

IN THE SUPREME COURT OF THE STATE OF ALASKA

ORDER NO. 470

Amending Rules 37, 38, 39, 40
and 41, Alaska Bar Rules,
Relating to Attorney Fee
Arbitration Proceedings.

IT IS ORDERED:

1. Rule 37, Alaska Bar Rules, is repealed and enacted to read:

RULE 37. VENUE OF FEE ARBITRATION PROCEEDINGS
AND COMPOSITION AND APPOINTMENT OF THE COMMIT-
TEE AND SUBCOMMITTEES.

(a) Fee arbitration in this state shall be divided into the following areas:

- (1) First Judicial District;
- (2) Third Judicial District; and
- (3) Second and Fourth Judicial Districts.

The fee arbitration area in which venue shall lie shall be any area in which the services for which fees are charged occurred.

(b) The Committee shall consist of four (4) area standing subcommittees composed as follows:

- (1) Anchorage: twenty-four (24) attorney members and eight (8) non-attorney members;
- (2) Fairbanks: twelve (12) attorney members and four (4) non-attorney members;
- (3) Juneau: six (6) attorney members and two (2) non-attorney members; and
- (4) Ketchikan: six (6) attorney members and two (2) non-attorney members.

(c) In the event of a fee arbitration request in a community not contiguous to a community listed in (b) above, a special subcommittee may be appointed for that arbitration consisting of two (2) attorney members and one (1) non-attorney member, one of whom must be a member of a standing subcommittee.

(d) An attorney member of a subcommittee shall be an active member of the Alaska Bar Association who maintains an office for the practice of law in the fee arbitration area for which he is appointed. The attorney

members of each subcommittee shall be appointed by the president of the Alaska Bar Association, subject to ratification by the Board of Governors.

(e) A non-attorney member of a subcommittee shall be a citizen of the United States, at least 18 years of age and who resides in the fee arbitration area for which he is appointed. The non-attorney members of each subcommittee shall be appointed by the president of the Alaska Bar Association, subject to ratification by the Board of Governors.

(f) The term of appointment to a subcommittee shall be for three years subject to the following conditions:

(1) appointments shall commence on July 1 of the year in which the appointment is made;

(2) if a member resigns prior to the expiration of his term, the president shall appoint a replacement to fill the unexpired term;

(3) if the term of a member expires while an arbitration is pending before him, the term shall be extended until the arbitration is concluded. His successor's appointment shall be made as if his term had concluded on time;

(4) if a member becomes the subject of a fee dispute arbitration; he shall not sit on a hearing panel during the pendency of that arbitration; if a fee dispute arises while an arbitration is pending before him, the proceeding thereon shall be stayed until the arbitration before him is concluded; and

(5) any member appointed to a hearing panel who fails for any reason to attend a hearing [WHERE HE HAS BEEN APPOINTED TO THE] of that hearing panel for two consecutive or three non-consecutive times may be removed from the subcommittee [AND] by the president who shall then appoint a new member to fill the unexpired term.

2. Rule 38, Alaska Bar Rules, is amended to read:

RULE 38. INITIATION OF PROCEEDINGS.

(a) [PROCEEDINGS BEFORE THE COMMITTEE] Fee arbitration proceedings shall be initiated by the filing of a written petition [SIGNED BY THE CLIENT] at the Office of the Alaska Bar Association. The petition must be signed by the client and must contain the following:

(1) [A] a statement by the client of the efforts he has made to attempt to resolve the matter directly with the attorney[.];

(2) [A] a statement by the client that he understands that by [EXECUTING] filing the petition[,] the determination of the [COMMITTEE] hearing panel is binding, that the determination may be reviewed by a court only for the reasons set forth in AS 09.43.120 et seq., and that the determination may be reduced to [AN ENFORCEABLE JUDGMENT BY ANY COURT OF COMPETENT JURISDICTION] judgment[.];

(3) [A] a statement of the dispute (including any amounts in dispute) that he has with the attorney in as specific terms as possible[.]; and

(4) [A] a statement of the remedy the client seeks from the [COMMITTEE] hearing panel against the attorney.

(b) Upon filing the petition at the Office of the Association, the [EXECUTIVE DIRECTOR] Bar Counsel of the Association shall review the petition to determine if the client has made reasonable efforts to resolve the dispute with the attorney prior to the filing of the petition. If the [EXECUTIVE DIRECTOR] Bar Counsel determines that the client has not adequately attempted to resolve the dispute informally, or that the petition is otherwise incomplete, the petition shall be returned to the client with a letter from the [EXECUTIVE DIRECTOR] Bar Counsel specifying to the client what steps shall be taken by the client to attempt to resolve the matter informally or requiring the client to complete the petition before the Association will accept the petition.

