SB 224

<TARGET><BILL>SB 224</BILL><SUBJECT>SB 224</SUBJECT><COMM>SJUD27</COMM></TARGET>

Alaska State Legislature

State Capitol, Room 510
Juneau, Alaska 99801
Phone: (907) 465-4947
Fax: (907) 465-2108

Committee Members:
Senator Dennis Egan, Chair
Senator Joe Paskvan, V. Chair
Senator Bettye Davis
Senator Linda Menard
Senator Cathy Giessel

Senate Labor and Commerce Committee

SB 224 Evidence Rules: Union/Employee Privilege 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.

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Senate Labor and Commerce Committee

Sectional Analysis

SB 224 Evidence Rules: Union/Employee Privilege

Section 1. This section amends Alaska Statute 09.25, adding a new section 09.25.405 that provides that confidential communications between an employee and an employee representative of an organization are privileged conversations when conducted in an advocacy setting in a disciplinary matter and provides for the definition of "organization."

Section 2. This section amends AS 23.40, adding a new section AS 23.40.065.

Subsection (a) provides that an individual cannot be compelled in any proceeding to disclose information acquired from an employee represented by the individual if such information was obtained in confidence by that individual in connection with providing advocacy services in regards to disciplinary proceedings of the employee.

Subsection (b) provides exception to the privilege.

Subsection (c) provides that a conflict between federal or state law, this statute is preempted and does not apply.

Subsection (d) defines "organization" and "proceeding."

Section 3. This section declares an indirect court rule change.

Section 4. This section provides that Sections 1 and 2 can only take effect upon a 2/3rds vote of both houses of the Legislature for Section 3.

SENATE BILL NO. 224

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE LABOR AND COMMERCE COMMITTEE

Introduced: 3/5/12
Referred: Labor and Commerce, Judiciary

A BILL

FOR AN ACT ENTITLED

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

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 09.25 is amended by adding a new section to article 3 to read:

Sec. 09.25.405. Privileged communication between employees and employee advocates. Confidential communications between an employee and an individual who represents the employee on behalf of an organization in connection with the individual's providing advocacy services to the employee that are related to anticipated or ongoing disciplinary proceedings are privileged as provided under AS 23.40.065. In this section, "organization" has the meaning given in AS 23.40.065.

*** Sec. 2.** AS 23.40 is amended by adding a new section to article 1 to read:

Sec. 23.40.065. Privileged communication between employees and employee organizations. (a) An individual may not be compelled in a proceeding to

disclose information the individual acquired from an employee while the individual represented the employee on behalf of an organization, if the information was communicated

(1) in confidence; and

(2) in connection with the individual's providing advocacy services to the employee that are related to anticipated or ongoing disciplinary proceedings.

(b) Nothing in (a) of this section prohibits a person from disclosing information

(1) to prevent a crime that would cause serious physical injury or death or create a risk of imminent serious physical injury or death;

(2) in a civil or criminal proceeding against the organization;

(3) as required by the superior court following a hearing in camera;

(4) when, after being fully informed regarding the nature and extent of the privilege under this section, the employee waives the privilege in writing; or

(5) after the employee's death, on written consent by the employee's personal representative.

(c) If a provision of this section is preempted by federal law or is in conflict with a federal or state law in a particular situation, the provision does not apply to the extent of the preemption or conflict.

(d) In this section,

(1) "organization" means a labor or employee organization of any kind in which employees participate and which exists for the primary purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, and conditions of employment;

(2) "proceeding" means

(A) a proceeding heard before a legislative, judicial, administrative, or other governmental body or official authorized to hear evidence under oath; or

(B) an arbitration, hearing, or meeting that is part of a grievance procedure conducted under a collective bargaining agreement.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to

read:

INDIRECT COURT RULE CHANGE. AS 09.25.405, enacted by sec. 1 of this Act, and AS 23.40.065, enacted by sec. 2 of this Act, have the effect of amending Rules 402 and 501, Alaska Rules of Evidence, by creating a new privilege preventing a person from being compelled to testify or produce evidence in a court and precluding admissibility of certain evidence in certain cases.

*** Sec. 4.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. AS 09.25.405, enacted by sec. 1 of this Act, and AS 23.40.065, enacted by sec. 2 of this Act, take effect only if sec. 3 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version	**SB 224**
Fiscal Note Number	1
(S) Publish Date	3/23/12

Identifier (file name)	SB224-DOA-LR-3-7-12	Dept. Affected	Administration
Title	Evidence Rules: Union/Employee Privilege	Appropriation	Centralized Administrative Services
		Allocation	Labor Relations
Sponsor	Senate Labor & Commerce		
Requester	Senate Labor & Commerce	OMB Component Number	58

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, intial version

Prepared by	Nicki Neal, Director	Phone	(907)465-4429
Division	Personnel & Labor Relations	Date/Time	3/7/12 10:20 AM
Approved by	John Cramer, Deputy Commissioner	Date	3/7/2012
	Department of Administration		

(Revised 1/17/2012 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 224

Analysis

SB 224 will have no fiscal impact on the Division of Labor Relations.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version **SB 224**
Fiscal Note Number
() Publish Date

Identifier (file name) SB224-LAW-CIV-03-28-12
Title An Act making privileged certain communications between employees and employee union....
Sponsor Labor & Commerce
Requester (S) Judiciary

Dept. Affected Law
Appropriation Civil
Allocation Labor and State Affairs
OMB Component Number 2718

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by Sheila Bugbee, Administrative Officer
Division Administrative Services
Approved by Michael C. Geraghty, Attorney General
Department of Law

Phone 465-3675
Date/Time 3/28/2012 8:30AM
Date 3/28/2012

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 224

Analysis

Senate Bill 224 creates a new evidentiary privilege for communications between an employee and their union — a union testimonial privilege. The privilege would apply to communications between a union member and the union when those communications relate to disciplinary proceedings. Importantly, the privilege applies not only to union grievance procedures but also to any subsequent civil court proceedings when the terminated union employee sues the employer for wrongful termination. The union member holds the privilege indefinitely under the bill. Although a zero fiscal note attaches to this bill, there are potential fiscal impacts to be considered, including whether this privilege will make it more difficult for the State of Alaska and other employers to defend the interests of workplace safety in wrongful termination cases. These concerns are currently before the Alaska Supreme Court in *Peterson v. State of Alaska*, Supreme Court No.:S-14233.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB 224**
Fiscal Note Number: 2
(S) Publish Date: 3/23/12

Identifier (file name): SB224-DOLWD-ALRA-3-16-12
Title: Evidence Rules: Union/Employee Privilege
Sponsor: Senate Labor and Commerce
Requester: Senate Labor and Commerce

Dept. Affected: Labor and Workforce Development
Appropriation: Commissioner and Administrative Services
Allocation: Alaska Labor Relations Agency
OMB Component Number: 1200

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Mark Torgerson, Administrator/Hearing Examiner — Phone: 907-269-4895
Division: Alaska Labor Relations Agency — Date/Time: 3/16/12 12:00 PM
Approved by: Click Bishop, Commissioner — Date: 3/16/2012
Department of Labor and Workforce Development

(Revised 1/17/2012 OMB)

FISCAL NOTE #2

STATE OF ALASKA **BILL NO.** SB 224
2012 LEGISLATIVE SESSION

Analysis

This bill provides that confidential communications between an employee and a person who represents the employee on behalf of an organization related to disciplinary proceedings are privileged under AS 23.40.065.

The bill also provides that a person who represents an employee and obtains information from the employee in confidence and that is related to disciplinary proceedings may not be compelled to disclose the information in a proceeding held to take evidence under oath or an arbitration, hearing, or meeting, unless (1) to prevent crime that would cause serious injury or death; (2) in a civil or criminal proceeding against the organization; (3) as ordered in an in camera proceeding in superior court; (4) when the employee knowingly waives the privilege; and (5) after the employee's death, with consent from the employee's personal representative.

There is no fiscal impact anticipated to the department as a result of this legislation.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

Explanation of Changes SB 224 Evidence Rules: Union/Employee Privilege

1. The word "individual was replaced with the word "advocate" which is then a defined term in Section 2(d).

2. In Section 2 (b), the following changes were made:

   The provisions of (1) and (2) were changed to more closely track the language of similar provisions in existing privileges under Court Rules.

   Provision (3) was added to clarify that no privilege exists for matters of workplace safety.

CS FOR SENATE BILL NO. 224(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE LABOR AND COMMERCE COMMITTEE

A BILL

FOR AN ACT ENTITLED

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

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Section 1.** AS 09.25 is amended by adding a new section to article 3 to read:

Sec. 09.25.405. Privileged communication between employees and employee advocates. Confidential communications between an employee and an advocate who represents the employee on behalf of an organization in connection with an employee disciplinary proceeding are privileged as provided under AS 23.40.065. In this section, "advocate," "organization," and "proceeding" have the meanings given in AS 23.40.065.

* **Sec. 2.** AS 23.40 is amended by adding a new section to article 1 to read:

Sec. 23.40.065. Privileged communication between employees and employee organizations. (a) An advocate may not be compelled in a proceeding to

disclose information the advocate acquired from an employee while the advocate represented the employee on behalf of an organization, if the information was communicated

(1) in confidence; and

(2) in connection with the advocate's providing advocacy services to the employee that are related to disciplinary proceedings.

(b) Nothing in (a) of this section prohibits an advocate from disclosing information

(1) that an advocate receives from an employee to whom the advocate provides advocacy services, on behalf of an organization, if the advocate's services were sought, obtained, or used to enable or aid the employee in committing or planning to commit acts or omissions that the employee knew or reasonably should have known constitute fraud or a crime;

(2) in a proceeding concerning an alleged breach of either the organization's legal duty to the employee or the employee's legal duty to the organization;

(3) to prevent physical injury or death in a workplace;

(4) as required by the superior court following a hearing in camera;

(5) when, after being fully informed regarding the nature and extent of the privilege under this section, the employee waives the privilege; or

(6) after the employee's death, on written consent by the employee's personal representative.

(c) If a provision of this section is preempted by federal law or is in conflict with a federal or state law in a particular situation, the provision does not apply to the extent of the preemption or conflict.

(d) In this section,

(1) "advocate" means an individual who represents an employee on behalf of an organization in connection with a proceeding that is related to employee discipline;

(2) "organization" means a labor or employee organization of any kind in which employees participate and which exists for the primary purpose of dealing

with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, and conditions of employment;

(3) "proceeding" means

(A) a proceeding heard before a legislative, judicial, administrative, or other governmental body or official authorized to hear evidence under oath; or

(B) an arbitration, hearing, or meeting that is part of a grievance procedure conducted under a collective bargaining agreement.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE CHANGE. AS 09.25.405, enacted by sec. 1 of this Act, and AS 23.40.065, enacted by sec. 2 of this Act, have the effect of amending Rules 402 and 501, Alaska Rules of Evidence, by creating a new privilege preventing a person from being compelled to testify or produce evidence in a court and precluding admissibility of certain evidence in certain cases.

*** Sec. 4.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. AS 09.25.405, enacted by sec. 1 of this Act, and AS 23.40.065, enacted by sec. 2 of this Act, take effect only if sec. 3 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

27-LS1427\M
Wayne
4/5/12

CS FOR SENATE BILL NO. 224(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE LABOR AND COMMERCE COMMITTEE

A BILL

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Sec. 23.40.065. Privileged communication between employees and employee organizations. (a) An advocate may not be compelled in a proceeding to

disclose information the advocate acquired from an employee while the advocate represented the employee on behalf of an organization, if the information was communicated

(1) in confidence; and

(2) in connection with the advocate's providing advocacy services to the employee that are related to disciplinary proceedings.

(b) Nothing in (a) of this section prohibits an advocate from disclosing information

(1) that an advocate receives from an employee to whom the advocate provides advocacy services, on behalf of an organization, if the advocate's services were sought, obtained, or used to enable or aid the employee in committing or planning to commit acts or omissions that the employee knew or reasonably should have known constitute fraud or a crime;

(2) in a proceeding concerning an alleged breach of either the organization's legal duty to the employee or the employee's legal duty to the organization;

(3) to prevent physical injury or death in a workplace;

(4) as required by the superior court following a hearing in camera;

(5) when, after being fully informed regarding the nature and extent of the privilege under this section, the employee waives the privilege; or

(6) after the employee's death, on written consent by the employee's personal representative.

(c) If a provision of this section is preempted by federal law or is in conflict with a federal or state law in a particular situation, the provision does not apply to the extent of the preemption or conflict.

(d) In this section,

(1) "advocate" means an individual who represents an employee on behalf of an organization in connection with a proceeding that is related to employee discipline;

(2) "organization" means a labor or employee organization of any kind in which employees participate and which exists for the primary purpose of dealing

with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, and conditions of employment;

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Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

Date: April 4, 2012

TO: Leg Legal

FROM: Cindy Smith

RE: CS for SB 224 LS-1427

Please provide a Judiciary CS for SB 224, with the following changes:

Replace the term "individual" with the word "advocate" wherever it appears throughout the bill.

In Section 1, delete the words "the individual's providing advocacy" and delete the words "anticipated or ongoing".

In Section 2, delete the words "anticipated or ongoing" on page 2 at line 6.

Delete language in (1) and replace (1) with "furtherance of crime or fraud" language modelled on the lawyer's privilege Court Rule language, attached.

Delete language in (2) and replace with "breach of duty" provision modeled on attorney privilege attached.

Add a new provision under (b) that makes an exception when it is necessary to ensure workplace or public safety, or to fulfill any mandatory reporting requirements or other disclosures required by law.

In item (4) delete the words "in writing"

Add definition for "advocate" as follows: "an individual who represents the employee on behalf of an organization in connection with disciplinary proceedings under AS 23.40.065".

SENATE BILL NO. 224

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE LABOR AND COMMERCE COMMITTEE

Introduced: 3/5/12
Referred: Labor and Commerce, Judiciary

A BILL

FOR AN ACT ENTITLED

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Sec. 23.40.065. Privileged communication between employees and employee organizations. (a) An ~~individual~~ advocate may not be compelled in a proceeding to

disclose information the individual acquired from an employee while the individual represented the employee on behalf of an organization, if the information was communicated

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(b) Nothing in (a) of this section prohibits a person from disclosing information

(1) to prevent a crime that would cause serious physical injury or death or create a risk of imminent serious physical injury or death;

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Cindy Smith

From: Ptacin, John M (LAW) <john.ptacin@alaska.gov>
Sent: Monday, March 26, 2012 11:40 AM
To: Cindy Smith
Subject: FW: SB 224/HB 327 (Evidence Rules: Union Employee Privilege) - Alaska Supreme Court brief
Attachments: Brief of Appellee State of Alaska.pdf; Appendix to Brief of Appellee State of Alaska.pdf

Importance: High

Hi Cindy,

Here is a copy of the state's brief. The Alaska Supreme Court heard argument on Feb. 28th, 2011. If you need any other briefing, or have any follow up questions, just let me know. I will be in person to testify on Friday (SB 224).

John

John M. Ptacin
Assistant Attorney General-Labor and State Affairs Section
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
(Tel) 907-269-5073
(Fax) 907-258-4978

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.

(Added by SCO 364 effective August 1, 1979)

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Rule 502. Required Reports Privileged by Statute.

A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer of an agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question.

(Added by SCO 364 effective August 1, 1979)

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Rule 503. Lawyer-Client Privilege.

(a) **Definitions.** As used in this rule:

(1) A client is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services.

(2) A representative of the client is one having authority to obtain professional legal services and to act on advice rendered pursuant thereto, on behalf of the client.

(3) A lawyer is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(4) A representative of the lawyer is one employed to assist the lawyer in the rendition of professional legal services.

(5) A communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) **General Rule of Privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, or (2) between the client's lawyer and the lawyer's representative, or (3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. The authority to do so is presumed in the absence of evidence to the contrary.

(d) **Exceptions.** There is no privilege under this rule:

(1) *Furtherance of Crime or Fraud.* If the services of the lawyer were sought, obtained or used to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(2) *Claimants Through Same Deceased Client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(3) *Breach of Duty by Lawyer or Client.* As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer; or

(4) *Document Attested by Lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) *Joint Clients.* As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994; and by SCO 1522 effective October 15, 2003)

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Rule 504. Physician and Psychotherapist-Patient Privilege.

(a) **Definitions.** As used in this rule:

(1) A patient is a person who consults or is examined or interviewed by a physician or psychotherapist.

(2) A physician is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be.

(3) **[Effective March 1, 1999.]** A psychotherapist is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient to be so, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, (B) a person

licensed or certified as a psychologist or psychological examiner under the laws of any state or nation or reasonably believed by the patient so to be, while similarly engaged, [OR] (C) a person licensed as a marital or family therapist under the laws of a state or nation or reasonably believed by the patient so to be, while similarly engaged, or (D) a person licensed as a professional counselor under the laws of a state or nation, or reasonably believed by the patient so to be, while similarly engaged.

(4) A communication is confidential if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(b) **General Rule of Privilege.** A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental or emotional conditions, including alcohol or drug addiction, between or among the patient, the patient's physician or psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the patient, by the patient's guardian, guardian ad litem or conservator, or by the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(d) **Exceptions.** There is no privilege under this rule:

(1) *Condition on Element of Claim or Defense.* As to communications relevant to the physical, mental or emotional condition of the patient in any proceeding in which the condition of the patient is an element of the claim or defense of the patient, of any party claiming through or under the patient, of any person raising the patient's condition as an element of that person's own case, or of any person claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or after the patient's death, in any proceeding in which any party puts the condition in issue.

(2) *Crime or Fraud.* If the services of the physician or psychotherapist were sought, obtained or used to enable or aid anyone to commit or plan a crime or fraud or to escape detection or apprehension after the commission of a crime or a fraud.

(3) *Breach of Duty Arising Out of Physician-Patient Relationship.* As to a communication relevant to an issue of breach, by the physician, or by the psychotherapist, or by the patient, of a duty arising out of the physician-patient or psychotherapist-patient relationship.

(4) *Proceedings for Hospitalization.* For communications relevant to an issue in proceedings to hospitalize the patient for physical, mental or emotional illness, if the physician or psychotherapist, in the course of diagnosis or treatment, has determined that the patient is in need of hospitalization.

(5) *Required Report.* As to information that the physician or psychotherapist or the patient is required to report to a public employee, or as to information required to be recorded in a public office, if such report or record is open to public inspection, or as to information or matters contained in or reasonably raised by a report submitted under AS 08.64.336, other than information that would establish the identity of a patient, unless the court finds that it is necessary to admit the identifying information in order to serve the interests of justice.

(6) *Examination by Order of Judge.* As to communications made in the course of an examination ordered by the court of the physical, mental or emotional condition of the patient, with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise. This exception does not apply where the examination is by order of the court upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with information needed so that the lawyer may advise the defendant whether to enter a plea based on insanity or to present a defense based on the defendant's mental or emotional condition.

(7) *Criminal Proceeding.* For physician-patient communications in a criminal proceeding. This exception does not apply to the psychotherapist-patient privilege.

(Added by SCO 345 effective August 1, 1979; amended by SCO 850 effective January 15, 1988; by SCO 1108 effective January 15, 1993; by

SCO 1153 effective July 15, 1994; by SCO 1337 effective March 1, 1999; and by SCO 1522 effective October 15, 2003)

Note: SCO 1108 incorporated changes in Evidence Rule 504(a)(3) made by the legislature in ch. 129 § 12 SLA 1992. This legislation added the language in subparagraph (a)(3), "or (C) a person licensed as a marital or family therapist under the laws of a state or nation or reasonably believed by the patient so to be, while similarly engaged."

