

NEW YORK STATE E-DISCOVERY LAW

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On 'Metadata,' Instant Messaging, and Bates Stamping

What electronically stored information is out there beyond just obtaining a printed copy of an e-mail in discovery? A myriad. And the New York courts have recently addressed other sources of electronically stored information, the form of how such materials should be produced, and issues concerning their authentication.

Much has been discussed in the legal press concerning an e-mail's "metadata" and one recent unreported New York County commercial division decision has addressed the production of "metadata" information. See *Buck Consultants, LLC v. Cavanaugh MacDonald Consulting, LLC*.¹ In another unreported commercial division decision, a Nassau County court addressed the form in which electronic documents should be produced in litigation, including metadata information. See *Delta Fin. Corp. v. Morrison*.² Also recently, in an unreported commercial division case, a New York County court ordered the production of "instant messages." See *Blue Star Jets LLC v. Halcyon Jets LLC*.³

'Metadata'

Before addressing how New York courts have begun to address "metadata," it is important to understand: what is metadata? Magistrate Judge James Orenstein of the U.S. District Court for the Eastern District of New York described metadata as "data about data, in [one] context, information about an electronically stored document that may or may not be visible if the document is reduced to printed form."⁴ Another federal court characterized metadata as follows:

Some examples of metadata for electronic documents include: a file's name, a file's location (e.g., directory structure or pathname), file format or file type, file size, file dates (e.g., creation date, date of last data modification, date of last data access, and date of last metadata modification), and file permissions (e.g., who can read the data, who can write to it, who can run it). Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept. Most metadata is generally not visible when a document is printed or when the document is



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converted to an image file. Metadata can be altered intentionally or inadvertently and can be extracted when native files are converted to image files. Sometimes the metadata can be inaccurate, as when a form document reflects the author as the person who created the template but who did not draft the document. In addition, metadata can come from a variety of sources; it can be created automatically by a computer, supplied by a user, or inferred through a relationship to another document.⁵

In *Buck*, plaintiffs alleged that defendant had altered metadata in certain computer files and produced such metadata in an "unidentifiable manner." The court noted metadata "describes how and when and by whom a particular set of data was collected, and how it is formatted."⁶ Plaintiffs presented "evidence that metadata which has been produced has been altered to conceal potentially damaging evidence" and therefore claimed that "electronic copies of documents are necessary to ensure relevant information is disclosed, because paper copy can be altered."⁷

Plaintiffs sought to determine when particular files were created because the files produced indicated they were created in 2006, while the computerized file name indicated that they were created in 2004. The case involved a principal of a company that left to form an allegedly competing firm and the issues in the case concerned whether defendant possesses plaintiffs' computer files and programs. The court found that the date when certain files in defendant's possession were created to be "relevant and necessary" and directed defendant to produce the requested discovery in "identifiable form within 14 days."⁸

Production of Information

In *Delta Financial*, the court, in addressing how electronically stored documents should be

produced, stated:

The best way to have [produced documents] would have been to produce Bates-stamped PDF versions [Bates stamping can be used to mark and identify images with copyrights by putting a company name, logo and/or legal copyright on them. This process provides identification, protection, and auto-increment numbering of the images] of all documents in native format with metadata from the outset of the proceedings. This would have allowed the documents to be searched through electronic means...

The Court finds that the need to be able to readily identify electronic documents at deposition and at trial is essential for the management of depositions and trial, and therefore, directs that all parties produce all electronic documents previously produced and all electronic documents to be produced in this manner, in TIF Format with Bates-stamped numbers identifying all documents. No party shall produce documents, either in paper form or electronic form, without a Bates number identifying the document.

In addition, the Court strongly suggests that counsel for the parties consider a litigation database to manage all documents during trial in these matters, sharing the cost, to preclude any issues arising with regard to the management of documents.

While the court believes that the production by [Plaintiff] of Bates-stamped electronic documents should have occurred from the commencement of the discovery process in these matters, [Defendant] also failed to raise this issue well into the discovery process. Accordingly, [Plaintiff] is given leave of Court to make an application for cost-sharing of reproducing all electronic documents previously produced, which shall now have to be produced in TIF format with Bates stamp numbers identifying each document. If the ability to search these documents will be important to either side then it should first be determined whether production in TIF Format will serve that purpose. If not, then PDF should be considered as an alternative.

The court is greatly disappointed that in a case of this magnitude with over a hundred million dollars allegedly at stake that this wasn't done correctly in the first place. The failure by

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[Plaintiff] to originally Bates stamp the electronically produced documents will be taken into consideration in any application they might make for cost sharing.⁹

See *Wundrok v. Hampton*,¹⁰ (“[D]efendants shall not be required to provide electronic discovery as to items previously provided to plaintiff in another form; defendants, however, are directed to provide, at defendants’ expense, electronic discovery as to any items not previously disclosed and which are already available in electronic form.”)

