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## ARTICLES

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# A Revolt in the Ranks: The Great Alaska Court-Bar Fight\*

PAMELA CRAVEZ\*\*

*This Article details the post-statehood controversy between the Alaska Supreme Court and the Alaska Bar Association known as the "court-bar fight." First, the Article discusses United States v. Stringer, a 1954 attorney discipline case illustrating the territorial courts' perceived inability to regulate adequately the legal*

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Editor's note: The author has drawn much of the material for this article from Anchorage Bar Ass'n, *Alaska's Territorial Lawyers: An Oral History*, an unpublished series of taperecorded interviews commissioned by the Anchorage Bar Association and conducted by the author. The audiocassettes are located at the former U.S. District Courthouse in Anchorage, Alaska. Unless otherwise indicated by citation, the information and quotations in this article have been drawn from this source. The editors, however, have not independently verified the information derived from the oral history. Accordingly, we rely on the author's representations as to the authenticity and accuracy of the statements drawn therefrom.

\*\* Reporter, Joint State-Federal Courts Gender Equality Task Force; J.D., Catholic University of America School of Law, 1981; B.A., George Washington University, 1978.

*profession. Relying frequently on first-hand interviews by the author, the Article then outlines the events and personalities involved in the court-bar fight, focusing on the efforts of Alaska lawyers to thwart the Alaska Supreme Court's attempt in 1964 to take over the Alaska Bar Association. The Article concludes that this conflict represents an example of the difficulties faced by Alaska lawyers during Alaska's transition into statehood.*

## I. INTRODUCTION

One hundred years ago a small group of lawyers got together to form the Alaska Bar Association. It began as a gentleman's club in Juneau, where admission depended upon the votes of the board of directors and the payment of a dollar fee. The most severe discipline was not disbarment but expulsion from the club, and the only action certain to bring suspension or expulsion was non-adherence to the minimum fee schedule.<sup>1</sup> Much has changed since this early attempt by Alaska lawyers to exercise some control over their profession. Rules and regulations of the modern bar dwarf the clubby association that sprang up in Juneau in 1896. What has remained the same over the years, however, is the desire of attorneys to exert some control over their professional lives and to work in a system that has rules upon which they can depend.

Unfortunately, Alaska's territorial justice system did little to ensure the predictability and consistency sought by attorneys. Throughout the territorial years, Congress passed a patchwork of laws to be applied to Alaska. It was equally inconsistent in appointing judges to serve on the Alaska bench. The appointments, often bestowed as a form of political payback, resulted in judges of wide-ranging abilities and ethical standards. For example, Judge Arthur Noyes, the first judicial appointment in Nome in 1901, became the linchpin in a scandal to take over the most valuable gold mining claims in his jurisdiction. At the opposite extreme, Judge James Wickersham, appointed that same year to serve in Eagle, became one of Alaska's most venerable jurists and was later elected Alaska's voteless delegate to Congress.

By the 1950s, attorneys wrestled with a territorial system in which cases were backed up five years or more, the court calendar shifted unpredictably and federally appointed jurists sometimes sacrificed the law for political expediency. Almost equally

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1. ARTHUR K. DELANEY, ALASKA BAR ASSOCIATION AND SKETCH OF THE JUDICIARY 33 (1901).

frustrating to attorneys was the federal court judges' exclusive power to discipline lawyers. From the territorial lawyers' point of view, the judiciary needed to be reformed. Searching for ways to change the judicial system, many lawyers served in the territorial legislature and helped pass laws. As momentum for statehood grew, lawyers looked beyond the territorial system and began working on committees to shape a state judiciary far superior to anything the territorial system offered.

This Article describes the transitional years from a territorial justice system to a state court system and the role Alaska lawyers played in that transition. Part II discusses a pivotal Anchorage disciplinary case, *United States v. Stringer*,<sup>2</sup> and how it served to rally lawyers to change the territorial system.<sup>3</sup> Part III details the escalating tug-of-war between attorneys and judges, even after statehood, which culminated in the historic legal battle between the first Alaska Supreme Court and the Alaska Bar Association, a conflict known as the "court-bar fight."

## II. THE *STRINGER* CASE

A lawyer is an officer of the court—a minister in the temple of justice. His high calling demands of him fidelity to his clients with an eye single to their best interests, as well as good faith and honorable dealings with the courts and the public in general.

—U.S. District Court Judge J.L. McCarrey, quoting a favored passage in his decision to discipline Anchorage attorney Herald Stringer.<sup>4</sup>

When Dwight D. Eisenhower became president in 1952, the long dormant Alaskan Republican party finally had an opportunity to recommend its members to appointed territorial posts, including the Alaska territory's three federal district court judgeships. While

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2. 124 F. Supp. 705 (D. Alaska 1954), *rev'd* 233 F.2d 947 (9th Cir. 1956).

3. The *Stringer* case was not the only disciplinary case in Alaska that caused lawyers to challenge the territorial system. Lawyers in southeast Alaska were stirred by an equally divisive case against Ketchikan practitioner, W.C. Stump. U.S. District Court Judge George Folta, sitting in Juneau, heard the case against Stump. See *United States ex rel. Fitzgerald v. Stump*, 112 F. Supp. 236 (D. Alaska 1953).

4. *Stringer*, 124 F. Supp. at 715 (quoting *People ex rel. Chicago Bar Ass'n v. Green*, 187 N.E. 811, 813 (Ill. 1933)).

judgeships at Juneau and Nome filled easily, staffing the Anchorage bench proved more difficult.<sup>5</sup>

Anchorage Republican Committeeman and attorney Herald Stringer searched for a suitable candidate to recommend for the Third Judicial Division post, but the search wasn't easy because most of the two dozen or so lawyers in Anchorage were Democrats. Former Anchorage Mayor and fellow Republican John Manders seemed a likely first choice until Stringer learned of Manders's philosophical opposition to the income tax. Manders had refused to pay his income tax for years.<sup>6</sup> Eventually, Stringer settled upon J.L. McCarrey, Jr., a devout Mormon and family man. McCarrey had come to Alaska in the 1930s to sell stockings and clothing for the Utah Woolen Mills. He had returned to Utah to get a law degree and had been practicing law in Alaska since the 1940s.

When Anchorage lawyers failed to endorse McCarrey at a meeting called for that purpose, Stringer made it clear that if local lawyers did not support McCarrey, they would lose the opportunity to help select the judge. Fearing an unknown from another state, the lawyers reconsidered their vote and endorsed McCarrey by a narrow margin.

Less than a year later, however, Stringer came to regret his ardent support of the Republican McCarrey when he found himself facing the judge, charged in a disciplinary case with unprofessional conduct.<sup>7</sup> In 1953, a client filed a claim against Stringer for billing more than \$2,000 to obtain a dismissal of the client's case without trial. The client alleged that the exorbitant sum was payment for Stringer's influence with the court.<sup>8</sup> In the absence of an indepen-

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5. Judge George W. Folta, appointed May 7, 1947, remained the judge for the First Judicial Division and Judge Joseph Earl Cooper was appointed July 17, 1952, while Congress was in recess, to the Second Judicial Division bench in Nome.

6. Senior U.S. District Court Judge James M. Fitzgerald remembered being told by a U.S. Justice Department official that John Manders did not pay his income tax. Manders was one of a number of people in territorial Alaska who balked at paying national taxes. Telephone Interview with James M. Fitzgerald, Senior Judge, U.S. District Court (Nov. 1995).

7. *Stringer*, 124 F. Supp. at 706.

8. A taxi cab driver, Robert Kemp, came to the U.S. Attorney's office complaining that he had given Stringer \$2,000 worth of promissory notes in addition to \$500 paid up front to cover the legal fee in a white slavery case. The charges, arising from Kemp's alleged transportation of a prostitute from one bar to the next and picking up passengers who were potential clients, had been

dent, integrated bar association to look discreetly into potential lawyer misconduct, all Alaska cases went directly to the U.S. Attorney's office for investigation, then to the grand jury for indictment and finally to the territorial court for adjudication.