SCO 1108 was entered for the sole reason that the legislature has mandated the above amendment. If ch. 129 § 12 SLA 1992 is invalidated by a court of competent jurisdiction, SCO 1108 shall be considered automatically rescinded.

Note to SCO 1337: Evidence Rule 504(a)(3) was amended by § 5 ch. 75 SLA 1998 to expand the definition of "psychotherapist" to include licensed professional counselors. Section 1 of this order is adopted for the sole reason that the legislature has mandated the amendment.

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Rule 505. Husband-Wife Privileges.

(a) **Spousal Immunity.**

(1) *General Rule.* A husband shall not be examined for or against his wife, without his consent, nor a wife for or against her husband, without her consent.

(2) *Exceptions.* There is no privilege under this subdivision:

(A) In a civil proceeding brought by or on behalf of one spouse against the other spouse; or

(B) In a proceeding to commit or otherwise place a spouse, the property of a spouse or both the spouse and the property of the spouse under the control of another because of the alleged mental or physical condition of the spouse; or

(C) In a proceeding brought by or on behalf of a spouse to establish the spouse's competence or

(D) In a proceeding in which one spouse is charged with:

(i) A crime against the person or the property of the other spouse or of a child of either, whether such crime was committed before or during marriage.

(ii) Bigamy, incest, adultery, pimping, or prostitution.

(iii) A crime related to abandonment of a child or nonsupport of a spouse or child.

(iv) A crime prior to the marriage.

(v) A crime involving domestic violence as defined in AS 18.66.990.

(E) In a proceeding involving custody of a child.

(F) Evidence derived from or related to a business relationship involving the spouses.

(b) **Confidential Marital Communications.**

(1) *General Rule.* Neither during the marriage nor afterwards shall either spouse be examined as to any confidential communications made by one spouse to the other during the marriage, without the consent of the other spouse.

(2) *Exceptions.* There is no privilege under this subdivision:

(A) If any of the exceptions under subdivision (a) (2) of this rule apply; or

(B) If the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or a fraud; or

(C) In a proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether such claim is by testate or intestate succession or by inter vivos transaction; or

(D) In a criminal proceeding in which the communication is offered in evidence by a defendant who is one of the spouses between whom the communication was made; or

(E) In a proceeding under the Rules of Children's Procedure; or

(F) If the communication was primarily related to and made in the context of a business relationship involving both spouses or the spouses and third parties.

(Added by SCO 364 effective August 1, 1979; amended by SCO 823 effective August 1, 1987; by SCO 1269 effective July 15, 1997; and by SCO 1522 effective October 15, 2003)

Note to SCO 1269: Evidence Rule 505(a) was amended by § 70 ch. 64 SLA 1996. Section 13 of this order is adopted for the sole reason that the legislature has mandated the amendment.

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Rule 506. Communications to Clergymen.

(a) **Definitions.** As used in this rule:

(1) A member of the clergy is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting the individual.

(2) A communication is confidential if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) **General Rule of Privilege.** A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of the clergy in that individual's professional character as spiritual adviser.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the person, by the person's guardian or conservator, or by the person's personal representative if the person is deceased. The member of the clergy may claim the privilege on behalf of the person. The authority so to do is presumed in the absence of evidence to the contrary.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

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Rule 507. Political Vote.

Every person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1522 effective October 15, 2003)

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Rule 508. Trade Secrets.

A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measures as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

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Rule 509. Identity of Informer.

(a) **Rule of Privilege.** The United States, the State of Alaska and sister states have a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) **Who May Claim.** The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished by the informer.

(c) **Exceptions.**

(1) *Voluntary Disclosure -- Informer a Witness.* No privilege exists under this rule if the identity of the informer or the informer's interest in the subject matter of the communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the prosecution.

(2) *Testimony on Merits.*

(i) If a party claims that a government informer may be able to give testimony necessary to a fair determination of the issue of guilt, innocence, credibility of a witness testifying on the merits, or punishment in a criminal case, or of a material issue on the merits in a civil case to which the state is a party, and if the government invokes the privilege, the party shall be given an opportunity to show that the party's claim is valid. The judge shall hear all evidence presented by the party and the government, and both sides shall be permitted to be present with counsel during the presentation of evidence, subject to subdivision (c) (2) (ii) of this rule.

(ii) If the government requests an opportunity to submit to the court, by affidavit or testimony or otherwise, evidence concerning the information possessed by an informant, which submission might tend to reveal the informant's identity, the judge shall permit the government to make its submission without disclosure to the other party. Neither the attorney for the government, nor the other party or the other party's attorney may be present when the judge is examining the *in camera* submission. Although the submission generally will consist of affidavits, the judge may direct that witnesses appear before the judge, without the government or the other party present, to give testimony.

(iii) If the judge finds that there is a reasonable possibility that the informant can give the testimony sought, and if the government elects not to disclose the informant's identity, the judge shall, either on motion of a party or sua sponte, dismiss criminal charges to which the testimony would relate if the informant's testimony is material to guilt or innocence. In criminal

proceedings in which the informant's testimony is not material to guilt or innocence and in civil proceedings the judge may make any order that justice requires.

(iv) Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the government.

(3) *Legality of Obtaining Evidence.*

(i) When a defendant challenges the legality of the means by which evidence was obtained by the prosecution and the prosecution relies upon information supplied by an informer to support its claim of legality, if the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible the judge may require the identity of the informer to be disclosed. In determining whether or not to require disclosure, the judge shall hear any evidence offered by the parties and both the defendant and the government shall have the right to be represented by counsel.

(ii) If the judge determines that disclosure of the informant's identity is necessary, upon request by the prosecution the disclosure shall be made to the court alone, not to the defendant. The judge may, if necessary, examine the informant or other witnesses about the informant, but such examination will be *in camera* and neither the defendant nor the prosecution shall be present or represented.

(iii) If disclosure of the identity of the informer is made to the court and not to the defendant, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the prosecution.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

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Rule 510. Waiver of Privilege by Voluntary Disclosure.

A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or

the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

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Rule 511. Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege.

Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

(Added by SCO 364 effective August 1, 1979)

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Rule 512. Comment Upon or Inference From Claim of Privilege--Instruction.

(a) **Comment or Inference Not Permitted.** The claim of privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(b) **Claiming Privilege Without Knowledge of Jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) **Jury Instruction.** Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

(d) **Application -- Self-Incrimination.** The foregoing subsections do not apply in a civil case with respect to the privilege against self-incrimination.

(Added by SCO 364 effective August 1, 1979)

NEA-ALASKA
Affiliated with the National Education Association

March 19, 2012

Senator Dennis Egan
State Capitol Room 510
Juneau, AK 99801

Re: Senate Bill 224

Dear Senator Egan:

On behalf of NEA-Alaska, I wish to express our support for Senate Bill 224, which makes privileged certain communications between employees and employee union representatives. It is important that members feel the conversations they have with their union representatives remain confidential. When members have the confidence to speak openly with union representatives, NEA-Alaska is better able to advocate for its members.

I thank you and the Senate Labor and Commerce committee for introducing and hearing this important legislation.

Sincerely,

Barb Angaiak

Barb Angaiak
President

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GENERAL TEAMSTERS LOCAL 959
STATE OF ALASKA

Affiliated with the International Brotherhood of Teamsters
Rick Boyles, Secretary-Treasurer
520 E. 34th Ave., Suite 102, Anchorage, Alaska 99503
Phone (907) 565-8122 • Fax (907) 565-8199

March 20, 2012

Hand Delivered

Senator Egan
Labor and Commerce Committee
State Capitol Room 108
Juneau, AK, 99801

RE: Senate Bill 224, Privileged Communications

Dear Senator Egan:

On behalf of our Teamster Local 959 Business Representatives and the members that we represent around the state, we wish to thank the Committee for introducing this legislation in regards to the impact of privileged communications. Senate Bill 224 would allow free candid and confidential conversations between employees and their Business Representative. In addition, this bill allows the Business Representatives to fully investigate workplace disputes. Senate Bill 224 establishes privilege similar to the "attorney-client" privilege, between a Business Representative and member. This correlates to conversations that occur during the administration of the Collective Bargaining Agreement.

Additionally, previous legislatures have recognized other privileges for persons other than doctors, lawyers and spouse, such as:

- Evident Rule 503, protects communication between clients and lawyers' representatives;
- 08.63.200, protects communications between marital and family therapists and their patients;
- 08.95.900, protects communications between licensed social workers, their employees and clients;
- 08.86.200, protects communications made to "psychological associates";
- 08.80.315, protects records of pharmacists and communications between pharmacists and patients;
- 08.04.662, protects communications of accountants and their clients.

Considering the above examples and Senate Bill 224, we believe the merit of privilege is to ensure that members, clients, and patients can confide freely in their

Representatives or provide support in order to help them reduce problems, resolve litigations, and/or get appropriate service.

For these reasons, we thank you for introducing this important bill.

Sincerely,

TEAMSTERS LOCAL 959

Rick Boyles
Secretary-Treasurer

Public Employees Local 71

BOB JOHNSON
Business Manager/
Secretary-Treasurer

DENNIS MOEN
President

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(907) 586-6993

March 20, 2012

RE: Support for Senate Bill 224 & House Bill 327

Dear Labor and Commerce Committee Member:

For almost 40 years Public Employees Local 71 has had the privilege to serve as a representative for the Labor Trades and Crafts positions with the State of Alaska and have added other Public Employee groups along the way. During this time we have worked with the employers to come to agreements on tough issues with our members and in most cases both sides have come away feeling better about the situation than going in.

What we do as a labor union is ensure that our union members will have representation in the work place as set out in the National Labor Relations Act and further expanded in the Weingarten decision that states that a union member had the right to have a union representative at investigatory meetings that could lead to discipline.

Public Employees deserve the same rights that union members in the private sector enjoy. It has been our experience that having the employee's representative present at such meetings expedites the resolution of grievances as well as fosters a cooperative relationship between the employer, the employee and the union.

We at Public Employees' Local 71 strongly urge you to support and employee's right to be represented in the work place.

Sincerely,

Robert Johnson
Business Manager
Secretary-Treasurer

AMERICAN CIVIL LIBERTIES UNION of ALASKA

AMERICAN CIVIL LIBERTIES UNION OF ALASKA
1057 W. Fireweed, Suite 207
Anchorage, AK 99503
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March 22, 2012

The Honorable Dennis Egan, Chair
The Honorable Joe Paskvan, Vice-Chair
Senate Labor & Commerce Committee
Alaska State Senate
State Capitol
Juneau, AK 99801
Via email: Senator_Dennis_Egan@legis.state.ak.us
Senator_Joe_Paskvan@legis.state.ak.us

Re: SB 224: Union-Employee Privilege
ACLU Letter of Support

Dear Chair Egan & Vice-Chair Paskvan:

Thank you for the opportunity to provide this Letter in Support of Senate Bill 224.

The American Civil Liberties Union of Alaska (ACLU) represents thousands of members and activists throughout Alaska who seek to preserve and expand the individual freedoms and civil liberties guaranteed by the United States and Alaska Constitutions. **From that perspective, we wish to offer our statement of support for SB 224.**

Constitutional Values Served by the Bill

While we do not argue that SB 224 is required by the Alaska or federal Constitutions, we do note that the bill supports some of the important rights outlined by both constitutions.

The federal constitution prohibits passing any laws that would infringe "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., Amend. I. The Alaska Constitution prohibits any violation of the right "peaceably to assemble, and to petition the government." Alaska Const., Art. I, Sec. VI.

Among many groups of people who may petition the government about their grievances are public employees who may wish to ask for changes in the terms of their employment or to complain about mistreatment. Contesting

unfair disciplinary treatment and communicating with a union representative are aspects of this right.

While confidentiality is not constitutionally required as to all communications relating to the right to seek redress of grievances, confidentiality can be an important element of promoting full and frank discussions of those grievances. The privilege as described in the bill will assist in promoting the rights of public employees to seek redress of grievances from the government, by ensuring that communications with union representatives will not be used against them later.

That the bill presents a qualified privilege which can be overcome "as required by the superior court following a hearing in camera" ensures that documents and communications that are appropriately disclosed in the interests of justice should be so disclosed. While the bill does not lay out the grounds by which the Superior Court should require disclosure, typical considerations by a court in such a circumstance include whether the information is available from another source, whether the party seeking the information has exhausted all other alternatives, whether the information sought is "highly relevant" or merely cumulative with other evidence, and whether the party seeking the information has a "compelling need" for it. *See, e.g., Newton v. National Brodcasting Co.*, 109 F.R.D. 522, 527 (D. Nev. 1985) (discussing how a qualified journalist privilege may be overcome).

The committee may wish to consider whether it wishes to give more specific guidance to any courts considering the privilege to decide how and when such a privilege should be overcome.

Conclusion

We hope that the Labor and Commerce Committee will pass SB 224.

Thank you again for letting us share our thoughts. Please feel free to contact the undersigned if you have any questions or wish additional information.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Senator Linda Menard, Senator_Linda_Menard@legis.state.ak.us
Senator Bettye Davis, Senator_Bettye_Davis@legis.state.ak.us
Senator Cathy Giessel, Senator_Cathy_Giessel@legis.state.ak.us

(907) 586-4004 **Douglas Kemp Mertz** *fax (888) 293-2530*
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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
March 19, 2012

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

Douglas K. Mertz
Attorney for the Petitioner
Alaska Bar No. 7505027
Mertz Law Office
319 Seward Street, Ste 5
Juneau, Alaska 99801
907 586-4004

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

Marilyn May, Clerk

By:_____
Deputy Clerk

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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

[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

[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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IN THE SUPREME COURT OF THE STATE OF ALASKA

RUSSELL PETERSON, JR.	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
STATE OF ALASKA,	)	
	)	
Respondent.	)	Supreme Court No.: **S-14233**
	)	

Trial Court Case No.: 1JU-10-569 CI

APPEAL FROM THE SUPERIOR COURT
FIRST JUDICIAL DISTRICT AT JUNEAU
HONORABLE PHILIP M. PALLENBERG, JUDGE

BRIEF OF APPELLEE STATE OF ALASKA

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Filed in the Supreme Court
of the State of Alaska
on September _____, 2011

MARILYN MAY, CLERK
Appellate Courts

By: _____
Deputy Clerk

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ALASKA STATUTES:

AS 23.40.110(a)(1), (5). Unfair Labor Practices.

(a) A public employer or an agent of a public employer may not

(1) interfere with, restrain, or coerce an employee in the exercise of the employee's rights guaranteed in AS 23.40.080 ;

(5) refuse to bargain collectively in good faith with an organization which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

AS 23.40.210(a). Agreement; Cost-Of-Living Differential.

(a) Upon the completion of negotiations between an organization and a public employer, if a settlement is reached, the employer shall reduce it to writing in the form of an agreement. The agreement may include a term for which it will remain in effect, not to exceed three years. The agreement shall include a pay plan designed to provide for a cost-of-living differential between the salaries paid employees residing in the state and employees residing outside the state. The plan shall provide that the salaries paid, as of August 26, 1977, to employees residing outside the state shall remain unchanged until the difference between those salaries and the salaries paid employees residing in the state reflects the difference between the cost of living in Alaska and living in Seattle, Washington. The agreement shall include a grievance procedure which shall have binding arbitration as its final step. Either party to the agreement has a right of action to enforce the agreement by petition to the labor relations agency.

COURT RULES

ALASKA RULES OF CIVIL PROCEDURE:

Rule 26(b)(1). General Provisions Governing Discovery; Duty of Disclosure.

b) **Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons

having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 45(d). Subpoena.

(d) **Subpoena for Taking Depositions--Place of Examination.**

(1) Proof of service of a notice to take a deposition as provided in Rules 30(b) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the court for any judicial district of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subparagraph (b) of this rule.

The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the material except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(2) A resident of the judicial district in which the deposition is to be taken may be required to attend an examination at any place within the district, unless otherwise ordered by the court. A nonresident of the judicial district in which the deposition is to be taken, and a nonresident of the state subpoenaed within the state, may be required to attend at any place within the district wherein the nonresident is served with a subpoena, unless otherwise ordered by the court.

ALASKA RULE OF EVIDENCE:

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.

(Added by SCO 364 effective August 1, 1979)

Rule 502. Required Reports Privileged by Statute.

A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer of an agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question.

(Added by SCO 364 effective August 1, 1979)

Rule 503. Lawyer-Client Privilege.

(a) Definitions. As used in this rule:

(1) A client is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services.

(2) A representative of the client is one having authority to obtain professional legal services and to act on advice rendered pursuant thereto, on behalf of the client.

(3) A lawyer is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(4) A representative of the lawyer is one employed to assist the lawyer in the rendition of professional legal services.

(5) A communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General Rule of Privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, or (2) between the client's lawyer and the lawyer's representative, or (3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

(c) Who May Claim the Privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the

successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. The authority to do so is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of Crime or Fraud. If the services of the lawyer were sought, obtained or used to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(2) Claimants Through Same Deceased Client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(3) Breach of Duty by Lawyer or Client. As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer; or

(4) Document Attested by Lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) Joint Clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994; and by SCO 1522 effective October 15, 2003)

Rule 504. Physician and Psychotherapist-Patient Privilege.

(a) Definitions. As used in this rule:

(1) A patient is a person who consults or is examined or interviewed by a physician or psychotherapist.

(2) A physician is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be.

(3) [Effective March 1, 1999.] A psychotherapist is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient to be so, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, (B) a person licensed or certified as a psychologist or psychological examiner under the laws of any state or nation or reasonably believed by the patient so to be, while similarly engaged, [OR] (C) a person licensed as a marital or family therapist under the laws of a state or nation or reasonably believed by the patient so to be, while similarly engaged, or (D) a person licensed as a professional counselor under the laws of a state or nation, or reasonably believed by the patient so to be, while similarly engaged.

(4) A communication is confidential if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(b) General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental or emotional conditions, including alcohol or drug addiction, between or among the patient, the patient's physician or psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(c) Who May Claim the Privilege. The privilege may be claimed by the patient, by the patient's guardian, guardian ad litem or conservator, or by the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(d) Exceptions. There is no privilege under this rule:

(1) Condition on Element of Claim or Defense. As to communications relevant to the physical, mental or emotional condition of the patient in any proceeding in which the condition of the patient is an element of the claim or defense of the patient, of any party claiming through or under the patient, of any person raising the patient's condition as an element of that person's own case, or of any person claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or after the patient's death, in any proceeding in which any party puts the condition in issue.

(2) Crime or Fraud. If the services of the physician or psychotherapist were sought, obtained or used to enable or aid anyone to commit or plan a crime or fraud or to escape detection or apprehension after the commission of a crime or a fraud.

(3) Breach of Duty Arising Out of Physician-Patient Relationship. As to a communication relevant to an issue of breach, by the physician, or by the psychotherapist, or by the patient, of a duty arising out of the physician-patient or psychotherapist-patient relationship.

(4) Proceedings for Hospitalization. For communications relevant to an issue in proceedings to hospitalize the patient for physical, mental or emotional illness, if the physician or psychotherapist, in the course of diagnosis or treatment, has determined that the patient is in need of hospitalization.

(5) Required Report. As to information that the physician or psychotherapist or the patient is required to report to a public employee, or as to information required to be recorded in a public office, if such report or record is open to public inspection, or as to information or matters contained in or reasonably raised by a report submitted under AS 08.64.336, other than information that would establish the identity of a patient, unless the court finds that it is necessary to admit the identifying information in order to serve the interests of justice.

(6) Examination by Order of Judge. As to communications made in the course of an examination ordered by the court of the physical, mental or emotional condition of the patient, with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise. This exception does not apply where the examination is by order of the court upon the request of the lawyer for the defendant in a criminal

proceeding in order to provide the lawyer with information needed so that the lawyer may advise the defendant whether to enter a plea based on insanity or to present a defense based on the defendant's mental or emotional condition.

