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TESTIMONY IN SUPPORT OF SB 224 ON PRIVILEGED UNION COMMUNICATIONS

I am here to testify in support of SB 224. From my own experience I can tell you that it is vital to the rights of individual workers and to the rights of workers to organize effectively.

For the past two years I have been litigating on behalf of a state employee who was fired under outrageous circumstances. To add to his injuries, the State adopted a litigation tactic that is unfair and offensive.

The state required him, like every other state employee, to pursue his claim through an administrative process before he was allowed to file a lawsuit. The state required him, like every other state employee, to use a union official as his advocate and banned attorneys from participating in the process.

Then, when the administrative process ended without resolving the dispute, he was free to bring a lawsuit; but when he did, *the state subpoenaed all the union records related to him*, including all correspondence and emails and notes of meetings between the employee and his union advocate, and even correspondence from his private attorney, related to tactics, to evaluations of the case, and to settlement positions. In short, according to the State, nothing that passes between the employee and his union advocate is private, no matter that for decades the unions and their members had thought they were private. It is a tactic that would be considered unethical and blatantly wrong if used against a litigant who had an attorney in the administrative phase; but here the state itself banned use of an attorney.

Why does this matter?

Confidentiality between an advocate and his client has for centuries been recognized as essential to a fair legal system. Allowing the other side in litigation to obtain all the information and correspondence that has always been considered private would destroy the relationship between advocate and client. This is so whether or not the advocate is an attorney. It would, as the California Supreme Court said, be ridiculous to think that the only advice a union advocate could tell his client would be, "Don't talk to me."

If there were no right to confidentiality, an employer could call a union advocate as a witness against his own client;

If there were no right to confidentiality between a union and its members, an employer could subpoena the other side's notes and minutes of private strategy sessions during collective bargaining sessions; this has already happened in other states.

If there were no right to confidentiality, an employer could subpoena confidential reports of wrongdoing so it could intimidate and punish workers who were reporting misconduct through their union;

If there were no right to confidentiality, no union member would ever talk to his union advocate and the entire system of administrative remedies for worker grievances would become a meaningless nullity.

Why is the Issue Coming up Now?

For decades this tactic was not used by the State or any other employer in Alaska. When it was tried Outside, it almost always failed. But now the Department of Law has decided to try it and has vigorously, if wrongly, defended it. It is on the table right now, being used against public employees right now, and if not challenged is likely to be used against all workers who are members of organized labor. In our case, the state superior court judge refused to stop the practice and said we should take it to the Legislature or to the Alaska Supreme Court. We did appeal his ruling to the Alaska Supreme Court, but it is likely to be many months before the court makes a ruling.

Why should the Legislature address it Now?

This obnoxious practice is before the Alaska Supreme Court. So why should the Legislature use its own judgment on it instead of letting the court do it?

The answer is that the Alaska Supreme Court is doing something different from what you are doing: It is examining whether the Department of Law's tactic violates the Constitution's requirement of due process. It is not deciding whether prohibiting the practice is a good idea. It is is far more difficult to establish a constitutional violation than to decide whether the tactic is basically unfair and repugnant.

You have the ability right now to decide whether union members should be protected from this outrageous tactic. We urge you to pass this bill.

Douglas K. Mertz
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