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Litigation
E-Discovery
January 17, 2008

Client Alert

Clients and Attorneys Risk Sanctions for Failing to Comply With Discovery Obligations

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Citing the need to restore “civility, professionalism and ethical conduct” in lawsuits, a federal magistrate judge in California recently referred several attorneys to the state bar for investigation of possible ethical violations after finding that their client withheld emails that the magistrate judge said undercut a key element of their client’s case. The district court judge already had imposed on the client over \$8.5 million in sanctions relating to the same conduct. The case serves as a stark reminder of the need for clients and attorneys to work together during the electronic discovery process to ensure that all relevant evidence is produced.

In *Qualcomm Inc. v. Broadcom Corp.*, No. 05-cv-1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), the jury in the underlying patent dispute had delivered a verdict in the defendant’s favor. A key issue in the case was whether the plaintiff had communicated with a particular organization known as the Joint Video Team or “JVT.” During the trial, the court found that the plaintiff had withheld evidence about its communication with the JVT. In light of this conduct, the court granted the defendant’s motion for sanctions.

46,000 Emails Elude Discovery

The court held that the plaintiff, Qualcomm Inc. (“Qualcomm”), violated discovery rules at all stages of the litigation. At the pre-trial phase, Qualcomm designated two Rule 30(b)(6) witnesses to testify about its communication with the JVT. Despite this designation, Qualcomm purportedly did not search either witness’s computer in response to the defendant’s request for JVT-related documents. The court considered it “incriminating” that a party would designate an employee as a Rule 30(b)(6) witness on a topic and yet fail to search that employee’s electronic records for documents related to that topic.

During trial, the magistrate judge found that a Qualcomm attorney discovered an email on an employee's computer that undermined Qualcomm's position with regard to the JVT. The attorney and the employee then searched the employee's computer and found 21 similar emails, all of which were responsive to the defendant's document requests. The magistrate judge concluded that Qualcomm attorneys incorrectly concluded the emails did not have to be produced to the defendant, Broadcom Corp. ("Broadcom"), and did not change their position regarding the JVT.

Several days later, Broadcom attorneys revealed that they had independently obtained evidence that undermined Qualcomm's position with respect to the JVT. The magistrate judge found that Qualcomm attorneys still chose to continue concealing the existence of the 21 emails and to argue against the admissibility of Broadcom's evidence. Shortly afterward, the employee on whose computer the 21 emails had been found testified. On cross-examination, she revealed the existence of the emails. Qualcomm attorneys produced the emails to Broadcom the same day. At the close of trial, Broadcom attorneys moved for sanctions.

During the post-trial phase, the tally of what were held to be Qualcomm's discovery-related violations continued to mount. Broadcom attorneys made numerous document requests to determine whether the 21 emails were the only responsive emails that Qualcomm withheld. After what the magistrate judge characterized as much delay, Qualcomm conducted additional searches. These searches revealed a staggering 46,000 emails totaling over 300,000 pages that were ostensibly responsive to Broadcom's discovery requests but that Qualcomm had failed to produce.

In her January 7th decision, the federal magistrate judge chastised both Qualcomm and Qualcomm's attorneys. She reasoned that Qualcomm's objective behind withholding the documents was to win the case, and Qualcomm could not have attained this objective but for its attorneys' willful indifference or assistance. In the court's words, Qualcomm's attorneys must have "suspected there was additional evidence or information [that had not been produced] but chose to ignore the evidence and warning signs and accept [the plaintiff's] incredible assertions regarding the adequacy of the document search and witness investigation." The magistrate judge noted, however, that Qualcomm's refusal to waive the attorney-client privilege impeded the court from assessing whether the attorneys' conduct was intentional.

The Consequences: Monetary Sanctions, Ethical Investigation and Electronic Discovery Protocol

The magistrate judge referred six of Qualcomm's attorneys to the California State Bar for ethical investigation. The sanctioned attorneys ranged from the associate who had discovered the 21 emails and those who oversaw the document production process, to the lead trial attorney and other members of the trial team, none of whom participated in the discovery process. According to the magistrate judge, the sanctioned trial attorneys had failed to conduct a reasonable inquiry into the sufficiency of the client's document production.

The court instructed Qualcomm and the sanctioned attorneys to participate in a Case Review and Enforcement of Discovery Obligations (CREDO) program. The program requires Qualcomm and its attorneys to identify the failures in the discovery process in the Broadcom litigation and to develop a comprehensive electronic discovery protocol pursuant to which corporate clients could manage the discovery process in the future.

As a monetary sanction, the court ordered Qualcomm to pay \$8,568,633.24 to Broadcom for attorneys' fees and costs. Because Qualcomm had already been ordered by the district court judge to pay such fees and

costs, the magistrate judge ordered that Qualcomm receive credit toward the monetary sanction for any payment made in satisfaction of the prior award to pay fees and costs.

The magistrate judge declined to impose additional fines on Qualcomm, not because they were unwarranted, but because if “the imposition of an \$8.5 million dollar sanction does not change Qualcomm’s conduct, the court doubts that an additional fine would do so.”

The Implications: Discovery in the Electronic Age

The implications of the Qualcomm decision are serious for corporations and their attorneys. While the duty to respond in good faith to discovery requests applies equally to electronic and more traditional forms of discovery, the former presents unique challenges. Previously, in the words of the court, attorneys “physically touch[ed] and read every document within the client’s custody and control.” In the age of electronic discovery, both the volume and the means of storage—from back-up tapes to metadata—mean that attorneys rarely have this opportunity. Clients, in turn, are assumed to know where vast quantities of electronically stored information may be found and how best to search it.

In order to discharge their electronic discovery obligations, corporate clients need to communicate with their attorneys about likely custodians of electronic information and the completeness of discovery responses. Corporations need to ensure that their attorneys are closely supervising the discovery process. Clients should be wary of an attorney who accepts the client’s “unsubstantiated assurances” that document production is complete, because the attorney’s acceptance of those assurances can have severe financial consequences—\$8.5 million worth of consequences—for the client.

Whether the court’s decision will in fact restore “civility, professionalism and ethical conduct” in the courtroom is far from certain. What is certain, however, is that the court’s apparent ire with Qualcomm and its attorneys will, and should, loom large in the minds of corporations facing electronic discovery obligations—as will that \$8.5 million price tag.

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