statutory claim like that. Could you be compelled, ultimately, to channel those claims to arbitration even if you were resisting it? I don't know the answer to that.

Nielsen: Going once! Going twice! Yes?

Audience Member: In response to Paul, if the court sends you a case and says that you've got to apply the statutory law, then you serve in the place of the judge, in effect, and the parties get all of the protections of the statute in question. You get an employment case, it shouldn't be called arbitration, but I lost that argument years ago. You've got to apply all the statutory protections. Therefore, you will have discovery, a reasoned opinion, and, hopefully, you'll have a transcript. In that way, you bulletproof the district court judge.

Nielsen: Well, I should respond to the notion that an arbitrator might at some point not comply with the law like they're told to, but we're out of time.

Thank you all, very much. Thanks to the panel.

VI. MEDIA, COMMUNICATIONS, AND TECHNOLOGY

Moderator: Catherine Harris, NAA Member, Sacramento, California

Union Panelist: Barbara Camens, General Counsel, The Newspaper Guild—CWA, Barr & Camens, Washington, DC

Employer Panelist: Susan Frier Wiltsie, Counsel, Hunton & Williams, Washington, DC

Harris: Good afternoon, everyone. Like almost every other arbitrator that I know, just cause is a large part of my practice. We are fortunate to have with us here today two brilliant young lawyers. Barbara Camens is the general counsel for The Newspaper Guild and has been practicing labor law since 1982. She also represents The News Media Guild. Susan Wiltsie, of Hunton & Williams, is the counsel for the firm's labor and employment group, representing employers in every aspect of the collective bargaining process with particular depth in representing publishing companies.

In preparation for this session, the three of us concluded that in the cases we want to discuss with you, we were not dealing with the Mittenthal/Vaughn problem—namely situations in which the parties have attempted to restrict the arbitrator's discretion

by inserting language that defines "just cause" into the contract. Depending on the results of the hypothetical cases we will discuss, however, parties might choose to enter into negotiations to influence the outcome of future cases arising out of the same or similar issues.

Our first hypothetical relates to a personal Web site. Susan will give a description of the hypothetical and indicate how management would present such a case to an arbitrator.

Wiltsie: Thank you, so much, Catherine. We will discuss a hypothetical "just cause" scenario that brings together two commonly observed underlying factors that we see more of every day—the technologies of the new millennium and the emerging young work force that has a different understanding and approach to work issues than their managers and many of us in the room today.

Our grievant, Jess Phoninitin had worked for *Cutting Edge Generation Magazine* until she was terminated for gross misconduct. *Cutting Edge* hired Jess when it was a novice publication. The magazine wanted to add a bit of celebrity appeal to get a little buzz going about the magazine. Jess had been working as a VJ, a video jockey, on a music television show. She had some notoriety with the younger generation from her VJ work. She had also gotten herself into the tabloids quite a bit with some antics—some "bad-girl" notoriety, so to speak.

For almost the entire time that Jess was at *Cutting Edge*—seven years—she had worked for Serius B. Ness. Serius had been hired by *Cutting Edge* for reasons exactly the opposite from those that had prompted Jess Phoninitin's hire. He was to lend some gravitas to the magazine, to get some old newspaper blood in there, and to keep everybody on the right track.

Our grievance is based on Jess' gross misconduct termination. Serius fired Jess after he learned that she had a personal Web site—a blog—and he read what she had posted on it. Serius had two objections. First, Jess' blog included a rant about her boss—specifically, his pathetic love life and his disgusting personal appearance. Serius was not named; nor did Jess identify herself, she referred to herself merely as "Fab-U-Jess" on her Web site. Second, Jess had an article on the blog about Cool Locks, Inc., a fledgling, but still substantial, cosmetics company. Cool Locks was a significant source of advertising revenue for *Cutting Edge*. Cool Locks and *Cutting Edge* both market nearly exclusively to young people with tastes in cosmetics and personal hygiene that might be characterized as being "on the fringe"—a progressive 15- to 30-year-old

market crowd. The article about Cool Locks included statements that Cool Locks tests its products on rabbits. *Cutting Edge* readers do not approve of cosmetics testing on rabbits. Serius was so angry when he read Jess' blog that he fired her on the spot.

