

Plaintiffs in Da Silva Moore Request Judge Peck's Recusal

April 17, 2012

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

On February 23, 2012, we wrote a blog post in regards to Judge Peck's decision in *Da Silva Moore*, which ordered the parties to adopt a protocol for e-discovery that includes the use of predictive coding. After the order was issued, the Plaintiffs sent a letter to Judge Peck, dated March 28, 2012, requesting Judge Peck to recuse himself from the case.

In the original decision, Judge Peck approved a protocol, which was initially agreed to by the parties, to apply predictive coding technology to approximately 2.5 million documents. Since that order's issuance, the parties have disagreed on how to measure and define success to relevance under the protocol approved by Judge Peck. The Plaintiffs now attempt another approach to winning the case and in a letter sent to the court they requested that Judge Peck step away from the case.

On April 2, 2012, Judge Peck responded to that letter, and the short order states that,

The Court notes that my favorable view of computer assisted review technology in general was well known to plaintiffs before I made any ruling in this case, and I have never endorsed Recommind's methodology or technology, nor received any reimbursement from Recommind for appearing at any conference that (apparently) they and other vendors sponsored, such as Legal Tech. I have had no discussions with Mr. [Ralph] Losey about this case, nor was I aware that he is working on the case. It appears that after plaintiffs' counsel and vendor represented to me that they agreed to the use of predictive coding, plaintiffs now claim that my public statements approving generally of computer assisted review make me biased. If plaintiffs were to prevail, it would serve to discourage judges (and for that matter attorneys) from speaking on educational panels about ediscovery (or any other subject for that matter).

It seems that the original letter, which is currently not available to the public, suggested that Judge Peck has ties to the software. Judge Peck completely discredited these allegations and left the Plaintiffs with some words of wisdom,

The Court suspects this will fall on deaf ears, but I strongly suggest that plaintiffs rethink their "scorched earth" approach to this litigation.

Check back soon as we continue to follow the case and see if the Plaintiffs make a formal motion as to this issue. In the mean time, if your company has questions, concerns, or would like more information about e-discovery practice measures, please email Arturo Castro at acastro@cullenanddykman.com or call him at [516-296-9173](tel:516-296-9173).

A special thanks to Sean Gajewski for helping with this post. Sean is a third-year law student at Hofstra University School of Law. You can reach him by email at [sean \[at\] sgajewski \[dot\] com](mailto:sean@sgajewski.com). Bio: www.sgajewski.com.