Journal of Dispute Resolution

Volume 2013 | Issue 1 Article 9

2013

Labor-Relations Privilege: How Far Can We Tip the Scales to Hide the Truth, The

Joanna L. Byrne

NOTES

The Labor-Relations Privilege: How Far Can We Tip the Scales to Hide the Truth?

Peterson v. State[1]

I. INTRODUCTION

Peterson v. State is crucial to the molding of the labor-relations privilege, both in Alaska and other jurisdictions because the case confronts a rarely litigated issue and reaches an even rarer holding.[2] The issue of labor-relations privilege generally arises when an employee has a confidential conversation with a non-attorney union representative assigned to his or her case and the employer attempts to acquire knowledge of this confidential conversation.[3] Through its holding, the Supreme Court of Alaska created an absolute labor-relations privilege that extends to confidential communications between union representatives and employees participating in grievance procedures.[4] The holding rendered communications between union representatives and employees undiscoverable in subsequent legal proceedings.[5]

Prior to the *Peterson* decision, an Alaska employer would have access to all correspondence between a union employee and his or her union representative that took place during the grievance proceedings.[6] Once the grievance proceedings failed and either the employer or employee appealed the decision rendered through an alternative dispute resolution method, the employer could discover all of these communications to use against the employee in the case on appeal.[7] This decision is important because universally recognized principles of justice indicate that there is a presumption that all available facts should be divulged in court proceedings to facilitate effective decision-making.[8] Therefore, new privileges are rarely created.

In order to understand the precise effect the *Peterson* holding will have on labor-relations law and privilege creation, it is important to first understand how privileges have been created in the past, both traditionally and divergently. Next, it is important to apply the historical context of privilege creation to understand

1. Peteron v. State, 280 P.3d 559 (Alaska 2012).
2. *See id.*
3. Mitchell H. Rubinstein, *Is a Full Labor Relations Evidentiary Privilege Developing?*, 29 BERKELY J. EMP. & LAB. L. 221, 221 (2008).
4. *See Peterson*, 280 P.3d at 567.
5. *See id.*
6. *See generally id.* at 561.
7. *See id.*
8. Jaffee v. Redmond, 518 U.S. 1, 9 (1996).

the critical thinking that determines when and how a new privilege should apply. Further, it is important to compare and contrast labor-relations privileges with other privileges in order to create proper limits and application of the labor-relations privilege. Applying this analytical framework to the facts, holding and reasoning of the *Peterson* case will provide a more clear determination of the effect of this case on labor-relations law and privilege creation.

II. FACTS AND HOLDING

In 2007, Russell Peterson, Jr. became employed with the Alaska Department of Labor.[9] At the commencement of Peterson's employment, he became a member of the Alaska State Employees Association (ASEA) union.[10] In 2009, following an investigation prompted by Peterson's request for service time credit,[11] the State discovered Peterson's 2007 job application failed to disclose a previous felony.[12] Consequently, the State terminated Peterson's employment.[13] Peterson responded by filing a grievance in compliance with ASEA's collective bargaining agreement with the State.[14] Peterson's grievance proceeding was represented by a non-lawyer ASEA representative,[15] who worked with Peterson's lawyer, Douglas Mertz, to develop legal strategies.[16] The ASEA representative and the State were ultimately unable to come to a resolution concerning Peterson's grievance.[17] Subsequently, Peterson filed a wrongful termination lawsuit in the superior court.[18]

The State subpoenaed the ASEA representative to appear for a deposition that would grant the State access to Peterson's grievance file, including all written communication between the ASEA and Mertz.[19] Peterson filed a motion for a protective order, claiming the file was protected by the attorney-client privilege.[20] The superior court denied the motion, holding that Peterson waived his right to the attorney-client privilege by giving the union access to his correspondence with Mertz.[21] Further, the court found that there was no available privilege to protect correspondence between a union member and a union.[22] After Peterson's motion for a protective order was denied, he petitioned for review of the superior court's order.[23] The Supreme Court of Alaska granted the petition to address the follow-

9. *Peterson*, 280 P.3d at 560.
10. *Id.*
11. *See* Payroll Procedures Manual, Section 14, *available at* http://doa.alaska.gov/dof/manuals/ppm/resource/14_verification.pdf (last visited Aug. 20, 2012). Explains that rehired government employees can input the hours they worked in their prior government position to be considered for retirement benefits.
12. *Peterson*, 280 P.3d at 561.
13. *Id.*
14. *Id.*
15. *Id.* ("The CBA states only the union, and not private counsel, may represent an employee in the grievance process.").
16. *Id.*
17. *Id.*
18. *Id.* ("...ASEA decided not to pursue arbitration.").
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*

ing issues: (1) the applicability of any existing privileges; (2) The Supreme Court of Alaska's authority, independent of rule-making authority, to judicially recognize new privileges; (3) any related privileges used in other jurisdictions; and (4) any related due process concerns that may arise.[24]

