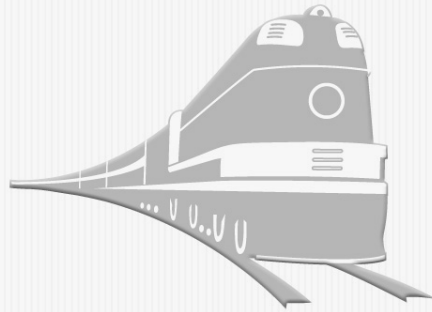


# 2007 BUSINESS LITIGATION EXPRESS



DESTINATION : INNOVATION

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# 2007 BUSINESS LITIGATION EXPRESS

## **Ethics Drama of 2007: Qualcomm, Congress and the Pressure to Waive Attorney Client Privilege**

Kenneth S. Klein, Foley & Lardner LLP

[InsideCounsel]

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# The End Point

- » “Stonewalling, concealment, and repeated misrepresentations concerning documentary evidence”
- » “Numerous witnesses who steadfastly testified falsely”
- » “Widespread and undeniable misconduct... throughout...discovery, pre-trial motion practice, trial, and post-trial proceedings”
- » “Organized program of litigation misconduct and concealment”
- » “Carefully orchestrated plan”

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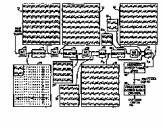
# The Patents at Issue

**United States Patent 6,432,104**  
 Patent Number: 6,432,104  
 Date of Patent: Sep. 22, 1999

**ADAPTIVE BLOCK DATA STORAGE AND RETRIEVAL SYSTEM**

**Abstract:** A system for storing and retrieving data in a storage system. The system includes a storage device and a controller. The controller is configured to store data in a storage device in a manner that allows for efficient retrieval of the data. The controller is also configured to retrieve data from the storage device in a manner that allows for efficient retrieval of the data.

**Claims:** 1. A system for storing and retrieving data in a storage system, comprising: a storage device; and a controller configured to store data in the storage device in a manner that allows for efficient retrieval of the data, and to retrieve data from the storage device in a manner that allows for efficient retrieval of the data.



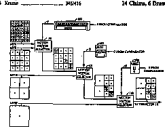
Ex. 1-1

**United States Patent 5,276,767**  
 Patent Number: 5,276,767  
 Date of Patent: Nov. 15, 1996

**DATA STORAGE AND RETRIEVAL SYSTEM**

**Abstract:** A system for storing and retrieving data in a storage system. The system includes a storage device and a controller. The controller is configured to store data in a storage device in a manner that allows for efficient retrieval of the data. The controller is also configured to retrieve data from the storage device in a manner that allows for efficient retrieval of the data.

**Claims:** 1. A system for storing and retrieving data in a storage system, comprising: a storage device; and a controller configured to store data in the storage device in a manner that allows for efficient retrieval of the data, and to retrieve data from the storage device in a manner that allows for efficient retrieval of the data.



Ex. 2-1


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# The Lawsuit

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17 COURT IN FILED 02  
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UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF CALIFORNIA

QUALCOMM INCORPORATED,      Case No. 16 CV 195816      WLS  
 Plaintiff,                              COMPLAINT FOR PATENT INFRINGEMENT  
 v.    DEMAND FOR JURY TRIAL  
 BROADCOM CORPORATION,  
 Defendant.


COUNTY FOR PATENT INFRINGEMENT  
 DEMAND FOR JURY TRIAL



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JVT who?








