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LITIGATION

Decisions Up Stakes for Managing E-Discovery Cases

BY BENJAMIN R. BARNETT AND PHILIP N. YANNELLA
Special to the Legal

The consequences for failing to properly manage e-discovery in complex litigation continue to rise. Recent court decisions are notable both for the courts' readiness to specifically identify the errors of outside counsel as well as the severity of the sanctions imposed for such failures. In effect, courts seem to demand a standard of near perfection from in-house and outside counsel in managing e-discovery.

With the growing size of electronic document review and productions and the still evolving e-discovery jurisprudence, litigants and their counsel continue to face a complex array of issues that can directly impact the outcome of a lawsuit. However, one thing is for certain: To manage these risks effectively, companies must recognize the high stakes in the e-discovery game and hire appropriate counsel to help manage them.

Three court decisions illustrate the stakes. The first, *Qualcomm v. Broadcom*, reflects what serious sanctions can be imposed for flagrant discovery failures. The second, *Stanley v. Creative Pipe*, demonstrates what can happen if counsel does not understand the basic technical aspects of e-discovery, such as keyword searching. The third, *In re Intel*, is perhaps the most troublesome of the opinions because it demonstrates that in the litigation environment, courts will dole out punishment for conduct that many attorneys might find entirely appropriate.

QUALCOMM

The widely reported *Qualcomm* case presents a study in how not to manage e-discovery. *Qualcomm* was a patent infringement case. Broadcom's key defense to the infringement claim was predicated on Qualcomm's participation in a Joint Video Team, or JVT. Broadcom served a number of discovery requests on Qualcomm relating to the company's participation in the JVT. Initially, Qualcomm appeared to comply with all discovery requests, agreeing to produce non-privileged relevant and responsive documents.

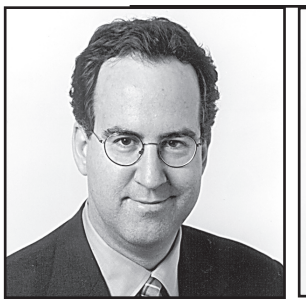
Problems with Qualcomm's production became apparent when Qualcomm's 30(b)(6) witnesses testified falsely that Qualcomm had never been involved in the JVT. Further problems came to light when a junior associate was preparing a witness to testify at trial. During this preparation, the associate came across 21 unproduced e-mails about Qualcomm's involvement in the JVT. Rather than producing the documents, more senior attorneys decided that they were not responsive to Broadcom's discovery requests and did not conduct a further inquiry into whether or not there were more JVT e-mails. At trial, Qualcomm's attorneys argued at a sidebar conference that there were no e-mails regarding the JVT, despite having knowledge of the missing e-mails.

After trial, Qualcomm's general counsel admitted to the court that Qualcomm had thousands of relevant, unproduced documents that revealed inconsistencies with their trial arguments. In fact, 46,000 documents from 21 employees had been withheld. After the conclusion of the trial and the post-trial revelations, the court found that "Qualcomm's counsel participated in an organized program of litigation misconduct and concealment throughout discovery, trial and post-trial[.]"

The court sanctioned Qualcomm and six of its outside attorneys. Significantly, the court concluded that Qualcomm alone could not have hidden the documents. Specifically, the court sanctioned a partner, senior associate and associate responsible for supervising discovery responses and document production for failing to conduct a reasonable inquiry into Qualcomm's production. The court also sanctioned the junior associate who discovered the 21 missing e-mails and the associate and partner supervisors who did nothing when they learned of the missing e-mails.

Finally, the attorneys who claimed during trial that there were no documents responsive to the JVT requests were sanctioned. All sanctioned attorneys were referred to the California State Bar and ordered to participate in a comprehensive Case Review and Enforcement of Discovery Obligations program. The six Qualcomm attorneys filed objections to the sanctions, and the court held that they could reveal privileged information in accordance with the self-defense exception to attorney-client privilege. Qualcomm's notice of appeal is pending in the 9th U.S. Circuit Court of Appeals.

Courts are exhibiting little patience for preservation, privilege review or production mistakes and are not hesitating to hold parties and their counsel responsible for such mistakes.



BARNETT

YANNELLA

BENJAMIN R. BARNETT *is a partner in Dechert's mass tort and products liability group. Since joining the firm in March 2001, he has defended clients in a number of product liability suits involving latex gloves, tobacco, a cholesterol-lowering medication and industrial drilling compounds.*

PHILIP N. YANNELLA *is counsel in the mass torts and product liability group. He has defended clients in product liability and mass tort cases involving an array of consumer and prescription products.*

CREATIVE PIPE

Judge Paul Grimm's decision in *Creative Pipe* demonstrates that counsel's actions need not rise to the level of alleged misconduct to result in an adverse decision impacting the attorney-client privilege.