(7) Criminal Proceeding. For physician-patient communications in a criminal proceeding. This exception does not apply to the psychotherapist-patient privilege.

(Added by SCO 345 effective August 1, 1979; amended by SCO 850 effective January 15, 1988; by SCO 1108 effective January 15, 1993; by SCO 1153 effective July 15, 1994; by SCO 1337 effective March 1, 1999; and by SCO 1522 effective October 15, 2003)

Note: SCO 1108 incorporated changes in Evidence Rule 504(a)(3) made by the legislature in ch. 129 § 12 SLA 1992. This legislation added the language in subparagraph (a)(3), "or (C) a person licensed as a marital or family therapist under the laws of a state or nation or reasonably believed by the patient so to be, while similarly engaged."

SCO 1108 was entered for the sole reason that the legislature has mandated the above amendment. If ch. 129 § 12 SLA 1992 is invalidated by a court of competent jurisdiction, SCO 1108 shall be considered automatically rescinded.

Note to SCO 1337: Evidence Rule 504(a)(3) was amended by § 5 ch. 75 SLA 1998 to expand the definition of "psychotherapist" to include licensed professional counselors. Section 1 of this order is adopted for the sole reason that the legislature has mandated the amendment.

Rule 505. Husband-Wife Privileges.

(a) Spousal Immunity.

(1) General Rule. A husband shall not be examined for or against his wife, without his consent, nor a wife for or against her husband, without her consent.

(2) Exceptions. There is no privilege under this subdivision:

(A) In a civil proceeding brought by or on behalf of one spouse against the other spouse; or

(B) In a proceeding to commit or otherwise place a spouse, the property of a spouse or both the spouse and the property of the spouse under the control of another because of the alleged mental or physical condition of the spouse; or

(C) In a proceeding brought by or on behalf of a spouse to establish the spouse's competence or

(D) In a proceeding in which one spouse is charged with:

(i) A crime against the person or the property of the other spouse or of a child of either, whether such crime was committed before or during marriage.

(ii) Bigamy, incest, adultery, pimping, or prostitution.

(iii) A crime related to abandonment of a child or nonsupport of a spouse or child.

(iv) A crime prior to the marriage.

(v) A crime involving domestic violence as defined in AS 18.66.990.

(E) In a proceeding involving custody of a child.

(F) Evidence derived from or related to a business relationship involving the spouses.

(b) Confidential Marital Communications.

(1) General Rule. Neither during the marriage nor afterwards shall either spouse be examined as to any confidential communications made by one spouse to the other during the marriage, without the consent of the other spouse.

(2) Exceptions. There is no privilege under this subdivision:

(A) If any of the exceptions under subdivision (a) (2) of this rule apply; or

(B) If the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or a fraud; or

(C) In a proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether such claim is by testate or intestate succession or by inter vivos transaction; or

(D) In a criminal proceeding in which the communication is offered in evidence by a defendant who is one of the spouses between whom the communication was made; or

(E) In a proceeding under the Rules of Children's Procedure; or

(F) If the communication was primarily related to and made in the context of a business relationship involving both spouses or the spouses and third parties.

(Added by SCO 364 effective August 1, 1979; amended by SCO 823 effective August 1, 1987; by SCO 1269 effective July 15, 1997; and by SCO 1522 effective October 15, 2003)

Note to SCO 1269: Evidence Rule 505(a) was amended by § 70 ch. 64 SLA 1996. Section 13 of this order is adopted for the sole reason that the legislature has mandated the amendment.

Rule 506. Communications to Clergymen.

(a) Definitions. As used in this rule:

(1) A member of the clergy is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting the individual.

(2) A communication is confidential if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General Rule of Privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of the clergy in that individual's professional character as spiritual adviser.

(c) Who May Claim the Privilege. The privilege may be claimed by the person, by the person's guardian or conservator, or by the person's personal representative if the person is deceased. The member of the clergy may claim the privilege on behalf of the person. The authority so to do is presumed in the absence of evidence to the contrary.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

Rule 507. Political Vote.

Every person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1522 effective October 15, 2003)

Rule 508. Trade Secrets.

A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measures as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

Rule 509. Identity of Informer.

(a) Rule of Privilege. The United States, the State of Alaska and sister states have a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who May Claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished by the informer.

(c) Exceptions.

(1) Voluntary Disclosure -- Informer a Witness. No privilege exists under this rule if the identity of the informer or the informer's interest in the subject matter of the communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the prosecution.

(2) Testimony on Merits.

(i) If a party claims that a government informer may be able to give testimony necessary to a fair determination of the issue of guilt, innocence, credibility of a witness testifying on the merits, or punishment in a criminal case, or of a material issue on the merits in a civil case to which the state is a party, and if the government invokes the privilege, the party shall be given an opportunity to show that the party's claim is valid.

The judge shall hear all evidence presented by the party and the government, and both sides shall be permitted to be present with counsel during the presentation of evidence, subject to subdivision (c) (2) (ii) of this rule.

(ii) If the government requests an opportunity to submit to the court, by affidavit or testimony or otherwise, evidence concerning the information possessed by an informant, which submission might tend to reveal the informant's identity, the judge shall permit the government to make its submission without disclosure to the other party. Neither the attorney for the government, nor the other party or the other party's attorney may be present when the judge is examining the in camera submission. Although the submission generally will consist of affidavits, the judge may direct that witnesses appear before the judge, without the government or the other party present, to give testimony.

(iii) If the judge finds that there is a reasonable possibility that the informant can give the testimony sought, and if the government elects not to disclose the informant's identity, the judge shall, either on motion of a party or sua sponte, dismiss criminal charges to which the testimony would relate if the informant's testimony is material to guilt or innocence. In criminal proceedings in which the informant's testimony is not material to guilt or innocence and in civil proceedings the judge may make any order that justice requires.

(iv) Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the government.

(3) Legality of Obtaining Evidence.

(i) When a defendant challenges the legality of the means by which evidence was obtained by the prosecution and the prosecution relies upon information supplied by an informer to support its claim of legality, if the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible the judge may require the identity of the informer to be disclosed. In determining whether or not to require disclosure, the judge shall hear any evidence offered by the parties and both the defendant and the government shall have the right to be represented by counsel.

(ii) If the judge determines that disclosure of the informant's identity is necessary, upon request by the prosecution the disclosure shall be made to the court alone, not to the defendant. The judge may, if necessary, examine the informant or other witnesses about the informant, but such examination will be in camera and neither the defendant nor the prosecution shall be present or represented.

(iii) If disclosure of the identity of the informer is made to the court and not to the defendant, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the prosecution.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

ISSUE PRESENTED FOR REVIEW

May an employee who has sued his former employer withhold relevant information in discovery by asserting a "union testimonial privilege," despite the fact that no such privilege currently exists under Alaska law, and despite the mandate of Alaska Rule of Evidence 501, which limits the creation of new evidentiary privileges?

STATEMENT OF THE CASE

I. Introduction

Mr. Peterson asks this Court to take the unusual step of creating a new evidentiary privilege for communications between an employee and his union — a union testimonial privilege. [Pet. Br. 3] No other jurisdiction has adopted such a privilege. Because new evidentiary privileges obscure the search for truth, because Alaska Rule of Evidence 501 limits the creation of new privileges, and because the proposed privilege would undermine important public policy goals, this Court should decline to adopt this new privilege.

Mr. Peterson sued his state employer for wrongful termination, and the state sought Mr. Peterson's union file in discovery pursuant to the Alaska Rules of Civil Procedure. [Exc. 001-008, 050] The subpoena for the union file was reasonably calculated to lead to the discovery of evidence which would establish that the state did not breach its duty of good faith and fair dealing in terminating Mr. Peterson and that Mr. Peterson failed to exhaust his administrative remedies.[1] Without access to Mr. Peterson's union file, the state will not be able to prove that Mr. Peterson failed to

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[1] *Noffke v. Perez*, 178 P.3d 1141, 1150 (Alaska, 2008).

fully pursue the grievance procedure provided in his collective bargaining agreement. [Tr. 033-039]

Mr. Peterson's union communications are not subject to any existing evidentiary privileges.[2] Courts refuse to extend the attorney-client privilege because the union representative is not a lawyer to the individual member during a labor dispute.[3] And when Mr. Peterson's private counsel inserted himself into the grievance process, the union and the private counsel did not enter into a joint representation of Mr. Peterson, nor was the union acting as an agent of Mr. Peterson's private counsel, because the union represents all of its members during a dispute.[4] [Tr. 020-021] Accordingly, Mr. Peterson may not withhold the requested documents unless this Court creates a new evidentiary privilege.

This Court possesses a limited authority to create new privileges. Alaska Rule of Evidence 501 limits the creation of new common-law privileges — since its enactment in 1979, this Court has not created a new common-law privilege.[5] Moreover, a union testimonial privilege would undermine important public policy objectives --- for instance, it would undermine the exhaustion doctrine by making it

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2 Alaska R. of Evid. 501-509.

3 *Walker v. Huie*, 142 F.R.D. 497, 501 (D. Utah 1992).

4 *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1175-6 (7th. Cir. 1995) *citing Seymour v. Olin Corp.*, 666 F.2d 202, 208 (5th. Cir. 1982).

5 SCO 364 effective August 1, 1979. The last common-law privilege was adopted in *Allred v. State*, 554 P.2d 411 (Alaska 1976) and it was the psychotherapist-patient privilege.

impossible for an employer to prove that an employee failed to exhaust the grievance process provided by a collective bargaining agreement. This Court should permit the legislature to debate the policy implications of such a new privilege or seek public input before adopting this unique privilege, as the legislature has yet to enact a statute which even implies the creation of such a privilege.[6] No court has adopted a union testimonial privilege applicable to civil litigation.[7] And privileges that are similar to the union testimonial privilege, such as the lay advocate privilege, do not apply in the labor relations context because labor relations statutes do not equate union representatives to attorneys.[8]

Finally, due process does not require the union testimonial privilege. State employees are afforded multiple opportunities to be heard both before and after the State terminates their employment. [Exc. 125, 128, 001-008] And the rules of discovery

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[6] Administrative Rule 44(e) permits this Court to adopt a new privilege but should submit notice to interested parties under this rule.

[7] Michael Moberly, *Extending A Qualified Evidentiary Privilege To Confidential Communications Between Employees And Their Union Representatives*, 5 Nev. L.J. 508, 568-569 (2004-2005). New York courts have arguably adopted the union testimonial privilege in limited circumstances. *Seelig v. Shepard* 152 Misc.2d 699, 699-700 (N.Y. Sup. Ct. 1991)(the case did not involve civil litigation); *See also, City of Newburgh v. Newman*, 70 AD.2d 362, 365-66 (3d Dept. 1979)(upholding an unfair labor practices decision of a labor relations board). Unlike courts in Alaska, New York courts have the authority to recognize new common law privileges and do not need to interpret whether statutory language and legislative history plainly demonstrate the legislature's intent to create a new privilege. *Am. Airlines, Inc. v. Superior Court*, 114 Cal.App.4th 881, 893 (Cal App. 4th 2004); Alaska Rules Of Evidence 501.

[8] *Am. Airlines, Inc. v. Superior Court*, 114 Cal.App.4th 881, 890 (Cal App. 4th 2004).

promote due process in that they ensure Mr. Peterson is not erroneously deprived of a property interest.[9]

The Court should decline to create a new evidentiary privilege for union communications, and thus should uphold the decision of the superior court allowing the state access to Mr. Peterson's union file.

II. Facts And Proceedings

Russell Peterson applied for a position as a Microcomputer/Network Technician II with the Division of Labor and Workforce Development ("the state") on January 16, 2007 and was hired on January 24, 2007. [Exc. 002-003] Unbeknownst to the state, Mr. Peterson falsified his employment application by certifying that he had never been convicted of a felony, when in fact he had been convicted of numerous felonies. [Exc. 016, 108, 110-111, 125] The employment application made it explicit that Mr. Peterson needed to disclose past felonies and applicants who fail to disclose are subject to termination. [Exc. 108-121].

In an odd twist of fate, it was Mr. Peterson's attorney, Mr. Mertz, who later tipped off the state to Mr. Peterson's undisclosed felony convictions. [Exc. 123-124] On June 1, 2009, Mr. Mertz sent a letter to Pat Shier, then Director of the State of Alaska Division of Retirement and Benefits. [*Id.*] In that letter, Mr. Mertz explained that Mr. Peterson had moved to Alaska in the late 1980's. [*Id.*] And that, in order to obtain

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[9] Alaska R. Civ. P. 26(b)(1). In this case, Mr. Peterson is not erroneously deprived of a property interest if he failed to exhaust administrative remedies. *Grant v. Anchorage Police Dept.*, 20 P.3d 553, 557 n. 16 (Alaska 2001) *citing Knight v. Am. Guard & Alert, Inc.* 714 P.2d 788, 791-92 (Alaska 1986).

"a fresh start," Mr. Peterson used a name ("Joshua Warner"), date of birth, and social security number that were not his own. [*Id.*] Mr. Mertz explained that Mr. Peterson had worked for the state under this false identity during the 1980's and asked that the Division of Retirement and Benefits correct Mr. Peterson's Public Employment Retirement System tier and other longevity-related benefits to give Mr. Peterson credit for his work under the false identity. [*Id.*] The state began to investigate Mr. Peterson's claims, and learned that he had failed to disclose several out-of-state felony convictions when he applied for his job. [Exc. 125]

Upon discovering the falsification, and after holding a pretermination meeting, the State terminated Mr. Peterson's employment on August 21, 2009. [*Id.*]. Mr. Peterson, who was a member of the Alaska State Employees Association Union, Local 52, American Federation of State County and Municipal Employees, AFL-CIO ("the union"), sought reinstatement through the grievance process set out in the collective bargaining agreement between the union and the state.[10] [Exc. 125, 128]

The union represented Mr. Peterson through three steps of the grievance process. [Exc. 095-096, 125, 128] None of the union's explanations for the falsification convinced the state to change its position. [Exc. 128] At no time during the grievance process did the state or any of its representatives seek to review communications between Mr. Peterson and the union. [Exc. 095-096; Tr. 033-039]

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[10] The Public Employment Relations Act (PERA) requires state employers and unions to enter collective bargaining agreements. The collective bargaining agreement must include a grievance process that has binding arbitration as its final step. AS 23.40.210(a)(2010).

In March, 2010, the union decided not to seek arbitration of Mr. Peterson's grievance under Step IV of the grievance process. [Exc. 128] If Mr. Peterson disagreed with that decision not to seek arbitration, he was required to appeal it with the union internally, but the state believes that he never did so, and thus failed to exhaust his administrative remedies.[11] [*Id.*] This failure would be fatal to his right to pursue his contract claims against the state in civil court.[12]

One month later, on April 30, 2010, Mr. Peterson filed a wrongful termination lawsuit in superior court. [Exc. 001-008]. In the complaint, Mr. Peterson alleges breach of the covenant of good faith and fair dealing, intentional infliction of emotional distress, and other ancillary causes of action. [*Id.*] Mr. Peterson claimed in his complaint that he exhausted his administrative remedies through the grievance process. [Exc. 004] Discovery ensued. [Tr. 184-187]

The state reviewed emails between Dick Isett (the union's business agent) and Benthe Mertl-Posthumus (the State's point person during the grievance process). [Exc. 128] Emails from Mr. Isett to Ms. Posthumous, which are hearsay, appear to indicate Mr. Peterson failed to appeal Mr. Isett's decision not to take this matter to arbitration. [*Id.*] Because Mr. Peterson's union file likely provides direct evidence of

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[11] *See, e.g., Crowley v. State, Dept. of Health and Social Services, Office of Children's Services*, Not Reported in P.3d, 2008 WL 5352309, 4 (Alaska 2011) (unpublished) (holding that an employee had a duty to appeal a business agent's decision not to seek arbitration to the union's grievance review committee in order to have exhausted administrative remedies).

[12] *Grant v. Anchorage Police Dept.*, 20 P.3d 553, 557 n.16 (Alaska 2001) *citing Knight v. Am. Guard & Alert, Inc.* 714 P.2d 788, 791-92 (Alaska 1986).

Mr. Peterson's failure to exhaust that the state could use in its defense, the state issued a proper subpoena to the union on September 29, 2010. [Exc. 050] Neither the union nor the AFL-CIO ("the amicus") objected to production of the union file at the time of the request. But Mr. Peterson filed a motion to quash on October 11, 2010. [Exc. 034-085] Although Mr. Peterson never appears to argue the file is irrelevant to this litigation, he argues that the records should be protected by an evidentiary privilege. [*Id.*]

Mr. Peterson's motion to quash placed the state at a considerable disadvantage in obtaining discovery, which was initially set to close in December 2010. [Tr. 033-039] The state deposed Mr. Peterson and sought follow-up discovery, but still has not obtained direct evidence of whether Mr. Peterson exhausted his administrative remedies. [*Id.*][13] In March 2011, the superior court denied Mr. Peterson's motion to quash, noting that under Evidence Rule 501, a court may recognize new privileges only if compelled to by a constitutional right, by a statute, or by changes made to the evidence rules by this Court in its rulemaking authority. [Exc. 158-175]. Mr. Peterson petitioned for review, and his petition was granted.

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[13] There have been several developments of the factual record regarding exhaustion since the superior court briefing took place in this case. On remand, if the Court adopts a union testimonial privilege, serious questions remain regarding whether Mr. Peterson waived the privilege in this case by asserting at his deposition that it was futile for him to exhaust administrative remedies with the union given the union's statements to him.

STANDARD OF REVIEW

Rulings on discovery are reviewed for abuse of discretion.[14] In determining whether a case presents facts warranting the recognition of a new privilege, certain general principles apply.[15] Foremost among these is the maxim that the public has the right to hear every man's evidence in a court of law.[16] Courts start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and it is the party which seeks the exception from this principle that bears the burden of establishing a privilege.[17] New privileges suppress evidence and compromise the search for truth.[18]

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[14] *Christensen v. NCH Corp.*, 956 P.2d 468, 473 (Alaska 1998).

[15] *In Re Grand Jury Subpoenas Dated January 20, 1998*, 995 F.Supp. 332, 334 (E.D.N.Y. 1988). This standard applies to the extent Mr. Peterson is asking the Court to create a common-law privilege.

[16] *United States v. Bryan*, 339 U.S. 323, 331 (1950).

[17] *In Re Grand Jury Subpoenas Dated January 20, 1998*, 995 F.Supp. 332, 334 (E.D.N.Y. 1988).

[18] *See Univ. of Pa. v. EEOC*, 493 U.S. 182 (1990) (privilege denied for confidential university peer review proceedings); *United States v. Gillock*, 445 U.S. 360 (1980) (privilege denied for state legislators); *United States v. Nixon*, 418 U.S. 683 (1974) (privilege denied in part for communications between President and his senior advisors); *Couch v. United States*, 409 U.S. 322 (1973) (accountant-client privilege denied). See also *In re Grand Jury*, 103 F. 3d 1140, 1147 (3d Cir. 1997) (circuit court refuses to recognize parent-child privilege).

ARGUMENT

I. The Union File Is Relevant And Discoverable Under The Alaska Rules of Civil Procedure

Under the Alaska Rules of Civil Procedure, the state is entitled to seek Mr. Peterson's union file.[19] The Court has stated that "discovery should normally proceed without judicial participation . . . 'in a manner demonstrating candor and common sense.'"[20] Alaska courts have adopted "a system of liberal pretrial discovery where parties may obtain discovery regarding any matter not privileged which is relevant to the subject matter involved in the pending action.[21] And "relevance for purposes of discovery is broader than for purposes of trial."[22] Accordingly, "[t]he information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[23] Mr. Peterson does not appear to argue that his union file is not relevant or discoverable, absent a privilege. [Exc. 034-085] And the union file is relevant to more than Mr. Peterson's failure to exhaust administrative remedies.[24]

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19 Alaska R. Civ. P. 26(b)(1).

