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The image of corporate America, including drug and device companies, has been tarnished in recent years by extensive media coverage of document destruction, financial mismanagement, inaccurate or incomplete disclosures of research studies and allegations of "gouging" the public with excessive pricing. The competitive nature of designing and successfully marketing a new drug or device creates a heightened need for immediate awareness of what is on a competitor's horizon, while keeping one's own research and development of new products under wraps. Current and former employees may be publishing information about their company on blogs that is favorable, or potentially very harmful.

Keeping a watch on the blogosphere can enlighten a company about what is being said by their employees, competitors and other commentators. In addition, disgruntled former employees may be making statements in blogs that relate to pending litigation. Companies are encouraged to set up a monitoring program that regularly searches blogs to keep the company abreast of the chatter. Doing so would enable a company to take proactive steps to stay competitive, ward off litigation or perhaps build a better defense when sued.

BLOGOLOGY 101

Bloggging is a term used to describe the process of writing a web log. A web log (or "blog"), in turn, is an easy-to-publish webpage. According to Technocrati.com, a blog search engine, there are over 100 million blogs. Entries are written in chronological order and usually exhibited in reverse chronological order. Individuals can share a very wide range of things on blogs, including personal opinions, news, and recommended links to other Internet websites. In fact, blogs often serve as online diaries. A common and popular feature of blogs is that readers are able to interact and engage the topics of blog postings by leaving their own comments. Issues arise when employees blog outside the workplace and discuss information regarding their employer's day-to-day business operations, clientele or competitors, workplace management, regulatory proceedings or setbacks, and company research & development. Since few blogs require a password to gain access to the featured material, the content of most blogs is broadcasted to anyone surfing the Internet.

Blogs may include text, images and audio/video clips. "Podcasting" allows bloggers to instantaneously distribute any audio or video recordings the minute a blogger has updated his or her blog. These podcasts can be played on a computer, iPod, or any number of other devices.

TO BLOG OR NOT TO BLOG?

Bloggging does not have to instill fear in the hearts and minds of employers. Specifically, drug and device manufacturers have much to

gain from the advent of blogs. One of the biggest challenges in the pharmaceutical/medical device industry is for companies to find a way to effectively keep their teams up to date with important news that relates to a team's product or research. This process of collecting, analyzing and circulating competitive intelligence material can be assisted by the use of blogs. Blogs may be the preferred method of handling competitive intelligence material since they are extremely flexible (e.g., one can post a short comment, long comment, include links to other sites). A chief information officer of a European pharmaceutical company that recently began using blogs to support the competitive intelligence function of the company put it best: "Competitive information is always very unstructured and comes in lots of different ways – through the Internet, internal sources, and various other ways. Using blogs to organize the data is quite effective because it doesn't impose too rigid a structure where we need some inherent flexibility." [1] Suw Charman, Dark Blogs: The Use of Blogs in Business, Case Study 01 A European Pharmaceutical Group, A Corante Research Report, June 13, 2005, available at http://www.suw.org.uk/files/Dark_Blogs_01_European_Pharma_Group.pdf (last visited on November 28, 2007).

In addition to providing platforms for competitive intelligence and internal communications, company sponsored blogs enable employers to observe which employees are active bloggers and whether entries reflect any negativity. Employers can then take steps to see what else the individual might be saying about the company on any non-company sponsored blogs. These steps might include: (i) Googling the employee's name; (ii) viewing the employee's profile on portals such as Facebook, MySpace, or Blogger.com; and (iii) entering relevant search terms in blog search engines. Blog search engines are used to search blog contents. Examples of such blog search engines are Blogdigger, Feedster and Technocrati.

Though the benefits of internal blogs abound, companies must take proper precautions. Content validation and internal editorial review processes are extremely important. A statement made in April of this year by an overzealous pharmaceutical salesman in an internal forum (which eventually made its way on to a third party blog) makes the point. The salesman admonished his underlings for not making calls and opined that there are "big buckets of money" sitting in every office and every time a salesman went in to an office, he or she was reaching into the bucket and grabbing a handful of money. Though the statement was likely not the position of anyone else at the company, the comment by the sole salesman caused much criticism to be cast upon the company. The incident exemplified how a widely broadcasted statement by one employee can adversely effect an entire corporation. Thus, it is crucial that comments on internal company blogs undergo some type of content validation prior to publication.

Given the sensitivity of information that employees of pharmaceutical/medical device companies and health care providers have access to, these employers must be vigilant with respect to employee blogs. The sensitive information can include data from clinical trials, information about the participants in a clinical trial, Social Security numbers of patients/clinical trial participants, information relating to a patient's finances, company trademarks, trade secrets and company patents. An episode involving health care giant Kaiser Permanente provides an excellent lesson. The blogger in this instance was a former employee of Kaiser who called herself the "Diva of Disgruntled." Whereas whether Kaiser posted patient information on an unsecured technical website was in dispute, the actions taken by the Diva in March 2005 were not. She posted confidential information about 140 Kaiser patients on her blog. The confidential information in these circumstances included medical record numbers, patient names, and even details relating to lab tests.