The magazine had a conflict of interest policy that had been in place for some years. It was not in the collective bargaining agreement, but it was a policy that applied to union and non-union employees. That policy provided that employees could not engage in any outside endeavors on *Cutting Edge* time or in using *Cutting Edge* property that would present a conflict of interest to their work at the magazine. The collective bargaining agreement with the union provided that all termination should be preceded by a written warning except in cases of gross misconduct, which require no prior warning.

Shortly after Jess was fired, Cool Locks dropped its account with the magazine. By the time of the arbitration, *Cutting Edge* had wooed Cool Locks back by promising that Jess was gone for good.

Harris: So, Barbara, what is the union going to argue in order to try and get Jess's job back?

Camens: This case is fascinating because we're talking about personal blogging, an activity that probably did not exist five years ago. We have emerging technology, which is creating a whole new range of employee behavior where the standards of conduct in terms of regulation at the workplace are completely nonexistent—there are no rules to this game. Our position during the course of the hearing would be to show that this employee got caught up in the resulting mess, the lack of clarity and lack of notice to the employees as to what the standards of conduct are.

The way that the hypothetical was posed by Susan, the employee was summarily discharged without warning because of gross misconduct. I'm going to presume that the collective bargaining agreement contains words to the effect that in the absence of *gross* misconduct, progressive discipline should be applied. It would be clear, therefore, that the employer would need to prove *gross* misconduct. The definition of gross misconduct, typically, would include the notion that the conduct itself is so inappropriate on its face that there's no need to notify an employee in advance, to warn an employee, or to engage in progressive discipline before summarily discharging that individual.

In the context of this case, I would adduce testimony that would show both a lack of notice and, indeed, the complete lack of un-

derstanding on the part of the employees—this younger generation of employees—that what they are doing off-hours, away from the employer, on a personal blog in an anonymous fashion could in any way come into play in terms of their job security at the job site. Certainly I would argue that before *Cutting Edge* can summarily discharge an employee for gross misconduct based on anonymous musings on a personal Web site, there have to be clear standards that bar such conduct. There has to be notice given to the employees that this conduct can be properly regulated by the employer.

Now, there's a reference to an "outside activities" or an "outside endeavors" clause. I represent The Newspaper Guild. Outside activities clauses are absolutely standard in Guild contracts. Here, this is not a negotiated clause. It's a clause that's in a unilaterally promulgated handbook. I would adduce testimony that the majority of employees, including our grievant, have no idea that there is an employee handbook, or if they do, that they have no idea what this "outside endeavors" clause means. Even if an employee is aware of the handbook and sees the language on the page about "outside endeavors," I would argue that the employee could have no understanding as to the meaning of that language in this factual context.

What is valuable about negotiating a code of ethics—even though it is not something the Guild relishes—is that during the course of that bargaining process there is a flushing out of the line the parties have in mind concerning the nexus between outside endeavors and the workplace—where that line is to be drawn. So given that we have a unilaterally issued code here, there is an argument that the lines are not clearly drawn in this circumstance and that there is no effective notice to the employees.

Then, too, we do not have the exact language of the outside activities clause. If it is anything like what you see in standard Guild contracts, that language is intended to prohibit certain activities, but it also guarantees employees certain rights. There are two sides to the equation. There is significant arbitral authority holding that, although outside activities clauses are intended to proscribe certain clearly defined conduct, they are just as clearly intended to guarantee to media workers that they have a private life and that there is a limit to the proper regulation of a private life by an employer. Again, the lines are drawn by the specific language of the outside activities clause. I would go in there and use this body of

arbitral law like an employee bill of rights, with certain limitations but nonetheless guaranteeing certain freedoms.

Looking at these contractual standards, what do we have here? Do we have gross misconduct? You have a blog where all of the opinions were expressed anonymously. There was no identification of the employee, no identification of the magazine. In the circumstance of the comment made about the supervisor, there is no identification of the supervisor. All is anonymous. Thus, there would be a reasonable expectation on the part of our employee, Jess, that any outside a member of the public who read her blog could not connect all the dots back to *Cutting Edge*. That needs to be taken into consideration.

In fact, in the circumstances of this case, Susan shared with me that the way that this case played out was that there was a vindictive co-worker who somehow became aware of the blog and basically ratted out Jess to the editor. I would argue that this act transformed an anonymous personal activity into something that, without notice to the employee, had an impact on her security in the workplace and how her behavior could be governed.

