

THE IMPATIENCE OF THE JUDICIARY:
CURRENT CASELAW

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The Impatience of the Judiciary—Current caselaw

The current state of the judiciary on the issue of sanctions can be described in a single word—impatience. A review of recent decisions indicates that more and more courts have lost their patience with disruptive and unethical behavior. Judges are granting more motions for sanctions with harsher penalties now more than ever before. In addition, courts are targeting not just the misconduct by the client, but are holding the lawyers responsible. *See GMAC v. HTFC*, 248 F.R.D. 182 (E.D. Pa. 2008), where the granted sanctions against both the client [Wider] and his attorney [Ziccardi] after Wider’s well publicized obnoxious behavior, which included using the “F” word no less than 73 times during his deposition. The Court stated:

It is true that, in most instances, Ziccardi did not actively counsel Wider on the record to provide evasive or incomplete answers or to refuse to answer questions. What is remarkable about Ziccardi's conduct is not his actions, but rather his failure to act. Despite the pervasiveness of Wider's evasive and incomplete answers and his repeated failure to answer questions, Ziccardi failed to take remedial steps to curb his client's misconduct. *GMAC*, at 197.

An even more dramatic example of lawyers taking the hit with their clients for questionable behavior occurred in the *Qualcomm* case. Because I find the conduct of both the attorneys and the client to be so bad, I have focused on this case as an example of what NOT to do and what happens when we, as attorneys, lose sight of our ethical and moral obligations to the Court.

The Qualcomm Six and No Nonsense Judges

The Qualcomm Six may not be as famous as some other notable numerical groups...The Magnificent Seven, the Fab Four or even The Three Amigos. But when United States Magistrate Judge Barbara L. Major lowered the boom on the high profile lawyers at Day Casebeer she clearly put the legal community on notice: abusing discovery can have real consequences.

Countless stories of discovery problems in litigation abound. Every lawyer has them. Defense lawyers have claimed for years that the plaintiff's bar is notorious for abusing the discovery process by taking long exploratory depositions, insisting on examining corporate records far outside the time period of the alleged wrongdoing, etc. Likewise, the plaintiff's bar surely tells tales of defense counsel stone walling, hiding documents or designating uninformed corporate representatives for depositions. But the recent news about the Qualcomm Six provides some insight on a possible trend in the way judges view "failures" in the discovery process.

Qualcomm Case

In May 2003, a video industry group called the Joint Video Team release the "H.264 standard," a universal standard for video coding. Participation in the JVT was contingent on agreeing to license any H.264-related patents free or under nondiscriminatory, reasonable terms. Qualcomm brought an action against Broadcom to enforce two patents, both of which involved the H.264 standard. One of Broadcom's defenses was that Qualcomm's participation in the JVT resulted in a waiver of both patents. Qualcomm responded that it did not participate in the JVT until September 2003 and so did not waive its patent rights. The question of when Qualcomm became involved in the JVT, was at the heart of the litigation.

Broadcom's unopposed discovery request included all materials regarding Qualcomm's participation in the JVT. In Interrogatory responses, retained attorney affirmed that Qualcomm first attended JVT meetings in December 2003 and first submitted a JVT proposal in December 2006. However, Qualcomm's first Rule 30(b)(6) deposition designee, never had her computer, file share or e-mail box searched for relevant files, was provided with no materials to review, and falsely testified that Qualcomm had never participated in the JVT.

Later, Qualcomm agreed to provide a second 30(b)(6) witness but the exact same problems occurred. The second witness was presented with a December 2002 JVT group email list showing Qualcomm employee Viji Raveendran as an e-mail recipient. Rather than use the list as a clue to look for e-mails, Qualcomm took no action.

In his opening statement at trial the lead Qualcomm attorney asserted that Qualcomm did not participate in the JVT until fall of 2003. Later, while preparing Raveendran for trial, it was discovered an August. 6, 2002 e-mail to viji@qualcomm.com welcoming her to the JVT mailing list. Five days into trial a search of Raveendran's laptop discovered 21 e-mails, none of which Qualcomm had produced in discovery, bearing several dates in November 2002 and discussing various issues relating to the H.264 standard. Despite their obvious responsiveness, the Qualcomm trial team did not produce them or investigate whether more such e-mails had not been produced.

When Raveendran testified, the Qualcomm attorney pointedly asked whether she had "**read**" any e-mails from the list. He phrased the question so that she could truthfully respond "no" without revealing that any such e-mails existed. On cross-examination, however, Raveendran admitted that she had "**received**" the 21 e-mails.

After trial, the trial judge ordered Qualcomm to pay over \$9.2 million in attorneys' fees in addition to the final fee award of over \$8.5 million. Qualcomm continued to dispute the relevance and responsiveness of the 21 e-mails and resisted Broadcom's efforts to determine the scope of the discovery violation.

