

**ALASKA STATE LEGISLATURE**  
**SENATE JUDICIARY STANDING COMMITTEE**

March 30, 2012

1:35 p.m.

**MEMBERS PRESENT**

Senator Hollis French, Chair  
Senator Bill Wielechowski, Vice Chair  
Senator John Coghill

**MEMBERS ABSENT**

Senator Lesil McGuire  
Senator Joe Paskvan

**COMMITTEE CALENDAR**

SENATE BILL NO. 138

"An Act relating to the inclusion of the charges of a vendor of goods or services on the bills of certain telecommunications carriers; and adding an unlawful act to the Alaska Unfair Trade Practices and Consumer Protection Act."

- MOVED CSSB 138(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 56

"An Act making arson in the first degree and arson in the second degree serious felonies for purposes of application of the crime of conspiracy."

- HEARD & HELD

SENATE BILL NO. 224

"An Act making privileged certain communications between employees and employee union representatives; and amending Rule 402 and Rule 501, Alaska Rules of Evidence."

- HEARD & HELD

CS FOR HOUSE BILL NO. 6(JUD) am

"An Act authorizing the governor to remove or suspend a member of the Board of Regents of the University of Alaska for good cause; and establishing a procedure for the removal or suspension of a regent."

- SCHEDULED BUT NOT HEARD

SENATE BILL NO. 198

"An Act establishing procedures relating to issuance, suspension, or revocation of certification of police officers by the police standards council; making certain court service officers subject to certification by the police standards council; making confidential certain information that personally identifies a police officer; relating to requesting or requiring police officers to submit to lie detector tests; repealing a provision exempting certain police officers from a prohibition against requiring certain employees to submit to lie detector tests; and providing for an effective date."

- SCHEDULED BUT NOT HEARD

**PREVIOUS COMMITTEE ACTION**

BILL: SB 138

SHORT TITLE: THIRD-PARTY CHARGES ON TELEPHONE BILLS

SPONSOR(s): WIELECHOWSKI, DAVIS, EGAN

01/17/12	(S)	PREFILE RELEASED 1/6/12
01/17/12	(S)	READ THE FIRST TIME - REFERRALS
01/17/12	(S)	L&C, JUD
02/02/12	(S)	L&C AT 1:30 PM BELTZ 105 (TSBldg)
02/02/12	(S)	Heard & Held
02/02/12	(S)	MINUTE(L&C)
02/23/12	(S)	L&C AT 1:30 PM BELTZ 105 (TSBldg)
02/23/12	(S)	<Bill Hearing Postponed>
02/28/12	(S)	L&C AT 1:30 PM BELTZ 105 (TSBldg)
02/28/12	(S)	Moved CSSB 138(L&C) Out of Committee
02/28/12	(S)	MINUTE(L&C)
02/29/12	(S)	L&C RPT CS 3DP 2NR SAME TITLE
02/29/12	(S)	DP: EGAN, DAVIS, PASKVAN
02/29/12	(S)	NR: GIESSEL, MENARD
03/23/12	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
03/23/12	(S)	Heard & Held
03/23/12	(S)	MINUTE(JUD)
03/26/12	(S)	JUD AT 2:00 PM BELTZ 105 (TSBldg)
03/26/12	(S)	Heard & Held
03/26/12	(S)	MINUTE(JUD)
03/30/12	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)

BILL: SB 224

SHORT TITLE: EVIDENCE RULES: UNION/EMPLOYEE PRIVILEGE

SPONSOR(s): LABOR & COMMERCE

03/05/12 (S) READ THE FIRST TIME - REFERRALS  
03/05/12 (S) L&C, JUD  
03/20/12 (S) L&C AT 1:30 PM BELTZ 105 (TSBldg)  
03/20/12 (S) Heard & Held  
03/20/12 (S) MINUTE(L&C)  
03/22/12 (S) L&C AT 1:30 PM BELTZ 105 (TSBldg)  
03/22/12 (S) Moved SB 224 Out of Committee  
03/22/12 (S) MINUTE(L&C)  
03/23/12 (S) L&C RPT 4DP  
03/23/12 (S) DP: EGAN, DAVIS, MENARD, PASKVAN  
03/30/12 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)

