IN THE SUPREME COURT OF THE STATE OF ALASKA

Russell Peterson, Jr.,	)	
	)	
Petitioner,	)	**Supreme Court No. S-14233**
	)	
vs.	)	
	)	
State of Alaska,	)	
	)	
Respondent.	)	
	)	

Superior Court No. 1JU-10-569 CI

PETITION FOR REVIEW FROM THE SUPERIOR COURT
FIRST JUDICIAL DISTRICT AT JUNEAU
HON. PHILIP M. PALLENBERG, JUDGE

PETITIONER'S OPENING BRIEF

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Filed in the Supreme Court of the
State of Alaska this _____ day of
July, 2011

Marilyn May, Clerk

By:_____
Deputy Clerk

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Constitutional Provisions

State Constitutional Provisions

State Statutes

Other Authorities

PROVISIONS RELIED ON

U.S. Const. 1st Amend.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. 14th Amend. Sec. 1

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alaska Const. Art. 1, Sec. 1. Inherent Rights.

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Alaska Const. Art. 1, Sec. 7 Due Process.

No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

Alaska Const. Art. 12, Sec. 6 Merit System.

The legislature shall establish a system under which the merit principle will govern the employment of persons by the State.

Alaska Statute 23.40.080. Rights of public employees.

Public employees may self-organize and form, join, or assist an organization to bargain collectively through representatives of their own choosing, and engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Alaska R. Evidence 408

Compromise and Offers to Compromise.

Evidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution, but exclusion is required where the sole purpose for offering the evidence is to impeach a party by showing a prior inconsistent statement.

Alaska R. Evidence 501

Rule 501. Privileges Recognized Only as Provided.

Except as otherwise provided by the Constitution of the United States or of this state, by enactments of the Alaska Legislature, or by these or other rules promulgated by the Alaska Supreme Court, no person, organization, or entity has a privilege to:

(1) refuse to be a witness; or

(2) refuse to disclose any matter; or

(3) refuse to produce any object or writing; or

(4) prevent another from being a witness or disclosing any matter or producing any object or writing.

Collective Bargaining Agreement with the State for AFSCME Local 52, Sec. 103

Exclusive Representation.

The Employer will not negotiate or handle grievances with any individual or employee organization other than the Union with respect to terms and conditions of employment of bargaining unit members in the GGU. When individuals or organizations other than the Union request negotiations or seek to represent bargaining unit members in grievances or to otherwise represent bargaining unit members in Employer/employee matters, the Employer shall advise them that the Union is the exclusive representative for such matters. Similarly, the Union will so advise individuals or organizations making such requests.

JURISDICTIONAL STATEMENT

This case comes on a Petition for Review from an order of the trial court of the Hon. Philip M. Pallenberg, dated March 17, 2011. This court granted the Petition for Review on April 27, 2011, and ordered briefing. This court has jurisdiction under AS 22.05.010.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

When a State of Alaska employee who is a union member is terminated, the State requires that the employee pursue a mandatory grievance process before he can file suit. The State requires that the employee be represented by the union in that process and does not allow a private attorney to participate. When the grievance process has ended and the employee then files suit, may the State, in the subsequent litigation, subpoena all internal union documents, communications, and files related to the member, including all communications between union officials and the member related to the grievance and all communications between the union and the member's private attorney working on the same matter? Does a lay advocate-client privilege similar to an attorney-client privilege apply when the party is not allowed to have his attorney represent him but only a lay advocate?

STATEMENT OF THE CASE

The petitioner, Russell Peterson, a former State employee, filed an action for unjust termination against the State.[1] [Exc. 1] Before filing the court case, he exhausted his administrative remedies by filing a grievance through his union, as required. [Exc. 51] Under the Collective Bargaining Agreement with the State, only a union representative was allowed to represent the employee in the grievance process; his private attorney was not permitted to

[1] The State claimed that Mr. Peterson had failed to note on his employment application that he had been convicted of a felony almost twenty years earlier. Mr. Peterson's defense is that he was told by a State employment officer that he did not need to list offenses that occurred so long ago, that he had a genuine confusion about whether old offenses were juvenile adjudications or adult convictions, and that the State had known about his record soon after he was hired and had decided that it was not a firing offense since he has had a clean record since moving to Alaska many years ago. [Exc. 1-6] These issues remain to be tried.

participate. [Exc. 20][2] After the grievance process ended and the employee filed suit, the State's attorney attempted to obtain discovery in several problematic ways, including a subpoena of all the union's records related to the member and his grievance, including all private communications, notes, and files related to the grievance, and all communications from Mr. Peterson's private attorney to the union.[3]

Mr. Peterson objected to this and related demands,[4] on the basis that communications with his union representatives should be considered privileged as the union representative was acting in the role of an attorney when no attorney was allowed, and that to allow one side in litigation to have access to all the private factual and strategic communications between the opposing party and his legal representative would violate due process. U.S.

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[2] The entire collective bargaining agreement in effect at the time of the incidents in this case is at http://www.afscmelocal52.org/component/option,com_docman/task,doc_download/gid,258/.

[3] The initial subpoena was quashed by the court because the State's attorney had improperly used a court form intended for use in children's cases instead of a subpoena duces tecum to a deposition. [Exc 28, 31] The state's attorney then served a subpoena in proper form. [Exc. 50]

[4] The State also subpoenaed all records of Mr. Peterson's mental health provider, including a memo from his attorney to his psychiatrist outlining the likely course of litigation so that the stresses of the litigation could be factored into his mental health treatment. [Exc. 158-175] And the State seized hundreds of emails from and to Mr. Peterson which were transmitted over the State's email system during his employment, including emails to his union stewards and other union officials and emails to his private attorney, marked as "confidential." [*Id.*] The trial court ruled that the memo to the psychiatrist must be produced because by writing to someone other than the client, the attorney waived the client's privilege, notwithstanding the fact that the psychiatrist also had a privilege for patient/client communications. But the trial court ruled that the emails to and from union officials could not be seized because Mr. Peterson had a reasonable expectation of privacy in those communications. [Exc. 169-175] Neither of those rulings is the subject of this Petition.

