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Fatal Discovery

What went wrong in the massive e-discovery failure in the Qualcomm-Broadcom patent fight? The six lawyers who were hit with sanctions had a client who was less than fully candid, said the magistrate judge who exonerated them. But a better understanding of Qualcomm's computer systems would have helped, too.

BY JOSEPH ROSENBLOOM

THERE WAS GOOD NEWS and bad news in the magistrate judge's opinion for six lawyers who had once represented Qualcomm Inc. in litigation against Broadcom Corp. Two years earlier, the magistrate judge, Barbara Major, had sanctioned them for an egregious discovery lapse: failing to turn over to Broadcom thousands of significant e-mails in a high-stakes patent infringement trial.

This time, in April 2010, Major didn't reinstate the sanctions, which had been vacated while the lawyers appealed, and she exonerated them of the charge that they had acted in bad faith.

But the magistrate judge didn't let them off the hook entirely. She slammed at least some of the six lawyers—she didn't specify which ones—for "significant errors." The lawyers' blunders, combined with what Major termed an "incredible lack of candor" by Qualcomm's employees, resulted in superficial and misdirected searches of Qualcomm's e-data. "There is still no doubt in this court's mind that this massive discovery failure resulted from significant mistakes, oversights, and miscommunication on the part of both outside counsel and Qualcomm employees," Major wrote.

The six Qualcomm lawyers—former Day Casebeer Madrid & Batchelder partners James Batchelder, Christian Mammen, and Lee Patch; former Day Casebeer associates Adam Bier and Kevin Leung; and former Heller Ehrman partner Stanley Young—are hardly the only lawyers to find themselves caught in the perilous cross-currents of electronic discovery these days. In the first five-and-a-half months of 2010, litigants sought sanctions against parties or their lawyers in 31 cases involving e-discovery failures, according to statistics tracked by Gibson, Dunn & Crutcher. The court approved sanctions against litigants or lawyers in 21 cases. In 2009 sanctions were sought in 88 cases; the court granted them in 62. The surge in claims of e-discovery abuses reflects the fast-growing "volume, complexity, and scope of electronic discovery, which appears to allow more opportunity for discovery violations than occurred in the paper world," says e-discovery specialist Farrah Pepper, of counsel at Gibson, Dunn.

The Qualcomm lawyers were relatively fortunate: A judge's decision to waive attorney-client privilege opened the way to freeing themselves from sanctions. But the sanctions proceedings took a huge toll on the six lawyers—and Day Casebeer. Wounded by the adverse publicity, the Cupertino, California–based IP firm ceased to exist as an independent firm, merging into Howrey last year. (San Francisco–based Heller Ehrman disbanded in 2008 for reasons unrelated to the sanctions case.) Qualcomm, too, was hit hard. In January 2008 Major sanctioned the company for intentionally withholding documents that it was obligated to produce, levying a $8.5 million penalty. Qualcomm did not appeal the finding or the penalty, although its counsel in the sanctions matter, Cravath, Swaine & Moore's Evan Chesler, acknowledges that they dealt a "profound" blow to the company's reputation.

In hindsight, several of the six lawyers now say they would do things differently in the Broadcom litigation. Still, Mammen captures their generally defensive response to Major's criticism when he says that he doubts any complex case could stand up to similar scrutiny "without some flaws being found." (Batchelder and Patch declined to comment for this article; the other four were interviewed.)

Joel Zeldin, a partner at San Francisco–based Shartsis Friese, who

TIMOTHY ARCHIBALD

Shartsis Friese's Frank Cialone (left) and Joel Zeldin defended lawyers Christian Mammen and Kevin Leung against sanctions arising from Qualcomm's discovery debacle.

defended Mammen and Leung against the sanctions charges, puts the blame for the discovery failure squarely on Qualcomm's "lack of candor," in Major's words. "Really, it was about asking [Qualcomm employees] a question and them not telling you everything they knew on the subject," Zeldin says. "So that has nothing to do with e-discovery."

