UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MONIQUE DA SILVA MOORE, MARYELLEN O'DONOHUE, LAURIE MAYERS, HEATHER PIERCE, and KATHERINE WILKINSON on behalf of themselves and all others similarly situated, PLAINTIFFS, v. PUBLICIS GROUPE SA and MSLGROUP, DEFENDANTS.	Civ No. 11-CV-1279 (ALC) (AJP)

BRIEF AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR RECUSAL OR DISQUALIFICATION

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IDENTITY AND INTEREST OF AMICUS CURIAE

I, Richard E. Flamm, am an attorney at law, duly licensed to practice before the state courts of California, as well as many federal courts, including the Southern District of New York. I have been a practicing attorney for three decades. I have had my own practice since 1995, in which I focus exclusively on matters of judicial and legal ethics.

I have frequently been asked to testify as an expert witness regarding such matters. Often this testimony is by way of affidavit, but I have also been qualified to testify as an expert in court. In December of 2009 I was invited to, and did testify before a subcommittee of the House Judiciary Committee regarding the law on judicial disqualification. I have also drafted a number of amicus briefs in conjunction with disqualification proceedings. I have taught the subject of Professional Responsibility as an Adjunct Professor at both the University of California at Berkeley (Boalt Hall) and Golden Gate University in San Francisco. In addition, I have frequently lectured on the subjects of recusal and disqualification, both at private law firm seminars and at public functions throughout the United States.

I am the author of three treatises, all of which relate to the subjects of recusal and disqualification. My first treatise, *Judicial Disqualification: Recusal and Disqualification of Judges* – originally published by Little, Brown & Company of Boston in 1996, and now in its Second Edition – has been relied on by a host of federal courts, as well as the highest courts of many states. *See, e.g., Dale v. Kolb*, 2010 Ala. LEXIS 208, *14 (Ala. 2010); *Wash. Mut. Fin. Group, LLC v. Blackmon*, 925 So. 2d 780, 786 (Miss. 2004); *Whitacre Inv. Co. v. State*, 113 Nev. 1101, 1116 at n.6 (Nev. 1997), Springer, J. (referring to the undersigned as the nation's "leading authority on judicial disqualification"). My second treatise, *Lawyer Disqualification: Conflicts of Interest and Other Bases* (Banks & Jordan Law Publishing Co.), was published in 2003. I

have also authored a host of scholarly articles on judicial and lawyer disqualification. These have appeared in law reviews and legal periodicals throughout the nation.

From 2000 until 2002, I served as Chair of the San Francisco Bar Association's Legal Ethics Committee. I have also served as a member of the Advisory Council for the American Bar Association's Commission on Evaluation of Rules of Professional Conduct ("Ethics 2000"), as Chair of Alameda County Bar Association's Ethics and Professionalism Committee, and as Vice-Chair of San Francisco Bar Association's Legal Ethics Committee.

Plaintiffs' counsel informed me that they filed a Motion to Disqualify Magistrate Judge Andrew Peck ("Judge Peck") from further participating in this matter, and asked whether I would be willing to review that motion and provide this Honorable Court with an Amicus Brief discussing my opinion as to the applicable recusal standard. After reviewing plaintiff's motion ("MPA") and defendant's opposition ("Oppo.") thereto, I agreed to do so. This brief is authored entirely by me.

In order to be in a position to draft this brief, I have reviewed several documents. These include: (1) Judge Peck's "*Search, Forward*" article dated October 1, 2011; (2) Plaintiff's Rule 72(a) Objection to Judge Peck's 2/8/12 Discovery Rulings, Defendant MSL Group's Opposition to that Objection, and Plaintiff's Reply thereto; (3) Plaintiffs' counsel's 2/20/12 Letter to Judge Peck; (4) Judge Peck's 2/24/12 Order Approving of Predictive Coding; and (5) Judge Peck's 4/2/12 Order on Recusal. I also reviewed transcripts of Hearings that were conducted by Judge Peck on December 2, 2011, February 8, 2012 and April 25, 2012.

After reviewing the foregoing documents two things became clear to me. First, while defendants characterize plaintiffs' challenge to Judge Peck as a claim that he is actually biased in this matter – and while Judge Peck has indicated that he views himself to be the victim of an

"attack" on his "integrity" – plaintiffs have neither accused Judge Peck of actually being biased in this matter, nor are required to do so in order to show that he should be disqualified from presiding over it. Plaintiffs' only burden is to show that a reasonable person *might* question the ability of Judge Peck's ability to be completely detached and impartial in this matter.

Second, while the comments and rulings a federal judge makes in the ordinary course of presiding over a matter do not usually present a basis upon which a reasonable person might question his ability to be impartial, they can do so in an extreme case, or where the moving party shows that the remarks and/or rulings flowed from an extrajudicial source. In this case, my initial predisposition was to assume, as defendants have, that whatever comments Judge Peck may have made were of the "garden variety" kind that could be attributed to such factors as justifiable "irritation" with counsel. But, after reviewing multiple transcripts and other documents, I am of the opinion that the judge's comments and conduct were sufficiently extreme that a reasonable person not only might, but would be very likely to question the ability of Judge Peck to be impartial in continuing to preside over this matter. This is so, *a fortiori*, because at least some of the comments would appear to have had their genesis in an extrajudicial source.

THE RELEVANT LEGAL STANDARD

The parties' briefs would appear to evince some confusion as to what the applicable disqualification standard is. As I will discuss, while plaintiffs say that they only need to show that a reasonable person might question his ability to be impartial, defendants seem to suggest that nothing short of a showing of pervasive bias on Judge Peck's part would warrant disqualifying him. The Court may find it helpful, therefore, for me to provide a brief background as to how the current federal judicial disqualification framework came to be.

Pursuant to the Roman Code of Justinian, a party who believed that a judge was "under

suspicion" was permitted to "recuse" that judge – so long as he did so prior to the time issue was joined. This expansive power to effect a judge's "recusal" formed the basis for the broad disqualification statutes that generally prevail in civil law countries even today.

The civil law "recusal" standard did not find favor in England. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820 (1986). Blackstone, for one, decided that a judge was not subject to disqualification for perceived bias, but only for pecuniary interest in a cause. 3 Blackstone, *Commentaries* 361 ("the law will not suppose the possibility of bias or favor in a judge, who is sworn to administer impartial justice, and whose authority greatly depends upon that presumption"). *Cf. Liteky v. U.S.*, 114 S. Ct. 1147, 1151 (1994) ("[r]equired judicial recusal for bias did not exist in England at the time of Blackstone"). In pre-revolutionary America, as in England, the only accepted ground for disqualifying a judge was pecuniary interest in a pending cause; and, for years following independence, American law continued to admit of very few grounds for judicial disqualification. *Idaho v. Freeman*, 507 F. Supp. 706 (D. Idaho 1981).

In its earliest incarnation, the federal judicial disqualification statute did not prescribe judicial disqualification even in cases where a judge not only appeared to be, but actually was biased in the cause. In fact, the initial (1792) version of the first federal judicial disqualification statute authorized disqualification only when a judge was "concerned in interest," had "acted in the cause," or had been "of counsel" in it. Act of May 8, 1792, ch. 36, §11, 1 Stat. 278. However, Congress subsequently amended that statute on multiple occasions, enlarging the grounds for seeking judicial disqualification almost every time. By 1911, judicial bias had been added as an acceptable ground for seeking a judge's disqualification.

