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Qualcomm Inc. v. Broadcom Corp.: 9,259,985 Reasons to Comply with Discovery Requests

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QUALCOMM INC. V. BROADCOM CORP.: 9,259,985 REASONS TO COMPLY WITH DISCOVERY REQUESTS

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I. INTRODUCTION

[1] Evolving technology has advanced communication throughout the business industry. Corporations use various communication methods to initiate conversation, propose business ventures, and relay correspondence from one place to another. Quite naturally, with the development of different means of communication, various innovations in the legal profession have materialized and gained popularity. One of these innovations is electronic discovery.[1]

[2] When compared to conventional discovery means, electronic discovery is more proficient, less time consuming, and more easily organized;[2] however, in some circumstances, it can pose difficulties if performed inefficiently or improperly. Under these circumstances, courts

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[1] FED. R. CIV. P. 26(f)(3)(C) (labeling electronic discovery as "disclosure or discovery of electronically stored information, including the form or forms in which it should be produced"); *see* Junk v. Aon Corp., No. 07 Civ. 4640(LMM)(GWG), 2007 WL 4292034, at *1 n.1 (S.D.N.Y. Dec. 3, 2007) (stating that a party referred to electronic discovery as "software capable of 'retriev[ing], preserv[ing], documenting and produc[ing] electronic communications, records, and files'").

[2] *See The E-Discovery Standard*, APPLIED DISCOVERY'S ELECTRONIC DISCOVERY NEWSLETTER (LexisNexis Applied Discovery), Apr. 2004, at 1-2, *available at* http://www.lexisnexis.com/applieddiscovery/lawLibrary/newsletter/EDS_Apr04.pdf.

must enforce sanctions against those who willfully engage in improper discovery antics or conduct considered unethical, disobedient, or done in bad faith.[3]

[3] The imposition of sanctions on attorneys, parties, or both, dates back decades; thus, it is not an issue that has developed over the past few years.[4] Early last year in *Qualcomm Inc. v. Broadcom Corp.*,[5] the United States District Court for the Southern District of California imposed one of the highest monetary discovery sanction awards in history on Qualcomm Inc. (Qualcomm) for failure to comply with discovery obligations.[6] Sanctions were imposed,[7] but the case has been partially vacated and recently remanded to the magistrate court for further proceedings pertaining to the sanctioned attorneys.[8] This note argues that the United States District Court for the Southern District of California properly imposed monetary and disciplinary sanctions on Qualcomm and its attorneys.

A. SCOPE AND PURPOSE

[4] This note contains three main focuses. First, it examines the historical background of the law preceding the *Qualcomm* decision as it pertains to the imposition of sanctions. Second, this note explores the facts of *Qualcomm* and analyzes the district court's rationale in determining its decision. Finally, the note concludes with a discussion of the future

[3] *See generally* Chambers v. NASCO, 501 U.S. 32 (1991) (holding that sanctioning those who abuse judicial processes with bad-faith conduct is within the discretion of the court); Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980) (holding that the court has the inherent power to assess attorneys' fees); Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639 (1976) (affirming a court's discretion to impose extreme sanction of dismissal for bad-conduct on part of parties and their attorneys).
[4] *See generally Chambers*, 501 U.S. 32; *Roadway Express, Inc.*, 447 U.S. 752; *Nat'l Hockey League*, 427 U.S. 639.
[5] Qualcomm Inc. v. Broadcom Corp. (*Qualcomm I*), No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008).
[6] *Id.* at *1, *20.
[7] *See id.* at 17.
[8] Qualcomm Inc. v. Broadcom Corp. (*Qualcomm II*), No. 05cv1958-RMB (BLM), 2008 WL 638108, at *3 (S.D. Cal. Mar. 5, 2008).

effects of the *Qualcomm* decision as it relates to various stages of discovery.

