

MARCH 5, 2012

## ***Da Silva Moore v. Publicis Groupe* Represents 1<sup>st</sup> Court Approval of Computer-Assisted Coding for eDiscovery Purposes**

The long-anticipated order and opinion from the Southern District of New York gender discrimination case *Da Silva Moore v. Publicis Groupe* represents the first court approval of the usage of computer-assisted (or predictive) coding for eDiscovery purposes. Magistrate Judge Andrew Peck concluded that the new technology, although not appropriate for all cases, should be considered as a potential eDiscovery tool in matters involving large volumes of data. He further noted that attorneys “no longer have to worry about being the ‘first’ or ‘guinea pig’ for judicial acceptance of computer-assisted review.”

The decision is likely to spur the continued dialogue sprouting up in courts throughout the country as to the best way in which the parties should search for relevant documents for production. Traditionally, parties have used the manual review of potentially relevant documents by attorneys and, increasingly, through the use of “keyword” search terms. Computer-assisted review leverages algorithms that search for patterns within the data based on input from lawyers as to the type of documents that the lawyers determine are relevant.

In endorsing the use of computer-assisted review, Magistrate Judge Peck canvassed the current literature and best practice guidance and noted several studies that question the efficacy of such searches, referring to the process in which parties guess the appropriate keywords as a game of “Go Fish.” Magistrate Judge Peck also noted the growing recognition in the literature that supports computer-assisted review as a viable alternative review and production process that offers the potential of cost-effectiveness for large scale document reviews.

Magistrate Judge Peck also addressed several concerns raised by plaintiffs’ criticism of the approach. First, he took on the argument that the producing party would be unable to certify under Fed. R. Civ. P. 26(g)(1)(A) that the production was “complete” because there would not be a human lawyer looking at every document. After observing that it would be practically impossible for any lawyer to “certify” the completeness of production involving millions of documents, Peck noted that certification under Fed. R. Civ. P. 26(g)(1)(A) only applied to disclosures not to the production of documents under Rule 34. Peck also noted that the operative rule is actually Rule 26(g)(1)(B), which does not require a certification of completeness and, equally important, specifically incorporates the FRCP 26(b)(2)(C) proportionality principle.

Second, Magistrate Judge Peck addressed the voiced concerns that the technology should only be deployed in discovery if it can meet the evidentiary standard of Fed. R. Evid. 702 and the associated *Daubert* framework. Peck stated that the instant discovery context was far different from trial



admissibility context of *Daubert* and that parties should not conflate the two. This is very important to allow for the application, in discovery, of processes, methodologies, and technologies to defensibly meet review and production requirements without having to defend the scientific reliability as if the process was on trial. That said, Magistrate Judge Peck recognized that if there was an error or problem with the computer-assistant discovery process that the producing party bore the risk.

Finally, it is also worth noting that the procedural context of the case helped influence the result. In particular, Magistrate Judge Peck highlighted the high level of transparency offered by the defendant in its production efforts. He also noted that the parties had essentially agreed upon the use of computer-assisted review, which was far different from one where one or more parties were vehemently opposed to the concepts involved.

Regardless of the resolution of the issues in the instant case, there can be no doubt that the issues raised in *Da Silva Moore* will likely be raised in cases across the country for years to come until there are more settled expectations as to the application of law and technology to the area of electronic discovery.

A full copy of the order can be found at

[http://pdfserver.amlaw.com/legaltechnology/DaSilva Moore 11 civ 1279 Opinion 20120224.pdf](http://pdfserver.amlaw.com/legaltechnology/DaSilva_Moore_11_civ_1279_Opinion_20120224.pdf)

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