20 *Langdon v. Champion*, 745 P.2d 1371, 1373 (Alaska 1987).

21 *Noffke v. Perez*, 178 P.3d 1141, 1150 (Alaska, 2008).

22 *Lee v. State,* 141 P.3d 342, 347 (Alaska 2006).

23 Civil Rule 26(b)(1).

24 Every employment contract in Alaska is subject to the implied covenant of good faith and fair dealing. *Smith v. Anchorage Sch. Dist.,* 240 P.3d 834, 844 (Alaska 2010). While lacking a precise definition, the covenant "generally requires employers to treat

Moreover, pursuant to Alaska R. Civ. P. 45(d), the union could have lodged an objection to the extent of the state's subpoena. Had an objection been lodged, the state could have worked with the union to narrow its requests and avoid areas of concern to the union. If the state thought the union was not providing all the documents it could, the state could have sought redress in superior court.[25]

II. The Union File Is Not Subject To An Existing Privilege Or Joint Privilege

Union representation during the grievance process does not form an attorney-client relationship between the union representative and the member. Attorney-client privilege in Alaska is governed by Evidence Rule 503, which applies to communications between a client and a "lawyer or the lawyer's representative." Courts routinely refuse to extend the attorney-client privilege to union representation

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like employees alike and act in a manner that a reasonable person would regard as fair. *Mitchell v. Teck Cominco Alaska, Inc.*, 193 P.3d 751, 760 (Alaska 2008). Thus, one question for trial is whether the state treated Mr. Peterson fairly during the grievance process. Mr. Peterson's union file could lead to the discovery that some of Mr. Peterson's explanations for his failure to report felonies surfaced only during the grievance process and not before. [Exc. 094-097] Moreover, if Mr. Peterson made false or misleading statements to his union, the file could establish that Mr. Peterson is not a credible witness which is always at issue in a trial. [*Id.*] If there are other grievances in the file involving Mr. Peterson, they would tend to show bias of potential witnesses. [*Id.*] The State's request is merely intended to flush out and develop these factual issues for trial. [*Id.*]

[25] *See McCoy v. Southwest Airlines,* 211 F.R.D. 381, 384-385 (C. Dist. Cal. 2002)(where a non-party witness objects to the scope of discovery, the nonparty can prevent disclosure by objection and the party seeking discovery must then obtain an order from the court directing compliance).

because the relationship between a union and its members is not that of a lawyer and a client.[26]

The union represents several interests during the grievance process, not just the interest of the member bringing the grievance. Once an employee bargaining unit designates a union, the members of that bargaining unit agree that the union is the exclusive representative of all the unit members.[27] The union advocates for the individual member during the grievance process and is obligated to do so.[28] But at times, the union must sacrifice the interests of individual employees for the sake of the larger bargaining collective in a unionized workforce.[29] The betterment of the entire unit is at stake in each and every grievance,[30] including Mr. Peterson's grievance. The union maintains considerable discretion over grievance matters.[31] The union's duty

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26 *See Walker v. Huie*, 142 F.R.D. 497 (D. Utah 1992) (refusing to apply attorney-client privilege to union representative because he was not an attorney). *Rawlings v. Police Dep't of Jersey City*, 627 A.2d 602, 609 (N.J. 1992) (same).

27 AS 23.40.110(a)(5).

28 *Kollodge v. State*, 757 P.2d 1028, 1034 (Alaska 1988).

29 *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1175-1176 (7th. Cir. 1995) *citing NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

30 *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965); *Peterson v. Kennedy*, 771 F.2d 1244, 1258 (9th Cir. 1985); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

31 *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1175 (7th. Cir. 1995) *citing Seymour v. Olin Corp.*, 666 F.2d 202, 208 (5th. Cir. 1982). *See Tedesco v. City of Stamford*, 610 A.2d 574, 582-83 (Conn., 1992) *citing Winston v. United States Postal Service*, 585 F.2d 198, 208 (7th Cir. 1978) (The union has a duty to discountenance disruptive and frivolous claims).

to the membership is critical when it decides not to take a dispute with management to arbitration, which can be expensive for the union.[32] This is not an attorney client relationship.

In an effort to bolster his claim that his union representative is an attorney, Mr. Peterson distorts the state's role in "requiring" union grievance proceedings. Mr. Peterson argues that "the State requires the employee pursue a mandatory grievance process before he can file suit." [Pet. Br. 2] He goes on to argue "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." [Pet. Br. 7, 4, 9] The state employer is not forcing Mr. Peterson into the grievance process. The Alaska Legislature requires state agencies to enter into collective bargaining agreements providing grievance procedures.[33] The state is required to recognize the union as the member's exclusive representative at all times, and work exclusively with the union during the grievance process.[34]

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[32] *See Kollodge v. State*, 757 P.2d 1028, 1036 (Alaska 1988) (the union did not breach its duty to fairly represent the member when it decided not to arbitrate, given that after careful review, the union felt it did not have a strong chance of prevailing at arbitration).

[33] AS 23.40.240; AS 23.40.110(a)(5); *Barnica v. Kenai Peninsula Borough School Dist.*, 46 P.3d 974, 977 (Alaska 2002)(plurality).

[34] *Id. See also* AS 23.40.210(a). The legislature determined that these rules best serve the State of Alaska by engendering harmonious and cooperative relations between state employers and its employees.

Mr. Mertz's assistance of Mr. Peterson during the grievance process does not create a joint privilege between the union and Mr. Mertz either. [Tr. 020-021] The presence of union representatives at meetings between attorneys and clients destroys the attorney-client privilege.[35] Labor law disfavors the involvement of privately retained counsel in the grievance process because it bypasses the union and undermines the strength of the union's exclusive representation.[36] Furthermore, the union is not Mr. Mertz's agent.[37] Thus, communications Mr. Mertz had with the union are not subject to a privilege.

III. The Court Has Limited Authority Outside Of Rulemaking To Create New Privileges

Because Mr. Peterson's union file is not protected by the attorney-client privilege, only a newly created union testimonial privilege would prevent its disclosure in discovery.[38] No Alaska court has recognized such a privilege, and no other jurisdiction

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35 *Atwood v. Burlington Indus. Equity, Inc.*, 908 F. Supp. 319, 323 (M.D.N.C. 1995).

36 *Castelli v. Douglas Aircraft Co.*, 752 F.2d 1480, 1484 (9th Cir. 1985) *citing Malone v. United States Postal Service,* 526 F.2d 1099 (6th Cir. 1975); *Johnson v. United Steelworkers of Am.*, 843 F. Supp. 944, 947 (M.D. Pa. 1994). *See McLean Hosp.*, 264 N.L.R.B. 459, 472 (1982) (Representation by private counsel is not tantamount to union representation and it is not considered a shared activity of the union and the attorney when they communicate).

37 *Cf. American Nat. Watermattress Corp. v. Manville*, 642 P.2d 1330, 1333-1334 (Alaska 1982) (statement of facts given by a prospective client to an attorney's agent is protected by the attorney-client privilege. The union is not an agent of Mr. Peterson's private counsel).

38 *Noffke v. Perez*, 178 P.3d 1141, 1150 (Alaska, 2008).

has created such an extensive privilege in civil courts.[39] This Court should decline to create a union testimonial privilege given its decision to codify the law of privileges in Alaska and to stop creating new common-law privileges, coupled with the strong public policy reasons against such a new privilege.

A. The Court has already decided not to adopt new privileges as a matter of common law

This Court decided in 1979 to limit the creation of new common-law evidentiary privileges by codifying the law of privileges.[40] The Court hired Professor Stephen Saltzburg of the University of Virginia School of Law to work with local practitioners to codify Alaska's privileges.[41] This Court has not adopted a common-law privilege since this project.[42] Under Alaska law, the Court through its rulemaking

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[39] New York courts have arguably adopted the union testimonial privilege in limited circumstances during management investigations into employee wrongdoing. *Seelig v. Shepard* 152 Misc.2d 699, 699-700 (N.Y. Sup. Ct. 1991); *City of Newburgh v. Newman*, 70 A.D.2d 362, 365-66 (3d Dept. 1979) (neither case involved civil litigation).

[40] In the 1970's, there was nationwide debate whether to cap the number of privileges in state and federal courts, or whether to allow individual courts to fashion common law privileges. Congress, for instance, enacted Federal Rule of Evidence 501, a rule that leaves the recognition of testimonial privileges in the hands of the courts to be developed as part of common law. Symposium, *Giving Codification A Second Chance – Testimonial Privileges And the Federal Rules of Evidence*, 53 Hastings L.J. 769, 770; 790 (2002).

[41] Various back up documents to SCO 364 are illustrative of this process, and are attached as Appendix 1.

[42] The last common-law privilege was adopted in *Allred v. State*, 554 P.2d 411 (Alaska 1976) and it was the psychotherapist-patient privilege. *See B.H. v. State*, 1995 WL 17220341 (Alaska App. 1995) (unpublished opinion) (declining to adopt the parent-child privilege noting that new privileges should be adopted by changes to court rules).

function or the Legislature through statute balances the policy benefits of creating a new testimonial privilege against the threat that the new privilege will shield too much evidence from the trier of fact.[43] The Court will occasionally recognize more limited privileges but only if that recognition is required by a constitutional provision like the executive privilege doctrine.[44]

B. The Public and the Legislature must balance public policy when deciding the merits of this privilege

First, new testimonial privileges are disfavored because they suppress evidence and compromise the search for truth.[45] This is why the U.S. Supreme Court has repeatedly ruled against the recognition of new privileges beyond those already existing in common law.[46]

Beyond this, the legislature and the public must balance various interests when deciding the merits of a new privilege. Privileges create zones of silence which are disfavored.[47] And these zones of silence can have important unintended consequence to

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43 Symposium, *Giving Codification A Second Chance – Testimonial Privileges And the Federal Rules of Evidence*, 53 Hastings L.J. 769, 797 (2002). The Court should not consider the privilege under common law principles and instead await a proposal under its rulemaking function which allows for public comment under Administrative Rule 44(e).

44 *Doe v. Superior Court*, 721 P.2d 617, 622-623 (Alaska 1986); *Capital Information Group v. State*, 923 P.2d 29, 35-36 (Alaska 1996).

45 *Supra* note 18.

46 *Id.*

47 *Id.*

our society. For instance, anti-discrimination laws prohibit discrimination on the basis of sex, marital status, changes in marital status, pregnancy, parenthood, age, race, disability, color, or national origin.[48] The legislature expressly applied this prohibition to unions by making it unlawful for unions to aid and abet in such discrimination.[49] If the Court establishes a union testimonial privilege, the union would have to aid and abet a member's discriminatory conduct by keeping it secret unless the employee signs a waiver.[50] This would undermine Alaska's anti-discrimination laws.[51]

A union testimonial privilege would also undermine the significance of the grievance process, arbitration of labor disputes, and the principle of self-governing. Grievance procedures in collective bargaining agreements between unions and management are mandatory in the sense that they preclude the use of other judicial remedies[52] so that the labor disputes can be handled internally. And when grievance

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48 AS 18.80.220.

49 AS 18.80.260.

50 In *Am. Airlines Inc. v. Superior Court*, a plaintiff alleged that his union representative had information that would support his claims of racial discrimination. At deposition, the union representative refused to answer questions relevant to discrimination he had witnessed on the basis that his discussions with other employees about derogatory remarks were protected by a union representative-union member evidentiary privilege. The court denied the privilege noting that such a privilege could severely compromise investigations into claims of harassment, discrimination, and unlawful conduct. *Am. Airlines Inc., v. Superior Court*, 114 Cal.App.4th, 881, 890 (Cal App. 4th 2004).

51 *Id.*

52 *Barnica v. Kenai Peninsula Borough School Dist.*, 46 P.3d 974, 977 (Alaska 2002)(plurality).

procedures have arbitration as a final step, that system promotes harmonious and cooperative government employer-employee relations.[53] The grievance process encourages the early resolution of disputes by discussion and conciliation before disputes escalate to unmanageable proportions.[54] For these reasons, courts typically give primacy to contractual grievance/arbitration clauses.[55] Mr. Peterson prevents the union and the state from weighing the merits of his grievance by not exhausting his administrative remedies, and he should not be allowed to withhold evidence of his failure to exhaust.[56]

C. Courts in other jurisdictions have sometimes created privileges by statutory implication but only if an underlying statute truly makes no sense absent a privilege

Sometimes courts recognize new privileges when their creation is implied in statute,[57] but the Alaska Legislature has not implied the creation of a union testimonial

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53 *Id.* at 978.

54 *Id.*

55 *Id.*

56 These policy concerns outweigh the unfounded concerns cited by Mr. Peterson. [Pet. Br. 24-28] First, Mr. Peterson is entitled to the state's internal documents if no privilege attaches. [Pet. Br. 27] Moreover, concerns over the privacy of collective bargaining strategies are unfounded. [Pet. Br. 27]. The union may petition the Alaska Labor Relations Agency (ALRA), a quasi-judicial executive branch agency, for redress if that were to occur. AS 23.40.110(a)(1);120-140. ALRA could issue a cease and desist letter, thereby prohibiting that conduct. *Alaska Comm. Colleges' Federation of Teachers, Local No. 2404 v. Univ. Of Alaska*, 669 P.2d 1299, 1305 (Alaska 1983). The union grievance proceedings will continue to function even if the union file is not subject to a privilege in subsequent litigation raised by the former employee. [Pet. Br. 28]

57 *Welfare Rights Organization v. Crisan*, 661 P.2d 1073, 1077 (Cal. 1983).

privilege in any statute. The Alaska Legislature at times creates civil court privileges and when it does so, its intention is crystal clear.[58]

Mr. Peterson relies on *Welfare Rights Organization v. Crisan*, a case in which a California court recognized a privilege as implied in statute.[59] The statute provided that an applicant for welfare benefits could be represented by counsel or by an "authorized representative" at an administrative hearing regarding the denial or termination of benefits.[60] In *Crisan*, the state subpoenaed the records of an authorized representative before the administrative hearing.[61] The California Supreme Court held that the subpoena request was improper because the statute creating the right to a hearing required, by implication, that communications with an authorized representative be privileged for purposes of the hearing.[62] *Crisan* did not establish a court privilege for such communications, only a privilege for purposes of the administrative hearing created by the statute.[63] And *Crisan* did not create a new evidentiary privilege as a matter of

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58 *See* AS 09.25.300 (public official or reporter privilege for official duties); AS 24.55.260 (ombudsman and their staff for official duties); AS 09.25.400 (domestic violence/sexual assault victim communications with counselors are subject to a privilege).

59 *Welfare Rights Organization v. Crisan*, 661 P.2d 1073, 1077 (Cal. 1983).

60 *Id.*

61 *Id.* at 1074.

62 661 P.2d 1073, 1077 (Cal. 1983).

63 *Am. Airlines Inc., v. Superior Court*, 114 Cal.App.4th 881, 889 (Cal App. 4th 2004). The *Crisan* holding would be akin to creating a testimonial privilege for Mr. Peterson during the grievance process with the union.

judicial policy; rather, it held that the legislature impliedly created the privilege because the statute equated "authorized representative" with "counsel."[64]

Courts have rejected the extension of *Crisan* to labor relations laws because those laws do not equate union representation to counsel. In *McCoy v. Southwest Airlines*, plaintiffs in a civil wrongful termination suit sought the union testimonial privilege, arguing that a union representative is equal to a lay advocate.[65] The federal court correctly noted that it could not provide such a privilege in a civil proceeding absent a specific statute to that effect, like the one in *Crisan*.[66] The court made a fundamental distinction; when a statute equates lay advocacy to counsel, the legislature has created an unfair trap if it does not provide a privilege between the representative and the claimant.[67] But because no such inducements were present in the labor relations statutes in *McCoy* for purposes of civil litigation, the court did not recognize the privilege.[68] Similarly, in *Am. Airlines Inc. v. Superior Court*, the court held that even if a statute creates some form of representation, the statute does not create an evidentiary privilege in all forums.[69] The privilege has to be implied in the words of the

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64 *Id.*

65 *McCoy v. Southwest Airlines*, 211 F.R.D. 381, 387 (C. Dist. Cal. 2002).

66 *Id.*

67 *Id.*

68 *Id.*

69 *Am. Airlines Inc., v. Superior Court*, 114 Cal.App.4th, 881, 888

statute.[70] In *Crisan,* the statute expressly pertained to authorized advocates before a tribunal under a narrowly drawn legislative administrative hearing scheme.[71] On the other hand, labor relations statutes only have general declarations of public policy that employees have the freedom to designate representatives "to negotiate the terms and conditions" of employment.[72] That general language, the court reasoned, does not create any specific proceedings or hearings from which it can be inferred the existence of an all encompassing privilege.[73]

This Court should also decline to create a union testimonial privilege based on the reasoning in *Crisan*, because no Alaska statute equates union representatives with counsel.

(Cal App. 4th 2004).

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.* at 890. The amicus advances a similar argument; that because union members must be free to engage in union activities under AS 23.40.110(a)(1) and because the Alaska Labor Relations Agency (ALRA) has the authority to curtail unfair labor practices, this Court may create a union testimonial privilege. [Am. Br. 2-3] Unlike in *Crisan*, PERA does not establish a statutory privilege, because it says nothing about lay advocacy or civil court privileges. AS 23.40.070-260. This Court interprets PERA under its plain meaning and cannot stretch its provisions to include the union testimonial privilege. *Univ. of Alaska Classified Employees Assoc, et. al. v. Univ. of Alaska*, 988 P.2d 105, 108 (Alaska 1999). Moreover, the amicus arguments were not made by Mr. Peterson to the trial court and have been waived. *Millette v. Millette,* 177 P.3d 258, 267 (Alaska 2008) ("It is well established that issues are waived for purposes of appeal if not adequately raised [in the trial court].").

IV. Other Jurisdictions Have Declined To Adopt The Union Testimonial Privilege

Courts sometimes find that communications between a union and its members are confidential within forums devoted exclusively to the resolution of labor-management disputes.[74] However, once the union concludes its representation and the member either pursues civil litigation or is summoned to a criminal court proceeding, courts find that the member cannot withhold evidence on the basis of a union testimonial privilege.[75]

The cases Mr. Peterson cites recognize a privilege only while the union is actively representing the member in a forum devoted to the resolution of labor-management dispute. [Pet. Br. 11-19] For instance, in *Cook Paint & Varnish Company*, a private employer sought details of the union steward's conversations with various employees shortly before the employee's grievance went to arbitration.[76] Unlike in *Cook Paint & Varnish*, in this case the state only subpoenaed the union file after the

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74 *See* Michael Moberly, *Extending A Qualified Evidentiary Privilege To Confidential Communications Between Employees And Their Union Representatives*, 5 Nev. L.J. 508, 568-569 (2004-2005).

75 *See e.g. Patterson v. Heartland Industrial Partners, LLP*, 225 F.R.D. 204, 207 (N.D. Ohio 2004)(rejecting the assertion of an "NLRA union privilege" during pretrial civil discovery); *In re Grand Jury Subpoena*, 926 A.2d 280, 284 (N.H. 2007)(rejecting a union privilege argument during a grand jury proceeding); *In Re Grand Jury Subpoenas Dated January 20, 1998*, 995 F. Supp. 332, 334 (E.D.N.Y. 1998) (declining to create a new common law union testimonial privilege under Federal Rule of Evidence 501); *American Airlines Inc., v. Superior Court*, 114 Cal.App.4th 881, 889 (Cal App. 4th 2004) (rejecting the union testimonial privilege); *McCoy v. Southwest Airlines*, 211 F.R.D. 381, 387 (C. Dist. Cal. 2002) (same).