With regard to the comments that were made about the supervisor, my argument is that making anonymous, unflattering comments about a boss on a Web log does not constitute gross misconduct. They are satiric remarks. This blog, like most, is satirical in nature. Blogs are in the nature of a personal diary and I would argue that given the anonymity of the site, it is an improper invasion of the employee's personal life to be firing her summarily in the circumstances of this case.

We don't have the facts, but if there were comments made about the supervisor's pathetic life, it might have been in the context of a broader discussion of the workplace and working conditions. Maybe Jess, here, had been ranting in that same blog about how this pathetic supervisor had routinely denied her overtime, improperly and in violation of law. So, I would try to do an investigation in advance of the hearing to see whether there's any argument of protected activity here. Blogs are increasingly becoming the equivalent of the watercooler or the break room. This is where employees now vent about their workplace conditions, their opinions about the world. Jess' conduct in this case needs to be viewed in that context.

The comment about Cool Locks, the advertiser, is a much more troubling fact for me to deal with as a union advocate because the

identity of the advertiser was revealed; and in the circumstances of this case, there was an actual loss of business to the employer. That is something I would have to grapple with in the hearing. I believe the hypothetical included the information that the advertiser became aware of Jess' blog and pulled its business only after the discharge. So there is at least an argument, based on a long-standing line of arbitral decisions, that such post-discharge conduct cannot be used to justify the termination for gross misconduct. But it is a troubling fact. Any arbitrator dealing with a case where there has been an actual loss of business would give pause before reinstating the employee.

I would argue that the circumstance was largely of the employer's own making—that it was the employer's own misstep of firing Jess for gross misconduct that led to Cool Locks, the advertiser, finding out about the blog. In truth, we do not know whether it was the co-worker who gave away the blog to Cool Locks or whether it was the consequent media coverage of Jess' firing that gave it away. In any event, I would argue that it was *Cutting Edge's* own action that led to its loss of business.

Another line of argument concerns whether there was, in fact, a conflict of interest, which is essentially what *Cutting Edg*e is arguing. Here, I would try to adduce testimony about whether what was revealed on the blog about the advertiser was true. That is, is it a fact that Cool Locks engages in animal testing of their products? If it is a fact, where is the conflict of interest? Is it a conflict of interest for an employee, on her own time, away from the worksite, anonymously, to state a fact to the public about the business practices of a company, albeit a company that has a business relationship with her employer? There are interesting questions about what constitutes a conflict of interest. I have actually brought expert witnesses into hearings to talk about and to define what a conflict of interest is because we at the Guild are often finding that employers have a more expansive view than the Guild would as to what poses a conflict. Many an expert in journalistic ethics that would say that a "conflict of interest" is where the media reporter's ability to report in a dispassionate and unbiased way is somehow compromised. None of those issues are in play here. So maybe it was misjudgment. Is that a conflict of interest? I would argue not under this type of code.

I will go one step further. There are many expert witnesses on issues of journalistic ethics who say that there must be an absolute

wall between the business side and the editorial side of a paper. Does the *Cutting Edge* action here in discharging Jess mean that the employer would not publish a newsworthy and responsible piece about the business practices of Cool Locks as a news target because Cool Locks has a business relationship with the magazine? So there's a lot of interesting play in all of these issues.

Harris: I think you've given us a lot to chew on here. Let's turn to Susan to tell us whether she characterizes Jess' behavior as a youthful indiscretion or a dischargeable offense.

Wiltsie: I derived this hypothetical from two real scenarios that have arisen in my practice, so this isn't pure make-believe. From the employer's standpoint, advising management with respect to gross misconduct is a struggle. We all know what happens when the weapon comes to work, or someone has drugs on the job, or is intoxicated, or engages in criminal behavior. Jess' case is not so easy. Nevertheless, management's argument would be that her behavior has all the elements of gross misconduct. The comments about her boss, which we would freely admit motivated his immediate reaction to terminate her, were insubordinate. It is not the same as sitting in your backyard dishing to your girlfriend or your over-the-fence neighbor. This was a public airing of personal disputes with this manager—not as to his management style or not being paid overtime. She simply didn't like him and she thought he was disgusting.

