsequent clarifications and rulings from the Court making it easier to determine attorney fee coverage issues.) Substantial amounts of court time could be devoted to other matters if not dealing with disputes or issues relating to attorney fees. Other jurisdictions seem to get by without attorney fee shifting. In summary, from the Ivory Tower of the court system (thanks for the survey, by the way), it may seem that Rule 68 and 82 offer more positives than negatives. But from the real world of 26 years of civil practice, the opposite is true. Litigation is too expensive (and often slow in getting feedback from the courts regarding dispositive motions) to begin with. People incur significant costs just being involved in litigation. On balance, I think the public would be better served by the American Rule (parties to bear their own atty fees). Or, if we just cannot let go, reduce the Rule 68 top percentage to 30%. I also left comments re Rule 68.	May 2, 2011 3:22 PM

Page 4, Q27. Do you have suggestions for ways that Rule 82 could be improved? What specific word changes would you suggest, and why would those be an improvement?

55	No suggestions.	May 2, 2011 11:11 AM
56	If rule 82 is to be kept in the rules, major changes in the $$ recovery threshold and associated fees awarded should be considered. Even the simplest case going to court trial will cost a client at least $3.5K. If a client prevails on the merrits of a case why should he be penalized for asserting his rights or mounting a defense. It just doesn't make sense.	Apr 29, 2011 10:47 PM
57	In federal court, fee shifting statutes are construed to include as a factor in an award "the ability to pay". This is missing in our state jurisprudence. Why does a court award $300K against a person with no assets, what is the point?	Apr 29, 2011 10:30 AM
58	I think that the court should consider whether the parties made attempts to settle, or made official offers of judgment, as a factor in setting the amount of Rule 82 fees. If a plaintiff never made an offer to settle or request a settlement conference, and instead proceeded to just rack up the atty fees, I do not think they should be rewarded by receiving the full Rule 82 fees under the fee schedule.	Apr 29, 2011 9:37 AM
59	It only effects the middle class - institutional parties don't have to worry about fees - the poor have nothing to lose. Also the current process unfairly awards disproportionate fees to the defense - on smaller cases the plaintiff will always re rive a disproportionately smaller recovery than defense	Apr 29, 2011 9:17 AM
60	The problem s with the judiciary. The perception is that there is no consistency in the administration of justice in similar cases. The Judicial Counsel should be tasted with conducting an indept study of the results in small claims cases.	Apr 29, 2011 6:33 AM
61	Where lawyers are paid by the hour, there is an economic incentive to higher fees. The defense award of 30% of actual fees is logically indefensible with the result that the exposure to defense Rule 82 fees is much greater than a successul Plaintiff's recovery of 10% of the actual amount recovered. There should be a cap on defense fees recovered under Civil Rule 82 and, if available, the Court should be required to consider the comparable fees of the plaintiff in determining whether the defense fees for the same case are reasonable.	Apr 28, 2011 4:38 PM
62	Consideration of ability to pay would be an improvement if standards could be set so the trial courts applied the standards consistently. There should be a mechanism for penalizing scorched earth defense of clearly meritorious claims and other forms of economic warfare used to defeat meritorious claims on other than the merits..	Apr 28, 2011 10:45 AM
63	See comment above on Rule 68; escape clause for claims or defenses made in good faith or reasonable grounds similar to fees and liquidated damages in Alaska Wage & Hour Act.	Apr 28, 2011 9:53 AM
64	Allowing or requiring the court to consider a parties' ability to pay a fee award is just another layer of issues to fight over. I would be much happier to have a rule allowing for the collection of post-judgment costs and attorney's fees to offset the time and effort of collection.	Apr 28, 2011 9:53 AM
65	Add a provision to Rule 82(b)(4) that provides that the court is to award the	Apr 28, 2011 9:48 AM

Page 4, Q27. Do you have suggestions for ways that Rule 82 could be improved? What specific word changes would you suggest, and why would those be an improvement?

