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Rocks and Hard Places

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The United States District Court in the Southern District of California recently ruled in *Qualcomm Inc. v. Broadcom Corp.* that counsel are clearly under an ethical obligation to ensure that their clients fully and properly disclose electronically stored information.

Magistrate Judge Barbara Major in that case sanctioned Qualcomm for its failure to produce over 46,000 e-mails and other electronic documents that Broadcom had requested in discovery. The sanctions took several forms. Judge Major ordered Qualcomm to pay Broadcom over $8.5 million for its "monumental and intentional discovery violation" and several of that company's outside counsel for "ignoring or rejecting numerous warning signs that Qualcomm's document search was inadequate, and blindly accepting Qualcomm's unsupported assurances that its document search was adequate." These six outside counsel were further ordered to send a copy of her order to the State Bar for investigation.

At page 31 of the decision, the magistrate jude stated that "the Court finds that these attorneys did not conduct a reasonable inquiry into the adequacy of Qualcomm's
document search and production and, accordingly, they are responsible, along with Qualcomm, for the monumental discovery violation."

Under our Rules of Civil Procedure, any information that is relevant and not privileged is discoverable. It's been that way for decades. As lawyers we know this from a very early stage of our training; Civil Procedure is so fundamental to our legal system that it is taught in first-year. But it's still not an easy concept for some non-lawyers involved in litigation to get their heads around. That may be because, to some, it seems counter-intuitive. As a judge in another Federal District observed eight years earlier in *Danis v. USN Communications Inc.*:

"In our system of civil litigation, the discovery process is the principal means by which lawyers and parties assemble the facts, and decide what information to present at trial. FRCP 26 requires a party to produce non-privileged documents which are 'relevant to the subject matter involved in the pending action.' That requirement embraces not only documents admissible at trial but also documents and information that are 'reasonably calculated to lead to the discovery of admissible evidence.' This broad duty of disclosure extends to all documents that fit the definition of relevance for the purposes of discovery, whether the documents are good, bad, or indifferent. While it may seem contrary to the adversarial process to require such 'self-reporting', it is in fact a central tenet of our discovery process."

Yes, we have an adversarial system, but when it comes to discovery, we have to fess up to whatever we have, good or bad.

In many other jurisdictions, such as on the European Continent, civil discovery is limited to disclosure of documents on which the party intends to rely in its case.

Qualcomm began in 2005, with Qualcomm as plaintiff alleging that Broadcom had infringed two of its patents. Broadcom's defense was that Qualcomm was precluded from suing on those patents because it had agreed to waive them as part of the terms of participation in an industry group known as the Joint Video Team (JVT),

which was tasked with the development of a video-compression standard that came to be known as the H.264 standard released in May 2003.

Notwithstanding discovery requests from Broadcom that would have covered any communications during the relevant pre-May 2003 period pertinent to the JVT and the H.264 standard, no such documents were produced during discovery by Qualcomm. The first time any came to light was during the trial, when counsel for Qualcomm was preparing one of their engineers, Viji Raveendran, to testify. It became apparent she had received 21 e-mails from the JVT industry group, which had set up a mailing list called “avc_ce”.

At the trial, Qualcomm counsel questioning Raveendran in her direct testimony on Jan. 24, 2007 “pointedly did not ask her any questions that would reveal the fact that she had received the 21 emails from the avc_ce mailing list; instead, he asked whether she had ‘any knowledge of having read’ any emails from the avc_ce mailing list.” On cross-examination by Broadcom’s counsel, Raveendran was forced to admit she had received these 21 e-mails. Qualcomm took the position that Raveendran was merely a passive recipient of an e-mail distribution and that the e-mails themselves weren’t relevant.

Maybe. But their mere existence raised a red flag, and the court found that outside counsel were doing their best to shield their eyes from seeing it, calling this “deliberate ignorance.”

The searches that would have revealed Qualcomm’s involvement in the JVT group didn’t exactly call for help from a professor of linguistics. Just using common sense searches for the phrases “JVT”, “H.264” and “avc_ce” would have revealed thousands of e-mails. The fact that such obvious searches were not conducted by Qualcomm led the court to the conclusion these searches weren’t done because they knew what they would find.

Outside counsel didn’t press Qualcomm more vigorously about its search strategies, even after the 21 e-mails on Raveendran’s computer came to light; this led the court to conclude that they didn’t want to upset the apple cart with an important client. The court found that “one or more of the retained lawyers chose not to look in the correct locations for the correct documents, to accept the unsubstantiated assurances of an important client that its search was sufficient, to ignore the warning signs that the document search and production were inadequate, not to press Qualcomm employees for the truth, and/or to encourage employees to provide the information (or lack of information) that Qualcomm needed to assert its non-participation argument and to succeed in this lawsuit. These choices enabled Qualcomm to withhold hundreds of thousands of pages of relevant discovery and to assert numerous false and misleading arguments to the court and jury.”

Qualcomm lost at trial anyway, and at the close of trial in early 2007, Broadcom moved for sanctions for discovery abuse, leading to the January 2008 decision. Nothing was gained by Qualcomm failing to make full disclosure; if counsel for Qualcomm thought it was better not to push its client to search more thoroughly, they were seriously mistaken. The sanctions were severe because of the severity of the discovery violation. This wasn’t an insignificant failure to produce material of peripheral importance; the suppressed documents went to the very validity of the lawsuit. If revealed earlier, there most likely would have been no trial at all.

The court noted that now, even more than before, the system requires good faith behavior on both sides. “For the current ‘good faith’ discovery system to function in the electronic age, 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. Attorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search. Producing 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.”

Sounding a final hopeful note, Magistrate Judge Major wrote: “While no one can undo the misconduct in this case, this process, hopefully, will establish a baseline for other cases. Perhaps it also will establish a turning point in what the Court perceives as a decline in and deterioration of civility, professionalism and ethical conduct in the litigation arena. To the extent it does so, everyone benefits, Broadcom, Qualcomm, and all

attorneys who engage in, and judges who preside over, complex litigation. If nothing else, it will provide a road map to assist counsel and corporate clients in complying with their ethical and discovery obligations and conducting the requisite ‘reasonable inquiry.’”

Bottom line: In this age of discovery of electronically stored information, the courts, more than ever, expect openness, honesty and co-operation. And they’re dead serious.

An integral actor in litigation support and e-discovery since the late 1980’s, Clifford F. Shnier has been a consultant, owner of his own service bureau and a senior sales and management executive with major e-discovery and litigation support providers. Prior to that, Shnier practiced law in Toronto for eleven years, litigating complex commercial matters, torts and criminal cases, with extensive trial and appellate courtroom experience. Since relocating to Scottsdale, Ariz. in 1994, Shnier has developed significant connections with the US legal community, while still retaining his ties with Canada and the legal profession here.

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