I think the question for the arbitrators is, When you're presented with facts by the employer that are a direct product of the employer's or supervisors' violation of the ECPA, the SCA, or potentially even the CFAA, are you going to exclude the evidence? If not, then how are you going to rule on a case with regard to the underlying issue when the employees have engaged in the misconduct for which they have been charged?

Daniel Nielsen: Thank you for an enlightening session. It is our hope that this session has provided you with an awareness of issues that may come before you, along with insights into relevant rulings for guidance.

II. Consolidated Outline

Martin Malin,[14] Jennifer Dunn, Esq.,[15] and Timothy Hawks, Esq.[16]

Part One: Social Media and the National Labor Relations Act[17]

I. An Overview of the State of Social Media and the Workplace
   A. Proskauer Rose, LLP surveyed 120 multinational companies.[18] Some key findings:
      - 76.3 percent use social networking for business purposes; 37.3 percent have done so for less than one year
      - 29.3 percent actively block employee access to social networking sites at work
      - 27.4 percent monitor the use of social networking sites at work
      - 44.9 percent do not have any social networking policy in place
      - 56.6 percent have had to deal with issues concerning misuse of social networks; 31.3 percent have disciplined employees for misuse of social networks

[14]Director, Institute of Law and the Workplace, Chicago-Kent College of Law, Chicago, IL.
[15]Franczek Radelet, PC, Chicago, IL.
[16]Hawks Quindel, Milwaukee, WI.
[17]Prepared by Martin Malin.
[18]Proskauer Rose, LLP, Social Networks in the Workplace Around the World (2011).

II. Key Provisions of the National Labor Relations Act
   A. Section 7: The heart of the National Labor Relations Act
      Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and *to engage in other concerted activities for the purpose of* collective bargaining *or other mutual aid or protection,* … (emphasis added).
   B. Section 8(a)(1)
      It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

III. Examples of Section 8(a)(1) Violations
   A. Disciplining, discharging, or taking other adverse action against an employee because of the employee's Section 7–protected activity.
   B. Taking adverse action to preempt an employee's activity from becoming Section 7–protected.[19]
   C. Maintaining an employment policy or conduct rule that forbids employees from engaging in Section 7–protected activity or that is worded in such a way that it would deter a reasonable employee from engaging in Section 7–protected activity.[20]

IV. Elements of Section 7 Protection
   A. The activity must be concerted.
      Clearly, when two or more employees act together, their activity is concerted. However, the action of a single employee may be considered to be constructively

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[19] *See* Parexel Int'l, LLC, 356 N.L.R.B. No. 82 (Jan. 28, 2011).

[20] *See, e.g.*, Lafayette Park Hotel, 326 N.L.R.B. 824 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999) (holding the following work rules violative of §8(a)(1): being uncooperative with supervisors, employees, guests, and/or regulatory agencies or otherwise engaging in conduct that does not support the Lafayette Park Hotel's goals and objectives; divulging hotel-private information to employees or other individuals or entities that are not authorized to receive that information; making false, vicious, profane, or malicious statements toward or concerning the Lafayette Park Hotel or any of its employees; unlawful or improper conduct off the hotel's premises or during nonworking hours that affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community; forbidding employees from using the restaurant or cocktail lounge for entertaining friends or guests without the approval of the department manager; forbidding employees from fraternizing with hotel guests anywhere on hotel property; requiring employees to leave the premises immediately after the completion of their shifts and to not return until the next scheduled shift); Heck's Inc., 293 N.L.R.B. 1111 (1989) (holding unlawful rule requesting employees not to discuss their wages with each other absent business justification).

concerted. In *NLRB v. City Disposal System, Inc.*,[21] the Supreme Court upheld the National Labor Relation Board's (NLRB's) Interboro Doctrine, which regards a single employee acting alone but asserting rights under a collective bargaining agreement as engaged in constructive concerted activity. However, the Board's position with respect to constructive concerted activity in the non-union setting has varied over the years.[22]

B. The activity must be for mutual aid and protection.

Different Boards have taken varying approaches to how broadly they construe what is for mutual aid and protection.[23]

C. Even if the activity is concerted and for mutual aid and protection, it may be so indefensible as to be denied protection.[24]

V. The NLRB's Scant Authority Dealing with Social Media

A. *Bay Sys Technologies, LLC*[25]

Default judgment entered where employer withdrew its answer to the complaint. Factual allegations of the complaint deemed admitted included that employees posted comments on Facebook critical of delays in their paychecks; comments were republished by local newspaper; employer discharged one of the employees

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[21] 465 U.S. 822 (1984).

[22] *Compare* Alleluia Cushion Co., 221 N.L.R.B. 999 (1975) (holding that a single employee's complaint of safety issues to a state occupational safety and health agency was constructively concerted) *with* Meyers Indus., Inc., 281 N.L.R.B. 882 (1986), *aff'd sub nom.* Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987) (overruling *Alleluia Cushion* and holding that to be concerted, employee must act "with or on the authority of other employees").

[23] *Compare* Holling Press, Inc., 343 N.L.R.B. 301 (2004) (holding that employee's request to co-worker to testify before state human rights agency in support of her sexual harassment complaint was for sole benefit of employee and not for mutual aid and protection) *with* D. R. Horton, Inc., 357 N.L.R.B. No. 184 (Jan. 3, 2012) (holding that class or collective action law suit or arbitration claim is concerted activity for mutual aid and protection).

[24] *See* NLRB v. IBEW Local 1229 (Jefferson Standard Broad. Co.), 346 U.S. 464 (1953) (product disparagement disloyal and not protected); *compare* Timekeeping Sys., Inc., 323 N.L.R.B. 244 (1997) (holding employee's mass e-mail to co-workers sarcastically criticizing employer's new paid time-off policy protected despite its arrogant, and perhaps boorish, tone) *with* Endicott Interconnect Techs. v. NLRB, 453 F.3d 532 (D.C. Cir. 2006) (holding unprotected employee's postings on local newspaper's blog criticizing employer's reduction in force for leaving "gaping holes" in areas of crucial technical knowledge and claiming that the "business is being tanked by a group of people that have no good ability to manage"); *see also* Atlantic Steel Co., 245 N.L.R.B. 814 (1979) (holding that whether internal employee statements, such as to supervisors, lose their protection depends on the place of the discussion, the nature of the discussion, the nature of the outburst, and whether the outburst was provoked by unfair labor practices; key is the degree to which it disrupts or undermines discipline).