	GREATER of the Rule 82 percentage or actual attorney fees, including contingent attorney fees at the rate agreed to by the attorney and his client. Presently, the measure of "actual reasonable fees" is based on the hourly rate time hours expended, which leaves a lot of room for argument, and unfairly punishes litigants on contingent fee arrangements.	
66	Larger percentage to prevailing party. The low percentage totally prevents people of moderate means from bringing legitimate claims when an ethical lawyer explains the risks / rewards of most litigation. The little guy facing a big unethical brute thus suffer's and this needs to change.	Apr 28, 2011 9:42 AM
67	A simple one size fits all rule should be implemented that allows a plaintiff to recover 30% of amount recovered including costs and interest and defense attornies recover 30% of actual costs and attorney's fees that is set yearly by the court, like the interest rate, at a say $250 an hour.	Apr 28, 2011 9:37 AM
68	The dollar amounts to which the fees are set for plaintiff victories should be increased, as currently there is a great discrepancy in how much a defendant may receive in Rule 82 fees in a small or medium case and how much a plaintiff would receive. As it exists, in a case that is poentially worth $100,000, an insurance company has no real concern, but plaintiff if unsuccessful, could have judgment entered against her a significant amount or even more than the amount sought. Defense costs could also be made proportion to the amount reasonably at stake (which would also discourage plaintiffs from saying that are seeking $1 million in $100,000 cases) (although it should also be remembered that when defense offers start at $0 and all compromise goes toward the middle, plaintiffs also have to exaggerate a little)	Apr 28, 2011 8:41 AM
69	Make it shorter, simpler, so that a putative litigant can be handed a copy and know what it means. If a rule requires multiple supreme court interpretations to explain it, then it needs help.	Apr 28, 2011 8:30 AM
70	If it is not to be abolished, Rule 82 should be specifically changed to require the Court to consider the circumstances of the case. Otherwise, the ability of a normal person to take on a large entity is severely and unacceptably impaired. If the plaintiff suffers a single adverse ruling on a portion of his case, there is no way to fix it except with a petition for review, which is almost never granted. The cost of appeal after the award in a big case will simp,y be too high.	Apr 28, 2011 8:22 AM
71	Rescind. The rule only creates more motion practice.	Apr 28, 2011 8:17 AM
72	Since the legislature's abolition of the public interest litigant rule and the Supreme Court's decision upholding that legislation, the prospect of attorney's fee awards has acted as a significant deterrent to valid, good faith public interest litigation. The problem is that, though the Supreme Court's decision requires that fee awards not be so high as to deter similarly situated litigants, there are no guidelines how to make that determination. It is impossible to advise clients with any assurance what their potential liability might be. In a case where, by definition, money is not at issue, and where the plaintiffs are normall nonprofit organizations, this is a huge deterrent. The court should either overrule the Nunapitchuk decision, or abolish fee awards in public interest cases, or set a firm cap on fee awards for public interest litigants, so that potential parties	Apr 28, 2011 7:57 AM

Page 4, Q27. Do you have suggestions for ways that Rule 82 could be improved? What specific word changes would you suggest, and why would those be an improvement?

	understand the extent of their risk.	
73	It is the best part of the Civil Rules and should be retained. Variations based on the ability to pay sounds good, but if you include reductions for inability to pay, you also must include increases for large ability to pay. For large corporate defendants, or the state of alaska, this might get messy.	Apr 28, 2011 7:46 AM
74	The only way it could be improved is to increase the amount/percentage of fees that are awarded. I am aghast that the above questions are being asked and that such action is even being considered. The present Rule 82 is the single best rule contained within the Alaska R.Civ.P. It encourages good faith in litigation - by all parties. It encourages rather than discourages settlement. Implementation of any of the ideas above would be asinine. Please DO NOT CHANGE RULE 82 other than to perhaps increase the award amounts/percentages.	Apr 28, 2011 7:43 AM
75	Allowing or requiring the court to consider a party's ability to pay fees is a terrible idea, at least in cases in which a party is insured. Such a rule would result in losing defendants always paying fees because of their insurance, while losing plaintiffs would almost never be required to pay fees.	Apr 28, 2011 7:35 AM
76	The Rule 82 fee shift should be simplified and increased, to better serve its purpose of putting costs on the cost-causer (the party with the incorrect legal position who nonetheless pushes the case to and through litigation). Plaintiffs should be required to state with particularity the dollar value of their damages in the complaint, which statement would provide a cap on the available damages in the case. Rule 82 awards should then be fixed based on the award: if the plaintiff wins more than 50% of the declared damages, it would be entitled to a fee award of 50% of the damages awarded if the case went to trial, or 25% if it did not. If the plaintiff wins nothing or less than 50%, the defendant would be entitled to a fee award of 50% of the declared damages if the case went to trial, or 25% if it did not. Enhancements would not be available (although the court, of course, would retain its inherent power to control the conduct of cases and litigants, including by imposing sanctions). It is a faulty premise to assert that the goal of Rule 82 is to discourage frivolous claims or defenses. If that were the case, one would not expect litigation conduct to affect the size of the fee award, but it does. On the other hand, one would expect there to be some explicit allowance for claims and defenses that were rejected (even if others were accepted). There is none. But to the degree the committee grafts this goal onto the Rule, it should be changed to make the losing party's attorney jointly and severally liable for a portion of any adverse fee award if the judge determined that the losing side had asserted frivolous claims or defenses.	Apr 28, 2011 7:30 AM
77	Generally, Rule 82 is working fine.	Apr 28, 2011 5:12 AM
78	Rule 82 could be most improved by being rescinded. That said, if it is not rescinded, then the court should be required to perform an analysis of the reasonableness of the fee bills presented if it is raised by the opposing party, and should be required to make findings.	Apr 28, 2011 12:41 AM
79	I don't think you can improve Rule 82. Most of the excessive, frivolous, and stupid litigation was the result of bad attorneys, not the clients.	Apr 27, 2011 10:29 PM

