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FEDERAL E-DISCOVERY

Expert Analysis

Final 'Qualcomm' Opinion May Be Just a One-Time Pass

Much has been written in e-discovery circles about the *Qualcomm Inc. v. Broadcom Corp.* saga and the fate of Qualcomm's outside counsel. Commentators and those who ride the e-discovery lecture circuit have frequently referenced *Qualcomm* as an illustration of e-discovery gone wrong, in which lawyers and their client did not fulfill their e-discovery-related obligations and were subjected to sanctions—and public embarrassment—as a result.

In the most recent (and final) chapter in this saga,¹ however, the same magistrate judge who sanctioned the six outside counsel in 2008 (and had her order vacated by the district court) declined to impose such sanctions again. Even after another blistering critique of the e-discovery conduct of Qualcomm and its lawyers, the judge ruled that sanctions were not warranted either under Federal Rule of Civil Procedure 26(g)(3) or the court's inherent authority.

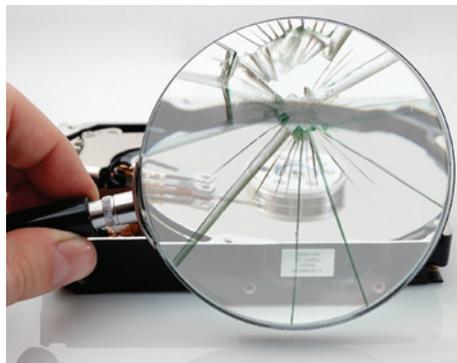
Those who might be tempted to rely on this latest ruling as establishing a standard for sanctions that will hold up in future cases do so at their peril. Rather than read the latest ruling as establishing the line between conduct that is sanctionable and conduct that will be excused, it is perhaps better to read this decision as a results-oriented ruling—one in which the court concluded that the appropriate sanction of "time served" had already been imposed by virtue of the lengthy and very



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public rulings and proceedings over the past several years.

The last chapter in the Qualcomm saga follows from an objection to Magistrate Judge Barbara Major's original sanctions order filed with Judge Rudi M. Brewster of the Southern District of California on behalf of the six sanctioned attorneys (the Qualcomm attorneys). Judge Brewster vacated the sanctions order and permitted the objectors to defend their conduct by applying the self-defense exception to the attorney-client privilege. Judge Brewster wrote that the attorneys had "a due process right to defend themselves" by revealing communications with their client.²

After Judge Brewster issued his order, the Qualcomm attorneys undertook a discovery effort to defend against sanctions. That discovery effort ultimately led to the production of well over 100,000 pages and depositions of Qualcomm's engineers, in-house counsel and one of the sanctioned attorneys.

After reviewing the evidence, Magistrate Judge Major concluded in a decision dated April 2, 2010, that there was a "massive discovery failure result[ing] from significant mistakes, oversights, and miscommunication on the part of both outside counsel and Qualcomm employees."³

While the new discovery revealed "ineffective and problematic interactions between Qualcomm employees and most of the" Qualcomm attorneys, it also showed that the attorneys "made significant efforts to comply with their discovery obligations."⁴ As a result, the court declined to impose sanctions on any of the Qualcomm attorneys.

The court first analyzed the conduct of the Qualcomm outside counsel who signed Qualcomm's discovery responses. The court noted that Federal Rule of Civil Procedure 26 makes clear that an attorney signing discovery responses is certifying that the discovery responses have been made "after a reasonable inquiry."⁵ Magistrate Judge Major reasoned that Qualcomm's discovery responses were made "after a reasonable, although flawed, inquiry and were not without substantial justification."⁶

The court then analyzed whether the Qualcomm attorneys should be sanctioned under the court's inherent activity. Under controlling Ninth Circuit precedent, the court had discretion to impose sanctions under its

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own power only if the court made a finding of bad faith. See *Qualcomm*, 2010 WL 1336937, at *6.

Applying that standard, the court then determined that the Qualcomm attorneys did not act in bad faith, even when choosing to withhold relevant documents discovered during trial.

The court reached this conclusion even though Magistrate Judge Major identified at least six errors made by the attorneys.

First, in-house lawyers and outside counsel did not meet in person with the appropriate Qualcomm employees at the beginning of the case to “explain the legal issues and discuss appropriate document collection.”⁷

Second, “outside counsel did not obtain sufficient information from any source to understand how Qualcomm’s computer system is organized.”⁸ For example, the Qualcomm attorneys did not know where e-mails were stored, how often and to what location computers were backed up, what type of information was contained in each database and repository, or what records were maintained for litigation.