The Supreme Court of Alaska ultimately found that a union-relations privilege existed through the implication of the Alaska Public Employment Relations Act (PERA),[25] and accordingly reversed the superior court's ruling and remanded the case for application of the privilege to discovery proceedings.[26]

III. LEGAL BACKGROUND

Evidentiary privileges afford certain parties and potential witnesses protection from forced disclosure of relevant and material evidence during the discovery phase, as well as the actual trial.[27] Although union representatives owe acknowledged fiduciary duties to the employees they represent and generally "evidentiary privileges reflect a recognition of the duty of loyalty fiduciaries owe to their principals," there is no universally recognized labor-relations privilege.[28] Each state varies as to if and how it protects labor relations.[29] While many courts have extended privileges to include employer-employee relationships, state courts have split views as to extending a privilege to third party strangers to the employment relationship.[30] Courts generally refuse to extend attorney-client privilege to non-attorney union representatives, despite the fact that many collective bargaining agreements require employees to commence a grievance process by working with lay union representatives.[31] A full labor-relations privilege, which extends to strangers outside the employment relationship, is vital for employees because many labor disputes and affairs are frequently conducted by non-attorneys.[32] Although the National Labor Relations Board (NLRB) has extended privilege to many non-lawyer representatives in labor arbitrations, courts have generally refused to extend the attorney-client privilege to situations where employees sought advice from lay union representatives.[33] The United States Supreme Court has not addressed labor relations privileges directly,[34] but the Court has "recognized that uncertain privileges are not in the public interest."[35]

---

24. *Id.*

25. ALASKA STAT. ANN. § 23.40.070 (West 2012). "The legislature finds that joint decision-making is the modern way of administering government... The legislature further finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct energies of public employees eager to have a voice in determining their conditions of work, to provide a rational method for dealing with disputes and work stoppages, to strengthen the merit principle where civil service is in effect, and to maintain a favorable political and social environment."

26. *Peterson*, 280 P.3d at 560.

27. Michael D. Moberly, *Extending a Qualified Evidentiary Privilege to Confidential Communications Between Employees and Their Union Representatives*, 5 NEV. L.J. 508, 508 (Winter 2004-05).

28. *Id.* at 510.

29. *See generally* Rubinstein, *supra* note 2.

30. Rubinstein, *supra* note 2, at 222.

31. *Id.* at 224-225.

32. *See id.* at 221.

33. *Id.* at 223-24

34. *See id.* at 225.

35. *Id.* at 227.

A. General Principles of Privilege Law

Privileges are unique from other rules of evidence because they exclude "reliable, relevant evidence in order to protect an interest deemed by a court or legislature to be more important than the interest served by admitting the evidence."[36] Privileges are controversial because they obstruct the placement of all relevant legal evidence before the trier of fact, impeding a core function of the adversarial process.[37] Although courts and tribunals traditionally disfavor evidentiary privileges,[38] it has been generally held that certain private communications must remain confidential from court proceedings in order to serve certain societal interests, such as the stimulation of important professional and personal relationships.[39] Federal Rule of Evidence 501[40] governs claims of privilege in federal courts and provides the courts with flexibility to determine new privileges on a case-by-case basis.[41] However, courts have found that Rule 501 has failed to provide federal courts with "clear guidelines" in addressing "novel privilege claims."[42] The Supreme Court has indicated that there is a presumption against recognizing new privileges[43] and, thus, has taken a "cautionary approach" applying its power to recognize new privileges under Rule 501.[44]

Dean John Henry Wigmore, an expert in the field of evidence,[45] has constructed a highly influential framework for recognizing new common law privileges.[46] Wigmore's framework requires the existence of four fundamental conditions prior to rendering communications as privileged:

(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 communication must be greater than the benefit thereby gained for the correct disposal of litigation.[47]

---

36. Nissa M. Ricafort, *Jaffee v. Redmond: The Supreme Court's Dramatic Shift Supports the Recognition of a Federal Parent-Child Privilege*, 32 IND. L. REV. 259, 260 (1998).

37. *Id.*

38. *See id.* at 286.

39. *See* Moberly, *supra* note 26, at 509.