B. HISTORICAL BACKGROUND

1. DEFINITION AND IMPOSITION OF SANCTIONS

[5] According to Black's Law Dictionary, a sanction is "[a] penalty or coercive measure that results from failure to comply with a law, rule, or order."[9] Rule 11 of the Federal Rules of Civil Procedure requires attorneys and parties to make true and good faith representations to the court and authorizes the court to impose sanctions on an attorney, law firm, or party if the court determines that the rule has been violated.[10] Furthermore, with respect to provisions governing discovery, Rule 26 of the Federal Rules of Civil Procedure requires a signature on all discovery requests and responses.[11] This signature certifies that the signing attorney or party, to the best of his knowledge and after a reasonable inquiry, verifies the validity of the discovery request or response.[12] Rule 26 also gives courts the authority to impose sanctions, including reasonable expenses and attorney's fees, on the person certifying the discovery request or response, the party on whose behalf the certifier is acting, or both.[13] Additionally, Rule 37 allows a party to file a motion to compel an opposing party who has failed to comply with a discovery request to respond accordingly.[14] This rule also provides for sanctions against a party that fails to abide by a discovery order.[15]

2. JUDICIAL AUTHORITY AND PRECEDENT INVOLVING THE IMPOSITION OF SANCTIONS

[6] In recent times, courts have imposed sanctions on attorneys, a party, or both, when misconduct or unethical behavior occurs. These sanctions

[9] BLACK'S LAW DICTIONARY 1368 (8th ed. 2004).
[10] FED. R. CIV. P. 11.
[11] FED. R. CIV. P. 26(g)(1).
[12] FED. R. CIV. P. 26(g)(1).
[13] FED. R. CIV. P. 26(g)(3).
[14] FED. R. CIV. P. 37(a).
[15] FED. R. CIV. P. 37(b)(2)(A).

have included the payment of large amounts of attorney's fees and costs as well as disciplinary actions, particularly when large and affluent corporations are involved.[16] To impose these sanctions, the courts have used rule-based authority derived from the Federal Rules of Civil Procedure.[17] In addition to the authority given by the Federal Rules of Civil Procedure, federal courts possess inherent power to impose sanctions on attorneys and parties who abuse the judicial process.[18]

[7] In *Fink v. Gomez*,[19] the United States Court of Appeals for the Ninth Circuit stated three sources of authority that allow courts to sanction a party or its attorneys for improper conduct.[20] The first source of authority derives from Rule 11 of the Federal Rules of Civil Procedure, which refers to pleadings, motions, and other court documents that are signed, filed, or submitted to the court.[21] The second source of authority is 28 U.S.C. § 1927, which penalizes those who unreasonably and purposely prolong litigation.[22] The third source is the court's inherent power.[23] The *Fink* court relied on the principles set out by the Supreme Court in *Roadway Express, Inc. v. Piper*[24] and maintained that the courts have inherent power to impose sanctions, including attorneys' fees, for "willful disobedience of a court order . . . or when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . ."[25]

[8] In 1991, the Supreme Court reaffirmed the *Roadway* principles when it decided *Chambers v. NASCO, Inc.*[26] In *Chambers*, Supreme Court Justice White held that the inherent power of courts to impose sanctions

[16] *See generally* Chambers v. NASCO, 501 U.S. 32 (1991) (holding that the excessive sanctioning for attorney's fees and costs for bad-faith conduct was appropriate).
[17] *Id.*
[18] *See id.* at 48-49 & n.13.
[19] 239 F.3d 989 (9th Cir. 2001).
[20] *Id.* at 991.
[21] *Id.* (citing FED. R. CIV. P. 11).
[22] *Id.* (citing 28 U.S.C. § 1927).
[23] *Id.*
[24] Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980).
[25] *Fink*, 239 F.3d at 991 (quoting *Roadway Express, Inc.*, 447 U.S. at 766). The *Fink* court stated that the *Roadway* court also "noted that a court 'certainly may assess [sanctions] against counsel who willfully abuse judicial processes.'" *Id.* (quoting *Roadway Express, Inc.*, 447 U.S. at 766).
[26] *See Fink*, 239 F.3d at 991-92; *see also* Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

