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Electronic Discovery in the Wake of *Qualcomm*

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Electronic Discovery in Federal Court

- Developed through case law beginning in late 1990s
- Federal Rules Advisory Committee began considering e-discovery rules amendments around 2000
- After a deliberative process involving input from plaintiff and defense bar, Federal Rules of Civil Procedure were amended effective December 1, 2006

Key Components of the Federal Rules

Requirement that parties meet and confer

- Rule 26(f) Conference
- Rule 34 discussions on form of production
- Rule 26(b) disclosure requirements

Two-tiered discovery regime

- Relevant reasonably accessible data must be produced
- Inaccessible data sources must be identified, but it need not be produced absent a showing of good cause

Rule 37 Safe Harbor

- With some limitations, a party can't be sanctioned for the good faith loss of data due to routine operations of its electronic data systems

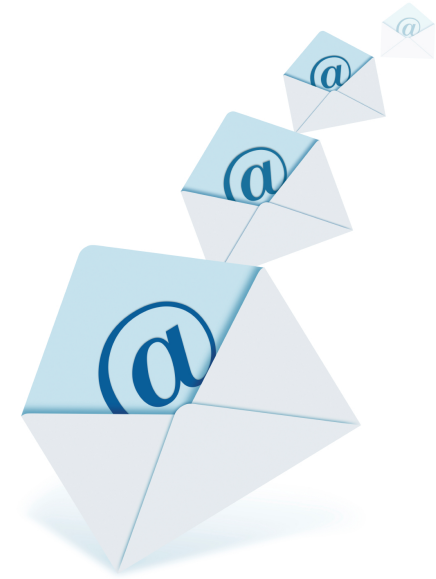
The Background of the *Qualcomm* Case

- Qualcomm brought a patent infringement suit against Broadcom
- Broadcom argued waiver due to Qualcomm's participation in an industry discussion group (the "JVT")
- Qualcomm claimed it did not participate in the JVT



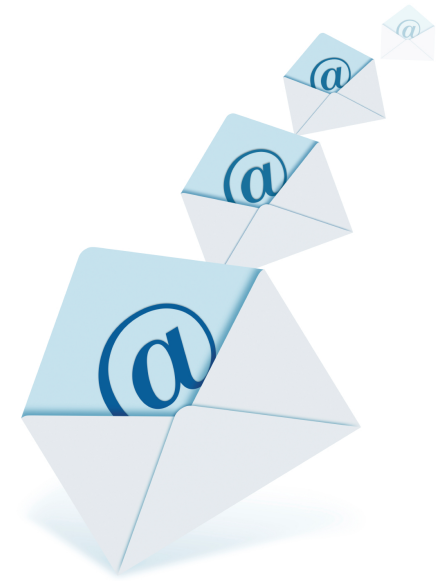
21 emails

- While preparing witnesses to testify, it was discovered that a witness had 21 emails from the JVT mailing list
- Qualcomm believed that the emails were not substantive and did not demonstrate that its employees had discussed the patent at issue with the JVT
- Qualcomm concluded the emails were neither responsive nor relevant
- Qualcomm did not disclose the existence of the emails



The *Qualcomm* Trial

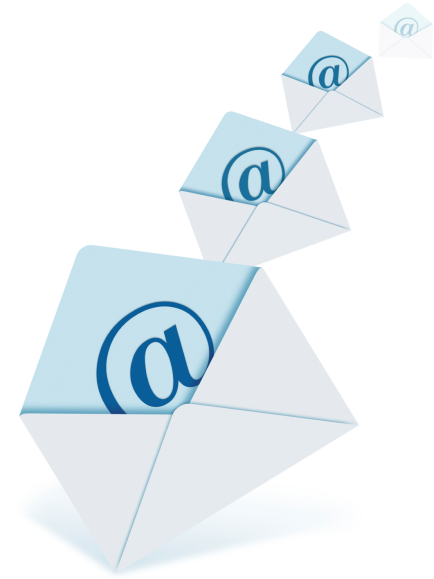
- Broadcom discovered the existence of the 21 emails while cross-examining a Qualcomm witness during trial
- Qualcomm continued to maintain the emails were irrelevant and withheld them
- The jury ruled in Broadcom's favor
- During post-trial proceedings, Qualcomm conceded the emails were relevant and produced another 46,000 documents (more than 300,000 pages) related to the JVT