40. FED. R. EVID. 501. PRIVILEGE IN GENERAL.
The common law--as interpreted by United States courts in the light of reason and experience--governs a claim of privilege unless any of the following provides otherwise:
• the United States Constitution;
• a federal statute; or
• rules prescribed by the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

41. Rubinstein, *supra* note 2, at 228-229.

42. Ricafort, *supra* note 35, at 264.

43. Rubinstein, *supra* note 2, at 229.

44. Ricafort, *supra* note 35, at 264-265.

45. *See* Donald F. Paine, *Wigmore on Evidence*, Tenn. B.J., September 2003, at 16. "[Wigmore's] treatise is universally acclaimed for the depth of legal research and historical background."

46. EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES, §3.2.3. CRITERIA FOR RECOGNIZING NEW PRIVILEGES (Aspen Publishers, 2012).

47. 8 J. Wigmore, Evidence §2285 (McNaughton rev. 1961).

Nearly all courts, including the Supreme Court, lower federal courts and state courts, apply Wigmore's test as the "litmus test for determining the propriety of recognizing a new privilege."[48] Under Wigmore's test, very little valuable evidence is lost to privilege because any correspondence that would meet Wigmore's criteria would only exist because both parties were fully aware of the existence of a privilege and information was divulged knowing it would remain confidential.[49] In response to concern that Wigmore's framework is unnecessarily strict, some courts have developed a more humanistic interpretation of some of Wigmore's essential principles in order to create more privileges than the initial framework allows.[50] Under the humanistic model, the validity of a privilege rests on whether the relationship between the parties is the type of relationship that requires one party to consult the other party in order to make intelligent and independent life choices.[51] This rationale creates a possibility for privileges in medical and familial relations, which are rejected under a pure Wigmorean analysis.[52]

The United States Supreme Court has never ruled on the issue of privilege in a labor-relations case.[53] In the past, the Supreme Court typically applied instrumental reasoning to the Wigmore framework and only found privilege in situations where information would not have been divulged in the absence of a known privilege.[54] In *University of Pennsylvania v. E.E.O.C.*, the Supreme Court did not create a privilege to protect peer review materials from disclosure in a Title VII case against the University of Pennsylvania.[55] In *University of Pennsylvania*, the Court found that creating a privilege would interfere with the enforcement of Title VII, which required an investigation into a charge of discrimination in order to establish "reasonable cause to believe that the charge is true."[56] Further, the Court reasoned that in creating the procedure for Title VII cases, Congress was aware of the privacy interests of educational institutions and chose not to extend privilege for peer review documents.[57] The Supreme Court did find it appropriate to create a privilege for confidential communications between a psychotherapist and her patient in *Jaffee v. Redmond*.[58] Here, the Court found that Rule 501 rendered the common law to be flexible and adaptable in varying conditions.[59] This flexibility of the common law allowed the Court to recognize privilege based on a confidential relationship on a case-by-case basis.[60] The Court applied a simpler version of

48. IMWINKELRIED, *supra* note 45.

49. IMWINKELRIED, *supra* note 45.

50. *See generally* IMWINKELRIED , *supra* note 45, § 5.4.3 IMPACT ON THE CRITERIA FOR SELECTING THE RELATIONS TO BE CLOAKED WITH A PRIVILEGE.

51. IMWINKELRIED, *supra* note 45.

52. IMWINKELRIED, *supra* note 45.

53. IMWINKELRIED, *supra* note 45.

54. *See* IMWINKELRIED, *supra* note 45. *See also* Fisher v. United States, 425 U.S. 391 (1976) (Supreme Court found party would not divulge information to an attorney without attorney-client privilege); Swinder & Berlin v. U.S., 524 U.S. 399 (2002) (reaffirming *Fisher*, since information would not be divulged without privilege the loss of evidence is "more apparent than real.").

55. *See* Univ. of Pa. v. EEOC, 110 S. Ct. 577 (1990).

56. *Id.* at 583.

57. *Id.* at 582.

58. *See generally* Jaffee v. Redmond, 518 U.S. 1, 9 (1996).

59. *Id.* at 8.

60. *Id.*

the Wigmorean framework.[61] The Court found that a "reasonableness standard" could be applied in favor of protecting confidential communications in light of the "sufficiently important interests" that "outweigh the need for probative evidence."[62] The Court found that justice would not be compromised by the recognition of a psychotherapist/patient privilege.[63]

B. Labor-Relations Privilege Law in Other Jurisdictions

In *Cook Paint & Varnish Co.*,[64] the NLRB held that correspondence between an employee and his union representative concerning a grievance matter was undiscoverable by an employer in relation to a subsequent lawsuit.[65] There, an employee was terminated for his involvement in a paint-spilling incident that resulted in the employee's own injury.[66] On the day the employee was terminated, the union filed a grievance on behalf of the employee invoking binding arbitration.[67] Prior to the arbitration, the employee's union representative was called into the General Superintendent's office and questioned about the grievance case he and the employee were preparing.[68] Additionally, the General Superintendent "ordered" the union representative to produce his notes of the employee's grievance from his union notebook by the following day.[69] The union representative was threatened with disciplinary action should he fail to comply with investigation.[70] The union representative answered questions under protest but refused to produce any notes from his union notebook.[71]