The *Stringer* case was mishandled from the start. An overzealous Assistant U.S. Attorney pushed it through to the grand jury.<sup>9</sup> An outraged grand jury threatened to increase the charge from unprofessional conduct to larceny by false pretenses.<sup>10</sup> Then Judge McCarrey refused to drop the case, even though a new Assistant U.S. Attorney, James M. Fitzgerald, evaluated the case and told Judge McCarrey that he did not feel it should be prosecuted.<sup>11</sup> At this point, the case was no longer just a disciplinary matter, but an opportunity for Judge McCarrey to show the Anchorage community that he offered no special favors in his courtroom.

Anchorage lawyers, smelling a lynching, rallied behind Stringer. Some served as witnesses, others as counsel. Despite his

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dismissed for lack of evidence. Kemp insisted he agreed to pay Stringer \$2,000 because Stringer implied that it would cost that amount to keep the case from going to trial. See *id.* at 706-13.

9. *Stringer* was originally handled by Assistant U.S. Attorney Arthur David Talbot. According to Talbot:

I wasn't going to take Kemp's word for anything. So, I used the U.S. Attorney's favorite tool. I ran the whole thing before a grand jury. That way, I could get Kemp under oath, get the evidence. After doing that I was satisfied that a complaint should be made, a disciplinary complaint against Mr. Stringer.

I think really it could have been handled informally and maybe would be today.

10. According to Talbot, the grand jury believed Talbot was covering up for Stringer: "[F]rom the evidence they heard they wanted to indict Herald for larceny by false pretenses." Even Talbot thought this was excessive and, instead, sent an information to his boss, U.S. Attorney Seaborn Buckalew, charging Stringer with unprofessional conduct. Talbot, uneasy with the time Buckalew was taking to consider signing the information, told Buckalew that

[the] Grand Jury was hotter than a two-dollar pistol, and that they had been trying to draw their own indictment against Herald Stringer. . . . You know, if they indict anybody over this, it isn't going to be me because I've done what I told them I'd do. The ball's in your court.

11. Fitzgerald reinterviewed the complaining witness, Kemp, and found him to be completely unreliable. As far as Fitzgerald could tell, Kemp had been unhappy with Stringer's fee and complained to his boss, the owner of his cab company, who had recommended Stringer to him. It was the owner of the cab company who allegedly told Kemp that the money must be going to take care of the judge. Telephone Interview with James M. Fitzgerald, *supra* note 6.

political ties to Stringer, McCarrey refused to disqualify himself from hearing the case, claiming that he remained on the case at the urging of defense counsel and the U.S. Attorney's office.<sup>12</sup> McCarrey declared that his judicial duty "must transcend all personal emotion and human desires, and it must discharge its moral obligation based upon the law as applied to the facts in this case."<sup>13</sup> He dispensed with Stringer's witnesses, proclaiming them "exceedingly well rehearsed" and therefore not worthy of much weight.<sup>14</sup> Judge McCarrey found no evidence that Stringer had bribed or inappropriately influenced a government official.<sup>15</sup> However, McCarrey did find Stringer guilty of overreaching by charging an excessive fee<sup>16</sup> and sentenced him to a relatively harsh 120-day suspension from practicing law.<sup>17</sup>

The *Stringer* case galvanized Anchorage lawyers already frustrated with the territorial court's inefficiencies. The court's backlog could delay even minor cases for five years. Even if a case got before a judge, results were uncertain. "Eventually, there were two factions formed," said Edgar Paul Boyko, who came to Anchorage from the east coast in the early 1950s.

The purists . . . who said, "Okay, McCarrey's totally incompetent, you can't even reason with that man." . . . And the people like myself who said, "Hey, we've got an obligation to our client. It's true you can't practice law in front of McCarrey, but you certainly can use child psychology." And I did. And I kept winning cases.

Roger Cremo, who in later years developed a specialty in banking law and represented the First National Bank of Anchorage, found McCarrey "utterly unsuited" to the bench. Although McCarrey knew Cremo's opinion, Cremo found this did not hurt him in court:

Strangely enough he was aware of it, [and] he went out of his way to see that I did well in his courtroom. I couldn't lose. The only case I did lose was a jury trial and he turned it around [with a judgment notwithstanding the verdict]. He bent over backwards. He was trying to show the world that he did not resent my opposition.<sup>18</sup>

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12. *Stringer*, 124 F. Supp. at 707.

13. *Id.* at 716.

14. *Id.* at 712.

15. *Id.* at 713.

16. *Id.*

17. *Id.* at 716.

18. Telephone Interview with Roger Cremo, attorney (Dec. 26, 1995).

The *Stringer* case hit a nerve among Alaska lawyers. The issue of whether Stringer actually overreached was dwarfed in importance by how the matter was handled. It demonstrated how little power lawyers had in the territorial legal system; they were forced to have both their cases and professional conduct judged by a jurist for whom they had little respect.

### III. THE COURT-BAR FIGHT

In the 1955 territorial legislative session—the session immediately following Stringer’s conviction—Speaker of the House Wendell Kay, who also happened to be Stringer’s counsel, introduced a bill creating a territorial bar association with the power to investigate disciplinary cases. Not surprisingly, the legislature, more than half of whom were lawyers, passed the Alaska Integrated Bar Act of 1955.<sup>19</sup>

Having achieved professional independence with the passage of the Integrated Bar Act, Alaska’s lawyers next focused on the judiciary. Attorneys dominated the judiciary committee at the constitutional convention held at Fairbanks in 1955.<sup>20</sup> The convention, a concerted effort by Alaskans to persuade Congress to grant Alaska statehood, met to hammer out a framework of laws to govern the prospective state. Upon the committee’s recommendation, the convention adopted the Missouri Plan for selecting judges.<sup>21</sup> In place of popular election, the system dictated that practitioners would evaluate their fellow lawyers under consideration for judicial posts. A judicial council, relying upon the evaluations, would provide the governor with a pool from which to select appointees.<sup>22</sup> The Alaska Bar Association would appoint three lawyer-members to the seven-member judicial council.<sup>23</sup>

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19. 1955 Alaska Sess. Laws 196. Passage of the Integrated Bar Act came too late to help Herald Stringer, whose case had already been appealed. *Stringer v. United States*, 233 F.2d 947 (9th Cir. 1956).

20. Anchorage lawyer George McLaughlin headed the committee, which included Thomas C. Harris, Maurice Johnson, Irwin L. Metcalf, Ralph Rivers, R.E. Robertson and Warren A. Taylor. See VICTOR FISCHER, *ALASKA’S CONSTITUTIONAL CONVENTION* 268 app. D (1975).

21. *Id.* at 113.

22. *Id.* at 113-14.

23. Under the proposal, the seven-member judicial council would include three lawyers, three laypersons and the chief justice, who would act only in the event of a deadlock. *Id.* at 114. One advisory group to the constitutional convention found that this system went

When Congress passed the Alaska Statehood Act in 1958,<sup>24</sup> lawyers saw an end to years of an inept and inefficient territorial judicial system. In anticipation of a new state judiciary, they began the process of selecting lawyers to represent their views on the judicial council.

Each of the three major Alaska judicial divisions—Anchorage, Fairbanks and Southeast—was to have a member on the judicial council. The constitution was silent, however, on the question of *how* the Alaska Bar Association was to choose these lawyers. In Anchorage, attorneys Buell Nesbett, Edward Davis, Ralph Cottis and James Fitzgerald proposed a democratic system involving nominations, ballots and votes, with provisions for a run-off in case of no clear majority. Juneau's Frank Doogan suggested to the Anchorage Bar Association that local bar associations establish a statewide system for selecting judicial council members.<sup>25</sup> However, before the local bars could come to an agreement, the Alaska Bar Association's board of governors took it out of their hands.<sup>26</sup>

a long way toward withdrawing the judicial branch from the control of the people of this state and placing it under that of the organized bar. No state constitution has ever gone this far in placing one of the three coordinate branches of the government beyond the reach of democratic controls. We feel that in its desire to preserve the integrity of the courts, the convention has gone farther than is necessary or safe in putting them in the hands of a private professional group, however public-spirited its members may be.

*Id.* at 116.

24. Pub. L. No. 85-508, 72 Stat. 339 (1958).

25. *See, e.g.*, ALASKA LEGISLATIVE COUNCIL, MINUTES OF THE DAILY PROCEEDINGS, ALASKA CONSTITUTIONAL CONVENTION 731 (1965). The discussion of this issue at the constitutional convention included the following exchange:

V. RIVERS: I see that on the basis of area representation, the governing body of the organized state bar, not the membership, shall select the appointees from the legal side. Is there some reason why these are not selected from the membership of the organized state bar, rather than by their governing body?

