

Alaska Judicial Council
Application for Judicial Appointment

RECEIVED

OCT 30 1995

AK Judicial Council

Nome, Alaska

Date: October 30, 1995

Court(s) for which you wish to be
considered

I. PUBLIC INFORMATION (Os. 1-27 & 32)

PERSONAL

1. (a) State full name* Ben James Esch
Name as it should appear on bar survey: Ben Esch
* Unless otherwise specified, this is how your name will appear on the bar survey.
- (b) Have you ever used or been known by any other name? If so, please identify
No

6. How long have you been a resident of the State of Alaska immediately preceding the date of this application? ** 22 years 8 months

Total years 22 months 8

7. How long have you been engaged in the active practice of law immediately preceding the date of this application? ** 22 years 2 months

Total years 22 months 2

** See AS 22.10.090; see also 1984 Inf. Op. Atty. Gen. (July 19; 366- 624-84).

NONLEGAL EDUCATION

8. State names and dates of attendance of all colleges and professional schools (other than law schools) ever attended and degrees and dates conferred. List any honors.

MacMurray College, Jacksonville, Ill Sept. '63- Jan. '68

BA - Chemistry

LEGAL EDUCATION

9. List all law schools, dates attended and degrees conferred. If you did not receive a degree from any law school, please indicate.

Arizona State University, Tempe, AZ Sept. '70 - Jan. '73

10. (a) Did you receive any honors in law school or belong to any honorary societies or groups? yes If so, please give details.

Member of the Law Review, "Law and the Social Order";
clerked for Justice Lorna Lockwood, Arizona Supreme Court
Summer '72

- (b) Have you taken any CLE (continuing legal education) courses during the past five years?

Yes x No Please describe: '92 - Real Prop/Forfeiture,
Bankruptcy; '93 - Civil Seminar; '94 - Maritime P.I., Fed. Local
Local Rules; '95 - Atty Fee Disputes, Employment Law, Advanced
Cross Examination, Trust Accounts

MILITARY

11. Have you served in the armed forces (reserves or otherwise)? No
If so, please provide the following information:

- (a) Dates of service: _____
(b) Branch of service: _____
(c) Rank at time of discharge: _____
(d) Type of military discharge: _____
(e) Awards or citations: _____

- (f) Have you ever been refused admission to or released from any of the armed services for reasons other than honorable discharge. If so, state the details.

NONLEGAL EMPLOYMENT

12. Describe major nonlegal working experience, if any.
Caterpillar Tractor Co., Peoria, Ill Apr.'68 - Aug.'70
quality control chemist, water pollution control

13. Describe major nonlegal business or professional experience, if any. If your association has been discontinued, please note whether there are unpaid debts or claims pending litigation.

Matanuska Utility Company, Inc. - a certificated
water utility in Wasilla, AK. I am shareholder
officer and director

LEGAL EXPERIENCE

14. Describe chronologically your legal employment since admission to law school. Please provide dates, name of employer, name of supervisor, addresses, the reason you left the position, and a brief description of type of practice (i.e., insurance defense, criminal, appellate, general, litigation, etc.). Also, provide the name and current address of a person, preferably your supervisor, who can verify your employment for each position listed below.

From admission to law school until graduation I was not employed, and was unemployed while studying for the Arizona bar examination. After the Arizona exam, I moved to Alaska and began contract legal work. I do not recall all my employers, but work was done for Edward Reasor, Wendall Kay, and Jim Christie. After the Alaska bar examination, but before the results were announced, I began to work for the Public Defender Agency. I worked as a staff attorney doing misdemeanors and felonies from August, 1973 until May, 1975. I was the Bethel attorney, covering that office from January, 1974 through March 1975, two weeks per month. I also spent about one month assigned to the Juneau office in 1974. My supervisor at the time of employment at the agency was Herb Soll, whose current address is: P.O. Box 5042 CHRB, Saipan, MP 96950. Employment can also be verified through John Salemi, 900 W. 5th Ave, #200, Anchorage, AK 99501.

I left the public defender's office to work with Dickson & Evans. I remained with that firm, subsequently known as Dickson Evans & Esch, from May, 1975 through its dissolution in the summer of 1984. The dissolution was a result of the suspension from practice of M. P. Evans. George Dickson and I continued as successor partners until June 1985 when that partnership was dissolved, and both of us began solo practices. Evans and Dickson are deceased, employment can be confirmed through Kathy Jasper, c/o District Attorney's Office, 310 K St., Ste 520, Anchorage, AK 99501.