In the early 1970's, Justice Lewis F. Powell Jr. – who was then President of the American Bar Association – proposed that a new Judicial Code of Conduct be drafted, and a special ABA

committee was appointed for this purpose. *See Margoles v. Johns,* 660 F.2d 291, 299 n.1 (7th Cir. 1981) (per curiam), *cert. denied*, 455 U.S. 909. The product of this effort, the ABA Code of Judicial Conduct (1972), mandated (among other things) that a judge recuse not only when he was actually biased in a matter, but whenever his impartiality could "reasonably be questioned." *See U.S. v. Haldeman*, 559 F.2d 31, 130 n.284 (D.C. Cir. 1976), *cert. denied.*

The ethical imperatives enumerated in the Code were much more stringent than those that had been prescribed in the statutory standard that pre-existed it. Therefore, following the Code's adoption, and prior to the passage of the 1974 amendments to 28 U.S.C. § 455, federal judges who were called upon to decide questions of judicial disqualification were obliged to choose between inconsistent legal and ethical imperatives. In 1973, the House Judiciary Committee determined that this situation placed judges on the "horns of a dilemma." Congress responded by amending § 455 to the point of virtual repeal. *Durhan v. Neopolitan*, 875 F.2d 91, 97 (7th Cir. 1989). The primary purpose of these amendments was to enact a comprehensive law that would promote confidence in the judiciary by eliminating even a possible appearance of impropriety. *Liljeberg v. Health Servs. Acq'n Corp.*, 486 U.S. 847, 860 (1988).

There are, at present, two separate federal judicial disqualification schemes, 28 U.S.C. § 144 and § 455. Section § 144 requires parties who move to disqualify a judge in accordance with its provisions to show that the judge is actually biased in the matter: "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him, or in favor of any adverse party, such judge shall proceed no further therein…" 28 U.S.C. § 455(b)(1) is also an "actual bias" provision. It provides that "a judge should disqualify himself in any proceeding in which he has 'a personal bias or prejudice concerning a party'…"

Section 455(a) contains no analogous requirement. Pursuant to that statute, any United States justice, judge, or magistrate not only may but "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," regardless of whether he is actually biased or not. In fact, because the purpose of § 455(a) is to enhance public confidence in the judicial system, a federal judge is expected to disqualify himself, in accordance with that statute, even if he believes that a reasonable person would probably not question the judge's ability to be impartial in presiding over a matter, as long as there is a possibility that he "might."

In enacting the 1974 amendments to § 455 Congress recognized that, in spite of the considerable precautions most judges take to avoid being placed in circumstances where reasonable people might question their impartiality, there are times when such situations occur. Therefore, when circumstances arise that suggest to a party that a judge may not be completely dispassionate and impartial in presiding over a matter, litigants have the right to seek that judge's disqualification. *In re Bernard*, 31 F.3d 842, 846 n.8 (9th Cir. 1994), *cert. denied,* 115 S. Ct. 1695 (1995) (parties and counsel "are entitled to question the impartiality of [judges]"). In fact, in appropriate circumstances an attorney may not only have the right, but the duty to seek judicial disqualification. *Fong v. Am. Air., Inc.*, 431 F. Supp. 1334, 1340 (N.D. Cal. 1977).

Plaintiffs have not sought disqualification under § 144; nor is their motion based on a claimed violation of § 455(b)(1). On the contrary, plaintiffs' motion was based exclusively on § 455(a). Yet, defendants seem to suggest not only that plaintiffs have accused Judge Peck of actual bias, but that they are required to show that he actually is biased in this matter in order to prevail on their motion. *See* Oppo. p.5 ("[Judge Peck's] decision adopting it cannot be assailed as reflecting bias against Plaintiffs"); p.13 ("[a]s additional muck to demonstrate purported bias"); p.14 ("None of these comments evidence bias by Judge Peck"); p. 14 ("*Judge Peck's*

Public Comments Cannot Rationally Be Considered Evidence of Bias").

Ordinarily, I would not be overly concerned about how a party characterized the applicable recusal standard. After all, because § 455(a) is intended to be self-enforcing, a judge is duty-bound to recuse whenever a reasonable person might question his ability to be impartial in presiding over a matter, without regard to what the parties might happen to believe. In this case, however, Judge Peck has made comments which reflect that he, too, thinks that plaintiffs have accused him of actual bias. *See* Judge Peck's 4/2/12 Order ("plaintiffs now claim that my public statements approving generally of computer assisted review make me biased"); 4/25/12 Hrg. Tr. p.32:1-4 ("what are you guys doing here? And then you're going to say yes, I'm biased. I'm not biased. I think you guys don't know how to practice law in the Southern District of New York"). Indeed, Judge Peck has gone even further, by accusing plaintiffs of "attacking his integrity." Id. at p.15:24-25. Plaintiffs' counsel attempted to explain to him that this is not the case ("What we've attacked is the appearance of impropriety. That's what we've attacked"), but Judge Peck would have none of it: "Yeah well, you call it what you call it." Id. at P. 16: 1-4.

I recognize that Judge Peck is not happy about having his ability to be impartial called into question – no judge likes to think that a reasonable person might question his ability to be impartial. It is important to remember, however, that a motion to disqualify is "not a trial of the judge's character and should not be treated as such." *In re Union Pac. Res. Co.*, 41 Tex. Sup. Ct. J. 591, 969 S.W.2d 427, 429 (Tex. 1998) (Hecht, J., concurring). Although a jurist may take offense at the filing of a § 455(a) motion, it is imperative for him to understand that the filing of such a motion is neither an accusation of actual bias on his part, nor an "attack" on his "integrity," which he has any "personal interest" in avenging. 4/25/12 Hrg. Tr. p.15:25.

It is well to bear in mind, also, that the standpoint for deciding a § 455(a) motion is not

whether the challenged judge believes himself to be biased. *In re IBM Corp.*, 45 F.3d 641, 644 (2d Cir. 1995) ("based on our knowledge of the Judge's long and distinguished career, we are prepared to assume that [his] subjective disposition is one of impartiality...But the recusal question does not turn on his subjective state of mind"). *Cf. Liteky, supra at* 1158 (Kennedy, J., concurring) (noting that one of the objects of law is judicial impartiality in fact and appearance).

On the contrary, regardless of whether a judge believes (or even is certain) that he is completely impartial and dispassionate in presiding over a matter, it is incumbent upon him to realize that, in determining whether a § 455(a) motion should be granted, the deciding factor – indeed the only cognizable factor – is whether a reasonable person, if aware of all of the relevant facts and circumstances, might have any doubt about that. As plaintiffs point out, moreover, because the statute was designed to insure the appearance as well as the fact of judicial impartiality, in a situation where the Court considers that the question of whether a reasonable person might question his ability to be impartial is a close one, the Court is obliged to err on the side of recusal.