[25] 357 N.L.R.B. No. 28 (Aug. 2, 2011).

because of the posting and told other employees that it was disappointed in their conduct, that their conduct breached their confidentiality agreements, threatened them with legal action; implied that they would be discharged unless they provided written explanations; threatened that their supervisors would be conducting performance evaluations in which their postings would be considered; interrogated employees about their postings; told employees that if they had complaints they should find other jobs; and told employees that they should have brought their complaints to management instead of posting them on Facebook. Based on the admitted factual allegations, the Board held that the postings were protected by Section 7 and the employer violated Section 8(a)(1).

B. *Hispanics United of Buffalo, Inc.*[26]

An employee of a not-for-profit social services agency sent text messages to various co-workers accusing them of not properly performing their jobs. Another employee posted on her Facebook page a message naming the co-worker as feeling "that we don't help our clients enough," saying that she "about had it," and asking, "My fellow co-workers how do u feel?" Several other employees responded with posts commenting about their jobs and clients. The employee who sent the text messages posted asking the employee who made the original Facebook post to stop her lies.

The employee who sent the text messages complained of bullying and harassment to the employer's executive director. The executive director fired each of the employees who posted on the matter, telling them that they violated the employer's policies against harassment and that their harassment had caused the employee to suffer a heart attack.

The administrative law judge (ALJ) held that the employees' "Facebook communications with each other, in reaction to a co-worker's criticisms of the manner in which HUB employees performed their jobs, are protected." Among other findings, the ALJ opined that the employees "were taking a first step towards taking

[26]No. 3-CA-27872, JD-55-11 (NLRB ALJ Sept. 2, 2011).

group action to defend themselves against the accusations they could reasonably believe Cruz-Moore was going to make to management." The ALJ further held that the employees' conduct was not so indefensible as to forfeit Section 7 protection. The ALJ found that the conduct did not violate the employer's anti-harassment policy.

C. *Karl Knauz Motors, Inc. d/b/a/ Knauz BMW*[27]

The employer, a BMW car dealership, launched a redesigned BMW 5 Series car with an "Ultimate Driving Event." The employer's general sales manager, in a meeting with the sales representatives, advised them that at the event it would have a hot dog cart and would also serve cookies and chips. Several sale reps voiced concern that the food was not sufficiently upscale for the event. The sales reps' compensation included commissions and bonuses based on sales volume.

The employer also operated an adjacent Land Rover dealership. A few days after the BMW event, a sales rep at the Land Rover dealership allowed a customer's 13-year-old son to sit in the driver's seat of one of their vehicles. The child engaged the vehicle and rolled over the customer's foot, down an embankment, and into a pond. The sales rep was thrown into the water. A sales rep at the BMW dealership was fired after he posted on his Facebook page pictures of the Ultimate Driving Event with sarcastic comments about it, and pictures of the Land Rover in the pond with sarcastic comments.

The ALJ held that the BMW postings were protected by Section 7. The postings related to the common complaints of the sales reps about the food offered at the event, which was linked to their concerns that the food might inhibit sales and, consequently, their earnings. The ALJ found that the sarcasm employed did not rise to the level of disparagement such as to constitute unprotected disloyalty.

The ALJ held that the Land Rover posting was not protected. The sales rep acted alone "apparently as a lark, without any discussion with any other employee … and had no connection to any of the employees' terms and

[27]No. 13-CA-46452, JD(NY)-37-11 (NLRB ALJ Sept. 28, 2011).

conditions of employment." The ALJ also found, as a matter of fact, that the discharge was motivated by the Land Rover posting and not the BMW posting and, therefore, concluded that the discharge did not violate the NLRA.

The ALJ, however, found that several provisions of the employer's handbook violated Section 8(a)(1). These were provisions prohibiting employees from discussing other employees with "attorneys, peace officers, investigators or someone who wants to 'ask a few questions;'" and providing that employees were "expected to be courteous, polite and friendly to our customers, vendors, suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership." However, the ALJ found that a rule requiring employees to "display a positive attitude toward their job" did not violate Section 8(a)(1) because employees would reasonably understand it to protect the dealership's relationship with its customers rather than restrict their Section 7 rights.

D. *First Report of the Acting General Counsel Concerning Social Media Cases*[28]

The report relates 9 cases referred by the regions to the General Counsel's Division of Advice. Two of the cases resulted in the ALJ decisions described above. The others are:

1. The General Counsel found that an employer violated Section 8(a)(1) by discharging an employee whose supervisor had denied her request for union representation when she was required to complete an incident report about a customer complaint. The employee had posted remarks criticizing the supervisor on her Facebook page and several co-workers responded. The General Counsel found the postings protected even though one referred to the supervisor as a "scumbag." The General Counsel also found that employer policies prohibiting employees from depicting the company in any media without company permission and from making disparaging

[28]National Labor Relations Board, General Counsel Memo OM 11-74 (Aug. 18, 2011).

remarks when discussing the company or supervisors violated Section 8(a)(1).

2. An employee posted comments on her Facebook page criticizing the employer's tax withholding and the fact that she now owed state income tax, and alleging that the employer could not even do paperwork correctly. Another employee clicked "like" in response and several other employees also posted comments, including one who referred to the employer as an asshole. Two of the employer's customers also participated in the conversation. The employer fired two of the employees for disloyalty. The General Counsel found the postings protected and the discharges illegal. The General Counsel also found that an employer policy that stated that employees were subject to discipline for engaging in "inappropriate discussions" on the Internet concerning the employer, management, and co-workers violated Section 8(a)(1) because employees could reasonably understand it to prohibit Section 7–protected activity.
3. A newspaper reporter was discharged for postings on his Twitter account in which he identified himself as a reporter for the employer. One tweet criticized the paper's copy editors; others related to his public safety beat, homicides, sexual content, and a criticism of a local television station. The General Counsel determined that the employee's conduct was not protected by Section 7 because it did not involve other employees (not concerted) and it did not relate to working conditions (not for mutual aid and protection).
4. A bartender was fired for Facebook postings of criticism of his employer's policy that wait staff need not share their tips with bartenders even when the bartenders assist in serving food. The General Counsel found the posting not protected because, although it related to working conditions, it was not concerted as the bar tender did not discuss it with co-workers, no co-worker responded to the posting, and there were no employee meetings or attempts to initiate collective action concerning the tipping policy.

