

## Judge rebukes Qualcomm, its attorneys

by Bruce V. Bigelow

After a months-long review of "exceptional misconduct" that emerged last year during a patent trial, a San Diego federal judge put the burden of responsibility for the legal wrongdoing squarely on wireless giant Qualcomm.

In a 48-page ruling Monday, U.S. Magistrate Barbara Major found that Qualcomm "intentionally withheld tens of thousands of decisive documents" to win its case and gain a strategic business advantage over Broadcom, a rival chip-maker based in Irvine, Calif.

Major refrained from ordering San Diego-based Qualcomm to pay fines for its misconduct, noting that the trial judge, U.S. District Judge Rudi Brewster, has ordered the company to pay Broadcom's legal fees, which total more than \$8.57 million.

In an unusual sanction, the judge ordered the company to review its failures in the case and create an improved "case management protocol" that would avoid such breakdown in similar cases.

In a statement Monday night, Qualcomm said the company "regrets the discovery errors that occurred in this case. However, as we pointed out in our brief to the appellate court, when Qualcomm discovered additional documents after the trial, it produced them and apologized to the court and Broadcom for the errors. These actions defy any suggestion that Qualcomm engaged in intentional misconduct."

Major said the electronic documents that Qualcomm withheld were crucial because they described the company's early participation in the development of a technical standard for digital video compression. The documents amounted to more than 300,000 printed pages detailing that participation.

If its early involvement with the industry's Joint Video Team were known, Qualcomm would have had to license its own video compression patents royalty-free or under reasonable and nondiscriminatory terms, Major said.

Calling Qualcomm's misconduct "a monumental discovery violation," Major wrote, "It is inconceivable that Qualcomm was unaware of its involvement in the JVT and of the existence of these documents."

The judge also found that Qualcomm could not have achieved its goal in the case "without some type of assistance or deliberate ignorance from its retained attorneys."

Major found that Qualcomm and its lawyers ignored several "red flag warnings" that should have prompted them to question the adequacy of the company's document production and the accuracy of its representations. Instead, Qualcomm's retained attorneys chose not to look for the correct documents and accepted the company's "unsubstantiated assurances" that its internal search for relevant documents was sufficient, she wrote.

The judge ordered five Qualcomm attorneys, Alex Rogers, Roger Martin, William Saylor, Byron Yafuso and Michael Hartogs, and six other lawyers hired to represent Qualcomm at trial to conduct the review of failures in the case. She ordered the 11 lawyers to report to her chambers Jan. 29 to begin their detailed analysis and develop an improved protocol for managing such cases.

Major also referred the six lawyers retained by Qualcomm, including lead trial lawyer James R. Batchelder, to the State Bar of California for disciplinary action. Four work with Batchelder at the Cupertino law firm of Day Casebeer Madrid & Batchelder: Adam A. Bier, Kevin K. Leung, Christian E. Mammen and Lee Patch. The sixth lawyer, Stanley Young, works in the Heller Ehrman law firm's Menlo Park, Calif., office.

The judge exempted from punishment 13 California lawyers who also had represented Qualcomm, saying they played no significant role or had relied on the work of other lawyers who were responsible for producing documents.

Among those exonerated were San Diego attorneys David E. Kleinfeld, Barry J. Tucker and Heidi Guitierrez.

"It has been difficult for them to understand why this proceeding was directed at them in the first place," said their lawyer, Doug Butz. "They're obviously delighted with the outcome and very pleased that they have been vindicated and that the court has accepted their explanation."

The case arose from a lawsuit Qualcomm filed in 2005 against rival Broadcom, which alleged the Irvine chip-maker was infringing on two patents held by Qualcomm for video compression technology.

The jury deliberated six hours before finding that Broadcom had not infringed on Qualcomm's patents. The jury also issued an unusual advisory, saying Qualcomm improperly withheld from a standards-making body and the U.S. Patent and Trademark Office key information that could have weakened its patents.

The full extent of Qualcomm's misconduct became clear months later, as Broadcom lawyers demanded a fuller explanation for 21 e-mails that emerged during the last day of testimony in the trial.

Federal rules authorize judges in civil lawsuits to impose sanctions on parties and their attorneys who fail to comply with document requests and court orders, "even for negligent failures to provide discovery."

The rules require litigants to respond to discovery requests in good faith.

"For the current 'good faith' discovery system to function in the electronic age, attorneys and clients must work together to ensure that both understand how and where electronic documents, records and e-mails are maintained and to determine how best to locate, review and produce responsive documents," Major wrote.

Attorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search.

"Producing 1.2 million pages of marginally relevant documents while hiding 46,000 critically important ones does not constitute good faith and does not satisfy either the client's or attorney's discovery obligations," Major wrote.

In its statement issued after Major's ruling, Qualcomm said, "We are considering our options, including further appeal."

*Judge rebukes Qualcomm, its attorneys by Bruce V. Bigelow*