MCLAUGHLIN: The intent was that there would be in existence or be created, a body which would be representative of all persons admitted to practice, and they would lay down the rules by which the governing body would designate people to the judicial council. It doesn't preclude election, it is determined on majority vote of the membership. The mechanics we felt should not be spelled out in the constitution.

*Id.*

26. The Alaska Integrated Bar Act of 1955, 1955 Alaska Sess. Laws 196, created the Alaska Bar Association, a territory-wide association that governed the profession. Lawyers throughout Alaska elected representatives to sit on the board of governors. In 1959, the board of governors included the following: Wilfred C.



In 1959, the board of governors met in Nome and “acted in a way that had never been anticipated,” said retired superior court judge Thomas Stewart, who had helped draft both the constitution and the Integrated Bar Act. The board’s appointments to the state’s first judicial council would have packed the court system with judges sympathetic to plaintiffs. The deal cut in Nome provided that Ernie Bailey of Ketchikan, Robert Parrish of Fairbanks and Herald Stringer of Anchorage would serve as the lawyer-members of the judicial council. These lawyers—two of whom had extensive plaintiff-oriented practices and the third of whom was friendly with the bar’s personal injury faction—would have easily overpowered the judicial council’s three lay members with block votes and presented the governor with a group of ideologically identical judicial candidates. But for some very unhappy board members and some outraged lawyers in Anchorage, the board of governors would have gotten away with this power grab.

Edward Davis presided over a meeting of the Anchorage bar at the Loussac Library in downtown Anchorage. Angry lawyers threatened to convene a special meeting to recall the board of governors if the board did not withdraw the judicial council candidates. Buell Nesbett and James Fitzgerald were dispatched to talk to Herald Stringer, the Anchorage candidate for the judicial council. Stringer agreed to take himself out of the running, provided that his former partner and board of governor member John Connolly not be censured for his part in the attempt to pack the first courts.<sup>27</sup>

The Anchorage bar voted to submit Buell Nesbett’s and Raymond Plummer’s names to the board of governors to replace Stringer. Although there was some effort in Fairbanks and Southeast to switch judicial council candidates, only the Anchorage candidate was changed. Raymond Plummer joined Ernie Bailey

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Stump, president, Ketchikan; James A. von der Heydt, vice president, Nome; John R. Connolly, second vice president, Anchorage; Wendell P. Kay, secretary, Anchorage; William V. Boggess, Fairbanks; Clifford J. Groh, Anchorage; Robert L. Jernberg, Ketchikan; Robert McNealy, Fairbanks; and M.E. Monagle, Juneau.

While the Alaska Bar Association and its board of governors began providing for territory-wide organization in 1955, lawyers continued to meet regularly at semi-formal local bar association gatherings. The Juneau, Ketchikan, Anchorage, Valdez, Nome and Tanana Valley Bar Associations had been in operation for many years prior to the passage of the Integrated Bar Act.

27. Telephone Interview with James M. Fitzgerald, *supra* note 6.

and Robert Parrish as the third lawyer-member of the judicial council. This addition paved the way for Edward Davis to be appointed superior court judge in Anchorage and Buell Nesbett to become the first chief justice of the Alaska Supreme Court.<sup>28</sup>

With statehood a reality and the formation of the state court system underway,<sup>29</sup> it was time to get down to the business of practicing law. Lawyers appointed to the bench from Alaska's legal community improved the standard of practice; the backlog of cases before the court began to ease, and new judges expressed a growing impatience with courtroom shenanigans. Old-time lawyers struggled to keep pace, while younger bar members expected prompt motions hearings and reasonably scheduled cases.

Although lawyers appreciated the reforms to the judicial system, the public began questioning the bar's ability to police its own members. The rash of suspensions following statehood slowed to a trickle as disciplinary committees in some cities became bogged down with more work than they could handle. Dissatisfied consumers began petitioning the state legislature to address the inability of lawyers to resolve disciplinary complaints. State legislators, in turn, began to reexamine the place of the integrated bar in the new scheme of state government. The Integrated Bar Act had set up an autonomous bar association, whose power was not constrained by the democratic checks and balances characteristic of typical governmental entities. Thus, in response to public concerns about the bar's disciplinary authority, legislators began introducing a series of bills to modify the Integrated Bar Act, the first of which would have placed the bar in the executive branch.

In February 1963, lawyers on the board of governors lobbied discreetly to oppose Senate Bill 61, a proposal that would have placed the bar in the executive branch and transformed the bar's governors into administrative appointees.<sup>30</sup> Concluding that it still

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28. The first supreme court justices were Chief Justice Buell A. Nesbett and Associate Justices John H. Dimond and Walter H. Hodge.

29. The following judges were appointed to the first state court bench: James A. von der Heydt, Presiding Judge, First District, Juneau; Water E. Walsh, Judge, First District, Ketchikan; Hubert A. Gilbert, Presiding Judge, Second District, Nome; Edward V. Davis, Presiding Judge, Third District, Anchorage; J. Earl Cooper, Judge, Third District, Anchorage; James M. Fitzgerald, Judge, Third District, Anchorage; Everett W. Hepp, Judge, Fourth District, Fairbanks. *See* 1961 Alaska Sess. Laws VI.

30. Alaska Bar Ass'n, Minutes of the Board of Governors' Meeting (Feb, 9, 1963) (unpublished, on file with the Alaska Bar Ass'n) (discussing S. 61).

had enough influential members in the state legislature, the bar's leadership sought to avoid a more public confrontation. The board depended upon Fairbanks lawyer Robert McNealy, who was also Majority Leader in the Alaska Senate, to express tactfully its opposition to Senate Bill 61.<sup>31</sup>

The issue would not die, however, and the board soon faced a more challenging opponent, Chief Justice Buell Nesbett. Dealing with Chief Justice Nesbett required more delicate maneuvering than dealing with the legislature. Nesbett, champion of bar independence in the 1950s, now championed the judiciary's independence. This veteran attorney, whom the bar had confidently endorsed in 1960 as the first supreme court justice, displayed the same intractable will that had previously endeared him to the bar.

Since the age of sixteen, when he left his mother's and stepfather's home, Nesbett had acted decisively to shape his life. He put himself through school, traveled around the world as a radio operator, served as a probation and parole officer in San Francisco, headed his law school class and achieved the rank of full commander in the Navy before any of his fellow officers. In 1945, discharged from the Navy and recently divorced, he turned down a job in the prestigious San Francisco firm of Pillsbury, Madison and Sutro and decided instead to head for Alaska.

The thirty-five-year-old Nesbett arrived in Anchorage and took an immediate liking to the city, where no elite lawyers or firms fixed the bar to one manner of practice. Although Nesbett enjoyed the informality of Alaska's practice, he did his best not to let it interfere with his own sense of how things should be done. When faced with the possibility of waiting two years for bar exam results, he convinced the examiners to adopt a more systematic process and organized a letter-writing campaign to get his results promptly. Teaming with solo practitioner Stanley McCutcheon, the youngest member of a politically active Alaska family and early proponent of statehood, Nesbett gained entry into the ranks of Anchorage's growing hierarchy.

Of the approximately ten lawyers practicing in Anchorage when Nesbett arrived, he was clearly among the best. But it was not just the practice of law that Nesbett embraced. He took just as enthusiastically to other great Alaskan pastimes: hunting, fishing, flying and drinking. His flying career ended in 1971, when a severe

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31. *Id.*

plane crash left him with a fused left ankle, little mobility in his right forearm and blinded in one eye. His drinking career ended even earlier. When interviewed in 1983, Nesbitt said:

The tendency is to drive yourself. If you worked hard on a case, you'd drive yourself and have a tendency to have a drink and work harder. Pretty soon you get to depending on it. [I] got to trying lots of cases and working hard and drinking [hard]. I finally reached a point where I said, "Hell, this is no life for me. I got to quit it." So, I did.

Nesbitt tackled drinking with the same ferocity he tackled everything else. In 1953, he went dry, determined to cut alcohol out of his life. People recall seeing a transformation in his personality. He was no longer so mellow or easygoing.

