

## NEW YORK STATE E-DISCOVERY LAW

BY MARK A. BERMAN

### *Changes in Laws on Electronically Stored Information*

New York appellate and trial courts have recently issued a series of significant decisions concerning electronically stored information, and they should serve as both a primer and a well-heeded warning to practitioners as to how best to properly deal with the transmission and use of such information in a litigation.

#### **Employer's E-Mail System**

• *'Privileged' Communications Waived When Made Through Employer's E-Mail System.*<sup>1</sup> In *Scott v. Beth Israel Med. Ctr. Inc.*, 17 Misc3d 934, 847 NYS2d 436 (Sup. Ct., N.Y. County 2007), the court essentially issued a warning to all New York counsel not to communicate by e-mail with clients via their work e-mail address or risk disclosure of such information in a litigation with their client's employer.

There, the court denied a protective order seeking to quash an employer's use of its employee's "privileged" e-mail communications made from or directed to an employee's e-mail address at defendant's employ that were sent over employer's e-mail server. Defendant's counsel had advised plaintiff's counsel that defendant was in possession of e-mail correspondence pertaining to plaintiff's dispute with defendant and that, although no one at defendant had reviewed such e-mails, defendant's position was that any privilege had been waived by employee's use of defendant's e-mail system.

Upon being alerted to the dispute, the court directed defendant to provide copies of such e-mails to plaintiff, place copies in a sealed envelope, and bar anyone from reviewing the e-mails pending court resolution.

Plaintiff asserted that his e-mail communications with counsel were protected from disclosure under the attorney-client privilege and work product doctrine. Defendant countered that such e-mails were not so protected because they could not have been



made in confidence where they were transmitted over defendant's e-mail system in violation of its written e-mail policy. Defendant contended that any protections had been waived by such usage. Defendant's e-mail policy had been disseminated to every employee and further provided Internet notice of it as well as a brief summary of it being included in defendant's employee handbook.

Plaintiff never signed an acknowledgement, as others had, that he had received or read the policy, and further denied knowledge of it.

Every e-mail plaintiff's counsel had sent to its client at his work e-mail address included a notice that, among other things, such communications "may contain information that is privileged and confidential [and, if you are not the intended recipient, you are hereby notified that any dissemination of this communication is strictly prohibited."<sup>2</sup> Plaintiff's counsel never received notification that the e-mails it had sent to its client were monitored by defendant.

Plaintiff relied upon CPLR §4548<sup>3</sup> to claim that his e-mails were made in confidence. The court found, however, that such:

statute does not absolve an attorney of his or her responsibility to assess the risk of communicating by e-mail with a client. New York State Bar Assoc., Committee on Professional Ethics, Op. No. 782 (Dec. 8, 2004). As with any other confidential communication, the holder of the privilege and his or her attorney must protect privileged communications; otherwise, it will be waived.<sup>4</sup>

The court rejected the argument that CPLR §4548 invalidated defendant's "e-mail policy and [held] that defendant's e-mail policy is critical to the outcome

here."<sup>5</sup> The court found that CPLR §4548 "does not preclude an employer from adopting a no personal use policy and, in fact, the "language of the statute ('no communication . . . shall lose its privileged character for the sole reason . . .') contemplates that there may be other reasons that an electronic communication may lose its privileged character."<sup>6</sup> The court further found that plaintiff's "otherwise privileged communication[s] . . . would not have been made in confidence because of [defendant's] policy."<sup>7</sup>

#### **'In Re Asia Global Crossing'**

The court noted that, as there is no New York case on point that would determine whether plaintiff's e-mail communication were made in confidence, it would look for guidance to *In Re Asia Global Crossing, Ltd.*, 322 B.R. 247 (S.D.N.Y. 2005). *Asia Global* concluded that the attorney-client privilege would be inapplicable if:

- (a) . . . the corporation maintain[s] a policy banning personal or other objectionable use,
- (b) . . . the company monitor[s] the use of the employee's computer or email,
- (c) . . . third parties have a right of access to the computer or emails, and
- (d) . . . the corporation notifies the employee, or was the employee aware, of the use and monitoring policies?<sup>8</sup>