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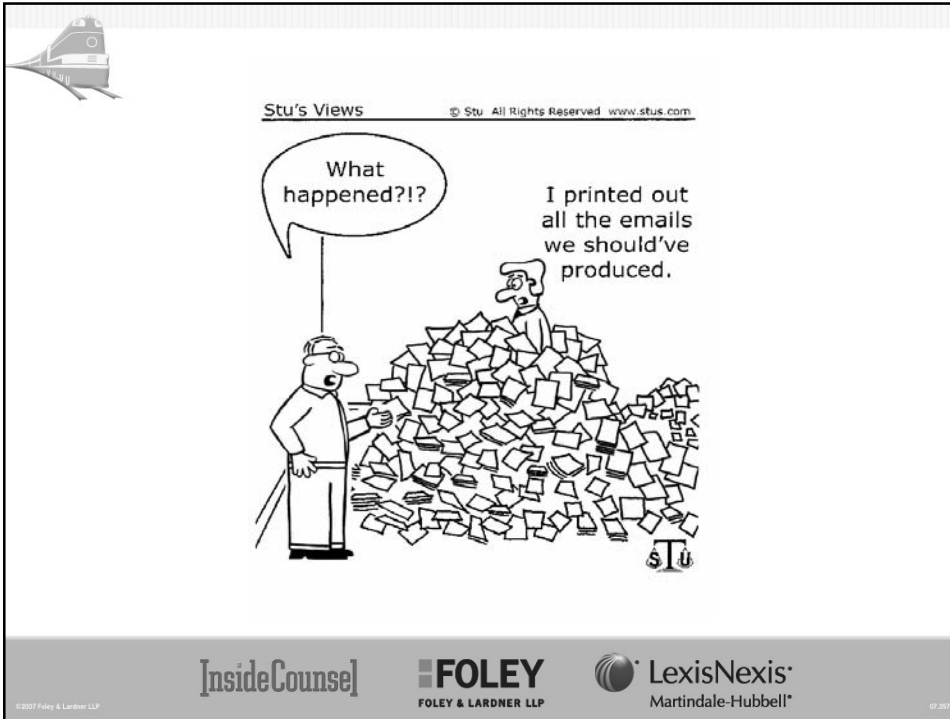


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What happened?!?

I printed out all the emails we should've produced.

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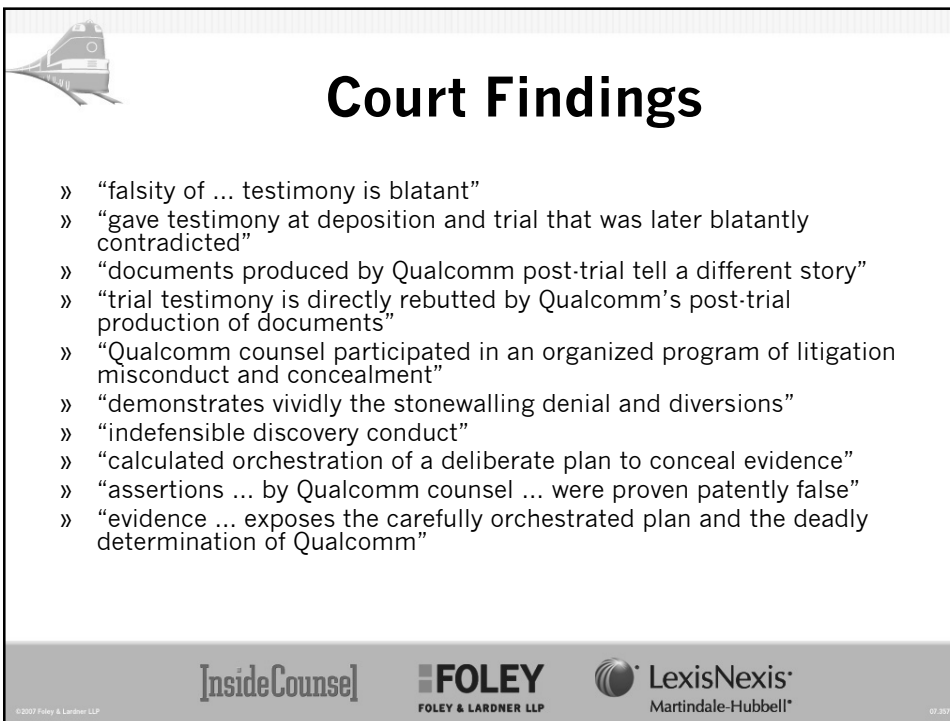
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## Court Findings

- » “falsity of ... testimony is blatant”
- » “gave testimony at deposition and trial that was later blatantly contradicted”
- » “documents produced by Qualcomm post-trial tell a different story”
- » “trial testimony is directly rebutted by Qualcomm’s post-trial production of documents”
- » “Qualcomm counsel participated in an organized program of litigation misconduct and concealment”
- » “demonstrates vividly the stonewalling denial and diversions”
- » “indefensible discovery conduct”
- » “calculated orchestration of a deliberate plan to conceal evidence”
- » “assertions ... by Qualcomm counsel ... were proven patently false”
- » “evidence ... exposes the carefully orchestrated plan and the deadly determination of Qualcomm”