Instant Messages

• *Chat Rooms*. “Instant messages,” “chat room” communications, and “electronic bulletin board postings” also provide extremely valuable avenues to obtain discoverable electronically stored materials other than e-mails. The New York Court of Appeals in *Lunney v. Prodigy Services Co.*,¹¹ noted:

As distinguished from e-mail communication, there are more complicated legal questions associated with electronic bulletin board messages, owing to the generally greater level of cognizance that their operators can have over them. One commentator defines an electronic bulletin board as “storage media, e.g., computer memories or hard disks, connected to telephone lines via devices known as modems and controlled by a computer.” In some instances, an electronic bulletin board could be made to resemble a newspaper’s editorial page; in others it may function more like a “chat room.” In many respects, an ISP bulletin board may serve much the same purpose as its ancestral version, but uses electronics in place of plywood and thumbtacks. Some electronic bulletin boards post messages instantly and automatically, others briefly delay posting so as not to become “chat rooms,” while still others significantly delay posting to allow their operators an opportunity to edit the message or refuse posting altogether....¹²

The Court further defined “chat rooms”¹³ “as services that allow multiple users ‘to talk’ through simultaneous text postings.”¹⁴

In *Blue Star*, the trial court addressed the production of “instant messages” that were the subject of an application for a protective order, and required them to be produced in redacted form to exclude any scandalous and inflammatory materials, but further provided that the “instant messages” could be “admitted into the record in redacted form so as to reveal those exchanges between the parties of the plaintiffs’ confidential and proprietary information.”¹⁵

As with e-mails, the significance of obtaining copies in discovery of “instant messages” cannot be underestimated. Many employers are now recording employee “instant message” communications, and the Securities Exchange Commission, New York Stock Exchange, and FINRA¹⁶ all require that institutions regulated by these entities maintain “instant messages.”¹⁷

However, once “instant messages” are turned over in discovery, they still must be authenticated. In *Aniello v. McKenna*,¹⁸ the court granted plaintiff’s motion for summary judgment and deemed admitted, pursuant to plaintiff’s notice to admit, defendant’s Internet screen name,¹⁹ that a particular “conversation” over the Internet had taken place, and that a

transcript of such “instant message” “conversation” was true and accurate.

Recently, in *People v. Pierre*,²⁰ the First Department addressed whether an Internet “instant message” was properly received as an admission against the defendant. The court noted that “[a]lthough the witness did not save or print the [instant] message, and there was no Internet service provider evidence or other technical evidence in this regard,²¹ the instant message was properly authenticated, through circumstantial evidence, as emanating from defendant. The accomplice witness, who was defendant’s close friend, testified to defendant’s screen name. The cousin testified that she sent an instant message to that same screen name, and received a reply, the content of which made no sense unless it was sent by defendant. Furthermore, there was no evidence that anyone had a motive, or opportunity, to impersonate defendant by using his screen name.”²²

Conclusion

As communications over the Internet expand, the types of electronically stored information that can be obtained in discovery is concomitantly increasing, including metadata, instant messages, and chat room conversations. The first issue, of course, is to determine whether such electronic information has been maintained and if it can be produced in any usable form and, if so, whether such form is the form demanded by one’s adversary or ordered by the court. But that is only the beginning. The practitioner must then, as with all evidence, ensure that such electronically stored information is properly authenticated in order to be successfully introduced at trial.



1. Index No. 603187/05 (N.Y. Sup. Ct. Feb. 15, 2007) (Lowe, III, J.).

2. Index Nos. 011118/03, 003084/04 and 018599/05 (Nassau Sup. Ct. April 21, 2006) (Warsawsky, J.).

3. Index No. 601408/07 (N.Y. Sup. Ct. May 25, 2007) (Lowe, III, J.).

4. *In re Payment Card Interchange Fee and Merchant Disc.*, 2007 WL 121426, at *1 (E.D.N.Y. Jan. 12, 2007).

5. See *Williams v. Sprint/United Mgmt Co.*, 230 FRD 640, 646-47 (D. Kan. 2005).

6. *Id.* at *1.

7. *Id.*

8. *Id.* at *2.

9. *Id.* at *2-3.

10. Index No. 601979/03 (N.Y. Sup. Ct. Oct. 24, 2006) (Heitler, J.), as amended, at *1 (Nov. 14, 2006).

11. 94 NY2d 242, 701 N.Y.S.2d 684 (1999).

12. 94 NY2d at 249-250, 701 N.Y.S.2d at 687 (citations omitted).

13. 94 NY2d at 250 fn.4, 701 N.Y.S.2d at 687 fn.4.

