is the balancing of employee privacy with employer operational needs. There are several analytical frameworks that have been adopted by arbitrators for assessing where the correct balance lies, but a consensus has yet to emerge on the framework or the outcomes. As the technology behind many issues becomes increasingly complex, the need for specialized expert evidence will rise. Understanding how a new technology works or the properties of a computer operating system often is critical to weighing the privacy questions that are being disputed. For this kind of understanding, expert witnesses will likely prove indispensable.

II. Privacy in the Age of Technology

Does it exist? Who has a right to it? Arbitrators from Canada and the United States explore issues related to employer monitoring of employee computer use and Internet access.

Moderator: **Jane H. Devlin,** NAA, Toronto, ON
Panelists: **Norman Brand,** NAA, San Francisco, CA
Alan A. Symonette, NAA, Philadelphia, PA
Michael Prihar, NAA, Granada Hills, CA
David R. Williamson, NAA, London, ON
Chris Sullivan, NAA, Vancouver, BC

In the fall of last year, Facebook surpassed Google as the Internet site on which the most time was spent: more than 700 billion minutes per month. Facebook has 600 million users worldwide. If it were a country, Facebook's population would rank behind those of China and India and ahead of that of the United States. It took 38 years for radio to reach 50 million consumers. It took television 13 years. It took Facebook two years.

Social networking has given us a new vocabulary. "Text" and "friend" were once thought to be nouns; now they're verbs. Twitter transmits messages of no more than 140 characters and, although it has been around for only five years, has almost 200 million users worldwide, and traffic of more than 140 million messages, or "tweets," daily.

In many respects, technology has taken over our lives. And, while we think that we control its use, sometimes we forget that it is public and indelible. This has opened employers and prospective employers to a wealth of information that would previously have been considered private, including exchanges between employees that they had intended to be confidential. The following scenarios test the limits of employees' freedom of expression using social media.

The first scenario. The grievant is a nurse's aide who was discharged for having posted to her Facebook wall disparaging comments about her supervisor and other staff workers, and also describing and posting photographs of facility residents whom she described as "difficult." Her Facebook settings were set to private, and her Facebook "friends" consisted of other nurses' aides who worked, separately, in the same facility. The facility administrator learned of the postings through a Facebook friend of one of the grievant's friends, and discharged her for having been insubordinate to management, disrespectful of other employees, and for having breached an agreement to keep resident information confidential. The grievant claimed that she had merely been chatting with her friends, just as she had previously done at work over the lunchroom table.

- By a show of hands, a majority of the attendees at this National Academy of Arbitrators (NAA) session, who included labor and management advocates, indicated that they would reinstate the employee. The panel of arbitrators on the dais all indicated that they would sustain the discharge. The following is their reasoning.
- **David Williamson**: A confidentiality agreement in a setting like this is not unusual; it's a reasonable requirement. The grievant has disclosed confidential information, violating her obligation of confidentiality. What she has done is not the same as chatting with her friends over the lunchroom table. Notwithstanding her Facebook privacy settings, she has disclosed information to the public at large. This scenario underscores the dangers of assuming that anything that goes into electronic communications from computers is private, or that others will treat it confidentially. The grievant has been publicly disrespectful and insubordinate to management and has disclosed confidential information about patients, including their photographs. Her conduct could reasonably be seen as

intentionally undermining the authority of management to run the enterprise.

- **Norman Brand**: Even absent a confidentiality clause, this might be a Health Insurance Portability and Accountability Act (HIPAA) violation because the resident has been depicted with an identifiable condition. Health care institutions have an obligation of confidentiality. They conduct fairly rigid training of their employees in the HIPAA requirements. If, in this scenario, the employer was covered by HIPAA, exhibiting the photograph of a patient without her permission, in a medically compromised position, would be the equivalent of revealing medical records. HIPAA prohibits two things: personal identification of the patient, and the attribution of a specific health condition. Publishing a picture of a patient that depicts her in a wheelchair or using an assistive device is probably a HIPAA violation (absent permission to have done so).

