

## Qualcomm, the Rules and the Duties of Counsel

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The epic e-discovery case, *Qualcomm v. Broadcom Corp.*, 2010 WL 1336937 (S.D.Cal. 2010), culminated in April 2010, after a post-trial sanction phase which lasted over a year and involved the production of over 1.6 million documents, a dozen depositions, and a three day evidentiary hearing. The facts of this well-known case will not be repeated here, except to remind the reader that the court imposed \$8.5 million in sanctions against the plaintiff, *Qualcomm*, due to the company's conduct during discovery. *Qualcomm* failed to produce thousands of electronic documents which undermined *Qualcomm's* patent infringement case. The court did not sanction *Qualcomm's* attorneys, although it expressed surprise at their ignorance and disorganization,

failing to have any in-person meetings at the beginning of the case with *Qualcomm's* engineers who would likely be witnesses to explain the legal issues to them and discuss appropriate document collection. Such meetings would have suggested systems to search. Substantively, it also would have caused the client to be expansive in its document search, and look for all documents relevant to the issues, as opposed to narrowly interpreting the document search to include only documents which would support the arguments that *Qualcomm's* lawyers intended to make. "Face-to-face" meetings were important, the court said, because emails and texts are inherently vague and incomplete, and do not allow for a meaningful dialog with the client.

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because (1) *Qualcomm* employees misled *Qualcomm's* lawyers about their conduct and the existence of the damaging documents; and (2) the attorneys made repeated attempts to verify the accuracy of their client's statements. If either of these factors were not present, the court's opinion suggests, the lawyers would not have escaped severe sanctions.

The following are the practical lessons and e-discovery "best practices" distilled from the *Qualcomm* court's final ruling. These lessons have far broader application than in the Southern District of California. Rule 26(g) and, here in Pittsburgh, the Local Rules of the Western District of Pennsylvania, would impose similar obligations.

**1. Meet face-to-face with likely witnesses early in the case.** The *Qualcomm* court noted that the "fundamental problem" was an "incredible breakdown in communications." The court criticized the lawyers for

**2. Obtain information as to how the client's data systems are organized.** *Qualcomm's* outside lawyers did not understand how *Qualcomm's* data systems were organized, where e-mail was stored, the frequency of back-ups, or when data was copied to repositories, the court criticized.

**3. Appoint one supervising attorney.** The court faulted outside counsel for failing to have one attorney who was ultimately responsible for coordination and data collection, and for following-up on evidence that suggested that relevant data was missed.

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**4. Verify information from the client's paralegals.** Outside counsel blindly accepted the judgments of Qualcomm's paralegals, who said that the personal computers of certain Rule 20(b)(6) witnesses need not be searched because the data would be duplicative of that found in centralized repositories. Outside counsel never questioned, analyzed or verified these representations.

**5. Follow-up when faced with conflicting evidence.** When incriminating emails written by Qualcomm employees were found on other parties' computers (but not on Qualcomm's), outside counsel did not follow-up or investigate the problems with the prior document search or question witnesses about the discrepancies.

If Qualcomm's employees had not misled their attorneys, a fact which swayed the court to withhold sanctions, any one of the attorney's failures could have led to

verify that Qualcomm's responses were accurate and to verify the truth of their client's statements, and found no willful bad faith conduct based largely on such efforts.

Local Rule LRcv26 expressly imposes some of the same responsibilities that the Qualcomm court criticized the attorneys for shirking. The Local Rule expressly provides that counsel must conduct an inquiry into the client's data systems and repositories in order to understand how ESI is stored and can be preserved, which would have avoided numerous problems with the Qualcomm data. The Local Rule requires the designation of one person who is knowledgeable about the client's systems, which would have avoided the problem of relying on unsubstantiated statements by the Qualcomm paralegals. However, practices such as face-to-face meetings, a clear chain of command headed by one supervising attorney, and follow-up attention to document issues when faced with facts evidencing document production prob-

***“If Qualcomm's employees had not misled their attorneys, a fact which swayed the court to withhold sanctions, any one of the attorney's failures could have led to a finding that Qualcomm's outside counsel violated their legal duties.”***

a finding that Qualcomm's outside counsel violated their legal duties. The court started with the duties of the attorney who signed the discovery responses. Rule 26 (g)(2) provides that every discovery response shall be signed by an attorney, whose signature is a certification that to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry, the response is consistent with the rules and not interposed for an improper purpose. The Rule imposes a duty to make a reasonable inquiry regarding the client's discovery responses, and provides for sanctions if the discovery response is not substantially justified. The court found that the signing attorney had made a reasonable, although flawed, inquiry, and that he had been misled by his client. As to the attorneys who participated in discovery, but did not sign the discovery responses, the court ruled that it had the inherent power to sanction those attorneys if they had acted in bad faith and had engaged in willfully improper conduct. The court emphasized that the attorneys had made repeated efforts to

lems, are and always have been practices that attorneys should use whether dealing with paper or electronic documents. Employing them will make discovery efforts reliable, and help avoid the monumental travesty that occurred in *Qualcomm*.

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For questions or comments regarding this issue of qubit, please contact Susan Ardisson at [Susan.Ardisson@bit-x-bit.com](mailto:Susan.Ardisson@bit-x-bit.com).

**qubit** \ˈkyü -bit\ n. a quantum bit, the counterpart in quantum computing to the binary digit or bit of classical computing. Just as a bit is the basic unit of information in a classical computer, a qubit is the basic unit of information in a quantum computer.  
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