76 *Cook Paint and Varnish Company*, 258 N.L.R.B. 1230, 1231-32 (1981).

union refused to take the grievance to arbitration and after Mr. Peterson filed his lawsuit. Similarly, the other cases Mr. Peterson cites involve a request for information while the union still represented the member either in a forum devoted to the resolution of labor-management disputes or pursuant to a management investigation.[77]

Because the State did not request discovery from the union or Mr. Peterson during the grievance proceedings, the cases Mr. Peterson cites do not support the creation of a union testimonial privilege in this case.

V. Due Process Concerns Do Not Require A Union Testimonial Privilege

Mr. Peterson argues that due process requires this Court to create a union testimonial privilege. [Pet. Br. 20-24] This Court should decline to consider this argument because it was inadequately raised in the superior court; due process was so

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[77] *U.S. Department of Treasury*, 38 F.L.R.A. 1300, 1303 (1991) (employer sought a union steward's interactions with the member while the union was still representing the employee); *Int'l Bhd. Of Elec. Workers v. Pub. Util. Dist. 1*, Dec. 7656-A, 2003 WA PERC LEXIS 46 (Wash. Pub. Employment Relations Comm'n June 11, 2003) (employer made the request while a grievance was ongoing); *N.H. Troopers Ass'n v. N.H. Dept. of Safety*, PELRB Decision No. 94-74, 5 (August 31, 1994)(an employer committed an unfair labor practice by ordering union representatives to disclose information while the threat of disciplinary action and investigation remained); *City of Newburgh v. Newman*, 70 A.D.2d 362, 366 (N.Y.A.D. 1979) (The questioning of a union official as to his observations and communications with a member facing disciplinary proceedings was held to deter members from seeking advice, so the practice was banned); *Seelig v. Shepard*, 152 Misc.2d 703 (N.Y. Sup. Ct. 1991) (a New York trial court modified an administrative subpoena where the state employer had yet to take any action against a union member). *Ill. Educ. Labor Rel. Bd. v. Homer Cmty. Consol. Sch. Dist., No. 208*, 547 N.E.2d 182, 183-84; 186 (Illinois 1989)(The court, through a combination of statute and common law, ruled that collective bargaining strategy notes were subject to a privilege in a hearing before The Illinois Educational Relations Board).

under-briefed that Judge Pallenberg did not even address the argument in his ruling.[78] But even if this Court does consider the argument, it fails because there is no threat to Mr. Peterson's due process rights as he is being afforded a fair trial on his claims in superior court.

The Court employs the three-part balancing test from *Matthews v. Eldridge* for determining due process requirements.[79] First, the court considers the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[80]

The risk of erroneous deprivation of Mr. Peterson's employment interest if the privilege is not recognized is low.[81] Under the current procedures, Mr. Peterson has been afforded three important opportunities to be heard; all of which provide checks

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78 *Millette v. Millette*, 177 P.3d 258, 267 (Alaska 2008) ("It is well established that issues are waived for purposes of appeal if not adequately raised [in the trial court]."). *State v. Public Safety Employees Ass'n* --- P.3d ----, 2011 WL 3241866 (Alaska 2011) *citing Barnett v. Barnett*, 238 P.3d 594, 598 (Alaska 2010).

79 *Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168, 181 (Alaska 2009); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

80 *Id.*

81 Mr. Peterson does not have a right to state employment but he has a sufficient property interest in his state employment to evoke due process concerns. *Nichols v. Eckert*, 504 P.2d 1359, 1363 (Alaska 1973).

against erroneous deprivation. First, the state, the union, and Mr. Peterson held a pretermination meeting before the state terminated his employment. [Exc. 125] After that meeting, where Mr. Peterson was afforded an opportunity to be heard why he falsified the application, the state decided to terminate Mr. Peterson's employment. [*Id.*] Then, the grievance process ensued, further protecting against erroneous deprivations of Mr. Peterson's employment property interests.[82] Mr. Peterson had an opportunity to be heard and represent his interests through the less formal and less expensive grievance process, which is handled by his union.[83] Third, Alaska law places no impediment on an employee's right to obtain direct review of the employer's decision to terminate the employee even after the union fairly refuses to take the dispute to arbitration.[84] Thus, Mr. Peterson is afforded one last due process check to make sure the state did not violate the covenant of good faith and fair dealing in terminating his employment interest.[85]

The additional safeguard Mr. Peterson seeks — an evidentiary privilege — is not required by due process. Mr. Peterson, by filing this lawsuit, has put the union

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82 *See Armstrong v. Meyers*, 964 F.2d 948 (9th Cir. 1992) (three-step grievance and arbitration procedure provided employee with due process).

83 *See Tedesco v. City of Stamford*, 610 A.2d 574, 582-83 (Conn., 1992).

84 *Casey v. City of Fairbanks,* 670 P.2d 1133, 1138 (Alaska 1983).

85 Under federal law, Mr. Peterson would never be able to assert his contract claims in a court of law unless the union breached its duty to fairly represent him during the grievance process. *Armstrong v. Meyers*, 964 F.2d 948 (9th Cir. 1992) (three-step grievance and arbitration procedure provided employee with due process); *Vaca v. Sipes,* 386 U.S. 171, 191 (1967).

grievance process squarely at issue.[86] The State is being sued for breach of good faith and fair dealing. [Exc. 001-008] One of the issues for trial is whether the state breached its duty of good faith and fair dealing during the grievance process, and the union file goes directly to this issue. [*Id.*] Additionally, the privilege sought would protect Mr. Peterson from his failure to exhaust his administrative remedies. The requested privilege is an attempt to obtain an advantage by keeping truth and evidence away from the trier of fact which is not an appropriate due process safeguard, especially after it is the employee who initiates this type of lawsuit; not the state.

Finally, under the third part of the *Matthews v. Eldridge* analysis, the Court must consider the Government's interest in not creating this privilege.[87] Contract claims require exhaustion of remedies.[88] If union members can evade the final stages of the grievance process, thereby depriving the state and the union a full opportunity to resolve a dispute, litigation costs will go up. Cases that could otherwise be disposed of at summary judgment will needlessly turn into jury trials where the union member's version of exhaustion will remain unchallenged to the trier of fact.

The risk of erroneous deprivation of Mr. Peterson's employment interest does not merit the creation of a new testimonial privilege in this case.

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86 *Supra* note 24.

87 *Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168, 181 (Alaska 2009); *Mathews v. Eldridge*, 424 U.S. 319, 335, (1976).

88 *Grant v. Anchorage Police Dept.*, 20 P.3d 553, 557 n. 16 (Alaska 2001) *citing Knight v. Am. Guard & Alert, Inc.* 714 P.2d 788, 791-92 (Alaska 1986).

The Government's interest in upholding the sanctity of the grievance process is a substantial factor weighing against this new privilege.

CONCLUSION

The Court should not create a new common-law privilege in order to keep relevant evidence away from the State. The Court should affirm the decision of the trial court below.

DATED this 21st day of September, 2011.

JOHN J. BURNS
ATTORNEY GENERAL

By:
John M. Ptacin
Assistant Attorney General
ABA No.: 0412106

APPENDIX

Alaska Court System

State of Alaska

OFFICE OF ADMINISTRATIVE DIRECTOR
303 K STREET
ANCHORAGE, ALASKA
99501

March 6, 1978

Professor Stephen Saltzburg
Associate Professor
University of Virginia
School of Law
Charlottesville, Virginia 22901

Dear Professor Saltzburg:

Enclosed please find a draft of the proposed Alaska Rules of Evidence with revisions made by the Committee on Rules of Evidence appointed by the Alaska Supreme Court. Also enclosed is a list of specific questions and requests for revision and clarification, as well as a copy of the committee's preliminary revision and various letters submitted by Alaskan attorneys and organized bar groups commenting on the preliminary revision.

As you will note, the revised draft of the committee includes numerous changes to your original proposal; they are not described at length. To the extent that no reason is given for the revisions of the committee in the materials enclosed, I would hope that you will find the revisions self-explanatory. In addition to the specific questions submitted to, the committee would very much enjoy hearing comment by you on any of the revisions which we have made in the event that you think such comment might be appropriate.

Please bear in mind that, in drafting revisions to your original proposals, the committee has worked under the assumption that we, as Alaskan attorneys, are probably more familiar with the realities of legal practice in Alaska and specific Alaskan case law than you might be. However we fully realize that we would not, either individually or as a committee, be justified in claiming any particular expertise in the law of evidence, and certainly not the type of expertise which you possess. Therefore, in the event it appears that, in making changes to acommodate peculiarly Alaskan interests, this committee has ended up with proposals which would in the long

run be undesirable or untenable, please do not hesitate to inform us of this fact.

The committee would very much appreciate hearing from you as to a tentative date when we could meet with you to discuss the particular questions and requests which we are forwarding, as well as the revision as a whole. Since I have recently abandoned ship and am no longer a member of the State Judiciary, you can call or write me directly at the United States Attorney's Office in Anchorage, 805 W. Fourth Avenue Room 249, Anchorage, Alaska 99501, (907) 277-1491.

I would like to apologize to you for the delay in getting these materials to you, but circumstances involved with my job changeover made the delay unavoidable. I look forward to hearing from you in the near future.

Very truly yours,

Alexander O. Bryner
Chairman
Committee on Rules of Evidence

AOB/bjs
Encls.

cc: Chief Justice Boochever
Arthur H. Snowden, II

Committee Members:
Walter L. Carpeneti
Patrick Gullufsen
Judge William H. Sanders
Judge Victor D. Carlson
Judge James R. Blair
Richard L. Nadson
Richard Gantz

MEMORANDUM TO PROFESSOR STEVEN SALTZBURG

REGARDING: REVISED PRELIMINARY COMMITTEE REDRAFT

OF PROPOSED ALASKA RULES OF EVIDENCE

Rule 106. Request for Addition to Commentary: The committee would request Professor Saltzburg to draft additions to the commentary on Rule 106, as revised, explicitely stating that the trial court has broad discretion in formulating specific mechanisms for deletion of privileged or irrelevant information; also that material deemed by the court to be privileged or irrelevant and, therefore, not subject to disclosure under this Rule, should be preserved under seal by the trial court for the purpose of appeal.

Rule 107. Additional Commentary: The committee's deletion of originally proposed Rule 107 reflects the view that, while judicial comment on the weight or effect of evidence should not, per se, be encourage, the Court, throughout a trial and, specifically, in the course of giving instructions such as those pertaining to credibility of accomplices and the weight to be given to out of court admissions by the accused in a criminal matter, is in effect commenting on the weight of evidence. Since comment by the judge has not constituted a problem in the past and proposed Rule 106 appeared potentially problematical, no specific rule precluding comment was deemed necessary.

Article II. Explanation and Request for Revision of Commentary: Article II has been redrafted in it's entirety. Much of the redraft was simply stylistic in nature, but substantial portions were revised to conform the Rule with

committee's impressions concerning the reality of judicial notice in the state of Alaska. Very few libraries in the state of Alaska contain current copies of statutes in effect in all states and territories of the United States. Similarly, very few libraries have full sets of regional reporters. There are numerous widespread areas of the state in which superior and district courts may regularly be holding sessions where lack of adequate research facilities constitutes a real problem. The committee's view was that the essential difference between mandatory judicial notice without request and mandatory or optional judicial notice upon request of a party was simply that, in the latter circumstances, the requesting party would be under an obligation to assure that correct information concerning the present state of the law or fact sought to be noted was made available to the court.

Due to lack of adequate research facilities in numerous relatively remote locations, it was deemed preferable to place the burden of providing adequate information upon which to base judicial notice on the requesting party, who would usually be in a position to anticipate the need for a request well in advance of trial, with sufficient time to obtain the requisite information. The extensive revision of Article II will require appropriate corresponding revision of the commentary pertaining to this Article.

Rule 203(a). Question and Request for Consideration of Possible Revision: The committee would like Professor Saltzburg to consider the possibility of adding additional language to the section permitting mandatory instructions to the jury with

respect to incontrovertible matters such as jurisdiction and venue. While it is no doubt true that the court cannot direct the jury in a criminal case to find as true noticed facts which are of an important or disputable nature, members of the committee felt that as to minor or incontrovertible issues, the court might properly instruct the jury in a binding fashion to accept as true a fact judicially noted.

Rule 203(a). Request for Addition to Commentary. The committee would like the commentary to this section to provide specifically that the meaning of the word "tenor" as used in the section is synonymous with the word "substance." Although "substance" was deemed a clearer word by the committee, "tenor" was retained to maintain continuity with the Federal Rules.

Rule 303. Request for Additional Commentary: The commentary to Rule 303, as revised by the committee, should indicate that the committee reinstated in full the language of the United States Supreme Court Rule from which the original Alaska proposal was drafted. Reinstatement of the U.S. Supreme Court Rule was decided on due to the advantage of the commentary on that rule provided in the form of the Advisory Committee's note contained in the Appendix to the Federal Rules of Evidence. See, e.g., Federal Rules of Evidence Annotated by the Federal Judicial Center, at 230-33 (Mathew Bender 1975). The committee was of the opinion that the Advisory Committee's note would be of substantial benefit in clarifying the intent and practical application of Rule 303.

Rule 303(a). Request for Additional Commentary: The committee would like to have additional commentary similar to

the language of the Advisory Committee's note to the United States Supreme Court Rule to the effect that Rule 303(a) does not apply to the presumption of innocence in a criminal case. Additionally, the commentary should make explicit that, in order to meet the presumption, the accused need not actually offer affirmative of evidence if evidence brought out on cross-examination or on direct examination in the course of the prosecution's case in chief is in itself sufficient.

Rule 404(a)(2)(ii). Request for Additional Commentary: Commentary should be added specifically stating that a hearing in camera should normally be on record with the right to cross-examination, the extent remaining in the court's discretion. The court additionally would have discretion to keep the record of proceedings in camera sealed pending appellate review in the event that it rules inadmissible the character evidence in question.

Rule 405(b). Request for Additional Commentary: The committee felt that it would be helpful to have specific examples given of the types of charges or cases in which character is an essential element of the charge or defense for the purpose of applying Rule 405(b).

Rule 410. Request for Additional Commentary. The committee's amendment of subsection (b)(1) of Rule 410 should be specifically dealt with in the commentary. The commentary should reflect that the committee's amendment of subsection (b)(1) was adopted to obviate the possibility of use of the word "impeachment", as it appeared in the original proposal, being misconstrued as limiting the use of prior inconsistent

statements beyond what is currently permissible under the Alaska Supreme Court's ruling in Beavers v. State.

Rule 412. Possible Redraft of Commentary: In light of the fact that the committee forwarded the original draft of Rule 412, along with one specific alternative, both without recommendation subject to the committee's statements appended as a footnote to Rule 412, the commentary applying to Rule 412 may have to be redrafted in accordance with the final version of the Rule adopted by the Alaska Supreme Court. It should be noted that the original proposal constitutes a narrowing of the current provisions of Criminal Rule 26(g) in that it would preclude a third party from having standing to assert violations of 5th Amendments rights vicariously. Although vicarious assertion of 5th Amendments rights is generally not permitted in other jurisdictions (see Dimmick v. State), the history of adoption of Criminal Rule 26 makes it clear that that Rule was specifically adopted to confer standing to assert 5th Amendment rights vicariously. See State v. Sears (1976). In the event that the Alaska Supreme Court should adopt Rule 412 as originally proposed, the commentary should explicitely reflect the change with respect to the issue of standing. The commentary in its present form is silent on the issue.

Rule 501. Request for Additional Commentary: The committee would like the commentary to Rule 501 to indicate specifically that, with the exception of the additional words "organization, or entity", the Rule is identical to former United States Supreme Court Rule 501.

commentary does not deal with this omission, and it is not clear whether the omission is inadvertent, stylistic, or substantive. It is generally the committee's view that in instances where a proposed Alaska Rule follows a Federal or United States Supreme Court Rule verbatim with the exception of several words, to avoid possible confusion and misinterpretation, the reason for the difference ought to be clarified in the commentary, even if the change is simply one of style.

Rule 503(d)(1). Additional Commentary: The committee's addition of the words "were used" in subsection 503(d)(1) was intended to cover instances where information given by an attorney--though initially given in the course of consultation for legitimate purpose--is subsequently used by the client to commit a crime.

Rule 504(b). Question: The committee did not understand exactly why this subsection adopted the language of the United States Supreme Court Rule verbatim except in changing the word "or" or "and" in the phrase "and persons who are participating. . . ." Use of the disjunctive "or" seems preferable. Can this be clarified?

Rule 504(c). Question: Although the committee was somewhat reluctant to change the proposed draft without more information, members of the committee were concerned as to whether there is any good reason to allow survival of privileges such as the attorney-client or physician-patient privilege after the death of the client/patient. If there is no good justification for survival of the privilege, then should it not terminate upon death of the client or patient?

Rule 504(d)(1). Question: Why isn't the language of the United States Supreme Court Rule 504(d)(3), with the addition of the word "physical", sufficient here? As is, the grammatical structure of Rule 504(d)(1) appears to be rather awkward and difficult to understand.

Rule 504(d)(4). Request for Revision of Commentary: It was the sense of the committee that the language of the commentary to the effect that "control over disclosure placed largely in the hands of a person in whom the patient has already manifested confidence" is largely unfounded in reality. Almost invariably, physicians or psychiatrists testify in involuntary commitment proceedings by court appointment, and, from the inception, there is little or no real physician-patient relationship in existence. The committee feels that this fact should be stated as the actual basis for the exception to the privilege, rather than the commentary as it now stands.

Rule 505. Request for Revision of Commentary: The privilege provided for in Rule 505 has been substantially amended by the committee, and spousal immunity has been deleted. The commentary should be revised accordingly. Additionally, the committee would like to include specific commentary with respect to some of the revised provisions. As to Rule 505(b)(4)(C), the commentary should specify that the exception contained in the subparagraph is not intended to be restricted solely to the natural or adoptive child of the spouse. With respect to Rule 505(b)(10), the committee thought that clarification as to the scope of the exception

created should be provided in the commentary by a specific statement that a communication between spouses is not confidential if it is made in the context of an agency relationship between the spouses, or in the context of any primarily business and non-marital relationship in which the marital relationship between the spouses is merely incidental to the business or non-marital communication. With respect to Rule 505(d) the committee would like to add to the commentary that a communication is not confidential if the context indicates that it either is not intended to be kept secret by the spouse making the communication or is not made by the communicating spouse as a result of the marital relationship. In general, the committee would appreciate comment on its revised form of Rule 505.

Request for Commentary Pertaining to Omission of United States Supreme Court Rule 509: The "secrets of state" privilege encompassed by former United States Supreme Court Rule 509 is properly omitted from the Alaska Rules of Evidence in the judgment of the committee; however, the committee thinks that commentary with reference to omission of the provision should make it clear that the omission does not justify the conclusion that all "state secrets" ought to be unprivileged; the only inference to be drawn from the omission is that, to the extent that any "state secrets" should be privileged, the problem of privilege should be left for resolution by legislation or regulation.

Rule 509. The committee would like to have Professor Saltzburg's view with respect to Rule 509 as to whether

political subdivisions ought to have a right to withhold the name of an informant.

Rule 509(c)(3). Question: The committee thinks that the language of this subsection needs substantial clarification. It was simply difficult for the committee to understand the subsection and how it is to be implemented. In this regard, the committee's own sentiments were joined by the comments of the Juneau Bar Association submitted to the committee with respect to Rule 509 generally.

Privileges Generally; Question: The committee voted to submit to Professor Saltzburg the question of whether consideration should be given to creation of a parent/child privilege, with further consideration to the alternative of allowing the party called as a witness to be holder of the privilege.