A REASONABLE PERSON MIGHT QUESTION JUDGE PECK'S CONDUCT

On October 1, 2011 an article by Judge Peck called "*Search, Forward*" appeared in Law Technology News. The article was scholarly in tone, and seemed to have been written for the purpose of enlightening attorneys and others in the legal community. Such efforts are generally to be encouraged, not condemned; and I do not think a reasonable person would be at all troubled by anything Judge Peck said in the first few pages of that article.

After discussing more traditional forms of discovery, Judge Peck made the point that "To my knowledge, no reported case (federal or state) has ruled on the use of computer-assisted coding. While anecdotally it appears that some lawyers are using predictive coding technology, it also appears that many lawyers (and their clients) are waiting for a judicial decision approving

of computer-assisted review." He added: "lawyers seem to believe that the judiciary has signed off on keywords, but has not on computer-assisted coding;" and said that lawyers had been reluctant "to be the guinea pig for a decision on predictive coding," as well as concerned (based on a prior decision that had been issued by Judge Facciola) that "they will have to go through a Daubert hearing as to the 'admissibility' of the results of predictive coding."

In and of themselves, these observations would appear to raise no concerns. But, after making these and other points about predictive coding, and why lawyers have been afraid to urge its use in their cases, Judge Peck concluded his article by reaching a conclusion which a reasonable person, if aware of all the relevant facts, would be likely to be find rather disconcerting. He said: "Until there is a judicial opinion approving (or even critiquing) the use of predictive coding, counsel will just have to rely on this article as a sign of judicial approval."

As defendants have rightly pointed out, the fact that a judge has written or spoken about legal issues is rarely a sufficient ground for disqualifying him; in fact, writing scholarly articles and speaking at legal education seminars is behavior which higher courts usually commend. *See, e.g., U.S. v. Pitera*, 5 F.3d 624, 626 (2d Cir. 1993) ("[t]he record discloses that the Judge commendably lectures to a variety of trial practice seminars"). It is unclear to me, however – and I believe that it would be equally unclear to a reasonable person – that a legal article is a proper place for a federal judge to signal advance "judicial approval" of a discovery technique which, in Judge Peck's own words, had not yet been "ruled on" in any "reported case."

For one thing, in a case where a matter has been "ruled on" by a judge, such a ruling is usually not made until all of the parties who have a right to be heard on the matter have been given notice and a fair opportunity to make their case, as well as to muster whatever evidence they can which supports their position. No such procedural safeguards attend "judicial approval"

that is predicated on a judge's private research; or his informal meetings with experts, software vendors and/or others who may have an interest in the subject matter.

Another problem with Judge Peck's comment about "judicial approval," it seems to me, is that this comment in particular – and his article in general – might be taken by a reader to signal that, in the event that a question about the viability of predictive coding was ever to come before him for adjudication, Judge Peck would be very receptive to ruling in favor of the use of that discovery technique, regardless of what the parties argued; or, worse, that he had already made up his mind as to how he would rule in such a case. In fact, an attorney could have read Judge Peck's article as a signal to the defense bar that he would relish the opportunity to be the first to formally approve of the use of predictive coding in an "appropriate" case.

If it was Judge Peck's intention to send such a message, it did not take long for a party to take him up on it. On November 29, 2011 – within weeks after publication of the *Search, Forward* article – Judge Sullivan referred this case to Judge Peck for general pretrial supervision. It was at the very first Hearing before him in this case, just days later on December 2, 2011, that he made his "died and went to heaven" comment to MSLGroup's counsel that set into motion the chain of events that resulted in plaintiffs filing their motion for disqualification.

In case the plaintiffs were unaware of the fact that Judge Peck had "judicially approved" predictive coding as a proper discovery technique in an "appropriate case," he made it clear at the initial Hearing what his position on predictive coding is. He said: "Now, if you want any more advice, for better or for worse on the ESI plan and whether predictive coding should be used, or anything else, if the case – I will say right now, what should not be a surprise, I wrote an article in the October Law Technology News called Search Forward, which says predictive coding should be used in the appropriate case." Id. at 20:9-14.

Judges are afforded wide latitude in conducting matters on their dockets. But the roles that judges may properly play are not without limitation. For one thing, because parties are entitled to a judge who is committed to refraining from the exercise of judgment until both sides have had an adequate opportunity to present their case, a necessary incident of a judge's duty is that he must hear with an open mind all of the evidence that a party wishes to offer and has a right to introduce, and not reach a final conclusion with respect to the matter until he has considered all such evidence. Where a judge violates this precept, by making a determination as to the merits of any material issue before listening to all of the relevant evidence that a party is entitled to present, an impermissible bent of mind may exist which may justify a party's fear that an impartial adjudication will be denied. *See Goldberger v. Goldberger*, 96 Md. App. 313, 624 A.2d 1328, 1330 (1993) (a fair trial is one in which a court hears before it decides, and by which it renders judgment only after receiving all relevant evidence that a party wishes to adduce).

Judge Peck would later say that the parties "consented" to the use of predictive coding in this case; however, the transcript of that Hearing reflects that when he made his "died and went to heaven" comment, he did so in response to defense counsel's characterization of plaintiffs as being "reluctant" to "utilize predictive coding." 12/2/12 Hrg. Tr. at 8:14-17. Shortly thereafter defense counsel underscored this point by saying that "plaintiffs have been resistant to the predictive coding." Id. at p.9:16-17. From a review of the transcript, one is not able to gauge just how "resistant" and "reluctant" plaintiffs were to agree to any form of predictive coding. But, after being advised by Judge Peck that he had "judicially" pre-approved a discovery technique that had not yet been ruled on in any case, counsel may have considered it foolhardy to risk antagonizing Judge Peck by arguing that plaintiffs would not assent to the use of predictive coding under any circumstances; and, of course, they did not do so.

At least as of the December 2, 2011 Hearing, however, it would appear to be clear that plaintiffs were far from totally "on board" with the use of predictive coding. One of plaintiffs' attorneys said: "I think defense counsel, what they said before [over simplified] our stance on predictive coding, we expressed multiple concerns to defense counsel on the way in which they plan to employ predictive coding. We asked for a lot of clarification. We can give you a copy of our last letter." Id. at p.21:8-12.

After Judge Peck alerted the plaintiffs to the article he had written in which he had telegraphed his eagerness to approve the use of predictive coding in an "appropriate case," the parties appear to have attempted to agree on a protocol for utilizing that technique. Perhaps not surprisingly, however, given plaintiffs' admitted reluctance and resistance to the use of predictive coding at all, the parties failed to agree on a mutually acceptable ESI protocol.

At that point Judge Peck could have decided to dispense entirely with an experimental discovery technique which the parties could not agree upon, but he did not do that. Instead, he "resolved" the dispute between the parties by simply adopting the ESI protocol which defendants had proposed. When plaintiffs declined to agree to the use of defendant's protocol, Judge Peck "ordered the parties" to submit a "joint" ESI Protocol "reflecting the Court's rulings." Plaintiffs thereupon submitted a "joint" ESI protocol with MSL Group; but, in the last paragraph of that protocol, they made it clear beyond peradventure that plaintiffs objected to the use of the ESI Protocol Judge Peck had approved in this case. ESI Protocol, p.22. It would appear, in other words, that the only thing "joint" about the protocol was its name.

