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Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Qualcomm Points To New E-Discovery Approach

By **Brendan Pierson**

Law360, New York (October 02, 2008) -- The notorious decision earlier this year sanctioning Qualcomm Inc. and several of its attorneys for discovery misconduct points to the need for a more cooperative, less adversarial approach to e-discovery, experts say.

That conclusion emerged from a teleconference on e-discovery issues in the wake of the Qualcomm case held Tuesday by the American Bar Association.

The conference was moderated by David D. Cross, of Crowell & Moring LLP, and featured Paul W. Grimm, chief magistrate judge of the United States District Court for the District of Maryland; William P. Butterfield of Cohen Milstein Hausfeld & Toll PLLC; and Stacy Slaughter of Robins Kaplan Miller & Ciresi LLP.

Cross began the conference by summarizing the case — Qualcomm Inc. v. Broadcom Corp. — that led to the sanctions.

The case, which Qualcomm filed against Broadcom in 2005 over video phone patents, dissolved amid accusations of misconduct after a trial last year when a witness inadvertently revealed during cross-examination that Qualcomm had failed to produce relevant e-mails and electronic documents during discovery.

Broadcom, which won the case, moved for sanctions against Qualcomm.

A central issue in establishing that Qualcomm's patents were valid was whether or not the company participated in an industry group known as the Joint Video Team to set industry standards. If Qualcomm had brought its patented method to the table in developing the industry standard, Broadcom argued, it had waived its right to enforce the patent.

Qualcomm denied throughout the case that it took part in the JVT, but both parties now agree that the documents revealed after the trial clearly show that it did.

In January, Magistrate Judge Barbara Majors referred six of Qualcomm's attorneys to the California state bar for disciplinary action and imposed an $8.6 million sanction on the company. She noted that the attorneys had not performed reasonable inquiries — including such obvious steps as searching witnesses' computers — when submitting their discovery responses.

Cross noted that, assuming Judge Majors' findings were correct, the Qualcomm case had little to do with e-discovery specifically and more to do with discovery ethics. Still, he said, the case had lessons for attorneys trying in good faith to navigate the sometimes murky waters of electronic discovery, which often involves huge volumes of documents.

Judge Grimm said that the Qualcomm case drew attention to the rule of civil procedure, Rule 26(g), under which the attorneys were sanctioned. That rule requires that attorneys submitting discovery requests or responses conduct a reasonable inquiry to determine if the submission is adequate.

Many attorneys, Grimm said, were not fully aware of their responsibilities under Rule 26(g) or the possibility of sanctions.

Butterfield, who is working on a brief advocating a more cooperative approach to e-discovery for a legal research group known as the Sedona Conference, said that the Qualcomm case could offer a valuable reminder.

"I think as a result of Qualcomm, it's going to be more understood and people will take more note of it," he said.

Slaughter agreed: "Attorneys are starting to pay close attention to what are their obligations when they sign pleadings."

Butterfield noted that the decision, though it pertained to document production, could also apply to a much less straightforward and more difficult problem in e-discovery — spoliation of evidence. Attorneys could find themselves responsible under the rule if their clients destroyed evidence in the ordinary course of business.

The way to avoid that, Butterfield said, is to embrace a new approach to discovery — one in which attorneys cooperate closely with opposing counsel to make sure all responsive evidence comes to light.

The first step, the panelists agreed, is for the attorneys to ask for a litigation hold on destroying any documents. Slaughter noted that it is better for the initial hold to be broad and to be narrowed in the course of discovery.

The attorneys, client and opposing counsel must then work together to arrive at a plan to locate all necessary information. Butterfield said that an important step for narrowing down discovery is to identify “key players” — people at a company most likely to deal with relevant information.

Furthermore, the parties must agree to electronic search methods, making sure to identify search terms that reveal relevant information — something the attorneys in the Qualcomm case failed to do. Generally, this requires the cooperation of the company whose data is being searched, Butterfield noted.

The choice of search methodology is important, Slaughter said, because “different search methods may produce different search results."

"The choice of search methodology will need to be fully explored,” Slaughter said.

Discovery methods “should be negotiated very early in the process,” Butterfield said. By agreeing early to how e-discovery will be conducted, litigating parties can avoid unduly burdensome discovery while making sure that all relevant data is produced, he said.

Butterfield stressed that the approach he was promoting didn’t mean abandoning the adversarial spirit of civil litigation.

“It is not an abandonment of or in derogation to the adversarial system,” he said. “The adversarial system does not mandate idiotic mutual self-destruction.”

The panelists agreed that the Qualcomm sanctions decision underscored the need for a new approach to discovery reform. Still, Butterfield said on Thursday, “I wouldn’t rule out that there could be future Qualcomms.”