had not been displaced with the enactment of 28 U.S.C. § 1927 and the Federal Rules of Civil Procedure.[27] Chambers, the petitioner, entered into a contract with respondent NASCO to sell a television station.[28] When Chambers changed his mind and breached the contract, NASCO initiated a cause of action seeking specific performance of the contract to sell the television station and a temporary restraining order to prevent an alienation or encumbrance of the property.[29] Chambers subsequently committed several delaying actions to deprive the district court of jurisdiction and prolong litigation.[30] Chambers asserted several more efforts to prevent the sale of the television station and was consequently held in contempt.[31]

[9] NASCO finally moved for sanctions pursuant to the court's inherent powers and after a full briefing and hearing, the court determined that sanctions against Chambers were appropriate "'for the manner in which this proceeding was conducted in the district court from . . . the time that plaintiff gave notice of its intention to file suit to [now].'"[32] In his defense, Chambers argued that 28 U.S.C. § 1927 and the other authorizations of sanctions in the Federal Rules of Civil Procedure "reflect a legislative intent to displace the [court's] inherent power."[33] The Court, however, rejected this contention by stating that statutes, rules, or a combination of the two "are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions."[34] The Court found no basis for holding that the enactment of statutes and rules prevented the Court from utilizing its inherent power to sanction Chambers, or any other person, for misconduct.[35]

[27] Chambers, 501 U.S. at 46.
[28] *Id.* at 35-36.
[29] *Id.* at 36.
[30] *Id.* at 36-39 (noting that Chambers and his lawyer created a trust in which they placed several properties at issue so they would be beyond the jurisdiction of the court and then intentionally withheld from the court).
[31] *Id.* at 37-39.
[32] *Id.* at 40 (quoting NASCO, Inc. v. Calcasieu Television and Radio, Inc., 124 F.R.D. 120, 123 (W.D. La. 1989)).
[33] *Id.* at 42-43.
[34] *Id.* at 46.
[35] *Id.*

[10] Although the Supreme Court corroborated the use of inherent powers to impose sanctions in *Chambers*, the *Fink* court distinguished the circumstances in which inherent powers alone were not sufficient.[36] In *Barber v. Miller*,[37] the Ninth Circuit held that a showing of bad faith is required for sanctions invoking the court's inherent power.[38] Similarly, *In re Keegan Management Co.*[39] reiterated that sanctions are allowed only when an attorney has behaved recklessly in conjunction with some other improper action.[40] Thus, mere recklessness, without a showing of any other improper purpose, does not justify sanctions under a court's inherent power.[41]

[11] In the Ninth Circuit's more recent case, *Aloe Vera of America, Inc. v. United States*,[42] the court held that there was no abuse in discretion when the district court imposed sanctions on Aloe Vera of America, Inc. (Aloe Vera).[43] The court opined that sanctions were appropriate, as Aloe Vera had purposely violated its order dated September 28, 2001.[44] The court stated that all federal courts possess inherent powers that enable them to manage their cases and courtrooms effectively, and as a result of this function, courts can award attorney's fees and assess fines.[45] This inherent power is especially important in cases, unlike *Qualcomm Inc. v. Broadcom Corp.*,[46] where the Federal Rules of Civil Procedure are not applicable.

[36] Fink v. Gomez, 239 F.3d 989, 993-94 (9th Cir. 2001). "The district court was correct that mere recklessness, without more, does not justify sanctions under a court's inherent power." *Id.*
[37] 146 F.3d 707 (9th Cir. 1998).
[38] *Id.* at 711.
[39] 78 F.3d 431 (9th Cir. 1996).
[40] *Id.* at 436.
[41] *See Fink*, 239 F.3d at 993-94; *In re Keegan Mgmt. Co.*, 78 F.3d at 436.
[42] 376 F.3d 960 (9th Cir. 2004).
[43] *Id.* at 966.
[44] *Id.*
[45] *Id*. at 964-65
[46] *Qualcomm I*, 2008 WL 66932.