Not long after the parties reduced Judge Peck's rulings to a "joint" ESI protocol which plaintiffs clearly had no desire to "join," Judge Peck issued the very "judicial decision approving of computer-assisted review" that he had said, in the article he had penned a few months earlier,

"many lawyers and their clients" had been "waiting for." Citing extensively to his own article and to others that had apparently not been cited or relied on by the parties before the Court, Judge Peck issued the first "judicial opinion [which] recognizes that computer-assisted review is an acceptable way to search for relevant ESI in appropriate cases." Doc. #96, p.2.

In reviewing Judge Peck's ground-breaking (and law-making) opinion, a reasonable person would, in my opinion, take note of many things. First, he took the opportunity "to correct the many blogs about this case" which, he said, without benefit of any citation to record evidence, had been "initiated by a press release from plaintiffs' vendor." Id. p.2 n.1. Judge Peck "corrected" those blogs by assuring the reader that "the Court did not order the parties to use predictive coding." Rather, he said, the parties had "agreed to defendants' use of it," and only "had disputes over the scope and implementation." Id.

I have seen no indication that plaintiffs, after expressing the initial "reluctance" and "resistance" which defense counsel was quite clear about, did an about face and willingly and eagerly embraced the use of predictive coding. It appears, rather, that Judge Peck inferred plaintiffs' "agreement to" defendants "use of predictive coding" from the supposed fact that they had indicated to the Court that they were "not opposed" to it. The reality would appear to be, moreover, that plaintiffs' counsel never said they did "not oppose" the use of predictive coding.

It is true that, at the initial Hearing before Judge Peck, plaintiffs' counsel sought to soften the potentially prejudicial impact of defense counsel's assertion that plaintiffs were "reluctant" and "resistant" to employ the discovery technique Judge Peck both favored and "judicially approved" by saying that MSL had "oversimplified plaintiffs' stance" on the subject. It is also true that plaintiffs' litigation consultant seemed to suggest that his company was on board with the use of predictive coding. 1/4/12 Hrg Tr. 51:15-16. In my opinion, however, nothing in any

of the documents I have reviewed would warrant Judge Peck in inferring that plaintiffs and their counsel had voluntarily elected to utilize that technique in this case.

Another thing a reasonable person would note, in reviewing the Judge's Opinion, is that after explaining why he had determined – consistent with the arguments he made in his *Search, Forward* article – that Rule 702 and Daubert are inapplicable to electronic discovery search methods (as well as why all of plaintiffs' objections to the predictive coding protocol the Court had adopted over plaintiffs' objections were all either meritless or premature), Judge Peck devoted nine pages of his "Opinion," not to opining about the merits of any dispute that been brought to him for resolution, but to providing the Bar with "lessons for the future."

The reasonable person would observe that, in this lengthy portion of Judge Peck's Opinion he did not confine himself to discussing the proceeding he had been assigned to preside over; but, instead, appeared to use that Opinion as a vehicle for writing a *de facto* law review article about the merits of Ediscovery review. The reasonable person would note further that, in crafting those aspects of his Opinion that read like a law review article, Judge Peck does not appear to have relied on any evidence that was properly before him, but instead relied on articles in journals that do not appear to have been brought to his attention by any of the parties.

A reasonable person would take a particularly close look at the Conclusion to the Judge Peck's Opinion. In the course of preparing my treatise on *Judicial Disqualification* and two others, I have had occasion to read and analyze more than 10,000 legal decisions, almost all of which contained "conclusions." At least in the case of lower court judges and magistrates, in every decision I can recall the conclusion to the court's opinion consisted of a recitation of the relief that had been ordered (or not ordered) and why. In this case, a reasonable person would observe that not once in Judge Peck's Conclusion did he even mention the parties, the nature of

the dispute he was purportedly opining about, or what the reasons were for his decision. Instead he appeared to make it clear to all and sundry that his Opinion had been written, not for the reasons judicial opinions are normally written, but to serve as a tool for educating the Bar.

Judge Peck wrote: "This Opinion appears to be the first in which a Court has approved of the use of computer-assisted review. That does not mean computer-assisted review must be used in all cases, or that the exact ESI protocol approved here will be appropriate in all future cases that utilize computer-assisted review. Nor does this Opinion endorse any vendor (the Court was very careful not to mention the names of the parties' vendors in the body of this Opinion, although it is revealed in the attached ESI Protocol), nor any particular computer-assisted review tool. *What the Bar should take away from this Opinion* is that computer-assisted review is an available tool and should be seriously considered for use in large-data-volume cases where it may save the producing party (or both parties) significant amounts of legal fees in document review. Counsel no longer have to worry about being the 'first' or 'guinea pig' for judicial acceptance of computer-assisted review. As with keywords or any other technological solution to Ediscovery, counsel must design an appropriate process, including use of available technology, with appropriate quality control testing, to review, and produce relevant ESI while adhering to Rule 1 and Rule 26(b)(2)(C) proportionality. Computer-assisted review now can be considered judicially-approved for use in appropriate cases." Id at pp. 25-26 (italics added).

As I have said, judges are generally encouraged to write scholarly articles in order to share their received wisdom with members of the Bar. But I cannot recall reviewing any prior decision by a magistrate or trial court which was written for the purpose of advising attorneys about what "they should take away" from that Opinion. I have also never seen any appeals court decision commending a magistrate or other judge for utilizing an opinion for such a purpose.

It may be that, in offering to provide "judicial approval" of a technique that had not yet been ruled on, and then seemingly jumping at the chance to be the one to give official "approval" to that technique, Judge Peck was acting with the noblest of intentions. He may well believe, for example, that predictive coding is a very valuable discovery technique that should be widely used by counsel; and that the legal system will be much better off when it is.

In my opinion, however, a reasonable person – if aware of the fact that Judge Peck first wrote a legal article that purported to be give "judicial approval" for a discovery technique that had never been ruled on, and then wrote an opinion in which he made the very ruling which he had said that certain counsel and their clients had been "waiting for" – might well wonder why he did that. Specifically, he or she might wonder whether the judge's goal was, as it should be, simply to dispense even-handed justice in the case he had been assigned to preside over; or if he may, perhaps, have had an ulterior motive.

A reasonable person would know that Judge Peck appears to be highly regarded in the Ediscovery community, as one of the nation's judges most knowledgeable about Ediscovery. A reasonable person might wonder whether the actions he has taken in this case – and, specifically, to issue an Opinion which was the first to endorse the use of predictive coding – were, in any way, motivated by a desire to enhance that reputation. A reasonable person would also know that, by virtue of his pre-eminent status in the Ediscovery field, Judge Peck has been asked to participate in many events, at least some of which appear to have been paid for; and which, therefore, many might consider to be "perks." His 2010 Financial Disclosure Statement, for example, reflects that during that year he participated in a conference in Hong Kong. Such a trip, if "comped" by others, would certainly be considered to be a very desirable one.

