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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Predictive Coding And Judicial Advocacy

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From time to time a judge takes a keen interest in a developing area of the law and becomes a leading expert on the subject. Southern District Magistrate Judge Andrew Peck has become such an authority on "predictive coding"—an emerging method of computer-assisted electronic document review about which he has written and spoken both inside and outside the courtroom. In February of this year, Peck issued the first judicial decision endorsing the use of predictive coding in *Da Silva Moore v. Publicis Groupe*.[1]

One month after he issued that decision, the plaintiffs, who objected to Peck's predictive coding order, sought his recusal, citing among other grounds his "advocacy" of predictive coding as evidence of bias requiring him to step aside. Against the general backdrop of the law governing judicial recusal, Peck's recent decision denying that motion contains an interesting discussion of why a judge's strongly held and publicly expressed views on an aspect of litigation cannot and should not provide grounds for disqualification.[2]

Peck's Article

Predictive coding refers to a process of reviewing large volumes of electronic documents in which a computer is "taught" how to recognize relevant documents from a small, manually coded "seed set." In very basic terms, a randomly selected sample of documents is initially coded for relevance by attorneys with a sophisticated understanding of the case. Using algorithms, the computer then codes, or makes predictions about how the lawyers will code additional groups of documents, incorporating feedback about its accuracy to refine its coding determinations. When the computer's coding is sufficiently reliable, it has "learned" how to identify relevant documents and then codes the remaining documents automatically.

Proponents of predictive coding, backed by several studies, maintain that it is far more effective and efficient than manual review aided by key word searches. Predictive coding yields documents that key word searches would not identify, and greatly reduces the number of false positives inherent in any key word search. When done properly it should result in a relatively small universe of highly relevant documents, ultimately requiring less manual review and capturing a higher proportion of relevant documents than other methods.

Peck is a proponent of predictive coding. In October 2011 he published an article titled "Search, Forward: Will Manual Document Review and Key Word Searches Be Replaced by Computer-Assisted Coding,"[3] in which he reviewed some of the drawbacks to manual document review and key word searches and explained the rudiments of computer-assisted coding. He noted that despite the advantages of computer-assisted coding, lawyers appeared reluctant to adopt it until the courts signaled their acceptance of this method. In the absence of any federal or state decisions on point, he offered his article as a sign of judicial approval in appropriate cases, concluding that "[i]n my opinion, computer-assisted coding should be used in those cases where it will help 'secure the just, speedy, and inexpensive' (Fed. R. Civ. P. 1) determination of cases in our e-discovery world."

'Da Silva Moore'

The opportunity to issue the first judicial decision on predictive coding presented itself to Peck shortly after he published his article, when, at his initial conference with the parties in *Da Silva Moore*, counsel for the defendants informed him that "plaintiffs' reluctance to utilize predictive coding to try to cull down approximately three million electronic documents from the agreed custodians" was an open issue.[4] He remarked to counsel for the defendants: "You must have thought you died and went to Heaven when this was referred to me." That statement later formed part of the basis for plaintiffs' motion that Peck recuse himself after the judge ultimately adopted defendants' predictive coding proposal.

At the initial conference in December 2011, Peck advised the lawyers of his "Search, Forward" article and instructed them to consider whether the case was appropriate for predictive coding. Before their next conference in early January 2012, the parties exchanged plans for the use of predictive coding and plaintiffs brought their predictive coding consultant to the conference to provide a response to the defendants' proposal. The plan, following that conference, was that the parties would continue to work toward an agreed-upon approach to predictive coding.

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In discussing scheduling for the next conference, Peck made two more comments that would figure prominently in the plaintiffs' subsequent recusal motion. First, when counsel for the defendants informed the court that he would be on vacation, Peck proposed that another lawyer from his firm cover the next conference so as not to lose time and also suggested involving a particular lawyer in the firm with expertise in predictive coding. Peck told counsel for the parties that he knew that lawyer very well. (In fact, he quoted the attorney in his "Search, Forward" article). Second, in discussing dates for the next conference, Peck noted that "that's LegalTech week," referring to the ALM conference and trade show focused on technology for law practices.