II. THE FACTS OF QUALCOMM

A. PRIOR TO TRIAL

[12] In *Qualcomm Inc.*, Qualcomm filed a patent infringement action alleging Broadcom Corporation's (Broadcom) infringement of Qualcomm patent numbers 5,452,104 ("'104 patent") and 5,576,767 ("'767 patent").[47] These patents are based on the H.264 standard,[48] which was released in May 2003 and governs video coding.[49] Broadcom filed a counterclaim alleging that one of the patents was unenforceable because of "inequitable conduct."[50] Broadcom also asserted an affirmative defense that both patents were unenforceable due to waiver as Qualcomm had participated in the Joint Video Team ("JVT"), the "standards-setting body" that had created the H.264 standard.[51]

[13] Subsequently, Broadcom used several methods of discovery, including requests for the production of documents, interrogatories and Federal Rule of Civil Procedure Rule 30(b)(6) deposition notices, to evidence Qualcomm's participation in the JVT.[52] In its First Set of Requests for the Production of Documents and Things, Broadcom specifically requested:

> [A]ll documents given to or received from a standards setting body or group that concern any standard relating to the processing of digital video signals that pertains in any way to any Qualcomm Patent, including without limitation communications, proposals, presentations, agreements, commitments, or contracts to or from such bodies. . . . [and] all documents concerning any Qualcomm membership, participation, interaction, and/or involvement in setting any

[47] *Id*. at *1.
[48] *See generally* Qualcomm Wireless Glossary, http://www.qualcomm.com/products_services/glossary/ (last visited Feb. 9, 2009) (providing explanation and background information of the H.264 standard).
[49] *Qualcomm I*, 2008 WL 66932, at *1.
[50] *Id.*
[51] *Id.*
[52] *Id.* at *2. *See generally* FED. R. CIV. P. 30(b)(6) (discussing the requirements for depositions).

> standard relating to the processing of digital video signals that pertains in any way to any Qualcomm Patent . . . .[53]

Broadcom also requested "all documents referring to or evidencing any participation by Qualcomm in the proceedings of the JVT, the ISO, the IEC, and/or the ITU-T" as well as any document referencing the JVT of any Qualcomm patent. [54]

[14] In response, Qualcomm's attorney Kevin Leung certified a discovery response that stated that the corporation would produce any relevant, non-privileged documents concerning Qualcomm's participation in the JVT that could be located after a reasonable search.[55] In these responses, Qualcomm falsely asserted that it had first attended a JVT meeting in December 2003 and that it did not submit a JVT proposal until January 2006, having no earlier involvement in the JVT.[56]

[15] As additional discovery responses were provided and the case progressed, Qualcomm presented several witnesses, who were designated representatives of the corporation's interests in the issues at hand, to be deposed concerning Qualcomm's involvement in the JVT.[57] Witness Christine Irvine, who was prepared by Leung, was not given any documents or information to review beforehand and her computer was not searched for relevant documents regarding the H.264 standard or Qualcomm's participation in the JVT.[58] As a result, she incorrectly testified that Qualcomm had never been involved in the JVT and she was subsequently impeached by Broadcom with a document evidencing Qualcomm's participation in the JVT in 2003.[59] Accordingly, Qualcomm agreed to provide another Rule 30(b)(6) witness, Scott Ludwin.[60]

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[53] *Qualcomm I*, 2008 WL 66932, at *2.
[54] *Id.* at *2. ISO stands for the International Organization for Standardization. ITU refers to International Telecommunications Union. *See generally* Qualcomm Wireless Glossary, *supra* note 43 (providing general definitions of ISO and ITU).
[55] *Qualcomm I*, 2008 WL 66932, at *2.
[56] *Id.*
[57] *Id.* at *3.
[58] *Id.*
[59] *Id.*
[60] *Id.*