BILL: HB 56

SHORT TITLE: INCLUDE ARSON IN CRIMES OF CONSPIRACY  
SPONSOR(s): GATTO, GRUENBERG, LYNN

01/18/11 (H) PREFILE RELEASED 1/7/11  
01/18/11 (H) READ THE FIRST TIME - REFERRALS  
01/18/11 (H) JUD, FIN  
02/18/11 (H) JUD AT 1:00 PM CAPITOL 120  
02/18/11 (H) -- MEETING CANCELED --  
02/21/11 (H) JUD AT 1:00 PM CAPITOL 120  
02/21/11 (H) Moved Out of Committee  
02/21/11 (H) MINUTE(JUD)  
02/23/11 (H) JUD RPT 3DP 2NR  
02/23/11 (H) DP: LYNN, GRUENBERG, GATTO  
02/23/11 (H) NR: KELLER, PRUITT  
02/22/12 (H) FIN AT 1:30 PM HOUSE FINANCE 519  
02/22/12 (H) Moved Out of Committee  
02/22/12 (H) MINUTE(FIN)  
02/24/12 (H) FIN RPT 1DP 8NR  
02/24/12 (H) DP: GARA  
02/24/12 (H) NR: T.WILSON, NEUMAN, FAIRCLOUGH,  
COSTELLO, EDGMON, DOOGAN, STOLTZE,  
THOMAS  
03/06/12 (H) TRANSMITTED TO (S)  
03/06/12 (H) VERSION: HB 56  
03/12/12 (S) READ THE FIRST TIME - REFERRALS  
03/12/12 (S) JUD, FIN  
03/30/12 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)

**WITNESS REGISTER**

THOMAS PRESLEY, Intern  
Senator Bill Wielechowski  
Alaska State Legislature  
Juneau, AK

**POSITION STATEMENT:** Explained the proposed changes to SB 138.

BOB LOHR, Executive Director  
Alaska Center for Public Policy  
Anchorage, AK

**POSITION STATEMENT:** Testified in support of SB 138.

REPRESENTATIVE MAX GRUENBERG  
Alaska State Legislature  
Juneau, AK

**POSITION STATEMENT:** Prime sponsor of HB 56.

MILES BROOKES, Staff  
Representative Max Gruenberg  
Alaska State Legislature  
Juneau, AK

**POSITION STATEMENT:** Introduced HB 56 on behalf of the sponsor.

ANNE CARPENETI, Assistant District Attorney  
Criminal Division  
Legal Services Section  
Department of Law (DOL)  
Juneau, AK

**POSITION STATEMENT:** Provided information and answered questions related to HB 56.

DAN JAGER, Fire Marshall  
Capital City Fire/Rescue  
Juneau, AK

**POSITION STATEMENT:** Testified in support of HB 56.

DANA OWEN, Staff  
Senate Labor and Commerce Committee  
Alaska State Legislature  
Juneau, AK

**POSITION STATEMENT:** Introduced SB 224.

JOHN PTACIN, Assistant Attorney General  
Civil Division  
Labor and State Affairs Section  
Department of Law (DOL)

**POSITION STATEMENT:** Testified in opposition to SB 224.

DOUGLAS MERTZ, Attorney  
Juneau, AK

**POSITION STATEMENT:** Testified in support of SB 224.

KATE SHEEHAN, Deputy Director  
Personnel and Labor Relations  
Department of Administration  
Juneau, AK

**POSITION STATEMENT:** Testified on SB 224, focusing on Section 2.

STEVEN SORENSON, Attorney  
Juneau, AK

**POSITION STATEMENT:** Testified in support of SB 224.

#### **ACTION NARRATIVE**

[1:35:21 PM](#)

**CHAIR HOLLIS FRENCH** called the Senate Judiciary Standing Committee meeting to order at 1:35 p.m. Present at the call to order were Senators Coghill, Wielechowski, and Chair French.

#### **SB 138-THIRD-PARTY CHARGES ON TELEPHONE BILLS**

[1:36:38 PM](#)

**CHAIR FRENCH** announced the consideration of SB 138 and asked for a motion to adopt the proposed committee substitute (CS), version U.

[1:36:47 PM](#)

**SENATOR WIELECHOWSKI** moved to adopt the committee substitute for SB 138, labeled 27-LS1002\U, as the working document.

**CHAIR FRENCH** announced that without objection, version U was before the committee.

**SENATOR WIELECHOWSKI**, speaking as the sponsor of SB 138, said Mr. Presley would present the CS.

[1:37:40 PM](#)

**THOMAS PRESLEY**, Intern to Senator Bill Wielechowski, sponsor of SB 138, said version U incorporates the three amendments that the Alaska Communication Service (ACS) offered during the last hearing.

Subsection (c) on page 2, lines 11-15, contains new language that says that a customer who contests a charge on their bill must inform the telecommunications carrier, either orally or electronically, of the reason for nonpayment.

New subsection (d) on page 2, lines 17-19, allows a telecommunications carrier to recover from third-party vendors,

reasonable costs incurred in implementing billing changes or otherwise complying with Sec. 42.05.715.

New subsection (d) on page [3], lines 28-30, absolves telecommunications carriers of the duty to verify independently the accuracy of information received from a person or billing under this section.

MR. PRESLEY said he forwarded a copy of the new CS to Alaska Communication Services (ACS) and he anticipated their approval. He informed the committee that both Verizon and AT&T voluntarily pledged to discontinue, by August, billing for all third-party enhanced services that are not telephone related.