The NLRB held that an employer may conduct a "legitimate investigatory interview in preparation for a pending arbitration"; however, in this case, a reasonable investigation did not extend to the meeting between the union representative and the District Superintendent.[72] The NLRB found that the District Superintendent did not have a legitimate reason for conducting the investigation and that acquiring the information sought would unreasonably interfere with the employee's rights.[73] While the NLRB refused to recognize a "blanket rule"—one that could have set a standard for all union and employee correspondences—the decision rendered officially recognized the need to protect certain activities in order to allow candid communication between union representatives and employees for matters involving potential or actual discipline.[74]

In a similar decision, a New York court held that an employer committed an improper employment practice by questioning a union officer in regards to "ad-

61. *Id.* at 9-10.
62. *Id.*
63. *Id.*
64. Cook Paint & Varnish Co., 258 NLRB Dec. (CCH) 1230, 1230 (1981).
65. *Id.*
66. *Id.*
67. *Id.* at 1231.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 1231-32.
74. *Id.* at 1232.

vice and assistance" he provided to a union employee facing disciplinary charges.[75] The court found that the failure to protect union and employee relations in the instant case and under similar circumstances would deter union employees from seeking advice and representation from the union.[76] The court found a statutory basis[77] for providing union members privileges "on matter[s] where a member has a right to be represented by a union representative, and then only where the observations and communications are made in performance of a union duty."[78]

The boundaries of union and employee relationships were further tested in *Seelig v. Shepard*.[79] In *Seelig*, the mayor of New York sought to investigate an alleged incident of the use of physical force in a prison.[80] As part of the investigation of the incident and the events leading up to it, representatives of the city of New York sought to discuss the incident with Seelig, President of the Correction Officer's Union, by issuing him a subpoena.[81] Seelig sought to quash the subpoena, arguing that any information he possessed of the events in question was privileged information due to his role as union president.[82] The court found Seelig's argument to be invalid and that a union-relations privilege is not absolute and does not protect communications between Seelig and non-union members, which includes upper-management at the Department of Correction.[83]

Union-relations privileges have been further limited in other jurisdictions, as demonstrated in the California case, *American Airlines, Inc v. Superior Court*.[84] There, an employee was suing American Airlines for wrongful termination, harassment and discrimination under the Fair Employment and Housing Act (FEHA).[85] A representative from the Local 564 of the Transport Workers Union of America, AFL-CIO (the Union) investigated the grievance on behalf of the employee.[86] When the union representative was questioned as to the details of the employee's allegations, he claimed the information was privileged.[87] American argued that the union representative was a necessary witness and American would be unable to construct a decent defense without any insight to the employee's allegations.[88] The court chose not to apply the narrow holding of *Cook Paint*, finding that the facts of this case were not analogous.[89] The court held that the questions did not "delve into the constitutionally protected right of associational

75. City of Newburgh v. Newman, 421 N.Y.S.2d 673 (N.Y. App. Div. 1979).
76. *Id.* at 675-77.
77. N.Y. CIV. SERV. LAW §209-a(1)(a) ("It shall be an improper practice for a public employer or it agents deliberately (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two for the purpose of depriving them of such rights.").
78. *City of Newburgh*, 421 N.Y.S.2d at 676.
79. Seelig v. Shepard, 578 N.Y.S.2d 965 (1991).
80. *Id.* at 966.
81. *Id.*
82. *Id.*
83. *Id.* at 968.
84. Am. Airlines, Inc. v. Superior Court, 8 Cal. Rptr. 3d 146 (Cal. App. 2003).
85. *Id.* at 148
86. *Id.* at 149.
87. *Id.*
88. *Id.*
89. *Id.* at 155 (Does not inquire into prearbitration assistance the union representative gave the employee and union employee does not face adverse job action).

privacy,"[90] and, therefore, there is no compelling reason for the court to judicially create a new privilege.[91]

C. Privilege Law as Applied in Alaska

Similarly to Federal Rule of Evidence 501, the Alaska Rules of Evidence state: "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 . . . ."[92] The Alaska Rules of Evidence list the following officially statutorily recognized privileges: lawyer-client privilege,[93] physician and psychotherapist-patient privilege,[94] husband-wife privileges,[95] communications to clergymen,[96] privilege of political vote,[97] privileges to protect trade secrets,[98] and privileges to protect identity of informers.[99]

