

## **Ediscovery Gloom and Doom/World FamousTech Seminar/Flat Panel Payback**

Curious as to how federal courts are looking at discovery issues in light of the new revisions? Be afraid. Be very afraid. A federal magistrate judge has recently levied sanctions against a party and its counsel for failing to produce relevant electronic discovery documents prior to trial, which later surfaced during the trial. In *Qualcomm Inc. vs. Broadcom Corp*, 2008 U.S. Dist. Lexis 911 (S.D. Calif. 2008), Qualcomm sued Broadcom for patent infringement. However, Broadcom had an absolute defense that Qualcomm waived any infringement if it could be shown that Qualcomm participated in a joint technology conference where the participants waived infringement issues. Hence the request for documents from Qualcomm as to its participation in the technology conference.

Qualcomm and counsel responded in discovery that requested documents – communications reflecting participation in the conference– did not exist, as it did not participate in the conference. Later, when preparing a witness for trial, counsel learned that in fact those communications did exist, but failed to advise the court or Broadcom counsel. When cross exam of the witness in trial caused disclosure of the suppressed communications, the missing documents were belatedly produced.

Turns out that there were 46,000 emails that were related to the patent issues involved, and that a simple keyword basic search of involved employees' computers would have generated the documents within a very short time. If those documents had been produced when requested, most likely the case would never have gone to trial, as they clearly established a solid defense for Broadcom. The judge was not amused. She maintained jurisdiction even after the verdict, and pursued the discovery issues that surfaced during trial. After an investigation, she levied sanctions against Qualcomm and its counsel. First she determined that the failure to conduct simple basic searches prior to trial amounted to intentional withholding of documents, and she did not buy Qualcomm's argument that it did not receive proper guidance from outside counsel. Nor did she buy counsel's argument that it was deceived by its client, instead finding that counsel should have known that its client had not properly performed searches for information, and ignored obvious signs that the production was incomplete. Sanctions were levied because the lawyers took the word of their client, which the court found was suspect. Ouch.

The associate who signed the original responses was sanctioned. The senior partner who was advised that some emails existed at trial, but did not disclose, was sanctioned. A junior associate who followed orders of his boss was sanctioned. The court did not levy monetary fines, as she had already awarded every dime requested by Broadcom for its attorneys fees and costs -- \$8,568,633. Instead, she referred the matter to the California bar, alleging the lawyers violated their ethical duty to make reasonable inquiries during discovery. Afraid? You should be. If this is upheld, every lawyer who

works on responding to discovery is at risk if the client chooses to withhold information, and we are not smart enough to figure it out. I will follow up.

Meanwhile, the World Famous MBA Law and Technology Section is having a seminar on April 16<sup>th</sup>, in which you can cram about 3 hours of tech knowledge into about 3 hours. With lunch, even. IT technoweenies from Baker Donnelson and Wyatt Tarrant and Combs will be on hand early to answer your specific questions about technology in your office, with a panel discussion designed to help you leave with a solution, or where to go for help. Jason Wolfkill will present an hour on the multiple uses of Adobe Acrobat 8, and how it can be used within an office. As he gets bored easily, and we are cheap, Jason will also present 60 tips in 60 minutes to help all of us navigate existing software and technology more efficiently. In addition, we will have a representative of Dragon Naturally Speaking voice dictation software to demo the new version during the lunch hour, followed by Logic Force, which is a well known forensic computer group. Finally, we will have a representative of EMC to discuss ediscovery and information management, and how to avoid what we witnessed in the Qualcomm case. And for you bright people who did the math and counted 5 hours, we are going to have split sessions, with handouts, so that two presentations will be made at 11, and also at 1, with Dragon in the middle at lunch.

Now for a few websites that might impact you and your practice. Law.com has honored 5 websites for 2007 that it considers newsworthy, and I am shamelessly publishing its picks. So sue me. The first is [www.avvo.com](http://www.avvo.com), which is a new lawyer rating service. After weathering a class action suit within days of its launch – convicted felons were rated higher than renowned litigators – the company changed its rating system and now assigns numerical rankings based upon certain information that must be in place. It is not rating Tennessee lawyers yet, but our time is coming. Want free case law access that is searchable? Try [Public.resource.org](http://Public.resource.org), and [www.altlaw.org](http://www.altlaw.org). For a better deal that helps your profession and gives you access to all federal and state case law and statutes, join the Tennessee Bar Association, which provides access to [www.fastlaw.com](http://www.fastlaw.com) for free. The ABA has now opened up its Journal website to the public, and provides a wonderful variety of articles, opinions, news and opinions, plus law blogs on every topic imaginable. [www.abajournal.org](http://www.abajournal.org). The last honoree is [www.justia.com](http://www.justia.com), which also has free searchable case law, blawgs, multiple databases, and lots of stuff that we use every day.

And yes, that was yours truly on the FedEx Forum megatron with his John Calipari signature model 42” Plasma TV, standing proudly in the “nose bleed/Summers is too cheap to make decent donation or else he could not have won the TV” seats at the UTEP vs. Tigers game. Eat your hearts out. . . . (And for those clients in the stands, consider that cheap is practical and keeps overhead down. . . .)