Page 4, Q27. Do you have suggestions for ways that Rule 82 could be improved? What specific word changes would you suggest, and why would those be an improvement?

80	All attorney fees in public interest cases should not be awarded regardless of what claims prevailed. The mental health trust lands case cost the state several million dollars in attorney fees even though the plaintiff prevailed on none of their arguments after the initial decision. They had no incentive to settle or limit their arguments to reasonable ones. In effect, the rule became their personal ATM.	Apr 27, 2011 7:47 PM
81	Lawyers abuse Rule 82 and those statutes that allow for "actual reasonable fees" such as landlord-tenant fees. Give judges more discretion to decide what is fair under the circumstances. Of course, that would require legislative help.	Apr 27, 2011 7:18 PM
82	Get rid of it. There is a reason the rest of the world allows full access to the courts, without threat of opposing counsel's fees. Alternatively, make CR 82(b)(3) factors have real teeth.	Apr 27, 2011 6:54 PM
83	enact a specific public interest litigaiton exception or abolish the rule.	Apr 27, 2011 6:53 PM
84	unless the claimant lives under a bridge, Rule 82 is just one more way the insurance industry hammers the helpless. Claimants have a single claim. The industry has thousands of them, and can afford the adverse fee award, just as it can afford to pay more to defend a reasonalbly valid claim than to settle it. Rule 82 becomes another arrow in the arsenal of the "deny, delay & defend" business model of insurers.	Apr 27, 2011 6:37 PM
85	Yes. Rule 82 should be re-written so that it incentivizes lawyers to do legal work for people who cannot otherwise affford lawyers. There are 1000s of people in this state who cannot get a lawyer to help them bc they cannot afford a $10,000 retainer. Say, for example, their house was just illegally foreclosed on by Wells Fargo. No lawyer will take on this case with the hope of getting Rule 82 fees. They are way too small. 20%?! So, what happens to this family? They end up without any legal help. This is not good. Rule 82 does not help this family at all. It should.	Apr 27, 2011 5:27 PM
86	Rule 82 is kind of complex, especially as interpreted by our Supreme Court. I recommend amending Rule 82 to specify that prejudgment interest is not included in computing the amount of fees. Requiring interest and fees both is, arguably, double dipping.	Apr 27, 2011 4:31 PM
87	If the court is going to retain rule 82, the following factors should be included:, (1) the parties ability to pay (2) the reasonableness of the positions taken by the losing party. (3) whether early reasonable settlement was attempted by the winning party (3) whether reasonable settlement offers were tendered by the winning party and refused (4) whether the winning party took steps to hold down fees and costs (5) The amount of fees spent in relationship to the amount of the claim	Apr 27, 2011 4:17 PM
88	Reinstate the public interest litigant rule. At the very least citizens should not be required to risk impoverishment for daring to use the court to challenge a government policy or decision. The post- Native Village of Nunapitchuk era will increasingly ensure that the courts are no longer an option for citizens to change bad and often corrupt government actions.	Apr 27, 2011 4:08 PM
89	Any variation of the Rule 82 fee schedule in a particular case should definitely	Apr 27, 2011 4:02 PM

Page 4, Q27. Do you have suggestions for ways that Rule 82 could be improved? What specific word changes would you suggest, and why would those be an improvement?