5. An employer discharged an employee for posting criticisms of the employer on the wall of the Facebook page of one of her U.S. senators. The General Counsel found the employee's conduct unprotected because it was not concerted. The employee did not discuss the postings with any other employees, and the postings were not aimed at initiating group action.
6. A retail store employee was fired for posting on her Facebook page complaints about the assistant store manager, calling him a "super mega puta" and complaining that she was chewed out for mispriced or misplaced merchandise. The General Counsel concluded that her postings concerned personal gripes and were not protected by Section 7.
7. The General Counsel found the following provisions in employer social media policies overbroad and in violation of Section 8(a)(1):
    a. A policy prohibiting employees from using any social media that might violate, compromise, or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity.
    b. A policy prohibiting any communication that constituted embarrassment, harassment, or defamation of the employer or any employee, officer, board member, or staff member or that lacked truthfulness or might damage the employer's reputation or goodwill.
    c. A policy prohibiting employees from talking about company business; posting anything that they would not want their managers or supervisors to see or that could put their jobs in jeopardy; disclosing inappropriate or sensitive information about the employer; or posting pictures or comments that could be construed as inappropriate.
    d. A policy prohibiting employees from posting personal information regarding employees, company clients, partners, or customers without their consent and precluding the use of the employer's logos and pictures of the employer's

store, brand, or product without written authorization.

8. The General Counsel found the following social media policies lawful:
   a. A policy prohibiting employees from pressuring co-workers to connect or communicate with them via social media.
   b. A policy that provided that it was imperative that the company's public affairs office be the one voice speaking for the company with the media. The policy prohibited employees from using cameras in the store or parking lot without prior approval. It also required employees to respond to media inquiries by stating that they were not authorized to speak for the employer. The General Counsel found that the policy was designed "to ensure a consistent controlled company message and limited employee contact with the media only to the extent necessary to effect that result. …"

E. *Second Report of the Acting General Counsel Regarding Social Media Cases*[29]

The General Counsel's second report covers 14 cases on which the General Counsel decided to issue complaints or dismiss charges since the first report.

1. Several cases dealt with the legality of employer social media policies. The General Counsel found unlawful policies that broadly prohibited employees from making disparaging comments about the employer; prohibited employees from identifying themselves as the employer's employees unless discussing terms and conditions of employment in an appropriate manner; prohibited "disrespectful conduct" and "inappropriate conversations"; prohibited disclosure of "confidential, sensitive, or non-public information"; and prohibited use of the employer's name or service marks outside the course of business without prior approval. On the other hand, the General Counsel found lawful policies that prohibited comments that were "vulgar, obscene,

[29]National Labor Relations Board, General Counsel Memo OM 12-31 (Jan. 24, 2012).

threatening, intimidating, harassing, or in violation of the employer's workplace harassment and anti-discrimination policies" and policies prohibiting employees from using or disclosing confidential or proprietary information such as personal health information about customers or patients, launch and release dates, and pending reorganizations.

2. The General Counsel continues to draw fine lines between protected discussions of working conditions and unprotected personal gripes. Similar fine lines are drawn between concerted activity and activity deemed not concerted. The General Counsel appears to place particular emphasis on whether the social media posting grew out of workplace discussions, whether it was aimed at inciting other employees to action, and whether co-workers responded to the posting.
3. The General Counsel addressed issues of alleged employer surveillance. The General Counsel opined that "even where employees are engaging in protected activity, there can be no unlawful surveillance if the employer's agent was invited to observe." Consequently, when employees friend their supervisors on Facebook, they are inviting their supervisors to their postings.

Part Two: Employer Social Media Policies and the Duty to Bargain[30]

I. Overview of Employer Social Media Policies
   A. Social Media Statistics
      1. As of 2011, there were 500,000,000 active Facebook users (1 in every 13 people on earth).[31]
      2. More than 70 percent of individuals who use the Internet in the United States are members of Facebook.[32]

[30] Prepared by Jennifer Dunn, Esq.
[31] Digitalbuzz Blog, http://www.digitalbuzzblog.com/facebook-statistics-stats-facts-2011/.
[32] *Id.*

3. As of 2010, more than 1.5 million businesses maintain active pages on Facebook.[33]
4. Twitter has more than 106 million user accounts and 180 million visitors each day.[34]
5. YouTube exceeds more than 2 billion views each day.[35]
6. 24 hours of video are uploaded every minute on YouTube.[36]

B. Employer Social Media Policy Statistics
   1. Proskauer Rose, LLP 2011 survey[37]
      a. 44.9 percent of employers do not have *any* social media policy in place.
      b. 31.3 percent of employers have disciplined employees for misuse of social media.
   2. Society for Human Resource Management (SHRM) survey[38]
      a. 40 percent of organizations have a formal social media policy—which leaves a vast majority of organizations with no formal policy in place.
      b. 39 percent of employers reported monitoring employee social media activity on employer-owned computers or handheld devices.
      c. Smaller organizations are less likely to have a policy compared with organizations with 100+ employees.
   3. Most common components of employer social media policies
      a. Code of conduct for employee use of social media for work-related purposes.
      b. Code of conduct for employee use of social media for personal purposes.

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[33]Eric Eldon, *New Facebook Statistics Show Big Increase in Content Sharing, Local Business Pages*, INSIDE FACEBOOK (Feb. 15, 2010), http://www.insidefacebook.com/201%2/15/new-facebook-statistics-show-big-increase-in-content-sharing-local-business-pages/.

[34]Jay Yarow, *Twitter Finally Reveals All Its Secret Stats*, BUSINESS INSIDER (Apr. 14, 2010), http://www.businessinsider.com/twitter-stats-2010-4?op=1.

[35]BROADCASTING OURSELVES: THE OFFICIAL YOUTUBE BLOG, http://youtube-global.blogspot.com/201%5/at-five-years-two-billion-views-per-day.html.