I worked as a sole practitioner from the summer of 1985 until December 1992. Thereafter, Walter Garretson and I formally entered a partnership. Mr. Garretson and I had been sharing office space from late 1989. Mr. Garretson's address is 310 K St., Ste. 709, Anchorage, AK 99501. My solo practice can be verified by George Trefry, 1029 W. 3d Ave., #300, Anchorage, AK 99501, from whom I sub-leased space prior to sharing space with Mr. Garretson.

15. For the past five years, please indicate (approximately) the following:

(a) Percent of your practice that was

Civil	<u>80</u>
Criminal	<u>20</u>
Other	<u> </u>

= 100%

Comment: _____

(b) Percent

State	<u>80</u>
Federal	<u>20</u>
Other	<u> </u>

= 100%

Comment: _____

(c) Of practice in state courts, percent:

Supreme Court	<u>1</u>
Court of Appeals	<u>1</u>
Superior Court	<u>73</u>
District Court	<u>25</u>

= 100%

Comment: _____

(d) Frequency of appearance in court: Regularly x; Occasionally _____;
Infrequently _____; Not at All _____

Comment: _____

(e) Number of trials (by court or jury) you conducted in the past 5 years:
 None 1 to 5 6 to 16 x 16 to 30 31 or more
Comment: these include civil trials in Barrow, Kotzebue & Kodiak

(f) Percent of these trials which were: Jury 75 Non-Jury 25

Comment: _____

(g) Approximate number of appellate matters handled: 6

Comment: _____

(h) Approximate number of arbitrations or administrative hearings: None
 1 to 5 x 6 to 16 16 to 30 31 or more
Briefly describe type of matters heard: Dept. of Commerce, Occ. Lic./discipline; Dept. of Pub. Safety, DMV licensing

(i) Have you undertaken any pro bono work during the period?

Yes x No

Describe: misc matters through Alaska Pro Bono pannel

16. List all the courts and administrative tribunals in the United States or elsewhere to which you are or have been admitted to practice, and the dates of admission.

Supreme Court of Arizona - '73, Supreme Court of Alaska - '73
United States Dist. Ct, Alaska - '73, United States Supreme Court - '94

PUBLIC SERVICE

17. List bar associations, sections and committees of which you are or have been a member or officer.

Alaska Bar Assn. - Statutes, Rules & Bylaw Comm "80-'83
Crim Law section - member

Arizona Bar Assn. - member; Anchorage Bar Assn. - member

American Trial Lawyer's Assn. - member, Alaska Trial Lawyer's Assn. - member, National Assn. Criminal Defense Lawyers - member

18. List legal publications, if any (give title, subject and date of publications):

None

19. Have you ever applied for a judgeship? Please list dates and judgeships applied for, as well as whether you were nominated by the Judicial Council and appointed:

Judgeship	Date	Nominated By Council (Y/N)	Appointed By Governor (Y/N)
None			

20. Have you ever held public or political office, elective or appointive? yes

If so, state office, manner selected, and when and where held.

Member GAAB Planning & Advisory Group on Drug Abuse Services, '73-
'76 (appted by Borough Mayor) Anchorage, AK; Governor's Advisory
Board on Drug Abuse Services, '83-'88 (appted by Gov.); Governor's
Advisory Board on Alcoholism & Drug Abuse Prevention, '88-'91
(appted by Gov.)

21. List all nonlegal organizations and clubs of which you are a member, including civic, charitable, religious, educational, social and fraternal. (Please indicate whether you participate in the organization's activities, or simply hold a membership.)

Alaska Council on Prevention of Alcoholism & Drug Abuse
(director)

currently no other memberships

Past: Akeela House, Inc. Bd. of Directors '76-'83

Cub Scouts/Boy Scouts - leader '86-'89

Parents United - director '88-'89 (resigned)

Men's Support Network - director '88-'91

Boy's & Girls Club, parent leader/coach '81-'87

22. Indicate (Yes or No) whether you have ever:

(a) been arrested, charged with, pled guilty or "nolo contendere" to, or been convicted of the violation of any law or ordinance, or been requested to appear before any prosecuting or investigative agency in connection with any matter other than minor traffic offenses (those for which a fine of \$50.00 or less, and no other sanctions were imposed)? No

(b) failed to answer any summons or other legal process served upon you personally at any time? No

(c) as a member of any armed forces, been the subject of any charges which may have resulted in disciplinary action or court martial? No

- (c) Have you ever been a party in any other legal proceeding? If so, give the particulars. Include all legal proceedings in which you were a party in interest; a material witness; a named co-conspirator or correspondent; and any grand jury investigation in which you figured as a subject, or in which you appeared as a witness. Do not list proceedings in which you were sued only in a representative capacity (e.g. Guardian ad litem, or as Commissioner of Natural Resources).

attached

24. State the nature and disposition of any of the following actions which apply to you:

- (a) Are there any unsatisfied judgments against you? Have you ever defaulted in the performance of any court-imposed obligation, including payment of alimony or child support or compliance with another court order or decree? In each case, list the name and address of the creditor, the court which rendered the judgment, the case number, the date, the amount of the judgment, and the circumstances on which such claim was based. Has property owned by you been either judicially or non-judicially foreclosed? Please state the circumstances and outcome of any such unsatisfied or default judgment, or of any foreclosure.