As demonstrated in *Doe v. Alaska Superior Court*, Alaska has a history of judicially-recognizing new privileges.[100] In this case, Alaska recognized a new executive privilege for the Governor in the discharge of official duties by protecting files "maintained by the Governor concerning potential appointees to state office."[101] The court found that the extension of privilege to internal memoranda and "miscellaneous papers" in the appointment file was justified by public policy considerations.[102] The court found that communications that contain advisory opinions and recommendations should be afforded necessary protections in order to encourage "candid opinions and debate among government officials during the decision-making process."[103]

IV. THE INSTANT DECISION

The Supreme Court of Alaska granted review of the superior court's order, which found no basis for recognizing a union-relations privilege that would render

90. *Id.* at 157.
91. *Id.* at 158.
92. ALASKA R. EVID. 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.
93. *Id. at* 503.
94. *Id. at* 504.
95. *Id. at* 505.
96. *Id. at* 506.
97. *Id. at* 507.
98. *Id. at* 508.
99. *Id. at* 509.
100. Doe v. Alaska Superior Court, 721 P.2d 617 (1986).
101. *Id.* at 618.
102. *Id.* a 623-24.
103. *Id.* at 625.

Peterson's grievance file confidential.[104] The court concluded that Peterson's grievance file was protected by the implied meaning of Alaska statutes, and the court reversed the superior court's ruling and remanded the case for application of the privilege to discovery proceedings.[105] As an appeal of a discovery ruling, the standard of review applied by the court was abuse of discretion.[106] Privilege is an issue that must be determined independently of the overall proceeding and, as it was purely a question of law, the issue was reviewed de novo.[107] The court stated it would "adopt the rule of law that is most persuasive in light of precedent, reason, and policy."[108]

The court first examined Alaska Evidence Rules to determine if there was an evidentiary privilege already in place to protect Peterson's grievance file.[109] Although Alaska Evidence Rule 503 was the most relevant statute, the court determined that no existing privilege, including the attorney-client privilege, was broad enough to extend to union representation.[110] The court reasoned that because a union representative is neither a lawyer's representative nor an exclusive representative of the employee, there was no existing privilege broad enough to encompass union representatives.[111]

Next, the court examined its authority to create new privileges in compliance with Alaska Evidence Rule 501.[112] The court examined other states with provisions similar to Rule 501 and found that many states limit the recognition of privileges "unless adopted by the legislature or a supreme court rule, or required by the state or federal constitution."[113] The court examined the history of the recognition of privileges in Alaska and found that the State had recognized an "executive privilege for the governor in the discharge of official duties" in *Doe v. Alaska Superior Court*.[114] In *Doe*, the court examined the separation of powers principle rooted in the Alaska Constitution, which allowed the court to create a limited executive privilege.[115] The court concluded that the basis for a valid union-relations privilege would have to exist in statutes, the rules of the court, or the constitution.[116]

Next, the court looked at relevant case law to survey privileges adopted by other jurisdictions.[117] The court examined *Cook Paint*, *City of Newburgh*, and *Seelig*.[118] At the conclusion of the court's analysis, it considered creating a union-relations privilege in Alaska based on the facts presented of the instant case.[119]

---

104. Peterson v. State, 280 P.3d 559, 561 (Alaska 2012).
105. *Id.* at 560.
106. *Id.* at 561.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 561-562.
111. *Id.* at 562.
112. *Id.*
113. *Id.*
114. *Id. See also* Doe v. Alaska Superior Court, 721 P.2d 617, 626 (1986).
115. *See generally id.*
116. Peterson v. State, 280 P.3d 559, 562 (Alaska 2012).
117. *Id.*
118. *Id.* at 562-564.
119. *Id.* at 564.

The State had argued that PERA does not create a unions-relations privilege, drawing parallels between the instant case and *American Airlines*.[120] The court noted that the instant case is significantly different from *American Airlines*.[121] First, unlike *American Airlines*, the instant case involved public employees covered by PERA.[122] Second, the facts were limited to confidential correspondence between an employee, his attorney and his union representative as it related to the grievance process; *American Airlines* dealt with a broader scope of communications which extended to communications between a union representative and other union employees.[123] Finally, the communications at issue in *American Airlines* contained facts and observations outside of the realm of confidential communications.[124] For these reasons, the court rejected the State's argument to limit the unions-relations privilege based on the holding in *American Airlines*.[125]