[36]BROADCASTING OURSELVES: THE OFFICIAL YOUTUBE BLOG, http://youtube-global.blogspot.com/201%3/oops-pow-surprise24-hours-of-video-all.html.

[37]PROSKAUER ROSE, LLP, SOCIAL NETWORKS IN THE WORKPLACE AROUND THE WORLD (2011).

[38]SOCIETY FOR HUMAN RESOURCE MANAGEMENT, AN EXAMINATION OF HOW SOCIAL MEDIA IS EMBEDDED IN BUSINESS STRATEGY AND OPERATIONS (Jan. 12, 2012).

c. Note regarding employer's right to monitor social media usage.
d. Guidelines for social media communications and for responding to feedback on social media.

II. The Duty to Bargain
   A. The NLRA
      1. Section 8(d): "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder … but such obligation does not compel either party to agree to a proposal or require the making of a concession … ."
      2. Section 8(a)(5): It shall be an unfair labor practice for an employer or its agents to refuse to bargain collectively with the representatives of its employees.
      3. Generally, a matter is mandatorily negotiable pursuant to the NLRA when it is "plainly germane to the working environment" and not among those "managerial decisions, which lie at the core of entrepreneurial control."[39]
      4. Generally, an employer may not unilaterally implement changes regarding mandatory subjects of bargaining prior to impasse.
   B. The Public Sector
      1. No single statutory framework, and for those states that continue to recognize a duty to bargain between public employers and the representatives of their employees, the approaches vary.
      2. Public Sector Sampler
         a. *Illinois*: Three-part test considers whether the topic is (1) a matter affecting employee wages, hours, and terms and conditions of employment; (2) a matter of inherent managerial authority; and (3) a balance of the benefits of bargaining versus the burdens bargaining imposes on the employer's decision-making process.

[39] *See, e.g.*, Ford Motor Co. v. NLRB, 441 U.S. 488 (1979).

b. *California*: A subject is within the scope of representation if (1) it involves the employment relationship; (2) is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective bargaining is an appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not unduly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the employer's mission.
c. "Laundry List" approaches (e.g., the Iowa Public Employment Relations Act)[40]

C. Duty to Provide Information
1. The duty to bargain under the NLRA generally requires that employers provide information to exclusive bargaining representatives where that information is relevant to mandatory subjects of bargaining.[41]
2. Broad discovery-type standards control relevance determinations.
3. Public sector jurisdictions that recognize the duty to bargain between public employers and the exclusive representatives of their employees apply a similar standard.
4. In certain circumstances, an employer's confidentiality interests may justify the nondisclosure of certain information.[42] However, an employer must do more than simply assert that information is "confidential," and instead must bargain toward an accommodation between the union's information needs and the employer's legitimate confidentiality concerns.[43]

D. Waiver
1. In both the private and public sectors, it is well settled that Section 8(a)(5)—and its counterparts—is not violated when the exclusive representative has

[40] *See, e.g.*, IOWA CODE §20.9.
[41] *See, e.g.*, NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).
[42] *See, e.g.*, Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979).
[43] *See, e.g.*, U.S. Testing Co. v. NLRB, 160 F.3d 14 (D.C. Cir. 1998).

or may be said to have waived its right to bargain about a specific subject. It is equally well settled, however, that the waiver of a statutory right must be clear and unmistakable.[44]

2. The NLRB has held that generally worded management rights clauses and zipper clauses will not be construed as waivers of statutory bargaining rights.[45]

III. Social Media Policies: Mandatory Subjects of Bargaining?

A. To date, the NLRB has not directly addressed this issue.

1. As of January 24, 2012, NLRB activity concerning social media has arisen in the context of non-union settings.
2. Reportedly, a failure to bargain over an employer's social media policy was alleged in the following cases:
   a. *Thomson Reuters Corp.*[46]

      The employer was alleged to have unilaterally implemented a new policy concerning the use of Twitter. The Region ultimately determined that the policies were issued outside the statute of limitations and that no Section 8(a)(5) allegation could proceed.

   b. *Children's Hospital of Pittsburgh of UPMC*[47]

      A complaint issued alleging that the employer promulgated and maintained a social networking policy without prior notice to the union that represented the employees covered by the policy, and without providing an opportunity to the union to bargain over the conduct covered by the policy or the effects of such conduct. Ultimately, the parties settled.

B. Relevant precedent that current NLRB may examine for guidance

1. *E-mail use policies*: In *ANG Newspapers*,[48] the NLRB affirmed an ALJ's decision, which recognized that, "There is no dispute that a rule respecting employee use of the employer's e-mail system, like a rule

[44] *See, e.g.*, Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983).
[45] *See, e.g.*, Johnson Bateman, Co., 295 NLRB 180 (1989).
[46] No. 2-CA-39682 (Apr. 5, 2011).
[47] No. 6-CA-37047 (settlement agreement approved Jan. 21, 2011).
[48] 350 N.L.R.B. 1175 (2007).

respecting employee use of employer telephones, is a mandatory subject of bargaining."[49]

2. *Telephone use policies*: In *Illiana Transit Warehouse Corp.*[50] and *Treanor Moving & Storage Co.*,[51] the NLRB held that telephone use policies constitute mandatory subjects of bargaining.
3. *Bulletin board use policies*: The NLRB and courts have held that bulletin boards are mandatory subjects of bargaining.[52]
4. *Policies/Rules that establish grounds for discipline*: The NLRB has held that work rules that can be the basis for discipline are mandatory subjects of bargaining.[53]
5. *Surveillance cameras*: The NLRB and courts have found that the use of surveillance cameras is a mandatory subject of bargaining.[54]
6. *Social Media Policies—"Core of Entrepreneurial Control"*: Recalling the statistics noted above, and namely that 1.5 million businesses have Facebook pages, it is certainly possible that a social media policy represents a management decision striking at the core of entrepreneurial control. Businesses increasingly rely on social media platforms to relate to customers and operate their businesses—Groupon and many of the "hyperdeal" Web sites are prime examples.