[16] After designating Ludwin as the corporation's new representative, Qualcomm did not search his computer or do anything else in preparation for his deposition.[61] Ludwin also testified falsely as to Qualcomm's participation in the JVT and in efforts to impeach him, Broadcom presented an e-mail list to Ludwin that indicated that a Qualcomm employee was receiving reports about the JVT in December of 2002.[62] Nonetheless, Qualcomm continued to deny its participation in the JVT during the time of its creation.[63]

[17] Qualcomm's participation in the JVT during the creation of the H.264 standard was an important factor in the litigation.[64] If Qualcomm had participated in 2002 or early 2003, it would have been required to identify its patents utilized by the H.264 standard and license them royalty-free.[65] Consequently, Qualcomm would have been prohibited from suing companies, that used the standard, including Broadcom.[66]

B. DURING TRIAL

[18] As trial began on January 9, 2007, Qualcomm continued to deny its involvement in the early stages of the creation of the JVT.[67] During trial preparations, attorney Adam Bier came across an e-mail dated August 6, 2002, sent to Qualcomm witness Viji Raveendran welcoming her to the avc_ce mailing list.[68] Following this discovery, Bier and Raveendran searched her computer and uncovered twenty-one other e-mails dated as early as November 2002, none of which Qualcomm had produced to Broadcom in its discovery responses.[69] Qualcomm's counsel decided not to produce the e-mails found on Raveendran's computer to Broadcom.[70] Qualcomm claimed the e-mails were "not responsive" to the discovery

[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.* at *4. *See generally id.* at *3 n.2 (discussing the relevance of the avc_ce list).
[69] *Id.* at *4.
[70] *Id.*

requests and ignored the fact that the e-mails undermined Qualcomm's principal argument.[71]

[19] During Raveendran's testimony at trial, Qualcomm's attorney avoided asking her any questions that would reveal the presence of the twenty-one e-mails; however, Broadcom's attorney asked a question that forced her to confess that she had received e-mails from the avc_ce list.[72] As a result of her testimony, Qualcomm produced the twenty-one e-mails that they had discovered on Raveendran's computer.[73]

[20] The jury returned unanimous verdicts in favor of Broadcom in reference to the non-infringement of the '104 and '767 patents, and in favor of Qualcomm regarding the validity of the patents.[74] The jury's unanimous advisory verdict in favor of Broadcom designated the '104 patent unenforceable due to "inequitable conduct" and the '104 and '767 patents unenforceable due to waiver.[75]

[21] U.S. District Court Judge Rudi Brewster agreed with the jury and found in favor of Broadcom regarding its waiver defense on the '104 and '767 patents, but on the contrary, he found in favor of Qualcomm on Broadcom's inequitable conduct claim regarding the '104 patent.[76] Judge Brewster also found

> By clear and convincing evidence that Qualcomm, its employees, and its witnesses actively organized and/or participated in a plan to profit heavily by (1) wrongfully concealing the patents-in-suit while participating in the JVT and then (2) actively hiding this concealment from the Court, the jury, and opposing counsel during the present litigation.[77]

[71] *Id.*
[72] *Id.*
[73] *Id.* at *5.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*

[22] Judge Brewster concluded that Qualcomm had engaged in litigation misconduct and concealment throughout not only the discovery process, but also before and after the trial and had thus waived its right to enforce the '104 and '767 patents.[78] As a result of Qualcomm's misconduct, Judge Brewster granted Broadcom's Motion for an Award of Attorneys' Fees.[79] Judge Brewster also ordered Qualcomm to pay $9,259,985.09 in attorneys' fees and cost.[80]