Const., 14th Amend., Sec. 1; Alaska Const. Art. 1, Sec. 7.

On March 1, 2011, the trial court ruled that the State could obtain all the union records because the attorney/client privilege applies only to attorney representation, not to a non-lawyer advocate performing the same function. [Exc. 159-175] Petitioner contends that it is a fundamental violation of due process to permit one side in litigation to discover private communications, opinions, and strategies between the other party and his legal advocate. There had been a trial date but the court took it off the calendar so the State could pursue its discovery claims.

STANDARD OF REVIEW

Rulings on discovery and on discovery are generally reviewed for abuse of discretion. *Christensen v. NCH Corp.*, 956 P. 2d 468 (Alaska 1998). However, when, as here, the issue before the court is purely one of law, the court is not bound by the lower court's decision; consequently, the "clearly erroneous" standard used in reviewing a trial court's factual findings is inapplicable. *Day v. A & G Construction Co.*, 528 P.2d 440, 443 n.3 (Alaska 1974). The court will adopt the rule of law that is most persuasive in light of precedent, reason, and policy. *Guin v. Ha*, 591 P. 2d 1281 (Alaska 1979).

SUMMARY OF ARGUMENT

State and federal courts and administrative agencies have long recognized that when the government permits or – as in this case – *requires* lay advocates to be the sole legal representatives of employees in legal proceedings, the representation must have the same privilege of confidentiality that adheres when the advocate is a bar member. Some courts and agencies have recognized a broader union privilege that precludes the government from

forcing union officials to divulge confidential discussions during the collective bargaining process; the State's demands here may be an opening wedge for such a demand, but existence of a broader privilege need not be decided in this case. Where, as here, a constitutional due process right is at issue, the courts have universally held that a court may recognize a privilege without legislative action, and this court has done so on several occasions.

ARGUMENT

I. Courts have consistently recognized a due process right to representation in legal proceedings involving employment rights. The right to representation includes the right to confidentiality between client and legal representative.

A. Employment is a right and a public employer may not deprive an employee of that right without due process

Alaska has long recognized that employment is a right, and a public employer may not deprive an employee of that right without due process.[5] *See* Alaska Constitution, Art. I, Sec. 1, and Article 12, Section 6 ("This constitution is dedicated to the principle [...] that all persons have a natural right to . . . the enjoyment of the rewards of their own industry.").

Due process includes the right to notice and an opportunity to be heard.[6] When due process is implicated, there is a right to counsel, including in civil cases.[7] As this court held,

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[5] *Hilbers v. Municipality of Anchorage*, 611 P.2d 31, 35 (Alaska 1980); *Herscher v. State, Dep't of Commerce*, 568 P.2d 996, 1002 (Alaska 1977).

[6] *Casey v. City of Fairbanks*, 670 P.2d 1133 (Alaska 1983).

[7] *Langfeldt-Haaland v. Saupe Enterprises, Inc.*, 768 P.2d 1144 (Alaska 1989); *Reynolds v. Kimmons*, 569 P.2d 799 (Alaska 1977).

> "The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363, 1369 (1914) (citations omitted). *See* Nichols v. Eckert, 504 P.2d 1359 (Alaska 1973); Frontier Saloon, Inc. v. Alcoholic Beverage Control Board, 524 P.2d 657 (Alaska 1974). And, "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct. 55, 64, 77 L.Ed. 158, 170 (1932).

Otton v. Zaborac, 525 P. 2d 537, 539 (Alaska 1974). Before a government employee may be fired, a hearing must be held at which the employee may present his own defense by testimony and other evidence in an adversarial hearing. *North Slope Borough v. Barraza*, 906 P.2d 1377 (Alaska 1995).[8] And this court has noted that the requirement of an adversarial hearing may, in limited circumstances under a collective bargaining agreement, be waived when there are "fair, reasonable, and efficacious procedures by which employer-employee disputes may be resolved." *Cassel v. State Dept of Admin.*, 14 P.3d 278, 286 (Alaska 2000). Persons who are employed other than "at will" have a sufficient property interest in continuing their employment absent just cause for their removal, to require that they be given notice and an opportunity to be heard under the due process clause of the Alaska constitution before their employment is terminated. *Casey v. City of Fairbanks*, 670 P2d 1133 (Alaska 1983).[9]

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[8] *North Slope Borough v. Barazza* cited *Storrs v. Municipality of Anchorage*, 721 P.2d 1146 (Alaska 1986) and *Nichols v. Eckert*, 504 P.2d 1359, 1365 (Alaska 1973), for the right to an adversarial hearing with witnesses. *See also Cassel v. State, Department of Administration*, 14 P.3d 278, 286 (Alaska 2000), which affirms the right of a terminated public employee to present evidence, by testimony or otherwise, in his own defense.

[9] *See also FV American Eagle v. State*, 627 P.2d 284 (Alaska 1982); *Crutchfield v. State*, 627 P.2d 182 (Alaska 1980).