	take relative ability to pay into account but should also look at the validity and strength of a case as it would have reasonably appeared when the litigation was undertaken, not post hoc after discovery and trial. Rule 82 is one appropriate tool to discourage frivolous litigation as well as partially compensate the winning party. Rule 82 fees should reflect both of these goals, which are in tension, without inevitably threatening a good faith litigant with bankruptcy.	
90	It isn't the wording of Rule 82 that is the problem, its the judge-created exceptions such as the public interest litigant rules. So long as there is a potential reward for bringing far-fetched claims, inventive attorneys will be pursuing purported "public interest" claims for the primary purpose of getting a fee award. This is a significant burden on the costs of doing business and on the government agencies that must devote public funds and resources to defending such lawsuits. If fees go the the prevailing party in public interest cases just as they do in other cases, this lawsuit-generation industry would be more limited.	Apr 27, 2011 3:48 PM
91	No change needed in the wording. Just the application by the courts.	Apr 27, 2011 3:38 PM
92	Require judges in non-monetary cases to address on the record all of the factors considered when varying from the schedule. Like a best interest find in child custody cases.	Apr 27, 2011 3:32 PM
93	Whether the case was filed in good faith, and whether the case was defended in good faith should be the standard in deciding if attorney fees should be awarded. Obviously, this means there is a judgment call that has to be made by the court, but that discretion should act as a deterrent to any frivolous lawsuits. Like I said earlier, there are so many variables to a law suit that could cause a valid suit to go sideways, but it is not fair to punish someone who believes that their claim has merit and is exercising their right to be heard in court.	Apr 27, 2011 3:24 PM
94	We are one of the few states that allows for attorney fees. If you represent a client with money, attorneys file marginal cases to settle for fees. It is a payment scheme for attorneys. Courts seem reluctant to require lossing parties with limited money to pay, which often encourages their next lawsuit.	Apr 27, 2011 3:17 PM
95	Courts' liberal application has caused R82 to be ineffective.	Apr 27, 2011 3:16 PM
96	The percentages should be higher; Plaintiffs only receive a small fraction of reimbursement of attorneys fees to collect on valid claims.	Apr 27, 2011 3:13 PM
97	the award for the prevailing party should be larger - close to actual reasonable fees and costs on the issues on which the prevailing party was successful	Apr 27, 2011 3:13 PM
98	Chuck it. Seems to be second only to divorce cases as to how many appeals are filed, especially as to who is the prevailing party.	Apr 27, 2011 3:13 PM
99	For the rule to be applied evenly to all parties, ability to pay should play no role in the decision about what to award for fees. The fees are what they are and are usually due to the actions of both parties. The fact that a party has the ability to pay or does not have the ability to pay is irrelevant if the Rule is to accomplish its intented purpose. The cases where I have received attorneys' fees awards against the other party were all awarded pursuant to Rule 68 over the last	Apr 27, 2011 3:11 PM

	Page 4, Q27. Do you have suggestions for ways that Rule 82 could be improved? What specific word changes would you suggest, and why would those be an improvement?	
	several years, so Rule 82 really did not factor into the award. Rule 68 does encourage settlement. Rule 82 does not as much.	
100	Rule 82 needs to be rescinded in contract cases, if the parties do not contract for attorney fees the absence of the language in the contract is indicative of the relative importance of the fee issue. Rule 82 in tort claims discourages people with good claims from pursuing their claims based on the fear of an adverse result which could have devastating financial results.	Apr 27, 2011 3:02 PM
101	My problems with Rule 82 aren't with the rule itself, but the way judges try to get around the harsh effects of the rule - either by ignoring both the rule and the factors for increasing/descreasing an award, or by comming up with creative ways of finding that there was no prevailing party in a case.	Apr 27, 2011 3:01 PM
102	The bar was strongly opposed to the last set of amendments. The Court ignored the bar's comments. As predicted by most lawyers, the amendments greatly increased Rule 82 litigation. Those amendments should be rescinded.	Apr 27, 2011 3:00 PM
103	If Rule 82 is not rescinded it needs to be changed in a way where it is not so one sided. Typically, a plaintiff is not concerned with Rule 82 because they do not have the means to pay a judgment.	Apr 27, 2011 2:57 PM
104	The fee exposure to each side of the case should match. For example, the fee award for a $10,000 plaintiff's case tried through trial is $2000 but the fee exposure to the defendant is presumptively 30% of the fees incurred in defense. There is frequently no correlation between the amount at issue and the amount spent to defend the case.	Apr 27, 2011 2:56 PM
105	Get rid of it.	Apr 27, 2011 2:54 PM
106	I would like to see courts use the adjustment factors in Rule 82. Rarely do courts use these, even when opposing counsel has caused needless hours of work that my client has paid for out of pocket. Also, the Supreme Court only gives minimal attorney fees, which I believe is problematic. Why have the rule if its not being followed?	Apr 27, 2011 2:47 PM
107	It should be clear that ANY Rule 68 offer is in good faith by definition.	Apr 27, 2011 2:46 PM

Page 5, Q28. What are the substantive areas in which you concentrate 25% or more of your practice?

