

presented by insights

Cyber "Slips" Can Sink Corporate Ships

By P. Blake Keating, Vice President, Claims — First Media

media•insights is published periodically by OneBeacon Professional Partners to address the broad scope of exposures faced by our agents' and brokers' clients, as media-related companies scramble to meet the public's appetite for information, news and entertainment in an increasingly litigious society. This issue of media•insights provides insight into establishing company policies and procedures as well as securing appropriate coverage to help minimize liability exposure from electronic messaging.

First Media is a division of OneBeacon Professional Partners. OneBeacon Professional Partners, located in Avon, Connecticut, is the Specialty Liability underwriting division of OneBeacon Insurance Group ("OneBeacon"). With roots that date back 170 years, an A.M. Best rating of A (excellent) and a Financial Size of XV, OneBeacon Insurance boasts a heritage of keeping promises, backed by financial strength. OneBeacon is publicly traded on the New York Stock Exchange under the symbol "OB."

Spurred by technological advances, American economic productivity is soaring. Corporate America has leveraged its comparative technological advantages through its growing use of computers and automation. The convenience and immediacy of email, in particular, has revolutionized the workplace, but it has also generated legal exposure – and public relations gaffes – for companies.

Even the corner office is not immune to impetuous internet behavior. In the latest corporate blunder, John Mackey, CEO of Whole Foods, admitted to

posting anonymous comments about his own company and his chief rival and acquisition target, Wild Oats, on Yahoo market boards from 1999 until 2006. Using an anagram of his wife's name, he repeatedly criticized Wild Oats, suggesting it had, for example, "no value and no future". He also talked up Whole Foods. The 110 store Wild Oats group was purchased by Whole Foods for \$565 million in February of 2007. Whole Foods had 195 stores prior to the purchase.

The Yahoo stock boards allow anyone to post comments and serve as a forum for gossip from anonymous users, including corporate insiders/employees and other interested parties, as well as ostensibly objective persons, stock traders or shareholders.

The news of the identity of the Yahoo poster, who called himself "Rahodeb", became public knowledge as a result of the Federal Trade Commission lawsuit seeking to block the Wild Oats takeover on antitrust grounds. It appears that papers filed by the FTC revealed that Mackey posted comments under his pseudonym on the Whole Foods Yahoo investment message board. The FTC claims that the acquisition would curtail competition and raise prices; arguing the presence of the two competitors in any one particular market holds consumer prices down. The Securities and Exchange Commission is also conducting an inquiry. At this time, it is not clear whether Mackey violated any laws in his postings. On July 17, 2007, Whole Foods Market Inc., said its board had formed an independent committee to investigate the postings.

The FTC is seeking to use Mr. Mackey's own comments against him, including his statements to Whole Foods board members that the takeover would allow Whole Foods "to avoid nasty price wars". While admitting that allowing an executive to praise his company and stock value using a pseudonym is not illegal per se, the FTC believes it is inappropriate and ill advised since such comments appear to have been made to influence public perception and the stock's price. That said, stock board users are well aware that posters could be anyone, including crackpots or fakes. A popular *New Yorker* cartoon once had a drawing of two dogs on a computer with one dog pointing out to the other that "on the internet, nobody knows you're a dog".

The internet's formulary of increased free flow of information has been praised as democratizing and a victory for the average citizen. The downside of the tidal wave of content from numerous, unknown sources is that information has become diluted and difficult to evaluate or analyze. The internet has in many ways effectively diminished and displaced the dissemination of accurate, objective information from experts and reliable sources with an opinion-laden information "food fight" atmosphere. Business communicators need to recognize that any content disseminated by the business or its employees – whether formally in a newsletter or press release, or informally through e-mail or blog – may have unintended consequences. Such consequences may include investigations by government agencies, or law enforcement, civil litigation by individuals or businesses and public

relations nightmares. All of these situations can give rise to intrusive and expensive electronic litigation discovery and the loss of corporate good will.

Company e-mail policies and procedures should be developed and endorsed to minimize unfortunate legal ramifications and to encourage employees to think before they communicate in an age of instantaneous communications. On an annual basis, employees should acknowledge the guidelines in writing and agree to abide by them. Such practices will hopefully develop and enhance good judgment and help businesses avoid embarrassing legal problems.

People have a tendency to say things online that they might not say in verbal or other forms of written communication, such as a letter. Employees and others who communicate by email need to reflect before forwarding provocative emails to colleagues or firing off responses relating to disputes or other disagreements. It is wise to sit back and evaluate all communications from the recipients' perspective. Employees are also encouraged to consider the effect of such communications were they to be enlarged into "big board" exhibits at trial. If there is momentary pause or caution, the communications should not be sent, at least not immediately. A day wait often provides a fresh and more objective perspective. Such emails may be discoverable in a lawsuit not because they are relevant, in and of themselves, but because they may lead to the discovery of other relevant evidence.

Needless to say, all the usual legal risks of libel, invasion of privacy, fraud, false advertising, misappropriation,

plagiarism, harassment, unlawful discrimination and infringement of intellectual property laws still apply to such communications.

Business leaders should make sure that employment practices liability coverage is in place to protect against harassment and hostile workplace claims arising from employee email. Media liability insurance can also protect companies for third-party claims arising from company-endorsed blogging activities or from other publications. However, even with insurance in place, certain isolated email communications that take place outside the sender's course and scope of employment, i.e., as an anonymous poster on a Yahoo forum, would not provide coverage for the business or the errant employee under most insurance policies. For this reason, employees – including company officers – must understand the exposure arising from careless email communications.

© 2007 First Media, a division of OneBeacon Professional Partners
The contents may be reproduced by recipients provided proper attribution is given. Material is provided for general informational and illustrative purposes and is not to be considered legal or risk management advice. Readers should consult their counsel for legal advice concerning copyright infringement.



OneBeaconSM
PROFESSIONAL PARTNERS

OneBeacon Professional Partners
30 Tower Lane Avon, CT 06001
tel 860.773.6150
www.onebeaconpro.com