Rule 612. Request for Additional Commentary: By an odd twist of draftsmanship, the present version of Alaska Civil Rule 43 appears to treat the necessary foundation for refreshing memory and admitting evidence under the past recollection recorded doctrine by the same criteria. This unfortunate confusion has been perpetuated in a specific decision of the Alaska Supreme Court, Gilbert v. Zamarello. The committee would like to have the commentary with respect to Rule 612 make it clear that documents or materials used for the purpose of refreshing memory need not meet the foundational requirements for admission of evidence under the past recollection recorded doctrine. Additionally, with respect to subsection 612(d), the committee believes that it would be

appropriate to add to the commentary a statement that actual dismissal should be regarded as a last resort available to the court, and not regularly used.

Rule 613(b)(2). Request: The committee would appreciate consideration and comment on the views stated with respect to Rule 613(b)(2) by the Tanana Valley Bar Association and by Mr. Murphy. As noted in a footnote to the committee revision, the statements of the Tanana Valley Bar Association and of Mr. Murphy echo the sentiments of a minority of the committee.

Rule 615. Request for Additional Commentary: Although the strict language of the rule applies only to presence in court of non-testifying witnesses--i.e., the opportunity to hear the testimony of other witnesses--the committee believes that the commentary ought to make it clear that the intent of the rule is not only to prevent non-testifying witnesses from actually hearing the testimony of other witnesses, but generally to prevent non-testifying witnesses from obtaining the opportunity to conform their testimony to the prior testimony of others. For this reason, the commentary should reflect that under normal circumstances, when the exclusionary rule is invoked, the court should instruct all witnesses to refrain from discussing their testimony with other witnesses outside the courtroom.

Rule 703. Question with Respect to Commentary: The committee has doubts as to whether the commentary pertaining to Rule 703, at pages 3 and 4, relating to categories of "unreliable evidence", items number 1 and 2, are actually valid or accurate. Clarification would be appreciated

Rule 704. Additional Commentary: The committee would like the commentary to this Rule specifically to reflect that, in permitting an opinion to be voiced as to ultimate questions, the Rule does not contemplate admissibility of opinions as to the guilt or innocence of the accused in a criminal matter.

Rule 705(b). The committee amendment of Rule 705(b) reflects the belief that use of the term "in camera", as opposed to "out of the presence of the jury", may be misleading, and, in any event, inordinately restrictive. The committee thinks that the commentary should reflect that the precise mechanism for determination of whether the requirements of Rule 705 are satisfied should be left to the sound discretion of the court, and tht these mechanisms may include side bar proceedings as well as proceedings out of the presence of jury or in camera. Perhaps the confusion arises due to differences in practice in various jurisdictions. In the state of Alaska, when hearing out of the presence of jury is required, common procedure is to send the jury out of the courtroom; in other jurisdiction, common procedure may be for the jury to remain seated while the judge discusses issues with counsel in the judge's chambers. Substantive proceedings conducted "in camera"--i.e., actually in the judge's chambers--are unusual in the state of Alaska.

Rule 706. Additional Commentary: The committee revision omits subsection (b) of the original proposed rules, covering the topic of compensation of experts. The omission is due to the fact that compensation of experts is already covered by Administrative Rule 9(c), and the subject of compensation was

not deemed an appropriate concern for the Rules of Evidence. The committee does suggest, however, that the commentary to Rule 706, in noting the omission of the originally proposed subsection (b), suggest to the Alaska Supreme Court that Administrative Rule 9 be revised to provide for more realistic compensation of expert witnesses, and to include specific provision for payment of experts by the court when, in the exercise of its discretion, the court elects to appoint experts; there should also be provision for a specific mechanism for advance payment of such witnesses.

Rule 803. Additional Commentary: The commentary should reflect that the committee voted to number, rather than to letter the subsections of Rule 803 in order to conform the subsections to the counterpart federal rule and to facilitate comparison and cross-referencing between the state and federal provisions.

Rule 804(a)(5). Question: The committee voted to submit to Professor Saltzburg the question whether Rule 804(a)(5) is repetitive and unnecessary in light of the provisions of Rule 803(w) [803 (23) as renumbered]. 804(a)(5) and 803(w) provide an identical exception; since 803(w) makes its exception applicable to all situations regardless of the availability of the witness, it appears adequately to cover those cases encompassed by Rule 804(a)(5), where the witness is unavailable. This may, in fact be, be the reason why there is no parallel provision in the corresponding Federal Rule.

Rule 901. Additional Commentary, Revision to Commentary and Question: The committee was of the view that the

provisions of originally proposed Rule 901(b), since they constituted mere examples, should more appropriately appear in the commentary rather than in the text. These examples should be joined in with existing commentary in an appropriate fashion. Specifically with reference to example 5, the committee voted to have the example rewritten as follows:

> 5. Since all voice identification is not a subject of expert testimony an opinion may be stated regardless of whether the requisite familiarity was acquired solely for the purpose of litigation, in this respect resembling visual identification of a person rather than identification of hand-writing.

The committee also wanted to refer to Professor Saltzburg the question whether specific reference to administrative regulations as well as statutes and rules might be desirable in example 10.

Rule 1004. Additional Commentary: The committee thought that the commentary should make it clear that this section applies to situations in which neither the original nor a duplicate, as defined by the rules, is available.

Rule 1005. Additional Commentary: The committee was of the view that additional language clarifying this provision should be included. As is, considerable effort is required to understand exactly how Rule 1005 relates to Rules 1002, 1003, 1004. A more specific explanation in the commentary of the relationships of these rules to each other would assist in better understanding and more accurate interpretation of these rules.

Rule 1101. Additional Commentary: The committee thinks that additional commentary should be added specifying that the

revisions made by the committee to the originally proposed draft are the result of the committee's view that inapplicability of the Rules of Evidence to various types of proceedings should be specifically provided for in the statutes or rules governing the excluded proceedings. To a large measure, this situation already exists in Alaska law. Specifically with reference to subsection (b), the committee wanted the commentary to reflect that the subsection and the Alaska Rules of Evidence do not apply to extradiction proceedings, but do apply to habeas corpus proceedings.

General Request: The committee voted to request Professor Saltzburg to consider the California Code of Evidence and the benefits and drawbacks of its structure and substance compared to the rules presently under consideration. Specifically, the committee would like to hear comment on the feasibility and desirability of a general definitions section such as that contained in the California Code of Evidence.

Memorandum to the Committee

I have tried to carefully review all of the changes, questions and suggestions made by the Committee. What I have done in light of your comments and actions is to supply you with a draft accompanied by an appropriate Reporter's Comment for every Rule that you have indicated that you propose to adopt. At times I have vigorously disagreed with the approach that you have chosen. In such cases I have supplied an alternative rule. It is my hope that you might consider the alternative that I have put forth and perhaps adopt it. But, assuming that you stay with your original preference, I hope that you will be willing to send my alternative rules along with yours to the Supreme Court. I have tried to confine myself to disagreeing only in the very few places where I think that the disagreement is fundamental and where I think that the Supreme Court ought to consider the competing drafts.

As I have gone through the material that you sent and commented upon it, I have pulled no punches. If I disagreed, I said so.

It seems to me unnecessary that I travel to Alaska to meet with the Committee. I don't think that I can add anything to what I have put in writing, and I have a pretty good idea from your comments as to what was on your minds. By providing you with alternative drafts, the drafting is over for all practical purposes. I would think that you could get something to the Supreme Court very quickly.

Of course, as I indicated in my letter to Mr. Bryner, he can call me at any time if he has questions.

If I thought that I could do any good by coming there, I would not hesitate to do so. But I really think that I would slow down the work. When you see what I have provided, I think that you will agree

with me that it is complete and that you will have no additional need for my services.

I would like to think that with this final submission I have given you the very best in service in terms of drafting a Code of Evidence for the State of Alaska. I received the material from Mr. Bryner on March 11, a Saturday. I spent 15-hour days doing nothing but going over the material doing what was to have been my spring vacation here. At the end of seven or eight days, I think I have a final product that you will like.

I am sending a copy of the comments that I have made and the alternative drafts of the Rules to Gerry Dubie at the Alaska Court System. I thought that he should have it for his records.

There was some confusion as to the way in which the Committee was going to respond to the material that I submitted to the Supreme Court. But I think that this confusion arose out of a transition between a Committee that once headed by Justice Erwin in the current Committee. In any event, I doubt that it was your fault, and I will note the confusion for the Supreme Court's administrative staff.

In choosing to be blunt in my comments, I intended to be helpful, not impolite. It struck me that I would be doing noone a service by being less than candid at this distance.

Please do not hesitate to call me if you have any questions. I respect the job that the Committee did in going over the draft, and I hope that the Committee understands why I have been concerned with certain changes.

One of the things that I have tried to do is to add in all the recent cases that have come down since I first drafted these Rules. Sometimes this required handwritten additions. But it really makes

the set a complete version of what has happened in Alaska Evidence since Alaska became a state.

My hope now is that you will keep the Rules and the comments together. I also hope that they will go to the Supreme Court relatively soon and that the Supreme Court will consider the Rules and comments together. If you think that a comment needs changes or additions, there is no reason you cannot make additions or changes. You can either change the comment directly, or indicate that the Committee has a note it is adding. However you want to do this would be fine with me. You might even consider taking the Reporter's Comments and adopting them as Committee's Comments. But there is no single right way to do this. Whatever you do will be fine with me.

Supreme Court

State of Alaska

ROBERT D. BACON
CLERK OF COURT

POUCH U
JUNEAU, ALASKA 99811
(907) 465-3410

June 5, 1979

TO: Alaska Attorneys and Judges

FROM: Robert D. Bacon
Clerk of the Supreme Court

Enclosed you will find a complete copy of the new Alaska Rules of Evidence, which will take effect on August 1, 1979.

Many of you have the blue paperbound copies of the rules issued by the Alaska Bar Association in May in conjunction with the continuing legal education program on the new rules. You will want to note that the Supreme Court has modified Rule 412 since that time, and the final, revised version appears in the enclosed set. In addition, non-substantive editorial corrections have been made in about half a dozen rules under the supervision of the Alaska Supreme Court. In case of discrepancies, the enclosed text is official and is the one which will be applied by the courts.

Book Publishing Company, official publishers of the Alaska Rules of Court, will publish the Rules of Evidence, together with the complete text of the commentary by Prof. Stephen A. Saltzburg of the University of Virginia, as a new Volume I-A of the Alaska Rules of Court. Subscribers should receive that volume late this summer or early this fall. The commentary has been modified since the Bar Association institutes in May to reflect the final changes in the text of the rules.

Users with suggestions for improvements in the form or substance of these or other Alaska court rules are urged to send them to this office. All suggestions are given careful consideration by the Alaska Supreme Court.

Robert D. Bacon

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 REPLY BRIEF

Douglas K. Mertz
Attorney for the Petitioner
Alaska Bar No. 7505027
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907 586-4004

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

Marilyn May, Clerk

By:_____
Deputy Clerk

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TABLE OF AUTHORITIES

Cases

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AUTHORITIES PRINCIPALLY RELIED UPON

Evidence Rule 501 [in relevant part]:

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 right to …(3) refuse to produce any object or writing…

ARGUMENT

I. Most Jurisdictions that have Considered Similar Issues have found a Privilege.

The State claims that no jurisdiction has ever adopted a privilege like the one here. But in fact most jurisdictions that have considered the issue have adopted or recognized a privilege when the law allows (or, as here, requires) lay representation in employment hearings or where important confidential communications of union members with union officials was threatened:

Welfare Rights Org. v. Crisan, 661 P.2d 1073 (Cal. 1983);
City of Newburgh v. Newman, 421 NYS 2d 673 (1979);
Seelig v. Shepard, 578 N.Y.S.2d 965 (Supr. Ct. 1991);
District No. 1-PCD v. Apex Mar Co, 296 AD 2d 32 (N.Y. App. Div. 2002);
In Re Grand Jury Subpoenas, 995 F. Supp. 332, 336 (E.D. NY 1998);
International Union v. Garner, 102 F.R.D. 108 (M.D. Tenn. 1984);
Woods v. N.J. Dept of Education, 858 F.Supp. 51, 55 (D. N.J. 1993);
NLRB v. Jackson Hospital Corporation, 257 F.R.D. 302, 311-12 (D.D.C.2009);
Cook Paint and Varnish Co., 258 NLRB 1230 (1981);
Berbiglia, Inc., 233 NLRB 1476, 1495 (1977), aff'd 602 F.2d 839 (8th Cir. 1979);
U.S. Dep't of Treasury, 38 F.L.R.A. 1300, 1302 (1991);
N.H. Troopers Ass'n v. N.H. Dept of Safety, No. P-0754:2, PELRB Decision No. 94-94-74 (N.H. Public Employee Relations Board, 1994);
IBEW Local 77, 2003 WL 21658695 (Wash. Publ Employment Relations Comm'n, 2003).[1]

The fallacy in the State's argument is that it defines the "privilege" so narrowly, i.e., a privilege between union members and union lay advocates in litigation following an administrative process involving the union member's employment status. In fact, all the listed cases recognize the critical need for maintaining confidentiality in union member

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[1] There are also cases in which courts recognized a full labor relations privilege, which would encompass cases like the instant one, but in situations in which union bargaining strategy was involved, *Ill. Educ. Labor Relations Bd. v. Homer Cmty Consol. Sch. Dist.*, 547 N.E. 2d 182 (Ill. 1989); and *Patterson v. Heartland Indus. Partners*, 225 F.R.D. 204 (N.D. Ohio 2004), holding that the First Amendment Freedom of Association prevents the disclosure of confidential labor relations information.

relations when substantial member rights are at issue, and they all lead to the conclusion that this case – in which the State mandated a lay union advocate in a vital process to which due process rights attach – easily falls within the same logic.

II. This Court is Free to Adjudicate the Rights of the Litigant Before It.

The State argues that this court has made a policy decision not to recognize new privileges in case law, but only through formal rule changes. It claims that the Supreme Court has failed to recognize any new privileges through case law after the Rules of Evidence were promulgated in 1979. But in fact this court has done so four times since 1979:

> *Confidentiality privilege for non-attorneys working with attorneys*, American National Watermattress Corp. v. Manville, 642 P.2d 1330, 1333-4 (Alaska 1982);
>
> *Executive privilege*, Doe v. Alaska Superior Court, Third Judicial District, 721 P.2d 617 (Alaska 1986);
>
> *Conditional privilege for publication of defamatory material in employer-employee relationship*, Schneider v. Pay'NSave, 723 P.2d 619 (Alaska 1986);
>
> *Deliberative process privilege*, Capital Information Group v. Office of Governor, 923 P.2d 29 (Alaska 1996).

In none of those cases did the court indicate any hesitation to consider and rule on the privilege questions before it. Indeed, the introductory sentence of Evidence Rule 501 indicates that privileges based on the federal and state constitutions are in addition to the privileges enumerated in the Rules, as they must be since this court has a duty to enforce

rights protected by the constitutions. The State urges the court to refuse to give relief to actual parties whose constitutional rights have been violated, in favor of a lengthy rulemaking process for future cases. This court has never chosen to ignore the rights of litigants in front of it, and the State has given no reasons why it should do so now.

III. The State Already has the Discovery Tools to Learn the Facts at Issue.

The State claims that recognition of a privilege between a litigant and his lay advocate would make it "impossible" to learn the facts regarding exhaustion of administrative remedies. Yet a privilege would not prevent the State from making ordinary discovery of relevant facts. And the main fact the State now claims it must prove – that Mr. Peterson did not take the last possible step in the administration process, of appealing to the union's board after his union advocate decided not to demand arbitration – has been admitted from the start. Indeed the State, in its deposition of Mr. Peterson, asked him whether he had appealed his advocate's refusal to take the matter to arbitration to the union's board, and received a full answer describing both the fact that he had not done so and the reasons it would have been futile. [TR 292-297, App. A] In short, the underlying facts are discoverable and have already been discovered. The State has shown no compelling need to invade advocate-client confidentiality in order to find out more. What the State really is after is confidences shared between a client and his advocate.

The State admits in its brief that it is actually fishing for anything else that may be helpful to it, such as whether "...Mr. Peterson's explanations for his failure to report felonies surfaced only during the grievance process...and [whether] Mr. Peterson made false

statements to his union...and if there are other grievances in the file involving Mr. Peterson..." [Respondent's brief, p. 10, fn. 24]. Obviously the State could have asked about such facts through normal discovery, without demanding to see the communications between Mr. Peterson and his advocate. While the State is free to do discovery to find out facts, there is nothing that would justify wiping out the confidentiality of a litigant with his advocate, merely so that the other side can fish for something that might be helpful.

In short, the State can discover all relevant facts through normal discovery without any need to invade the communications between client and advocate, a relationship in which Mr. Peterson, along with all union members, have an expectation of privacy.

IV. Due Process is Not Optional in this Litigation

The State claims that due process is not even required at this stage, i.e., in litigation, because the State gave Mr. Peterson due process already, in the administrative phase. In that phase, the State says, it benevolently refrained from demanding the private communications between Mr. Peterson and his advocate. So it doesn't matter that now that privacy is being invaded.

This creative argument fails because it would deny due process, i.e., the critical right to private communications with one's advocate, if at any point in the process a litigant knew that at some later point all his private communications could be revealed to the State. As the California Supreme Court said in *Crisan, op.cit.*, the legislature cannot have intended that the only advice a lay advocate could give his client is, "don't talk to me."

Moreover, this court has never held that in either of the two phases of union

member litigation – the administrative process or the court process –due process is optional. Both phases are vital to an employee's rights. The State's broad claim that by according due process in only some isolated parts of the process, it is excused from offering due process in other parts, implicates the whole scheme under which the State requires public employees to go through both phases, and in which it prohibits attorneys from participating in the first phase. It is not necessary for this court to decide now whether due process is denied by the State's imposition of a rule disallowing attorney representation in the administrative phase, but the breadth of the State's claim that it does not need to provide due process in the courtroom phase if it grants it in the administrative phase is sweeping. We urge the court to decide for the Petitioner on narrow grounds, i.e., that he has a right to confidentiality with his union lay advocate; but the State's argument does raise the question of whether it is even constitutional to require an employee to go through a process in which lawyers are prohibited and lay advocates are not allowed to maintain client confidentiality.

V. Confidentiality Between Grievant and Advocate Promotes Fair and Efficient Process.

The State argues that the "grievance process" would be damaged if it cannot invade the confidentiality of a public employee's communications with his advocate. The opposite is the case. As it is, there is substantial skepticism among state employees about whether the administrative process is anything but a time-consuming charade with an outcome that is preordained in almost all cases. If the employee knows that he cannot speak openly to his own advocate, it is all the more likely that that employee will consider the administrative process to be a farce, intended by the State to delay resolutions and force workers to seek

employment elsewhere or just forget about seeking an objective adjudication of grievances.

VI. The State's Statement of "Facts" is Biased and Aimed at Prejudicing the Court

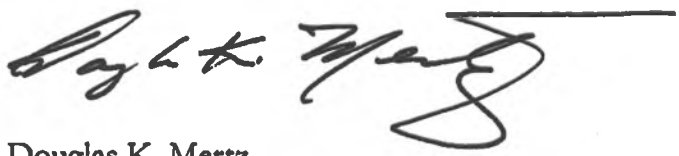
Finally, we note that the State's characterization of the facts is an unbalanced ad hominem attack on Mr. Peterson, by setting out highly contested factual claims as if they were true. There are serious fact issues regarding whether Mr. Peterson had *any* convictions for felonies as an adult; whether a Department of Labor employee instructed him not to put down convictions from thirty years earlier on his job application; whether the State knew about his record as a young person, investigated it, and told him it was not a problem, two years before this job action against him; whether the same State that now claims surprise by his use of another name during part of his life prosecuted him twelve years ago for using the other name instead of his own. On the other side, the State ignores the fact that he has been a solid citizen and member of the community since leaving his home in another state to start a new life thirty years ago, and that he was steadily employed, using his own name, until the State brought up facts that it had known about and excused for years. In short, the court should not be swayed by a one-sided recitation of the background facts that should be left to the jury to consider.

