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PROFESSIONAL CONDUCT

Risk Management and E-Discovery: *Qualcomm* Revisited

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Special to the Legal

Almost three years ago, we wrote about the tension between a lawyer's defense of his own professional conduct and his duties of loyalty and confidentiality to his client. The issue was presented in *Qualcomm Inc. v. Broadcom Corp.*, a California patent infringement case involving cell phone technology.

During trial, the court learned that Qualcomm and its counsel did not produce more than 200,000 pages of relevant electronic documents. As a result, Qualcomm was ordered to pay Broadcom's hefty legal fees ($8.5 million), and the district court judge referred the matter to a magistrate for consideration of further sanctions. The magistrate found that Qualcomm intentionally withheld thousands of documents that had been requested during discovery and that certain of the withheld documents directly contradicted one of Qualcomm's key arguments. In addition, the magistrate sanctioned Qualcomm's attorneys based upon the premise that they failed to conduct a reasonable inquiry into the adequacy of Qualcomm's document production.

Those sanctions were vacated by the district court, and the matter was remanded to the magistrate to provide counsel the opportunity to defend themselves. On April 2, 2010, the magistrate ruled that the attorneys should not be sanctioned, as the record demonstrated that they took significant steps to comply with the original discovery obligations. While the attorneys were vindicated, the court's decision provides important guidance on discovery practices, as well as how to maintain both objectivity and integrity in our relationships with clients.


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First, the magistrate took issue with counsel's failure to personally meet with the Qualcomm custodians whose documents were being collected. In today's technological society, despite the fact that we are constantly connected to one another through electronic media, nothing replaces the face-to-face meeting. Language can be misread out of context in an e-mail, and the ability to see the confusion (or conversely, understanding) on someone's face is completely lost when your interaction is limited to a 13-word text message. Thus, it is critically important to get face time with the client, as it allows for a clear explanation of all the relevant issues.

Second, the court was appalled that there appeared to be no concerted effort by counsel to understand the technical aspects involved in the collection of the client's documents. There was no clear understanding of where the e-mails and other electronic information were stored, nor of any back-up or file transfer protocols. Knowledge of the physical location of the relevant data is a requirement for a thorough search. Without an understanding of the client's information technology systems and services, documents, e-mails and other information is bound to be missed.

The court also took issue with the fact that there appeared to be a breakdown in the chain of command with respect to the discovery; no attorney was ultimately responsible for the supervision of the entire collection. Thorough collection, inspection and production requires clear structure and

methodology; and inherent in such a system is a chain of command in which one attorney is responsible to another for clearly defined tasks. Without accountability, the quality of the work product inevitably declines.

Similarly, the court found that there was a lack of uniform, mutual understanding regarding the client's responsibility for document collection. An overview memo had been prepared, stating that it was outside counsel's responsibility to determine the locations to be searched. However, this memorandum had not been circulated in-house.

When outside counsel requested the files of individuals specifically identified by in-house counsel, the in-house paralegals, ignorant of the memorandum, replied that a search of such files would be duplicative of searches currently being conducted in conjunction with a separate litigation, and therefore such a search was unnecessary. Outside counsel then blindly acquiesced, without independently investigating whether this was correct.

Another issue raised by the court was the lack of follow-up with respect to contradictory evidence. Assumptions were made based upon answers provided by the client, and those answers were accepted without question. As time passes, memories grow hazy, and people tend to fit facts to theories, instead of the other way around. While we always hope and expect that our clients are telling the truth, independent confirmation of key facts should be the norm, not the exception.

Counsel's saving grace came in the form of repeated attempts to establish key facts involved in the matter. For example, one of the issues at play concerned whether a Qualcomm employee had participated or interacted with a specific development team. Though counsel repeatedly inquired, Qualcomm employees categorically denied having such an interaction, despite the fact that one Qualcomm employee had exchanged 118 e-mails with the team. Even though counsel had received the same answer over and over again, they took the extra precaution of bringing in a "fresh set of eyes" to review the matter and determine if there were any inconsistencies with respect to the investigation. These efforts demonstrated that, while counsel may have been disorganized in their approach to discovery and document production, they were not intentionally dishonest.

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While the *Qualcomm* decision provides a good case study for any firm conducting large-scale discovery efforts, the key take-aways apply to productions in even the smallest case. Effective representation of our clients in discovery depends on us asking and getting answers to a slew of important questions: Am I certain that the client understands what I'm saying? Where can I find the information necessary to best represent my client? Where are all of the client's documents and other information that may be relevant to this matter? Are there any holes in my discovery plan? Who is overseeing this matter? Are all parties aware of the chain of command and the responsibilities of each team member? What basic assumptions have I made, and what verification do I have to support them?

These sound like basic questions — and they are. Yet no matter how expert we become at managing discovery, we have to start with a solid foundation: a good plan, well communicated to the client and controlled by a tightly supervised and structured litigation team. We can't eradicate the risks that come with these modern burdens, but we can manage and minimize them. In that way, we serve our clients, and protect ourselves.

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