

Electronic Discovery & Records Management

TIP OF THE MONTH



January 2010

What You Need To Know About Instant Messaging

Scenario

An organization learns that an employee has filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that she was sexually harassed in the workplace. The organization is aware that many of its employees, including key employees named in the EEOC complaint, use publicly available Instant Messaging (IM) software to communicate with one another while at work. The organization does not have an existing policy governing the use of IM and is concerned that key employees may be engaging in discoverable communications via IM. The organization is now considering whether, and how, to take steps to retain potentially relevant IM communications.

What is Instant Messaging?

Originally popularized by teenagers and college students, IM has spread into the workplace. IM allows direct communications between two or more individuals via the Internet using a small message window to deliver a typed message from the sender's computer to the recipient's computer. It differs from email in that it is instant and is designed to be interactive and conversational. In addition, unless specific measures are taken to retain the text exchanged during an IM session, the messages generally cease to exist once the session is terminated.

Many business people use IM because of its immediacy and efficiency in exchanging real-time information. Initially, business people used public IM services such as AIM, Yahoo IM or Google Chat — products they downloaded free of charge on their employers' computers. In recent years, however, some organizations have installed internal IM systems.

Although a consensus has yet to be reached as to whether, for purposes of discovery, instant messages most resemble email, chat room "conversations," conference tools, or telephone conversations, it is clear that IM has borrowed features from both telephony and email. However, whether IM remains as ephemeral as telephone communications or endures like email depends on whether transcripts of the messages are made, printed or otherwise recorded by the user prior to ending the IM session or, in the case of corporate IM, whether the conversation is captured on the organization's server.

What Issues Arise Regarding Instant Messaging in Discovery?

The significance of IM as a source of electronically stored information (ESI) has grown in recent years due, in part, to the increasing use of IM in the corporate world, the increasing ability to capture or log IM sessions and the fact that communications via IM are often even more casual than email communications. Under Fed. R. Civ. Proc. 34(a) "electronically stored information" is discoverable if it is "stored in any medium" from which it can be obtained and "translated, if necessary," into a "reasonably usable form." To

the extent that IM is retained in the ordinary course of business, by either individual users or on an organization's servers, IM may, like email, constitute ESI and be subject to preservation and production to the extent it is reasonably calculated to lead to the discovery of admissible evidence.

An even more difficult question arises when an organization does not retain instant messages in the ordinary course of business and where a continuing obligation to preserve information arises in connection with a pending or anticipated litigation. In those situations, an organization that does not retain IM in the ordinary course of business must consider whether it is required to institute some form of retention as a result of the anticipated or pending litigation.

There has, to date, been very little explicit guidance from the bench on this subject. Given this lack of direction, whether an organization has a legal obligation to preserve instant messages is best determined by examining the practical issues involved, such as the specificity of any demand for preservation (whether by demand letter, subpoena or the like), its likely relevance to the issues in dispute, and any regulatory or other business needs involved.

Best Practices for Preserving Instant Messages

Organizations should consider taking affirmative steps to establish policies and procedures regarding the use of IM in the workplace. Further, the absence of clear guidance from the courts regarding the production and preservation of instant messages counsels in favor of taking affirmative action to address this issue at the onset of litigation.

- *Evaluate the Need for an IM System.* Before considering the question of instant message retention, organizations should carefully consider whether IM should be made available at all. While IM can provide substantial efficiencies in the conduct of business matters, it may trigger employee misuse and become a tool for sexual harassment, offensive or other non-professional communications, theft of corporate secrets, or simple abuse of corporate time and resources. Only if the benefits of IM outweigh the risks should an organization adopt the use of an IM system in the workplace.
- *Install a Corporate IM System and Prohibit Public Instant Messages from Being Used.* If an organization concludes that IM poses a net benefit, the next step is to decide what kind of IM system it should use. While this is a business decision, the issue of control of the server is likely going to tip the balance in favor of purchasing an enterprise-wide system. An organization that has its own IM platform, and that implements and enforces a policy on the use and retention of instant messages, is in a much better position to ensure that instant messages are being treated correctly and consistently.
- *Establish a General Policy Governing the Use, Content and Retention of Instant Messages.* Organizations should consider implementing a written, clear and understandable IM policy. In evaluating the need for retention, organizations should consider regulatory or other industry requirements: for example, in recent years, both the Securities and Exchange Commission and the Financial Industry Regulatory Authority have promulgated rules that specifically require the retention of instant messages for three years. Retention, archiving and deletion procedures for instant messages should be described if a determination is made that retention is appropriate.
- *Raise the Issue of Instant Messages Early in Discovery.* Organizations should carefully evaluate their preservation obligations at the outset of any litigation, including whether a requirement may exist

to preserve instant messages on a going-forward basis. Litigants should consider raising this issue with the opposing party early in the litigation, including whether and how potentially relevant instant messages should be preserved or produced. As with all issues related to ESI, if an agreement cannot be reached, it is preferable to approach the court with a sensible, reasoned solution early rather than face allegations of spoliation later.

For inquiries related to this Tip of the Month, please contact the authors, Therese Craparo at tcraparo@mayerbrown.com, and Jason Fliegel at jfliegel@mayerbrown.com.

Learn more about Mayer Brown's [Electronic Discovery & Records Management](#) practice or contact Anthony J. Diana at adiana@mayerbrown.com, Michael E. Lackey at mlackey@mayerbrown.com or Thomas A. Lidbury at tlidbury@mayerbrown.com.

Please visit us at www.mayerbrown.com

If you would like to be informed of legal developments and Mayer Brown events that would be of interest to you please fill out our [new subscription form](#).

Mayer Brown is a global legal services organization comprising legal practices that are separate entities (the Mayer Brown Practices). The Mayer Brown Practices are: Mayer Brown LLP, a limited liability partnership established in the United States; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales; JSM, a Hong Kong partnership, and its associated entities in Asia. The Mayer Brown Practices are known as Mayer Brown JSM in Asia. In Brazil Mayer Brown is in association with Tauil & Chequer Advogados, a Brazilian law partnership. "Mayer Brown" and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.

© 2010. Mayer Brown LLP, Mayer Brown International LLP, and/or JSM. All rights reserved. This publication provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek legal advice before taking any action with respect to the matters discussed herein.