In 1986 action was brought by Alaska Mutual Bank against myself, Dickson and Evans for unpaid real estate loans which had gone bad. Judgment was entered in plaintiff's favor for approximately \$175,000. This judgment was assigned to FDIC after the bank's failure. Dickson and Evans discharged this debt in bankruptcy, and I entered into a work-out plan with FDIC, which is current. The unpaid balance on this obligation is approximately \$16,000. Additionally, my home collateralized the loans and it was foreclosed upon non-judicially.

- (b) Have you ever made an assignment for the benefit of creditors? Has any petition in bankruptcy ever been filed by you? If so, state the circumstances, case number, and the outcome.

No

Plaintiff:

I have been a plaintiff in several actions to collect legal fees. No counter claims were filed in any of these proceedings:

Esch v. Wincupp - 3AN88-5569 Civ.
Esch v. Aszmus - 3AN91-1880 SC
Esch v. Sandland - 3AN91-2412 SC
Esch v. Tessmer - 3AN91-2413 SC
Esch v. Dyasuk - 3AN92-618 SC
Esch v. Thompson - 3AN92-619 SC

I was a plaintiff in an attempt to collect an assigned debt. Esch v. Gibson 3AN91-7637. The debt was discharged in bankruptcy prior to judgment.

I was also a plaintiff in my divorce: Esch v. Esch - 3AN80-2528 Div

Witness:

I was a material witness in a Habeas Corpus action brought by a defendant I represented, alleging ineffective assistance of counsel. Harper v. United States A92-055 Cr. (JKS). The U.S. District Court dismissed the action, finding that there had been no defect in the representation.

Defendant:

I was a defendant in the matter of Johnson v. Esch, 3AN80-4150 a slander of title action arising from an attempted execution sale of Fairbanks real property. The matter was settled and paid.

I was a defendant in a malpractice action brought by Admiral Insurance, arising from my representation of the City of Bethel in a wrongful death action. The plaintiff was the city's insurer. The matter was settled and paid by my E&O carrier. I do not recall the terms, and I have not been able to find the case #. I was represented by John Brubaker.

I was a defendant in a number of collection matters arising from the partnership of Dickson Evans and Esch.

Fischer v. DEE 3AN84-6529 CI - debt for unpaid rent. Settled and paid.
Mathew Bender v. DEE 3AN85-9383 CI - debt for books. Settled and paid.
Gilmore & Feldman v. DEE 3AN85-9333 CI - debt for legal service for representation of Evans before the Supreme Court in the appeal of his bar sanction. Settled and paid.

Alaska Mutual Bank v. DEE 3AN86-3805 CI - debt for unpaid real estate loans. Judgment for plaintiff, assigned to FDIC. (see answer to next question)

REFERENCES*

25. (a) List the names, addresses, and phone numbers of two persons whom the Judicial Council may contact who can discuss your general character and background.

(1) NAME: Phillip P. Weidner
ADDRESS: 330 L St.
CITY/STATE/ZIP: Anchorage, Ak 99501 PHONE: 276-1200

(2) NAME: Brian Shortell
ADDRESS: c/o 303 K St.
CITY/STATE/ZIP: Anchorage, AK 99501 PHONE: 264-0430

(b) List the names, addresses, and phone numbers of three other persons whom the Judicial Council may contact who can discuss your professional competence and qualifications for a judicial position. (You should not list the Chief Justice of the Alaska Supreme Court.)

(1) NAME: Nancy Shaw
ADDRESS: Federal Public Defender Agency, 510 L St., Ste. 400
CITY/STATE/ZIP: Anchorage, AK 99501 PHONE: 271-2277

(2) NAME: Douglas Serdahely
ADDRESS: Bogle & Gates, 1031 W. 4th Ave.
CITY/STATE/ZIP: Anchorage, AK 99501 PHONE: 276-4557

(3) NAME: Rene Gonzales
ADDRESS: c/o 303 K St.
CITY/STATE/ZIP: Anchorage, AK 99501 PHONE: 264-0425

* Please Note: Letters of reference from these persons are confidential and will not be given to either the Governor or the applicant. The applicant should not request a copy of the letter from the reference.