This transformation in Nesbitt did not seem to bother an Anchorage bar that itself was undergoing a transition from an informal territorial practice to a more organized and efficient group of professionals determined to shape their future legal system. Elected president of the Anchorage Bar Association in the 1950s, Nesbitt spearheaded a drive to convince Congress not to reappoint U.S. District Court Judge J.L. McCarrey to the Anchorage bench. Anchorage lawyers' efforts to block McCarrey's renomination succeeded.

Although Nesbitt did not serve at the constitutional convention in 1955, he did ensure that the Anchorage bar received daily reports from the committee writing the judiciary article. Under Nesbitt's leadership, the Anchorage bar set up committees on various aspects of judicial reorganization: inferior courts, judicial salaries, retirement, budget, jurisdiction areas and venue. Nesbitt, along with other Alaska lawyers, long subservient to the federal system of appointments, could now wield power over the new judiciary.

During his first year as chief justice, Nesbitt organized the state court system. His administrative abilities helped to make a success of a state court that had started with no money and no viable predecessor. Nesbitt successfully implemented the novel concept of an electronic recording system in place of court reporters because a shortage of court reporters in Alaska made electronic recording invaluable. He also championed the controversial notion of setting up supreme court headquarters in Anchorage

rather than Juneau, the state capital.<sup>32</sup> His ideas had some opposition, but as fellow Justice John Dimond observed, "He was commander of a destroyer during the war [and] he had some of that concept of authority as chief justice."

In 1963, after three years as chief justice, Nesbett placed himself squarely in the middle of one of the most sensitive issues involving the Alaska Bar Association. Nesbett used the facts of *In re Houston*<sup>33</sup> to establish his position on where the Alaska bar belonged in the scheme of state government.

In that case, Clyde Houston, an experienced trial lawyer, applied for bar membership on reciprocity from the State of Washington. The Alaska Bar Association denied his request, insisting he take a bar exam.<sup>34</sup> The Alaska Supreme Court reversed the board's decision and admitted Houston to practice before the court.<sup>35</sup> The supreme court cited its "inherent and final power and authority to determine the standards for admission to the practice of law."<sup>36</sup> The board viewed the decision as stating that the supreme court had "inherent and final power" not only to admit but also to punish or disbar lawyers.<sup>37</sup>

A month later, in March 1963, Chief Justice Nesbett confirmed the board's suspicions by suggesting to the board that the bar be administered by the judiciary. Board president Robert Ziegler supported this request and proposed introducing a resolution at the bar association's next convention to place "the Alaska bar under the Judiciary by judicial rule."<sup>38</sup>

That same month, Alaska Senate Resolution 39 called for placing the bar under the judiciary. Passage of this resolution, entitled "Relating to the preparation of rules by the Supreme Court to place the Alaska Bar Association in the judicial branch," on

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32. Justice Walter H. Hodge, originally part of the court, bought a house in Juneau, hoping that the court would be there. Hodge eventually applied for the federal court post and left the supreme court. Justice Harry O. Arend replaced him.

33. 378 P.2d 644 (Alaska 1963).

34. *Id.* at 644.

35. *Id.* at 647.

36. *Id.* at 645.

37. Alaska Bar Ass'n, Minutes of the Board of Governors' Meeting (Mar. 11, 1963) (unpublished, on file with the Alaska Bar Ass'n).

38. *Id.*

March 19, 1963, upstaged any vote the Alaska Bar Association planned on Chief Justice Nesbett's proposal.<sup>39</sup>

The supreme court, by now accustomed to taking administrative matters in hand, gave Anchorage attorney Burton Biss the task of examining the disciplinary rules of bar associations around the country and drafting appropriate rules for Alaska. Biss spent "all of a good day on it," and recommended streamlining the disciplinary procedure. The rules were first published for comments in January 1964. Because the Juneau bar responded favorably to the rules, while the Anchorage bar reacted sharply against them, the board of governors reserved its opinion, approaching the issue warily.

Nesbett, sensing resistance to the proposed rules prepared by Biss, had his administrative director of courts, Thomas Stewart, review them. Stewart compared various states' bar rules and determined that Biss had made the Michigan rules his primary model but had excluded a crucial step relating to the disciplinary process. In Michigan, a three-judge panel from lower courts prepared initial findings, while the supreme court served only as an appellate body. Biss's scheme left out the special panel, making the supreme court the sole arbiter.

Stewart told Nesbett that the rules left the supreme court too involved in the disciplinary procedure. They also provided for no appellate procedure. He suggested the court use the Michigan format with some minor alterations, still leaving the supreme court in an appellate role. Nesbett refused this advice.

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39. See S. Res. 39, 3d Leg., 1st Sess., 1963 Alaska Sess. Laws 162. The resolution read as follows:

Whereas the Courts of many states, including the Supreme Court of the State of Alaska, have held that attorneys are officers of the court and their qualifications and fitness to practice law before the courts is a matter for final determination by the Supreme Court; and

Whereas the Alaska Integrated Bar Act . . . raises the question of whether the Board of Governors of the Alaska Bar Association as presently constituted is a part of the executive or judicial branch of government;

Be it resolved that the Supreme Court of the State of Alaska with the assistance of the Judicial Council and the Alaska Bar Association is respectfully requested to prepare suggested rules placing the Alaska Bar Association in the judicial branch of government and report its actions and recommendations, together with recommendations for any necessary legislative action consistent with its determinations, to the legislature at the time of the convening of the second session in 1964.

On April 7, 1964, eleven days after the Good Friday earthquake devastated much of southcentral Alaska, the Alaska Supreme Court published the new bar rules. Anchorage lawyers, preoccupied with the earthquake damage, treated the court proclamation with more than its usual diffidence. Two weeks after the court issued the bar rules, Wendell Kay raised the matter for consideration at the weekly Monday luncheon meeting of the Anchorage bar. Arthur David Talbot recalled:

[Kay said,] "You fellows have all gotten this great big thick thing in the mail from the Supreme Court which purports to be a proposed set of rules for the bar association. Has anybody read it?" The thing was too bulky, nobody had read it. Wendell said, "Well, we'd better have a committee read the thing and see what's in it. I'll appoint Dave Talbot and myself, a committee of two." He said, "Dave, you read it." So I went home and found my copy and I read the thing, and I was horrified. It was a purported takeover by the Supreme Court of Alaska of our statutory bar association. It abolished the statutory bar and created a new bar association as part of the supreme court. It was right off the wall and right out of the blue.

Talbot called Kay and told him, "We're in trouble."

Talbot figured the court promulgated these bar rules because of the dilatory handling of grievance matters in Ketchikan and Fairbanks. Talbot, who had been the original Assistant U.S. Attorney to bring disciplinary charges against Herald Stringer in the fated 1950s case, had, by the 1960s, mellowed considerably. When a disciplinary matter came to his attention as head of Anchorage's grievance committee, he followed a discreet procedure. He would call the attorney in question, see him after work hours and tell him about the problem. "With any luck at all, by five the next night there is no more problem," said Talbot. "You straighten it out with his client, with his opponent, or with the judge. You make a little note for the file, mark it closed, and go on to something else." But in Ketchikan and Fairbanks grievance matters could go on for years. According to Talbot, Chief Justice Nesbett "was getting letters daily from irate citizens."

In February 1964, two months before the bar rules were promulgated, the board of governors had anticipated the possibility of new bar rules and had spoken of the need for "calm, cool, positive action" that would not deteriorate into anything "heated or aimless."<sup>40</sup> The board established a committee to write

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40. Alaska Bar Ass'n, Minutes of the Board of Governors' Meeting (Feb. 9,

legislation and lobby the legislature. In May, after promulgation of the rules, bar president David Thorsness met with Nesbett to determine whether the rules could be modified. His overtures were met with "complete indifference."<sup>41</sup> Two days after Thorsness's disheartening report, incoming bar president Robert Ziegler appointed Wendell Kay, David Talbot, Eugene Wiles, Richard McVeigh and George Boney to a committee in charge of retaining counsel and writing an opinion regarding the institution of a suit in federal court if the rules were put into effect. Also in May, members of the Alaska Bar Association voted to reject the bar rules and authorized the board to disregard them. Nevertheless, on June 1, 1964, the supreme court activated the bar rules with Supreme Court Order No. 64, the first of a series of supreme court orders that culminated in a full legal battle between the court and the Alaska Bar Association.<sup>42</sup>

Although Senate Resolution 39 had empowered Nesbett to place the bar association under the judicial branch, he proceeded in a manner that did not countenance discussion or compromise. Nesbett not only threatened the bar's independence, but offended its sense of fairness. His autocratic order angered, above all, the Anchorage bar. "Nesbett wanted to be the man on the white horse after he became chief justice, but he hadn't been a man on a white horse up until that time and the other lawyers knew that," recalled Anchorage attorney Kenneth R. Atkinson. It was the Anchorage bar that remembered the hard drinking years and the fierce sobriety that followed. Not only was the Anchorage bar intimately aware of Nesbett's foibles, but Nesbett was well aware of the faction of the Anchorage bar that loved a good fight.