Apparently, the possibility of a \$250,000 fine and 10 year prison term was not enough to deter the Diva.

CLOGGING UP THE BLOGOSPHERE

According to a May 3, 2006 survey by New York-based public relations firm Makovsky & Co., approximately 20% of U.S. companies have some sort of formal policy in place for monitoring blogs that include remarks about the company. However, many companies still do not have policies that address employee blogging. Though standard company policies on computer use, confidentiality, privacy, and employer monitoring of computer usage or restriction on access may serve as a check on employees, blog-specific policies that expressly prohibit content which negatively reflects on the company, management, employees, or the company's products should be implemented. It may also be wise to remind employees with written policies that individuals who are not government employees and in at-will employment states can be fired for many reasons, including blogging at home or at the office.

Notwithstanding the foregoing, there are risks in disciplining bloggers. Employees who are censored while trying to bring to light discrimination, health and safety concerns, and matters of public policy will likely enjoy protection under whistleblower statutes. Under both state and federal law, employees fired in retaliation for discussing employment discrimination on the basis of race, color, national origin, religion, or sex may be protected. Employer retaliation against a blogger who brought to light poor health and safety conditions, breaches of compliance with manufacturing standards, or misrepresentations in preliminary clinical trials would also likely fall out of favor with a court. Blog content relating to employer misconduct and unlawful business practices of an employer would more than likely be protected under state and/or federal law. Employers in the pharmaceutical/medical device industry must especially be conscious of the potential claim that an employee was merely trying to warn the public of a company practice or bring to light any comments or rulings made by regulatory agencies in connection with a product. Given that at least some content may be protected, companies must pause and reflect on the negative impact of any decisions to reprimand or terminate a blogger. Indeed, employers must evaluate the risk of retaliation or encouraging the blogger to become a whistleblower. A review of the company's policies on the use of electronic equipment and confidentiality will assist in evaluating any proposed adverse employment-related response.

Some employees anticipate the risk of getting fired and therefore blog anonymously. Anonymous blogging can be accomplished by doing any of the following: (1) using pseudonyms and free web blogging services to avoid true identity; (2) using public computers to avoid identification through IP addresses; (3) using proxy servers to use a third party's IP address; (4) using encrypted onion routing which routes encrypted text through 2-20 computers and their various IP addresses; and (5) using sites such as Invisiblog.com and MixMaster which encrypt emails sent to post information on anonymous web blogging sites. On the other hand, discovering a blog and its creator can be accomplished by: (1) conducting searches through Internet search engines; (2) searching for employees' names on search engines; (3) monitoring employee Internet usage and examining Internet logs, nicknames, screen names, aliases, etc.; and (4) subpoenaing Internet Service Providers to reveal the identity information of the owner/computer of a known IP address. However, we may be witnessing the start of a trend where courts make it more difficult to unmask anonymous bloggers. In *John Doe No. 1 v. Cahill*, 884 A.2d 451 (2005), an elected town council member and his wife brought a defamation action against four John Doe defendants based on anonymous statements posted on a blog. The trial judge applied a good faith standard when he denied the motion for a protective order. The Supreme Court of Delaware reversed and held a defamation plaintiff must

satisfy a “summary judgment” standard before obtaining the identity of an anonymous defendant. The court was concerned with the possibility of chilling potential bloggers from exercising their First Amendment right to speak anonymously. The rationale of the holding also hinged on the court’s belief that many defamation plaintiffs bring suit only to unmask the identities of anonymous critics, and that plaintiffs cared more about silencing them than collecting any damages.

CONCLUSION

Blogs are websites created by individuals who wish to comment on the news or particular events that affect their lives. Blogs can be both beneficial and harmful to pharmaceutical companies and health care providers. Blogs can be beneficial when used as a platform for competitive intelligence and as a way to monitor employees’ feelings about a company. Dire consequences may result when employees begin to provide inappropriate comments about the company on personal blogs. Given the trend of courts to err on the side of free speech when confronted with a defamation plaintiff, a company’s best practices would include adopting guidelines *ex ante*, setting forth what an employee may and may not blog about. Ideally these guidelines would include a prohibition on any negativity expressed towards management, fellow employees, the company and its products.

If a company is being sued by a former disgruntled employee, a whistleblower affiliated with a Qui Tam action or defending a claim in which an employee is seeking relief from a noncompetition agreement, etc., searching blogs for statements made by the former employee may provide fodder for deposition inquiries, requests for admission or cross examination. Streamlining a process for gathering information from blogs will allow companies to be proactive in many arenas, including: employment; competitive intelligence; identification and containment of information “leaks,” and perhaps even recognition of an employee’s positive cyber contributions that deserve a cyber “thank you.”

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