B. There is a constitutional right to counsel in civil cases arising from the due process clause

There is a constitutional right to counsel in civil cases arising from the due process clause, *Langfeldt-Haaland v. Saupe Enters*, 768 P.2d 1144 (Alaska 1989).[10] As noted above, this court has held that the "right to be heard" would be of little value if it did not include "the right to be heard by counsel."[11]

In this case, the State has prohibited private attorneys from appearing as counsel and mandated the use of union officials to represent the members. Section 103 of the collective bargaining agreement between the State and the General Government Unit of State employees is explicit regarding who may represent an employee and who may not:

> The Employer will not negotiate or handle grievances with any individual or employee organization other than the Union with respect to terms and conditions of employment of bargaining unit members in the GGU. When individuals or organizations other than the Union request negotiations or seek to represent bargaining unit members in grievances or to otherwise represent bargaining unit members in Employer/employee matters, the Employer shall advise them that the Union is the exclusive representative for such matters. Similarly, the Union will so advise individuals or organizations making such requests.

[Exc. 20] Thus the State has explicitly and emphatically decreed that attorneys may not represent employees in Mr. Peterson's situation, but only union officials may do so.

The question then is, what becomes of the rights associated with legal representation

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[10] *Accord, Otton v. Zaborac*, 525 P.2d 537 (Alaska 1974).

[11] *Otton v. Zaborac*, 525 P.2d 537 (Alaska 1974), quoting from *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S.Ct. 55, 64, 77 L. Ed. 158, 10 (1932).

– such as client confidentiality – in a matter requiring constitutional due process standards, when the State has prohibited attorneys from representing a party.

II. Confidentiality Between Advocate And Client Is Critical To Effective Representation.

This court has consistently upheld the importance of confidentiality between a client and his legal representative. Evidence Rule 503 offers substantial protections for such communications in almost all instances. This court held that the attorney-client privilege extends to client communications with a non-lawyer working with a lawyer in legal representations.[12] Although the facts of that case differ from this case, the court made certain points that matter here:

> ...the very heart of the common-law privilege was to protect the facts given by the client to his attorney. The privilege was based on the necessity that an attorney have the full disclosure of the facts from his client.[13]

The court has also noted the important public policy purpose of the privilege:

> Other jurisdictions have held, however, that lawyer-client privilege is more than just a testimonial exclusion. "The privilege against disclosure is essentially a means for achieving a policy objective of the law. The objective is to enhance the value which society places upon legal representation by assuring the client full disclosure to the attorney unfettered by fear that others will be informed. . . . If client and counsel must confer in public view and hearing, both privilege and policy are stripped of value." The Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 263 Cal.App.2d 41, 53-54, 69 Cal.Rptr. 480 (1968) (since superseded by statute).[14]

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[12] *American Nat. Watermattress Corp. v. Manville*, 642 P.2d 1330, 1333-1334 (Alaska 1982).

[13] *Id.* at 1334, citations omitted.

[14] *Cool Homes, Inc. v. Fairbanks North Star Borough*, 860 P.2d 1248, 1261 n.23 (Alaska, 1993).

The court has stated that the attorney-client privilege is entitled to "greater solicitude" than the physician-patient privilege.[15] This makes relevant the court's treatment of the physician-patient privilege. In *Allred v. State*, 554 P.2d 411 (Alaska 1976), the court found that a common law psychotherapist-patient privilege exists, based on consideration of the following factors that apply to all claims of privilege:

> Professor Wigmore has proposed four canons to be used as a basis for determining whether, for any particular relationship, a common law privilege is desirable. These are:
>
> > (1) The communications must originate in a confidence that they will not be disclosed.
> >
> > (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
> >
> > (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
> >
> > (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. 8 J. Wigmore, Evidence, § 2285. (Emphasis in original).[16]

The court found that the need for confidentiality is essential in order to make the relationship work. So the question then becomes, is the need to maintain confidentiality between a person in a legal dispute and his authorized advocate any less critical when the advocate is not a bar member; and does it make a difference that the State itself has prohibited private attorneys from participating in the process in this matter.

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[15] *Lewis v. State*, 565 P.2d 846 (Alaska 1977) at note 4.

[16] 554 P.2d at 417.

III. Courts And Labor Agencies Have Consistently Recognized Confidentiality As a Due Process Right Where Lay Advocates Are Permitted, But Have Varied In Whether There Is a Broader Union Privilege In Other Contexts.[17]

A. State courts and agencies.

Several states have addressed this issue or related ones.

California: In California, the seminal case is *Welfare Rights Org. v. Crisan*, 661 P.2d 1073, 33 Cal 3d 766, 90 Cal. Rptr 919 (Cal. 1983). In *Crisan*, a statute permitted welfare recipients to be represented by lay advocates, although attorneys were not barred, as here. The California Supreme Court held that the privileges that would otherwise be applicable to an attorney-client relationship also apply to the lay relationship when the Legislature has created a system of lay representation. The court held,

> [T]he considerations which support the privilege are so generally accepted that the Legislature must have implied its existence as an integral part of the right to representation by lay persons. Otherwise that right would, in truth, be a trap by inducing confidential communications and then allowing them to be used against the claimant. We do not attribute such a sadistic intent to the Legislature.

661 P.2d at 1076-77.[18] The court also said,

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[17] The best analyses of caselaw on this topic is found in these articles: Moberly, Michael D., Extending a Qualified Evidentiary Privilege to Confidential Communications between Employees and Their Union Representatives, 5 Nev. L.J. 508 (2004-2005); Rubinstein, Mitchell, Is a Full Labor Relations Evidentiary Privilege Developing?, 29 Berkeley J. Emp. & Lab. Law 221 (2008). Also useful is Goldman, David, Union Discovery Privileges, The Labor Lawyer Vol. 17. No. 2, p. 241 (2001), which analyzes the First Amendment protections against obtaining confidential union information on members and bargaining strategy under the First Amendment and other authorities.