C. Relevant Public Sector Precedent
   1. Scant decisions address social media policies, let alone whether any mandatory duty to bargain exists with respect to such policies.
   2. The California Public Employment Relations Board (PERB) has held that the decision to implement a computer resource policy was a matter of inherent

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[49] *See also* TXU Electric, 2001 NLRB GCM LEXIS 74 (2001) (finding that employer e-mail policy was a plant rule clearly affecting terms and conditions of employment and was a mandatory subject of bargaining).

[50] 323 N.L.R.B. 111 (1997).

[51] 311 N.L.R.B. 371 (1993).

[52] *See, e.g.*, NLRB v. Proof Co., 242 F.2d 560 (7th Cir. 1957); Arizona Portland Cement Co., 302 N.L.R.B. 36 (1991).

[53] *See, e.g.*, Praxair, Inc., 317 N.L.R.B. 435 (1995); Womac Indus., 238 N.L.R.B. 43 (1978); Murphy Diesel Co., 184 N.L.R.B. 757 (1970), *enforced*, 454 F.2d 303 (7th Cir. 1971).

[54] *See, e.g.*, National Steel Corp., 335 N.L.R.B. 747 (2001), *enforced*, 324 F.3d 928 (7th Cir. 2003); Colgate Palmolive Co., 323 N.L.R.B. 515 (1997).

managerial prerogative and therefore not negotiable.[55] It also held, however, that the employer was not relieved of its duty to negotiate the effects of its decision regarding a computer resource policy on bargaining unit members (e.g., discipline and union access rights).[56]

3. Even assuming the use of electronic surveillance or monitoring to track employees, the Florida Public Employees Relations Commission (PERC) dismissed an unfair labor practice charge alleging that an employer unilaterally changed its past practice of monitoring employees by personal observation only.[57]
4. The Michigan Employment Relations Commission likewise dismissed an unfair labor practice charge in which it was alleged that a school district improperly refused to bargain over its implementation of a Web page program for teachers.[58] The agency found that implementation of that program was a prohibited subject of bargaining under the Michigan Public Employment Relations Act, which prohibited public school employers and unions from bargaining over decisions concerning the use of technology to deliver educational programs and services and staffing to provide the technology or the impact of these decisions on individual employees or the bargaining unit.[59]

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[55]California Faculty Ass'n v. Trustees of Cal. State Univ., 31 PERC ¶152 (Cal. PERB 2007).

[56]*Id.*

[57]Clay Educ. Staff Prof'l Ass'n v. School Dist. of Clay Cnty., 34 FPER ¶139 (Fla. PERC 2008); *see also* Orange Cnty. Prof'l Firefighters, IAFF Local 2057 v. Orange Cnty. Bd. of Cnty. Comm'rs, 38 FPER ¶131 (Fla. PERC 2011) (holding that employer's social media policy was overbroad; failure to bargain was not an issue).

[58]Grand Haven Pub. Sch. & Grand Haven Educ. Ass'n, 19 MPER ¶82 (Mich. ERC 2006).

[59]*Id.*

Part Three: The Intersection of Social Media and Labor Arbitration of Discipline and Discharge Cases[60]

I. Is Social Media an Attractive Nuisance for Both Employees and Employers?
II. The Exclusionary Rule in Labor Arbitration—Should Communications Obtained From Social Media Ever Be Excluded? If So, When?
    A. A longstanding difference of opinion. The more things change …
        1. The view that evidence wrongfully obtained should be excluded from labor arbitration hearings:

            "It was the position of the labor members of the committee that an employee does not give up all of his personal rights as a condition of employment. They are of the conviction that conduct, such as breaking into a locker exclusively assigned to an employee for his own use, forcible search of his person, or breaking into his automobile is conduct which should not be tolerated in the employer-employee relationship, and the arbitrator should exclude such evidence upon objection or a motion to suppress."[61]
        2. The contrary view:

            "… the management members of the committee were of the opinion that an employee does not have the right to have excluded from evidence in an arbitration case evidence which is relevant and important to reaching the right result."[62]
        3. And with regard to evidence provided by "closed circuit TV" systems:

            "The committee was in agreement that if an employee is aware of the fact that he is being observed, the testimony of the observant should be admissible. The labor members took a position, however, that if an employee does not know of the

[60] Prepared by Timothy Hawks, Esq.
[61] Bert I. Luskin et al., *Problems of Proof in the Arbitration Process: Report of the Chicago Area Tripartite Committee*, in PROBLEMS OF PROOF IN ARBITRATION: PROCEEDINGS OF THE NINETEENTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 86, 105 (Dallas L. Jones ed., 1966). For the reader's convenience, the article is excerpted in the Appendix to this chapter.
[62] *Id.*

existence of the TV system, the evidence should be inadmissible. The same division took place with reference to the use of motion pictures."[63]

4. Hill and Sinicropi took up this debate in their treatise, *Evidence in Arbitration*,[64] noting on one hand the award and rationale of Arbitrator Lohman:

   "… both the knowledge and possession of the knife by the company were brought about under highly questionable if not illegal procedures. Knowledge, even though incriminating, if acquired through such illegitimate procedures, is of questionable validity in bring action against the individual. …"[65]

   On the other hand, the authors cited Arbitrator David Dolnick's reasoning to support the opposite conclusion: "An arbitration hearing is a civil proceeding. It is not a court of law. I do not derive my authority to hear and decide the issue in dispute from any statute, ordinance or law enacted by a legally constituted legislative body."[66]

5. And the Elkouris sum up the current status of the question:

   "Reported arbitration decisions reveal that arbitrators differ significantly in their views as to the use of such evidence, though the inclination to accept and rely on it appears to be fairly strong."[67]

B. Federal law ostensibly protecting the privacy of Internet communications.
   1. Fourth Amendment (public employees)
      a. *City of Ontario v. Quon*;[68] *O'Connor v. Ortega*;[69] *Katz v. United States*.[70]
      b. Facts: In *Quon*, a government employer conducted a search of an employee's text messages on an employer-provided cell phone to determine the cause of an overage that had resulted

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[63] *Id.*
[64] Marvin Hill & Anthony Sinicropi, Evidence in Arbitration 77–84 (1980).
[65] Campbell Soup Co., 2 LA 27 (Lohman, 1946).
[66] Aldens, Inc., 61 LA 663, 664 (Dolnick, 1973).
[67] Elkouri & Elkouri: How Arbitration Works 399 (Alan Miles Rubin, ed., 6th ed. 2003).
[68] 130 S. Ct. 2619 (2010).
[69] 480 U.S. 709 (1987).
[70] 389 U.S. 347 (1967).

in additional charges. The search revealed personal messages sent during work time, including some that were sexually explicit. The employee was disciplined for violation of work policies

c. Two-part test (drawn from plurality decision in *O'Connor*):
   i. Did the employer have a reasonable expectation of privacy? (Assumed by the Court.)
   ii. Was the search reasonable?