REFERENCES (continued)

- (d) List the names, addresses and phone numbers of attorneys involved in your three most recent cases that did not go to trial but in which you did significant work. (Applicants who are currently judges should list the three most recent trials they presided over that did not go to trial but in which they did significant work.) Please include case names and numbers. (Attach additional pages if necessary.)

1 Name of Case State V. Dennis Bradbury Case Number 3PA95-944 Cr.

Attorneys Involved

Name: Jayne Wallingford
Address: 800 W. Evergreen #102
Palmer, AK 99645

Name: _____
Address: _____

Name: Bill Estelle
Address: 800 W. Evergreen #102
Palmer, AK 99645

Name: _____
Address: _____

2 Name of Case Stark v. ARG, Inc. Case Number A94-181 Civ (JKS)

Attorneys Involved

Name: S. Jay Seymour
Address: 550 W. 7th #1650
Anchorage, AK 99501

Name: _____
Address: _____

Name: _____
Address: _____

Name: _____
Address: _____

3 Name of Case Vickers v. Choi Case Number 3AN91-1359 CT

Attorneys Involved

Name: Patrick McKay
Address: 605 W. 2d. Ave.
Anchorage, AK 99501

Name: _____
Address: _____

Name: _____
Address: _____

Name: _____
Address: _____

Ben ESCH, Appellant,
 v.
**SUPERIOR COURT OF the State of
 Alaska, THIRD JUDICIAL
 DISTRICT, Appellee.**

No. 2966.

Supreme Court of Alaska.

April 21, 1978.

The Superior Court, Third Judicial District, Kenai, James A. Hanson, J., imposed \$500 sanction against attorney for attorney's alleged failure to file brief in accordance with certain briefing schedules established by court, and attorney appealed. The Supreme Court, Burke, J., held that: (1) automatic change of judge authorized by rule was inapplicable to proceedings; (2) attorney was not entitled to change of judge; (3) where order to show cause why sanctions should not be imposed was issued ten days before rule became effective, judge could not use rule as basis for imposing sanction; (4) absent finding that attorney was in contempt, there was no basis for exercise of inherent power of court to impose sanctions; (5) judge's failure to observe notice requirements of rule was error, and (6) superior court had no authority to suspend attorney from practice before trial court as means of enforcing payment of fine.

Reversed and remanded.

1. Judges ⇐39

Where determination to be made is whether sanctions should be imposed for infraction of court's rules or lawful order of court, automatic change of judge authorized by rule is inapplicable. Rules of Civil Procedure, rule 42(c).

2. Judges ⇐39

Judge should not be disqualified from presiding over contempt proceedings if his actions do not indicate feelings of personal rancor toward alleged contemnors.

3. Judges ⇐49(1)

Judge should not sit in judgment upon misconduct of counsel consisting of infraction of court's rules or lawful order of court if misconduct charged is entangled with personal feelings of judge against lawyer. Rules of Civil Procedure, rule 95(b).

4. Judges ⇐51(3)

Despite fact that record perhaps indicated that judge was not particularly pleased by attorney's performance, record failed to demonstrate degree of personal rancor on part of judge sufficient to entitle attorney to change of judge in proceedings concerning alleged failure of attorney to comply with court order. Rules of Civil Procedure, rule 95(b).

5. Attorney and Client ⇐32

Where judge's order to show cause why sanctions should not be imposed for attorney's alleged failure to meet briefing schedule was issued on April 21, 1976, ten days before effective date of rule authorizing sanctions, judge could not use rule as basis for imposing sanction for attorney's alleged failure to comply with court order. Rules of Civil Procedure, rules 95, 95(b).

6. Attorney and Client ⇐32

Where judge imposed \$500 fine for attorney's alleged failure to meet court-ordered briefing schedule but where judge clearly stated that he was not finding attorney in contempt of court, there was no basis for exercise of inherent power relied upon by judge, and thus, to the extent \$500 fine represented sanction for violation of briefing order, fine was imposed without lawful authority.

7. Attorney and Client ⇐32

Notice requirements of rule authorizing judge to impose sanctions upon attorney for violation of court rule or order were essential to proper application of rule, and thus, even though it appeared highly unlikely that attorney could have made sufficient showing to avoid being properly sanctioned for failure to meet filing date ordered by court, attorney was entitled opportunity to do so. Rules of Civil Procedure, rule 95(b).

8. Attorney and Client ⇐32

Where sanctions are to be imposed upon attorney for failure to comply with court order, courts should, as a matter of sound practice, make clear record concerning reason for imposing particular sanction and authority relied upon to do so, and failure to make clear record concerning reason for imposing particular sanction and authority relied upon to do so may require reversal and remand for entry of such findings. Rules of Civil Procedure, rules 90(a), 95(b).