[18] Other courts have noted that this privilege does not extend to immunizing underlying factual information known by the union official, see *American Airlines, Inc. v. Superior Court*, 8 Cal. Rptr. 3d 146 (Cal. App. 2004); *Walker v. Huie*, 142 F.R.D. 497, 500 (D.Utah 1992). The

> As Justice Broussard noted at oral argument, the Legislature could not have intended that the only sound advice the authorized representative could give was, "Don't talk to me."[19]

Subsequently a California appeals court held that *Crisan* did not create a broad union-member privilege but was limited to the situation where the state itself created a system of lay representation, or where "required by constitutional principles, state or federal." *American Airlines, Inc. v. Superior Court*, 8 Cal Rptr 3d 146, 114 Cal. App. 881 (Cal. App. 2004), citing *Crisan, id.*, 661 P.2 1073.

New York: In New York, there are two key cases. In *City of Newburgh v. Newman*, 70 A.D. 2D 362, 421 NYS 2d 673 (1979), a police commissioner had questioned an officer of a police union regarding his observations of and communications with a member who had sought union advice and assistance concerning discipline charges against him. The court upheld the ruling of the Public Employee Relations Board that such questioning was improper. It quoted with approval the board's finding that

> An aspect of the right of public employees to organization and representation is the privilege of consulting with appropriate union officials as to matters affecting them as employees. Such consultations are in the nature of internal communications and, like other internal union affairs, they may be deemed confidential by the union and the employees. To invade that confidentiality tends to inhibit the employees from seeking the advice of their union representatives as to matters affecting their interest and similarly to deter the representatives from proffering advice, if sought. Thus, questioning by responsible representatives of an employer as to private internal union affairs such as events transpiring during discussions relating to the rights of

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defendants here have gone well beyond a discovery request for factual information and made a sweeping demand for materials that undoubtedly would be privileged if held by an attorney.

[19] *Welfare Rights Org. v. Crisan*, 661 P.2d 1073, 1076-77 (Cal. 1983).

> employees in the face of anticipated disciplinary charges interferes with the full measure of the protected right of organization and representation accorded by the Taylor Law.[20]

[70 A.D. 2D 364-5.] The court found that its ruling did not create a common-law privilege "on a par with that of attorney-client" but found that its ruling was "strictly limited to communications between a union member and an officer of the union, and operates as against the public employer, on a matter where the member has a right to be represented by a union representative." *Id.* at 366.

In *Seelig v. Shepard*, 578 N.Y.S. 2D 965, 152 Misc. 2d 699 (Supr. Ct. 1991), investigators sought testimony of a union official on his communications with members, and the official objected. The court summarized the need to protect such communications:

> Petitioner does not have, and, as I understand him, does not even claim to have, a broad common-law privilege, an analogue of the attorney-client privilege. There is, however, plainly a need, for the benefit of society as a whole, for unions to be free to function without harassment and interference from government. Accordingly, there arises, in the context of rules regulating relations between management and labor, a species of privilege for labor union leaders. If unions are to function, leaders must be free to communicate with their members about the problems and complaints of union members without undue interference. Members must be able to have confidence that what they tell their representatives on such subjects cannot be pried out of the representatives by an overzealous governmental agency. Union members must know and be secure in feeling that those whom they elect from among their ranks will be their spokespersons and representatives, not the unwilling agents of the employer. The union leadership councils must be free to confer among themselves, exchange views, make plans and arrive at negotiating strategies without intrusion from the organs of official power.

152 Misc. 2d at 701-2, 578 N.Y.S. 2d at 967. The court also held that requiring an official to

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[20] The Taylor Law is New York State's statutory recognition of the rights of workers to organize and be represented through unions, the equivalent to Alaska Statutes 23.40.070-260 and specifically AS 23.40.080.

testify on communications with members could violate the members' associational rights under the First Amendment (U.S. Const. 1st Amend.) due to the chilling effect of compelled disclosure.[21]

Seelig was followed by *District No. 1-PCD v. Apex Mar Co.*, 296 AD 2d 32 (NY App. Div. 2002), in which the court found that an arbitrator illegally allowed an employer to demand a confidential statement by a union member made to a union official; it found that the demand "may have breached the confidentiality protections that have been recognized as attaching to communications between a union member and the union with respect to representation matters." *Id*, at fn. 2.[22]

Illinois: In Illinois a full labor relations privilege has been recognized. In *Illinois Educ. Labor Relations Bd. v. Homer Cmty. Consol. Sch. Dist.*, 547 N.E.2d 182 (Ill. 1989), a reverse situation occurred: During labor negotiations, a teachers union sought the school district's

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[21] The court held,

> Petitioner contends that compelling his testimony would have a chilling effect on the associational rights of his members. Insofar as intra-Union communications on labor relations matters are concerned, the privilege I have described above is available to protect the members' rights. To the extent that questioning about communications made by petitioner to non-Union members is concerned, such questioning, allowed by the labor relations privilege described above, may well give rise to serious problems for the preservation of First Amendment rights. (*See, New York State Commn. on Govt. Integrity v Congel*, 142 Misc 2d 9 [Sup Ct 1988, Glen, J.], mod 156 AD2d 274 [1st Dept 1989], supra.) *Id* at 703.