> "Under the approach of the *O'Connor* plurality when conducted for a 'non-investigatory, work-related purpose' or for the 'investigation of work-related misconduct,' a government employer's warrantless search is reasonable if it is 'justified at its inception' and if 'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of' the circumstances giving rise to the search. The search here satisfied the standard of the *O'Connor* plurality and was reasonable under that approach."[71]

d. The Court did not have before it the question of whether the service provider violated the Stored Communications Act (although the Ninth Circuit so held); however, Quon argued that such a violation required the conclusion that the search was unreasonable per se. The Court rejected this argument, relying on precedent to reach the opposite conclusion.

2. Electronic Communications Privacy Act of 1986 (ECPA),[72] Stored Communications Act (SCA),[73] and the Computer Fraud and Abuse Act (CFAA).[74]
   a. Overview

> "Congress passed the Electronic Communications Privacy Act (ECPA) . . . which was intended to afford privacy protection to electronic communications." Title I of the ECPA amended the

[71] 130 S. Ct. at 2630.
[72] 18 U.S.C. §2510 *et seq.* (2006).
[73] 18 U.S.C. §§2701–11.
[74] 18 U.S.C. §1030.

federal Wiretap Act, which previously addressed only wire and oral communications, to "address the interception of…electronic communications." Title II of the ECPA created the Stored Communications Act (SCA), which was designed to "address access to stored wire and electronic communications and transactional records."[75]

The CFAA supplements the ECPA and SCA by making it a criminal misdemeanor for an individual to intentionally access a protected computer without authorization or in excess of authorization and thereby obtain information from the computer. The conduct becomes a felony if the act was to further tortious or criminal conduct.[76]

b. Selected Cases
   i. An employee stated a claim under the SCA against a supervisor who obtained user names and passwords for a protected Web page from co-employee and then used them to access, retrieve, and discipline the employee for comments critical of the supervisor. The employee also stated a claim for violation of the employee's protected activities under the Railway Labor Act.[77]
   ii. An employee was found guilty of interception of electronic communications under 18 U.S.C.S. §2511(a) when he redirected a supervisor's e-mail by automatic forwarding of them to his e-mail address.[78] *Query: Could a supervisor's similar interception of an employee's e-mail be criminal misconduct?*
   iii. The owner of a company and the company were found to have violated the SCA when the owner admitted to accessing the employee's personal America Online account at all hours of the day, from home and Internet cafes, and from locales as diverse as London,

[75]Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 874 (9th Cir. 2002).
[76]United States v. Drew, 259 F.R.D. 449, 457 (C.D. Cal. 2009).
[77]*Konop*, 302 F.3d 868.
[78]United States v. Szymuszkiewicz, 622 F.3d 701 (7th Cir. 2010).

Paris, and Hong Kong. During discovery, the owner produced copies of 258 different e-mails he had taken from her AOL account.[79]

iv. A district court denied an employer's motion to dismiss SCA claims brought against it by an employee in the following factual context: The company implemented a social media program to advertise its business. The employee created personal "Twitter" and "Facebook" accounts that were password protected, but she stored the access information on her employer's computer. She used her personal accounts to augment the social media campaign until an automobile struck and seriously injured her. While hospitalized she found out that the company had posted entries on her Facebook page and posted tweets on her Twitter account promoting the campaign. She asked the company to refrain from posting updates to her Facebook page and Twitter account while she was in the hospital and not working, yet the company continued to do so.[80]

v. In *United States v. Drew*,[81] the government alleged that the defendant and others conspired to intentionally access a computer used in interstate commerce without authorization in order to obtain information for the purpose of committing the tortious act of intentional infliction of emotional distress upon "M.T.M.," a 13-year-old girl living in the community and a classmate of a sibling of one of the defendants. The conspirators registered and set up a profile for a fictitious 16-year-old male juvenile named "Josh Evans" on MySpace, and posted a photograph of a boy without that boy's knowl-

[79]Van Alstyne v. Electronic Scriptorium, Ltd., 560 F.3d 199, 202 (4th Cir. 2009).
[80]Maremont v. Susan Fredman Design Group, Ltd., 2011 U.S. Dist. LEXIS 140446, at *6–7 (N.D. Ill. Dec. 7, 2011).
[81]259 F.R.D. 449 (C.D. Cal. 2009).

edge or consent. Such conduct violated MySpace's terms of service. The conspirators contacted M.T.M. through the MySpace network (on which she had her own profile) using the Josh Evans pseudonym and began to flirt with her over a number of days. Then, the conspirators had "Josh" inform M.T.M. that he was moving away, tell her that he no longer liked her, and that "the world would be a better place without her in it." Later on that same day, after learning that M.T.M. had killed herself, one of the defendants caused the Josh Evans MySpace account to be deleted. The government did not prove all of the fact allegations contained in the indictment and the jury acquitted the defendant of the felony charge, but found him guilty of the misdemeanor of accessing a computer without authorization (or in excess of authorization). The District Court granted the defendant's motion for acquittal on the ground that the CFAA was void for vagueness.[82]

vi. An individual was employed by Hillstone Restaurant Group as a server. He created a group on MySpace called the "Spec-Tator." He stated in his initial posting that the purpose of the group would be to "vent about any BS we deal with at work without any outside eyes spying in on us. This group is entirely private, and can only be joined by invitation." He then exclaimed "[l]et the s**t talking begin." Once a member was invited to join the group and accepted the invitation, the member could access the Spec-Tator whenever he or she wished to read postings or add new postings.