1:40:17 PM

BOB LOHR, Executive Director, Alaska Center for Public Policy, stated support for SB 138 and relayed that he was speaking as a former executive director of the Public Utilities Commission and a former chief insurance regulator for the State of Alaska. He described the legislation as timely and important consumer protection. He disputed the notion that third-party billing was important to consumers to reduce costs and expand competitive choice because this was not an effectively competitive market. Two assumptions that economists make about competitive markets are that there is perfect information available and there is zero transaction cost. Both are demonstrably untrue in the case of third-party non-telephone charges on telecommunication billings.

MR. LOHR said SB 138 was good legislation, but he was concerned with the latest amendments because they added an element of "blame the victim." If a customer has a bill of \$50 for local exchange service and \$25 for charges that he or she doesn't recognize, the intent is quite clear if the customer pays \$50 even if there isn't a written instruction on the bill as to how to allocate the charge.

MR. LOHR said he was heartened to hear that both Verizon and AT&T recognize that this was a genuine issue. He reiterated that the legislation was still vitally necessary.

SENATOR WIELECHOWSKI said his office worked hard to satisfy everyone concerned and a better bill resulted.

SENATOR WIELECHOWSKI moved to report CS for SB 138, version U, from committee with individual recommendations and attached fiscal note(s).

CHAIR FRENCH announced that without objection CSSB 138(JUD) moved from the Senate Judiciary Standing Committee.

At ease from 1:47 p.m. to 1:48 p.m.

**HB 56-INCLUDE ARSON IN CRIMES OF CONSPIRACY**

[1:48:14 PM](#)

CHAIR FRENCH announced the consideration of HB 56.

REPRESENTATIVE MAX GRUENBERG, prime sponsor of HB 56, said his staff member would present the bill, which adds arson in the first degree and arson in the second degree to the conspiracy statute.

[1:48:49 PM](#)

MILES BROOKES, staff to Representative Max Gruenberg, introduced HB 56 by speaking to the following sponsor statement:

House Bill 56 adds first and second degree arson to Alaska's conspiracy statute, which will provide strong deterrents to committing arson and close a loophole in current law. HB 56 was drafted after it became apparent during a committee hearing last session that arson is not currently included in Alaska's conspiracy statute. Because of this, arsonists may only be charged with a crime if the arson is attempted or completed, and they cannot be charged with the separate crime of conspiracy if two or more people are involved in the arson. This bill only adds first and second degree arson [to the list of serious felony offenses for which a person could be charged with the crime of conspiracy.]

- Conspiracy: an agreement by two or more people to commit a crime with at least one overt act committed towards the completion of the crime.
- Arson in the first degree: damaging property by fire or explosion and recklessly placing another person (including emergency personnel) in danger or serious physical injury. (Class A Felony)
- Arson in the second degree: knowingly damages a building by fire or explosion. (Class B Felony)
- Conspiracy to commit a Class A Felony (Arson One) is a Class B Felony.

- Conspiracy to commit a Class B Felony (Arson Two) is a Class C Felony.

HB 56 will fix those problems. Including arson in the conspiracy statute will provide stronger punishments, whether or not conspirators actually complete the arson. Under HB 56, if arson is committed, the conspiring arsonists can [be] charged with both arson and conspiracy, rather than just arson under the current law. If the arson is not completed, however, this bill will allow conspirators to be prosecuted for conspiracy to commit arson, which is not punishable under current law.

REPRESENTATIVE GRUENBERG added that a charge of conspiracy requires a criminal agreement and one act towards that agreement. He highlighted that much less of an actus reus is required than for an attempt, which requires a substantial step towards the final crime.

CHAIR FRENCH asked Ms. Carpeneti to remind the committee of the difference between attempt and conspiracy.

[1:51:40 PM](#)

ANNE CARPENETI, Assistant District Attorney, Criminal Division, Legal Services Section, Department of Law (DOL), explained that the elements of conspiracy are an agreement between at least two people with the specific intent to commit a crime, and one act in furtherance of that agreement.

CHAIR FRENCH recalled that there could not be attempted conspiracy.

MS. CARPENETI agreed.

CHAIR FRENCH asked why Alaska law had a specific list of crimes that can be subject to a conspiracy charge.

MS. CARPENETI explained that when the Legislature revised the criminal code in 1978 it decided not to have a conspiracy provision in the substantive criminal law. In the early 1980s, the Legislature changed its collective mind and passed a conspiracy provision that was limited to certain very serious crimes, each of which would more likely happen by agreement among people.

CHAIR FRENCH commented that there can't be conspiracy to commit theft, for example.

MS. CARPENETI agreed, and added that the least serious offense on the list of crimes that can be subject to a conspiracy charge is a class B felony. HB 56 would add a class A felony crime, [arson in the first degree] and a class B felony crime, [arson in the second degree].

[1:53:47 PM](#)

SENATOR COGHILL asked about the difference between proving attempted arson versus conspiracy to commit arson.

MS. CARPENETI explained that to prove conspiracy to commit arson the evidence would have to show, for example, that two or more people conspired and agreed to burn a building to make a claim for insurance. The evidence would also have to show that in furtherance of that agreement, one or more of the people went out and purchased incendiary materials. The two acts together - the agreement to burn the building and the purchase of fuel - prove conspiracy.