[22] A Federal District Court, construing New York law, found that this privilege should be strictly construed to attempts by the employer to obtain confidential information and that it should not be expanded to a full equivalent to an attorney-client privilege. *In re Grand Jury Subpoenas*, 995 F. Supp. 332, 336 (E.D. NY 1998).

documents related to its bargaining strategy. The Illinois Supreme Court found the documents were subject to a qualified labor relations privilege, citing the four factors in *Wigmore* that this court cited in *Allred v. State*, 554 P.2d 411 (Alaska 1976), when it found a psychotherapist-patient privilege. The court also analogized the interest in confidentiality to that attorney work-product privilege (547 N.E. 2d at 187), and quoted from a National Labor Relations Board decision revoking subpoenas for union records of communications with members:

> ...requiring the Union to open its files to Respondent would be inconsistent with and subversive of the very essence of collective bargaining and the quasi-fiduciary relationship between a union and its members.[23]

New Hampshire: The New Hampshire Supreme Court addressed the situation in which a grand jury sought evidence from a union official as part of its criminal investigation, and found that whatever privilege may exist as to employer efforts to gain evidence from a union, there was insufficient reason to find such a privilege as to grand jury testimony. *In re Grand Jury Subpoena*, 926 A.2d 280 (N.H. 2007). The court acknowledged that a state administrative agency had declared an employer subpoena of union records to be an illegal and unfair labor practice, *New Hampshire Troopers Association v. New Hampshire Department of Safety, Division of State Police*, PELRB Decision No. 94-74 (August 31, 1994); and discussed at length in rulings by two federal labor relations boards that found such employer discovery to be illegal.

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[23] *Berbiglia, Inc., v. NLRB*, 233 N.L. R. B 1476, 1495 (1977) *aff'd* 602 F.2d 839 (8th Cir. 1979). The Illinois court also noted that this labor privilege is qualified and could be overcome by a showing of necessity after an in camera inspection of the documents.

New Jersey: In *Rawlings v. Police Dept of Jersey City*, 627 A.2d 602 (N.J. 1993), a policeman was arrested for sale of drugs. The police department, as his employer, demanded an immediate drug test and sought the testimony of a union official who gave advice to the arrested member. The court rejected the claim that the official was in the position of a lawyer representing a client, with little analysis of what protections may apply, and applied the definition of "lawyer" in the state's evidence code literally.

B. Federal Courts:

Federal courts have held widely diverse opinions. The U.S. Supreme Court has not addressed this specific issue but several of its decisions are relevant to the rights of unions and union members.

In *NLRB v. J. Weingarten, Inc.*, 420 US 251 (1975), the Court held that a union member had a right to have a union representative present during an investigative interview by the employer and commented at length on the importance of allowing a worker to have representation during any interview or questioning. This right – now commonly referred to as the "Weingarten" right – is recognition that an employer may not invade the important relationship between union member and his union officials who are aiding him.[24]

In *Teamsters Local 391 v. Terry*, 494 U.S. 558, 567, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990), the Court held that there is a right to a jury trial in a suit by a member against a union for failure to represent and breach of its fiduciary duty; the court analyzed the nature of the fiduciary duty to protect its members' interests. It is a logical extension that forcing the

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[24] The Supreme Court analyzed issues related to privileges in general in *Jaffee v. Redmond*, 518 U.S. 1 (1996), in which it recognized the psychotherapist-patient privilege.

union to reveal what it has learned in confidence as part of its mandated duty to represent its members in a legal proceeding would breach that relationship of trust by converting the union into management's agent for the collection and transmittal of information that employees might not otherwise choose to reveal.

The Supreme Court has also held that states may not refuse to allow lay representation in a case involving a non-attorney "jailhouse lawyer", except if inmates are given a reasonable alternative, *Johnson v. Avery*, 393 U.S. 483, 490 (1969). The underlying rule adopted by the court is that the party must have access to effective legal representation, whether by an attorney or by a lay advocate.[25]

In *Harvey's Wagon Wheel, Inc. v. NLRB*, 550 F.2d 1139, 1143 (9th Cir. 1976), the Ninth Circuit Court of Appeals found a privilege against a demand for disclosure to an employer of employee statements made to NLRB investigators during an official investigation, citing evidence that employees would not provide information that the NLRB needed in litigation if they knew that the employers could obtain the statements.

A Federal District Court in New York found that a union-member privilege existed but should be limited to attempts by the employer to obtain confidential information and that it should not be expanded to a full equivalent to an attorney-client privilege. *In re Grand Jury Subpoenas*, 995 F. Supp. 332, 336 (E.D. NY 1998).

The union-member privilege was recognized in *International Union v. Garner*, 102

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[25] The Court has even granted a petition for writ of certiorari filed by a non-attorney jailhouse lawyer. *See Mitchell H. Rubinstein*, Jailhouse Lawyer Granted Cert. By Supreme Court, ADJUNCTLAWPROFESSORBLOG, Feb. 7, 2008, http://lawprofessors.typepad.com/adjunctprofs/2008/02/jailhouse-lawyer.html.

F.R.D. 108 (M.D. Tenn. 1984). The case involved an attempt by an employer to gain access to union authorization cards signed by members and was largely based on application of the First Amendment to confidentiality in the union-member relationship.

In *Patterson v. Heartland Indus. Partners*, 225 F.R.D. 204 (N.D. Ohio 2004), the court rejected a full labor relations privilege under labor principles, but accepted the proposition that First Amendment Freedom of Association principles prevent the disclosure of confidential labor relations information.

On the other hand, some federal courts have been less receptive to union confidentiality. In *Walker v. Huie,*142 F.R.D. 497, 500 (D.Utah 1992), the court found that there was no basis for a union-member privilege that would withstand the duty to testify before a grand jury.

A full union relations privilege was rejected by a magistrate judge in *Ahearn v. Rescare W. Va.*, 208 F.R.D. 565 (S.D. Va. 2002), who found that some protections applied but others did not. A district court rejected a claim of a general privilege of members with union officials, *Atwood v. Burlington Industries Equity, Inc.*, 908 F. Supp. 319 (MD N.C. 1995), and in *McCoy v. Southwest Airlines*, 211 F.R.D.381, 387 (C.D. Cal. 2002), a federal magistrate judge found that no privilege should apply to union representation in a grievance proceeding when there was no express statutory authorization for lay representation, as there was in *Crisan* (and there is in the instant case).