(c) After the [EXECUTIVE DIRECTOR] Bar Counsel has determined that the client has made adequate efforts to resolve the dispute informally with the attorney and that the petition is otherwise complete, the [EXECUTIVE DIRECTOR] Bar Counsel shall forthwith notify both the client and the attorney of the acceptance of such petition and further notify both that the matter shall be held in abeyance for a period of ten (10) days in order for both the client and the attorney to have the opportunity of settling the matter without action by [THE COMMITTEE] a hearing panel. Such notification shall also advise both parties that, if the matter is not settled within the ten (10) day period, it shall be referred to [THE] an appropriate hearing panel. [THE EXECUTIVE DIRECTOR, UNLESS INFORMED THAT THE MATTER HAS BEEN SETTLED, SHALL REFER IT TO THE CHAIRMAN OF THE APPROPRIATE PANEL AT THE END OF THIS TEN (10) DAY PERIOD.]

(d) At the end of the ten (10) day period, if he has not been informed that the matter has been settled, the Bar Counsel shall select a hearing panel from the members of the appropriate standing subcommittee. The hearing panel shall consist of two attorney members of the subcommittee and one non-attorney member of the subcommittee. The Bar Counsel shall

appoint one of the attorney members of the hearing panel to serve as chairman of the hearing panel.

3. Rule 39, Alaska Bar Rules, is amended to read:

RULE 39. HEARINGS.

(a) The [EXECUTIVE DIRECTOR] Bar Counsel shall, at the time the matter is forwarded to the chairman of the appropriate hearing panel and at least 20 days in advance of the hearing, give written notice to the client of the time and placing of the hearing. The notice of the hearing shall also advise the client of his right to present witnesses and to submit documentary evidence in support[,] of his position, to have the hearing recorded on tape and later, at his own expense, to request a transcript of the recording, and to be represented by an attorney at law. A similar notice shall at the same time be sent to the attorney. No response to a petition is required, and all material allegations are deemed denied. All notices shall be sent by certified mail, return receipt requested.

(b) Continuances will be granted only for good cause and when absolutely necessary. Application for continuance shall be made to the chairman of the appropriate hearing panel. An application must be made at least 10 days prior to the date for hearing unless good cause is shown for making application subsequent to that time.

(c) Each hearing panel shall meet at a time and place convenient to both the client and the attorney as arranged by Bar Counsel. [EACH PANEL SHALL MEET, IF THERE ARE PENDING MATTERS, ON THE SECOND TUESDAY OF EVERY MONTH AT 7:00 P.M. IN A DESIGNATED COURTROOM IN THE LOCAL SUPERIOR COURT. THE EXECUTIVE DIRECTOR, FOR GOOD CAUSE SHOWN, MAY FIX A DIFFERENT TIME OR PLACE FOR THE MEETING.]

(d) Each hearing panel shall act only with the concurrence of a majority of its members sitting for the transaction of the matters before it. Three members shall constitute a hearing panel and the quorum, one of [WHICH] whom shall be [THE] a non-attorney member[, OR, IF THE NON-ATTORNEY MEMBER IS UNABLE TO SIT FOR ANY MATTER, THE NON-ATTORNEY ALTERNATE]. The chairman of the [COMMITTEE] hearing panel shall preside at the hearing and have the powers relating to the conduct of the hearing. He shall judge the relevancy and the materiality of the evidence offered and shall rule on all questions of evidence and procedure.

(e) Either party may submit a written statement in lieu of or in addition to presenting evidence at the hearing. Such written statement must be filed with the [EXECUTIVE DIRECTOR] Bar Counsel and be served on the other party at least 10 days before the date set for hearing. The other party may,

within three days prior to the date set for hearing, respond to the [PARTIES] party's written statement. The other party may require the party filing the written statement to appear at the hearing and be subject to cross-examination by filing with the [COMMITTEE] hearing panel and mailing to the party whose presence is required a notice of intention to cross-examine within five days prior to the date set for hearing. Such notice must be made in good faith and not with an intention to cause delay or inconvenience. The [COMMITTEE] hearing panel may award expenses of appearance if it determines that the notice was filed solely for the purpose of causing delay or inconvenience.

(f) Either party may submit written affidavits by witnesses on their behalf in lieu of or in addition to presenting evidence at the hearing. Such written affidavits must be filed with the [EXECUTIVE DIRECTOR] Bar Counsel and served on the other party at least 10 days before the date set for hearing. The other party may require the witness filing the affidavit to appear at the hearing and be subject to cross-examination by filing with the [COMMITTEE] hearing panel and mailing to the person on whose behalf the witness would appear a notice of intention to cross-examine that witness within five days prior to the date set for hearing. It shall be the responsibility of the person upon whose behalf the witness is appearing to insure the appearance of the witness. Such notice must be made in good faith and not with an intention to cause delay or inconvenience. The [COMMITTEE] hearing panel may award expenses of appearance if it determines that the notice was filed solely for the purpose of causing delay or inconvenience.

