Juris Prudence

The power of (an) attorney??!

On several occasions, this column has addressed ways in which small businesses might bring or resolve claims more cost-efficiently. For example, using small claims court or mediation (where applicable) does not necessitate the services of an attorney.

The Alaska Supreme Court recently determined, however, that a statutory power of attorney does not entitle a non-attorney agent to litigate a civil claim on behalf of his principal. A power of attorney is a written instrument which evidences the authority of the principal's agent to third parties with whom the agent deals on behalf of his principal.

Of course, one can always proceed with a legal action *pro se* that is, in one's own behalf without counsel. But in *Christiansen v. Melinda* the

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Supreme Court ruled that a principal can only engage an agent under a power of attorney to file or prosecute a legal action in his place if the agent is a licensed attorney.

The facts of the case are quite simple. Christiansen was appointed attorney-in-fact authorized to act on behalf of an apartment owner in all matters relating to an apartment complex. Pursuant to that authority, Christiansen (agent) attempted to file a small claims action on behalf of the owner (principal) but court personnel refused to accept the filing on the ground that a power of attorney does not authorize an agent to bring suit *pro se* - on behalf of the principal.

Christiansen then filed suit *pro se* (on his *own* behalf) against the Alaska Court system for the failure to honor a properly executed statutory form power of attorney under state law. The trial court dismissed his complaint and Christiansen appealed.

The Alaska Supreme Court analyzed the appeal in two parts: first, whether Christiansen's in-court representation of his principal violated the statutory prohibition of the unlicensed 'practice of law'; and second, if so, whether the statutory power of attorney overcame that prohibition.

The unlicensed practice of law is a criminal misdemeanor; however, the term 'practice of law' is not previously defined in case law for civil purposes. The Supreme Court readily found that (Christiansen's) in-court representation of another (his principal) falls within the definition.

Therefore, the Supreme Court's analysis turned to whether a statutory form power of attorney removes the agent from the prohibition against unlicensed law practice. Christiansen argued that because the durable power of attorney authorized him to act in the shoes of his principal and the principal could represent himself *pro se* Christiansen could litigate *pro se* for his principal. The Court concluded otherwise.

The Supreme Court acknowledged that several of the powers explicitly granted in the statutory form (AS 13.26.344(i)) could be construed to confer on the agent the authority to litigate in his principal's stead. But the Court also noted that other language in the statute authorizes only those actions by the agent that "the principal can do through an agent."

Consequently, the Court concluded that an agent's authority is thus limited by other existing law which prohibits the unlicensed practice of law. As such, a principal can engage an agent to practice law on his behalf only if that agent is a licensed attorney. The Court observed that, if it were otherwise, a mere power of attorney would enable any person to practice law in Alaska - contrary to the prohibition against unlicensed law practice.

As a result of the *Christiansen* decision, the scope of the statutory form power of attorney is necessarily restricted. An agent is generally authorized to act only as the client in an attorney-client relationship but lacks the authority to litigate *pro se* on behalf of his principal - unless, of course, the agent happens to be a licensed attorney.

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Origins of the Alaska Bar Association

By Russ Arnett

The Alaska Bar Act was passed by the 1955 Legislature to a large extent because of two Anchorage disciplinary cases and some bar exam problems.

Herald Stringer was a lawyer and the Third Division's most powerful Republican at the time of the death of District Judge Anthony J. Dimond in 1953. Herald backed the appointment of J.L. McCarrey Jr. as his successor and told some of the Anchorage Bar they were going to get him whether they liked it or not. He was right. Not long afterward he found himself before Judge McCarrey on a disciplinary matter. Judge McCarrey disqualified himself and sent the case to Fairbanks. The Fairbanks judge sent the case back to Anchorage. Assistant United States Attorney Jim Fitzgerald prosecuted the case, and Judge McCarrey suspended Herald. In the Ninth Circuit "Stringer, represented by many attorneys (Grigsby, Kay, Davis, Butcher), vehemently complained for a procedure in which he acquiesced. In our judgment, once having disqualified himself for the cause, on his own motion, it was incurable error for the district judge to resume full control and try the case."

Bailey Bell was handcuffed in his office in the Central Building by a Deputy Marshal because of a disciplinary charge against him and marched across the street to the Federal Building. A Fairbanks judge who was new to Alaska and had spent most of his time in Fairbanks tried the case. He held that the prevailing ethical standards in Anchorage were so abysmal that it would be unfair to punish only Bailey. We now realized something had to be done, if only to quit referring Anchorage grievances to Fairbanks judges.

Three of the five unsuccessful candidates for the 1952 bar exam filed *In re Fink, Hermann and Arnett*, alleging that questions were given to some candidates before the exam and that secrecy system of grading was violated by at least one examiner. Judge Folta held that "If a member violates his oath, it is doubtful whether any system could be devised that would assure secrecy in the particular here under discussion. The remedy indicated is the administrative one of removal, rather than invalidation of the examination by judicial process." He also held that there was no showing of "a scheme or conspiracy, participated in by the remaining board members, or some of them to flunk the petitioners." The smart flunkee instead of litigating went to work for the Attorney General, who ran the exam, and his score improved from the mid 60's in the 1952 exam to the mid 90's in the 1953 exam.

Others complained that the bar examiners did not expeditiously grade the annual exams because they took five months one year and 11 months another year to grade about 20 papers.

The 1955 Legislature had a good number of able lawyers. Lead by Representative Kalamarides, they answered the question of whether the lawyers themselves could do a better job on admissions and discipline with "Why not?" They passed the Bar Act.

The first convention of the Alaska Bar Association soon followed in Ketchikan, Earl Cooper asked the Convention how Arnett's wife could possibly be in Anchorage when he had seen a woman in his room only the night before. Ah, to return to those golden days of the bar!

—Reprinted from the Bar Rag archives