



# DIGITAL DISCOVERY & E-EVIDENCE



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## TRENDS

Everyone makes lists, lists of what to do, who to see, and the like. To begin the new year and generate dialogue, Ronald J. Hedges offers a preliminary list of the Top 10 decisions on discovery of electronically stored information (“ESI”).

### The ‘Top 10’ E-Discovery Decisions?

By RONALD J. HEDGES

**W**hat is the purpose, at this particular juncture of jurisprudential history, in generating a list of the Top 10 e-discovery decisions? The e-discovery amendments to the Federal Rules of Civil Procedure have now been in effect for over two years. The case law on the amended Rules has been voluminous. Trends and themes in e-discovery are becoming apparent (and will be the subject of a follow-up article). Listing the Top 10 should assist in discerning the trends and themes.

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**Requirements.** Several criteria inform the list. First, in order to be considered, a decision had to postdate December 1, 2006, when the amendments became effective.

Second, only decisions from federal courts were considered as these, rather than state courts, are bound by the amended rules.

Third, only decisions related to discovery, rather than admissibility, were considered.

Please take note that the *Zubulake* decisions do not appear in the Top 10. The first selection criteria aside, Judge Scheindlein’s e-discovery rulings in *Zubulake* have reached iconic status and are beyond any list.

Special acknowledgement is due to Judge Lee H. Rosenthal (S.D. Texas). Judge Rosenthal’s leadership led to the adoption of the 2006 amendments, which enabled courts and practitioners to focus on the procedures and practices of discovery of ESI.

### The Cases and Their Holdings

**Cache La Poudre Feeds, LLC v. Land O’Lakes Inc.**, 244 F.R.D. 614 (D. Colo. 2007), in which the court imposed sanctions on defendants for failing to preserve evidence and not monitoring a litigation hold. This decision

makes the Top 10 for its thorough consideration of when a litigation hold is “triggered” and for its discussion of the ongoing obligation of parties and attorneys to comply with a litigation hold.

**Columbia Pictures, Inc. v. Bunnell**, 245 F.R.D. 443 (C.D. Cal. 2007), where defendants were ordered to preserve random access memory (“RAM”). *Columbia Pictures* is noteworthy for its definition of electronically “stored” information and for its rejection of RAM as being “ephemeral” (and nondiscoverable) information. *Columbia Pictures* also stands out as the first decision by a U.S. court to address the European Privacy Directive as a basis for noncompliance with a discovery demand.

**Doe v. Norwalk Comm. College**, 2007 U.S. Dist. LEXIS 51084 (D. Conn. July 16, 2007), where the wiping of hard drives was found to be “at least grossly negligent, if not reckless,” and sanctions were imposed. *Doe* makes the list as an example of the level of scienter necessary for the imposition of sanctions in one judicial circuit (the Second Circuit) and as a reminder that the federal courts are not uniform in their consideration of scienter. *Doe* also makes the list for its rejection of the so-called “safe harbor” rule, now Fed. R. Civ. P. 37(e).

**In re eBay Seller Antitrust Litigation**, 2007 WL 2852364 (N.D. Cal. Oct. 2, 2007), which held that document retention notices were subject to privilege and work-product protection. *eBay* makes the list for its careful distinction between notices which are intended to implement legal holds and steps taken to collect and preserve ESI subject to a litigation hold.

**Haka v. Lincoln County**, 246 F.R.D. 577 (W.D. Wisc. 2007), which required a pro se plaintiff and the defendant to share the cost of an electronic search of certain hard drives. This has my vote as the most important decision on the Top 10 for several reasons. First, it arose in the context of what might be characterized as “minor” litigation between parties with limited resources. Second, *Haka* recognized that discovery of ESI can be problematic. Third, *Haka* accepted that an incremental approach to production might be worthwhile under appropriate circumstances.

**John B. v. Goetz**, 531 F.3d 448 (6th Cir. 2008), where an appellate court granted mandamus relief in favor of the defendants, offices, and employees of Tennessee, from a district court order that would have allowed direct access to office and personal computer systems. Leaving the federalism issues addressed in this decision, *John B.* makes the Top 10 for its affirmation of pre-December 1, 2006 opinions which recognize that parties review their records and then make production and that, absent exceptional circumstances, direct access to an adversary’s ESI is not permitted.

**Knifsource LLC v. Wachovia Bank**, 2007 U.S. Dist. LEXIS 58829 (D. S.C. Aug. 10, 2007), which required the defendant bank to produce electronic versions of documents. *Knifsource* is Number Two on my Top 10 list for its recognition that conversion of a document from paper to electronic form does not make the latter “not reasonably accessible” under Rule 26(b)(2)(B).