In February 2007, Qualcomm again asserted that the initial search for discovery was proper and the 21 e-mails unresponsive. However, by the end of June 2007, Qualcomm had identified more than 46,000 responsive documents taken from the archives of 21 employees.

As a result of the email suppression, the trial judge had no trouble finding that Qualcomm had intentionally withheld "tens of thousands" of e-mails that showed Qualcomm's active participation during the period when Qualcomm had asserted it was not involved in the JVT. The judge referred the issue of sanctioning the attorneys responsible for the suppression of documents to Magistrate Judge Major. Judge Major issued a 48 page opinion sanctioning 6 of the 19 attorneys involved in the document suppression and referred the attorneys to the State Bar Association.

Judge Major determined that Qualcomm violated its discovery obligations by failing to produce more than 46,000 emails and documents that were requested in discovery and that Qualcomm agreed to produce. See Fe. R. Civ. P. 26(g) Advisory Committee Notes (1983 Amendment) ("Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37). Further, Qualcomm did not establish any substantial justification for its failure to produce the documents. Qualcomm did not establish that it searched the computers of email databases of the individuals who testified on their behalf and it indicates that it did not conduct any such search.

The Magistrate found that the fact the Qualcomm did not perform these basic searches at any time before the completion of trial indicates that Qualcomm intentionally withheld the documents. Even when they discovered 21 emails during trial, Qualcomm did not produce them and did not engage in any time of review to determine whether there were additional relevant, responsive, and unproduced documents.

In the end, Qualcomm presented no evidence to explain or justify its failure to produce the e-mails. Qualcomm did not search the electronically stored information of its 30(b)(6) witnesses. When it discovered the 21 Raveendram e-mails, it suppressed them, did not look for

additional responsive but unproduced ESI, and claimed to the court that the e-mails were non-responsive.

Other Notable Cases

Many may think that Qualcomm's severity is the exception, not the rule. Judges are much more lenient when it comes to discovery. While, in practice this may seem true, if you get the wrong judge on the wrong day, anything can happen. Including big repercussions for failure to act responsibly as a lawyer and member of the bar.

In the spring of 2005, a state court in Florida imposed severe sanctions on defendant Morgan Stanley for failing to search for and produce emails from backup tapes in violation of a court order. In this case the plaintiff sought \$680 million in losses and \$2 billion in punitive damages in connection with Morgan Stanley helping Sunbeam to falsely inflate its finances.

The sanctions included, but were not limited to, the entry of partial default judgment against the defendant pursuant to which the jury was instructed that numerous factual allegations in the complaint are deemed established. These allegations include that the defendant participated in a massive fraud that caused the plaintiff's damages and that the defendant helped to conceal it. The court's order further "reversed the burden of proof on the aiding and abetting and conspiracy elements and included a statement of evidence of the defendant's effort to hide its emails to be read to the jury, as relevant to both the defendant's consciousness of guilt and the appropriateness of punitive damages."

In 2006, Hyundai Motors faced a different type of sanction for a similar failure to complete thorough discovery. At the first trial of a product liability case, the jury awarded over \$8 million in damages. Hyundai appealed liability but not damages, and the case was remanded for a second trial on the issue of liability. During preparation for the second trial, plaintiff filed a

motion to compel defendants to produce documents relating to other similar incidents. The court granted the motion. Hyundai submitted a Motion for Relief from the court's order, asking that the court relieve it of certain of its production obligations. Hyundai requested that it be permitted to produce only those responsive consumer complaints that were maintained on its current computer system, and that it not be required to restore some 96 backup tapes which were believed to contain original data from Hyundai's old mainframe computer.

Plaintiff opposed the motion. The court denied Hyundai's motion for relief, and also denied plaintiff's motion for spoliation sanctions.

Two months later, the court granted plaintiff's motion for default judgment based upon Hyundai's failure to produce evidence regarding other similar claims and incidents. The court held a four-day evidentiary hearing on the motion for default judgment and concluded that Hyundai and its counsel committed numerous discovery violations, "which were willful, deliberate, direct and egregious."

Hyundai apparently did not search its Consumer Affairs Department's electronic records for responsive documents. The court went on to discuss the other sanctions available, and concluded that nothing short of default judgment was appropriate. The court's entry of default judgment reinstated the jury's damage award of \$8,064,055. In a separate opinion, the court also awarded plaintiff the attorneys' fees and costs because of Hyundai's discovery violations.

