

Can An Instant Message Exchange Amend The Terms of Your Contract?

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Instant messaging is often used for quick, informal communications. When used in a business setting, could an instant message exchange become an amendment to a written agreement between the parties? Based on a recent federal court decision, the answer is a resounding "yes."

In August, 2009, Smoking Everywhere Inc., a seller of electronic cigarettes, entered into a written contract with affiliate advertising company CX Digital Media Inc. Under the contract, CX Digital referred Smoking Everywhere to web sites that posted ads for Smoking Everywhere's products and Smoking Everywhere agreed to pay CX Digital \$45.00 for each completed sale up to 200 sales per day. About a month after signing the contract, Smoking Everywhere's vice president of advertising and an account manager of CX Digital spent most of a day communicating about the advertising links via instant message. At one point, the CX Digital account manager messaged: "We can do 2000 orders/day by Friday if I have your blessing." Thereafter, the Smoking Everywhere VP responded: "NO LIMIT" to which CX Digital's representative replied: "awesome!" After that, the number of sales CX Digital sent to Smoking Everywhere increased substantially to an average of 1244 sales per day. A dispute arose when Smoking Everywhere didn't pay CX Digital's invoices.

CX Digital filed a breach of contract action against Smoking Everywhere in federal court in Florida. Applying Delaware law, the court rejected Smoking Everywhere's asserted defense that the instant message exchange could not amend the parties' contract, including the argument that the contract required that amendments be agreed to by the parties in writing. The court ruled that "the instant messages operate collectively as an unsigned writing containing the terms of the agreement to modify" the contract. After a five day trial, the court awarded damages to CX Digital of over \$1.2 million dollars based on the amended contract terms.

If your organization uses instant messaging to communicate with business partners, take care that you are not agreeing to terms inconsistent with your contractual terms that could result in an amendment to the terms of your contractual engagements.

For more information about legislation or litigation involving technology, intellectual property protection of information technology assets or any other Information Technology law issue, contact your Miller Canfield attorney.