The court ultimately decided to recognize the existence of a union-relations privilege, determining that such a privilege was implied in PERA where the statute states: "the enactment of positive legislation establishing guidelines for public employment is the best way . . . to provide a rational method for dealing with disputes and work stoppages."[126] The court found that PERA further recognized the benefits of collective bargaining, stating that a public employer "may not interfere with, restrain or coerce an employee in the exercise of employee rights . . . or dominate or interfere with the formation, existence, or administration of an organization."[127] The court then noted reasoning in *Seelig* that in order for a union to function properly, there must be open communication that is free of undue influence and allows the union members to feel secure that the information they divulge to representatives will not be "pried out of the representatives."[128] The court emphasized the importance of a privilege: to encourage union employees to be forthcoming in grievance procedures and allow union representatives to better advise and represent union employees.[129] The court recognized a union-relations privilege under PERA that extends to "communications made in confidence in connection with representative services relating to anticipated or ongoing disciplinary or grievance proceedings between an employee (or the employee's attorney) and union representatives acting in official representative capacity."[130] The union-relations privilege "may be asserted by an employee or the union of behalf of the employee" and "only extends to communications, not underlying facts."[131] The court noted that the "expectation of confidentiality" was a crucial factor in determining the applicability of a privilege to a situation.[132] The privilege does not go so far to protect informal conversations and only applies to circumstances where

120. *Id.*
121. *Id.* at 566.
122. *Id.* at 564.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 564-565
127. *Id.* at 565.
128. *Id.*
129. *Id.*
130. *Id.* at 559.
131. *Id.*
132. *Id.*

the union representative is acting in his or her official union role.[133] The court remanded the case for further proceedings consistent with the opinion.[134]

V. COMMENT

The *Peterson* holding will likely affect labor relations law in Alaska because the decision ultimately strengthened the role of unions in grievance proceedings. Further, the decision has the potential to affect the judicial discretion of courts in other jurisdictions trying similar cases. The issue of the labor-relations privilege is rarely tried, so courts in other jurisdictions will likely evaluate the *Peterson* holding in forming their own analysis.[135] Finally, the court's reasoning may have a macro effect on the creation of privileges in other jurisdictions, especially considering there is no universally recognized standard for privilege creation and courts differ as to how and when they exercise discretion in privilege creation.

A. Exploring the Complex Nature of Union Relations

Before analyzing the effect of the *Peterson* holding on labor relations, it is important to recognize that, unlike all other generally recognized privileges, the labor-relations privilege has a broader scope. Unlike the attorney-client privilege—where only the lawyer and client have interests in preserving a relationship of confidentiality— the labor-relations privilege raises the issue of third party interests.[136] These third party interests encompass the interests of all other union employee who rely on the union for employee organization.[137] Also unique to the interests at stake in a labor-relations privilege are that employees do not always have the same interests and conflict between individual employee rights and collective welfare of the union is inevitable.[138] However, proponents of the labor-relations privilege argue that internal conflicts favor the protection of "full and frank" communication in order to serve the public interest.[139] As the court in *City of Newburgh* explained, allowing the overreaching questioning of a union representative would not only affect the case of the employee currently seeking union representation, but it would also further chill lawful union activity and potentially seriously frustrate the union's ability to represent the needs of employees.[140] Due to the nature of the quasi-fiduciary relationship between a union and its members and the effect that relationship has on the nature of collective bargaining, the union representative and employee must be able to "formulate their positions and

133. *Id.*

134. *Id.*

135. Similar to the way the *Peterson* court looked to *Cook Paint, City of Newburgh, Seelig*, and *American Airlines*.

136. Mitchell H. Rubinstein, *A New York Court Recognizes a Labor Union Evidentiary Privilege*, 9 LAB. LAW. 595, 599 (1993) [hereinafter *Labor Union Evidentiary Privilege*].

137. *Id.*

138. *Id.* "Unions, on a daily basis, often have to make difficult trade offs... between individual rights and collective welfare." The article further discusses examples such as seniority disputes and affirmative action.

139. *Id.* at 600.

140. City of Newburgh v. Newman, 421 N.Y.S.2d 673, 675 (N.Y. App. Div. 1979).

devise their strategies without fear of exposure."[141] As these authorities suggest, the process of candid communications between one union representative and one employee pertaining to a single case affects the infrastructure of the collective bargaining system on which every other union employee relies.[142]

B. Peterson Holding Furthers Employee Interests

By understanding the complex nature of the collective bargaining relationships and the scope of the interests at stake, it becomes understandable why the court chose to expand its discretion to create a labor-relations privilege within the means of the PERA statute. There is a strong public policy argument to recognize a labor-relations privilege[143] and the *Peterson* court gave great weight to this argument.[144] There are many reasons why lawyers do not and should not have a "monopoly" in employment-related proceedings.[145]

Grievance proceedings often involve either small claims that do not justify the cost of an attorney or employees that simply cannot afford to hire attorneys.[146] It would seem unjust for these financial restraints to cost an employee an opportunity of adequate representation, because, absent a labor-relations privilege, any communication with a lay representative could be subject to discovery.[147] Rather than penalize employees for using grievance procedures, the creation of a union-relations privilege strengthens the collective bargaining infrastructures already in place and ensures a more economical use of both parties' time and money.[148] Additionally, most grievance procedures in the employment setting apply various alternative dispute resolution (ADR) procedures.[149] In order for these ADR procedures to work effectively, employees must perceive the system to be fair.[150] By allowing an employer full-disclosure of an employee's communications during the ADR stage of the grievance process, it is likely that employees will not view the grievance procedure as fair, and the overall effectiveness of ADR in the workplace may suffer as a consequence.