  Assuming that the grievant has been disparaging her colleagues by name for a considerable period of time, you can assume that those postings would have circulated through the workplace. She may well have poisoned the workplace against her. This would be a terminable offense.
- **Alan Symonette**: The HIPAA issue and the privacy issue are very critical here. Because of the patient's right to privacy and the sensitivity of information released about this resident, the grievant's conduct may rise to the level of a cardinal offense.

The second scenario. A female employee of a small-town retail food store—a longtime employee—left her cell phone at work at the end of the day. To determine the phone's ownership, the night supervisor scrolled through the photos it contained as four co-workers looked over his shoulder. One photo was of the grievant engaging in sex while displaying a two-thumbs-up sign to the camera. The supervisor returned the cell phone to the grievant the next day without telling her that he, and others, had viewed its contents. Thereafter, and for the following three months, people at work and in the town, including fellow churchgoers, greeted the grievant with a two-thumbs-up sign, which she reciprocated. When she learned that the photos had been viewed and discussed, and that people had been mocking her by displaying two thumbs up, a gesture she had reciprocated, the grievant suffered great stress and was deemed medically unable to continue working at the store. She filed a grievance claiming harassment.

- At the NAA session, by a show of hands, half of the attendees indicated that they would have sustained the grievance. The panel of arbitrators offered the following observations.
- **Chris Sullivan**: Did management know of what was going on, or should they have known? Given the general knowledge throughout the town of the content of the photograph, management presumably would have known of it. Its countenancing the derision of the grievant was harassment. But by way of remedy, monetary damages would not have been appropriate; staff training in harassment would have.
- **Michael Prihar**: The supervisor—a member of management—should not have examined the phone in the presence of other employees, and should have taken steps to ensure that nobody thereafter spoke about the photo. Management engaged in harassment; the question is one of remedy. If the grievant were still an employee of the company and she wanted to transfer to another location or work shift, he would accommodate her. And he would grant other contractual remedies.
- **Alan Symonette**: The supervisor need not have gone through the phone's contents to determine its owner. But the first question I would ask is this: Is there a remedy under the collective bargaining agreement (CBA) for this particular case? What contractual violation was asserted in the grievance and what does the CBA say with respect to harassment? Does the CBA incorporate Title 7? I agree that there is probably a cause of action in a civil court. But, I don't know what violation or remedy might reside in the collective bargaining agreement.

The third scenario. Hank and George work on building projects for a community housing organization. Both applied for a supervisory position in the bargaining unit. The collective bargaining agreement provides that, where applicants are relatively equal, seniority is the determining factor. Both were satisfactory employees; Hank had slightly greater seniority. The Human Resource (HR) manager heard rumors that Hank used marijuana. He viewed the Facebook page of each candidate. Hank had photos of himself in full leathers, his motorcycle, and members of his motorcycle club; photos of him partying with women; an article claiming the benefits of marijuana; and complaints he posted about having been placed in a police "john" program. The HR manager also viewed George's Facebook page. It had photos of George with his family at a church picnic and photos of him helping build a house for

Habitat for Humanity and volunteering at the food service line. The HR manager awarded the position to George. Hank grieved, on the basis of seniority. At the arbitration hearing, the HR manager sought to introduce the Facebook information. Should the arbitrator have permitted its introduction?

- **Norman Brand**: I would allow an offer of proof so I knew what the evidence was. Otherwise, I couldn't even get to the question. Then I would ask, what is the nexus? If the claim was being made that Hank had reported to work under the influence of drugs, that claim would have to be proven. If the claim was that some workers might be afraid of motorcyclists, the claim is nonsense. In these online media cases, nexus is the critical question. I give you two examples:

  Case One: A big employer is about to be sold. One of the company's employees—an engineer—writes on a newspaper's public blog, "I'm against the sale because I know that they will never be able to do the work they're promising with the number of people they've promised to keep. They just can't do the job." The company sued, and the court viewed the blog posting as disparagement of the employer.