Not everyone encourages judicial participation in events of this nature. *People v. Lester*,

2002 WL 553844, *2 (N.Y. Just. Ct. 2002) ("Attendance at bar meetings, and CLE programs, both locally and at exotic vacation spots, are the Sodom & Gomorrah of the legal profession. Dinners and seminars are opportunities to meet, network, compare notes and determine whose plight is similar to our own. Some judges are known to 'nod and wink' while others reward their loyalists with assignments and appointments. Our system, from top to bottom, tolerates ex parte communications geared to curry favor with both suspecting and unsuspecting members of the judiciary. Awards from bar associations, free dinners or drinks, a round of golf, a cup of coffee or a free cigarette offered to an accepting jurist, may all be indicia of attempts to influence. Only a fool and no judge is a fool; or a deaf, dumb and blind jurist, and none are all of that, would accept such emoluments and imagine that nothing is expected of them in return or that an imaginary Chinese wall exists between social contacts and judicial opinion").

Still, as defendants have pointed out, judicial participation in such events is not prohibited per se. *In re Aguinda*, 241 F.3d 194, 205 (2d Cir. 2001) ("A holding that an appearance of partiality was created [here would mean] that attendance by a judge at any presentation on a debated issue might lead to recusal, at least where a party or counsel to a party has provided any financial support, no matter how minor or remote. A vast array of educational opportunities for judges would thereby be indiscriminately foreclosed, or recusals would become routine"). I have seen no reason to believe, moreover, that any interest Judge Peck might arguably have in continuing to be invited to speak at expenses-paid events would be sufficient to call into question his ability to be impartial in deciding this case.

A reasonable person might be more concerned, however, about the prospect that Judge Peck's actions in this case may have been motivated, in part, by a different type of pecuniary interest. At the April 25, 2012 Hearing, Judge Peck made a point of remarking on the "low pay

of being a federal judge." Id. at p.28:2. Although the sum that federal judges and even federal magistrates get paid (which, I informed and believe, currently stands at $160,080 per annum) is hardly insignificant, a reasonable person would understand that many attorneys in private practice – especially those with expansive reputations who toil at large law firms like the one Judge Peck used to work at – can often command several times that amount.

Another thing a reasonable person would know is that a United States Magistrate Judge is not an Article III judge; who, by law, enjoys lifetime tenure. On the contrary, Magistrates are Article I judges who lack both tenure and salary protection. *Tech'l Automation Servs. Corp.* v. Liberty Surplus Ins. Corp., 673 F.3d 399 (5th Cir. 2011). A reasonable person might consider, therefore, the possibility that Judge Peck – first in writing his article which gave "judicial approval" to an Ediscovery technique that no party had asked him to opine about, and then in his Opinion in this case which lectured the bar on Ediscovery – might not be acting out of purely altruistic motives, but with an eye on possible future employment in the private sector.

Judges are afforded a presumption of integrity, and I have no reason to suspect that Judge Peck's motivation for writing his *Search, Forward* article or issuing the Opinion he did in this case was anything other than judicial. I suspect, moreover, that neither the District Court nor the Second Circuit would discern any untoward motive in Judge Peck's writings. The reasonable person, however, is not a judge; and, as the Seventh Circuit has noted, "it is essential to hold in mind that these outside observers are less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be." *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990). In my opinion, a reasonable person would at least consider the possibility that Judge Peck's apparent determination to become the first judge to authorize the use of predictive coding may have been motivated, at least in part, by the possibility that being recognized as the person who

blazed the predictive coding trail could enhance his long-term employment prospects.

There is, then, the concern raised by plaintiffs – that Judge Peck's seeming cagerness to be the first judge to embrace predictive coding aligned his interests with those of the defendant in this case. As to this, I am inclined to agree with the plaintiffs. As noted above, at the initial Hearing before Judge Peck defense counsel stated both its client's desire to use predictive coding and plaintiffs' equal and opposite "reluctance" and "resistance" to doing so. Judge Peck thereupon made his "died and went to heaven" comment, and proceeded to advise the parties to consult his *Search, Forward* article to glean his own, favorable pre-determination as to the merits of predictive coding. In so doing, it could well appear to a reasonable person that he had aligned himself with, and become an advocate for, the defendants' position. Perhaps more fundamentally, when Judge Peck later acknowledged at a public event that, even though there had been no motion before him regarding the propriety of using predictive coding, he had signaled to plaintiffs that their only choices were to either acquiesce in utilizing that technique or move for his recusal, he appeared to confirm that he had predetermined an issue that was not properly before him; and, in the process, had aligned himself with the interests of the defendants.

A judge is not an advocate – his role is to rule on matters placed before him, based upon the evidence submitted by the parties and the applicable law. In so doing, he must sit in an impartial posture, guided by a neutral duty to the law and the rights of all of the litigants who appear before him. It has long been recognized, therefore, that while a federal judge may properly play an active role in a proceeding, he ordinarily best serves the administration of justice by remaining detached from the dispute. *Gardiner v. A.H. Robins Co., Inc.*, 747 F.2d 1180 (8th Cir. 1984). Certainly, a judge must not abandon his proper neutral role by needlessly injecting himself into the proceeding in favor of one party or another. *Reserve Mining Co. v.*

Lord, 529 F.2d 181 (8th Cir. 1976) ("in such a case, the public as well as the litigants, may become overawed, frightened and confused"). In a case where a judge does this, legitimate questions about his impartiality in presiding over such a matter may be raised. *See, e.g., U.S. v. Ala.*, 828 F.2d 1532, 1546 (11th Cir. 1987) (per curiam), *cert. denied*, 108 S. Ct. 2857 (1988).

In *In re Antar*, 71 F.3d 97 (3d Cir. 1995) the Third Circuit noted that "[w]hen the district judge announced that his goal in the criminal action was to recover for the investing public the funds which they had lost through the Antars' schemes, he also created the appearance that he had allied himself with the SEC in the civil action." Id. at 102. It would seem, likewise, that when Judge Peck signaled that his goal in this case was to approve the use of predictive coding, he created the appearance that he had aligned himself with the interests of MSLGroup.

Creating such an appearance is plainly improper. *In re U.S. v. Wilensky*, 757 F.2d 594, 598 (3d Cir. 1985) (when a judge joins sides, or appears to have done so, he abandons the greatest virtue of a fair and conscientious judge – the impartiality with which he is charged); *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 166 (3d Cir. 1993) (while concerns about improper judicial advocacy typically arise during jury trials, even in a non-jury trial a judge's participation in a case must never reach the point at which it appears – or is reasonably perceived to appear – that he is aligned in interest with any party). But perhaps more importantly, for purposes of this motion, making comments which appeared to align Judge Peck's personal aims with those of MSLGroup might well cause a reasonable person to question his ability to be wholly detached and impartial in presiding over this case.