Sanctions

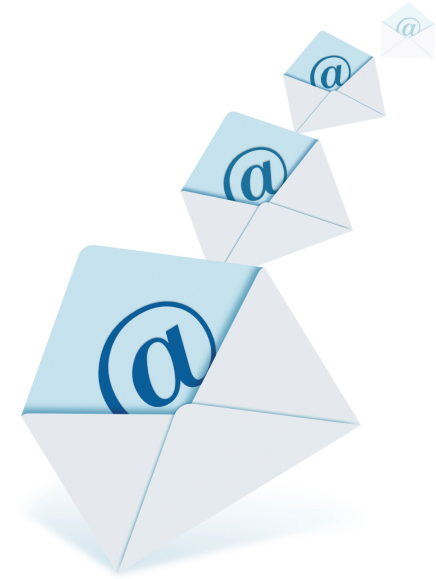
The Court made several judgments in assessing whether to impose sanctions

- Qualcomm should have known the 21 emails were relevant and responsive
- Qualcomm should have disclosed the 21 emails as soon as they found them
- Qualcomm should have immediately revisited the rest of its emails to see if there were other JVT emails



Sanctions

- Qualcomm ordered to pay all of Broadcom's legal fees
- Qualcomm's counsel referred to state ethics commission
- Qualcomm ordered to develop an electronic discovery program under court supervision



Qualcomm's Lessons

Lessons Learned

1. Take reasonable steps to ensure that relevant ESI is located and reviewed for production
2. Communicate appropriately with opposing counsel and the court
3. Develop and implement an Electronic Discovery Program

Reasonable Steps

- Confirm that data is being reviewed from relevant custodians
- Develop appropriate search criteria and search terms
 - Work with fact witnesses as appropriate
 - Audit the reasonableness of search results
- Use common sense

Communication

- Participate in the meet and confer process
- As circumstances change, inform opposing counsel as appropriate
- Get in front of issues as they develop so you can't be accused of trying to "hide the ball"

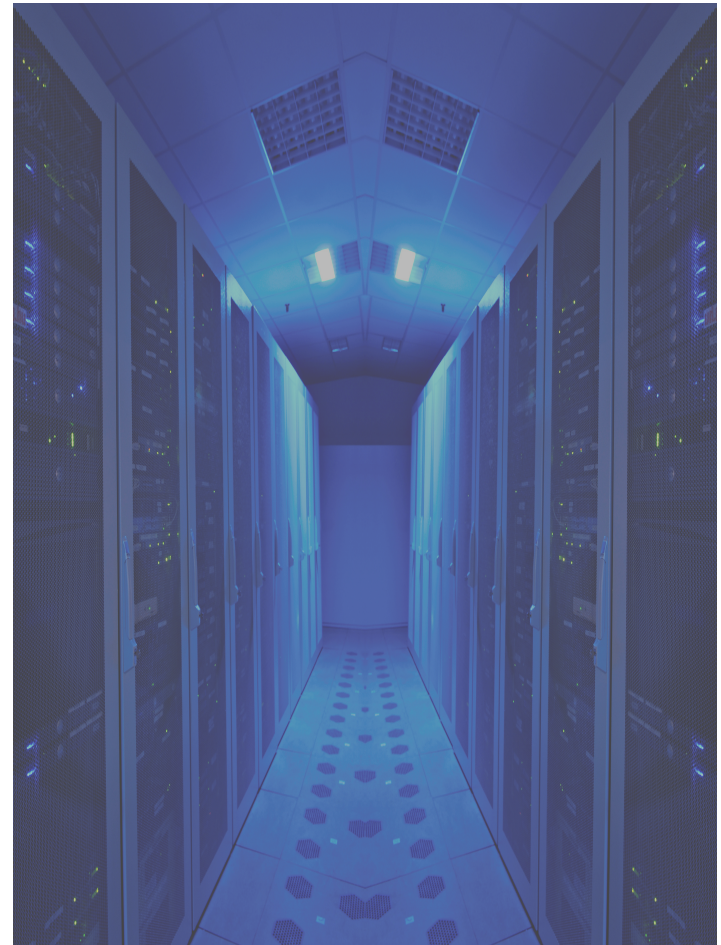


Electronic Discovery Program

- Promotes consistency within a case and between cases
- Creates efficiency in dealing with recurring electronic discovery issues
- Better positions the organization to argue that its electronic discovery processes were reasonable

Components of an Electronic Discovery Program

- Define the roles and responsibilities of those involved in the electronic discovery process
- Define the processes and procedures to be employed
- Identify and inventory data within the organization
- Articulate organizational electronic discovery policies



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QUESTIONS & ANSWERS

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