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Judge Peck Denies Da Silva Moore Plaintiffs' Formal Request for Recusal in Lengthy 56-Page Opinion

July 2, 2012

Da Silva Moore v. Publicis Groupe, No. 11 Civ. 1279 (S.D.N.Y. Feb. 8, 2012).

On April 17, 2012, we wrote a blog post detailing Judge Peck's response to plaintiffs' request for his recusal in the *Da Silva Moore* case. In the April 5, 2012 short order decision, Judge Peck denied allegations of an improper relationship with defense counsel and with the vendor running the predictive coding review of the electronically stored information in this case – an e-discovery protocol which was first approved by Judge Peck on February 8, 2012, and reported on in our February 23, 2012 blog post.

Last Friday, Judge Peck issued a full, 56-page opinion and order denying plaintiffs' motion for his recusal. The lengthy opinion details the chronology of events in this highly contentious and widely publicized litigation. The court's disapproval of plaintiffs' strategy of "seeing whether they prevail on matters and when they do not, only then raising recusal," is glaringly evident throughout the opinion.

Although Judge Peck could have easily dispensed with plaintiffs' motion solely on the ground that it was untimely, since plaintiffs were "aware of [his] view on predictive coding since at least December 2, 2011" and his participation on speaking panels with defense counsel and at LegalTech tradeshows since January 4, 2012, he chose to address each of plaintiffs' allegations in turn, before rejecting the entire motion as meritless.

As to the first of plaintiffs' claims concerning Judge Peck's speaking engagements, the judge wrote that "the fact that my interest and knowledge about predictive coding, in general, overlaps with issues, in this case, is not a basis for recusal." While speaking on e-discovery panels, Judge Peck stated that he "only spoke generally about a computer-assisted review in comparison to other search techniques" and the one time he "mentioned" a pending case that was using computer-assisted review, he "did not mention the parties or counsel involved." Even so, the comments were made before the plaintiffs' case became "the subject of publicity," a fact that was entirely due to a press release by plaintiffs' own e-discovery consultant. Moreover, any general statements about predictive coding by Judge Peck *after* his assignment to plaintiffs' case were no different then what he had already written prior to assignment in a *Search Forward* article – an article plaintiffs were fully aware of since 2011.

Judge Peck's opinion next addressed his alleged relationship with defense counsel, Ralph Losey, with whom the Judge previously spoke with on an educational panel. Judge Peck denied having any conversation whatsoever with Losey about plaintiffs' case and rejects plaintiffs' assertion that participating on an educational panel with Losey is a basis for recusal. Indeed, Judge Peck wrote that such an argument is undermined by Canon 4 of the Judicial Code of Conduct, "which encourages judges to participate" in educational panels. Moreover, Judge Peck made no secret of the fact that he knew Losey "very well" and plaintiffs never expressed any concern or requested the Judge's recusal.

Judge Peck also rejected plaintiffs' claim that his participation in speaking engagements "which was at least indirectly sponsored and funded by [the vendor] Recommend," created an appearance of impropriety that mandated recusal. Recommind was one of "39 sponsors, 186 exhibitors and hundreds of paying attendees" at LegalTech and they did not even sponsor the topic that Judge Speck spoke about at the event.

Finally, Judge Peck warned that plaintiffs' argument "that a judge's public support for computer-assisted review is a recusable offense" would preclude judges who are knowledgeable about the subject from presiding over cases or participating in CLE programs involving predictive coding. It would also "discourage lawyers from participating in CLE programs with judges about e-discovery issues, for fear of subsequent motions to recuse the judge (or disqualify counsel)."

Check back soon as we continue to follow the *Da Silva Moore* case. There are sure to be new and interesting developments in this closely watched e-discovery saga. In the meantime, if your company has questions, concerns, or would like more information about e-discovery practice measures, please email Jim Ryan at jryan@cullenanddykman.com or call him at 516-357-3750.

A special thanks to Margaret Corchado for helping with this post. Margaret is a third-year law student at Brooklyn Law School.