C. POST-TRIAL

[23] After the trial had concluded, Qualcomm continued to challenge the importance of the twenty-one e-mails found on Raveendran's computer.[81] Bier asserted that Qualcomm had performed a reasonable search; however, Broadcom requested that Qualcomm conduct additional searches to determine the scope of Qualcomm's discovery violation.[82]

[24] As of June 2007, Qualcomm had discovered more than 46,000 relevant documents on the computers of twenty-one employees.[83] According to members of Qualcomm's general counsel, James Batchelder and Louis Lupin, thousands of these unproduced documents revealed information that was inconsistent with the arguments made on Qualcomm's behalf during trial.[84] Batchelder apologized for not finding the documents earlier and for asserting inconsistent arguments at trial.[85]

III. ANALYSIS

[25] After hearing oral argument and reviewing the District Court Judge's Orders, Magistrate Judge Barbara L. Major concluded that sanctions were appropriate because Qualcomm and its attorneys had intentionally withheld thousands of documents relevant to the litigation.[86] Magistrate

[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.* at *6.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.* at *17.

Judge Major correctly sanctioned Qualcomm and six of its attorneys for violating discovery obligations because the evidence of the violation was clear and convincing.[87] When discussing the legal standard used to impose sanctions on parties who fail to abide by discovery rules and court orders, Magistrate Judge Major referenced Rules 37 and 26 of the Federal Rules of Civil Procedure.[88]

[26] Rule 37 authorizes courts to sanction parties who do not comply with a motion to compel discovery.[89] Qualcomm argued that Broadcom was not entitled to sanctions under Rule 37(a) or (b) because Broadcom failed to file a motion to compel discovery.[90] Magistrate Judge Major suitably criticized this contention by noting that Qualcomm agreed to produce all relevant documents and had answered interrogatories, thus leaving Broadcom with no reason to file a motion to compel discovery.[91] The filing of a motion under these circumstances would not have served as a compellation of discovery, but as a measure of preservation of Broadcom's rights in the event that Qualcomm had suppressed documents.[92] Nevertheless, Broadcom's failure to file a motion to compel discovery limited the available remedies under Rule 37(a) and (b) to those only covered under Rule 37(c).[93]

[27] Furthermore, a strict interpretation of Rule 26 would also restrict Broadcom's available remedies. Magistrate Judge Major referred to the language of Rule 26 that authorizes sanctions against individual attorneys who fail to comply with discovery obligations.[94] Under a literal reading of Rule 26, only the attorney who certified the false or misleading discovery response is held responsible for the violation.[95] Therefore, in this case, only Leung or another specific Qualcomm attorney could be held liable for the discovery violation despite that fact that several Qualcomm attorneys participated in the process of discovery.

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[87] *See id.* at *6.
[88] *Id.* at *7.
[89] FED. R. CIV. P. 37(b)(2).
[90] *Qualcomm I*, 2008 WL 66932, at *8; *see id.* n.4.
[91] *Id.* at *8.
[92] *Id.*; *see id.* n.4.
[93] *See* FED. R. CIV. P. 37.
[94] *Qualcomm I*, 2008 WL 66932, at *7.
[95] *See* FED. R. CIV. P. 26(g)(3).

[28] Fortunately for Broadcom, Magistrate Judge Major correctly went beyond the scope of the literal interpretation of Rule 26 to justify the imposition of sanctions against Qualcomm.[96] In her rationale, she referenced the Advisory Committee Notes to the 1983 Amendment to Rule 26, which explain that there is an affirmative duty to conduct discovery in a "responsible manner that is consistent with the spirit and purposes of Rules 26 through 37."[97] Failing to comply with discovery rules under the Federal Rules of Civil Procedure without a substantial justification is a blatant disregard of discovery obligations and warrants sanctions.[98]

[29] In addition to the remedies available under Rule 37(c) and a broad interpretive reading of Rule 26, courts have the inherent power to sanction attorneys, parties or both when they fail to comply with discovery obligations.[99] As the *Chambers* Court stated, "other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions."[100] Using an approach similar to the Supreme Court's decision in *Chambers*, Magistrate Judge Major correctly used the court's inherent power to impose sanctions on Qualcomm and its attorneys.