1	Construction Law	May 21, 2011 4:56 PM
2	Employment	May 16, 2011 9:30 AM
3	Native Law (particularly health)	May 13, 2011 9:23 AM
4	Environmental	May 13, 2011 8:38 AM
5	employment, civil rights	May 12, 2011 6:00 PM
6	Environmental	May 12, 2011 4:03 PM
7	Employment, employment discrimination	May 12, 2011 4:03 PM
8	employment law	May 12, 2011 3:41 PM
9	health care, nonprofit	May 12, 2011 12:09 PM
10	public benefits	May 12, 2011 11:20 AM
11	Insurance coverage	May 12, 2011 11:07 AM
12	Seaman's injury and death (Plaintiff) 99%	May 12, 2011 10:02 AM
13	Medical Malpractice	May 12, 2011 9:41 AM
14	personal injury, insurance defense, insurance law, subrogation	May 12, 2011 9:36 AM
15	Aviation, Medical and legal malpractice	May 12, 2011 9:27 AM
16	Intentional torts, civil rights	May 12, 2011 9:21 AM
17	Insurance	May 12, 2011 9:07 AM
18	construction/contract claims	May 12, 2011 8:53 AM
19	environmental	May 12, 2011 8:43 AM
20	environmental	May 12, 2011 8:29 AM
21	eminent domain/construction litigation	May 12, 2011 8:27 AM
22	Native Civil Rights, Environment	May 12, 2011 8:21 AM
23	civil rights	May 12, 2011 8:19 AM
24	Environmental	May 12, 2011 8:14 AM
25	Oil and Gas	May 12, 2011 7:59 AM
26	Environmental	May 12, 2011 7:54 AM
27	CINA	May 12, 2011 7:53 AM

Page 5, Q28. What are the substantive areas in which you concentrate 25% or more of your practice?

28	Alaska Native Law	May 12, 2011 7:50 AM
29	Elder law	May 12, 2011 7:47 AM
30	Native Civil Rights, environmental	May 11, 2011 3:44 PM
31	Tort - Defendant	May 9, 2011 3:41 PM
32	Construction	May 9, 2011 8:50 AM
33	Child in Need of Aid	May 7, 2011 8:52 PM
34	Product Liability defense	May 3, 2011 3:22 PM
35	Environmental	May 3, 2011 3:16 PM
36	I do probono work	Apr 29, 2011 6:34 AM
37	ERISA employee benefit claims	Apr 28, 2011 9:54 AM
38	Civil Rights	Apr 28, 2011 9:28 AM
39	Environmental	Apr 28, 2011 7:58 AM
40	Insurance	Apr 28, 2011 5:13 AM
41	Judge	Apr 27, 2011 7:18 PM
42	Environmental	Apr 27, 2011 6:54 PM
43	Constitutional Law	Apr 27, 2011 5:28 PM
44	Environmental	Apr 27, 2011 4:45 PM
45	Environmental	Apr 27, 2011 4:09 PM
46	product liability; environmental	Apr 27, 2011 3:39 PM
47	Business civil litigation	Apr 27, 2011 3:38 PM
48	employment law	Apr 27, 2011 3:25 PM
49	negligible	Apr 27, 2011 3:13 PM
50	poverty law	Apr 27, 2011 3:08 PM
51	class actions	Apr 27, 2011 3:00 PM
52	municpal	Apr 27, 2011 2:58 PM
53	Natural Resources	Apr 27, 2011 2:55 PM
54	Federal Law Clerk - Criminal, Habeas & Admiralty/Marine	Apr 27, 2011 2:50 PM

Page 5, Q28. What are the substantive areas in which you concentrate 25% or more of your practice?		
55	retired government attorney	Apr 27, 2011 2:50 PM
56	Judicial Officer	Apr 27, 2011 2:48 PM
57	Environmental	Apr 27, 2011 2:47 PM
58	Native, health	Apr 27, 2011 2:46 PM
59	Civil Liberties	Apr 27, 2011 2:44 PM

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