

# LITIGATION

## Paper Trails

The importance of document review...  
and a warning about discovery masters

- | In defense of contingency fees
- | Honesty really does pay



# THE RECORDER

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AUTUMN, 2008

An incisivemedia publication

## Discovery Lessons

By J. Eric Bartko and Robert Bunzel

In 2002, the U.S. Justice Department launched an investigation to look into alleged price fixing in the DRAM computer chip market. The investigation resulted in \$731 million in fines, which was the second largest antitrust recovery ever recorded.

Gary Swanson, an executive at Hynix, a computer chipmaker, was indicted by the Justice Department in October 2006 and charged with joining a global conspiracy to fix prices and rig bids in the DRAM industry. Fifteen other individuals, along with four corporations (Samsung, Infineon Technologies, Hynix and Elpida Memory), were also charged in connection with the massive federal investigation into antitrust violations that were carried out through a worldwide cartel in the DRAM industry. (DRAM, which stands for dynamic random access memory, allows for high-speed computer storage and is an essential component for computers and other electronics.)

Fourteen defendants pleaded guilty while one has remained a fugitive in Korea. Executives from Micron Technologies received amnesty and agreed to testify for the government. Hynix, the world's second largest DRAM manufacturer, pleaded guilty and was ordered to pay a \$185 million fine, the third largest criminal fine in U.S. history. Four Korean executives at Hynix to whom Swanson reported also pleaded guilty and agreed to serve prison terms and pay fines. Because he believed that he had not engaged in price fixing or knowingly supported the activities of others, Swanson, on the advice of counsel, decided to go to trial.

Discovery during the case resulted in the government producing more than 19 million electronic pages and 1,152 boxes of hard copy materials. The sheer size of this document dump is a symptom of the proliferation of recorded information in the digital era. In an effort to

avoid drowning in this sea of information, BartkoZankel, which represented Swanson in the trial, put together a team of technical experts to assist in the initial organization of the discovery and other related electronically stored information. These experts were also involved in the ongoing interaction with all of this material that would be required during the course of the trial.

BZresources (BZr) is the team that BartkoZankel developed for this purpose. To enable effective computer-assisted searches of the data, BZr scanned all of the paper documents in order to add them to the rest of the electronically stored information. After a master database of all discovery materials had been created, the BartkoZankel attorneys were better able to work with BZr when it came to understanding and mastering the huge amount of information.

To prevent themselves from being overwhelmed, members of the BartkoZankel litigation team were required to sort and prioritize data. The initial focus was on documents pertaining to Hynix and Micron (the amnesty applicant), from which more than 580,000 were selected for further issue and relevancy review. Through the use of scanning and manual coding by such particulars as date, key words and key witnesses and by narrowing the relevant time frame as much as possible, the number of documents that had to be reviewed for content was significantly reduced. During this culling process, BZr integrated a number of currently available tools (deduplication, text search, and concept search) to create a successful blend of document review strategies and cutting-edge technologies.

Through the elimination of duplicates, linguistic analysis and structured double-blind reviews for quality control, BZr was able to further limit the initial document review for relevancy to 327,522 documents (many still in the original Korean) that required an eyeball review.

In an effort to reduce the expense of this initial document review, BZr developed a review and analysis facility in conjunction with a company in the Philippines that has long provided high-end information services to several foreign governments. The goal was to create a pool of experienced Philippine attorneys who could be used during document review at a significant price differential, without having to sacrifice education, experience or

commitment to diligence.

Given that the Philippine legal system is modeled after ours in the United States — and with English as its official language — the choice was an easy one. Our confidence in choosing the Philippines continues to be regularly rewarded and confirmed by the consistent, high quality and cost-effective review and analysis of completed and ongoing projects.

The Swanson case went to trial in February 2008 in federal district court in San Francisco. Given their success in the investigation and with witnesses who agreed to cooperate at the trial, the Justice Department lawyers clearly anticipated a conviction. In large part, their case hinged on e-mails sent to Swanson from his Korean counterparts that were suggestive of a conspiracy and the testimony of Michael Sadler, Micron's president of worldwide sales and marketing, who had acknowledged fixing prices. Under the government's criminal antitrust amnesty program, Sadler had been assured that he would not be charged with a crime if he cooperated. He had promised to testify that Swanson agreed to fix DRAM prices with him, as reflected in more than 50 phone calls catalogued by the FBI.

Because of its firm grasp of the electronically stored information relating to the case, the defense was able to refute some key prosecution assertions. Perhaps most tellingly was the defense's ability to demonstrate that a key phone call central to Sadler's testimony could not have occurred, an assertion that was graphically presented to the jury through the display of travel receipts produced during discovery.

Swanson's trial ended in a hung jury after seven days of deliberations, and a mistrial was declared on March 6. Interviews with jurors and reports in the media indicated that 10 jurors favored acquittal while none found the government's key witness credible. The Justice Department announced two weeks later that it would not retry the case.

The records on which Swanson's case hinged could never have been identified or quickly retrieved by the defense team without our having put together a technical team that could work, with senior counsel, to carefully design and execute an intelligent review of the government's enormous document production. ♦

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