(g) In the event the matter involves an amount less than [\$500.00] \$2,000.00, it may be heard, in the discretion of the [CHAIRMAN, BY THE CHAIRMAN SITTING ALONE] Bar Counsel and with the concurrence of the attorney and client, by a single subcommittee member alone.

(h) A [COMMITTEE] subcommittee member must disqualify himself from hearing any action in which: (1) he is a party or is directly interested; [(2) HE WAS NOT PRESENT AND SITTING AS A MEMBER AT THE HEARING OF THE MATTER WHEN IT WAS SUBMITTED FOR THE COMMITTEE'S DECISION;] [(3)] (2) he is a material witness; [(4)] (3) he is related to either party by consanguinity or affinity within the third degree; [(5)] (4) he has been retained by either party as an attorney or he has professionally counseled either party in any matter within two years preceding the filing of the petition; or [(6)] (5) he feels that, for any reason, he cannot give a fair and impartial decision; provided, that if the instances specified in [(4)] (3) and [(5)] (4), disqualification shall be deemed waived unless raised by challenge to said member filed by any party with the [EXECUTIVE DIRECTOR] Bar Counsel not later than 10 days following notice to the parties of the relationship between the member and a party. The [EXECUTIVE DIRECTOR] Bar Counsel

shall relieve the challenged member of his obligation to participate in the matter if the challenge is well taken, and shall make a replacement from the appropriate sub-committee. [A REPLACEMENT SHALL NOT BE APPOINTED IF A QUORUM EXISTS EVEN IN THE ABSENCE OF A CHALLENGED MEMBER. OTHERWISE, THE EXECUTIVE DIRECTOR SHALL REQUIRE THE SENIOR MEMBER OF THE BOARD OF GOVERNORS IN THE AREA WHERE THE PANEL SITS TO DESIGNATE AN ADDITIONAL MEMBER OF THE PANEL.]

(i) If either party files an affidavit alleging under oath that he believes that he cannot obtain a fair and impartial hearing before a named member of a [HEARING COMMITTEE] hearing panel, the [EXECUTIVE DIRECTOR] Bar Counsel shall at once, and without requiring proof, relieve the challenged member of his obligation to participate in the matter. A replacement shall be designated by Bar Counsel. [A REPLACEMENT SHALL NOT BE APPOINTED IF A QUORUM EXISTS IN THE ABSENCE OF THE CHALLENGED MEMBER, OTHERWISE A REPLACEMENT SHALL BE THE SENIOR MEMBER OF THE BOARD OF GOVERNORS IN THE AREA WHERE THE PANEL SITS.] The affidavit shall contain a statement that it is made in good faith and not for the purpose of delay. The affidavit shall be filed not later than ten (10) days prior to the date set for hearing. Each party shall be entitled to one challenge under this paragraph.

(j) If any party to an arbitration who has been duly notified fails to appear at the hearing, the hearing panel may proceed with the hearing and determine the controversy upon the evidence produced notwithstanding such failure to appear.

(k) (1) Upon written request to the chairman of the hearing panel, the chairman may issue subpoenas for witnesses. Any attack on the validity of the subpoena shall be heard and determined by the chairman. The cost of the service of the subpoena and the transportation of the witness shall be borne by the party requesting the subpoena to be issued. Any person subpoenaed by the chairman or ordered to appear or produce writings who refuses to appear, give testimony or produce the matter subpoenaed is in contempt of the hearing panel. The chairman may report such contempt of the hearing panel to the superior court for the judicial district in which the proceeding is being conducted. The court shall treat this in the same manner as any other contempt. The refusal or neglect of a party to respond to a subpoena or subpoena duces tecum shall constitute cause for a determination of all issues to which the subpoenaed testimony or matter is material in favor of the non-offending party, and a final decision of the [COMMITTEE] hearing panel may issue upon the basis of such determination of issues. Costs may be assessed in the case of a party's contempt.

(2) Applications for discovery, including production of documents, shall be within the discretion of the chairman of the appropriate [FEE ARBITRATION] hearing panel.

(1) Each party may: (1) call and examine witnesses; (2) introduce exhibits; (3) cross-examine opposing witnesses on a matter relevant to the issues, even though that matter was not covered in the direct examination; (4) impeach a witness regardless of which party first called the witness to testify; (5) rebut the evidence against [HIMSELF] him; and (6) testify on his own behalf.

If a party does not testify on his own behalf he may be called and examined as if under cross-examination.

