

Select '**Print**' in your browser menu to print this document.

Copyright 2010. ALM Media Properties, LLC. All rights reserved. Cal Law

Page printed from: <http://www.callaw.com>

[Back to Article](#)

Changing a Judge's Mind on Qualcomm Sanctions


Zusha Elinson

04-12-2010

Video extra: Four of the former Day Casebeer lawyers talk about the sanctions experience.

SAN FRANCISCO — They didn't mean to do it.

That's what six no-longer-sanctioned lawyers in the Qualcomm Inc. discovery scandal were finally able to convince U.S. Magistrate Judge Barbara Major of [last week](#).

 It took 817 days from her Jan. 7, 2008, sanctions order. At Qualcomm, 1.6 million documents were reviewed. Hundreds of thousands of pages were produced. More money was spent on lawyers in the sanctions case than in the actual underlying patent case against Broadcom Corp., several lawyers involved in the case said.

The turning point for the Qualcomm Six seemed to be a January hearing. The sanctioned lawyers told their stories humbly and meekly, as one of the lawyers put it, while depositions of the Qualcomm employees, the ones they were pointing a finger at, played on the screen. Major backed off the lawyers.

Major, a former prosecutor, had initially written a [blistering sanctions order](#) accusing former Day Casebeer Madrid & Batchelder lawyers James Batchelder, Adam Bier, Kevin Leung, Christian Mammen and Lee Patch, and former Heller Ehrman attorney Stanley Young, of assisting "Qualcomm in committing this incredible discovery violation by intentionally hiding or recklessly ignoring relevant documents, ignoring or rejecting numerous warning signs that Qualcomm's document search was inadequate, and blindly accepting Qualcomm's unsupported assurances that its document search was adequate."

What turned Major 180 degrees was hearing the outside lawyers' side of the story after attorney-client privilege was pierced by the court.

First, they submitted long briefs, blaming Qualcomm for misleading and stonewalling about whether its employees had participated in the industry standard-setting meetings — a key fact in the patent dispute.

Then at the January hearing, all six of them took the stand in Major's courtroom and told their stories, with some taking responsibility for mistakes that were made. They answered any questions that Major had for them. Their lawyers played video deposition snippets of the Qualcomm employees that they thought showed them contradicting themselves.

Joel Zeldin, Leung and Mammen's lawyer, said the six "came across as honest and sincere; she saw them as human beings." He said the contrast with the Qualcomm testimony was "part of the plan."

This production was put on by Zeldin and Frank Cialone, another Shartsis Friese partner representing Leung and Mammen; Wagstaffe & Kerr's James Wagstaffe and Adrian Sawyer (for Patch); Reed Smith's W. Thomas McGough Jr. (for Batchelder); Chapman, Popik & White's Merri Baldwin (for Bier); and Kirby, Noonan, Lance & Hoge's David Noonan (for Young).

Major concluded that ([.pdf](#)) "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." However, she found that the lawyers had made "significant efforts to comply with their discovery obligations." In contrast, she found that the "failures were exacerbated by an incredible lack of candor on the part of the principal Qualcomm employees."

Evan Chesler, the Cravath, Swaine & Moore partner representing Qualcomm at the hearing, said he had argued that it was a breakdown in communication and not deliberate misconduct. Qualcomm had already paid its sanctions — Chesler said that he was there to set the record straight. "They were on trial. We weren't." Still, he countered the stonewalling accusations, saying the outside lawyers hadn't asked for the documents that weren't turned over.

In her order, Major had the final word on each lawyer's responsibility for the fiasco. Young, now a partner at Covington & Burling, did not even know about his co-counsel's late discovery of some fateful e-mails when he told the court there was no evidence of them. She wrote that while associate Leung and partner Mammen "didn't pursue several discovery paths that seem obvious ... they did make repeated efforts to verify that Qualcomm's discovery responses were accurate." She said the same of Patch. Major ruled that Bier, the associate who found the e-mails that turned out to be just the tip of the iceberg, wasn't to blame because no one had told him why such evidence might be important. The supervising lawyer, Batchelder, got barely a mention.

The sanctions had a profound impact on most of the lawyers' careers. Young was able to move to Covington after Heller collapsed. Batchelder stayed on at Day Casebeer until the firm, reeling from the black mark, merged with Howrey.

But at Qualcomm, General Counsel Louis Lupin resigned immediately. Leung, Bier, Patch and Mammen all left Day Casebeer under strained circumstances.

"I felt the firm had made a business decision with regard to my future there," said Leung. "It's an understandable one and I hold no ill will toward them."

Those four have been working as solo lawyers. Bier has left litigation altogether, and does corporate work for startups at his own startup, bierLegal. Leung has also left litigation for patent prosecution, doing work for a friend's firm. Mammen has been freelancing and teaching at Hastings College of the Law — he'll soon be teaching a class on e-discovery. And Patch has been doing work as an independent IP consultant.

Day Casebeer didn't abandon them when it came to their legal defenses. Patch said that Day Casebeer paid the legal bill for all five lawyers.