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## The Accused “Bad Actors”

- » The company
- » The company’s non-legal personnel
- » The company’s in-house counsel and litigation managers
- » The company’s outside counsel

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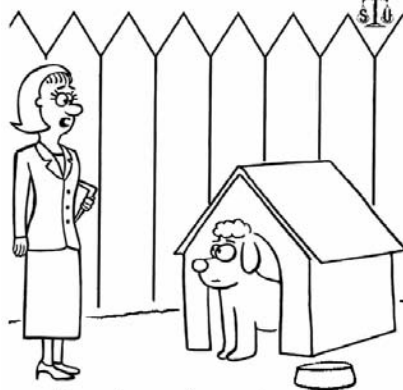
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I need a really good excuse...  
Do you think you can eat 200,000  
pages of discovery?

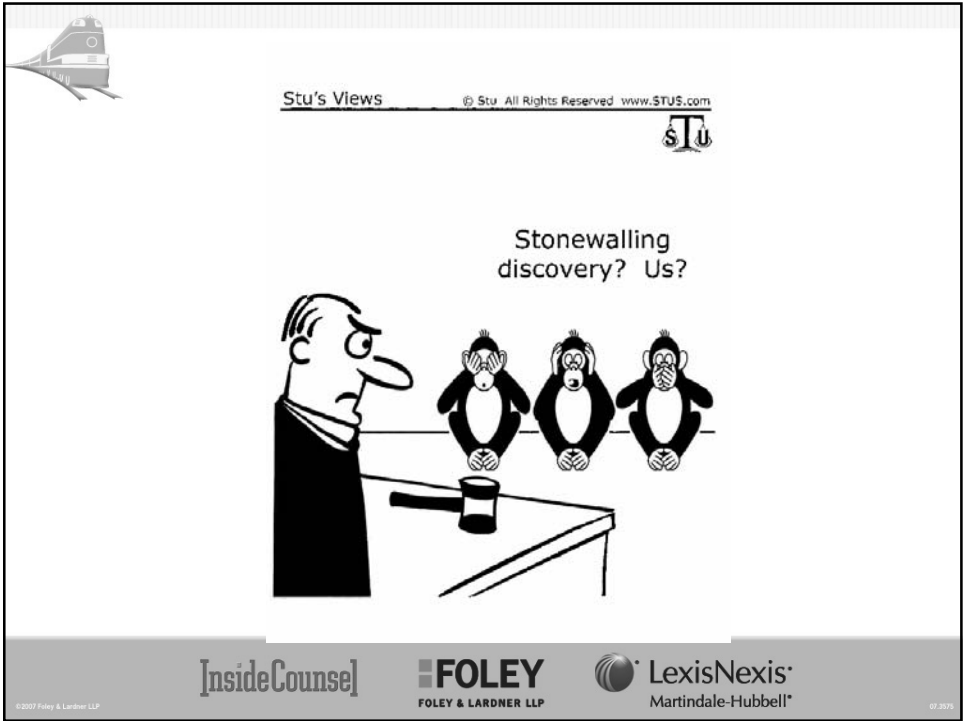
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Stonewalling  
discovery? Us?