In contrast, in *Woods v. N.J. Dept of Education*, 858 F. Supp. 51, 55 (D. N.J. 1993), which involved Special Education hearings at which lay advocates are permitted, the court found that a privilege attached to communications with the advocate. In *NLRB v. Jackson*

Hospital Corporation, 257 F.R.D. 302, 311-12 (D. D.C. 2009), the court acknowledged the existence of a "de facto attorney-client privilege" where there is no actual attorney-client relationship but one entity is acting like the other's attorney, focusing on statements made by an individual to agency staff who the individual believed were providing him with legal advice. The court found that the "common interest" of the two in a common effort was sufficient to provide a privilege. Conversely, in *Nemecek v. Bd. Of Governors of the University of N.C.*, 2000 WL 33672978 (E.D. N.C. 2002), the court expressed skepticism regarding whether a privilege attached to a lay representative in the absence of a statute permitting lay representation.

C. Federal Administrative Agencies

The most frequently cited administrative ruling on this topic is *Cook Paint and Varnish Co.*, 258 NLRB 1230 (1981). The National Labor Relations Board found that the employer committed an unfair labor practice when it questioned a union steward who had been involved in another employee's grievance arbitration and threatened to discipline the steward if he did not turn over his notes. The Board held,

> Clearly, the scope of Respondent's questioning . . . impinged upon protected union activity. For while questions posed by Nulton may be termed "factual inquiries," the very facts sought were the substance of conversations between an employee and his steward, in the course of fulfilling his representational functions. Such consultation between an employee potentially subject to discipline and his union steward constitutes protected activity in one of its purest forms. To allow Respondent here to compel the disclosure of this type of information under threat of discipline manifestly restrains employees in their willingness to candidly discuss matters with their chosen, statutory representatives. Such actions by Respondent also inhibit stewards in obtaining needed information from employees since the steward knows that, upon demand of Respondent, he will be required to reveal the substance of his discussions or face disciplinary action himself. In short, *Respondent's probe into . .*

> *. protected activities has not only interfered with the protected activities of those two individuals but has also cast a chilling effect over all of its employees and their stewards who seek to candidly communicate with each other over matters involving potential or actual discipline.*

Cook Paint, 258 NLRB at 1232 [emphasis added]. *Cook Paint* built on the earlier NLRB decision in *Berbiglia, Inc.*, 233 NLRB 1476, 1495 (1977), *aff'd* 602 F.2d 839 (8th Cir. 1979), in which the Board noted that the employer was engaged in a "fishing expedition," and that forcing a union to open its files to the employer would be "subversive of the very essence of collective bargaining and the quasi-fiduciary relationship between a union and its members."

See also *U.S. Department of Treasury*,38 F.L.R.A. 1300, 1302 (1991), in which the Federal Labor Relations Agency held that when the employer required the union representative to disclose, under threat of disciplinary action, statements that the employee had made to the representative while the representative was representing him in a disciplinary proceeding, the conversations between the union representative and employee constituted protected union activity.

State administrative agencies in Washington and New Hampshire responsible for public sector labor-management relations held that unions were not required to disclose investigatory notes to employers for use in labor arbitrations. *N.H. Troopers Ass'n v. N.H. Dep't of Safety*, No. P-0754:2, PELRB Decision No. 94-74 (N.H. Pub. Employee Relations Bd. August 31, 1994),[26] (recognizing a labor relations privilege as against the employer, but not as against third parties); *IBEW, Local 77*, No. 15544-U-00-3932, 2003 WL 21658695 (Wash. Pub. Employment Relations Comm'n 2003).

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[26] Available at http://www.nh.gov/pelrb/Decisions/1994/94-74.pdf.

D. Summary

Courts and administrative agencies in other jurisdictions have been uniform in holding that when lay representation is allowed or required, due process requires recognition of a confidentiality privilege between the party and the lay advocate, at least as to demands from the employer in civil litigation. Most courts that have considered the issue have declined to extend this to a more general labor union privilege or to extend it to confidentiality in grand jury proceedings. Courts and agencies have largely analyzed this issue in terms of the constitutional right of due process, the constitutional right to freedom of association under the First Amendment, and state and federal statutory rights to maintain unions.

In this case, in which lay union representation has been both authorized and mandated by the State, and that same State is now attempting to obtain confidential union files, there is no question that precedents in other jurisdictions would protect the files, notes, and communications of the union in connection with representation of its member. There are literally no cases that would find a lack of a privilege in these circumstances.

IV. The courts universally agree that they can recognize a privilege when constitutional due process requires it; beyond that, it is a matter of whether courts or legislatures set the basic rules governing legal processes.

A subsidiary issue is who has the authority to recognize a union-member privilege in whatever form it may take.

Every court that has reviewed this point has concluded that when a privilege must be recognized to satisfy a constitutional requirement, such as due process in connection with lay

representation, the courts are fully empowered to make such rulings.[27] Indeed, the opening language of the section of the Alaska Rules of Evidence on privileges, ER 501, explicitly states that a person may not refuse to testify or to produce materials "Except as otherwise provided by the Constitution of the United States or of this state, by enactments of the Alaska Legislature, or by these or other rules promulgated by the Alaska Supreme Court." In other words, when there is a constitutional basis for a privilege, it provides protections notwithstanding the fact that neither this court nor the legislature has codified it.