An example of attempted arson would be a person who decides to burn his or her house for insurance. The person purchased the fuel, spread it around the house, and lit a match, but for some reason the fire did not catch and the house was not destroyed. To prove attempted arson, proof of specific intent is required.

SENATOR COGHILL asked if a charge of conspiracy would be in addition to other charges.

MS. CARPENETI replied it depends, but it is unique to the conspiracy law that a person can be convicted of both conspiracy and the completed crime. The probable rationale is that once people agree to commit a crime, it's more likely to happen than if just one person thinks about it.

SENATOR COGHILL commented that if somebody was suspected of arson, an investigation would likely ensue to look for some conspiratorial action.

MS. CARPENETI said yes and reiterated that these crimes are difficult to prove and the prosecutions are rare.

[1:57:19 PM](#)

DAN JAGER, Fire Marshall, Capital City Fire/Rescue, Juneau, AK, testified in support of HB 56. He informed the committee that he

was a member of the Alaska Association of Fire and Arson Investigators and had actively investigated fires across the state for 10 years. He said the crime of arson is difficult to investigate and catching the person responsible is even harder. The 2011 statistics for Juneau show more than 30 fires classified as arson or suspicious in nature, and suspects have been identified in just three cases.

MR. JAGER said it was his experience that arson usually involves planning and execution by more than one person. Under current law, arsonists can only be charged with a crime if arson is completed or attempted, and attempted arson requires proof that a substantial step towards arson occurred. Without HB 56, two or more people who conspire and act to commit arson can't be charged with conspiracy. Passing the bill will provide stronger punishment whether or not the conspirators complete the arson.

[2:00:00 PM](#)

REPRESENTATIVE GRUENBERG supplemented Ms. Carpeneti's history of the conspiracy statute and said he didn't know why arson wasn't included when the statute passed initially.

CHAIR FRENCH closed public testimony and announced he would hold HB 56 in committee.

**SB 224-EVIDENCE RULES: UNION/EMPLOYEE PRIVILEGE**

[2:02:09 PM](#)

CHAIR FRENCH announced the consideration of SB 224.

[2:02:18 PM](#)

DANA OWEN, staff to the Senate Labor and Commerce Committee, sponsor of SB 224, introduced the bill by speaking to the following sponsor statement:

Senate Bill 224 seeks to protect confidential information acquired by an agent of an employee's union in the course of providing that employee advocacy services relating to anticipated or ongoing disciplinary proceedings. Without the expectation of confidentiality, union members are hesitant to be fully forthcoming to their representative, severely hampering the union agent's ability to advise and represent the member and denying the employee the full and effective advocacy to which she or he is entitled.

The bill provides exceptions to this privilege, including being ordered by the court to disclose information concerning the commission of a crime, or if the employee consents to the disclosure. The bill also provides that where federal or state law preempts or conflicts with this act, the federal or state law prevails to the extent of the preemption or conflict.

MR. OWEN highlighted that communications between an agent of the union and a union member are privileged if the agent is an attorney. SB 224 seeks to grant the same protection to communications when the union representative is not an attorney.

SENATOR WIELECHOWSKI asked if this would apply to all public employee union members in the state.

MR. OWEN said the sponsor was thinking of union representatives of people who work for the state.

SENATOR WIELECHOWSKI stated for the record that he was an attorney who worked for a labor union in the state.

CHAIR FRENCH noted the people available to answer questions and testify.

[2:05:24 PM](#)

JOHN PTACIN, Assistant Attorney General, Civil Division, Labor and State Affairs Section, Department of Law (DOL), testified in opposition to SB 224. He said his testimony would be three pronged. First, he would describe how these lawsuits initiate and why the state sees the need to obtain certain communications between a union and its members. Second, he would put to rest some of the misconceptions about the administration's conduct in these cases. Third, he would note that the privileges, as drafted, appear rather complicated.

MR PTACIN explained that state workers are primarily unionized and, by law, the employer and union have to enter into a grievance process when the employer makes a decision to terminate an employee. During the grievance procedure, the union represents the member and meets with the employer two or three times to try to explain why the state should reconsider its decision. At this same time, the union is representing the collective bargaining unit as a whole.

CHAIR FRENCH asked if something less than a termination can begin a grievance process and lead to a request for discovery.

MR. PTACIN clarified that for minor grievances such as suspensions, there is no need to ask for information.

CHAIR FRENCH asked if cases other than terminations go to court.

[2:09:38 PM](#)

MR. PTACIN responded that DOL primarily handles termination decisions. Responding to a comment, he clarified that these are not appeals of a termination decision per se. Most decisions of an employer to terminate a worker are never submitted to superior court because the grievance process includes binding arbitration against the state if the union decides the state didn't concede enough.

SENATOR COGHILL asked if the grievance process was a contractual agreement.

