

## QUALCOMM V. BROADCOM

### A reminder of 'reasonable inquiry' requirements

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In a stark reminder of commercial litigators' potential exposure for failing to engage in reasonable efforts to ensure that their clients fully comply with their document discovery obligations, the

because Qualcomm's failure to produce a massive number of critical documents significantly increased the scope, complexity and length of the litigation.

In Qualcomm's patent infringement action, the defendant Broadcom asserted a waiver defense based on Qualcomm's alleged participation in the Joint Video

conduct a reasonable document search and then later engaging in ostrich-like behavior once it became apparent that the initial searches had been grossly insufficient and documents prejudicial to Qualcomm's case had not been produced.

The court castigated Qualcomm's attorneys for not searching the files of employees likely to possess relevant documents and for blindly accepting their corporate client's assurances that no further follow-up searches were necessary. The court also took umbrage at Qualcomm's attorneys' repeated representations to the court that all responsive documents had been produced, even after they no longer had a reasonable basis for such a certification.

Qualcomm's outside counsel, in preparing Qualcomm's FRCP 30(b)(6) witnesses for their depositions, did not even inquire as to whether the witnesses' computers had been searched for relevant documents relating to Qualcomm's alleged participation in the JVT, which resulted in the witnesses falsely testifying that there was no such participation. Broadcom's counsel showed Qualcomm's witnesses an e-mail list at the depositions evidencing that relevant Qualcomm employee e-mail boxes had not been reviewed.

During witness preparation for trial, Qualcomm's attorneys finally searched relevant employee e-mail boxes and discovered 21 e-mails not previously produced that supported Broadcom's contention that Qualcomm had participated in the JVT.

Not only did Qualcomm's trial team decide not to produce the e-mails, but they argued to the court that there was no evidence they existed, and even went so far as to structure



federal district court in *Qualcomm, Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal. 2008) sanctioned six attorneys at two prominent law firms, and referred them to the California Bar for disciplinary action for violating their discovery obligations and ethical duties.

The court also awarded Broadcom all of its attorneys' fees and costs incurred in the litigation, totaling more than \$8 million,

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Team (JVT), a standard setting body. Qualcomm denied participating in the JVT throughout the course of discovery proceedings and trial. On the last day of trial, cross-examination of Qualcomm's witness uncovered that 21 highly relevant e-mails had been withheld. As a result, the jury found in favor of Broadcom due to Qualcomm's inequitable conduct and the new evidence of waiver. During post-trial proceedings, it was revealed that tens of thousands of documents evidencing Qualcomm's participation in the JVT had not been produced.

The court found Qualcomm's outside counsel personally liable for failing to

their direct examination so that Qualcomm's key witness could avoid admitting she received them. Despite the Qualcomm attorneys' yeoman efforts to conceal these e-mails, Broadcom's trial team exposed their existence during cross-examination.

Even in response to a post-trial sanctions motion, Qualcomm's attorneys continued to maintain that an adequate document search had been conducted. After repeated requests by Broadcom, Qualcomm finally agreed to conduct certain specified e-mail searches. Qualcomm then admitted that at least 46,000 responsive documents had not been produced—many of which were materially damaging to Qualcomm's case.

### How To React

In the wake of *Qualcomm*, here are several things outside counsel should do in discovery and trial practice to protect themselves and their clients.

At a minimum, *Qualcomm* reminds us that a "reasonable inquiry" requires outside counsel to create a discovery compliance plan and review it with their client to ensure that all employees suspected to have knowledge of material issues are contacted and all potentially relevant files are reviewed. Outside counsel should document their efforts so that there is a

paper trail of reasonable diligence in case the sufficiency of a document search is ever called into question.

What about the difficult client? The *Qualcomm* court admonished that in such a situation, junior attorneys in a law firm should obtain the assistance of supervising or senior attorneys. If senior attorneys are unable to persuade the client to conduct an adequate search, they should withdraw from the representation and/or take other action to ensure an adequate search and production is made. Outside counsel will be responsible for their clients' obstruction or inattention, if they simply stand idly by when informed of facts that should cause a reasonable attorney to question whether an adequate document search was conducted.

*Qualcomm* is a reminder and admonishment that the fundamental question of whether a client's document search was adequate should not be overlooked at any stage of litigation. Even outside attorneys who are not personally involved in assembling discovery responses are nonetheless in a position due to their participation in, *inter alia*, preparing witnesses and briefing issues, to determine whether

the underlying discovery upon which they are relying is adequate by simply making a reasonable inquiry. Counsel must follow-up on any red flags that come to their attention.

Above all, attorneys should not represent to the court that all responsive documents have been provided when they know, or reasonably should know, that this is not the case. However, if attorneys are not privy to any red flags, after making a reasonable inquiry, they may still rely on work performed by other lawyers who were more involved in the discovery process.

The *Qualcomm* case is proof positive of the fact that negligent or willful ignorance is no defense. Outside counsel may not safely rely on their client's blanket assurances that all relevant files have been adequately searched for documents. In the electronic discovery era, attorneys and clients (large and small) must work together starting at the earliest stages of the case to ensure that both understand how and where electronic documents are maintained and to determine how best to conduct an adequate search. Both inside and outside counsel must take responsibility for ensuring that their corporate clients conduct adequate discovery searches. ■