9. Attorney and Client ⇐36(1)

Superior court is without authority to suspend attorney from practice before trial courts as means of enforcing payment of fine, as Supreme Court is only entity having such authority.

10. Attorney and Client ⇐32

Ordinarily, maximum sanction authorized by rule for attorney's failure to comply with rules or court order should be reserved for very serious transgressions or persistent violations of court's rules.

M. P. Evans, Dickson, Evans and Esch, Anchorage, for appellant.

F. P. Pettyjohn, Pettyjohn & Pestinger, Anchorage, for appellee.

Before BOOCHEVER, Chief Justice, and RABINOWITZ, CONNOR and BURKE, Justices.

OPINION

BURKE, Justice.

In this appeal, appellant Ben Esch, an attorney, challenges a \$500 sanction imposed against him by the superior court. The sanction was based upon Esch's alleged failure to file a brief in accordance with certain briefing schedules established by the court.

Esch was retained by one Robert Starr to seek reinstatement of an appeal to the superior court, notice of which had been filed after Starr's conviction for reckless driving. The appeal was dismissed after Starr failed

to file his opening brief. On January 30, 1976, the Honorable Ralph E. Moody, Presiding Judge of the Superior Court, Third Judicial District, agreed to reinstate Starr's appeal. Judge Moody established a briefing schedule and assigned the case to the Honorable James A. Hanson, Judge of the Superior Court, at Kenai, Alaska.

When the district attorney expressed concern over the future handling of Starr's appeal, the following exchange occurred:

MR. ESCH: . . . Your Honor, I was retained by Mr. Starr and I am entering an appearance on behalf of Mr. Starr as of this date. I've explained to Mr. Starr I will not be doing the briefing schedule—doing the briefing myself.

THE COURT: Yes, but you're the attorney of record.

MR. ESCH: . . . [H]owever, we are all on notice as of this—at this time and I will file a substitution of counsel when—as soon as I'm notified by Mr.

THE COURT: As far as I'm concerned you're counsel as of now.

MR. ESCH: I am counsel as of now and if anything happens from now on I realize it'll be on my shoulders.

Judge Moody's briefing schedule required that Starr's brief be filed in the superior court by February 15, 1976. No brief was filed by that date. On February 16, 1976, appellant Esch filed a motion for an extension of time for filing the brief and for appointment of the Public Defender to handle Starr's appeal. On April 21, 1976, Judge Hanson denied the motion for appointment of the Public Defender, extended the time for filing appellant's brief until May 1, 1976, and ordered appellant Esch to show cause why he should not be sanctioned for his failure to follow Judge Moody's briefing schedule. Appellant Esch, indicating his desire that a judge other than Judge Hanson determine the matter of sanctions, filed a "Notice of Change of Judge." Presiding Judge Moody denied that request.

Esch appeared at the show cause hearing on June 2, 1976, with his own attorney. Stating that he planned to withdraw from the case, Esch continued:

I've made it clear to Mr. Starr, I've made it clear to the court that I'm not going to write the brief in this case. I've not been retained to write the brief. I've indicated right from the beginning that I had no intention of writing the brief. I repeated that in court, to Mr. Starr repeatedly and in affidavits to this court.

The trial court, relying in part on Esch's statement to Judge Moody on January 30 that he was "counsel as of now and if anything happens from now on I realize it'll be on my shoulders," imposed a sanction of \$500. When Esch's attorney asked the court to specify precisely what conduct it was sanctioning, the court responded:

THE COURT: His failure to meet—well, I'll say now, two briefing schedules as ordered by the court, one as ordered by Judge Moody previously and the second ordered by me.

MR. EVANS (counsel for Esch): You're summarily handling the second failure today without notice?

THE COURT: Yes. Well, would you like—I can come up with another—I can put another 500 on top of the 500, but I don't—I think the point is made with one 500. It includes both.

The court further specified that the \$500 sanction was imposed pursuant to Alaska R.Civ.P. 95(b).¹ However, when Esch's attorney pointed out that the trial court's

order to show cause was issued on April 21, 1976, while Rule 95(b) did not go into effect until May 1, 1976, the court stated that the sanction was being imposed pursuant to "the inherent power of the court," as well as Rule 95(b).

The trial court then specified that if Esch did not pay the fine or perfect an appeal by the next day, he would be suspended from practice before the trial courts until he paid the fine.