A REASONABLE PERSON WOULD BE CONCERNED ABOUT JUDGE PECK'S IN COURT COMMENTS

As I pointed out in my *Judicial Disqualification* treatise, while judges are usually

afforded broad discretion in conducting proceedings, a "judge is expected to do everything that is within his power to ensure that his conduct is not only unbiased, but above reproach. To that end, a judge should endeavor to observe proper decorum; be cautious and circumspect in his conduct and use of language; maintain a calm and impartial demeanor; and generally avoid any action that might suggest bias or favoritism toward any" party. *Judicial Disqualification*, 2d Ed., Ch. 15, para. 1. In fact, Canon 3A(3)of the Code of Judicial Conduct for United States Judges mandates that "[a] judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity." *See also* People v. Snow, 30 Cal.4th 43, 78 (Cal. 2003) (without compromising its neutrality, a judge has the duty and discretion to control the trial, but the court "commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel").

I suspect that, were Judge Peck to review the transcripts of the Hearings that have taken place before him in this case, he would be inclined to acknowledge that his conduct has not always been a model of decorum. For one thing, at the February 8, 2012 Conference, three different female attorneys representing plaintiffs – Ms. Nurhussein and Ms. Bains in person, and Ms. Wipper on the telephone – addressed the Court. Although it appears from reviewing the transcript that each was very respectful to Judge Peck, and attempted to do no more than make points and request rulings, as all litigators are expected and entitled to do, within a matter of minutes each and every one of them was admonished by Judge Peck about "whining."

Early on in the hearing Judge Peck told Ms. Nurhussein to write the opposing side "a letter, and they will respond to it." She attempted to explain that: "[a]ctually, they have not been responding to the majority of our correspondence, which is another reason why..." Id. at p.12: 18-21. Before she could finish the sentence, it would appear, Judge Peck cut her off and

launched into a soliloquy in which he said, *inter alia*: "I've seen many a big case in this court go a lot more smoothly than this. As I say, I cannot speak to what happened before I inherited the case, but I expect cooperation. Stop the whining and stop the sandbagging." P.13: 18-21.

Shortly thereafter Ms. Bains was at the podium. The Court asked: "Do you want the W-2's or not?" P.17: 6-7. She answered by saying: "We do, because we didn't get full and 9 complete payroll." The judge interjected: "Stop. Please. I take judicial notice of the fact that you don't like the defendants. Stop whining and let's talk substance..." Id at 17:8-12.

It was then Ms. Wipper's turn. She said plaintiffs "would object to moving the briefing schedule to an earlier period given the discovery disputes in this case." Id. at p.21:5-6. Judge Peck responded: "That wasn't my question. My question is, how soon can you do it? Democracy ends very quickly here, meaning you don't want to give me a date other than no later than April 1, 2013. I get to pick the date and you get to whine to Judge Carter." Id. at 21:7:11.

In my opinion, the irony of a male judge demeaning, in rapid succession, three different female attorneys who are representing female plaintiffs in a gender discrimination case by advising them to "stop whining" would not escape the attention of a reasonable person – particularly if that reasonable person happened to be female herself. But if these were the only comments Judge Peck made that were lacking in the requisite judicial circumspection, I doubt very much that a reasonable person would question his ability to be impartial in the case.

Unfortunately, these were not the only comments of this nature that he made. By way of example, early in the Conference Ms. Wipper listened to a point Judge Peck made, thanked him, and made a seemingly polite offer. She said: "Thank you, your Honor. If you believe it would be more efficient to have more frequent conferences, obviously we would like that to happen." Judge Peck responded: "Ms. Wipper, have you read my rules?" When she told him that she had,

he said "What does it [sic] say about the frequency of conferences. I am going to embarrass you here, because I really don't think you did read them." Id. at 4:15-22.

Later on, Ms. Wipper attempted to explain why plaintiffs would object to moving the briefing schedule. She said: "Your Honor, there is no guarantee what standard would be applied. That would be up to Judge Carter. Depending on his judgment on the level of discovery." The Court apparently interrupted her to say: "Ms. Wipper, your motion is due two weeks from today. Thank you very much for not participating. I'm also withdrawing your ability to participate telephonically in the future." Id. at 21:5-22:6.

It is unclear from reviewing the cold transcript what, if anything, Ms. Wipper said or did that prompted Judge Peck to take the rather unorthodox step of withdrawing her "ability to participate telephonically in the future." However, had he limited himself to imposing that sanction, a reasonable person probably would not have been overly concerned. Judge Peck did not stop there, however. When Ms. Wipper made a seemingly innocuous request on behalf of the clients she represents – "Your Honor, plaintiffs request that you issue a written order" – the Court responded: "You're very close to getting not only your telephone privileges removed but your pro hac vice removed. You have a written order. It's called the transcript. If you want to object to every single ruling I make, feel free. The rules allow you to do that. Does it make me happy? You figure that out. Would you like to have your pro hac withdrawn or would you like to learn the rules of the Southern District of New York?" Id. at p.22:16-23:1.

In considering this threat by Judge Peck, a reasonable person would know a number of things about pro hac vice admission. He or she would know, first, that while an attorney generally does not have a right to be admitted to practice pro hac vice before a Court in which she is not licensed to practice law, once she has been admitted pro hac vice she is "entitled to the

same notice and opportunity to be heard as are admitted counsel prior to being sanctioned;" and that the fact that she is "strongly suggests that the grounds for revoking pro hac vice status should not diverge significantly from the grounds for disqualifying admitted counsel." *Martens v. Thomann*, 273 F.3d 159, 177 n.11 (2d Cir. 2001).

The next thing a reasonable person would know is that depriving clients of the services of their counsel is generally considered to be a drastic, if not draconian sanction. *Capponi v. Murphy*, 2009 U.S. Dist. LEXIS 83774, 2009 U.S. Dist. LEXIS 83774, at *29 (S.D.N.Y. 2009) ("Because disqualification impinges on a party's right to select counsel...it is considered a drastic remedy"). Such a drastic measure is "generally disfavored and imposed only when absolutely necessary." *See, e.g., Multimedia Patent Trust v. Apple Inc.*, 2011 U.S. Dist. LEXIS 46237, *5 (S.D. Cal. 2011). In fact, with "rare exceptions disqualification has been ordered [in the Second Circuit] only in essentially two kinds of cases: (1) where an attorney's conflict of interests in violation of Canons 5 and 9 of the Code of Professional Responsibility undermines the court's confidence in the vigor of the attorney's representation of his client, or more commonly (2) where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation, for example, in violation of Canons 4 and 9, thus giving his present client an unfair advantage." See *Martens*, supra.

To my knowledge, no court in the United States has ever taken the draconian step of disqualifying an attorney or revoking her pro hac vice admission for her perceived lack of familiarity with the Court's rules – much less for requesting that the Court reduce an oral ruling to writing. A reasonable person would know, in other words, that in a short span of time Judge Peck not only repeatedly demeaned plaintiff's counsel, but threatened them with sanctions that it had neither any logical reason nor any legal basis to impose.

A reasonable person might consider the possibility that the many less than circumspect comments and threats Judge Peck directed towards plaintiffs' counsel at the February 8, 2012 Conference – none of which appear to have been uttered in response to any intentional provocation by counsel – may have been out of character; and, perhaps, attributable to Judge Peck having a bad day. However, when the parties appeared before him again in this case, at an April 25th Hearing, he made even more comments that might cause a reasonable person to call into question his ability to hold the line between the parties "fair and true."

