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Electronic Discovery & Records Management Practice

## **Qualcomm Court Imposes Multi-Million Dollar Sanctions for Electronic Discovery Failures**

A court in California has fired a warning shot across the bow of corporate litigants everywhere: if you fail to produce relevant electronically stored information during litigation, there will be consequences.

The opinion, issued on January 7, is the latest to come out of *Qualcomm Inc. v. Broadcom Corp.*, Case No. 05cv1958-B (BLM) (S.D. Cal.). It establishes “a baseline for other cases” regarding what steps must be taken to ensure compliance with ethical and discovery obligations related to electronic discovery.

The case arose when Qualcomm filed a patent infringement suit against Broadcom. Broadcom prevailed in the suit, but during the trial, it became apparent that Qualcomm had not produced “tens of thousands of documents that Broadcom had requested in discovery.” Complicating the situation further, the court found that Qualcomm ignored warning signs that its production was deficient and instead fought efforts by Broadcom to investigate the production issues. In characterizing these failures, the court wrote that:

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. Similarly, agreeing to produce certain categories of documents and then not producing all of the documents that fit within such a category is unacceptable. Qualcomm’s conduct warrants sanctions.

Accordingly, Qualcomm was ordered to pay all of the costs Broadcom incurred during the litigation – approximately \$8.5 million – and the most culpable attorneys were reported to the California State Bar for ethics violation.

Additionally, the court ordered Qualcomm to create a comprehensive electronic discovery program, including:

- (1) identification of the factors that contributed to the discovery violation;
- (2) creation and evaluation of proposals, procedures, and processes that will correct the deficiencies;
- (3) development and finalization of a comprehensive protocol that will prevent future discovery violations;

(4) application of the protocol to other factual situations;

(5) identification and evaluation of data tracking systems, software, or procedures that corporations could implement to better enable inside and outside counsel to identify potential sources of discoverable documents; and

(6) any other information or suggestions that will help prevent discovery violations.

This program is intended to "provide a road map to assist counsel and corporate clients in complying with their ethical and discovery obligations and conducting the requisite 'reasonable inquiry'" in connection with electronic discovery.

For more information on how Mayer Brown can assist in electronic discovery issues, you may contact the author, Jason Fliegel, at (312) 701-8839 or [JFliegel@mayerbrown.com](mailto:JFliegel@mayerbrown.com).

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