14. See *People v. Barrows*, 177 Misc2d 712, 714-15, 677 N.Y.S.2d 672, 674 (Kings Sup. Ct. 1998) (“Through America Online, Inspector Hayes was able to access ‘cyberspace’ and enter ‘chat rooms’ for ‘real-time’ ‘conversations’ with people all over the world. In addition to these ‘chats,’ in which up to 23 people are able to communicate simultaneously through typed messages which appear on a common screen visible to all participants, the participants are also able to send private ‘instant messages’ to each other which are not visible to all, and may also send e-mail to any individual whose ‘address’ on the Internet is known. Also available are private ‘chat rooms’ which are established by individual users who may invite others to enter but which may not be otherwise accessed.”), *rev’d in part*, 273 AD2d 246, 709 N.Y.S.2d 573 (2nd Dept. 2000). In a footnote, the trial court explained that, “[a]n ‘instant message’ can only be sent in ‘real time’ to someone who is ‘on line,’ that is, using the computer and connected to the Internet at the time the message is sent. ‘E mail’ is a message that can be sent at any time and stored for future reading if the addressee is not on line when the message is sent.” *Id.* at fn 2. See *People v. Foley*, 257 AD2d 243, 246, 692 N.Y.S.2d 248, 251 (4th Dept. 1999) (“Individuals gain access to the Internet through various avenues, including Internet service providers such as America Online, CompuServe, the Microsoft Network and Prodigy. An individual may obtain and trans-

mit text, sound, pictures, and moving video images using various methods. One of those methods is the use of a ‘chat room.’ In a chat room, individuals engage in real-time dialogue, i.e., when a message is typed, it appears almost immediately on the computer screen of other individuals in the chat room. In addition, an individual can send pictures to another individual in the chat room. The chat rooms foster an exchange of information or ideas on a particular topic. Two individuals may break away from the main chat room to have a private chat. Individuals in the chat room use ‘screen names’ of their choosing.”), *aff’d*, 94 NY2d 668, 709 N.Y.S.2d 467 (2000).

15. *Id.* at *1.

16. FINRA, the Financial Industry Regulation Authority, was “[c]reated in July 2007 through the consolidation of NASD and the member regulation, enforcement and arbitration functions of the New York Stock Exchange.” See <http://www.finra.org/index.htm>.

17. SEC Rule 17a-4(b)(4) and NASD Rule 3110 state that communications, including electronic communications, relating to a broker/dealer’s “business as such” must be preserved for three years and readily accessible for the first two years. As the NASD recognized in Bulletin 03-33 in July 2003, this rule applies to “instant messages” and that “the preference of employees to use instant messaging to communicate does not alter the obligation of the firm to keep relevant records. NASD members must ensure that their use of instant messaging is consistent with their basic supervisory and recordkeeping obligations.” Similarly, the NYSE defines communications to include “electronic communications” and requires such communications to be kept in accordance with NYSE Rule 440, which requires the same retention period as the SEC. See NYSE Rule 472.

18. Index No. 705/01 (Nassau Sup. Ct. March 13, 2002) (Gallasso, J.).

19. See *State v. Sorabella*, 277 Conn. 155, 163 fn. 10, 891 A2d 897, 905 fn.10 (2006) (“A screen name is the mode of identification by which an AOL member identifies himself or herself online. AOL provides its members with the opportunity to create and to publish a profile, listed under the member’s screen name, which may include various items of personal information about the member, such as the member’s real name, birth date and address or location. Published profiles are available to all AOL members.... Upon entering a chat room, a member’s screen name is visible to others in the room. If that screen name is the subject of a published profile, the profile also is accessible. AOL members can locate and access chat rooms using an AOL directory.”).

20. 41 AD3d 289, 838 N.Y.S.2d 546 (1st Dept. 2007).

21. See generally *Malletier v. Dooney & Bourke, Inc.*, 2006 WL 3851151, *2 (Dec. 22, 2006 SDNY) (“[U]ntil 2006 the technology that [defendant] utilized apparently did not provide a ready means for retaining such communications. Only in February 2006 did defendant install software that saved these communications for as long as two weeks”); *Sorabella*, 277 Conn. at 163 fn. 11, 891 A2d at 905 fn.11 (“AOL does not store or save instant messages, but a member may save such messages on his or her personal computer.”); *Convolve, Inc. v. Compaq Computer Corp.*, 223 FRD 162, 177 fn. 4 (SDNY 2004) (“at least some Instant Messenger programs have the capability, like e-mail, of storing messages.”); *State v. Voorheis*, 176 Vt. 265, 267-68, 844 A.2d 794, 796-97 (2004) (“At trial, the State introduced evidence seized from Ms. Delisle’s home, including a computer system and discs which stored a number of photographs....The computer forensic examination recovered text from ‘instant messaging’ conversations between defendant and Ms. Delisle. An expert witness testified for the State that ‘instant messaging’ is not normally saved into a computer, and that to save it to floppy disks required a concerted effort.... When asked about the chat messages saved in her computer, Ms. Delisle testified that she created a conversation in which defendant suggests giving Jennifer alcohol because she suspected that there were people using her computer without her permission and wanted to see if it would generate a response from them. She also claimed that she had saved and edited other instant messages to put the defendant in a bad light. Ms. Delisle asserted a lack of knowledge or recollection with respect to several relevant events.”).

22. *Pierre*, 41 AD3d at 291, 838 N.Y.S.2d at 548-49.

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