In states in which evidence codes – including recognition of privileges – is a legislative prerogative, not a creation of the courts, there has been a hesitation on the part of some judges to recognize privileges beyond what is necessary to comply with constitutional minimums, e.g., *American Airlines, Inc. v. Superior Court*, op. cit.; *McCoy v. Southwest Airlines*, op cit. It is important to note here that in California and New York, the evidence rules used in courts are creations of the legislatures[28] whereas in Alaska the Rules of Evidence are

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[27] *Seelig*, op. cit.; *New York State Commn. on Govt. Integrity v Congel*, op. cit.; *Patterson v. Heartland Indus. Partners*, op. cit.; *International Union v. Garner*, op. cit.;

[28] California Evidence Code, found at www.leginfo.ca.gov; 2006 New York Code: Civil Practice Law and Rules, Secs. 4501-4548. It should be noted that in both *Crisan*, op. cit., in California, and *Seelig*, op. cit., in New York, the finding of a union-member privilege was not because of anything in the respective evidence code, but was result of a statutory scheme of lay representation that gave rise to a constitutional right of confidentiality. There is some confusion among the federal courts on recognition of privileges due to the fact that the Federal Rules are initially promulgated by the Supreme Court but then are reviewed and sometimes changed by Congress. As an example of the unsettled nature of the federal view on this matter, although Congress mandated that U.S. District Courts promulgate rules of confidentiality in mediations, the Ninth Circuit has questioned whether the District Courts actually have that authority. The *Facebook Inc. v. Pacific Northwest Software Inc.*, 2011 WL 1346951 (No 08-16745) (9th Cir. Apr. 11, 2011), in which the court stated in dicta, "It's doubtful that a district court can augment the list of privileges by local rule" and stated that

promulgated by the Alaska Supreme Court under its constitutional authority to prescribe rules of process in the courts. There is thus no reason to defer to the legislature in recognizing privileges or other rules of confidentiality.

The history of recognition of privileges in Alaska is instructive. This court recognized the psychotherapist-patient privilege as a matter of common law while ruling on a specific case and only later codified it through inclusion in the Rules of Evidence.[29] Likewise, this court has recognized common-law confidentiality privileges as to non-lawyers working with attorneys,[30] executive privilege,[31] deliberative process privilege,[32] and a conditional privilege for publication of defamatory material based on employer-employee relationship. In none of these cases did the court hold off from recognizing a privilege so that it could first be codified in court rules or so that the legislature could first enact such a privilege. Indeed, while some of those privileges (attorney-client, physician-patient, and several others) are now codified in the Rules of Evidence, several others (executive privilege, deliberative process privilege, conditional privilege regarding defamatory material) have not been added to the Evidence Rules although the court has recognized them and their constitutional basis.

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privileges are created by federal common law, not local rules. But the rules and authorities for federal evidence rules are sui generis to the federal courts and have no relevance here.

[29] *Allred v. State*, 554 P.2d 411 (Alaska 1976).

[30] *Amer. Nat. Watermattress Corp v. Manville*, 642 P.2d 1330, 1333-4 (Alaska 1982).

[31] *Doe v. Alaska Superior Ct., Third Jud. Dist.*, 721 P. 2d 617 (Alaska1986).

[32] *Capital Info. Group v. Office of Governor*, 923 P. 2d 29 (Alaska 1996).

In short, when there are constitutional grounds for a privilege, the courts, including this one, have never hesitated in recognizing them without a prior codification in rule or in statute.

V. Joint privilege: Any reason not to recognize joint representation? Two positives make a negative?

One of the issues in this appeal concerns the fact that while the union lay representative was representing Mr. Peterson in his grievance, Mr. Peterson also had a private attorney advising him and attempting to advise the union advocate. The State has demanded all communications between the union and the private attorney. The State apparently contends that by communicating with a non-lawyer, the attorney waived the attorney-client privilege, at least as to those communications. What becomes of the confidentiality of Mr. Peterson's communications with his attorney, or his communications with his union representative, when the attorney and the representative confer?

The joint privilege has long been recognized in the criminal context in which attorneys for codefendants work together,[33] as well as in civil cases.[34] Here, the question boils down to the State's "two positives make a negative" claim, i.e., that a communication

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[33] *See, e.g., US v. Austin*, 416 F. 3d 1016 (9th Cir. 2005); *US v. Henke*, 222 F. 3d 633 (9th Cir. 2000).

[34] In *NLRB v. Jackson Hospital Corp.*, 257 F.R.D. 302, 311-12 (D. D.C. 2009), the court found that the "principle of common interest" protected communications between two entities when they were pursuing a common interest and the cooperating in a joint legal effort.

between one person who has the right to maintain confidentiality of client communications (the private attorney), with another person with a confidentiality privilege (the union representative), results in the two privileges cancelling each other out so there is no longer *any* privilege. As strange as that result may seem, it was the rationale used by the trial court in permitting the State to obtain a confidential memo from the private attorney to his client's psychiatrist regarding how the litigation could affect his treatment. (Exc. 160-163). But applying the joint privilege approach, when two entities with a privilege communicate with a common interest in a common client, there is no logical reason that the privilege should not continue to apply. Any other result – such as two positives cancelling each other out and making a negative – would be absurd and contrary to the rationale for observing a privilege in the first place.

VI. The Issues in this Case regarding Confidentiality Privileges Need a Thorough Review.

Obviously we believe that in this case the trial court's order allowing the State to obtain confidential union records relating to its representation of Mr. Peterson should be reversed without delay. If the ruling is not reversed, there are far-reaching ramifications that should be noted.

A. Lay representation in the courts of Alaska.

It is an everyday occurrence for municipal prosecutions in Alaska to be handled by a paralegal, intern, or other non-admitted person; in other places police officers prosecute cases without lawyers. (We pointed out that the U.S. Supreme Court has held that jailhouse

lawyers who are not admitted may represent prisoners in the absence of an alternative,[35] and the Court has even granted a certiorari petition filed by such a non-admitted person on behalf of another prisoner.[36]) So non-lawyers have and will continue to present cases in Alaskan courts. If the trial court's literal interpretation that the privilege only applies to admitted bar members, the question then becomes whether communications between the non-lawyer doing the courtroom prosecution and others, e.g., in a police department or a municipal prosecutor's office, can be discovered by a defendant. If the trial court ruling stands, the question is an open one.