Some twenty years later, Nesbett said:

Frankly I was never, to put it bluntly, in the same boat with Wendell [Kay] or with any of those fellas. . . . I always held back because I didn't approve of some of the things they'd laugh about and do in their practice and the way they'd handle things and the way they did politics even. And yet I never was such a square that I'd come out and tangle with them on it. I just stayed away from them to a certain extent and they sensed it and resented it I guess. I know Wendell resented not being

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1964) (unpublished, on file with the Alaska Bar Ass'n).

41. Alaska Bar Ass'n, Minutes of the Board of Governors' Meeting (May 7, 1964) (unpublished, on file with the Alaska Bar Ass'n).

42. See, e.g., *In re* Supreme Court Orders No. 64, 68, 69, 70 & 71, 395 P.2d 853 (Alaska 1964) (per curiam).



president of the Anchorage Bar Association instead of me. But the fellas came to me instead of him.

Still, Nesbett reflected:

When Wendell would go on a big drunk, Mary (his secretary) would be the first one to come around to my office at the First National Bank with some files and say, "He's due in court at 10 and it's 9:30." And I'd always go in and handle his cases for him and take care of it.

The board of governors signaled its intention not to abide by the rules as promulgated. Board member Charles Clasby wrote Nesbett, specifically telling the chief justice that he did not consider himself a member of the board under the auspices of a supreme court. Nesbett decided to poll other board members. Justice John Dimond advised against the poll, warning that it would invite members to articulate and, thereby, harden their dissent. Justice Arend apparently agreed with Nesbett about the poll because it was sent out in July.<sup>43</sup> No one responded.

On July 23, 1964, Nesbett, interpreting the board of governors' silence as a refusal to serve under the new rules, determined that the Alaska Bar Association had no governing body. He then issued Supreme Court Orders No. 68, 69 and 70, placing the bar under the temporary trusteeship of the Alaska Supreme Court. The court removed the bar's board of governors and ordered all the association's assets into the custody of the supreme court. The court seized the bar's property and funds, along with all bar records, so that the court could oversee the bar's administrative duties.

The bar's files, which filled all of two or three file cabinets, were taken into custody. However, Alaska bar president Robert Ziegler, foreseeing a "raid on the treasury," had sent much of the bar's funds to an account in Ketchikan. He left only a token amount in the original account at the First National Bank of Anchorage. The court ordered Ziegler to deliver these funds.

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43. In a 1964 newspaper article, Alaska bar president Robert Ziegler was reported to have said that the court apparently took this action as a result of a poll among the board of governors in which

we had a choice of being hung or poisoned. The unilateral action of the Supreme Court either jeopardizes or destroys the Alaska Bar Association as legislatively constituted. I regret very much the fact that the Supreme Court has taken the action that it has. And I doubt there can be found within the state of Alaska nine attorneys who will voluntarily serve on a re-constituted board of governors.

*Bar Funds Taken at Gun Point*, ANCHORAGE TIMES, July 24, 1964, at 1.

Court administrator Thomas Stewart drew up the writ of sequestration and was then directed by Nesbett to serve the writ on the bank and move the bar's money to a trust account.

Stewart and a trooper went to the First National Bank after business hours and handed the writ to the cashier. The cashier had the bank's attorney, Roger Cremo, look over the writ. Stewart vividly remembered the following sequence: "[Cremo] said, 'I'm not really sure of the legality of this, and I'm not sure what our response should be. Do you mind if I consider it overnight?' I said, 'Well, no. We'll come back in the morning, that's fine.'"

When Stewart reported that Cremo had asked for an extension of time, Nesbett was extremely upset. Stewart and the trooper went back before business hours the next morning, and the cashier had the check ready for them. But before he would deliver the check, the cashier said he had to call Mr. Cremo. According to Stewart:

The cashier talked with Cremo and he turned to the officer and said, "Do you have a gun?" The officer kind of looked at me and I looked at him and, as I recall, kind of shrugged. I didn't know whether he had a gun or not. He said, "Yes."

The cashier reported that the trooper had a gun, and Cremo asked whether the trooper had showed it to him. The cashier replied that he had not. Stewart continued:

Roger said, "Well, have him show it to you." So the cashier said to the officer, "Can I see your gun?" So he opened up his coat and he had a gun in the shoulder holster. He wasn't in uniform. He closed his coat back up again and the cashier spoke to Roger [over the telephone] and told him what happened, and Roger said, "Has he pulled his gun?" The cashier responded that he hadn't and Cremo said something like, "We don't think it's legal unless we're forced to, and ask him to pull his gun." So, he pulled it out.

Cremo then asked the cashier to have the trooper point the gun at him. The trooper "turned it to him with his hand outside the trigger guard." Finally, "Roger said, 'Well, give him the check.'" Check in hand, Stewart set up the trust account. Within "half an hour, forty-five minutes, the newspaper was on the street—'Court Takes Bar Funds at Gunpoint.' It was totally a set up . . . to embarrass the court," said Stewart.<sup>44</sup>

Cremo denied setting up Stewart. "There are only two ways to get money from a bank," said Cremo more than thirty years later,

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44. See *id.*

“by force or a writ and that writ was completely invalid.” Although Cremo did not call the newspapers, he did relate the incident to one or two colleagues, and the call was made.<sup>45</sup>

The news didn't stop with the Anchorage Times. When Stewart reached New York a few days later for a meeting of the National Association of Court Administrators, he found the newspapers there were reporting the same story. “Why did the court use a gun to take bar funds?” he was asked time and again. It was difficult to explain the situation in Alaska to the New York bar.

The court had taken fast authoritative action; the bar had maneuvered politically. By the end of July, the activists were able to rally the rest of the bar to their cause. The Alaska Bar Association hired counsel and brought suit against the Alaska Supreme Court, the individual members of the court and the court administrator.<sup>46</sup>

The court had less freedom than the board to maneuver and take decisive political action. Still, it found one ally: Alaska Senate Majority Leader and Chairman of the Senate Judiciary Committee Robert McNealy. In a letter dated a day after the July 23 takeover, Nesbett thanked McNealy, the only lawyer in the senate, for supporting a number of bills that would have curbed the bar. Nesbett wrote McNealy:

The Anchorage Bar Association went so far as to create a special committee with one main responsibility—that of causing legislation to be introduced of a type which would harass the supreme court and which might possibly create a rift between the legislature and the court over the Alaska Bar Rules.

Nesbett also praised McNealy's “high sense of public duty and [his] willingness and unique ability to advise [his] fellow Senators of the true facts.”<sup>47</sup>

Nesbett's letter to McNealy coincided with an announcement by the Anchorage bar that it intended to poll legislative candidates on how they felt about the supreme court instituting jury costs. The court required a bond of no more than thirty dollars to be paid by the losing party in a civil case in order to pay for a jury. The

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45. Telephone Interview with Roger Cremo, *supra* note 18.

46. Alaska Bar Ass'n v. Nesbett, No. A-42-64 CIV. (D. Alaska filed July 29, 1964).

47. Letter from Buell Nesbett, Chief Justice, Alaska Supreme Court, to Robert McNealy, Majority Leader, Alaska Senate (July 24, 1964).

trial judge could waive the rule for anyone without funds. Opponents—many of whom also opposed Nesbett's takeover of the bar—claimed the order was another highhanded scheme by the supreme court and an abridgment of the constitutional right to a jury trial. The supreme court, realizing the potential harm that could come from encouraging candidates for the legislature to debate the court's order, issued its own press release.

