

## Global & Domestic Compliance Readiness – Legal Service Providers

# Qualcomm, The Subprime & E-Discovery Trends For 2008

The Editor interviews *Mary Mack, Technology Counsel, Fios, Inc.*, who has been regularly blogging on e-discovery issues and the *Qualcomm v. Broadcom* case in her blog, *SoundEvidence*, on *DiscoveryResources.org*.

**Editor:** It seems that e-discovery is a moving target. Even though assessing and managing risk seems to be the mantra of today's in-house compliance professionals, each new legal crisis seems to come as a surprise to those involved. No sooner did the wave of backdating scandals start to recede, than companies in the financial sector now find themselves in the midst of the subprime mortgage financial crisis. How do you see this evolving in 2008?



Mary Mack

**Mack:** The financial crisis in the subprime market will spawn an immense wave of litigation, much of which will turn on evidence generated by e-discovery. Mortgage lenders will be sued by borrowers who claim misrepresentation or unsuitability. The larger cases, however, will be seen by businesses suing other business – those that sold and bought Collateralized Debt Obligations (CDOs). Questions will be asked during the discovery process, such as:

- What did those involved know about the risk profile of those bundles?
- When did they know it?
- How were they represented?
- What were the expectations?
- What due diligence occurred?

The litigation nightmare will probably not stop there. Actions might be brought by prosecutors and by regulatory agencies. There will be shareholders' suits. There will be deals that cannot be consummated due to this credit adversity, whether it is considered a material adverse event or not.

We're already seeing the initial cases. I liken this situation to what happens when popcorn starts popping. There is always a first pop, and then it might be a little while before the second pop occurs. The next thing you know, all you can hear is pop, pop, pop, pop.

**Editor:** As we discussed in your September article,<sup>1</sup> another high profile trend in today's market is the *Qualcomm vs. Broadcom* case. How will the rulings and actions in this case affect e-discovery practices in the coming year?

**Mack:** One effect of the *Qualcomm v. Broadcom* case is that it has introduced distrust and suspicion into relationships. It has adversely impacted the relationship between inside and outside counsel in a profound way. What occurred in *Qualcomm v. Broadcom* was a series of missteps in the discovery process that resulted in a perception of hiding evidence. One of the substantive elements of the case was the argument and perception that information was withheld from a standards body, which, if successfully hidden, would have trapped those applying the technology into being beholden to Qualcomm.

The concealment affected not only the results of the case, in that important patents became generally unenforceable,

but it also resulted in the referral of 14 attorneys for Qualcomm to a magistrate for determination of sanctions (still pending at the time of this article being written). It will remain to be seen whether sanctions are only rendered against the corporation or whether the outside counsel will also be sanctioned and potentially be called before bar disciplinary bodies.

There was also an effort on the part of outside counsel to force Qualcomm, its former client, into abrogating its privilege. In one case involving a law firm's request for a waiver, the judge said that as to attorney-client communications, the privilege would still stand. However, outside counsel was allowed to use work product to defend itself. This could lead law firms, if they wish to defend their practices, to create internal documents that are not shared with the clients, which by their nature, will increase risk to the client if something goes awry.

Qualcomm pulled a couple of its unrelated cases before the same judge where the e-discovery "mistake" occurred and also fired one of their outside counsel on a couple other cases. Losing a major client, part of whose business model is to defend its IP and generate legal billings, is a major blow to any law firm. The General Counsel resigned. The relationship between Qualcomm and its outside counsel was destroyed. This will have reverberations in other client relationships throughout the legal community.

When Qualcomm was called on to defend its behavior with respect to e-discovery, it selected a paralegal to testify on its behalf. This occurred at a time when the judge was showing signs that she was very displeased with the company's response to her request that Qualcomm explain its behavior. We will definitely see some ripples in the paralegal community over this action.

Along the accountability line, it was an associate, who is no longer with Qualcomm's former law firm, who determined that further production was not necessary. This decision was based on a mistaken belief that if you object to a request for production and you "narrow" it, you don't have to produce. Inside counsel is going to want a clearer understanding of the knowledge of the attorneys that represent them, including the review teams.

Finally, inside counsel may experience a greater demand from law firms for

an agreement that the client will waive the privilege if they need to defend themselves. And, inside counsel will have to consider their own liability in such matters and may wish to consider protecting themselves with insurance and/or a company indemnification agreement.