B. Mediations.

Many, perhaps most, mediators, are not lawyers, and there is no requirement that they be lawyers. In a typical mediation, the mediator may meet separately with each side and discuss confidential facts and confidential settlement positions. Although there is a rule barring admission into evidence of offers of compromise in subsequent litigation (Evidence Rule 408), it is entirely conceivable that a mediator could be subpoenaed to turn over notes and made to testify to his or her recollections of confidential information and positions.[37]

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[35] *See Johnson v. Avery*, 393 U.S. 483, 490 (1969). The U. S. Supreme Court recognized that states may prohibit the practice of law by jailhouse lawyers only if the inmates are provided with a reasonable alternative to assistance from such laypersons.

[36] *Mitchell H. Rubinstein*, Jailhouse Lawyer Granted Cert. By Supreme Court, ADJUNCTLAWPROFESSORBLOG, Feb. 7, 2008, http://lawprofessors.typepad.com/adjunctprofs/2008/02/jailhouse-lawyer.html.

[37] This has happened in California, where the state Supreme Court recently held that the mediation provisions of state statutes made the mediator's testimony confidential and inadmissible. *Michael Cassel, Petitioner, v. The Superior Court of Los Angeles County*, 244 P.3d 1080, 51 Cal. 4th 113, 119 Cal. Rptr. 3d 437 (Cal. 2011).

Many mediators protect against this by requiring confidentiality agreements that preclude such a tactic, but a private contractual agreement may not prevent a court subpoena, if the courts do not recognize a privilege for communications with a non-lawyer mediator. If the tactic were to become widespread, it would grievously diminish the likelihood that parties to a dispute would agree to mediation and be frank with the mediator, knowing that the mediator could be forced to repeat what they say to the other side.[38]

C. Statutory Permission for Lay Representation.

To our knowledge, the State's mandate of lay representation in union member grievances is the only such instance in Alaska; but in other jurisdictions statutory systems of lay representation are more common, as in the California case cited above, *Welfare Rights Org. v. Crisan*, 661 P.2d 1073 (Cal. 1983), in which there was a statutory scheme for lay advocates in welfare entitlement hearings. Since the Legislature (or, as here, the executive branch as part of a collective bargaining agreement) can create lay representation systems, any future lay representation system would create the unintended breaches of confidentiality if the trial court decision were not overruled.

D. Calling the advocate as a witness against his own client.

In this case and in similar cases, if there is no privilege attached to client communications, a lay advocate could be called by the other side to testify against his or her own client. It has not arisen in this case yet, but if there is no privilege, there is nothing to

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[38] Similarly, in arbitrations, a non-attorney arbitrator could be forced to divulge information that the parties thought confidential. There is also a question whether a judge or retired judge who acts as a settlement judge and hears confidences can be made to divulge them, since the judge would not be a lawyer-advocate for a client, and would not be, strictly speaking, acting as a judge in the matter.

prevent it from happening, in which case, a union member would be very foolish to share any information with his or her advocate.

E. Demanding the state's confidential documents and subpoenaing its staff as witnesses.

If the state can subpoena union documents related to the grievance process, then it is likely that the employee could demand the State's internal documents and subpoena its staff in the Division of Personnel, since in the grievance and arbitration phases, the state is represented by laypersons, not by attorneys. Internal discussions of strategy and settlement postures would be fair game. So far in this case, the State had resisted all efforts to obtain such materials, but it is likely that if the State succeeds in wiping out the employee's confidentiality rights in this phase, the employee would be justified in demanding the same access to all the State's confidential internal communications. The result would be balanced but hardly fair if neither side could have confidentiality in its internal communications.

F. Confidentiality of collective bargaining strategy.

If there is no confidentiality in union-member relations, it is conceivable that management could subpoena records of the union's collective bargaining strategy and strategic discussions, in which case the entire viability of unions as representatives of the workforce would be in grave jeopardy, and the union's fiduciary duty to its members would be impossible to maintain.[39]

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[39] *See Teamsters Local 391 v. Terry*, 494 U.S. 558, 567, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990) (union has fiduciary duty to protect members' interests). Forcing the union to reveal what it has learned in confidence would breach that relationship of trust by converting it into management's agent for the collection and transmittal of information that employees might not otherwise choose to reveal.

G. Role of unions in prelitigation dispute resolution.

If there is no confidentiality in union-member representation, the entire value of unions as part of the administrative phase of dispute resolution would be lost, and either unions would be forced to lay off their lay staff and hire lawyers for all their grievances and do away with the system in which employees act as union stewards for members. The prelitigation administrative process would become meaningless without advocates and would simply be a time-waster before litigation.

CONCLUSION

The situation in this case has implications for the rights of individual employees as well as for sensible administration of justice. It is a constitutional right to have effective representation at hearings mandated by due process. If the representation is not by an attorney – and particularly where the State itself forbids attorney representation – it must at least have the essential safeguards that would apply if the advocate were an attorney, chief among which is confidentiality so that the client can safely share his or her side of the case without fear that it will all be divulged to the other side. When the employer that seeks to invade the confidential relationship is also the entity that prevented the employer from using an attorney as an advocate, it is all the more vital that the courts safeguard confidentiality and prevent this attack on due process and fair adjudications.

The court should reverse the trial court.

Respectfully submitted this 18th of July, 2011.

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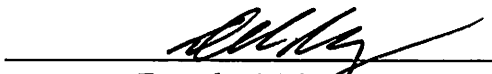

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