Early in the conference plaintiffs' lead counsel, Steven Wittels, made a seemingly innocuous request. He enquired: "is your Honor amenable to entering an order then that extends the discovery cutoff." Id. at p.5:4-5. Judge Peck responded by asking: "Are you from the New York office or the California office?" When told that Mr. Wittels was from "New York," the Court said: "You seem to be picking up the infection of your colleague in California that you don't seem to know how we practice law in this court." Id. at p.5:11-12.

As before, this particular comment, if taken out of context, might seem to a reasonable person not to import any particular animus towards plaintiffs' counsel. Shortly thereafter, however, when plaintiffs' counsel noted that "Judge Sullivan's order number ten of August 9, 2011 said the motion shall be filed no later than April 1, 2013," the Court responded: "I've yet to see a lawyer who files something before a deadline. But you've done lots that other lawyers don't do. So maybe you will." Id. at p.12: 21-24.

Once again, the transcript does not appear to reflect that Mr. Wittels did or said anything at the Hearing which would warrant Judge Peck's sarcasm. Yet, after making that comment Judge Peck's animus toward plaintiffs' counsel seems only to have grown more intense. At one point, Mr. Wittels tried to explain why counsel had taken action that it had, saying "The reason,

frankly, your Honor is I believe that you were not going to grant the stays, and that we requested. And given the tenor of the case thus far, I didn't want to antagonize you." The Court responded: "I think you're a little late on that Mr. Wittels." Id. at p.14:2-7.

Later on at the same Hearing, when a different attorney from plaintiffs' firm, Ms. Bains, attempted to make a point, the Court accused her of contemning the Court, and threatened monetary sanctions. Id. at 29:10-24. Mr. Wittels thereupon noted, for the record, that Judge Peck appeared to be expressing a bias against plaintiffs. Judge Peck then began screaming at Mr. Wittels. Id. at 30:1-2. We know this to be so, even though transcripts do not reflect tone of voice, because Mr. Wittels had the presence of mind to note this fact for the record. In response, Judge Peck did not deny that he had raised his voice in speaking with Mr. Wittels; rather, he confirmed it: "I am yelling at you because you are showing contempt for the Court." Id. at 9-10.

In their Opposition defendants cited *Rosen v. Sugarman*, 357 F.2d 794, 798 (2d Cir. 1966) – a case which, defendants failed to mention, pre-dated Congress' adoption of § 455(a) – for the proposition that: "[i]t is well-settled…that [a]n occasional display of irritation...does not suffice to show personal bias or prejudice, whether the irritation was justified or not." Oppo. p. 16. The fact is, however, that plaintiffs are neither attempting nor are obliged to "show personal bias" on the Judge Peck's part. What they are required to do – and all they are required to do – is to show that a reasonable person might question his ability to be impartial.

A reasonable person would know, moreover, that what Judge Peck expressed towards plaintiffs' counsel was not an "occasional display of irritation." During the course of consecutive hearings he: (1) screamed at plaintiff's lead counsel; (2) rebuked three female attorneys from his firm for "whining;" (3) attempted to "embarrass" one of his partners by attempting to show that she had not read his rules, only to suggest that he believed she was lying

when she said that she had; (4) revoked the telephone privileges of the same partner, before threatening to disqualify her from representing the plaintiffs without due process of law, seemingly for asking him a question that he did not like; and (5) threatened to hold another firm attorney in contempt. The judge also – not once, but on multiple occasions – accused various attorneys from plaintiffs firm of not "knowing how to practice law." During the course of his relative brief tenure as the pre-trial magistrate, in other words, Judge Peck has made a series of comments which would seem to fall well below the minimum level of "caution" and "circumspection" envisioned by the drafters of the Code of Judicial Conduct.

Such comments would, in my view, have been much better left unsaid. But more significantly, for purposes of the pending motion, it is my opinion that the comments and threats Judge Peck directed were both numerous enough and extreme enough to prompt a reasonable, objective observer – independent of any other criteria – to question whether he is capable of continuing to preside over this case with the requisite degree of impartiality.

This Court has noted that "a judge's actions, without indication of partiality from an extrajudicial source, are ordinarily not sufficient to support recusal." *Rudaj v. United States*, 2011 U.S. Dist. LEXIS 67745, *6 (S.D.N.Y. 2011). Therefore, in considering the negative comments Judge Peck made to plaintiffs' counsel, a reasonable person would consider not only their frequency and intensity – and the tone in which they were said – but whether there might possibly have been an extrajudicial source for Judge Peck's comments and conduct.

In the run-of-the-mill § 455(a) case, there is no reason to believe that any of the judge's comments or conduct sprang from an other than judicial source; it is typically assumed, therefore, that whatever the judge did or said was a byproduct of what he learned about the parties and/or their counsel during the course of presiding over their matter. In this case a

reasonable person would consider that, from the outset, Judge Peck appears to have expressed a predisposition towards using this case as the "guinea pig" for advancing the ball on a particular Ediscovery technique which he believes should be give a judicial imprimatur. A reasonable person would wonder, therefore, whether the animus Judge Peck directed towards plaintiffs' counsel stemmed purely from his dealings with counsel in this case – virtually all of whom appear to have been respectful of Judge Peck at all times – or if Judge Peck might possibly have felt disdain for anyone whom he perceived to be standing in the way of the adoption and affirmance of his ground-breaking Opinion on predictive coding.

A REASONABLE PERSON WOULD BE CONCERNED ABOUT JUDGE PECK'S PUBLIC COMMENTS

Plaintiffs have expressed concern about the fact that Judge Peck, while presiding over this case, and without making any disclosure to the plaintiffs, appeared on pro-predictive coding panels with a partner from defendant's firm, Ralph Losey, and attended other speaking events in which Judge Peck espoused pro-predictive coding positions. Plaintiffs have noted, further, that Judge Peck not merely attended events which dealt with predictive coding during the pendency of this proceeding, but spoke at them, and repeatedly adverted to this very case.

As Plaintiffs pointed out, after they expressed their "reluctance" and "resistance" to acquiesce in predictive coding, but before Judge Peck issued his Opinion indicating that they had "agreed to defendants' use of it, Judge Peck appeared on a public panel hosted by a predictive coding vendor. According to plaintiffs, during that appearance he "admitted that [his 'died and went to heaven' comment] may have served to compel Plaintiffs' partial acquiescence to his and Defendants' position on the key issue before him; and openly remarked about recusal – agreeing there was 'no doubt' it was Plaintiffs' only alternative to capitulation." MPA p.2.

Plaintiffs also noted that "on January 31, 2012, Judge Peck participated in" a trade show, during which he again "espouse[d] the virtues of predictive coding," and noted "that he 'couldn't resist' telling Defendants they must have "thought they **died and went to Heaven**"' when he got the case." Id. Notably, according to plaintiffs, at the show Judge Peck "moderated a panel discussion in which Mr. Losey highlighted what he perceived to be the substantial advantages of predictive coding." Id. at pp. 2-3. A reasonable person would be very concerned about this allegation, if true, not only because of the fact that Judge Peck was simultaneously presiding over this case and attending public events endorsing positions on matters in issue before him, but because Mr. Losey happens to be a partner with defendant's law firm.