Further, society as a whole benefits when unions are free to function without "harassment and interference."[151] Open communication without undue interference is central to the functioning of the union.[152] It is crucial that employees who rely on the union view the union representatives as their spokespersons and not mere agents of their employer.[153] As a result of the *Peterson* holding, unions in Alaska will be strengthened because the court explicitly protected communica-

141. Rubinstein, *supra* note 2, at 241.
142. *See generally* Rubinstein, *supra* note 2.
143. Rubinstein, *supra* note 2, at 233.
144. Peterson v. State, 280 P.3d 559, 565 (Alaska 2012).
145. *Labor Union Evidentiary Privilege*, *supra* note 135, at 601.
146. *Labor Union Evidentiary Privilege*, *supra* note 135, at 601.
147. *Labor Union Evidentiary Privilege*, *supra* note 135, at 601.
148. *See generally Labor Union Evidentiary Privilege*, *supra* note 130.
149. *Corporate Counsel's Guide to Legal Aspects of Employee Handbooks and Policies*, Empl. Handbooks & Policies § 25:2 (Nov. 2012).
150. *Id.*
151. *Id.* at 245.
152. *Id.*
153. *Id.*

tions made in confidence in connection with representative services relating to anticipated or ongoing disciplinary or grievance proceedings between an employee (or the employee's attorney) and union representatives acting in official representative capacity.[154] Thus, in Alaska, industrial strife will be curtailed as a result of the facilitation of labor-relations communications.[155]

Additionally, the *Peterson* holding has the potential to affect the creation of a labor-relations privilege in other jurisdictions. Just as the court in *Peterson* relied on decisions in other jurisdictions to create their labor-relations privilege,[156] it is possible that courts from other jurisdictions will apply the *Peterson* holding to their holding analysis. The influence of prior analysis by other courts is evident in the *Peterson* decision because the privilege does not extend to underlying facts of a claim or informal conversations where the union representative is not acting in their official role.[157] This more narrow interpretation of a labor-relations privilege considers the rationales of the courts in *Seelig*[158] and *American Airlines*,[159]—two cases in which courts held that there was no applicable labor-relations privileges based on the facts of the case. Given that the *Peterson* court created an absolute labor-relations privilege—one that takes into account positive and negative rulings in favor of a labor-relations privilege in other jurisdictions—it is reasonable to believe that the holding may influence other courts who consider the applicability of a labor-relations privilege in their respective jurisdictions.

C. The Peterson Rationale: All Policy and No Balancing

The *Peterson* case indirectly raises broad issues related to privilege creation. It is important to evaluate the court's rationalization in determining the existence of an absolute privilege in order to ensure the court complied with standards of privilege creation. As mentioned prior, Wigmore's four-pronged test created the general standard for the recognition of new privileges.[160] Wigmore's test balanced the "benefit to society from encouraging a particular class of communication against the cost of impeding the fact-finding process."[161] Though Wigmore's theory fails to rectify the specific harm imposed on a litigant whose privilege claim is denied, his approach adequately "focuses on extrinsic social policy and the systematic effects of [a] privilege claim."[162] Wigmore required that privilege beneficiaries who shared confidential communications be certain that a privilege existed.[163] Although Wigmore's obvious intent was to curtail the creation of new privileges, courts recognize the importance of protecting the loss of evidence.[164] Thus, courts have been least reluctant to create privileges when the loss of evi-

154. Peterson v. State, 280 P.3d 559, 567 (Alaska 2012).
155. *Labor Union Evidentiary Privilege*, *supra* note 135, at 601.
156. *Peterson*, 280 P.3d at 567.
157. *Id.*
158. Seelig v. Shepard, 578 N.Y.S.2d 965, 968 (1991).
159. Am. Airlines, Inc. v. Superior Court, 8 Cal. Rptr. 3d 146, 155 (Cal. App. 2003).
160. IMWINKELRIED, *supra* note 45.
161. Ricafort, *supra* note 35, at 266.
162. Ricafort, *supra* note 35, at 266.
163. Ricafort, *supra* note 35, at 266.
164. IMWINKELRIED, *supra* note 45 and accompanying text.

dence is "more apparent than real."[165] However, Wigmore's requirement of certainty is too narrow of a test to protect all necessary confidential communications.