IV. THE FUTURE EFFECTS OF THE QUALCOMM DECISION

A. DISCOVERY

[30] The *Qualcomm* case will likely improve the proficiency of discovery investigations of electronic documents in the future. After criticizing Qualcomm's search during the discovery process, the court gave an example of an adequate investigation:

> An adequate investigation should include an analysis of the sufficiency of the document search and, when electronic documents are involved, an analysis of the sufficiency of

[96] *See Qualcomm I*, 2008 WL 66932, at *7.
[97] *Id.*
[98] *See id.* at *9.
[99] Chambers v. NASCO, 501 U.S. 32, 46 (1991).
[100] *Id.*

> the search terms and locations. In the instant case, a reasonable inquiry should have included using the JVT, avc and H.264 search terms and searching the computers of Raveendran, Irvine, Ludwin (and other Qualcomm employees identified in the emails discovered on the computers of these witnesses).[101]

[31] This statement provides a road map on how to conduct an adequate discovery investigation that can be used by attorneys in the future to test the sufficiency of their own investigations. This could potentially reduce the frequency of discovery violations and save attorneys and corporations money, time, and embarrassment.

B. 30(B)(6) WITNESSES

[32] After the false testimonies of Christine Irvine and Scott Ludwin, Qualcomm provided a valid example of how *not* to adequately prepare a Federal Rules of Civil Procedure Rule 30(b)(6) witness.[102] Rule 30(b)(6) states that any person designated as a deponent "must testify about information known or reasonably available to the organization."[103] This imposes a duty on the corporation to "make a conscientious good-faith endeavor to . . . prepare those persons in order that they can answer fully, completely, unevasively, the questions posed . . . ."[104]

[33] The *Qualcomm* decision serves as a warning to future corporate litigants who request or provide designees as Rule 30(b)(6) witnesses. Because of the possible scrutiny a witness could endure, corporations in the future are likely to conduct an adequate preparation of all witnesses designated as its most knowledgeable representatives. Attorneys are also likely to better prepare persons for depositions to avoid impeachment.

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[101] *Qualcomm I*, 2008 WL 66932, at *11.
[102] *See id.* at *3.
[103] FED. R. CIV. P. 30(b)(6).
[104] S.E.C. v. Morelli, 143 F.R.D. 42, 45 (S.D.N.Y. 1992) (citing Mitsui & Co., Inc. v. Puerto Rico Water Resources Authority, 93 F.R.D. 62, 67 (D.P.R. 1981)).

C. COUNSEL AND CLIENT INTERACTIONS

1. ATTORNEY CLIENT PRIVILEGE

[34] In the *Qualcomm* appellate case, Judge Brewster vacated the magistrate court's order denying the self-defense exception to the attorney-client privilege.[105] The motion filed for a finding of a self-defense exception to Qualcomm's attorney-client privilege was unopposed by Qualcomm and denied by the magistrate judge because Qualcomm had not presented any evidence against its attorneys.[106] After the magistrate court denied the motion, however, Qualcomm filed four declarations that were "exonerative of Qualcomm and critical of the services and advice of their retained counsel."[107] Subsequently, Judge Brewster vacated the order since the declarations "change[d] the factual basis which supported the court's earlier order denying the self-defense exception to Qualcomm's attorney-client privilege."[108] This could potentially affect the assertion of the attorney-client privilege in the future.