  Case Two: On a password-protected website, one employee called another a "faggot"—a violation of the company's policy about treating other workers with dignity. It's reported to the company, and the company discharges the name-caller. The arbitrator found that the employee had violated the company's rules, but ordered reinstatement.

  Sometimes, complaining about management, even on a password-protected site, can turn into advocacy of an illegal job action. That raises a nexus question: Is the employee actually promoting a workplace job action? Parenthetically, in some of the cases in the public and private sectors, courts have ruled that an employer has no right to surveil its unions' Web boards.
- **David Williamson**: I cannot see a nexus between the information seen by the HR manager on George and Hank's Facebook pages and the requirements of the job. So, I would not allow the employer to introduce the information. On the other hand, if the job were a different one—if it involved working with troubled youth, broken families, or single mothers—then I think a nexus is more apparent and would allow the information to be introduced.

- **Michael Prihar**: We're assuming that the awarding of such positions in the past has been based solely on seniority and work performance. If that's the case, the Facebook pages will have very little relevance. If, on the other hand, you've got a history of making decisions based on external factors, then the evidence may be relevant and should be admitted.

The fourth scenario. Employer monitoring can be installed on employees' computers remotely, with the employees being unaware of its presence. Those programs can take screen shots or perform keystroke monitoring. The following scenario deals with such a program.

Julie has worked for a public sector employer for five years. Her performance appraisals have been satisfactory. The employer installed software that monitors Internet use and keystrokes. The employer published a policy stating that the computers are the property of the employer, that that they are to be used for business purposes, and that computer usage will be subject to monitoring. Management noted that Julie's word processing was slow and that her keystrokes-per-hour were well below both accepted standards and the rates of her fellow employees. Julie met with her supervisor and promised to improve. In the following months, further similar discussions took place. Eventually, Julie went off on sick leave. She has now filed a grievance alleging harassment and discrimination. She has provided the employer with a medical report indicating that she is suffering from carpal tunnel syndrome and stress. She claims that these conditions have been caused by the employer's monitoring and her supervisor's pressuring her. She requests, as remedies, the restoration of the sick leave she used during her absence, and to exemption from further keystroke monitoring.

- Nearly all of those attending the NAA session indicated, by a show of hands, that they would not grant the grievance. The panel of arbitrators offered the following observations.
- **Alan Symonette**: Reading this case very broadly, it is, *arguendo*, an Americans with Disabilities Act (ADA) issue. If this grievant had placed an ADA claim, would the employer have had an obligation to accommodate her? Keystroking may be a question of accommodation. It is not a question of harassment.
- **Chris Sullivan**: The grievant's performance appraisals have been satisfactory. She's got a disability that's been proven.

And there's the nexus between her disability and her duties at work. This is not a basis for a charge of harassment, but may be a basis for a demand of reasonable accommodation.

- **Michael Prihar**: Regardless of the grievant's past performance, the employer has a right to impose reasonable performance standards and to utilize reasonable means to measure compliance with those standards, unless the CBA has precluded its doing so. As far as the grievant's distress and carpal tunnel, that's a workers' compensation issue.

The fifth scenario. The grievant already had a written warning in his file for inappropriate comments made to his supervisor, when the supervisor—Bonnie—chastised him for not completing his work. The grievant responded by yelling that the supervisor was always out to get him, that everyone hated her, and that she had no business being a supervisor. Other employees heard this. He was discharged.

The company's computer policy states that its computers are the property of the company, but that their occasional personal use is permitted. Following the discharge, the company scanned the grievant's hard drive, accessed his Hotmail account, and downloaded the e-mails he sent, some of which contained sexually explicit material. One of the e-mails referred to his supervisor as a "bitch." Another included a cartoon of a woman and the caption "To the Moon, Bonnie." The grievant had sent these e-mails to the personal e-mail accounts of two co-workers, one of whom was recently hired as a summer student. Neither co-worker had brought the grievant's e-mails to the attention of the company. The company wants to introduce the e-mails as an additional basis for discharge, the charge being that the grievant had misused the company's computer equipment.