MR. PTACIN answered yes; it was part of the collective bargaining agreement under the Public Employment Relations Act (PERA). Whenever a state employee bargaining union is formed, the state has to allow for binding arbitration at the end of any grievance process. The Department of Law doesn't get involved until the state is sued, which is after the grievance process and binding arbitration.

SENATOR COGHILL asked what employment levels are involved in the grievance process.

MR. PTACIN replied it depends on the step of the grievance, but the lower steps would involve someone who correlates to a business agent at the union. Higher and higher levels of management are involved as the steps progress. Importantly, at this stage it is conciliatory, non-legal conduct between the employer and employee. If there is no agreement during the grievance process, the union has to decide whether to take the case to binding arbitration.

SENATOR COGHILL asked how binding arbitration fit into the realm of adjudication.

MR. PTACIN explained that the union and employer agree on and present evidence to an arbitrator who makes a final decision that is binding on both parties. He said that was different from what was before the committee because the Alaska Labor Relations Board referees both the grievance process and arbitration and it is conduct under the Public Employee Rights Act.

2:13:49 PM

SENATOR WIELECHOWSKI asked if the bill would apply to all unions in the state.

MR. PTACIN answered yes.

SENATOR WIELECHOWSKI asked if it would apply to all unions that are either state employee unions or unions under the National Labor Relations Act.

MR. PTACIN replied, "It seems to."

MR. PTACIN said he wanted to clarify that the Alaska Labor Relations Agency acts as a referee throughout the grievance and adjudication processes, and the ground rules under PERA and fair labor practices are that the state cannot obtain documents during those proceedings. The bill does not intend to change that.

MR. PTACIN said what sometimes happens when the union has made a decision not to take a case to arbitration is that the worker files suit against the employer, and the case ends up in superior court. That is what the bill takes aim at; it creates a privilege for everything that happened in that other realm.

SENATOR WIELECHOWSKI said that was seriously inaccurate. First, not all the cases are governed by the Alaska Labor Relations Act, many are governed by the National Labor Relations Act. Second, the state is requesting confidential documents and information that the employee shared with his or her business representative. It's not necessarily in the unfair labor practice realm; it can be any realm at all. He said the amicus brief specifically addressed a case where the state subpoenaed the employee to get confidential communications between the employee and his business representative.

MR. PTACIN countered that the state was in civil litigation at that point. The member and the union no longer had a relationship, and the member had put everything at issue by filing a breach of contract claim against the state. The individual was saying that the state treated him unfairly by terminating him and by what happened during the grievance process.

CHAIR FRENCH asked for an example of why a court case would be more advantageous to an employee than the arbitration process.

MR. PTACIN said he would defer the question to others because he had no idea.

[2:17:24 PM](#)

SENATOR COGHILL asked if there was case law on this.

MR. PTACIN responded that the collective bargaining agreement recognizes the inherent need to allow a member to communicate with the union while the grievance process is ongoing. However, no court has said there was a privilege under common law, or anything less than a statute, once that process ended and the member made a decision to put the entire matter at issue in superior court.

SENATOR WIELECHOWSKI asked if the state agreed that in the context of the grievance and arbitration processes, the communications between the employee and union representative are privileged and confidential.

MR. PTACIN replied he wasn't aware of any collective bargaining agreement that used the term "privilege."

SENATOR WIELECHOWSKI asked what ALRA would say.

MR. PTACIN said it would probably be called a confidence, but he didn't believe it would elevate to a privilege.

[2:19:49 PM](#)

SENATOR COGHILL asked if the employee didn't agree to a certain duty to the employer when he or she took employment.

MR. PTACIN replied that would be specific to the collective bargaining agreement, but there probably were times when the union had a duty to tell the employer that something was going on that should be addressed.

SENATOR COGHILL asked if an employer wouldn't have a right to know if there were conversations between a business agent and an employee about somebody not fulfilling a license, for example.

MR. PTACIN said that was just one of the conversations that would have to take place regarding what this privilege does and what it would create.

SENATOR WIELECHOWSKI said his experience was that many unions have business representatives who are non-attorneys, although

they function essentially as attorneys. He said both the NLRA and ALRA allow this, and he can't understand what public policy reason there would be for saying that conversations between an employee and his or her business representative who happens to be an attorney are privileged, but when the business representative happens to be a non-attorney the communications are not privileged.

MR. PTACIN opined that it was an oversimplification to say that a business representative acts essentially as an attorney because that business agent not only represents the employee during the grievance process but also the collective as a whole.

SENATOR WIELECHOWSKI pointed out that the business representative who happened to be an attorney was doing that too.

MR. PTACIN offered his view that an attorney represents a client.

SENATOR WIELECHOWSKI responded that there was no difference at all whether it was a union attorney or a business representative who was not an attorney.

MR. PTACIN said the bottom line was that the attorney represents both the individual's interest and the union's collective bargaining interests.

SENATOR WIELECHOWSKI responded that the same holds true for the business representative.