**Mancia v. Mayflower Textile Services Co.**, 2008 WL 4595275 (D. Md. Oct. 15, 2008), where, in addressing discovery disputes between the parties, Chief Magistrate Judge Paul W. Grimm clarified the duties of counsel to comply with Rule 26(g) and to cooperate in order to avoid abusive discovery requests. *Mancia* is a clarion call for counsel to consider their obligations under eth-

ics standards and the federal rules to control the cost of discovery.

**McPeek v. Ashcroft**, 202 F.R.D. 31 (D.D.C. 2001), where Magistrate Judge John M. Facciola required the defendant to restore a limited number of back-up tapes in order to “sample” the resident ESI before ordered further restoration efforts. Although a pre-December 1, 2006 decision, *McPeek* is among the Top 10 as the “once and future” decision on the efficacy of sampling as a means to control the cost of discovery.

**Qualcomm Inc. v. Broadcom Corp.**, 2008 WL 638108 (S.D. Ca. Mar. 5, 2008), and the related decisions preceding it, where case dispositive, monetary, and professional sanctions (reference to a disciplinary body) were imposed for a failure to produce ESI in discovery and the latter sanction vacated and remanded for a hearing. *Qualcomm*, unfortunately, makes the Top 10 as the “perfect storm” of allegations between in-house and outside counsel as to why the production was not made and for what many observers see as rising tensions between outside counsel and their client in the ESI context.

**Quon v. Arch Wireless Operating Co.**, \_\_\_ F.3d \_\_\_ (9th Cir. June 18, 2008), which held that the Stored Communications Act (SCA) prohibited the disclosure of the content of text messages and that the plaintiff had a reasonable expectation of privacy in that content. *Quon* is on the Top 10 as an example of how courts interpret the SCA and of what courts look to when an employee asserts a privacy claim to electronic communications using his employers systems.

**Smith v. Café Asia**, 246 F.R.D. 19 (D. D.C. 2007), in which the court ordered the plaintiff to preserve images on his cell phone. *Smith* is on the Top 10 for its consideration of what might be considered a novel form of ESI and for its recognition that discovery and admissibility issues must be addressed together.

**State of Texas v. City of Frisco**, 2008 WL 828055 (E.D. Tex. Mar. 27, 2008), in which the court held that it had no jurisdiction under the Declaratory Judgment Act to consider whether a preservation letter “triggered” the plaintiff’s duty to preserve. *State of Texas* is among the Top 10 because it demonstrates that preservation decisions are often made unilaterally and before litigation commences and that courts are unlikely to review such decisions prior to the commencement of litigation.

**Victor Stanley, Inc. v. CreativePipe Inc.**, 250 F.R.D. 251 (D. Md. 2008), where the court held the defendant had waived privilege as to a number of documents. *Victor Stanley* makes the Top 10 for its critique of the process by which the defendant conducted its privilege review and for its insistence that any review be reasonable and provable. *Victor Stanley* stands out as a plea for cooperation between counsel in reaching nonwaiver agreements.

**In re Advocat “Christopher X,”** Cour de Cassation, Appeal n 07-83228 (French Supreme Court, Dec. 12, 2007), which fined a French lawyer 10,000 Euros for criminal violation of the French blocking statute, stemming from discovery ordered in *Strauss v. Credit Lyonnais*, 242 F.R.D. 199 (E.D. N.Y. May 25, 2007). (Citation from The Sedona Conference® Working Group 6, *Framework for Analysis of Cross Border Conflicts*, p. 21 (August 2008), available free for individual download from [www.theseconaconference.org](http://www.theseconaconference.org).) Why on the Top 10? It may be a “warning shot” that European authorities intend to en-

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force the European Privacy Directive against discovery requests made in U.S. litigation for protected data.

### **Other Key Developments**

**Federal Rule of Evidence 502**, enacted into law on September 19, 2008, and intended to reduce the burden of ESI privilege review, provide clear guidance on the law of waiver, avoid broad waiver, and protect parties to nonwaiver agreements. This new rule of evidence deserves to be on any “elastic” Top 10 for its scope and the questions raised by it, including its constitutionality as applied to the states.

**The Sedona Conference® Cooperation Proclamation**, which is intended to “launch[] a national drive to promote open and forthright information sharing, dialogue

(internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery.” This makes the Top 10 for its aspirational goals and its recognition that something must be done about the burdens of e-discovery.

### **Comments Invited**

That is my tentative Top 10 list; not all post-December 1, 2006, not all from federal courts, not all judicial decisions, and not just 10. Anyone who cares to engage in a dialogue about the list or about trends and themes is encouraged to contact me at rhedges@nixonpeabody.com or through the *Digital Discovery & e-Evidence*<sup>TM</sup> managing editor, ceannou@bna.com.