Admissibility of Email Strings and Co-Conspirator Emails

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The Federal Rules of Civil Procedure are frequent superstars spotlighting requests and production of electronically stored information in case law. Whether or not such discovery is admissible is another story.

Park W. Radiology & Park W. Circle Realty v. Carecore Nat'l Llc, 2009 U.S. Dist. LEXIS 110282 (S.D.N.Y. Nov. 19, 2009) is an extensive opinion addressing the admissibility of email in motions in limine.

Admissibility of Email Strings

The Plaintiff attempted to exclude an email string pursuant to the Federal Rules of Evidence 402 (Relevancy), 403 (Prejudice), 608 (Character Evidence/Witness Conduct), and 609 (Impeachment by Evidence of Conviction of a Crime). *Park,* at *8.

The email string contained the statement, "I was hoping that her friends would want to have sex with [sic] me after they saw the ring." *Park,* at *8. As one can imagine, the Plaintiffs argued the email was irrelevant and highly prejudicial if it somehow was relevant. *Park,* at *8.

The Plaintiffs further claimed the email chain contained attorney-client communications. *Park,* at *8.

The Defendants in turn argued the email was relevant in showing the bias of one of the Plaintiffs' trial witnesses. *Park,* at *8-9.

The Court held the section of the email string that could show bias of a trial witness was relevant. However, the section stating, "I was hoping that her friends…." was so prejudicial that it outweighed any relevance it had in showing bias. As such, that section would need to be redacted for trial. *Park,* at *9.

Planning a Conspiracy on Email

The Defendants sought preclusion of emails from a doctor as hearsay between nonparties (Federal Rule of Evidence 802). *Park,* at *39.

The Plaintiffs claimed the email chain showed a conspiracy because a doctor who was affiliated with the Defendants' Board of Managers "suggested" to the other doctors on the email that the Defendant was "unlawfully controlling the market for imaging centers and suggesting a business decision agreeable to the conspiracy." *Park,* at *40.

The Plaintiffs argued that the emails were not hearsay, because they were statements between co-conspirators under Federal Rule of Evidence Rule 801(d)(2)(E). *Park,* at *40. This provision requires the existence of a

conspiracy and the participation of the declarant in furthering the conspiracy. See, Federal Rule of Evidence Rule 801(d)(2)(E).

The Court issued a "preliminary" denial of the Defendants' motion in limine to exclude the email messages. *Park,* at *40-41. The Court would allow the use of the email exchange, if the Plaintiffs could meet the co-conspirator requirements of Federal Rule of Evidence Rule 801(d) (2) (E). *Id.*

Bow Tie Thoughts

Attorneys and vendors often get wrapped up in the production and review of electronically stored information. This is with good reason, considering the volume of ESI that can appear in discovery. However, litigation tends to be over the 10 or 20 key documents that prove a party's case to the jury. Being ready for any admissibility challenges can help avoid your case theory getting derailed by motions in limine to exclude a key email or instant message.

Attorneys can help prepare for the admissibility of electronically stored information while doing document review. Coding fields can be set up for issues such as "Relevant," "Authentication," "Best Evidence," "Hearsay" and "Probative Value vs Unfair Prejudice." Reviewing attorneys can consider the admissibility factors as they are performing document review, which may impact their choices on which documents to ultimately use in trial or mediation.