The union argues that the grievant reasonably assumed that his Hotmail e-mails were private, and that they would not have been accessed by the company. The union asks that the e-mails be ruled inadmissible. Should the company be allowed to rely on the e-mails to support the discharge?

- **David Williamson**: The e-mails were written on company time, on the company's computer, by the grievant—a company employee—and were sent to other company employees. Their content pertained to a company supervisor. The e-mails involve the company and should be admitted.

- **Norman Brand**: First, the discharge should have been based upon the evidence known to management at the time that the discipline was issued; this is after-acquired evidence. Second, the computer policy allows for "occasional personal use." Whether the grievant wanted to place bets on horse races or to retain the services of the Elliot Spitzer consort service, it's still personal. And third, if the e-mails were not obtained from a company server but, instead, from a Hotmail server, then the investigation has gone outside the company—and management has likely violated the Stored Communications Act—a kind of wiretapping. For any of these three reasons, I didn't see grounds for the use of these e-mails in a just cause hearing contesting the discharge.

The sixth scenario. The grievant is a case worker at a family service center. Under his CBA, he has a one-hour unpaid lunch. Otherwise, he has a very flexible and unsupervised schedule. His duties include assisting families in crisis by helping them to find housing, and also medical, educational, and counseling services. He is married. He used his office computer to access the Ashley Madison website, which facilitates extramarital affairs. He used his employer-issued cell phone to meet Sally and set up daytime trysts with her. These trysts did not interfere with his work-related duties.

When Sally learned of the grievant's family advisor role, she was appalled and notified management of his extramarital conduct. Management investigated, including analyzing the grievant's office computer and phone records. They found that he had spent extensive time on the Ashley Madison site and had made and received many phone calls to and from Sally and other non–work-related numbers. The grievant's supervisor reported that his work had been exemplary: he had successfully managed a higher caseload than his colleagues. Due to the potential damage to the center's reputation and the grievant's misuse of its computer and cell phone, he was discharged. He grieved the discharge and accused the employer of having invaded his privacy.

- Almost all of those attending the NAA session indicated, by a show of hands, that they would sustain the grievance. The panel of arbitrators offered the following observations.
- **Alan Symonette**: Can the employer prove that the grievant's extramarital conduct has had some impact on its reputation?

Unless it can, then there is no nexus. The communications were between Sally and the employer. The grievant kept the duration of his trysts under an hour, during which he was on his own time. I would probably reduce the penalty pertaining to the grievant's misuse of the employer's equipment, but I wouldn't uphold the discharge.

- **Michael Prihar**: The focus is the grievant's misuse of his computer and cell phone, and not the subject matter of that misuse. The outcome should not have been different from what it would have been if the grievant had been trying to sell Bibles, or to set up prayer meetings.
- **Chris Sullivan**: The grievant was an exemplary employee, with no work performance issues, and no evidence that his personal life interfered with his work duties. The purpose of discipline is to correct behavior, and not to punish. A brief suspension would have served the corrective purpose.

Other discussion. If you find there to be no nexus between the evidence that an advocate seeks to introduce and the subject matter of the grievance, should you nonetheless allow the evidence in, to preclude the possible claim that you did not conduct a full and fair hearing?

- **Norman Brand**: The problem is, once that evidence gets in, what's the other side do? You're turning a one-day hearing into a two-day hearing. If, after an offer of proof, you know that the evidence is going to be irrelevant to your decision because there's no nexus, don't let it in. Telling advocates that their evidence is utterly irrelevant should not endanger your award.
- **Alan Symonette**: That offer of proof conversation is one that the advocates should conduct outside of the hearing room.