In another recent example of the impatience of the judiciary, the Maryland Court of Appeals again showed its frustration with lawyers. The case before the court involved two Pennsylvania lawyer who claimed they acted reasonably in hiring an associate with no litigation experience to be the sole representative of the firm in Maryland. The firm specialized in automobile lemon law litigation. The lawyers argued that they kept track of their associate's

work via phone and email despite the fact that 47 cases were dismissed because of the associate's failure to respond to discovery. The Court of Appeals found that email communication between the Pennsylvania office and the Maryland office was insufficient oversight. The Maryland Bar Grievance Commission argued to the court that partners of a law firm cannot shift the blame to their associate and that they must take full responsibility for the associate's actions. The court agreed and lambasted the firm for its failures.

In November 2007, a Manhattan federal judge delivered a 129-page decision sanctioning attorneys for discovery abuse. The judge took this opportunity to discuss in his words how "naked competition and singular economic focus of the marketplace have begun to infiltrate the practice of law, subordinating the high standards of service, collegiality and professionalism as a result." Interestingly, this opinion was written after the defendant's motion for sanctions had been withdrawn as a result of a settlement between the parties.

The attorney misconduct that irked the judge arose in the course of a trade secrets lawsuit brought by financial software maker against a rival which had recruited three former employees. The judge found that the lawyer in charge of the plaintiff's case had shown a "studied disregard for the sanctity of court orders." The judge ended his lengthy order with the observation that "partners are at times made and retained for their rainmaking skills and not for their legal skill, that the number of billable hours is not only the alpha and omega of bonuses but that these hours -- or at least the ones that count -- often exclude pro bono hours, or that who gets credit for originating a piece of business can throw a firm into turmoil and prompt internecine struggles, or that the bottom line has eclipsed most everything else for which the practice of law stands or stood to the extent that the practice of law is now frequently described as a business rather than a

profession.” With more than 100 pages between the beginning and the end of his order it is abundantly clear that this frustration had been building for some time.

Lessons to Learn

The most basic lesson to be drawn from the Qualcomm matter and others is that counsel, and not the client, is responsible for producing discovery. Qualcomm illustrates is how that responsibility permeates all aspects of representation, and how it cannot be avoided by recasting it in other terms.

John Tredennick, a lawyer and author of three books on litigation and technology and founder of Catalyst Repository Systems recently wrote an article about the *Qualcomm* case. Tredennick points to five additional lessons to take away from the Qualcomm Six.

Check you Witnesses' Computer before allowing him to Testify:

During discovery, the Qualcomm offered two company representatives (30(b)(6) witnesses) to testify about documents and company knowledge. Each testified that Qualcomm did not participate in the Joint Video Team (JVT) standards body's work—which was at the heart of the case. Later, the court discovered that both had emails on their computers flatly contradicting their assertions.

“The Federal Rules impose an affirmative duty upon lawyers to engage in discovery in a responsible manner and to conduct a “reasonable inquiry” to determine whether discovery responses are sufficient and proper.”

Opinion at 27 lines 3-9.

Under the Qualcomm court's interpretation of discovery responsibility of an attorney, there is a duty to double check a client's collection efforts. While in the old days of paper discovery attorneys regularly relied on clients to collect relevant documents, the Qualcomm

decision appears to change this rule. Thus, discovery is going to get even more expensive. Consultants are going to be required, to protect the lawyers if nothing else. They are going to have to certify their efforts and look in every nook and cranny. Clients will have to pay for these certifications as well as the related attorney oversight.

Associates Can't Hide

Traditionally, associates could avoid many penalties simply by hiding behind “the partner made me do it” philosophy. But this notion did not save the associates in Qualcomm. The team working on this phase of discovery in Qualcomm included a senior partner, a senior associate and an associate. The deposition of Qualcomm employee Viji Raveendran was not critical to the overall Qualcomm v. Broadcom action, but it became critical after the fact. The lawyer handling the deposition was an associate. It is not uncommon for an associate to cover what often considered less important depositions. The court found that this associate was responsible for making sure that his superiors or their client properly checked witness computers.

In the sanctions hearing, the associate’s attorney argued that he raised concerns about the thoroughness of the production to his superiors. The court cut him no slack:

If [he] was unable to get Qualcomm to conduct the type of search he deemed necessary to verify the adequacy of the document search and production, then he should have obtained the assistance of supervising or senior attorneys. If Mammen and Batchelder were unable to get Qualcomm to conduct a competent and thorough document search, they should have withdrawn from the case or taken other action to ensure production of the evidence.

Opinion at 27 note 10.

Tredennick asks simply, “Since when does an associate get to determine what level of search is deemed necessary to verify the adequacy of a document search?” An argument can be made that going to your superiors with concerns ought to have been enough to save Leung. However, Judge Major found differently.