Peck attended LegalTech and was a speaker at seven panels at the conference, on two of which the lawyer from defendants' firm also participated. At one of the panels, Peck referred in general terms to the *Da Silva Moore* case, stating that he had seen computer-assisted review in only one of his cases, and that the parties had "more or less" reached agreement that they were "willing to go that route" although the specifics still needed to be resolved.

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Peck said that because those issues remained in front of him, he would not say more about the case, other than to repeat the line he told defense counsel during the first conference about how he must have thought he "died and went to Heaven" when the case was assigned to Peck. The conference had more than three dozen sponsors, one of which was the vendor whose software the defendants proposed to use in their predictive coding plan. That vendor did not sponsor any of the panels on which Peck spoke, nor did it provide Peck with any compensation or expense reimbursement.

The next conference in *Da Silva Moore* took place in early February 2012, following the LegalTech conference. In advance of that conference, the parties submitted competing predictive coding proposals. The principal difference between the proposals appears to have been with the number of "iterative reviews" and the size of the document pools used in each round for training the computer, with the defendants proposing up to seven rounds of review with 500 documents per round, and the plaintiffs proposing two rounds of review using more than 16,000 documents per round.

In a lengthy ruling, Peck accepted the defendants' proposal.[5] Significantly, although plaintiffs' technology consultant expressed doubt about whether defendants' plan "is going to work" it made enthusiastic statements about predictive coding in general, and issued a press release following Peck's order, touting its role in the first federal case to adopt predictive coding.

Plaintiffs' Recusal Motion

Plaintiffs filed objections to Peck's order on Feb. 28, 2012, attended an additional discovery conference on March 9, 2012, and then wrote to Peck on March 28, 2012, requesting that he recuse himself, followed by a formal motion for recusal pursuant to 28 U.S.C. §455 on April 13. They raised three grounds for recusal: (1) Peck's "advocacy" for predictive coding; (2) his "relationship" with the lawyer from defendants' firm; and (3) his speaking engagements at LegalTech. They also asserted that various in-court statements by Peck demonstrated bias warranting recusal. Peck denied the motion both because it was untimely and on the merits.

Peck noted that although §455 is silent on time limits for seeking recusal, recusal motions must be made "at the earliest possible moment after obtaining knowledge of the facts demonstrating the basis for such a claim," in order to avoid waste of judicial resources and the movant's use of recusal as a hedge on the eventual outcome of a matter before the court.[6] He listed the four factors courts consider in assessing timeliness: (1) whether the movant has participated in a substantial manner in the proceedings; (2) whether granting the motion will result in waste of judicial resources; (3) whether the motion was made after entry of judgment; and (4) whether good cause exists for any delay.[7]

Applying these factors, Peck concluded that the plaintiffs' motion was untimely. Specifically, he found that plaintiffs were on notice of his interest in and knowledge of predictive coding from the initial conference in December 2011 and of his relationship with the lawyer in defendants' firm and that he would be attending LegalTech by the January 2012 conference. He rejected the plaintiffs' argument that the early stage of the case militated in favor of recusal because plaintiffs had actively participated in pretrial proceedings and he had already expended substantial resources in learning the case and responding to the parties' discovery issues and disputes. He also held that although the motion was brought before final judgment, it came after his ruling on predictive coding and appeared to be a fall-back position following an unfavorable outcome. He concluded that plaintiffs had all the requisite knowledge for their motion by no later than Jan. 4, 2012, and that no good cause existed for plaintiffs' almost three-month delay in requesting recusal.

Peck observed that plaintiffs' view that his public support for predictive coding constituted a "recusable offense" would have the paradoxical result of either precluding judges who know most about the subject from presiding over a case in which it is at issue, or from speaking about it at CLE conferences.