Also, she had displayed an appalling lack of judgment—a catastrophic lack of judgment. Cool Locks is the premier advertiser for *Cutting Edge Magazine*. Even as a fluff news reporter, she knew that this was the advertiser that had 6 to 10 pages in every issue and that if she upset their primary advertiser, it would have business consequences. She used their name on the blog. I would certainly argue in the arbitration that Jess' site was not an anonymous Web site. She was certainly not an A-list celebrity, but she was someone who was known. I would put witnesses on who would say, "Yes, I looked at Jess' Web site because I remember her from her VJ days."

If I needed to, I would put on some expert testimony about who is blogging and what the readership is of that blogging. Such expert testimony would show that there are well-known bloggers on political issues and legal issues, and that people read them because of their content. By and large, people read personal Web sites because they have a relationship or they believe they have a

relationship, like you do with a celebrity, with the person who is creating the blog. Who would read Jess' blog if they didn't know who Jess was?

So the anonymous argument would be blown apart pretty quickly. Once that is done, then Jess' comments about Cool Locks subjected *Cutting Edge* not to just the potential, but to the actual, loss of the revenue from the advertisers. And there is legal liability as well. If Cool Locks could argue that Jess was acting somehow as their agent when she wrote the blog, she has defamed Cool Locks if Cool Locks doesn't, in fact, test on animals. Also, *Cutting Edge* has a legal claim against her under the common law tort of the breach of duty of loyalty. If an employee engages in conduct that would allow them to sue her for the damages for the loss of Cool Locks as an advertiser, that's gross misconduct. Or if it isn't, it should be.

Turning to the argument that the code of ethics did not apply to the union employees, it would be fun to cross-examine the union's witnesses who said, "We had no idea, as journalists, that we were governed by a code of ethics." I think that argument would blow up pretty quickly, too.

Finally, with respect to the post-discharge termination of the business relationship between Cool Locks and *Cutting Edge*, it did happen after the fact. Nevertheless, I would argue first that it was an anticipated result of Jess' conduct. Failing that, I would argue in the alternative, with respect to remedy, that it makes some limited front pay the only option. Reinstatement is out of the question because if the arbitrator reinstates Jess, then *Cutting Edge* will lose the potential to regain Cool Locks as an advertiser.

Harris: Well, thank you both. When I initially discussed this hypothetical with Susan and Barbara over the telephone, my immediate thought was that this grievant had done something very detrimental to her employer's interest by publishing information that was damaging to an advertiser on her blog. But as I listened to more and more facts, I cautioned myself not to jump to any conclusions. For one reason, I don't spend a lot of time visiting personal Web sites, myself. I'm in a different demographic. I found myself wondering if my reaction to this case is somewhat influenced by the fact that I'm not aware of how popular personal Web sites are among young people. If I were hearing a case of this nature, I would have to consider whether what the grievant was doing was analogous to—in my day—going to a coffee house and chatting with my friends. Maybe this is the 2006 equivalent of what

I used to do—just going out to talk about controversial subjects in the Rathskeller at the University of Wisconsin.

Susan also reminded me of the line of cases about post-discharge conduct and the effect it can have on remedy, particularly reinstatement. It struck me that neither of the representatives here mentioned whether the Web site is still open for business, whether the material about Cool Locks has remained on the site until the day of hearing, or will continue to be posted. It seems on the face of it untenable to even consider reinstating someone who has a Web site posting negative information about the customers of an employer.

But the electronic watercooler aspect of this case is something that I certainly would have to think about when I'm exploring some of the other issues that I would typically consider. For example, what is presented to show me that the grievant was on notice that this was a type of conduct that could jeopardize her employment? This would be something that any arbitrator would mull over in considering a case of this nature. Another question that occurs to me is whether this particular case is being used as a vehicle to convey a message to others in the company that this type of conduct will not be tolerated. Because the company had no experience with this type of case, there is no rule related to it; there is nothing in the collective bargaining agreement and so the case presents an opportunity to establish policy. This is always a concern to me in a case where new facts are presented or a new scenario and there is no history. Certainly, no one said anything about even-handed conduct or disparate treatment because this is the first time this particular situation has arisen.

This is the type of case we could talk about endlessly. Is there anyone out there who's had a case anything like this?