Qualcomm counsel Chesler, in contrast, calls the judge's swipe at his client "terribly unfortunate." He says the real problem was poor communication among Qualcomm's outside counsel. Young, relatively inexperienced lawyers at Day Casebeer decided not to search witnesses' individual computer files—and then did not relay those decisions to senior members of their team, he says. "That's just a recipe for something going wrong," Chesler says.

THE FULL EXTENT OF THE disaster only became apparent in the spring of 2007, when a posttrial search of Qualcomm's computer files yielded a mother lode of more than 200,000 pages of e-mails and other documents that had eluded the company's outside lawyers until then.

"I was shocked. I was stunned," recalls Mammen, one of the two Day Casebeer lawyers most immersed in document collection in the case. "I honestly expected that when Qualcomm ran those searches, that they would come up empty."

In the litigation, filed in federal district court in San Diego, Qualcomm accused Broadcom of having infringed two of its patents for video-compression technology integral to some small digital devices, such as cell phones. The 200,000 pages of documents related to an issue that surfaced in September 2006, when most discovery was complete. Broadcom signaled a new potential claim in an amendment to its interrogatory responses: that Qualcomm had participated in the deliberations of an industry-sponsored body, the Joint Video Team, or JVT, to formulate a standard for small-screen video-compression technology. The JVT had met in cities around the world between January 2002 and May 2003, when it adopted the standard known as H.264. If Qualcomm had participated in the standard-setting deliberations, it would have been precluded from recovering damages for infringement of patents incorporated in the standard. Rather, Qualcomm would have been required to license its patents on "reasonable" terms to companies such as Broadcom whose products adhered to the H.264 technology.

Mammen recalls being "stunned" when 200,000 pages of new e-mails turned up.

Sure enough, Qualcomm's JVT involvement became a central focus of the trial the following winter. And on the last day of testimony, in January 2007, Qualcomm engineer Viji Raveendran admitted under cross-examination that 21 JVT–related e-mails had recently been discovered on her laptop. They had never been produced to Broadcom.

That omission and other evidence persuaded jurors to find for Broadcom. The jury found that Broadcom had not infringed Qualcomm's patents and, in an advisory verdict, that the Qualcomm patents were not enforceable. Federal district court judge Rudi Brewster ordered a hearing on the enforceability of the patents—and Broadcom demanded a JVT–targeted search of Raveendran's computer and those of other Qualcomm employees. That's when the enormous, unsuspected trove of e-mails turned up. (Broadcom later bowed out of the sanctions proceedings in April 2009 after reaching a broad settlement with Qualcomm on a range of outstanding patent disputes.)

In August 2007 Judge Brewster issued a blistering 54-page opinion, holding that Qualcomm had followed a strategy of "stonewalling, concealment, and repeated misrepresentations" to keep documents out of Broadcom's hands that would have demonstrated Qualcomm's participation in the JVT. Brewster found that Qualcomm's outside lawyers—he did not specify which ones—had engaged in an "organized program of litigation misconduct and concealment" during discovery and trial.

(Qualcomm strongly denies intentionally withholding documents, although the company did not appeal its sanction. It acquiesced in order to take responsibility for what had happened, not to admit wrongdoing, Chesler says.)

The judge's opinion highlighted key decisions by Qualcomm's outside lawyers—in particular Mammen and Leung—that had determined the course of document retrieval. Under the 2006 e-discovery amendments to the Federal Rules of Civil Procedure, electronically recorded information is specifically included among the documents that lawyers must reasonably try to unearth in fulfilling their discovery obligations. E-discovery consultant George Socha says that under the rules, lawyers should establish a process that ensures "good, solid product management." Exactly what such a process looks like, however, remains ill-defined under the law, he admits.

Early in the Broadcom litigation, Mammen, charged with responding to Broadcom's discovery requests, decided to abide by guidelines drafted by Day Casebeer lawyers in an earlier case against Broadcom. The guidelines—the so-called Overview Memo—outlined how Qualcomm's in-house staff of four paralegals and Day Casebeer's lawyers would divide document collection duty. "It has been Qualcomm's experience that document collection efforts are best handled by Qualcomm's in-house staff," the memo says.