Esch challenges Judge Hanson's imposition of the sanction on the following grounds:

1. Judge Moody erred in denying his application for change of judge.
2. The trial court lacked the authority under Rule 95(b) or the contempt power to impose sanctions for failure to meet either of the briefing schedules.
3. The trial court erred in failing to make detailed findings of fact and conclusions of law.
4. The trial court did not have the authority to temporarily suspend him from practice.
5. The \$500 sanction was excessive under the circumstances.

1. CHANGE OF JUDGE

As already noted, after he received Judge Hanson's April 21, 1976, order to show cause, Esch filed a notice of change of judge, pursuant to Alaska R.Civ.P. 42(c).²

Rule 45(f), Alaska R.App.P., promulgated by this court, provides that in appeals to the superior court:

The superior court shall set the time limits for filing the necessary briefs and the time for oral argument at the time of a prehearing conference to be ordered by that court.

We consider failure to comply with such a briefing schedule to be a violation of a rule promulgated by this court, sufficient to authorize the imposition of Rule 95(b) sanctions.

2. Civil Rule 42(c) provides in pertinent part:

(c) *Change of Judge as a Matter of Right.*

In all courts of the state, a judge or master may be peremptorily challenged as follows:

(1) *Nature of Proceeding.* In an action pending in the Superior or District Courts,

1. Rule 95, Alaska R.Civ.P. provides:

(a) For any infraction of these rules, the court may withhold or assess costs or attorney's fees as the circumstances of the case and discouragement of like conduct in the future may require; and such costs and attorney's fees may be imposed upon offending attorneys or parties.

(b) In addition to its authority under (a) of this rule and its power to punish for contempt, a court may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing by the court, if requested, impose a fine not to exceed \$500.00 against any attorney who practices before it for failure to comply with these rules or any rules promulgated by the supreme court.

We hold that Judge Moody's denial of the request was proper.

[1] In cases such as this, where the determination to be made is whether sanctions should be imposed for an infraction of the court's rules, or a lawful order of the court, the automatic change of judge authorized by Rule 42(c) is inapplicable. Application of that rule in such cases would prevent Alaska's trial judges from taking the immediate action that is often necessary to insure the orderly and expeditious handling of those matters coming before them. Instead, we hold that the applicable rule is the one expressed in *Continental Insurance Cos. v. Bayless & Roberts, Inc.*, 548 P.2d 398 (Alaska 1976), where we discussed the circumstances justifying a change of judge in contempt matters.

[2,3] In *Continental* we held that a judge should not be disqualified from presiding over contempt proceedings if his actions do not indicate feelings of "personal rancor" toward the alleged contemnor. 548 P.2d at 406. We cited with approval the holding in *Offcut v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954), that "a judge should not sit in judgment upon misconduct of counsel if the contempt charged is entangled with personal feelings of the judge against the lawyer." *Id.* The same considerations should apply to cases involving the imposition of sanctions under the authority of Rule 95(b).

[4] The record in this case, although perhaps indicating that he was not particu-

each side is entitled as a matter of right to a change of one judge and of one master. Two or more parties aligned on the same side of an action, whether or not consolidated, shall be treated as one side for purposes of the right to a change of judge, but the presiding judge may allow an additional change of judge to a party whose interests in the action are hostile or adverse to the interests of another party on the same side. A party wishing to exercise his right to change of judge shall file a pleading entitled 'Notice of Change of Judge.' The notice may be signed by an attorney, it shall state the name of the judge to be changed, and it shall neither specify grounds nor be accompanied by an affidavit. A judge may honor an informal request for change of judge. When he does

larly pleased by Esch's performance, fails to demonstrate a degree of personal rancor on the part of Judge Hanson sufficient to entitle Esch to a change of judge. Thus, Judge Moody correctly denied his request.

2. TRIAL COURT'S AUTHORITY TO IMPOSE SANCTIONS

Judge Hanson stated that the \$500 sanction was imposed on Esch both for his failure to meet Judge Moody's briefing schedule, issued on January 30, 1976, and his failure to comply with the extended time for briefing granted in Judge Hanson's April 21, 1976, order. Appellant next contends that the trial court lacked authority under Rule 95(b) or the contempt power to impose sanctions for failure to meet either of the briefing schedules. Appellant analyzes each schedule separately.

a. Briefing Schedule No. 1.

[5] Appellant argues that Judge Hanson could not use Rule 95(b) as a basis for imposing sanctions for failure to meet Judge Moody's January, 1976, schedule since the amended rule was not effective until May 1, 1976. Appellant is correct in his contention; Judge Hanson's order to show cause why sanctions should not be imposed for failure to meet the first schedule was issued on April 21, 1976, ten days before the new provision of Rule 95 became effective.

However, Judge Hanson responded to this argument when it was raised at the

so, he shall enter upon the record the date of the request and the name of the party or parties requesting change of judge. Such action shall constitute an exercise of the requesting party's right to change of judge.