[2:23:33 PM](#)

SENATOR COGHILL asked if a business agent acting in that situation would get legal counsel from the union.

SENATOR WIELECHOWSKI replied that sometimes they do, but not always.

[2:23:57 PM](#)

CHAIR FRENCH reviewed the reason for the bill and the facts in one case that alleged abuse of discovery practices.

SENATOR COGHILL asked if the issue in that specific case was that the state subpoenaed conversations that took place between a union representative and an employee during the grievance process.

CHAIR FRENCH said yes.

SENATOR COGHILL asked what issue had to be resolved.

MR. PTACIN explained that in that particular collective bargaining agreement, the union member had to take a final step in the grievance process. The member had to communicate with his union internally to voice disagreement with the business agent's decision and ask the full board to decide whether the case should go to binding arbitration. If the member didn't take that final step, the case in superior court would likely be dismissed because the member hadn't exhausted every opportunity for the employer to consider whether it treated the employee fairly.

SENATOR COGHILL asked if the state would be able to subpoena the record of the board decision.

MR. PTACIN replied that question is before the court right now. The state thinks these records are very helpful in proving fair treatment of the employee in the breach of contract claim that the employee brought against the employer. The state believes that there is opportunity for those documents to show bias and prior inconsistent statements. An entire array of issues could come before the jury that is deciding whether the employer treated the employee fairly.

CHAIR FRENCH voiced sympathy with the notion that the state was reaching into a privileged communication. "It feels invasive," he said.

SENATOR COGHILL said it would be valuable to know if the subpoena was asking about strategy or something that would adversely affect the company.

MR. PTACIN said the exhaustion issue was likely a communication between the member and the union and the bill would not allow the state to probe for that information even though the member put it at issue.

He raised several questions about Section 2. He questioned whether subsection (a)(1),(2) might cause problems for the court if it has to decide what will trigger the privilege. Under subsection (b)(2), he said it appeared that the only time the union had the ability to disclose was if there was an ability to prevent crime. His reading of the AFLCIO brief was that the union wanted the ability to weigh in if it was for the benefit of the entire membership, and the bill didn't do that. He said

he'd like to hear the drafter's intention regarding subsection (b)(3) because it appeared to require the state to prove that its need for the information outweighed the union's need for confidentiality. Subsection (b)(4) says the employee can waive the privilege in writing, but an employee can waive a privilege at any time if they discuss it with anybody or it comes up in discovery. Finally, subsection (d)(2)(A) has a list of forums where this would apply, yet the only forum that was at issue was the judicial forum and the subsequent litigation that is brought by the member against the employer.

[2:32:11 PM](#)

SENATOR WIELECHOWSKI read Section 2, subsections (a)(1),(2) and questioned the public policy rationale for allowing an employer to delve into confidential information that was acquired in connection with providing advocacy services.

MR. PTACIN said the first policy reason was that the matter was in civil court and the jury needed to know the latent facts in the advocacy relationship in order to make a decision about the fairness of the grievance proceeding. The second policy reason was that there are affirmative defenses in these cases and there are certain conversations that happen between the union and the union member that are central to affirmative defenses, including exhaustion. He said this was more about what was happening at the civil court level because all these confidences were intact while that process was ongoing.

CHAIR FRENCH commented that he understood the exhaustion issue, but believed there were easier ways to get there.

SENATOR COGHILL asked, up to binding arbitration, if there had been a problem keeping conversations between the union representative and the union member private and off the table.

MR. PTACIN said no; it was only when the union decided against taking the matter to binding arbitration and the member decided to sue, putting everything at issue in superior court.

[2:35:18 PM](#)

DOUGLAS MERTZ, Attorney, Juneau, AK, told the committee that this issue came to him because of a client who was unjustly terminated by the state. The state required him to pursue his claim through an exhaustive administrative process and to use a union representative as his advocate.

SENATOR COGHILL voiced his understanding that the union member did not exhaust his administrative remedies.

MR. MERTZ confirmed that the state alleged that the member did not completely exhaust his administrative remedies. The law says the employee has to use his or her union advocate and may not use an attorney as an advocate during that administrative grievance process, including the arbitration.

CHAIR FRENCH asked the reason for that rule.

MR. MERTZ responded that the only answer was that at some point in the collective bargaining agreement, both the state and the multiple unions decided it was in their collective best interest to freeze out private attorneys.

CHAIR FRENCH commented that it might be to keep costs down.

SENATOR COGHILL asked if a union representative would generally get legal counsel during the proceeding.

MR. MERTZ said his experience was that they do not, unless some unique legal question is at issue. The union member can hire a private attorney to advise him or her, and that attorney can try to advise the union lay advocate, but that brings the problem. After the union member filed suit, the state subpoenaed all union records related to the member, including all communications between his private attorney and the union representative.

SENATOR COGHILL asked if the union could have subpoenaed the employer for all records concerning conversations to that employee.