In practice, Mammen testified before Major last January, the Overview Memo meant that outside lawyers would convey discovery requests to the in-house paralegals, who would take the lead in identifying witnesses and collecting documents in a "collaborative process" with Day Casebeer. But there was apparently some confusion over who was responsible for what. The lead Qualcomm paralegal for much of the Broadcom discovery, Christine Glathe, said in a declaration during the sanctions proceedings that she had merely followed the outside counsel's instructions about which documents to collect.

Leung, who joined Day Casebeer as an associate in December 2005, replaced Mammen as the outside lawyer instructing Glathe soon after his arrival, although Mammen continued to oversee Leung. Glathe proposed to Leung that they collect background documents to prepare for the depositions of Qualcomm employees by searching relevant corporate repositories, central computer files in which Qualcomm engineers dumped documents about a particular case or subject. To search the individual computer files of witnesses would be "cumulative" and inefficient, Glathe told Leung in an e-mail.

Leung discussed the corporate-repository plan with Mammen. They agreed that it sounded reasonable. Leung says he remembers that Glathe told him that searching just the corporate repositories "had worked flawlessly" in other cases. The corporate-repository approach became Leung's document-

search norm from then on. Qualcomm, he learned, had a JVT–related corporate repository that contained all the publicly available documents surrounding the standard-setting group's meetings. When a search of the repository produced no documents showing Qualcomm's participation in the H.264 standard-setting, the result seemed to confirm what Leung and Mammen were hearing from Qualcomm employees: no JVT participation.

Embracing the corporate-repository methodology turned out to be a fateful decision. It meant that document collection would not reach the individual computers of the key witnesses at Qualcomm. And the corporate repository that Leung searched turned out to be a "red herring," says Frank Cialone of Shartsis Friese, cocounsel for Leung and Mammen.

The Day Casebeer lawyers' reliance on another form of digital technology may have marred their efforts from the start of discovery. The great majority of the communications between the Day Casebeer lawyers in Cupertino and employees at Qualcomm, which is headquartered in San Diego, were conducted by e-mail or telephone. With few exceptions, there were no face-to-face interviews until the time came for prepping the witnesses for depositions—a point that Major noted disapprovingly in her April 2010 opinion, though she did not elaborate.

Patch and Bier decided that the 21 e-mails didn't fall under Broadcom's discovery request.

In a blizzard of e-mails and telephone calls during the 15 months of discovery, Leung, Mammen and other outside counsel followed up with engineers, in-house counsel, custodians of corporate files, and other Qualcomm sources earmarked by the in-house paralegals or other company employees as potentially knowledgeable about JVT participation. All told, 15 Qualcomm employees confirmed that there was no JVT participation during development of the H.264 standard, according to W. Thomas McGough, Jr., of Reed Smith, who represented Batchelder in the sanctions proceedings. Among them were two digital video engineers, Viji Raveendran and Harinath Garudadri.

When Raveendran's e-mail address appeared on a JVT–related document that Broadcom produced in a deposition, Leung investigated. The document was a reflector list, a compilation of e-mail addresses for bouncing messages to a group of people. Leung determined that the reflector list contained the e-mail addresses not of JVT participants in H.264 standard-setting but of a subgroup that had performed a kind of bake-off comparing video-clip technologies to existing standards—a different matter. Raveendran said that she had not subscribed to the reflector list, had not received any e-mails from it, and did not belong to the subgroup.

But Raveendran's relationship to the subgroup would reemerge in a far more nettlesome way during the patent infringement trial in January 2007.

Day Casebeer associate Adam Bier was then helping partner Lee Patch prepare Raveendran for her testimony at trial. James Batchelder, Qualcomm's lead lawyer in the litigation, had brought Patch, a former in-house lawyer at Sun Microsystems, Inc., into the case as a "fresh pair of eyes," as Batchelder explained in later testimony. Like Bier, Patch had never conducted discovery or tried a case.

While meeting with Raveendran five days after the start of trial, Bier searched her laptop for e-mails, entering as a keyword the initials of the JVT–related subgroup. Twenty-one e-mails popped up. Bier quickly reported these hits to Patch and Mammen.