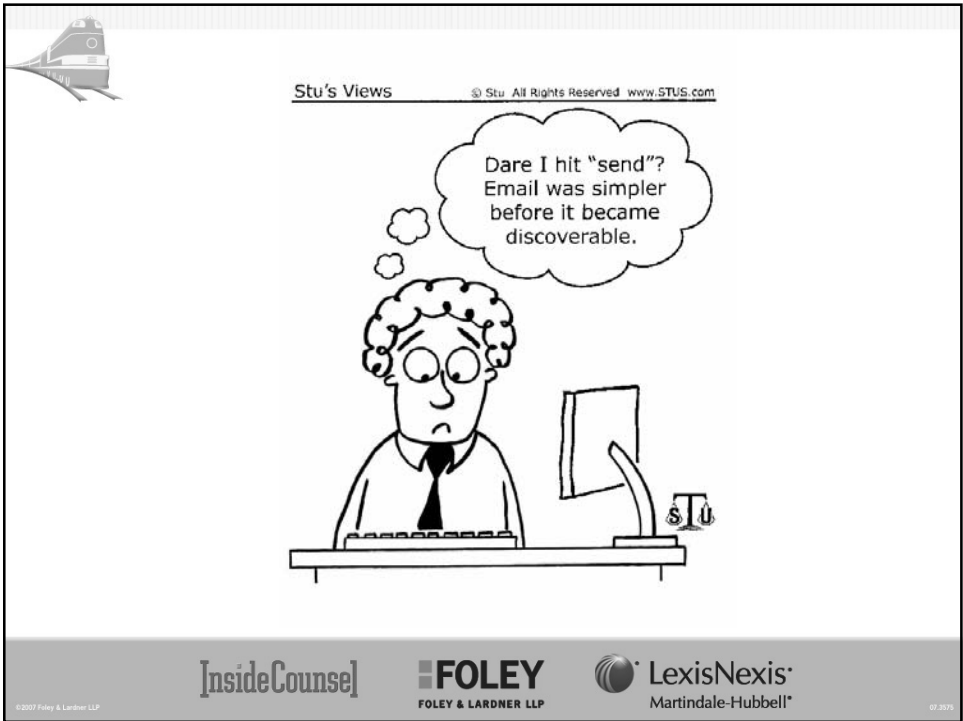
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Dare I hit "send"?  
Email was simpler  
before it became  
discoverable.

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## Three Kinds of Bad Conduct

- » Incomplete document production
- » Inaccurate witness testimony
- » Inaccurate statements by counsel

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## Broad and Aggressive Discovery

- » “All documents concerning Qualcomm membership, participation, interaction, and/or involvement in setting any standard relating to the processing of digital video signals that pertains in any way to any Qualcomm Patent.”
- » “All documents referring to or evidencing any participation by Qualcomm in the proceedings of the JVT...”