The supreme court explained that although the Alaska Constitution guaranteed the right to a jury trial, it did not require that the taxpayers foot the bill. Since the supreme court was operating on a shoestring, any provisions that defrayed jury costs would help it cope with other administrative matters and also curtail abuses of the jury system, such as using the demand for a jury to delay a trial or delaying settlement until a party could assess whether the jury would be favorably disposed to the claim. Plaintiff's personal injury attorneys, "who often advance the costs of their clients' suit in return for a percentage of the recovery," were the primary opponents of the fee, the supreme court told the public.

When interviewed later, Nesbett recalled:

In running the Anchorage bar for five years, I observed that the most active members and the ones that showed up regularly were the aggressive plaintiff's lawyers. Because they are aggressive and that's the way they practice law, rough and tough in court, because that's the way they win cases. So, when they took out after the court it was hammer and tongs.

There was little countervailing influence, according to Nesbett, because the "fat cat defense lawyers that represent the insurance companies" were apathetic. Nesbett also added that they did not attend meetings of the Anchorage bar in any numbers. He recalled:

If you've got 25 percent of the bar behind you in those days you'd know you're all right because nobody else showed any interest. Davis and Renfrew, which is now Hughes Thorsness and so on, Plummer and Delaney, all those are just busy representing insurance companies at \$75 an hour, they really didn't take much of an interest in the bar, they didn't in those days. So, apathy was one of the problems you had to contend with in trying to get something, to get the bar behind something as a whole.

The press release made an additional threat to personal injury lawyers: "The court may next consider a court rule for Alaska requiring that copies of all contingent fee contracts between attorneys and clients be filed with the trial court as is done in New

York.” After judgment, the trial court would review the terms of the contingent fee contract to determine whether it was fair to the client, in “light of the amount of work performed by the attorney.” The proposal infuriated plaintiff’s lawyers.

It was war, and the only way the court could attack the attorneys at this stage was in its orders and press releases. Nesbett did not consider these devices to be manipulative. Later, he commented:

When you’re put in a position to make decisions, like the court was, you don’t run to the people and ask them how to decide cases or appeals. . . . It was rough there for quite a while. But I felt that that was the right thing to do. So, if the heat was intense that was just part of the job.

Nesbett felt the heat not only from the close-knit Anchorage group of the 1950s, but also from new bar admittees. Excited at being a part of a novel fight between bar and bench, young lawyers were easily enlisted.

Five days after seizure of the bar’s bank account, the Alaska Bar Association sued the Alaska Supreme Court, Justices Nesbett, Dimond and Arend and court administrator Thomas Stewart in federal court. The court tried to enlist the aid of Alaskan counsel but was unsuccessful. It then turned to George Cochran Doub, a Baltimore attorney who had been an Assistant Attorney General in the Eisenhower Administration, and who had helped in the initial organization of the Alaska court system.

Upon the filing of the federal court case, Nesbett fired off a press release outlining his version of the events leading up to the court case:

This entire one-sided controversy centers around the court’s rules on disciplinary procedure, although this would never be obvious from the objections that are made public by the bar. The bar of Alaska under territorial status was not under the control of a court with respect to its self-discipline responsibilities. The result was, discipline was not being enforced.<sup>48</sup>

This press release was followed by another alleging that the bar had been irresponsible with its funds by collecting \$20,000 a year in dues while keeping a check register rather than books of account. Though Nesbett maintained in his statements to the public that only a small, volatile portion of the bar was behind the

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48. Chief Justice Buell Nesbett, Press Release (July 29, 1964) (located in closed case file for Alaska Bar Ass’n v. Nesbett, No. A-42-64 CIV. (D. Alaska filed July 29, 1964)) (on file with U.S. District Court, D. Alaska).

controversy, the reality was that nearly every member of the bar paid a special assessment to fight the case. Most bar members lent their names to the official case title.

Nesbett directed his attacks at Anchorage, since it was his belief that Anchorage led the fight. However, by this time it was not only Anchorage that opposed him; Fairbanks and Juneau lawyers had also entered the fray. As Robert Ziegler of Ketchikan recalled, "We were practicing attorneys, we knew what was good for us, we knew what was bad for us. We likewise knew what was good for the people we represented and what was bad for the them. The supreme court in those days was icily aloof."

By August 7, 1964, bar counsel had taken over communications between the court and the bar. Arthur David Talbot, retained by the board to represent the bar association, wrote the court:

[O]ur clients expect to obey as far as is reasonably possible the rules, orders and writs of the Supreme Court of Alaska affecting the Alaska Bar Association in the conduct of its affairs, unless the enforcement of these rules, orders and writs is stayed by the U.S. District Court, or until the same are vacated or annulled by a court of competent jurisdiction or the Legislature and people of Alaska.

Talbot advised the court that his "clients are rendering such obedience as they are able under protest." The court, taking Talbot's letter as a sign of conciliation, and noting that the grievance committees around the state were making their required reports, promulgated Supreme Court Order No. 72 rescinding the damning orders that had mobilized the bar. The bar's funds and files were returned, and the board was permitted to run the bar. However, returning the funds, files and bar to their original status was a unilateral effort for reconciliation. The day the order came out, Ziegler wrote Nesbett that he still refused to recognize the validity of the new rules, that he would not resume his former position as president of the bar under those rules and that it would be his recommendation that bar officers not accept any funds or files from the court. Apparently bar counsel Talbot had not spoken for Ziegler.

To make matters murkier, Ziegler admonished the court for bypassing bar counsel when it promulgated Supreme Court Order No. 72. By this time, the bar had enlisted the aid of Joseph Ball, a prominent California lawyer who had just been to Alaska for a bar convention and had so impressed the membership that it asked

him to be their counsel. Apparently, Ball had not been consulted about Supreme Court Order No. 72.<sup>49</sup>

The bar realized that if the court returned the funds and files, its actions would not seem so egregious to the federal court. In a purposefully haphazard fashion, the bar allowed counsel to set its strategy, and only a few were informed of the direction. Bar secretary Kenneth Atkinson remembers feeling like a pawn, getting no absolute instructions and ending up "sort of winging it." As he recalled, "They were letting everybody improvise what they were going to do to see how it came out and if something happened that was to the advantage of the lawyers that's fine." That strategy was intended to make it more difficult for the court to deal in any concrete way with the membership.

In response, the court continued to appeal to the public through press releases while it antagonized lawyers with seemingly self-serving case law. *In re Houston* had given the court power to admit attorneys,<sup>50</sup> but the court needed another case to show it had the power to promulgate bar rules. Nesbett went along with a scheme devised by his attorney, George Cochran Doub. Anchorage attorney Harland W. Davis was asked to petition the court to decide whether it had the power to make rules for governing the bar association.<sup>51</sup> Davis, acting in accord with Nesbett's plan, based his petition on a written memorandum he received from Doub and the court administrative staff. Members of the bar, suspicious of Davis's reasons for bringing the petition, swiftly deposed him. Davis quickly admitted that the petition had been instigated by Nesbett.<sup>52</sup> Anchorage bar members persuaded Davis to withdraw the petition,<sup>53</sup> but the court denied Davis's request<sup>54</sup> and, in the process, left itself vulnerable to charges of procuring cases to enhance its own power.

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49. Ziegler wrote: "[I]nasmuch as both parties are represented by counsel that counsel should have been consulted and a stipulation entered into by and between counsel encompassing whatever points contained in Order No. 72 that counsel could agree upon." Letter from Robert Ziegler, President, Alaska Bar Association, to Buell Nesbett, Chief Justice, Alaska Supreme Court (Sept. 10, 1964).

50. 378 P.2d 644 (Alaska 1963).

51. See *In re Alaska Supreme Court Orders* No. 64, 68, 69, 70 & 71, 395 P.2d 853 (Alaska 1964) (per curiam).

52. Deposition of Harland W. Davis, *In re Alaska Supreme Court Orders* (No. 532).

53. *In re Alaska Supreme Court Orders*, 395 P.2d at 855.