(2) *Filing and Service.* The notice of change of judge shall be filed and copies served on the parties, the presiding judge, and the area court administrator, if any, in accordance with Rule 5, Alaska Rules of Civil Procedure.

(3) *Timeliness.* Failure to file a timely notice precludes change of judge as a matter of right. Notice of change of judge is timely if filed before commencement of trial and within five days after notice that the case has been assigned to a specific judge.

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June 2, 1976, hearing by stating that he was also relying on the "inherent power" of the court to impose sanctions for violation of its orders.

[6] The "inherent power" alluded to by Judge Hanson could only mean the power of the court to impose sanctions for contempt. That the superior court has such inherent power was firmly established by our decision in *Continental Insurance Cos. v. Bayless & Roberts, Inc., supra*. However, in the case at bar, Judge Hanson clearly stated that he was not finding Esch in contempt.

MR. EVANS: Your Honor, are you finding Mr. Esch in contempt?

THE COURT: No. I'm imposing sanctions under Rule 95 for failure to meet his responsibility as an attorney in this case.

Absent a finding that Esch was in contempt of Judge Moody's order, there was no basis for the exercise of the "inherent power" relied upon by Judge Hanson. Thus, to the extent it represents a sanction for violation of Judge Moody's order, the \$500 fine was imposed without lawful authority.

b. Briefing Schedule No. 2.

Appellant concedes that sanction provisions of Civil Rule 95(b) were in effect at the time of his failure to meet the time requirements of Judge Hanson's own briefing schedule. However, he contends that Judge Hanson ignored the notice provisions of that rule.

Judge Hanson's April 21 order to show cause also set a new briefing schedule which required Starr's brief to be filed by May 1, 1976. Appellant Esch did not meet the May 1 deadline, and at the June 2 hearing on the failure to comply with Judge Moody's first briefing schedule, Judge Hanson stated that the \$500 fine was in part a sanction for failure to meet the second briefing schedule. Rule 95(b), however, requires the court to give the party "reasonable notice and an opportunity to show cause to the contrary, and . . . [a] hearing by the court, if requested," before sanctions can be imposed. Appellant argues that since he was given no prior notice that sanctions might be imposed for failure to

comply with the second schedule, he was deprived of due process.

[7] The sanction imposed for the second failure to file the brief was authorized by Rule 95(b). However, the trial court failed to give specific notice of its intention to impose a sanction for failure to meet the May 1 filing date. While a strong argument can be made that anyone in Esch's position should have anticipated the possibility of such sanctions, we hold that Judge Hanson's failure to observe the notice requirements of Rule 95(b) was error. Those requirements are clearly stated and essential to a proper application of the rule. Although it appears highly unlikely that Esch could have made a sufficient showing to avoid being properly sanctioned, we believe that he was entitled to the opportunity to do so.

Thus, with regard to Esch's alleged violation of Judge Hanson's own briefing schedule, we reverse the order imposing a \$500 sanction and remand the case for further hearing on proper notice. If, after such further hearing, it appears that a sanction under Rule 95(b) is warranted, the court may enter such additional orders as it deems appropriate.

3. FINDINGS OF FACT AND CONCLUSIONS OF LAW

[8] Our determination that the sanction in this case must be set aside, upon the grounds already stated, makes it unnecessary for us to reach appellant's third contention that the trial court erred in failing to make findings of fact and conclusions of law. On that issue, we state only that where sanctions are to be imposed, courts should, as a matter of sound practice, make a clear record concerning the reason for imposing the particular sanction and the authority relied upon to do so. Failure to do so may require a reversal and remand for entry of such findings. See *Weaver v. Superior Court*, 572 P.2d 425 (Alaska 1977); Alaska R.Civ.P. 90(a).

4. SUSPENSION FROM PRACTICE

[9] In *Weaver v. Superior Court, supra*, we held that the superior court had no

authority to suspend an attorney from practice before the trial courts as a means of enforcing payment of a \$100 fine for contempt. That holding is dispositive of the same issue in this case. This court is the only one having that authority. *Id.*

5. EXCESSIVENESS OF SANCTION

[10] Appellant's final contention is that the \$500 sanction was excessive under the circumstances. Since reversal is required, it is unnecessary for us to decide this issue. However, we do deem it appropriate to make one comment regarding appellant's argument. Ordinarily, the maximum sanction authorized by Rule 95(b) should be reserved for very serious transgressions or persistent violations of the court's rules.

REVERSED and REMANDED for further proceedings consistent with this opinion.