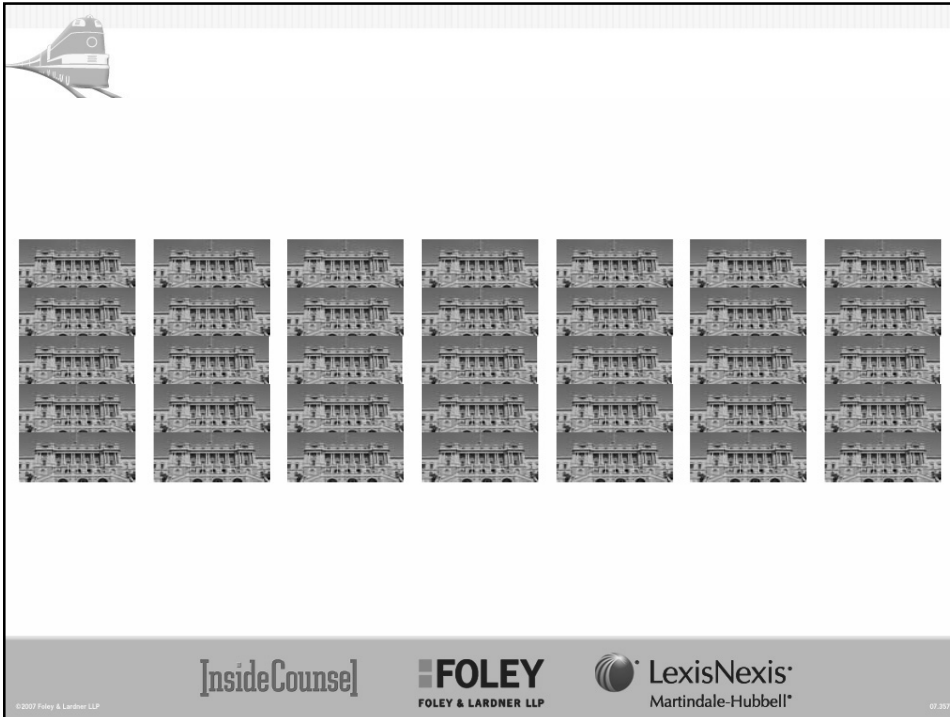
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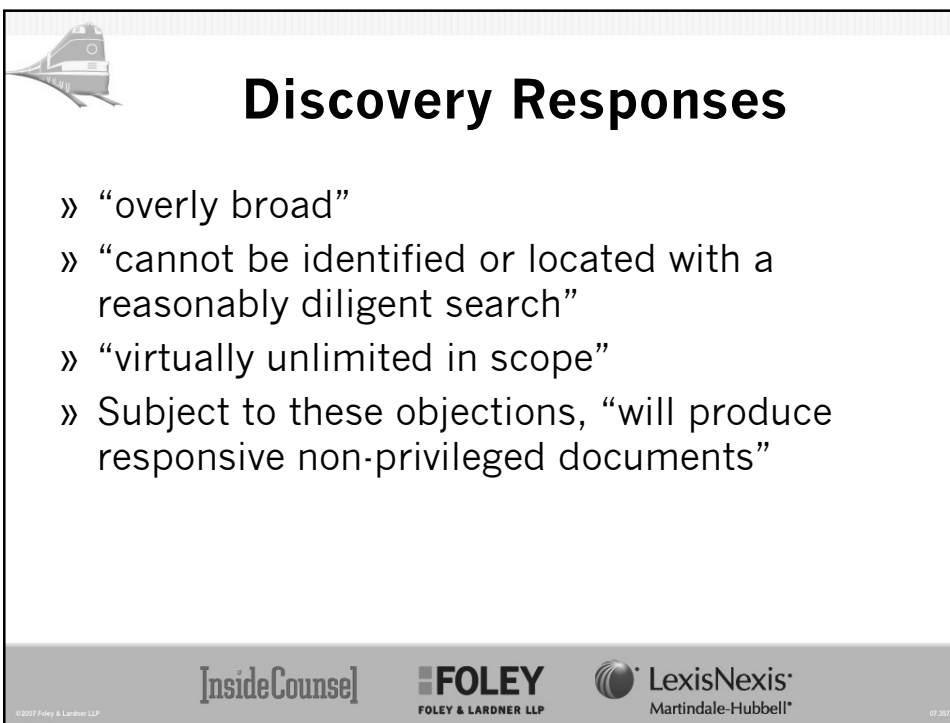
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## Discovery Responses

- » “overly broad”
- » “cannot be identified or located with a reasonably diligent search”
- » “virtually unlimited in scope”
- » Subject to these objections, “will produce responsive non-privileged documents”







## Document Production – What Qualcomm Said

» We produced according to the instruction we were given by counsel

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## Document Production – What Outside Counsel Said

» We were kept in the dark by Qualcomm

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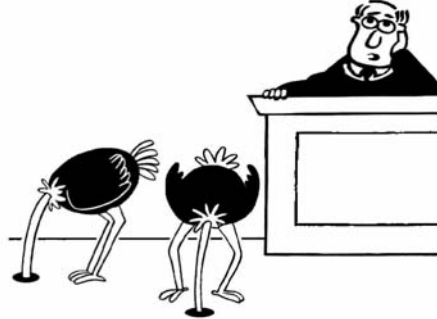


## Document Production – What the Court Heard

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I see Qualcomm  
has yet another defense  
to its discovery violations.



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## A Better Response

- » Here is how information is organized at our company
- » Here are the search terms we used
- » Here is the volume of hits that resulted
- » Here was our criteria for sorting through those hits
- » From this result, we produced all non-privileged documents

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## Testimony – What Qualcomm Said

- » Counsel prepared me and I testified accurately within the parameters of how I was prepared

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## Testimony – What Outside Counsel Said

- » The attorneys who handled document production let me know what documents were relevant to the witness, and the witness never gave me any additional information

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## Testimony – A Better Approach

- » We too often prepare witnesses under the paradigm, “No good deed goes unpunished” – in other words, any volunteered information not literally asked for will lead to more questions. Perhaps a better paradigm is “The Bill Clinton Rule” – anything short of “the whole truth” could lead to bigger trouble

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## Counsel at Trial



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## Counsel at Trial – A Better Idea

- » Do not let the contemporary economics of law practice compel decisions on training or staffing that focus on short term savings to the detriment of long term preparation

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