54. *Id.*

In the meantime, making clear its intent to handle disciplinary cases more expeditiously than the bar and demonstrating its prerogative to be notified of all disciplinary matters whether or not the bar was acting upon them, the supreme court reopened a disciplinary case. Neil Mackay, an Anchorage attorney, had been accused of overcharging a client in the 1950s. In September 1961, a trial committee of the bar voted two to one to discipline Mackay. After hearing argument from Mackay's lawyer Wendell Kay, the board of governors reversed the trial committee and voted to exonerate Mackay. The board never referred the matter to the supreme court since it had disposed of the question. However, Nesbitt, while president of the Anchorage bar in the 1950s, had been notified of the Mackay case and referred the matter to David Thorsness, chairman of the Alaska bar's grievance committee. That was the last Nesbitt heard of the matter until he received the report from the grievance committee after the July 23, 1964, takeover. Nesbitt, determining that there was cause to reopen the case, held a hearing on September 24.

Mackay was represented by Wendell Kay and David Talbot. Kay, now president of the Anchorage bar, and Talbot, Alaska bar counsel, both had a special interest in this case. The Mackay case, the bar must have thought, was a perfect example of the supreme court's overreaching: it was going into a case of a lawyer already cleared of any misdeed.

On October 24, 1964, the supreme court issued its *per curiam* decision in the Davis case; on October 26, the court disbarred Neil Mackay; and on October 27, federal judges Walter H. Hodge, William T. Beeks and Gilbert H. Jertberg heard the Alaska bar's case against the court, *Alaska Bar Association v. Nesbitt*.<sup>55</sup>

Most state bars were integrated under judicial authority. The power of courts to integrate bars had already been tested and found valid. Nonetheless, Alaska's special circumstances—a legislatively created, integrated bar—tempted the federal court to find that the Alaska Supreme Court could not exercise control over the bar. Yet, such a decision could set a dangerous precedent, encouraging bar associations in other jurisdictions to contest judicial control. For this reason, both the federal court and the American Bar Association actively encouraged settlement. The American Bar Association went so far as to provide a mediation team to

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55. No. A-42-64 CIV. (D. Alaska filed July 29, 1964).



work with the parties.<sup>56</sup> In December, the supreme court and the board of governors met for a settlement conference in Juneau.

Before the conference, Anchorage bar members, knowing they had the favor of the federal court in their fight against the Alaska Supreme Court, decided to determine if their leverage might influence the supreme court in Neil Mackay's case. They petitioned for a rehearing, which was granted in early November.

The court and the board of governors entered into a settlement of the federal case before the results of the Mackay rehearing were made public. On December 18, 1964, a joint press communique reported a settlement between the court and bar that included state legislation and new bar grievance and admission rules. Ziegler and Nesbett signed a stipulation to dismiss the case in federal court pending bar ratification of the settlement.

Jubilant at the general good spirit of the mediation and success of the bar, which had drawn encouragement during the negotiations from the federal court's apparent respect for its initial case, Talbot sent Judge Hodge an exuberant letter:

As you will have observed from the stipulation signed by Justice Nesbett and Mr. Ziegler, as President of the Alaska Bar Association, the miracle I thought couldn't happen is now coming to pass.

In view of the understanding achieved at Juneau as the result of our conference on December 16, 17, and 18, I am happy to do a complete flip-flop and say that I cannot now imagine that the litigation pending before Judge Jertberg, Judge Beeks and yourself will not be fully settled—although I consider the 45 days estimated in the stipulation to be optimistic indeed.

We plainly owe the forthcoming settlement to the generosity of the members of the supreme court of Alaska, and I believe there are many members of the Alaska Bar Association who, like myself, are determined that our supreme court will have no occasion to regret this settlement, or to fault the Association for the manner in which it will henceforth discharge the important responsibility of professional self-government.<sup>57</sup>

Talbot's good cheer was somewhat premature. Ballots were composed on December 24, 1964, regarding the stipulation at the conference and mailed out to bar membership on January 15, 1965. By January 21, the membership ratified the settlement plan and,

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56. The mediation team included Dean Alfred J. Schweppe of the University of Washington Law School, Oregon Supreme Court Justice William M. McAllister and Washington Supreme Court Justice Hugh J. Rosellini.

57. Letter from Arthur David Talbot to Walter H. Hodge, Judge, U.S. District Court (Dec. 23, 1964).

relying on ratification, Ziegler and Nesbett presented a joint statement to the legislature recommending adoption of the new rules. On January 29, the board's designated agent received all the bar's property and assets, and the court rescinded Supreme Court Order No. 64, the controversial bar rules. The order was to be replaced by the new rules established at the December mediation, which were scheduled to go into effect on February 8, 1965. On January 30, Ziegler wrote Nesbett that lawyer-legislators John Rader in the House and Howard Pollack in the Senate would introduce the settlement legislation in the form of Senate Bill 48. Everything seemed to promise an end to the controversy. However, on that same late day in January, the supreme court came down with its final decision in the Mackay case and blew the settlement apart.

Justice Arend wrote the opinion disbaring Neil Mackay.<sup>58</sup> The Anchorage bar was in an uproar. A meeting of the Alaska Bar Association to be held in Anchorage was called on short notice. The meeting, scheduled for February 13, was to reconsider the December agreement in light of the *Mackay* decision.

The reopening of the court-bar fight did not have the support of the entire Alaska bar. Ziegler was loath to do anything that might make the federal court, the supreme court or the bar association disavow the favorable Juneau settlement. In an open letter, Ziegler warned the Anchorage bar not to throw away its gains over one disciplinary case:

I am not by any stretch of the imagination endeavoring to hurl a gauntlet in anyone's face, but I would urge you not to take any action which, in effect, would endeavor to have the Board of Governors repudiate the agreement which we made in December of last year and to which we must professionally and ethically adhere, in my opinion.

Ziegler urged members to go through existing legal channels. The bar—absent many board members—met in Anchorage on February 13, 1965. Joe Ball, outside counsel to the bar, listened quietly as Alaska co-counsel George Boney, David Talbot and Wendell Kay persuaded their colleagues to reject the settlement. Boney, an avid plaintiff's lawyer and later supreme court justice, took turns with Kay and Talbot (both of whom had represented Neil Mackay), explaining how the *Mackay* decision meant there was no settle-

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58. *In re Mackay*, 416 P.2d 823 (Alaska 1965), cert. denied, 384 U.S. 1003 (1966), overruled, 464 P.2d 304 (Alaska 1970).

ment. Convinced the bar had the sympathies of the federal court, they assured the lawyers that the *Mackay* decision would work to their benefit. Bar members voted to reject the settlement and sent this resolution to the board of governors for ratification.

The board met in Juneau to consider the resolution. It voted to discharge David Talbot as counsel, with Ziegler casting the tiebreaking vote. W.C. Arnold, who sided with Ziegler on that vote, later told the Anchorage bar that the board had found a conflict of interest between Talbot's retainer from the board in its litigation with the supreme court and his acceptance, without consultation with the board, of a retainer for Neil Mackay, a defendant before that court.<sup>59</sup> Wendell Kay, also counsel for Mackay, withdrew as bar counsel.<sup>60</sup>

Convinced that Kay, Talbot and Boney had steamrolled the convention in Anchorage, the board of governors set aside the resolution and decided to poll bar members on whether they favored settlement. On March 12, 1965, ballots were sent out and the members voted against the settlement agreement. The lawyers went back to court, arguing that the December negotiations in Juneau had not been between the board and the supreme court because the members of the bar at that meeting had been merely a negotiating team with no binding authority on the membership of the bar. While the lawyers argued in court, the legislature passed Senate Bill 48, implementing the settlement proposal. It was obvious to some members of the bar—especially those lawyers in firms, uninterested in Neil Mackay's disciplinary problems—that the fight had now come down to a quest for revenge in the *Mackay* case.

A number of attorneys withdrew as party plaintiffs from the federal case against the supreme court. Robert Ziegler, one of the first zealots, withdrew from the case on March 26, 1965. He was followed in April by Anchorage attorneys John Hughes, Robert Lowe, John Brubaker and Murphy Clark, all insurance defense and corporate lawyers. Juneau lawyers Michael Holmes (from Banfield's firm), Shirley Meuwissen, Gladys Stabler and Doug Gregg withdrew at the same time. These southeastern lawyers had ties to court personnel and/or saw no reason to back the outspoken

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59. *Talbot is Ousted from Bar Case*, ANCHORAGE DAILY NEWS, Feb. 24, 1965, at 1.

