

Qualcomm Court Sets Baseline for Electronic Discovery Programs for In-House and Retained Counsel

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The U.S. District Court for the Southern District of California's latest opinion in *Qualcomm Inc. v. Broadcom Corp.*, Case No. 05cv1958 (BLM) (S.D. Cal.), issued on January 7, 2008, serves as a warning to all corporate litigants regarding electronically stored documents and emails. This warning is especially applicable for in-house counsel, of which several were engulfed in this quagmire. The court ordered Qualcomm to pay all of Broadcom's litigation costs — around \$8.5 million — for “intentionally with[holding] tens of thousands of decisive documents from its opponent in an effort to win this case and gain a strategic business advantage over Broadcom.” In addition, the attorneys most heavily involved were referred to the California State Bar for violations of their ethical duties.

The underlying case was a patent infringement suit filed by Qualcomm, alleging that Broadcom was infringing two of Qualcomm's patents on video-compression

technology. In defense, one of Broadcom's arguments was that Qualcomm had an obligation to disclose its technology to a committee that was setting industry standards for the technology. Qualcomm repeatedly represented that this obligation did not exist. Broadcom succeeded at trial and subsequently the court became aware that Qualcomm had failed to produce an abundance of documents that were responsive to Broadcom's discovery requests. The court found that Qualcomm opposed any attempts to remedy its deficient production and to investigate the surrounding issues.

The district court was particularly concerned with upholding the good faith standard necessitated by the discovery system

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and emphasized that for the system to work in a time when documents are stored electronically, “attorneys and clients must work together to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents.”

Emphasizing that it is the responsibility of attorneys (both in-house counsel and retained counsel) to make certain that their clients carry out an effective and comprehensive document search, the court noted that “[p]roducing 1.2 million pages of marginally relevant documents while hiding 46,000 critically important ones does not constitute good faith and does not satisfy either the client’s or attorney’s discovery obligations.” The court suggested that in-house counsel have a duty to confirm the veracity of any signed papers produced during discovery.

The district court’s solution was to order Qualcomm to implement a “comprehensive Case Review and Enforcement of Discovery Obligations (‘CREDO’) program” which, at a minimum, includes:

- (1) identifying the factors that contributed to the discovery violation . . . , (2) creating and evaluating proposals, procedures, and processes

that will correct the deficiencies identified in subsection (1), (3) developing and finalizing a comprehensive protocol that will prevent future discovery violations . . . , (4) applying the protocol that was developed in subsection (3) to other factual situations, such as when the client does not have corporate counsel, when the client has a single in-house lawyer, when the client has a large legal staff, and when there are two law firms representing one client, (5) identifying and evaluating data tracking systems, software, or procedures that corporations could implement to better enable inside and outside counsel to identify potential sources of discoverable documents . . . , and (6) any other information or suggestions that will help prevent discovery violations.

The court ordered that the attorneys submit a proposed protocol for the court to evaluate and revise, if necessary. While the district court’s immediate goal was to remedy this specific instance of misconduct, the court hoped that its opinion would be a “road map” for electronic discovery and would “assist counsel and corporate clients in complying with their ethical and discovery obligations and conducting the requisite ‘reasonable inquiry.’”

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One Year Subscription ■ 11 Issues ■ \$451.00
(ISSN#: 1088-0593)

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