A manager asked another employee to provide the password to access the Spec-Tator, which she did. Although the

[82] *Id.* at 452.

employee stated that she was never explicitly threatened with any adverse employment action, she said that she gave her password to members of management solely because they were members of management and she thought she "would have gotten in some sort of trouble." The manager used the password provided by the employee to access the Spec-Tator from the co-worker's MySpace page and printed copies of the contents of the Spec-Tator.

The posts on the Spec-Tator included sexual remarks about management and customers, jokes about some of the specifications that the company established for customer service and quality, references to violence and illegal drug use, and a copy of a new wine test that was to be given to the employees. The server explained in his deposition that these remarks were "just joking"; however, members of management testified that they found these postings to be "offensive." The company terminated the server and a co-worker based on the information gathered from the protected Web site.

The plaintiffs filed a complaint against the defendant alleging, among other claims, violations of the federal Wiretap Act, the federal and state stored communications acts, and common law tort of invasion of privacy. The district court denied the defendant's motion for summary judgment on these claims.[83]

A jury trial commenced to determine whether the defendant (1) violated the federal or state stored communications acts, (2) invaded the plaintiffs' privacy, and/or (3) wrongfully terminated the plaintiffs in violation of public policy. The jury returned

[83]Pietrylo v. Hillstone Rest. Grp., 2008 U.S. Dist. LEXIS 108834, at *1–6 (D.N.J. July 24, 2008).

a verdict in favor of the plaintiffs on the stored communications acts claims, finding that the defendant had, through its managers, knowingly or intentionally or purposefully accessed the Spec-Tator (a chat group on MySpace.com, accessed by invitation and then the members' MySpace accounts and passwords) without authorization on five occasions. The jury found that the defendant had not, however, invaded the plaintiffs' common law right of privacy. The jury further found that the defendant had acted maliciously, leading to a right to punitive damages.[84]

C. State regulation.
   1. Invasion of privacy
      a. Overview: Wisconsin, for example, prohibits "invasion of privacy" and defines one form of it as: "Publicity given to a matter concerning the private life of another, of a kind highly offensive to a reasonable person, if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed. It is not an invasion of privacy to communicate any information available to the public as a matter of public record."[85]
      b. Cases
         i. The court allowed a plaintiff to proceed with claims advanced against his employer and various fellow employees under the ECPA, the SCA, the CFAA, and Wisconsin's right to privacy statute, WIS. STAT. §995.50, as well as a common law defamation claim, arising out of the defendants' interception of a telephone call that the plaintiff placed from his place of employ, and the defendants' review of e-mails contained in a personal e-mail account that the plaintiff maintained

[84]Pietrylo v. Hillstone Rest. Grp., 2009 U.S. Dist. LEXIS 88702 (D.N.J. Sept. 25, 2009).
[85]WIS. STAT. §995.50(2)(c).

with Hotmail, which account the plaintiff accessed from his work place. There were sharply differing versions of the content of these various communications. The defendants alleged that during the telephone call, the participants, while masturbating, graphically described homosexual activity between two males. The plaintiff denied this. The defendants also alleged that the e-mails read from the plaintiff's e-mail account evidenced that the plaintiff was involved in homosexual activity. The plaintiff denied that these e-mails had been sent to him.

The court refused to dismiss the plaintiff's claim advanced under WIS. STAT. §995.50, arising out of the review of e-mail from the plaintiff's personal Hotmail account. The court held that issues of fact existed as to whether the review of such e-mail would be highly offensive to a reasonable person, and as to whether a reasonable person could consider such an account to be private, which precluded a grant of summary judgment to the defendants. The court also refused to dismiss the claim that the plaintiff brought under the SCA arising out of the review of these e-mails. If such a review took place (as opposed to the defendants' having fabricated the e-mails), it would run afoul of the SCA. The court did dismiss the claims that the plaintiff raised under the CFAA, holding that the plaintiff had not alleged economic damages arising from the review of these e-mails sufficient to state a claim under the Act.[86]

ii. A jury found that managers did not invade the plaintiff's privacy rights by request-

[86]Fischer v. Mt. Olive Lutheran Church, 207 F. Supp. 2d 914 (W.D. Wis. 2002).

ing from a co-employee a password to the employee's Web site.[87]

III. Surveillance and Social Media
  A. Monitoring of employees' Internet and social media footprints.
    1. In June 2011, Forbes reported that the Federal Trade Commission dropped its investigation of Social Intelligence Corporation's search methods of social media and the Internet generally.[88] The article reported further:

> "And what about ongoing monitoring of employees after they've been hired? Andrews was reluctant to talk about who their clients are or how many there are. He said they have clients in the Fortune 500, in the healthcare industry (making sure doctors and nurses aren't discussing their patients around the Web) and from the educational sphere (people who work with children are in need of special scrutiny?).
>
> 'We recommend that companies inform their employees about this ongoing monitoring,' says Andrews. The company only provides monitoring services if a client has a social media policy set up with its employees. Most of the time, Social Intelligence is scanning the Web for employees' disclosure of confidential or proprietary information, professional misconduct, or illegal activity. Andrews said though that monitoring does sometimes extend to looking to make sure an employee isn't criticizing the company somewhere or getting into Internet fights with colleagues. (The company will not monitor ex-employees.)"[89]

    2. On September 19, 2011, Senators Blumenthal and Franken sent correspondence to Max Drucker, CEO of Social Intelligence Corp, asking specific

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[87] *Pietrylo*, 2009 U.S. Dist. LEXIS 88702.

[88] Kashmir Hill, *Feds OK Start-up That Monitors Employees' Internet and Social Media Footprints*, Forbes, June 15, 2011, *available at* http://www.forbes.com/sites/kashmirhill/2011/06/15/start-up-that-monitors-employees-internet-and-social-media-footprints-gets-gov-approval/.