Conclusion

The State's brief fails to show any substantial case law that would allow the State to invade the private communications between a litigant and his advocate. The fact that the State itself mandates that the litigant use a lay advocate and not an admitted attorney is itself

questionable, but to then use that requirement as a wedge to invade private communications vital to due process should not be allowed. The trial court's order should be reversed and the case sent back for trial.

Respectfully submitted this 7th of October, 2011.



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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

RUSSELL PETERSON, JR.,)
)
Plaintiff,)
)
v.)
)
STATE OF ALASKA,)
)
Defendant.)
)

Case No. 1JU-10-1569 Civil

DEPOSITION OF RUSSELL PETERSON, JR.

Pages 1 through 333, Inclusive

Taken: Tuesday, November 16, 2010

Place: Juneau, Alaska

APPENDIX A

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people, four people -- five, four -- I've said in front of three people that I don't really know some embarrassing stuff. And it's like -- and then guess what? There is going to be five more people that have to talk about it, and five more.

And you know what? I'm good to go. If I have to stand up in a front of a courtroom and tell everybody what happened to me, and why, bring it. Because you know what? It doesn't change the fact that this is wrong. It's wrong. All -- and all I wanted to do was the right thing, Mr. Ptacin. Ask Pat. I tried to do the right thing. And I said, "Hey" -- I mean -- I'm sorry. I'm so sorry.

Q. No, it's okay.

A. I didn't have control right there for a second, and I'm sorry.

This is -- it's sad to me. It's really sad, because I know people that are at JAMHI. You know what? I have to call a few people tonight and tell them that nothing you tell those people is sacred. Nothing. (Witness crying.) It doesn't matter if it's your priest, your union, your lawyer.

That's what this is about to me,

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and it's not going to stop with just this. I can't let it. Not you guys. There is a thing with the union now. It's -- and if I have to spend my time doing that, I'm comfortable up on the hill. And if I -- and I've never come down -- and I've never left there without -- because it's always about the right thing. If you go up the hill -- that's still my belief, that if you go next door to the building and you're right -- and that's what Tim Kelly taught me -- that if you go -- if you're real, if you're sincere with your thing, whatever you're going there for, you will prevail. And that -- and that's what this is all about.

And I may have made some mistakes, but -- and, you know, whatever. I'm just a little disappointed that JAMHI, you know, had to sell me out. So, you know.

MR. MERTZ: Let's see if John's got some more questions.

THE WITNESS: I'm sorry.

Q. Yeah. That's okay.

I don't want to talk too much about the union grievance process, because we've got issues there, but --

A. Yeah.

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Q. -- can you at least tell me -- and, again, just stop it if you, you know -- do you recall why -- and I'll show you. This is all I have so far. I've got an e-mail from Dick Isett to Mertl, or Benthe Mertl-Posthumus.

A. I got a good recording if you want it.

Q. What's the recording of?

A. The one of Dick saying, "Everything's going to be great." And I had a meeting with -- it was a message he left on my phone.

MR. MERTZ: Okay. That's separate from what he's talking about.

THE WITNESS: Okay.

Q. Yeah. But it says --

A. I have two, if you want to hear them.

Q. We'll wait on that.

It says, "Hello, Benthe. Mr. Peterson has not appealed my decision not to arbitrate his grievance. The union hereby withdraws Union Case" -- and then it goes on to list it.

And this is all the information that I have about your union grievance process, going to the union to talk about what happened. (Handing.)

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A. Oh. Oh. And I asked him for arbitration over and over. I don't know really what -- I don't know really what that is. I don't know. It -- you talk about stuff, but --

Q. Did you -- and, again, stop if you want me to stop, but --

A. I'm sorry.

Q. -- did the union send you any kind of letter saying that you had an ability to file or to --

A. Maybe.

Q. -- go for --

A. I know he told me that it would be pointless, because he said, "We're the people -- we're the people that make that decision, and I'm telling you right now that it's pointless. But you can -- if you don't believe me, you can file a grievance, file an appeal. You can arbitrate. You can file for arbitration. You can file an appeal for our decision, but it's going to be pointless, because we're the people who make up the decision," and ---

Q. So you actually had a conversation with --

A. Many, yeah.

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Q. -- with Dick about this very issue?
A. Yeah. Yeah. In fact, he told me that it was all going to be all pretty much settled. That's a good recording or message that he left. "I had a great meeting with this Mertl-Posthumus" --
MR. MERTZ: Okay. Now, he's asking you about something else.
THE WITNESS: Okay.
MR. MERTZ: It's the question of whether to press the state for an arbitration.
THE WITNESS: He told me to forget it.
MR. MERTZ: And then after Dick had decided they wouldn't ask for arbitration, then there is what he told you about whether you should appeal.
THE WITNESS: Yeah. Yeah. He said, "Don't -- don't -- you can appeal this arbitration, but you can't" --
Q. Did you do that through a phone call, a talk with Dick?
A. Oh, I'm sure it was on the phone, because I never saw him.
Q. You never did that in e-mail or

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anything?
A. Doubtful.
Q. He never sent you an e-mail?
A. He sent me lots -- well, a few e-mails, but --
Q. And you consider all of these conversations between you and Dick are privileged?
MR. MERTZ: Well, he's obviously willing to tell you about it. And this particular one, about the futility of that final appeal, is something you ought to know, which is why I'm not making an objection.
Q. Right. Right. And that's what I need to know.
A. Yeah. He said --
Q. What's the --
A. -- don't -- he said, "You can do it." He made it sound like -- you know what, honestly? He sounded -- he didn't sound like Josh Lovett, but it was the same pretense, like -- no, it was completely -- I'm sorry. Scratch that. It was completely different.
But in the same tone, he said, "You can appeal it, but we're the ones that make the decision if it's going to be approved." And so

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why bother?
Q. Do you have any notes from this or any --
A. No. I remember it, though, because he said -- he explained --
Q. Do you have any -- do you have anything, paperwise, that would confirm this?
A. I can look, but I don't think -- I don't think so.
Q. You folks have the union records. I don't. I've never seen them. And --
A. Oh, that's what I heard.
MR. PTACIN: Is there a way to get through this stuff, do a priv. log or anything for -- at least on this issue?
MR. MERTZ: Yeah. My recollection is that there is nothing in writing about this, other than that e-mail to Benthe that you mentioned. But I'm going to look.
MR. PTACIN: Okay.
MR. MERTZ: And if there is something, I'll give it to you.
THE WITNESS: I'll look too. I'll look tonight. I save --
MR. MERTZ: See if you've got

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anything. Tell me if you find anything, and I'll look through the records.
THE WITNESS: Okay.
MR. MERTZ: And if there's something, you'll get it.
MR. PTACIN: At least on this issue, yeah.
THE WITNESS: Yeah.
MR. PTACIN: At least get that far.
THE WITNESS: Yeah. Because I remember him telling me that it was pointless. But he was like kind of weird about it, because he said, "But you can go ahead and do that anyway," (enunciating) you know, in his Dick Isett voice.
MR. PTACIN: Yeah. We'll mark that in, just for good measure.
(Exhibit 11 duly marked.)
BY MR. PTACIN:
Q. As far as union questions, I'll just -- hold that open, waiting for the judge to rule on those issues for now.
A. Yeah. I don't mind.
Q. Now, unemployment. In one of your responses, you'd mentioned that you had been taking some unemployment --

Supreme Court Case No. S-14233

SUPREME COURT OF THE STATE OF ALASKA

RUSSELL PETERSON, JR.,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

On Petition for Review of an Order of the Superior Court for the State of Alaska First Judicial District at Juneau

Superior Court Judge Philip M. Pallenberg
Trial Court Case No. 1JU-10-00569CI

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor organizations with a total membership of approximately 11.5 million working men and women.[1] The petitioner in this case, Russell Peterson, Jr., was represented in the grievance process by a representative of the Alaska State Employees Association, which is affiliated with the AFL-CIO through its parent union the American Federation of State, County and Municipal Employees. This case presents an important and recurring question for the AFL-CIO and its affiliates: the extent to which confidential communications between employees and their union representatives made during the grievance process are protected from disclosure in subsequent litigation involving the employee and the employer.

STATEMENT OF THE CASE

Petitioner Russell Peterson, Jr. (Peterson) was employed by the Alaska Department of Labor in a bargaining unit represented by the Alaska State Employees Association, AFSCME Local 52, AFL-CIO (ASEA). Petitioner's Excerpt (hereinafter Pet. Exc.) 142, 146. After he was fired from his position with the Department of Labor, Peterson filed a grievance pursuant to the collective bargaining agreement between the State of Alaska and the ASEA. Pet. Exc. 146. The agreement states clearly that only the union, and not private counsel, may

[1] Both parties have consented in writing to the filing of this brief *amicus curiae*.

represent an employee in the grievance process. Pet. Exc. 20. Pursuant to this provision, a non-lawyer representative of the ASEA handled Peterson's grievance. Pet. Exc. 20-21. The ASEA and the State were unable to resolve Peterson's grievance and the union decided not to pursue the grievance to arbitration. Pet. Exc. 128. Peterson then filed this suit for unjust termination in superior court. Pet. Exc. 2-8.

In court, the State subpoenaed the ASEA's entire grievance file pertaining to Peterson and subpoenaed the ASEA's Business Manager to appear for a deposition. Pet. Exc. 50. Peterson objected to the State's attempt to discover Peterson's communications with the ASEA during the grievance process and moved for a protective order, contending that the grievance-related confidential communications at issue were privileged. Pet. Exc. 34, 38-45. The superior court rejected this argument and denied Peterson's motion for a protective order. Pet. Exc. 146-151. Peterson then petitioned this Court for interlocutory review of the superior court's discovery order, which this Court granted. *See* Order Granting Pet. for Rev. 1.

SUMMARY OF ARGUMENT

A public employer's demand to discover confidential grievance-related communications between an employee and his union representative constitutes an unfair labor practice in violation of the Alaska Public Employment Relations Act. (PERA). Rather than require parties to commence wasteful satellite litigation by filing unfair labor practice charges under that law, this Court should, by means of

its supervisory authority over the discovery process, permit employees and their unions to assert a limited privilege for confidential grievance-related communications in court. The recognition of this limited privilege is necessary to permit the proper functioning of PERA's mandatory grievance and arbitration system and to ensure that labor disputes are, to the greatest degree possible, resolved through contractual dispute-resolution processes rather than through litigation.

ARGUMENT

A public employer's demand to discover confidential communications between an employee and his union representative made during the mandatory grievance and arbitration process interferes with the employee's right to union representation in violation of the Alaska Public Employment Relations Act (PERA). AS 23.40.070 et. seq. Alaska's civil discovery rules generally permit a party to "obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action." Alaska R. Civ. P. 26(b)(1). No express privilege exists under Alaska's Rules of Evidence for confidential grievance-related communications between employees and their union representatives. *See* Alaska R. of Evid. 501 – 509. In order to harmonize PERA's strong public policy in favor of contractual resolution of labor disputes with the civil discovery rules' presumption in favor of disclosure, this Court should recognize a statutory-based limited privilege for confidential grievance-related communications between employees and their union representatives.

1. The NLRB has held that an employer's demand to discover confidential communications between an employee and his union representative made during the grievance process interferes with the employee's right to union representation and therefore will not be enforced. *See Cook Paint and Varnish Co.*, 258 NLRB 1230 (1981). The NLRB's ruling has been followed by every state court and public employment labor relation board that has addressed the question. *Ill. Ed. Lab. Rel. Bd. v. Homer Cmty. Consol. Sch. Dist.*, 547 N.E.2d 182, 188 (Ill. 1989); *Seelig v. Shepard*, 578 N.Y.S.2d 965 (N.Y. Sup. Ct. 1991); *Int'l Bhd. of Elec. Workers v. Pub. Util. Dist. 1*, Dec. 7656-A, 2003 WA PERC LEXIS 46, 55 (Wash. Pub. Employment Relations Comm'n, June 11, 2003); *N.H. Troopers Ass'n v. N.H. Dept. of Safety*, Dec. 94-74 (N.H. Pub. Employee Relations Bd., Aug. 31, 1994), *available at* http://www.nh.gov/pelrb/decisions/board/documents/1994-074.pdf. Thus, there is unanimous agreement that an employer's attempt to discover confidential grievance-related communications between an employee and his union representative interferes with the employee's protected rights.[2]

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[2] Neither of the cases cited by the State in its Brief in Opposition to Petition for Review, *see* Resp. Br. in Opp., p. 8 n.11, are to the contrary. In *Atwood v. Burlington Indus. Equity, Inc.*, 908 F.Supp. 319 (M.D.N.C. 1995), the court held that the presence of a non-lawyer union representative at pre-litigation meetings between employees and an attorney destroyed the attorney-client privilege. *Atwood* is factually inapposite because the conversations did not occur during the grievance or arbitration process. In *Walker v. Huie*, 142 F.R.D. 497 (D. Utah 1992), the court held that a citizen injured by a police officer could discover communications made between the officer and a union representative during internal employer disciplinary proceedings. However, the plaintiff in *Huie* was a stranger to the collective bargaining process in which the communications took place, so that case is distinguishable as well.

The logic of these decisions is unassailable. The grievance process is a mechanism by which a union, performing its statutory role as the exclusive representative of all the employees in the bargaining unit, is able to exercise its statutory responsibility to enforce the terms of the collective bargaining agreement through "the continuing administration of the contract" and thus "protect the interest[s] of . . . employee[s]" in the terms and conditions of employment set forth in that contract. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965). Allowing an employer to compel the disclosure of confidential grievance-related communications would necessarily inhibit the union from "obtaining needed information from employees" that is critical to the union's ability to perform its statutory duty as exclusive representative to police the agreement. *Cook Paint*, 258 NLRB at 1232. Likewise, requiring such disclosure would materially interfere with the union's representation of individual employees in the grievance process by "restrain[ing] employees in their willingness to candidly discuss matters with their chosen, statutory representatives." *Ibid.* In other words, "[t]he right to union representation would be meaningless if, upon disclosing the facts needed for representation, the disclosure were then available to the employer upon asking. The union representative would become little more than a conduit." *N.H. Troopers Ass'n*, *supra*, at 5.

This same logic applies with equal force to the union's statutory responsibilities under PERA. PERA was enacted by the Alaska Legislature "to promote harmonious and cooperative relations between government and its

employees and to protect the public by assuring effective and orderly operations of government." AS 23.40.070. An important mechanism for accomplishing this purpose is the statutory requirement that every public sector collective bargaining agreement must "include a grievance procedure which shall have binding arbitration as its final step." AS 23.40.210(a). *Accord United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) ("The present federal policy is to promote industrial stabilization through the collective bargaining agreement. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."). In order to ensure that labor disputes are resolved through the grievance and arbitration procedure rather than in court, public employees in Alaska "must first exhaust their contractual or administrative remedies, or show that they were excused from doing so, before pursuing a direct action against their employer." *Cozzen v. Municipality of Anchorage*, 907 P.2d 473, 475 (Alaska 1995).[3]

The relevant provisions of PERA are modeled on Sections 7 and 8(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 157 & 158(a)(1). Like the NLRA, PERA makes it an unfair labor practice for "[a] public employer or an

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[3] Once a grievance is decided by an arbitrator, that decision is given "great deference" by this Court, which "will only vacate an arbitration award arising out of a collective bargaining agreement where it is the result of gross error – those mistakes that are both obvious and significant," *State v. Pub. Safety Employees Ass'n*, 235 P.3d 197, 201 (Alaska 2010), further ensuring that labor disputes are resolved through the grievance and arbitration procedure rather than in court.

agent of a public employer" to "interfere with, restrain, or coerce an employee in the exercise of the employee's rights guaranteed in AS 23.40.080." AS 23.40.110(a)(1). That section of PERA, like Section 7 of the NLRA, guarantees the right of Alaska public employees to "form, join, or assist an organization to bargain collectively through representatives of their own choosing." AS 23.40.080. For this reason, "[r]elevant decisions of the National Labor Relations Board and federal courts [are] given great weight" in interpreting PERA. 8 AAC 97.240. *See also Alaska Pub. Employees Ass'n v. Department of Admin., Div. of Labor Relations*, 776 P.2d 1030, 1032 (Alaska 1989) ("We have followed federal decisions interpreting the NLRA when the provisions of the NLRA are similar to state statutes.").

Given the similarities between the relevant provisions of PERA and the NLRA, the Alaska Labor Relations Agency (ALRA), the body charged with enforcing PERA, would undoubtably reach the same conclusion as the NLRB reached in *Cook Paint* and would hold that an employer's demand to discover confidential grievance-related communications between an employee and his union representative constitutes an impermissible unfair labor practice.[4] Faced with such a discovery request, whether in the form of a civil subpoena or otherwise, the affected employee and/or his union could file an unfair labor

[4] Because ALRA expressly permits non-lawyers to represent parties before the agency, 8 AAC 97.355(a), there can be little doubt that ALRA would find that an employer's attempt to discover communications between an employee and a non-lawyer union representative made in preparation for an ALRA proceeding constitutes an unfair labor practice and would not permit that discovery to occur.

practice charge with ALRA and would be entitled to an order enjoining the employer's unlawful discovery effort.

2. In this case, Peterson chose to assert his PERA-protected rights by objecting to the State's discovery requests in superior court, rather than filing an unfair labor practice charge with ALRA. Under Alaska Rule of Evidence 501 and the Court's supervisory authority over the discovery process, this Court should sustain Peterson's objection and rule that employees and their unions may assert a limited privilege against being forced to disclose confidential grievance-related communications in court without having to engage in the time-consuming and wasteful extra step of instituting collateral litigation before ALRA by filing an unfair labor practice charge to challenge an employer's discovery request.

The Alaska Rules of Evidence state that "no person, organization, or entity has a privilege to . . . refuse to disclose any matter; or . . . refuse to produce any object or writing . . . [e]xcept 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." Alaska R. Evid. 501. Although "[p]rivileges in litigation are not favored and should be narrowly construed," Alaska courts recognize that "where some major public policy clearly articulated in a constitutional provision, statute, or court rule clearly outweighs the truth-seeking function . . . a privilege should be recognized." *Russell v. Anchorage*, 706 P.2d 687, 693 (Alaska App. 1985).

There is no explicit privilege in the Alaska Rules of Evidence for confidential grievance-related communications between an employee and a union representative. Alaska R. Evid. 501 – 509. Because the grievance belongs to the union rather than the grievant, Alaska's lawyer-client privilege does not apply. *See* Alaska R. Evid. 503(b) (privilege only applies to "confidential communications . . . between the client . . . and the client's lawyer"). That is so even if the union were to designate one of its attorneys, rather than a lay union representative, as the person responsible for representing the union's interest in the grievance. *See Peterson v. Kennedy*, 771 F.2d 1244, 1258 (9th Cir. 1985) ("We do not believe that an attorney who is handling a labor grievance on behalf of a union as part of the collective bargaining process has entered into an 'attorney-client' relationship in the ordinary sense with the particular union member who is asserting the underlying grievance.").[5] The proper functioning of PERA's mandatory grievance and arbitration system, however, requires, some protection for – to paraphrase Alaska's lawyer-client privilege rule – "confidential

[5] A union attorney does, of course, have an attorney-client relationship with the union itself and, in some cases, may also establish an attorney-client relationship with an employee where the attorney "specifically agree[s] . . . to provide direct representation to [the employee] as an individual client." *Peterson*, 771 F.2d at 1261. *See also Bachner v. Air Line Pilots Ass'n.*, 113 F.R.D. 644, 648 (D. Alaska 1987) (same). For example, a union may provide or pay for a private attorney for an individual employee as a benefit of union membership. In this situation, "a tripartite attorney-client relationship exists" between the employee, the union's lawyer, and the private attorney. *Raymond v. N.C. Police Benevolent Ass'n, Inc.*, __ S.E.2d __, 2011 N.C. LEXIS 224 (N.C., April 8, 2011).

communications made for the purpose of facilitating the rendition of [grievance-related representative] services to the [employee]." Alaska R. Evid. 503(b).