Slick Questions Don't Work

The Qualcomm case fell apart on the last day of trial. That's when Qualcomm witness Viji Raveendran admitted on cross that there were relevant emails showing Qualcomm participation in the JVT. For one attorney, Lee Patch, things began several days earlier when he first learned that Raveendran had some interesting emails that had not been produced. While preparing Raveendran for trial, a junior associate, Adam Bier, learned that she had over 20 emails on her computer that buried Qualcomm's case, or at least its main defense. However, the legal team decided not to produce them on the grounds they were "not responsive to Broadcom's requests." They also did nothing further to check whether there might be others.

Strangely, Patch still called Raveendran as Qualcomm's last witness. Patch asked Raveendran whether "she had 'any knowledge of having read any emails" from the JVT mailing list. Opinion at 9, line 25-26. She conveniently answered "no," maybe because she did not recall actually reading them. However, she clearly had received them, which was more than enough to kill the case for legal purposes.

On cross, opposing counsel asked her whether she had ever received emails of this type. That's when the bottom fell out. She admitted truthfully that she had. She also noted that they were pulled from her production by the attorneys and all hell broke out. Judge Major scolded Patch for "carefully [tailoring] his questions to ensure that Raveendran did not testify about the unproduced emails." Opinion at 30, line 10-12.

What does this mean? Arguably Patch asked Raveendran a question that she could answer honestly in a way that helped his case. It used to be the rule that an attorney could not ask a question and let his client give an answer which he knew to be untrue. Patch did not go further

and have her clarify the limits of her answer; he left that work for opposing counsel to do or not do. Judge Major didn't buy it.

So the lesson is, don't be cute with testimony. While sometimes determining what the definition of "is" does make a difference, but when it doesn't, do not play games. Today's judges seem less likely to want to play along.

You better live up to your résumé

In Qualcomm, Judge Major cleverly turned the impressive resumes of the retained attorneys against them. She reasoned that attorneys with such impressive resumes could not have missed the suppressed e-mails. Given their high level of education, experience and competence, their failure to produce the suppressed e-mails was even more suspect.

The warning here is that the big firm pedigree can cut both ways. Although there was no evidence that any of the lawyers were aware of the Qualcomm documents until the end, that didn't stop the court. Laying out each attorney's work and educational background, the court essentially said they were too smart to allow discovery violations of this magnitude to happen.

The Legal Team May Be Responsible for Your Client's Collection Efforts.

In naming individual attorneys to be sanctioned in the Qualcomm matter, the Magistrate repeatedly voiced the theme that the attorneys are responsible to supervise their clients collection and production of documents. Often the case with big corporations, outside counsel worked with a number of internal counsel, all of whom were members of the bar and likely had excellent credentials. Traditionally, outside counsel passed on production requests to their counterpart in corporate legal and waited for the response. They would never question the client, tell them what to do as far as collection of materials, and certainly not second guess them.

The court said, however, that the Qualcomm attorneys were responsible for the discovery violation because they also did not perform a reasonable inquiry to determine whether Qualcomm had complied with its discovery obligations. Similarly, the court dinged several of the attorneys for not conducting a reasonable inquiry into Qualcomm's discovery production before making their argument that the case should be dismissed because there was no evidence to support it. However, if there is no evidence produced to support an opponent's case, you have the right if not the obligation to point that out to the court and hope for dismissal, don't you? In the Qualcomm case the court suggests that more is required. You may have to go back to your client and conduct additional sweeps to confirm that there is no evidence.

When is that required? It is easy to look back in hindsight here and say: "C'mon guys, you had to know something was up here." But what about your garden variety case where the clients sends over the files and says "That's all there is." There is no clear-line test, other than "let your conscience be your guide." Or to put it another way, can you defend your actions later on down the road? This burden adds adds a new wrinkle to the ever-evolving attorney client relationship. Perhaps as sanctions become more frequent, caselaw will become more clear.

Qualcomm epilogue

The retained attorneys appealed Judge Major's decision back to the trial judge. They argued that in the sanctions phase, Qualcomm has asserted attorney client privilege over certain things causing the retained counsel to limit their argument and evidence. The trial judge ruled in March that the self defense exception to attorney client privilege applied and remanded the sanction phase back to the magistrate with instruction to all retained counsel to fully defend their position. The associates involved in this matter are no longer with the firm, all the partners remain.

Conclusion

As the discovery process becomes more complex and convoluted, the opportunities for abuse increase. However, courts are sanctioning conduct that is abusive or perceived to be abusive more frequently and with greater consequences. Further, attorney conduct is being scrutinized more closely. Client misconduct can easily be imputed to counsel. In order to avoid this problem, counsel must take his/her ethical obligations seriously and understand that the judiciary has run out of patience.