[89] *Id.*

questions that reveal the potential pitfalls of the search techniques.[90]

3. Issues associated with social media search engines.
   a. As reported in a February 20, 2012, workforceverification.com article:[91]

      "Social media legal experts and various literature point to a multitude of issues and *risks* faced by both the [Consumer Reporting Agency] CRA and the employer who uses social media checks, which include, but are not limited to:

      - **Problems under [Fair Credit Reporting Act] FCRA section 607(b) in exercising "reasonable procedures to assure maximum possible accuracy" of the information.**
        Since the information on social media sites is self-reported and can be changed at any time, it is often difficult if not impossible to ascertain that the information is accurate, authentic and belongs to the subject. Online identity theft is not uncommon, as are postings under another person's name for the purpose of "cyber-slamming" (which refers to online defamation, slander, bullying, harassment, etc.).
      - **Information may be discriminatory to job candidates or employees, or in violation of anti-retaliation laws.**
        Social sites and postings may reveal protected concerted activity under the National Labor Relations Act (NLRA) and protected class information under Title VII of the Civil Rights Act and other federal laws, such as race, age, creed, nationality, ancestry, medical condition, disability, marital status, gender, sexual preference, labor union affiliations, certain social interests, or political associations. And while the information may have no impact on

[90] *See* Richard Blumenthal, U.S. Senator for Connecticut, Press Release, Blumenthal, Franken Call on Social Intelligence to Clarify Privacy Practices, *available at* http://blumenthal.senate.gov/newsroom/press/release/blumenthal-franken-call-on-social-intelligence-corp-to-clarify-privacy-practice.

[91] Workforceverification.com, Controversy Abounds in Employment Decisions Based on Social Media Searches, *available at* http://workforceverification.com/2012/02/20/controversy-abounds-in-employment-decisions-based-on-social-media-searches/.

the employment decision, the fact that the information was accessed may support claims for discrimination, retaliation or harassment.

- **Accessing the information may be in violation of the federal Stored Communications Act (SCA).**
  To the extent that an employer requests or requires an employee's login or password information, searches of social networking sites may implicate the SCA (18 U.S.C. §2701) and comparable state laws which prohibit access to stored electronic communications without valid authorization. A California court recently ruled that the SCA also may protect an employee's private information on social networking sites from discovery in civil litigation.
- **Assessing the information may violate terms of use agreements and privacy rights.**
  While certain social media sites have stricter privacy controls than others, most if not all limit the use of their content. The terms of use agreements typically state that the information is for "personal use only" and not for "commercial" purposes. Although the definition of "commercial" in connection with employment purposes is interpretive, most legal experts indicate that employment screening fits that scope.
- **Information may be subjective and irrelevant to the employment decision.**
  Blogs, photos and similar postings often do not provide an objective depiction of the subject or predict job performance. The California Labor Code, for example, specifically provides that an employer is prevented from making employment-related decisions based on an employee's legal off-duty conduct. Employers may use such information only if the off-duty conduct is illegal, if it presents a conflict of interest to the business or if it adversely affects

the employee's ability to do his/her job. And the evidence of such activities must be clear."

Appendix: Excerpts From the Proceedings of the Nineteenth Annual Meeting, National Academy of Arbitrators[92]

8. The Sources Affecting the Admissibility of Evidence

We are here concerned with the admissibility of confidential company records or records not available to the union, items taken from employees' lockers or picked out of wastebaskets, closed circuit TV systems, moving pictures, etc. On this issue the committee was divided. The principal problem appeared to be a civil rights issue. This issue was posed most sharply with relation to the breaking into of employees' lockers without consent and without a search warrant.

It was the position of the labor members of the committee that an employee does not give up all of his personal rights as a condition of employment. They are of the conviction that conduct, such as breaking into a locker exclusively assigned to an employee for his own use, forcible search of his person, or breaking into his automobile is conduct which should not be tolerated in the employer-employee relationship, and the arbitrator should exclude such evidence upon objection or on a motion to suppress.

While the committee was in agreement that the arbitrator should exclude a forcibly extracted confession, the management members of the committee were of the opinion that an employee does not have the right to have excluded from evidence in an arbitration case evidence which is relevant and important to reaching the right result. A similar division of opinion took place with reference to the use of a closed circuit TV system. The committee was in agreement that if an employee is aware of the fact that he is being observed, the testimony of the observant should be admissible. The labor members took a position, however, that if an employee does not know of the existence of the TV system, the

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[92]Bert I. Luskin et al., *Problems of Proof in the Arbitration Process: Report of the Chicago Area Tripartite Committee,* in PROBLEMS OF PROOF IN ARBITRATION: PROCEEDINGS OF THE NINETEENTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, 86, 105–07 (Dallas L. Jones ed., 1966).

evidence should be inadmissible. The same division took place with reference to the use of motion pictures.

What is presented is an issue of considerable importance in the development of sound management labor policy. Does an employee give up his right to privacy within the plant? Outside the plant he is protected by the constitution from search and seizure, even by police officers, and the breaking into of private property, including an automobile, is both a crime, and a tortious act. Why should the employee lose these protections once he enters the plant? The answer given by the company representatives is that when an employee takes a job, he takes the job with the knowledge that certain conditions may be imposed upon him and that he must adhere to plant rules and may also be required to give up certain rights which he has on the outside. An employee's locker which is assigned to him remains company property and the company has the same right to enter the locker that it has to open up any other files or containers in the plant.

On the other side, it is contended by the union representatives that the employee should be accorded the dignity and worth he has as a person whether or not he is in the plant, and that there is an undesirable and distasteful intrusion into his way of life when a company can break into his locker or monitor his actions by closed circuit TV or movie, or otherwise spy upon him. This demeans the employee instead of encouraging him to live up to high standards and may in fact cause resentment and in turn cause him to act in undesirable ways. At what point does the violation of privacy of the individual require the arbitrator to rule out the evidence? For example, one of the company representatives recognized as an exception a tactic condemned by the Supreme Court, the use of a stomach pump to force out the contents of an employee's stomach in order to ascertain whether or not incriminating evidence was swallowed. The broader question presented to the arbitrator is that, absent a constitutional right or a right specified in the contract, may the arbitrator reject evidence because the manner in which it has been obtained is reprehensible or distasteful to him or because it is his opinion that sound labor-management relations would be better served by such exclusion. These are not easy questions to answer and deserve extensive discussion.

As to company records, the committee was in agreement that the union is entitled to see all records, that this is part of the

national labor policy under the broad rules established by the National Labor Relations Board. Accordingly, there should be relatively few records relevant to the issues not available to the union to examine. But even as to company records or letters not subject to production on request, the committee was in agreement that such records should be admissible in evidence.