In an attempt to recognize privileges obstructed by Wigmore's rigid framework, some courts and academics have adopted a humanistic model to determine the applicability of a privilege.[166] The humanistic model focuses on "whether the other party to the relation is the sort of individual whom the person needs to consult in order to make intelligent, independent life preference choices."[167] Unlike Wigmore, this model invites the court to consider public policy and create privileges based on privacy justifications.[168] This approach is more individualized to encompass the facts of the case and does not focus on the effect of the privilege on broader behavior.[169]

In understanding the strengths and weaknesses of each framework, it becomes understandable why courts are reluctant to set one standard for privilege creation. Courts should not pick one framework as a universal framework for identification of all privileges, but rather choose which of the two models will render the most appropriate form of a privilege, given the facts of the case. The humanistic model is most effective in determining the application of a privilege in a particular judicial proceeding on a case-by-case basis.[170] In contrast, Wigmore's balancing process is a better framework for courts that aim to recognize "an absolute privilege in all proceedings."[171]

In *Peterson*, the court failed to fully adopt the Wigmore framework in creating an absolute labor-relations privilege.[172] Further, the court bases much of its authority to create an absolute judicial privilege in the findings of other courts that created fact-specific privileges made applicable to those immediate cases. While the lack of precedence and the complexity of labor-relations interests suggest the court may have struggled in reaching its decision, it seems clear that absolute privileges should not be created until the court balances the loss of evidence with the interest of facilitating communication. Although public policy arguments indicate a Wigmorean analysis in other instances of privilege creation, that will likely not be a key characterization in issues concerning the labor-relations privilege.

Irrelevant of which framework is used, courts should examine public policy arguments in order to properly weigh the interests of the entire union. Policy justifications alone are not compelling enough for an absolute privilege of any kind to pass the muster of the Wigmore test. The key component of the Wigmore test requires that the court balance evidentiary interests with policy interests. The *Peterson* court's finding[173] was based on public policy rationales, and the probative

165. IMWINKELRIED, *supra* note 45 and accompanying text.
166. IMWINKELRIED, *supra* note 45 and accompanying text.
167. IMWINKELRIED, *supra* note 45 and accompanying text.
168. Ricafort, *supra* note 35, at 266-67.
169. Ricafort, *supra* note 35, at 266-67.
170. Ricafort, *supra* note 35, at 266-67.
171. Ricafort, *supra* note 35, at 266-67.
172. Peterson v. State, 280 P.3d 559, 567 (Alaska 2012). The court concluded that "the expectation of confidentiality is critical to the privilege because without it 'union members would be hesitant to be fully forthcoming with their representatives, detrimentally impacting a union representative's ability to advise and represent union members with questions or problems.'" Thus, the court rendered a decision based on an expectation of confidentiality without weighing the probative value of the evidence lost.
173. *Id.* at 565. State's forced "disclosure of confidential communications between an employee and a union representative during a grievance proceeding would constitute an unfair labor practice." Further,

value of the evidence was never explored. The *Peterson* holding was supported by the PERA statute and the court acted within its discretion in rendering its decision. However, by omitting a balancing test in its creation of an absolute privilege, the court failed to discretely rationalize its conclusion. Even in the presence of a strong public policy argument, courts should also consider the rationale for preserving candid communications in light of the court's interest in the facilitation of the discovery of truth. This will help to ensure privileges do not become overly utilized in a way that grossly obstructs the judicial system.

VI. CONCLUSION

The *Peterson* decision effectively advances the interests of unions and employees by creating a privilege that protects confidential communications between union representatives and employees made during the grievance procedure process. In its holding, the court sets forth a clear rule that takes into consideration many scenarios that both limit and broaden the rule based on case law in other jurisdictions. The court's holding is consistent with the principles of labor-relations law and the court properly identified PERA as the source of the privilege. Further, the court's decision will preserve the equal footing necessary to ensure ADR techniques are effective in the workplace. However, the rationale the court used to reach its decision was solely based on discretion and public policy in favor of creating the privilege. In creating new privileges, courts should consider some form of a cost-benefit analysis in order to fully recognize the evidence that the creation of the privilege will obstruct. Privileges should remain a rare exception and courts should continue to prove that the interest in loss of evidence is outweighed by the interest in protecting the confidential communications.

JOANNA L. BYRNE

the court held "[b]ased on the strong interest in confidential union-related communications and the statutory protection against unfair labor practices, we hold PERA impliedly provides the State's union employees a union-relations privilege." *Id.*