The question they faced on a Sunday night in the middle of trial was this: Should they disclose the existence of the 21 e-mails to Broadcom and the court?

In hindsight, the answer is obvious. But because receipt of the 21 e-mails did not necessarily indicate that Raveendran had been involved with the JVT's standard-setting—or even that she was a member of the subgroup—Patch and Bier decided that Broadcom's discovery request did not cover the 21 e-mails.

In a sidebar conference four days later, cocounsel Stanley Young of Heller Ehrman told Judge Brewster that there was no evidence that any e-mails had been sent to the subgroup's reflector list. (Young would later testify that he did not then know about the 21 e-mails, and Major concluded that he should not have been implicated in any other way in the discovery blunders.) And when Raveendran testified, she said again that she had no involvement in the JVT during the H.264 standard-setting. Under cross-examination by Broadcom counsel William Lee of Wilmer Cutler Pickering Hale and Dorr, however, Raveendran mentioned the 21 e-mails that had been found on her laptop.

That's when "the wheels started to fall off this wagon," as Chesler put it at a later hearing.

MAGISTRATE JUDGE MAJOR, tasked by Judge Brewster to delve into the discovery mess, issued her opinion in April 2007: Even if the 21 e-mails were not within the scope of Broadcom's discovery request, the fact that the outside counsel were unaware of them before Bier found them "proved Qualcomm's document collection and production had been inadequate," Major wrote. Judge Brewster's broadside followed five months later. In January 2008, Major sanctioned the six attorneys, singling them out for the first time as those responsible. She referred them to the state bar for possible discipline.

Although the six lawyers remained at their firms, they found their reputations clouded. "I had pulled myself up by my bootstraps," says Leung, who came from an immigrant family in San Francisco's Chinatown, the son of a pastry chef and a factory seamstress. "It felt like all the work that I had done to get where I was had been wiped away," he says. Mammen says he became "professionally radioactive" because of the harshly critical tone of much news coverage.

Undoing the damage wouldn't be easy. Qualcomm had invoked attorney-client privilege, a serious hurdle to the lawyers' defense. In 2007 Qualcomm's Raveendran, Glathe, and two other Qualcomm employees had filed declarations with the court that maintained, among other things, that the paralegals had merely collected documents "at the discretion" of the outside counsel, and that the outside lawyers had neglected to ask if witnesses had JVT–related electronic files on their individual computers. Zeldin, counsel for Mammen and Leung, appeared at an October 2007 hearing with a binder stuffed with privileged documents. With a showman's flourish, he held up each for Major to see, saying they would contradict the employees' declarations—but adding that he couldn't let her read them because of attorney-client privilege.

The six lawyers appealed to Judge Brewster to set aside the privilege. In March 2008 he held that the Qualcomm witnesses' declara-

tions had triggered the "accusatory adversity" principle, which justified the self-defense exception to the attorney-client privilege. The judge went further, allowing discovery of Qualcomm documents and depositions of its employees. Vacating the sanctions, he remanded the case to Major.

At a hearing last January, Zeldin and counsel for the other four sanctioned attorneys—Reed Smith's McGough for Batchelder; Kerr & Wagstaffe's James Wagstaffe for Patch; Kirby Noonan Lance & Hoge's David Noonan for Young; and Chapman, Popik & White's Merri Baldwin for Bier—presented to Major the results of the waiver. The new evidence painted a different picture of Qualcomm's participation in the H.264 standard-setting. Although Raveendran had repeatedly denied to outside counsel that she had any JVT involvement, in 2002 she had attended a meeting of the standard-setting body at Klagenfurt, Austria, from which she e-mailed a report back to the company. She had also received reports from two other Qualcomm engineers who attended a JVT meeting in Awaji, Japan, the same year, and exchanged about 118 e-mails about JVT meetings with Jordan Isailovic, a consultant hired by Qualcomm to attend them.

Major cited the poor communication between Qualcomm and its lawyers.

The lawyers for the six unveiled similar apparent discrepancies between newly discovered information and what Garudadri and several other Qualcomm employees had told the company's outside counsel during the Broadcom discovery. Garudadri, too, had attended JVT meetings and had compared Qualcomm's patents to the emerging H.264 standard. (Chesler told Major that, when Garudadri had said he did not actively participate in JVT meetings, the words were subject to interpretation.)