MR. MERTZ said he tried that but, according to the state, the state can get all the union materials once the matter gets into litigation, but the union and the private attorney cannot get any correspondence from the state.

SENATOR COGHILL asked what happens when one private employer wants information from another private employer about a union member.

MR. MERTZ responded that the private employer could probably get the information with the exception of attorney client communications.

CHAIR FRENCH confirmed that attorney client communications were highly protected.

MR. MERTZ said the state wanted all attorney client tactical discussions and decisions, including the lay advocate's legal research files. The state wanted information that would never be exchanged in civil litigation.

SENATOR COGHILL asked for further clarification of private communications.

Mr. Mertz explained that, in this case, Mr. Ptacin said he needed the information that the union lay-advocate held about exhaustion of administrative remedies. If an attorney were involved, there might be an ability to define a certain class of information that would not invade the attorney's thought processes of private communications.

CHAIR FRENCH commented that the last union act was internal so it was difficult for an outsider to know whether all the remedies were exhausted.

MR. MERTZ said, in this case, the state asked for written discovery and the client testified under oath as to all those materials. If the state really needed something else like that to make its case, the existing precedents interpreting the attorney client privilege would allow the other side to get to those materials, too. At issue were the core confidential things about tactics, settlement possibility, and the thought processes.

CHAIR FRENCH hypothesized that the union might tell the employee it wasn't taking the case any further because, from their perspective, the case was a "stinker." The employee makes the decision to go to court and the state wants that final statement from the union so it can show the judge and jury what the union thought about the case.

MR. MERTZ added that if the state could get the records that show that, it could also call the union advocate as a witness against his own client.

SENATOR COGHILL asked if what comes before a court is the verbal "he said, she said" unless there was some action outside the arbitration.

CHAIR FRENCH responded that what comes before the court should be all the things that happened in the workplace that made the individual a good or bad employee.

2:44:42 PM

MR. MERTZ relayed that in a parallel case, the California Supreme Court said it would be ridiculous to assume that the law intended that the only advice the union advocate could give to the client was "Don't talk to me." He said that since the lower ruling that was the current situation in this state. Union members cannot be assured that communications with the union are confidential.

CHAIR FRENCH commented that there should be a form that the employee and the union advocate sign attesting to the fact that the union member exhausted all remedies. He reiterated that he was sensitive to the issue.

MR. MERTZ said there were two reasons the Legislature should address the matter when it was before the Alaska Supreme Court. The first reason was that union communications in this state are not and will not be confidential until either the court acts or the Legislature passes a bill like this. The second reason was that the issue before the court was whether it was unconstitutional, as a violation of due process, to allow the state to demand this information from the union and union member. That constitutional bar of due process is very high and very difficult to meet, whereas the Legislature can make a judgment call based on fairness and good policy.

SENATOR COGHILL asked if there were other instances of the employer subpoenaing information between the union advocate and union member.

MR. MERTZ said he wasn't aware of it happening in Alaska, but the state just started making this sort of request a couple of years ago. A number of other states and the National Labor Relations Board (NLRB) have said the employer cannot ask for this information. Two states have enacted legislation and this bill models the Illinois legislation.

SENATOR COGHILL commented that HB 224 tried to delineate what information was and was not going to be available.

MR. MERTZ agreed and added that the bill also had an escape provision that allowed the judge, when asked, to make a judgment call as to which interest was more important.

2:48:35 PM

KATE SHEEHAN, Deputy Director, Personnel and Labor Relations, Department of Administration, said her testimony would focus on Section 2 and the proposed amendment to AS 23.40. That section specifically talks about the grievance and arbitration procedures conducted under the authority of collective bargaining agreements.

She stated that the proposed legislation would turn the grievance process into a legal process found only in the courts. It was to the betterment of both parties to have a grievance process that was self-governing and bargained. Both parties have bargained specific grievance processes into their collective bargaining agreements and both parties are bound to follow the process. The union representatives work with Division of Personnel and Labor Relations representatives and attorneys were not involved.

MS. SHEEHAN confirmed that some of the labor relations analysts on staff had legal training and background but were not practicing attorneys. Therefore, she said, there was no privilege attached to their communications.

She opined that fairness was not an issue with regard to Section 2 because there was no subpoena authority in the state's collective bargaining agreements. The Uniform Arbitration Act in Title 9 allows for subpoena and arbitrations if expressly adopted in the collective bargaining agreement. The state has not done this except in the instance of the Public Safety Employees Association (PSEA) where the arbitrator can subpoena non-state employees to appear. She said that during her tenure as deputy director she did not recall a time that the state tried to subpoena union member communications. Furthermore, at any point in the grievance process either party can argue that the other was being unfair or not handing over documents necessary to present the case. It would then be up to an arbitrator to decide if the request was relevant to the proceedings at hand. She concluded that SB 224 would undermine what the parties have already agreed to through bargaining.

2:52:06 PM

SENATOR COGHILL asked for clarification because he understood that the bill addressed what happened after the grievance process when the employee decided to go to court.

