
Use of Instant Messaging Raises Legal and Business Concerns

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Introduction

The use in business environments of instant messaging, or IM, to "chat" with other online users, often without any systematic archiving of messages, raises a number of legal and practical questions. While IM is similar to email in many ways, it is a more recent phenomenon in business and involves a real-time conversation that many users may assume is not being recorded or archived by the other parties involved in the IM chat. Use of IM in an organization may not be officially sanctioned by management, and individual employees may be able to adopt IM as a mode of business communication without the knowledge of management simply by downloading from the Internet freely available IM "client" applications. In contrast, some organizations facilitate use of IM by employees, but do not have the infrastructure to permit oversight of IM use or archiving of IM messages, while relatively few organizations have established formal archiving policies and capabilities for IM.

Archiving of IM Messages

IM raises different concerns, depending on the nature of an organization's business. One significant concern for many organizations is whether and how to archive instant messages. Some organizations are subject to regulatory requirements that require archiving of communications, including IM. In particular, the SEC recently highlighted the obligations of the securities industry to archive correspondence such as IM. In December 2002, the United States Securities and Exchange Commission (SEC) [imposed fines in the aggregate amount of \\$8,250,000 on five major securities firms](#) for, *inter alia*, failing to preserve email correspondence in the manner and for the time periods required by Rule 17a-4 under the Securities Exchange Act of 1934, as amended. This Rule requires each broker, dealer and securities exchange member subject to the Rule to preserve "[o]riginals of all communications received and copies of all communications sent by such member, broker or dealer (including inter-office memoranda and communications) relating to its business as such." In imposing the fines, the SEC cited email messages that were often stored in "an unorganized fashion on backup tapes, other media, or on the hard drives of computers used by individual employees..." In its order, the SEC did not explicitly address IM; however, the use of IM without archiving will result in an even greater problem than that of storage of messages in an unorganized fashion.

The fines imposed in the SEC order have increased awareness in the securities and other industries of potential regulatory exposure that may arise from failure to archive electronic correspondence. Some organizations may wish to archive instant messages for other reasons, such as preparation for litigation or simply for administrative purposes, while others may intentionally not archive instant messages to avoid creating a record of those messages. For those companies seeking to establish archiving capabilities for IM, the number of commercial-grade software tools that enable the archiving of IM communications is increasing.

Other Legal and Practical Concerns of IM

Communications of any type raise legal and practical concerns. The principal unique characteristic of IM is that users may assume that their communication is not being monitored by their employer or archived by their employer or the other parties. Sales personnel may distribute instant messages that make claims that would not be made by email or printed material, due to different expectations about the permanence of statements made via IM. Users may utilize IM messaging to make statements that could later be construed as warranties or public statements subject to securities regulation. In some contexts, instant messages recorded by a chat participant may be used as evidence that a binding agreement was reached among chat participants, even when one or more of the participants believed they were doing nothing more than engaging in informal, off-the-record communications. Employees within an organization might engage in workplace "chat" that is inappropriate, violates company policy, or is otherwise detrimental to the organization. All of these problems are more likely to arise when participants using IM are not conscious that IM may be monitored, recorded and archived.

Developing an IM Policy

Organizations may find it useful to establish IM policies, which could be as simple as an addendum to existing email policies. These policies would identify whether employees are permitted to utilize IM as a means of communication within and/or outside the organization and a statement that use of IM must be consistent with all other company policies. Such policies also should inform employees whether IM chats are monitored or archived by their employer, and caution employees that other organizations and participants may record IM chats as easily as they could any email correspondence.

Jeffrey Johnson

jeffrey.johnson@haledorr.com

Steven Barrett

steven.barrett@haledorr.com

Authors



Steven D. Barrett

PARTNER

Co-Chair, Technology
Transactions and Licensing
Practice Group

✉ steven.barrett@wilmerhale.com

☎ +1 617 526 6238



Jeff P. Johnson

PARTNER

Co-Chair, Technology
Transactions and Licensing
Practice

✉ jeff.johnson@wilmerhale.com

☎ +1 617 526 6394