The court found that defendant's e-mail policy clearly satisfied the first requirement of *Asia Global*, noting that defendant "has the right to regulate its workplace including the usage of its computers and resources"<sup>9</sup> as well as the second requirement where defendant's policy provided for monitoring, even though defendant acknowledged that it did not monitor plaintiff's e-mail, but that it retained the right to do so under such policy. The court found the third factor as to whether third parties had access to plaintiff's computer or e-mails was "not relevant,"<sup>10</sup> where only plaintiff had access during his employ and, after his employ, the only personnel with access would be defendant's computer staff. As to the fourth factor, the court found that plaintiff had both actual and constructive knowledge of the e-mail policy.

The court also rejected plaintiff's claim of work product protection, finding that plaintiff's counsel's pro forma notice at the bottom of each of its e-mails was not a reasonable precaution to protect client

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confidences. The court found that plaintiff could not create “a right to confidentiality out of whole cloth” and counsel’s notice on its e-mails does not “alter” defendant’s e-mail policy.<sup>11</sup> Again citing to New York State Ethical Opinion No. 782, the court noted that “a lawyer who uses technology to communicate with clients must use reasonable care with respect to such communication, and therefore must assess the risks attendant to the use of the technology and determine if the mode of transmission is appropriate under the circumstances.”<sup>12</sup>

• **E-Mail Not ‘Documentary Evidence’ Under CPLR 3211(a)(1).** Counsel should be cautious when utilizing an e-mail as documentary evidence on a motion to dismiss. In *Advanced Global Tech., LLC v. Sirius Satellite Radio Inc.*, 44 AD3d 317, 843 NYS2d 220 (1st Dept. 2007), the First Department found that a trial court erred, as a matter of law, when it relied upon an “e-mail” “that was not otherwise admissible, and thus [it] cannot serve as documentary evidence which conclusively establishes a defense.”<sup>13</sup>

## Spoliation

• **E-Discovery Permitted to Demonstrate Spoliation.** In *Lamb v. Maloney*, 46 AD3d 857, \_\_\_NYS2d\_\_\_, 2007 WL 4555651 (2d Dept. 2007), the court permitted extensive discovery by a party who sought to demonstrate spoliation of evidence. The Second Department held that a trial court had improvidently exercised its discretion in denying the following motion, and reversed, permitting:

(a) to compel the depositions of [three specified witnesses] and “any other staff/employees/individuals who had contact with the office computers/hard drive,” (b) to compel the production of “all documentary evidence regarding the ‘destruction’ of the hard drive, the purchase and formatting of any replacement computer, complete details regarding the date of purchase of the destroyed computer and all software utilized, all service and maintenance records for the destroyed computer and complete details regarding all back-up mechanisms used” with respect to those defendants, and (c) to permit the plaintiffs to inspect all “current[]” computers of those defendants.<sup>14</sup>

In addition, leaving open the door for a future sanction, the court in denying plaintiff’s motion which sought, among other things, to strike defendants’ answer and to preclude defendants from utilizing their office records to support their defenses, specifically provided that its denial would be without prejudice subject to renewal.

• **Pre-Action Discovery of the Identity of an Anonymous Internet Blogger Denied.** In *Greenbaum v. Google Inc.*, 18 Misc3d 185, 845 NYS2d 695 (Sup. Ct., N.Y. County 2007), petitioner commenced a proceeding seeking pre-action discovery concerning the identify of a certain blogger, against Google, the Internet service provider which maintained an Internet Web site known as “Blogger” and “Blogspot.com”

for the hosting of Internet blogs. Blogger’s motion to intervene was granted, subject to disclosure to the court of its identity through an in camera review of blogger’s retainer agreement with counsel.

The court found that the New York courts have not articulated a standard that governs applications for the disclosure of the identity of anonymous Internet speakers. The court noted that the First Amendment protects the right to participate in online forums anonymously or under a pseudonym, but recognized that the right of anonymous speech is not absolute and cannot shield tortious acts. The court indicated that in determining applications for the disclosure of the identity of anonymous Internet speakers, a balance need be struck between the interest of the plaintiff in seeking redress for grievances (such as defamation and the protection of plaintiff’s reputation) and the First Amendment interest of the speaker remaining anonymous.