The protection extended to such confidential grievance-related communications need not be absolute. The United States Supreme Court has long recognized "limited" or "qualified" privileges for certain confidential communications not otherwise protected by the evidentiary rules, such as a limited privilege for confidential Executive Branch conversations and correspondence. *United States v. Nixon*, 418 U.S. 683, 708 (1974). *See also Fed. Open Market Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (1979) (recognizing a "limited" or "qualified" privilege against disclosure of certain monetary policy directives by Federal Reserve); *United States v. Nobles*, 422 U.S. 225, 238-39 (1975) (applying the work product doctrine in the criminal context, while explaining that "[t]he privilege derived from the work-product doctrine" is "qualified," "not absolute"). Similarly, this Court has recognized a "qualified" privilege for "confidential . . . internal governmental communications" necessary to "protect the deliberative and mental processes of decision makers," *Capital Information Group v. State of Alaska*, 923 P.2d 29, 33-34 (1996) (quoting *Doe v. Alaska Superior Court*, 721 P.2d 617, 622-23 (Alaska 1986)), based on the conclusion that "the public policy rationale upon which the Supreme Court relied in *United States v. Nixon* is equally applicable to our state government," *Doe*, 721 P.2d at 623.

When a party invokes a limited privilege, the superior court must apply a "balancing test" to determine the applicability and scope of the privilege. *Capital Information Group*, 923 P.2d at 37. First, the party asserting the privilege must make a "threshold showing" that the communication is covered by the privilege. *Ibid.* "If [the party asserting the privilege] . . . meets the threshold requirements, then there is a presumptive privilege and the party seeking disclosure must make a sufficient showing that the need for production outweighs the need for secrecy." *Ibid. See also Doe*, 721 P.2d at 626 ("[W]hen a formal specific claim of . . . privilege is asserted, a presumptive privilege attaches.").

Because PERA – an "enactment[] of the Alaska Legislature," Alaska R. Evid. 501 – explicitly requires the inclusion of a mandatory grievance and arbitration procedure in every public sector collective bargaining agreement, and because the effective operation of PERA's mandatory contractual dispute-resolution system constitutes a "major public policy clearly articulated in a . . . statute," *Russell*, 706 P.2d at 693, this Court has authority under Rule 501 to recognize a privilege for confidential grievance-related communications between employees and their union representatives. For reasons similar to those that motivated this Court to recognize a limited deliberative process privilege for confidential internal government communications, this Court should recognize a limited privilege for such grievance-related communications, thus creating a "presumption in favor of nondisclosure." *Capitol Information Group*, 923 P.2d at 37.

3. The precise nature of the limited privilege required by PERA flows from the role that the grievance and arbitration procedure plays in the collective bargaining process.

"[A]rbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." *Steelworkers*, 363 U.S. at 578. It is the grievance and arbitration process that provides "a common law of the shop which implements and furnishes the context of the agreement." *Ibid.* The union's obligation, as the "exclusive representative of *all the employees* in the bargaining unit," AS 23.40.100 (emphasis added), is to enforce the collective bargaining agreement in a manner that establishes a "common law of the shop" most favorable to all the employees. Although "[t]he rights of individual employees concerning . . . conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts," *Smith v. Evening News*, 371 U.S. 195, 200 (1962), "[t]he bargaining representative . . . is responsible to, and owes complete loyalty to, the interests of all whom it represents," *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (U.S. 1953).

The grievance, therefore, is controlled by the union. By "giv[ing] the union discretion to supervise the grievance machinery and to invoke arbitration," "frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedure[]," "both sides are assured that similar complaints will be treated consistently and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved." *Vaca v.*

Sipes, 386 U.S. 171, 191 (1967). In contrast, "[i]f the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined," and "a significantly greater number of grievances would proceed to arbitration," "greatly increas[ing] the cost of the grievance machinery and . . . overburden[ing] the arbitration process as to prevent it from functioning successfully." *Id.* at 191-92.

Without a proper recognition of the employee's right to freely confer with his union representative during the grievance process, PERA's policy of "promot[ing] harmonious and cooperative relations between government and its employees and . . . protect[ing] the public by assuring effective and orderly operations of government" through contractual resolution of labor disputes would be thwarted. See AS 23.40.070. Permitting the State to discover the contents of confidential grievance-related communications will "discourag[e] the communication of relevant information by employees . . . to [union representatives]" in the grievance process, *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981), because employees will justifiably fear that such communications will be discoverable in subsequent litigation. Employee reluctance to communicate with the exclusive bargaining representative will, in turn, substantially interfere with the union's ability to represent employees in the grievance process, as "[t]he first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." *Id.* at 390-91. And this, in turn, would wreak havoc on the

mandatory exhaustion-of-remedies requirement that is designed to resolve labor disputes in the grievance and arbitration procedure without the necessity of court involvement. If employees refuse to cooperate with a union's investigation, the union will lack the information it needs to effectively settle cases or decide which grievances to take to arbitration, ultimately leading to fewer labor disputes resolved through contractual means and more cases that will be heading to the Alaska courts.

There are two important lessons to be drawn from the foregoing description of the collective bargaining process with regards to the scope and application of a limited privilege for confidential grievance-related communications between an employee and a union.

First, the limited privilege would only operate where the parties to the underlying grievance are the same, or in privity to, the parties in the subsequent lawsuit, and where the lawsuit involves the same basic facts or occurrences as the grievance. In other words, the scope of the limited privilege is co-extensive with what would constitute an unfair labor practice under PERA. In the language of Alaska's civil procedure rules, where a public employer's discovery request would violate PERA, "the burden . . . of the proposed discovery" on the statutorily-protected right of an employee to union representation in the grievance process, as well as on the right of the union to enforce the collective bargaining agreement through the grievance procedure, strongly "outweighs its likely benefit" to the employer. Alaska R. Civ. P. 26(b)(1).

Moreover, to allow discovery of confidential grievance-related communications between an employee and the union would permit a public employer to obtain in litigation what it is forbidden by PERA from obtaining in the mandatory grievance and arbitration process. Such a rule would create "a trap by inducing confidential communications and then allowing them to be used against the [employee]." *Welfare Rights Org. v. Crisan*, 661 P.2d 1073, 1077 (Cal. 1983). It could not have been the Alaska legislature's intent to create a mandatory grievance and arbitration system for public employees in which "the only sound advice the authorized [union] representative could give [an employee] was, 'Don't talk to me.'" *Id.* at 1077 n.3.

In contrast, where discovery is sought by a party other than the public employer, or where the subject matter of the lawsuit is different from that of the underlying grievance, the limited privilege would not apply. Such a discovery request would instead be evaluated through the usual framework of Rule 26, which provides that a court may limit discovery "if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit," as, for example, where "the discovery sought . . . is obtainable from some other source that is more convenient, less burdensome, or less expensive." Alaska R. Civ. P. 26(b)(2)(A). For example, where the subject of the lawsuit differs from the grievance, such as in the investigation of a criminal violation, the benefit of discovery often outweighs the burden on PERA-protected rights, because "[n]owhere is the public's claim to each person's evidence stronger than in the

context of a valid grand jury subpoena," *In re Grand Jury Subpoena*, 926 A.2d 280, 284 (N.H. 2007) (quoting *In re Sealed Case*, 676 F.2d 793, 806 (D.C. Cir. 1982)). *See also Dep't of Justice v. FLRA*, 39 F.3d 361 (D.C. Cir. 1994); *In re Grand Jury Subpoenas*, 995 F. Supp. 332 (E.D.N.Y. 1998).

The second lesson to be drawn from the role that the grievance and arbitration procedure plays in collective bargaining is that any privilege ultimately belongs to the union. Even though the grievant employee may assert the privilege initially, the union remains free to waive it in furtherance of the union's obligations to the bargaining unit as a whole.[6] That is because in some cases the union must be able to waive the confidentiality of its communications with employees in the grievance process in order to fulfill its broader "responsib[ility] to . . . the interests of all whom it represents." *Huffman*, 345 U.S. at 338. For example, where the union is called to represent the competing interests of two or more employees, the union is entitled to take a position that furthers the interest of the bargaining unit as a whole – as long as it does so "in good faith and in a nonarbitrary manner," *Vaca*, 386 U.S. at 194 – even if taking such a position requires the union to waive the confidentiality of its communications with an individual grievant:

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[6] Like the client in a lawyer-client relationship, the employee also can waive the limited privilege by testifying to a confidential communication or disclosing a confidential document in his possession. In such a case, the union still can, however, assert the limited privilege as a defense to disclosing any confidential communications that only the union possesses.

> "Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes."

Humphrey v. Moore, 375 U.S. 335, 349-50 (1964).

4. When the limited privilege described above is applied to the facts of this case, it is clear that the confidential grievance-related communications between Peterson and the ASEA should be protected from disclosure.

The State seeks discovery of Peterson's communications with the ASEA for the purpose of "show[ing] that most of his lawsuit should be dismissed for failure to exhaust administrative remedies." Resp. Opp. to Pet. for Rev. at 4. As an initial matter, the State acknowledges that "the union, under its own authority, decided not to seek arbitration of Mr. Peterson's grievance." *Id.* at 3. Because an employee exhausts his contractual remedies when he requests that the union take his grievance to arbitration and the union refuses, *Casey v. Fairbanks*, 670 P.2d 1133, 1138-39 (Alaska 1983), the State requires no further discovery regarding exhaustion. Even if the law were, as the State argues, that "[i]f Mr. Peterson disagreed with the union's decision not to seek arbitration, he was required to appeal it with the union internally," Resp. Opp. to Pet. for Rev. at 3, the State still would not require discovery of Peterson's confidential grievance-related communications because a non-privileged communication from the ASEA to the State already in the record clearly states that Peterson did not appeal the union's

decision not to seek arbitration of his grievance. *See* Pet. Exc. 128 (e-mail from ASEA to State stating "Mr. Peterson has not appealed [the union's] decision not to arbitrate his grievance.").

Moreover, the State could easily obtain the information it says it needs by serving Peterson with an interrogatory or a request to admit concerning his efforts to exhaust contractual and internal union remedies. That is, the *fact* of whether Peterson sought to appeal the union's decision not to seek arbitration is not a communication "made for the purpose of facilitating the rendition of [grievance-related representative] services to the [employee]," Alaska R. Evid. 503(b), and therefore is not protected from discovery by the limited privilege. *See Upjohn*, 449 U.S. at 395-96 ("The protection of the privilege extends only to *communications* and not facts. A fact is one thing and a communication concerning that fact is an entirely different thing." (Internal quotation marks and brackets omitted)). Thus, even if clear evidence that Peterson did not appeal the union's decision not to take his grievance to arbitration were not already in the record, the State still could not show that it requires access to the ASEA's entire grievance file to ascertain this particular fact.

More generally, the State's effort to obtain its sought-after discovery constitutes an unfair labor practice under PERA and therefore the limited privilege should apply. If the State is permitted to discover confidential communications between Peterson and the ASEA, other public employees will be loath to participate in the PERA-mandated grievance and arbitration procedure for fear that

their statements to the union could later be used against them if they were to bring a suit in court. This result would undermine the Alaska legislature's purpose in enacting PERA of "promot[ing] harmonious and cooperative relations between government and its employees" through mandatory arbitration, AS 23.40.070. It would also wreak havoc on this Court's exhaustion requirement that aims to keep labor disputes in the grievance and arbitration procedure and out of court by applying "great deference to an arbitrator's decision," *Pub. Safety Employees Ass'n*, 235 P.3d at 201. If employees refuse to cooperate with union investigations, the union will be unable to gather the information necessary to decide whether to take cases to arbitration, ultimately leading to more cases in Alaska courts.

Finally, if the State were permitted to obtain its sought-after discovery, the ASEA's ability to enforce its collective bargaining agreement with the State would be substantially impaired, as its ability to investigate future grievances by interviewing employees would be restrained by its knowledge that any communications with employees during the investigatory process will be discoverable in subsequent litigation. This would leave the union without the ability "to settle the majority of grievances short of the costlier and more time-consuming step[]" of arbitration, placing a "dampening effect on the entire grievance procedure." *Vaca*, 386 U.S. at 192-93.

CONCLUSION

For the reasons stated, the superior court's order denying Peterson's motion for a protective order regarding his communications with union officials should be reversed.

July 18, 2011

Respectfully submitted,

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Matthew J. Ginsburg
AFL-CIO
815 Sixteenth Street, NW
Washington, DC 20006

Michael Rubin
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108

CERTIFICATE OF TYPEFACE AND POINT SIZE

Pursuant to Alaska Rule of Appellate Procedure 212(b) and Alaska Rule of Civil Procedure 513.5(c), I hereby certify that this Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* in Support of Petitioner is typed in Times New Roman typeface in 13-point type.

Justin W. Roberts
Alaska Bar # 0605023
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Anchorage, AK 99503

EXHIBIT

American Federation of Labor and Congress of Industrial Organizations

815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000
www.aflcio.org

July 12, 2011

John M. Ptacin
Assistant Attorney General
1031 W. 4th Avenue, Suite 200
Anchorage, Alaska 99501

Re: *Russell Peterson, Jr. v. State of Alaska*,
Supreme Court of the State of Alaska, Supreme Ct. No. S-14233

Dear Mr. Ptacin:

The Alaska Rules of Appellate Procedure state that "[a] brief of an amicus curiae may be filed . . . if accompanied by written consent of all the parties." Alaska R. App. P. 212(c)(9). This is to request the consent of the State of Alaska, Respondent in the above-captioned case, to the filing by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) of a brief *amicus curiae* in support of the Petitioner.

If the Respondent will consent to the filing of the AFL-CIO's brief, please so indicate by endorsing this letter in the space provided below.

Thank you for your consideration.

Yours truly,

Matthew J. Ginsburg

Respondent State of Alaska hereby consents to the filing of a brief *amicus curiae* in support of the Petitioner by the AFL-CIO.

John M. Ptacin
Counsel for Respondent

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Richard P. Hughes Jr.
Rogelio "Roy" A. Flores
Malcolm B. Futhey Jr.
Roberta Reardon
John W. Wilhelm

July 12, 2011

Douglas Mertz
Mertz Law Office
319 Seward Street, Suite 5
Juneau, Alaska 99801

Re: *Russell Peterson, Jr. v. State of Alaska,*
Supreme Court of the State of Alaska, Supreme No. S-14233

Dear Mr. Mertz:

The Alaska Rules of Appellate Procedure state that "[a] of an amicus curiae may be filed . . . if accompanied by written consent of all the parties." Alaska R . P. 212(c)(9). This is to request the consent of Russell Peterson, Jr., Petitioner in the above-caption se, to the filing by the American Federation of Labor and Congress of Industrial Organizations (CIO) of a brief *amicus curiae* in support of the Petitioner.

If the Petitioner will consent to the filing of the AFL-CI brief, please so indicate by endorsing this letter in the space provided below.

Thank you for your consideration.

Yours truly,

Matthew J. Co g

Petitioner Russell Peterson, Jr. hereby consents to the filing of a *amicus curiae* in support of the Petitioner by the AFL-CIO.

Douglas Mertz
Counsel for Petitioner

IN THE SUPREME COURT OF THE STATE OF ALASKA

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

MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER BY WRITTEN CONSENT OF ALL THE PARTIES

Pursuant to Alaska Rule of Appellate Procedure 212(c)(9), the American Federation of Labor and Congress of Industrial Organizations moves for leave to file the accompanying brief, *amicus curiae*. Both petitioner Russell Peterson, Jr. and respondent State of Alaska have consented to the filing of this brief. The written consent of both parties is attached as an exhibit to this motion.

WHEREFORE, the AFL-CIO respectfully requests that this Court grant leave for the AFL-CIO to file the accompanying brief, *amicus curiae*.

July 18, 2011

Respectfully submitted,

Justin W. Roberts
(*Counsel of record*)
Alaska Bar # 0605023
3333 Denali Street, Suite 2000
Anchorage, AK 99503

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EXHIBIT

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July 12, 2011

John M. Ptacin
Assistant Attorney General
1031 W. 4th Avenue, Suite 200
Anchorage, Alaska 99501

Re: *Russell Peterson, Jr. v. State of Alaska*,
Supreme Court of the State of Alaska, Supreme Ct. No. S-14233

Dear Mr. Ptacin:

The Alaska Rules of Appellate Procedure state that "[a] brief of an amicus curiae may be filed . . . if accompanied by written consent of all the parties." Alaska R. App. P. 212(c)(9). This is to request the consent of the State of Alaska, Respondent in the above-captioned case, to the filing by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) of a brief *amicus curiae* in support of the Petitioner.

If the Respondent will consent to the filing of the AFL-CIO's brief, please so indicate by endorsing this letter in the space provided below.

Thank you for your consideration.

Yours truly,

Matthew J. Ginsburg

Respondent State of Alaska hereby consents to the filing of a brief *amicus curiae* in support of the Petitioner by the AFL-CIO.

John M. Ptacin
Counsel for Respondent

American Federation of Labor and Congr of Industrial Organizations

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July 12, 201

Douglas Mertz
Mertz Law Office
319 Seward Street, Suite 5
Juneau, Alaska 99801

Re: *Russell Peterson, Jr. v. State of Alaska.*
Supreme Court of the State of Alaska, Supren . No. S-14233

Dear Mr. Mertz:

The Alaska Rules of Appellate Procedure state that "[of an amicus curiae may be filed . . . if accompanied by written consent of all the parties." Alaska R . P. 212(c)(9). This is to request the consent of Russell Peterson, Jr., Petitioner in the above-caption se. to the filing by the American Federation of Labor and Congress of Industrial Organizations (CIO) of a brief *amicus curiae* in support of the Petitioner.

If the Petitioner will consent to the filing of the AFL-C rief, please so indicate by endorsing this letter in the space provided below.

Thank you for your consideration.

Yours truly,

Matthew J. C

Petitioner Russell Peterson, Jr. hereby consents to the filing of *amicus curiae* in support of the Petitioner by the AFL-CIO.

Douglas Mertz
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Justin W. Roberts, certify that on July 18, 2011, the foregoing Motion For Leave To File Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* In Support of Petitioner By Written Consent of All the Parties was served on all parties or their counsel of record by mailing a true and correct copy via first class United States mail to the addresses listed below:

Douglas Mertz
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Counsel for Petitioner

John M. Ptacin
Assistant Attorney General
State of Alaska
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(907) 269-5073
Counsel for Respondent

Justin W. Roberts
Alaska Bar # 0605023
3333 Denali Street, Suite 2000
Anchorage, AK 99503

CERTIFICATE OF SERVICE

I, Justin W. Roberts, certify that on July 18, 2011, the foregoing Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* In Support of Petitioner was served on all parties or their counsel of record by mailing a true and correct copy via first class United States mail to the addresses listed below:

Douglas Mertz
Mertz Law Office
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Counsel for Petitioner

John M. Ptacin
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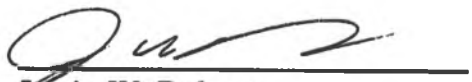

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