Eileen Marie MILLER, wife, Michael Paul Miller, son, and Valerie Ann Merriman, stepchild of David Eugene Miller (Deceased), Appellants,

v.

ITT ARCTIC SERVICES, Liberty Mutual Insurance Company, and Alaska Pacific Assurance Company, Appellees.

ITT ARCTIC SERVICES, Liberty Mutual Insurance Company, and Alaska Pacific Assurance Company, Cross-Appellants,

v.

Eileen Marie MILLER, wife, Michael Paul Miller, son, and Valerie Ann Merriman, stepchild of David Eugene Miller (Deceased), Cross-Appellee.

Nos. 3311 and 3312.

Supreme Court of Alaska.

April 21, 1978.

Employee's widow and children appealed decision of Workmen's Compensation

Board denying benefits. The Superior Court, Third Judicial District, Victor D. Carlson, J., affirmed Board's determination, and applicants appealed. The Supreme Court, Rabinowitz, J., held that: (1) medical testimony constituted substantial evidence to overcome presumption of compensability concerning death of worker who collapsed while loading toolbox on back of pickup truck and allegedly died as result of bleeding caused by ruptured berry brain aneurysm, since a reasonable mind could find evidence adequate to support a conclusion that worker's death was not related to his employment; (2) rule that any doubt as to substance of medical testimony should be resolved in favor of workmen's compensation claimant is not necessarily applicable whenever evidence reveals lack of unanimity or shows uncertainty among medical experts about ultimate causation; the rule is properly applicable only when the substance of a particular witness' testimony is in doubt, and (3) evidence supported decision of Board, based upon testimony of medical experts and of employee's co-workers, that applicants had failed to show a work connection.

Affirmed.

1. Workmen's Compensation ⇌ 1364

Medical testimony constituted substantial evidence to overcome presumption of compensability concerning death of worker who collapsed while loading toolbox on back of pickup truck and allegedly died as result of bleeding caused by a ruptured berry brain aneurysm, since a reasonable mind could find evidence adequate to support a conclusion that worker's death was not related to his employment. AS 23.30.120(1).

2. Workmen's Compensation ⇌ 1339

In the absence of presumption of compensability, workmen's compensation claimants must prove all elements necessary to establish a claim. AS 23.30.120(1).

3. Workmen's Compensation ⇌ 1359

Rule that any doubt as to substance of medical testimony should be resolved in fa-

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ADDITIONAL COMMENTS (Non-Confidential)

32. Please make any additional comments that you wish to bring to the Council's attention regarding your experience and suitability for this judgeship.

I believe I have excellent qualifications for the position of Superior Court Judge in Nome, Alaska. My background as a private general practitioner affords me good insight into the realistic needs of civil litigants. As an attorney who primarily represented individual clients, as opposed to institutional clients, I am sensitive to the expense of litigation and believe that as a judge I can help minimize such costs by establishing procedures which encourage speedy resolution of such matters.

I have represented parties in domestic, child in need of aid, and termination actions and understand the emotional consequences of such proceedings to all concerned. I have also represented juveniles, been a single parent for two sons, and the victim of a burglary perpetrated by juvenile offenders. These experiences have taught me some of my most important lessons.

I have substantial experience in criminal actions, the majority as criminal defense counsel; however, for approximately six years, I acted as city attorney to Bethel, Alaska. During a portion of that time I drafted and acted as prosecutor on municipal in-fraction matters. This experience has given me insight into the realities of law enforcement. I am aware of the need for firm, fair and consistent sanctions for breach of societal norms.

As a consequence of working for many years in the substance abuse field, I am also aware of the terrible cost society pays for alcohol and drug abuse and applaud the determined efforts of the rural communities to confront the use and effects of alcohol and drugs. I know the majority of rural defendants are involved with the law as a consequence of actions undertaken under the influence of alcohol or drugs, but also realize that treatment can work, if an individual wishes to change his or her behavior.

During my practice, I have had the opportunity to act as public defender for the Yukon-Kuskokwim delta area and thereafter, to serve as city attorney for Bethel from 1976 until the early 80's. I have also handled cases and tried matters outside Anchorage and Fairbanks, including Juneau, Haines, Valdez, Kodiak, Nome, Kotzebue, and Barrow. I have some appreciation of cross-cultural issues and am sensitive to important native concerns like subsistence and sovereignty. Most importantly, I believe my life experience has made me aware that there are few absolutes. The majority of the issues which our society face are those in which both sides have realistic and legitimate points of view. At age 50 I have developed a good and reliable decision making process and accept responsibility for those decisions. My family, friends and clients regard me to be a reliable sounding board for ideas, concerns and troubles, large and small. These are qualities most people would expect in a judge before whom they might appear.