The court applied the factors set forth in *Dendrite Intern. Inc. v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001), requiring that the “anonymous Internet speakers be given notice of the application for discovery of their identities and an opportunity to be heard in opposition, and that the plaintiff specify the particular statements that are alleged to be defamatory,”<sup>15</sup> and which conditioned disclosure of the speaker’s identity on an evidentiary showing of the merits of plaintiff’s cause of action. Ultimately, the court concluded that it need not address the “quantum of proof” required to evaluate the merits of plaintiff’s claim because the alleged defamation was “inactionable as a matter of law.”<sup>16</sup>

• **Copying of Electronic Material From Web Site Did Not Constitute Conversion.** In *Leser v. Karenkooper.com*, Index No. 104005/07, Sup. Ct., N.Y. County, Jan. 16, 2008, plaintiff alleged conversion and misappropriation where “defendants wrongfully copied and displayed material, including images of handbags, from her Web site and improperly displayed said material or other locations on the Web, without her permission, where plaintiff’s merchandise was allegedly represented to be counterfeit.”<sup>17</sup> Defendants claimed that plaintiff failed to state a claim because plaintiff did not allege that she “was ever deprived of the use of any materials on her Web site and/or that any image or information was taken out of her dominion or control.”<sup>18</sup> The court agreed and dismissed the claim, noting that while

[t]he Court of Appeals recently held that the wrongful denial of access to electronic records that are stored on a computer (and are indistinguishable from printed records) may be subject to a claim of conversion in New York (see *Thyoff v. Nationwide Mutual Insur. Co.*, 8 NY3d 283 [2007]), the Court merely permitted the tort to “keep pace with the contemporary realities of widespread computer use.” [Id. at 292] It expressly did “not consider whether any of the myriad other forms of virtual information should be protected by the tort. (Id. at 293)<sup>19</sup>

## Long-Arm Jurisdiction

• **E-Mail Did Not Provide Basis for Long-Arm Jurisdiction.** In *Lewis v. Kraesig*, 17 Misc.3d 126(A), 2007 WL 2782357 (App. Term, 9th and 10th Jud. Dists., Sept. 24, 2007), the court affirmed dismissal of a breach-of-contract action for lack of jurisdiction, where plaintiff had contacted defendant, a resident of Kentucky, by e-mail to purchase certain merchandise. The court found no jurisdiction stating:

In order to subject defendant to the jurisdiction of the court, due process requires “certain minimum contacts...such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice” (*International Shoe Co. v. Washington*, 326 U.S. 310, 316 [1945]). There must be an articulable nexus between the business transacted and the cause of action sued upon (see *McGowan v. Smith*, 52 NY2d 268, 272 [1981]). Since the plaintiff contacted defendant via e-mail to purchase the [merchandise], the evidence did not establish that defendant purposely availed himself of the privilege of transacting “business within a district of the court in the county” (UDCA 404[a][1]; *Kinco Exchange Place Corp. v. Thomas Benz Inc.*, 34 AD3d 433, 434 [2006]).<sup>20</sup>

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1. See Mark A. Berman and Aaron Zerykier, “Are Private E-Mails Really Private?,” 234 NYLJ 69 (Oct. 7, 2005).

2. Id. at 937, 847 NYS2d at 439.

3. CPLR §4548 provides: No communication under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communications may have access to the content of the communication.

4. Id. at 938, 847 NYS2d at 439.

5. Id. at 939, 847 NYS2d at 441.

6. Id.

7. Id. at 938, 847 NYS2d at 440.

8. Id. at 941, 847 NYS2d at 442.

9. Id.

10. Id. at 942, 847 NYS2d at 443.

11. Id. at 942, 847 NYS2d at 444.

12. Id. at 943, 847 NYS2d at 444.

13. Id. at 318, 843 NYS2d at 222.

14. Id. at \*1.

15. Id.

16. Id. at 188, 845 NYS2d at 699.

17. Id. at 12.

18. Id.

19. Id. at 13.

20. Id. at \*1.

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