[35] Judge Brewster allowed the attorney-client privilege to be infiltrated because of the "introduction of accusatory adversity" between Qualcomm and its attorneys.[109] Judge Brewster's action lowers the standard by which the severance of this privilege is permitted and could significantly impact the relationship between a corporation and its retained counsel in the future. When corporations and their retained counsel attempt to exonerate themselves in the future, they will be less inclined to condemn the other in efforts to appear less blameworthy. The *Qualcomm* appellate case will prevent them from using the other as a scapegoat to avert the imposition of sanctions.

[105] Qualcomm Inc. v. Broadcom Corp. (*Qualcomm II*), No. 05CV1958-RMB (BLM), 2008 WL 638108, at *3 (S.D. Cal. Mar. 5, 2008).
[106] *Id.* at *2.
[107] *Id.* at *3.
[108] *Id.*
[109] *Id.*

2. INTERNAL AND EXTERNAL COUNSEL

[36] *Qualcomm* will potentially affect the actions and relationships between internal and external counsel in the future. Qualcomm tried to hold its outside counsel liable for its failure to comply with discovery obligations by making statements such as, "outside counsel selects . . . the custodians whose documents should be searched."[110] Magistrate Judge Major rejected these statements as they did not relieve Qualcomm or its internal counsel of their obligations.[111] The court stated that there were several "warning flags," which should have alerted Qualcomm that its search was inadequate, flags that internal counsel "inadvertently" ignored and to which outside counsel chose to exert willful blindness.[112] This criticism by the court will likely encourage a checks and balances system between future internal and external counsel. External counsel will also be more prone to make inquiries in regards to the designation of witnesses and the efficiency of researched discovery responses to internal legal counsel before certifying and relying on them in court.

V. CONCLUSION

[37] With companies such as Qualcomm Incorporated and Broadcom Corporation enabling the expansion of the wireless industry, electronics will continue to develop to facilitate effortless and reliable communication between corporate entities and organizations.[113] These ever-evolving technological advances could further complicate the known difficulties involved when conducting extensive electronic discovery throughout complex litigation. To avoid sanctions, attorneys and corporations need to know how to efficiently manage electronic discovery.

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[110] Qualcomm Inc. v. Broadcom Corp. (*Qualcomm I*), No. 05cv1958-B (BLM), 2008 WL 66932, at *11 n.6 (S.D. Cal. Jan. 7, 2008).
[111] *Id.*
[112] *See id.* at *10-12.
[113] *See, e.g.*, Broadcom Company Overview, http://www.broadcom.com/company/?source=top (last visited Feb. 9, 2009); Qualcomm Who We Are, http://www.qualcomm.com/who_we_are/businesses/index.html?linksource=topnavbar (last visited Feb. 9, 2009).

[38] Since Qualcomm and its attorneys were sanctioned on the basis of a correct application of the Federal Rules of Civil Procedure and the court's inherent power, the *Qualcomm* case provides a road map for future litigation involving extensive electronic discovery. Parties who are wronged by opposing litigants that are remiss in their discovery obligations have several remedies under the law. First, if a party has filed a motion to compel discovery, the party has the benefit of remedies under Rule 37(a) through (c) as opposed to only Rule 37(c), which is the only remedy available under this rule to those who have not filed a motion to compel.[114] Second, notwithstanding the filing of a motion to compel, a broad interpretation of Rule 26 authorizes sanctions against those who abuse the judicial system.[115] Finally, a federal court can use its inherent power to penalize abusers of the judicial process.[116]

[39] Although the *Qualcomm* holding serves as a warning to those involved in risky, complex litigation, it also reassures the public that our legal system is based on justice by enforcing sanctions on litigants that commit obvious wrongs. Taking into consideration the advances in electronically stored information, the court noted: "[f]or 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 emails are maintained and to determine how best to locate, review, and produce responsive documents."[117]

[114] *See* FED. R. CIV. P. 37.
[115] *See* FED. R. CIV. P. 26.
[116] *See* Chambers v. NASCO, 501 U.S. 32, 46 (1991).
[117] *Qualcomm I*, 2008 WL 66932, at *9.