**Editor:** Why has the attention given to compliance by judges and magistrates, at the state and federal level, made compliance with the Federal Rules of Civil Procedure an even more important concern of corporate counsel.

**Mack:** The attitude of the judges, particularly the magistrate judges, has changed. They are wielding the pen on e-discovery protocol and issuing sanctions more often. The amended Federal Rules of Civil Procedure (FRCP) have raised the consciousness of the people who are stewards of the process, namely the judges and the magistrate judges. The expertise of both the federal and state judiciary with respect to the e-discovery process has increased at a faster rate than that of practitioners and clients. Many of the principles embodied in the amended FRCP are being followed in some capacity in the state courts.

For example, had the *Qualcomm v. Broadcom* case been heard before the amended Federal Rules went into effect last year, the corporation and its lawyers might have gotten a pass. Yet, the hearings took place after the rules were in effect. Under the new rules, a "meet and confer" conference, as required under FRCP Rule 26(f), might have dispelled the misunderstandings about the process that led Qualcomm into its current quagmire. Before the adoption of the new Rules, the custom was not to have a conference. Or, if you did have one, it was more than likely that one party said "I want your data," and the other responded, "No you can't have it." Qualcomm's big mistake was anticipating that the climate would stay the same as they went to trial.

**Editor:** How can Fios help clients avoid the kind of mistakes that characterized the *Qualcomm* case?

**Mack:** Increasingly clients are calling us in, even before a lawsuit occurs, to help with assessing e-discovery practices and developing discovery response plans.

We are also called in very early to help with meet-and-confer planning. We are already seeing such requests from companies in a variety of different markets facing heavy regulation or product liability issues. Having a structure in place to defensibly and predictably respond to discovery allows a company to demonstrate good faith during the meet and confer process and put in place repeatable processes that can be improved over time, from case to case.

Clients are engaging us earlier in that process. We have a consulting service that helps clients anticipate their preparedness for identifying, preserving and collecting data potentially responsive during discovery. We also have a review management service to support counsel in defensible review strategies and protocols that are quick, cost effective and risk

appropriate. Qualcomm could have benefited from such a review protocol that included search optimization and hot document routing.

**Editor:** What should a company involved in, or subject to potential litigation, be doing to protect itself right now?

**Mack:** Inside counsel needs to look very closely at the composition of the discovery response team and determine how prepared they are to respond to the demands of e-discovery. He or she needs to consider if there is a person or persons who understands and can manage the intersection of law and technology. This Office of Technology Counsel is typically filled by an attorney or technical person aware of the systems and devices where the corporation's electronic information resides and who can move quickly to help it orchestrate its response to e-discovery demands. This person should have a combination of strategic and tactical accountability.

Secondly, counsel needs to assess whether or not it needs outside, independent guidance from external e-discovery experts. Seeking help from an organization like Fios, who has a deep understanding of all phases of the e-discovery process, can help legal understand the risks associated with each phase of the discovery process as well as facilitate critical, open communication with other departments inside the organization vital to defensible response, such as IT and records management.

Most importantly, counsel needs to get started now. Whether in the midst of litigation or anticipating litigation, getting started, assessing practices and putting in place a discovery response plan that can be used to monitor and measure actions from case to case will enable counsel to focus on the merits of each matter vs. getting bogged down in the e-discovery details. The bottom line is to make sure that the process is there to demonstrate good faith and to ensure there is not any perceived hiding of the ball – because that's the double whammy in the *Qualcomm* case.

**Editor:** Getting back to the subprime issue, why is *Qualcomm* so important if it is a patent case?

**Mack:** The main issues in *Qualcomm* that resonates with the subprime crisis are the elements of bad faith and hiding information. Companies defending themselves in subprime cases will be pressed to demonstrate what they knew, when they knew it and how and to whom they communicated. If they appear to be holding back on electronic evidence, even if it just due to communication errors or newness to the process, it could have a "material adverse effect" on the outcome of the litigation.

Isn't it always better to litigate on the merits of the case rather than on perceived e-discovery misbehavior?

<sup>1</sup> See *Compliance And E-Discovery: Two Inseparable Risk Management Functions*, The Metropolitan Corporate Counsel, September 2007