As mentioned above, federal judges are ordinarily encouraged to – and certainly not discouraged – from attending educational seminars. But Circuit Court approval of judicial attendance at these types of events typically does not necessarily extend to that situation where the presentation relates "to legal issues material to the disposition of a claim or defense in an action before a judge who attended the presentation." *See In re Aguinda*, supra at 204. Concerns about such appearances are further heightened in a case like this, where prompt disclosure of the judge's participation in those presentations has not been made.

I do not believe – and I do not think an objective observer would believe – that it is improper for Judge Peck to attend, or even participate in, any type of legal education seminar. I would assume, however, that the Second Circuit would agree with the Third that a judge's participation in such an event is only permissible when there is no reason for him to believe that his attendance or participation will predispose him to a particular view of a pending case. *See In re Sch. Asbestos Litig.*, 977 F.2d 764, 781-782 (3d Cir. 1992) (disqualifying a judge who attended a predominantly pro-plaintiff conference regarding the hazards of asbestos from

presiding over a major asbestos action). Indeed, the Second Circuit has itself observed that, in situations where a presentation concerns issues material to the disposition of litigation, "the recusal calculus will differ;" and that, in certain circumstances judicial participation in these types of activities may be "ill-advised." *In re Aguinda*, supra at 202-206.

The fact is, moreover, that, Judge Peck did not just attend and speak at these types of events; he commented publicly on this pending case. As a general rule, "public comment" by a sitting judge is expressly prohibited by Canon 3A(6) of the Code of Judicial Conduct ("A judge should not make public comment on the merits of a matter pending or impending in any court"). While the federal Canon contains an exception for public statements made in the course of "scholarly presentations made for purposes of legal education," it is not altogether clear that all of the comments Judge Peck has made about this case were made in the context of such a presentation, or for such a purpose. In any event, public commentary about a case pending before a judge is something judges have frequently been admonished to avoid. *See, e.g., U.S. v. Haldeman*, 559 F.2d 31, 134 (D.C. Cir. 1976) (public comment bearing specifically on pending or impending litigation is an activity that judges should scrupulously avoid), *cert. denied, Ehrlichman v. U.S. and Mitchell* v. U.S., 431 U.S. 933 (1977).

Even if it would not constitute an ethical violation for a judge to make comments about a matter that is pending before him, judges are well-advised to tread carefully, because the comments a judge makes about a pending matter in a non-judicial forum may cause a reasonable person to question the ability of the judge to preside over that matter with the requisite degree of neutrality. *See Hathcock v. Navistar Intl. Transp. Corp.*, 53 F.3d 36, 41 (4th Cir. 1995) (holding that a judge's blunt remarks at an auto torts seminar – while a jury trial on the issue of damages in a product liability case was then pending in his court – reflected a predisposition against the

defendant). *See also U.S. v. Microsoft Corp.*, 253 F.3d 34, 114-115 (D.C. Cir. 2001) (noting that "[s]ome courts of appeals have taken a hard line on public comments, finding violations of § 455(a) for judicial commentary on pending cases that seems mild in comparison to what we are confronting...[Here], we believe the line has been crossed. The public comments were not only improper, but also would lead a reasonable, informed observer to question the District Judge's impartiality," and opining that the judge's remarks might not have given rise to a violation of the Canons or § 455(a) "had he uttered them from the bench...But then Microsoft would have had an opportunity to object, perhaps even to persuade, and the Judge would have made a record for review on appeal. It is an altogether different matter when the statements are made outside the courtroom, in private meetings unknown to the parties"); *U.S. v. Fla. Water Mgmt. Dist.*, 290 F. Supp.2d 1356, 1360-1361 (S.D. Fla. 2003) (finding that statements attributed to a judge in the press would cause a disinterested observer to entertain doubts about the judge's impartiality).

THE CUMULATIVE EFFECT OF JUDGE PECK'S COMMENTS AND CONDUCT

In the great majority of reported cases in which parties have sought to disqualify a judge under § 455(a), the parties have drawn the court's attention to one, or at most two, reasons why a reasonable person might question the judge's ability to be impartial. The documents I have reviewed reflect that there are at least four separate bases which could independently warrant a reasonable person in questioning Judge Peck's ability to be impartial in this case.

First, Judge Peck made a comment at the initial Hearing in this matter which could be taken to suggest that he was aligned in interest with the defendants in advocating for the use of predictive coding. Second, he engaged in conduct that a reasonable person might take to suggest that, in issuing his Opinion in this case, he was motivated more by a desire to give a judicial imprimatur to predictive coding than to dispense justice to the parties. Third, he directed

numerous hostile and/or sarcastic comments to plaintiffs' counsel, many of which were vituperative in tone, and laced with implicit or explicit threats of possible sanctions. Finally, he participated in public events – none of which were disclosed in advance to the plaintiffs – in which he made improper or at least intemperate comments about this very case.

In my opinion, a reasonable person would be justified in considering that any one of these things, standing alone would call into question Judge Peck's ability to be completely dispassionate and impartial in the conduct of this case. It should be noted, however, that even if none of them, in and of themselves, would warrant a reasonable person in questioning Judge Peck's ability to be impartial, there are a great many situations known to the law in which facts, though deemed to be insignificant separately, have been found to be compelling in combination. *See, e.g., Obert v. Repub.* W. Ins. Co., 398 F.3d 138, 145 (1st Cir. 2005) ("sometimes a multiplicity of small grounds will persuade even though each alone is weak or insufficient").

With specific reference to motions for disqualification, a number of courts have indicated that there are times when the whole may be greater than the sum of the parts. *See, e.g., In re Martinez-Catala*, 129 F.3d 213, 221 (1st Cir. 1998) ("The cumulative effect of a judge's individual actions, comments and past associations could raise some question...even though none (taken alone) would require recusal"); *Onishea v. Hopper*, 126 F.3d 1323, 1342 (11th Cir. 1997) (appellants' other grounds for recusal, although alone insufficient to mandate recusal, added to the totality of the circumstances and "increased the appearance of injustice"); *Dodson v. Singing River Hosp. Sys.*, 839 So. 2d 530, 534 (Miss. 2003) (finding that the "totality of circumstances" inquiry was appropriate in the case; and that, "under a totality of the circumstances analysis a reasonable person might have reasonable doubts as to [the judge]'s impartiality"); *Chillingworth v. State*, 846 So. 2d 674, 676 (Fla. App. 2003) ("It is not an isolated incident that warranted

disqualification [but] a combination of two events"); *Com. v. Benchoff*, 700 A. 1289, 1295 (Pa. Super. 1997) (although "each of appellant's allegations do not individually amount to an appearance of impropriety…the cumulative effect of the uncontested claims, the public comment on the case and the comments in his letter…amount to an appearance of impropriety").

CONCLUSION

In my opinion this is one of those cases where, even if a reasonable person were to conclude that nothing Judge Peck did or said would be enough to warrant recusal if considered separately, he or she would be very likely to conclude that, given the totality of the circumstances, his ability to continue to preside impartiality over this matter is in serious doubt.

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