During discovery in the copyright infringement and unfair trade practices case, defense counsel asked the court to approve a "clawback agreement" that would allow the parties to reclaim inadvertently produced privileged material. When the discovery deadline was extended by four months, defense counsel apparently determined that a clawback agreement was unnecessary because counsel would have time to conduct a document-by-document privilege review. After production, the plaintiffs discovered that Creative Pipe had inadvertently produced 165 privileged documents.

Following briefing, Grimm found that Creative Pipe's privilege review was far from exhaustive. Defense counsel conducted a search of relevant text-searchable documents using a list of 70 keywords. Due to time restraints and the sheer volume of documents, all non-text-searchable documents were reviewed by two attorneys who examined the title page of the documents, not their contents. Documents not flagged by either the keyword search or the title-page review as privileged were produced to plaintiffs.

The court held that Creative Pipe had failed to conduct a reasonable review for attorney-client privileged information, and thus waived the privilege. The court found that in light of the "known limitations and risks" of keyword searches, Creative Pipe should have employed a technical expert, met and conferred with the plaintiffs about the keywords

or sought and obtained a court-approved agreement about the keywords. The court concluded that the deficiencies in defendant's privilege review protocol were apparent both in the sheer number of privilege documents produced and the fact that plaintiffs, not defendants, first noticed the inadvertent production.

Creative Pipe highlights the need for counsel to have a sophisticated understanding both of the technical issues involved in electronic privilege review, as well as the procedural rules governing privilege review. Courts increasingly have no patience for counsel that is not well-versed in both areas. Unfortunately, clients may pay the price for such missteps.

IN RE INTEL

The *In re Intel* decision concerns counsel conduct far afield from alleged misconduct or ignorance. *In re Intel* was a civil antitrust action. At the beginning of litigation, Intel put into place a comprehensive document retention plan that placed significant responsibility on employees to retain their own documents.

Despite this effort, a year and a half after the plan was implemented, Intel discovered some significant lapses in retention. Outside counsel was hired and interviewed 1,023 Intel employees to assess their compliance with the litigation hold instructions. The attorneys discovered that the preservation lapses arose from human error, including failure to save "sent" as well as "received" e-mails, a gap in backup tapes and mistaken recycling of backup tapes. Intel informed the judge about the problems, explained the causes and disclosed its remedial efforts going forward. After Intel revealed its findings, the parties stipulated to a preservation disclosure order.

In response to the order, Intel's counsel prepared more than 400 pages of custodian-specific retention reports and relied upon attorney notes from the custodial interviews to compile the information in the disclosure. Plaintiffs argued that in order to test Intel's assertion that the discovery failures were due to human error, it should be permitted to review the notes from the attorney-custodian interviews. The discovery special master and the court agreed. By relying on privileged information when asserting that the mistakes were due to human error, Intel waived the underlying attorney-client privilege. The special master also found that the interviews were mainly "fact work-product" and not "core work-product," which is afforded absolute protection from discovery because it contains the "mental impressions, conclusions, opinion or legal theories of an attorney[.]"

In re Intel is particularly troubling because Intel suffered a loss of the privilege and work product protections not because its attorneys acted recklessly or lacked understanding of the technical aspects of e-discovery. In fact, Intel and its counsel arguably acted consistently with the emerging standards of disclosure and candor involving e-discovery. Intel diligently investigated lapses in its preservation program upon learning of potential problems and took reasonable steps in an effort to cure the errors. Nevertheless, the court effectively punished Intel because of its counsel's decision to rely upon attorney notes in explaining the discovery lapses, which the court deemed to waive the work-product privilege.

Whether other courts follow *In re Intel* and begin ordering the production of attorney notes from custodial interviews relating to preservation issues remains to be seen. Among the possible ramifications of this opinion is the potential that companies and their counsel will be less willing to cooperatively share information concerning preservation for fear of waiving any privileges that may attach to the attorney notes and memos, which may herald more e-discovery battles.

Attorneys involved in managing e-discovery matters need to pay special attention to this opinion and take proactive steps with opposing counsel, and if necessary the court, to ensure that any discussion of preservation not be used as a sword to seek discovery of privileged materials.

LESSONS LEARNED

The *Qualcomm*, *Creative Pipe* and *Intel* cases illustrate the continuing trend of broad and significant sanctions, including adverse discovery decisions, in the e-discovery world. Courts are exhibiting little patience for preservation, privilege review or production mistakes and are not hesitating to hold parties and their counsel responsible for such mistakes.

Whether the rulings in these cases are fair is a debate for another day. What is clear, however, is that companies must engage experienced e-discovery counsel and that those attorneys must plan, manage and consider every step in the discovery process, from the dissemination of litigation hold to document collection, review and production, as if preparing for a trial. The price for failing to manage e-discovery remains high for companies and their counsel.