Brisco: Chet Brisco from Tustin, California. Yes, I had a supervisor with the police department who had an America Online (AOL) account. One can have a personal page with AOL. The supervisor posted some very unkind comments about an ex-employee, whom she identified with a nickname. Had you been an employee with the city, you would have known who that person was. In various imaginative ways, the supervisor called the ex-employee fat. The employer demoted the supervisor to a nonsupervisory position. The grievant's defense was, "Well, she is fat." [Laughter.]

The object of the grievant's derision wrote a letter to the city council with a copy to the district attorney. The police chief's attention was directed to this Web site. Now, the lady who was criti-

cized must have learned about the Web site from someone else, because it wouldn't be a place one would normally go.

I found that there was no nexus to her employment, absolutely none. She was demeaning another person who *formerly* worked for the city. The only way that person could have retaliated was to try to have her fired. Well, it got her demoted. It was the outside (non-work) use of electronic media that is the only twist in this case that distinguishes it from ordinary off-duty misconduct.

Harris: That's right.

Brisco: And this case is the same. Here, with *Cutting Edge,* the connection is a lot closer. I'm not sure how it came out, yet, but I would lean toward sustaining the discipline at this point. But, you know, I could change my mind.

Harris: What did the employer argue about the nexus in your case?

Brisco: Only that it was demeaning of another person—not very good arguments. They could not have been because I don't remember. In fact, the two arguments on both sides missed the point. The point was nexus; and I just went down the points and said, "No, no, no" and gave her job back to her.

Harris: Rosemary?

Townley: Rosemary Townley, New York. One thing that jumps out at me from the fact pattern is the bad-girl notoriety. From an employer's perspective, if you hire Howard Stern, you have an expectation that something is going to happen. The employer would have a hard time explaining its surprise. For it to say, "Oh, my God, we would have never expected this lady to overlook due diligence," is simply not credible. An employer cannot have it both ways. If you're going to hire this bad girl, then you really have to expect some sort of naughty behavior, if you want to categorize it that way. That is the thing that really jumps out.

Harris: All of the notoriety about this blog probably sells more magazines with this generation. Moreover, it probably truly offends the readers that this woman was discharged for her blogging because this is big with a younger generation—a growing group of consumers in the media.

Audience Member: And I think Rosemary's point fits in with the notice point in that, not only did she not receive notice that this type of activity could result in discipline or discharge, she may have been mislead about how her activities might impact her employment.

Brisco: How far does "notice" go when the problem is that you say this is gross misconduct, a deliberate attempt to injure your

employer? I don't think you need notice. That's major misconduct, if you go that way.

Hertkin: Peter Hertkin, Orange County. The National Labor Relations Board (NLRB) has wrestled with the issue of how to treat and how to analogize electronic publications. What the Board is wrestling with is that they are not going to treat it like watercooler conversations. This is a publication and subject to the law on libel and slander. On the question of whether you treat this simply as watercooler conversation or talking to her girlfriends at the coffee shop, that would be a mistake.

I take Chet Brisco's side on the issue that there are some things that you shouldn't have to tell employees that they shouldn't do—like publishing deleterious information about major advertisers in the magazine. I represented a lot of municipalities before I went into government service. In the police department, for example, there was no rule against negligently waving your gun while you're off duty, even if it is unloaded. But seeing an officer do that was a dischargeable offense, notwithstanding the fact that the officer didn't understand and said, "Well, no one ever told me I wasn't supposed to do that."

Harris: With that, I am afraid we have exhausted our time. I want to thank all of you once again on behalf of the Academy for your contributions to a useful session.

VII. RAILROADS

Moderator: Joan Parker, NAA Member, Haverford, Pennsylvania

Panelists: Charlie McGraw, Vice President, Brotherhood of Railroad Signalmen, Chicago, Illinois

Lisa A. Mancini, Vice President, Labor Relations, CSX Transportation, Inc., Jacksonville, Florida

Richard K. Radek, Vice President and Director of Arbitration, Brotherhood of Locomotive Engineers and Trainmen, Cleveland, Ohio

Charles E. Woodcock, Director, Labor Relations, National Railroad Passenger Corporation (Amtrak), Washington, DC

Parker: This is our breakout session on discipline in the railroad industry. I am really fortunate because I am flanked by very experienced people who will be responding to the Mittenthal/