The hearing need not be conducted according to technical rules relating to evidence and witnesses. Relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of a common law or statutory rule which makes improper the admission of the evidence over objection in a civil action. The rules of privilege are effective to the same extent that they are recognized in a civil action, except that neither the attorney nor the client may assert the attorney-client privilege with respect to the issues subject to arbitration. Irrelevant and unduly repetitious evidence shall be excluded. Any party to the arbitration has the right to be represented by an attorney at law at any hearing or at any stage of the arbitration. On request of any party to the arbitration, or any member of the hearing panel, the testimony of the witness shall be given under oath. Where so requested, a member of the hearing panel who is presiding at the hearing may administer oaths to witnesses testifying at the hearing.

(m) Any party may have a hearing before a hearing panel recorded at his own expense by a notary public or other person authorized to administer oaths, [AT HIS EXPENSE, BY] provided that he presents a written request [PRESENTED] to the chairman of the hearing panel at least three (3) days prior to the date of the hearing. In such event any other party to the arbitration shall be entitled to a copy of the reporter's transcript of the testimony at his own expense by arrangements made directly with the reporter. Where no party to the arbitration makes a request to have the hearing recorded, and the hearing panel deems it necessary to have the hearing recorded, the hearing panel may employ a reporter for such purpose, if authorized to do so by [THE BOARD OF GOVERNORS OF THE ALASKA BAR ASSOCIATION] Bar Counsel.

(n) (1) All records, documents, files, proceedings, and hearings pertaining to the arbitration of any dispute under these

rules[,] shall be confidential[,] and shall not be open to the public or any other person not a party to the dispute, except as set forth in [SUBSECTION] subparagraph 2 of this [SECTION] paragraph unless ordered by a superior court upon good cause shown.

(2) A summary of the facts, without reference to either of the parties by name, may be publicized in all cases once the action of the Alaska Bar Association has become final.

4. Paragraph (c) of Rule 40, Alaska Bar Rules, is rescinded, and paragraph (d) of that rule is redesignated as paragraph (c). Paragraphs (a), (b) and (c) are amended to read:

(a) The hearing panel shall render its decision within thirty (30) days after the close of the hearing. The decision of the hearing panel shall be made by a majority of the hearing panel and shall be based upon the standards set forth in the Alaska Code of Professional Responsibility.

(b) [WHILE IT IS NOT REQUIRED THAT] The decision shall be in writing and need not be in any particular form[.]; however, [IT SHOULD CONSIST OF] the decision shall include: (1) a preliminary statement reciting the jurisdictional facts (i.e., that a hearing was held upon proper notice to the parties[.], and that the parties were given the opportunity to testify, [AND] cross-examine witnesses and present evidence)[.]; (2) a brief statement of the dispute[.]; (3) the findings of the panel on all issues and questions submitted to it which are necessary to resolve the controversy; (4) a specific finding as to whether the matter should or should not be referred to the Bar Counsel for appropriate disciplinary proceedings; and (5) the decision. [IT SHALL INCLUDE A DETERMINATION OF ALL QUESTIONS SUBMITTED TO THE PANEL, THE DECISION OF WHICH IS NECESSARY IN ORDER TO DETERMINE THE CONTROVERSY.]

[(c) THE DECISION OF THE PANEL SHALL INCLUDE A SPECIFIC FINDING AS TO WHETHER THE MATTER SHOULD OR SHOULD NOT BE REFERRED TO THE EXECUTIVE DIRECTOR FOR APPROPRIATE DISCIPLINARY PROCEEDINGS.]

[(d)](c) The original of the decision shall be signed by the members of the panel concurring therein. The chairman shall forward this decision together with the entire file to the [EXECUTIVE DIRECTOR,] Bar Counsel who shall thereupon, for and on behalf of the hearing panel, serve a copy of the signed [AWARD] decision on each party to the arbitration by registered or certified mail and notify the chairman of the [COMMITTEE] hearing panel that the matter has been concluded.

5. Rule 41, Alaska Bar Rules, is amended to read:

Should either party appeal the matter to the superior court under the provisions of AS 09.43.120-.180, the appeal shall be filed with the clerk of the superior court in accordance with Appellate [RULE 45] Rules 601 through 609, and notice of such appeal must be filed with the [EXECUTIVE DIRECTOR] Bar Counsel of the Alaska Bar Association.

DATED: May 7, 1981

EFFECTIVE DATE: May 18, 1981

/s/ Jay A. Rabinowitz
Chief Justice

/s/ Roger G. Connor
Justice

/s/ Edmond W. Burke
Justice

/s/ Warren W. Matthews
Justice

/s/ Allen T. Compton
Justice

cc: as usual