Peck held, in the alternative, that the motion failed on the merits. Specifically, he rejected the notion that his speaking engagements created a conflict, finding that "[t]he fact that my interest in and knowledge about predictive coding in general overlaps with issues in this case is not a basis for recusal."[8] Peck noted that he had not identified the case in his remarks at the CLE panel, had made only general remarks about predictive coding that were consistent with the views expressed by the plaintiffs' own expert, and had not discussed any of the details that remained to be resolved in the case. He held that plaintiffs' assertion that appearances on educational panels create an appearance of impropriety was both inconsistent with Canon 4 of the Judicial Code of Conduct, which encourages judges to participate in such events, and bad policy inasmuch as a contrary rule would "'either push judges toward a hermit like existence or open the floodgates to recusal motions.'"[9]

Peck distinguished those cases in which a judge attends a conference sponsored by a group that is clearly associated with one side of the merits of a litigation,[10] or receives meals or lodging from organizations that are heavily dependent on a party or its counsel.[11] Noting that he is one of only a handful of judges who regularly speak at e-discovery conferences, he observed that plaintiffs' view that his public support for predictive coding constituted a "recusable offense" would have the paradoxical result of either precluding judges who know most about the subject from presiding over a case in which it is at issue, or from speaking about it at CLE conferences.

Finally, Peck, applying the extra-judicial source doctrine, rejected the contention that his in-court statements could supply a basis for recusal. Quoting at length from the Supreme Court decision in *Liteky v. United States*,[12] he noted that judicial rulings and expressions of impatience and annoyance will rarely support recusal when no extra-judicial source is involved, unless they show such a "high degree of favoritism or antagonism as to make fair judgment impossible." Concluding that whatever criticisms he had leveled at the lawyers had been due to their performance, he determined that recusal was not warranted based on his in-court comments and denied the plaintiffs' motion.

Conclusion

Magistrate judges play a critical role on the frontline of discovery. As the bench, bar and clients become increasingly concerned with the cost and burdens of litigation, much of it driven by e-discovery, there is an ever-growing need for creative tools in the discovery process. Predictive coding may be one such tool, and it is important that magistrate judges—who are perhaps best situated to assess predictive coding—be free to communicate candidly with the bar in non-judicial forums without fear of recrimination, sanction or disqualification.

1. 2012 WL 697412 (S.D.N.Y. Feb. 24, 2102), adopted 2012 WL 1446534. (S.D.N.Y. April 26, 2012) (Carter, J.).

2. Da Silva Moore v. Publicis Groupe, 2012 WL 2218729 (S.D.N.Y. June 15, 2012), objections filed June 26, 2012.

3. Law Technology News, Oct. 2011 at 29.

*4. 2012 WL 2218729, at *1 (internal quotation marks omitted).*

5. 2012 WL 697412.

*6. 2012 WL 2218729, at *10 (quoting Apple v. Jewish Hosp. & Med. Ctr., 829 F.2d 326, 333 (2d Cir. 1987)).*

*7. Id. at *11 (quoting Apple v. Jewish Hosp. & Med. Ctr., 829 F.2d 326 at 334).*

*8. Id. at *15 (citing, inter alia, Metropolitan Opera Ass'n v. Local 100 Hotel Emps. Int'l Union, 332 F. Supp. 2d 667, 674-76 (S.D.N.Y. 2004) (Preska, C. J.) (Judge's discussion at CLE presentation of specific discovery failures set out in published opinion in matter pending before her not grounds for recusal)).*

*9. Id. at 18 (quoting Leja v. Schmidt Mfg., 2010 WL 2571850, at *2 (D.N.J. June 22, 2010)).*

10. Id. at 19 (distinguishing Pfizer v. Kelly (In re School Asbestos Litig.), 977 F.2d 764, 782 (Judge attended conference sponsored by pro-plaintiff group largely supported by court-approved funds where same experts as would appear at trial gave presentations)).

11. Id. at 20 (distinguishing Aguinda v. Texaco, 241 F.3d 194, 206 (2d Cir. 2001) ("accepting something of value from an organization whose existence is arguably dependent on a party…might well cause a reasonable observer to lift the proverbial eyebrow.")).

12. 510 U.S. 540 (1994). See also Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 (2d Cir. 2009).