MS. SHEEHAN responded that Section 1 dealt with the code of civil procedure, which was the issue in the current case, whereas Section 2 talked about the grievance processes. She reiterated that confidentiality would apply and the state would not have the ability to subpoena confidential communications during the grievance process.

SENATOR WIELECHOWSKI questioned how this would undermine collective bargaining if PERA, the NLRA board, and the ALRA board already ruled that the information was privileged.

MS. SHEEHAN said that language was bargained into agreements about what union stewards and/or board members can and cannot do. She said her understanding of PERA was that the unions and employer work together to agree on the wages, hours, terms, and conditions of employment, which would fall under "Terms and Conditions of Employment."

SENATOR WIELECHOWSKI asked if the state wanted the ability to get all the confidential communications between an employee and the employee's representative.

MS. SHEEHAN responded that she was only testifying about Section 2.

SENATOR WIELECHOWSKI reiterated his question, and asked for a yes or no answer.

MS. SHEEHAN answered no. She added that the state did not have that ability now, and "at this point there's been no push to bargain the Uniform Arbitration Act subpoena."

CHAIR FRENCH observed that she was not speaking to the court process, just what occurred within the grievance process.

MS. SHEEHAN confirmed that was correct.

SENATOR COGHILL asked if the rules change in the court process.

CHAIR FRENCH confirmed that they change dramatically.

SENATOR WIELECHOWSKI disagreed with Ms. Sheehan's interpretation.

CHAIR FRENCH suggested the committee would hear a rebuttal witness after Ms. Sheehan finished her statement.

[2:55:58 PM](#)

MS. SHEEHAN said the legislation would also present problems for agencies that provide security-related services. She cited a specific case from the Department of Corrections where a shift supervisor, who happened to be a union board member, did not pass along a report of potential unethical actions because he thought the information was given in confidence. She said both the union member and the union representative could hide behind this legislation and place management in a very difficult position.

SENATOR COGHILL said his question was answered about the difference between the strategies of how a supervisor who was a union steward can advise an employee against how it affected the duties required in the job.

CHAIR FRENCH commented that there should be a way to define around whether or not to disclose something about an unsafe practice at a prison.

[2:58:30 PM](#)

STEVEN SORENSON, Attorney, Juneau, AK, said he represented the Public Safety Employee Association (PSEA) and the union believed the legislation was important. He relayed that two PSEA members sued the City of Fairbanks after each went through the grievance procedure and arbitration and had satisfied the entire administrative procedure found in the collective bargain agreement. Civil attorneys representing the city subpoenaed all the union records for the two members with regard to the advice and strategies used when PSEA represented them under the collective bargain agreement. The city's attorneys also deposed the former executive director of the union seeking the same information. In each instance, PSEA responded to the subpoena and provided limited discovery and the list of privilege that it was not going to supply. In the deposition, the former executive director indicated that he would not provide the information unless ordered to do so by a court. The city's attorneys didn't press the issue in either instance, but it wouldn't take much and they could anticipate a further push for more information.

SENATOR COGHILL assumed that the employees weren't happy with the binding arbitration settlement.

MR. SORENSON explained that a union was obliged under its duty of fair representation to review and take properly presented grievances through the administrative procedures process set out in the collective bargain agreement. However, the decision of

whether or not arbitration should go forward lay solely with the union, not the grievant. If the union decided not to go forward with arbitration, the duty of fair representation ends and the employee then has the right to take civil action. If the union decided to go to arbitration, the employee would have the right to sue if he or she didn't like the outcome.

SENATOR COGHILL commented that the rules change when the case goes to civil court and it seemed that discovery should change as well.

MR. SORENSON responded that the conversations that the union representative had with the member with regard to representation during the period of advocacy under the contract should remain protected. SB 224 does that; it ensures that those conversations, strategies, and thought processes remain confidential and privileged despite the subsequent actions of either the employee or the employer.

SENATOR COGHILL said he was trying to understand when strategy advice would compete with policy and procedure advice that would determine the competency of an issue.

CHAIR FRENCH reiterated that there should be a way to let a court know whether the procedural steps of exhaustion to remedies had taken place. It should not be a secret.

MR. SORENSON responded that it was not a secret because the employer, the employee, and the union were in lockstep through all the steps of the grievance procedure.

CHAIR FRENCH asked if arbitration was part of the exhaustion of remedies sequence.

MR. SORENSON said that arbitration was the final step in every PSEA collective bargain agreement, and it was final and binding.

SENATOR COGHILL asked if that was a contractual obligation.

MR. SORENSON said yes and it exists in PERA.

SENATOR COGHILL offered his belief that not fulfilling that complete contractual obligation could really be the question.

[3:08:12 PM](#)

CHAIR FRENCH announced he would hold SB 224 in committee.

3:08:20 PM

There being no further business to come before the committee, Chair French adjourned the Senate Judiciary Standing Committee meeting at 3:08 p.m.