In oral arguments before Major, Zeldin conceded that "maybe someone who is particularly skilled or more experienced would have done something differently" than his clients had. But he argued that a lawyer was "entitled to rely on his or her client to answer questions honestly and completely."

For his part, Qualcomm counsel Chesler said that Qualcomm did not favor sanctioning the six lawyers. There was blame to go around, he implied: "Questions were not asked as they should have been asked, and answers were not given as they should have been given."

But Chesler faulted the outside lawyers on basic trial preparation. "The first thing to do is get the files before you question the witnesses," he said.

MAJOR'S FINAL OPINION sifted through the roles that the six lawyers had played. In one finding, she appeared to rebuke the Day Casebeer lawyers for not getting enough information on how Qualcomm's computer system was organized. In retrospect it became clear that the system was highly balkanized. There was no centralized, companywide data storage, and a vast trove of records was stored only in employees' individual computers and backup tapes.

She admonished Mammen and Leung for following the procedure outlined in the Overview Memo rather than directing the in-house paralegals to documents and instructing them on what to collect. And she blamed the outside counsel for acquiescing in the "inadequate" corporate repository plan instead of searching witnesses' individual computers. (Ironically, the posttrial scouring of Qualcomm's records did identify a corporate repository, called the LiveLink Server, that contained the kind of JVT–related documents that would have greatly illuminated the question of the company's involvement in the H.264 standard-setting.)

Further, Major noted that "no attorney took supervisory responsibility for verifying that the necessary discovery had been conducted." In general, Major decried the lack of communication among Qualcomm employees, including in-house lawyers, and the company's outside counsel. She noted that when Leung e-mailed the trial team to let the other lawyers know that he would not be searching computer drives of individual Qualcomm employees, no one apparently questioned the decision—or even responded to his e-mail.

As for the 21 e-mails that turned up on Raveendran's computer during trial, the judge said that she was dismayed that Qualcomm's lawyers had failed to consider whether this find might indicate larger discovery problems. The judge said that Patch and Mammen should have given Batchelder and Young more detailed information about the discovery of the e-mails, and Batchelder should have asked more detailed questions. (She accepted Bier's and Young's explanations about the e-mails: Bier, who found them, did not understand their significance because he did not take part in discovery, and Young was not aware of them when he made his sidebar statement.)

The Qualcomm employees did not escape unscathed. Major acknowledged Raveendran's "nuanced" explanation for the apparent discrepancy between her statements before and after the patent infringement trial. Raveendran testified in a deposition during the sanctions proceedings that she had indeed been at a JVT meeting in Austria—but only because the meeting was "colocated" with that of the JVT's umbrella organization. (Both Raveendran and Garudadri are still employed by Qualcomm.) But Major also wrote tartly that Raveendran and other Qualcomm employees had been less than forthcoming: Many of them knew that "Qualcomm had analyzed the H.264 standard and had attended JVT meetings during the relevant time period and yet no one" informed outside counsel.

Despite Major's criticism of the six lawyers, she decided that they had made good faith (if flawed) efforts to collect the required documents. She declined to re-impose sanctions. "That felt like the weight of the world had been lifted," Mammen says.

FREED FROM THAT CRUSHing weight, the six lawyers have nevertheless seen their careers affected differently. Batchelder and Young have landed on their feet, as partners in the San Francisco–area offices of Am Law 100 firms—Batchelder at Howrey, as a result of its merger with Day Casebeer, and Young at Covington & Burling. But Patch, Bier, Leung, and Mammen report a striking lack of interest from prospective employers, both law firms and corporations, because of their "notoriety," as Mamman puts it. Patch, Leung, and Mammen have continued to practice law at least part-time, working out of their houses. Bier has opened a solo practice in San Francisco. Mammen has also been teaching UC Hastings College of the Law.

This fall he will teach civil procedure. But Mammen says he will not use his experience in the Qualcomm-Broadcom case as a case study. "I am not anxious to revisit and relive this experience," he says. ■