Third, “no attorney took supervisory responsibility for verifying that the necessary discovery had been conducted...and that the resulting discovery supported the important legal arguments, claims, and defenses being presented to the court.”

Fourth, there was no agreement among the participants to the discovery process as to who had which responsibilities. The court noted that both outside and in-house counsel believed the other was responsible for identifying specific electronic documents to be searched.

Fifth, the court noted an “incredible lack of candor” on the part of the principal Qualcomm employees and noted that some employees lied when they denied any involvement with the creation of the standard at issue in the litigation.⁹

Finally, the court noted that there was inadequate follow-up in response to “contradictory, or potentially contradictory evidence.”¹⁰

The Qualcomm attorneys did not ensure that critical witnesses’ computers were searched, even after evidence was discovered to suggest those witnesses participated in the Joint Video Team (JVT).¹¹

Magistrate Judge Major wrote that the attorneys “did not pursue several discovery

paths that seem obvious” and “should have considered the contents of [] documents and their relevance to the arguments being presented in court and to the adequacy of the discovery process.”¹²

What They Should Have Done

In sum, Qualcomm attorneys were disorganized and failed to undertake any independent effort to locate responsive electronic documents, even after discovering time and again that documents existed contradicting witnesses’ assurances to the contrary.

The court notes what the Qualcomm attorneys should have done: they should have identified computers and databases to search; they should have run obvious and logical search terms through the found data; they should have redoubled their efforts to find documents after identifying unproduced, relevant documents that contradicted witness testimony; they should have organized among themselves and with Qualcomm’s in-house counsel a comprehensive and effective strategy to search any potentially relevant electronic documents.

Those who might be tempted to rely on this latest ruling as establishing a standard for sanctions do so at their peril. It is perhaps better to read the decision as one in which the court concluded that the appropriate sanction of “time served” had already been imposed by virtue of the lengthy and very public rulings and proceedings over the past several years.

Despite finding these failures, the Qualcomm attorneys were not sanctioned. Perhaps the most critical fact in support of Magistrate Judge Major’s decision not to impose sanctions was her finding that Qualcomm employees lied to those outside counsel who were making attempts to determine the nature of Qualcomm’s participation in the JVT. The court appears to believe that efforts were “reasonable,” at least in part, because Qualcomm employees continued to tell the Qualcomm attorneys throughout the litigation that they had no involvement in the JVT at the time that the relevant standard was created.

However, the Qualcomm attorneys were confronted several times with evidence that

Qualcomm employees were being less than truthful. First, although witnesses claimed that they did not participate in the creation of the relevant standard, Qualcomm attorneys discovered documents relating to the JVT during trial. The court, however, accepted that attorneys who learned of relevant, unproduced documents during trial innocently believed that they were non-responsive.

Second, Broadcom’s attorneys identified several documents that contradicted the assertions of the Qualcomm employees. The court ultimately found that despite the Qualcomm attorneys’ failure to follow-up, they made “reasonable” inquiries of the client.

The Qualcomm attorneys’ investigation was determined to be “reasonable” and in good faith even though they neglected to identify and search critical electronic databases and repositories, on the belief that Qualcomm’s representation that no responsive documents existed was truthful.

Given the history here, it would be inappropriate to move *Qualcomm* into any summary of cases refusing to impose sanctions. Rather, it appears that Magistrate Judge Major declined to impose sanctions largely because the Qualcomm attorneys already had been sanctioned by virtue of her prior ruling and proceedings.

For this reason, going forward, attorneys will be wise to pay heed to Magistrate Judge Major’s first *Qualcomm* opinion. This final *Qualcomm* opinion may best be viewed as a one-time pass for attorneys who had been through enough. Certainly, judges in other cases have imposed sanctions for less.

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1. No. 05 CV 1958-B, 2010 WL 1336937 (S.D. Cal. April 2, 2010).

2. *Qualcomm Inc. v. Broadcom Corp.*, 05 CV 1958-RMB, 2008 WL 638108, at *3 (S.D. Cal. March 5, 2008).

3. *Qualcomm Inc. v. Broadcom Corp.*, 05 CV 1958-B, 2010 WL 1336937, at *2 (S.D. Cal. April 2, 2010).

4. *Id.*

5. Fed. R. Civ. P. 26(g)(1).

6. *Id.* at *6.

7. *Id.* at *2.

8. *Id.*

9. *Id.* at *4.

10. *Id.* at *5.

11. As anyone who has followed the Qualcomm saga knows, the unproduced documents in the case related to Qualcomm’s participation in the Joint Video Team, or JVT, which was a critical issue in the case.

12. *Id.* at *6, *7.