60. *Id.*

Anchorage bar. The case became a dogfight, and the sacrificial bone was to be Justice Harry Arend.

Arend wrote the opinion in the *Mackay* case,<sup>61</sup> joined in all of Nesbett's rulings and refused to answer questions regarding his participation in the early orders. When he came up for a retention vote in March, lawyers across the state launched a campaign to vote him off the bench. In Fairbanks, where Arend had practiced for years, television spots opposed the judge. In Juneau, attorney Doug Baily remembered hearing fellow attorneys on the radio urging people to vote against Arend. In Anchorage, letters went out to clients advising them of Arend's retention election. The plea might have begun: "Dear John, I've been your lawyer for a number of years and you've trusted me with your legal problems. Let me tell you what this bench-bar fight means to you." The letter would have discussed the bond for jury trials, which was perceived as a threat to the right to a jury trial. It would have complained of an imperious supreme court taking over an independent bar. Finally, it would have appealed to the client, as a citizen living in the new state of Alaska, to vote in the forthcoming election for justice and an end to Justice Arend's tenure. Arend made no response.

The claim that he was obstructing access to jury trials in civil cases particularly hurt Arend. Nesbett later recalled that he told Arend to do what Nesbett had never done:

"Harry, you wouldn't believe it. The radios and everything are blasting this out," I said. "I think you should go on and say something." He said, "No, we're not supposed to do that sort of thing. A judge is supposed to be stoic and take it." "Well," I said, "I think it's serious enough to let me go on the air and explain it." "No," he said, "I don't want you popping into it."

After all, it was Nesbett they were really after.

In March 1965, Harry Arend was the first and only supreme court justice in the Alaska system ever to lose office in a vote. The bar had shown its full strength. It had won its last triumph in the controversy. In July, the federal court, acting on affidavits of the American Bar Association team that had mediated between the parties, dismissed without prejudice and without costs the case against the Alaska Supreme Court. On February 16, 1970, the exhibits and documents were returned and the case file closed.

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61. See *In re Mackay*, 416 P.2d at 826.

Jay Rabinowitz won appointment to the Alaska Supreme Court, filling Justice Arend's seat. The bar began to have a greater influence on the court. Many who had been prominent in the court-bar fight or had supported it in spirit eventually found their way to the supreme court bench. According to the constitution, the court could be expanded only at the request of the chief justice. In 1968, Governor Walter Hickel, taking the advice of his attorney general, Edgar Paul Boyko, forced Nesbett to ask for two more judges to sit on the supreme court, thereby allowing Alaska's first Republican governor to appoint members. Nesbett was threatened with a budget constraint, Boyko later explained, if he did not request the additional judges. Nesbett remembered no threats. But relations between Nesbett and Boyko had been strained ever since Nesbett publicly reprimanded Boyko in a supreme court opinion.

Nesbett's power base was completely eroded with the appointment of George Boney, the dogged bar counsel, and Roger Connor, a liberal lawyer from Juneau. Boney, to dilute Nesbett's power further and enhance his own, helped institute the concept of rotating the chief justice position among the justices. This meant Nesbett would no longer be the only justice to sit on the judicial council and participate in appointments to the bench.

The federal court refused to follow the example of the state court and continued to allow Neil Mackay to practice before its bench. Mackay had a federal practice for a number of years until the state court, by then virtually packed with plaintiff's lawyers, came out with a revised version of the *Mackay* case, reversing the original decision.<sup>62</sup> John Dimond, the only member of the supreme court besides Nesbett who had voted for the original disbarment, wrote the opinion for reinstatement while Nesbett was recovering from extensive injuries suffered in a plane crash. Nesbett later remarked:

Dimond thought he saw a chance to become chief justice and that's when he got together and wrote that opinion for the supreme court saying that they made a mistake in disbarring Neil Mackay. Then he got Boney, Connor and Rabinowitz to go along with him on it. It was an illegal decision, it was no decision for this reason: Connor and Boney, neither one, had any business participating in this decision when they were never a member [sic] of the court at the time. Rabinowitz, as soon as

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62. *In re Mackay*, 464 P.2d 304 (Alaska 1970), *overruling In re Mackay*, 416 P.2d 823 (Alaska 1963), *cert. denied*, 384 U.S. 1003 (1966).

he came on the court, refused to have anything do with the bar fight. He said, "I wasn't involved." And he wanted to be liked by all those lawyers. And he said, "I'm not going to sit on anything." So, then all the proceedings that went on for a couple of years, Rabinowitz never participated. But he did in that decision saying it was a mistake, we shouldn't have done it and he wasn't even on the court when it was done. Neither was Connor, neither was Boney. And I was out of that. So that Dimond was the only one who had authority. . . . And he didn't get to be chief justice after all. Boney got it.

The independent mindedness of Nesbett, which alienated him from the bar, also made it more difficult for him to deal with a supreme court no longer within his control.

Being a supreme court justice changes a person, Nesbett said. "It makes you firm. And you [have] got to be. . . . [Y]ou won't be the jolly, happy-go-lucky practicing lawyer you were." Taking Alaska out of the territorial era and into a state court system took its toll on Nesbett. The decisions he made and actions he took reflected his mission to provide a reliable and fair justice system for the people. However, the authoritative manner he brought to the task put him at odds with many practicing lawyers.

#### IV. CONCLUSION

The years prior to statehood had seen a bar dominated by the culture of solo practitioners. Most lawyers worked in isolated general practices, looking forward to daily luncheons and frequent phone calls to share accounts of their trials and experiences. Although the expertise varied among practitioners, a camaraderie pervaded. Most came to Alaska, just as Nesbett had, to escape the constraints and conventions of law practice outside. During the 1950s, bar members united on a number of occasions. The *Stringer* case brought attorneys together; attorneys spearheaded the drive to pass the Integrated Bar Act; and they worked on the constitutional convention, actively participating in, among other things, the drafting of the judiciary article. Although legal practices and agendas varied, attorneys in the 1950s took a leading role in shaping not only the framework of their profession but also the framework of the prospective state of Alaska.

By the end of the 1950s and during the early 1960s, the bar was becoming less cohesive. More and more lawyers, particularly in Anchorage, formed partnerships. These lawyers put in long hours behind their desks. They had less time for bar lunches, politics and social activities. The first state court system added

another wrinkle, as members of the small coterie of lawyers were elevated to the bench.

It was in this atmosphere of change and stratification that Buell Nesbett presided over the first supreme court. Few lawyers would disagree with Nesbett's goal to improve the legal system in order to provide reliability and consistency. What attorneys did not want, however, was for this improvement to come at the expense of their own power. However, Nesbett was not content with simply providing standards of justice upon which lawyers could rely; he also felt a duty to the people to ensure that the lawyers they paid to represent them would be competent and efficiently policed. This was just one more job best undertaken by the new supreme court.

Nesbett was very familiar with the bar he took on when he promulgated orders to take it over. He knew the faction that operated on the margins—taking advantage of a less rigorous territorial system—a faction that preferred backroom politics and loosely fashioned deals. In many ways, Buell Nesbett's tenure as the first chief justice demonstrated just how difficult it is for a person at the cusp of two eras, with a foot in each. He had practiced with the lawyers he took on. He knew how they fought, and at times this knowledge brought him closer to their level.

Nesbett also underestimated the power of the bar. The territory may have changed to a state overnight, but attorneys practicing law took much longer to change from the territorial practice to one more similar to their stateside counterparts. Although a higher level of professionalism was becoming apparent, the bar was still a powerful unifying force. Nesbett's abrupt effort to have the bar placed under the control of the judiciary alienated those who would normally have been favorably disposed to him. His taking of bar funds, the arbitrary opening of the *Mackay* case and the Harland Davis fiasco proved to even the most reasonable lawyers that their domain was being encroached. The fact that supreme courts in other states had been integrating bar associations for years became lost in a conflict over personalities and power plays.

The court-bar fight was the last time the bar association in Alaska united. The leaders, older members, shared with their younger colleagues the romance of the territorial days. The leaders were able to whip a group of disparate attorneys into a force fighting for a cause because many had come expecting to be on an outpost. In the end, the conflict was an expression both of

Alaska's transition into statehood and of the growing professional identity of Alaska's lawyers.