Judicial thinking on discovery of electronically stored information (ESI) has undergone a revolution since the turn of the twenty-first century. In this lucid overview, a federal magistrate judge discusses (1) the influential 1999 law review article that questioned the adequacy of traditional approaches in the new electronic environment; (2) a now-famous series of judicial decisions in the Zubulake case, which broke new ground across a range of important ESI issues; (3) how a consensus on best practices developed under the auspices of the Sedona Conference; (4) the nature and significance of extensive ESI-related amendments to the Federal Rules of Civil Procedure in 2006; and (5) why a failure to adequately address e-discovery issues in criminal procedure “is going to be dangerous to the courts.”

1. Introduction: Did anyone get the license plate of the rocket ship that hit me?

In any society, and particularly one whose legal system is predicated on the common law and its emphasis on following precedent, change is a slow process, following the model that there
should be no change unless change is necessary. The revolution in the processing of information in a complicated society brought as dramatic a change in civil procedure and evidence as the American common law courts ever confronted. The revolution was as wide as it was deep. New forms of information management and retrieval have led to entirely new requirements in the search and production of information. Indeed, a complementary revolution took place in establishing the authenticity of information introduced into evidence, with the courts now pondering how to prove that emails, voice messages, and tweets are what they seem to be, and therefore as worthy of consideration by a fact finder as a piece of paper.\(^1\)

The dramatically different nature of the changes that the information technology revolution made can be illustrated by comparing the 2006 amendments to the Federal Rules of Civil Procedure, which dealt with information technology and e-discovery and radicalized the very nature of the rules pertaining to discovery, and the more recent amendments, effective December 1, 2010, which deal with how to calculate the number of days within which a party has to file a responding pleading or other filing. The latter problem has been around in the common law for centuries, while the 2006 amendments dealt with new developments in the past 20 years in a rapidly, ever-changing environment. It is like comparing a rocket ship to a horse-drawn carriage.

We intend to slow that rocket ship down for at least a moment to try to understand the historical forces that shaped the present environment. We expect to show that the process has been unique in the history of American civil procedure in many ways:

- First, the relationship between district court judges and magistrate judges has been significantly altered, with the magistrate judges now producing the vast majority of the opinions and having primary responsibility for the judicial management of e-discovery.
- Second, because so many of the cases filed in federal court settle, there are precious few appellate decisions; and a decision by the Supreme Court, if one ever comes, may be a generation away. This has led to idiosyncratic case law, developed, as it were, from below by magistrate judges with little or no appellate guidance.

• Third, there have been unexpected developments in the demands imposed on lawyers, ethics for which the broad statements of their duties and responsibilities have provided little guidance.

• Fourth, the Sedona Conference, a nonprofit think tank of lawyers, judges, and computer technicians, has had a profound impact on the development of the law.

• Fifth, making money, like nature, abhors a vacuum and, consequently, an entire industry selling services that lawyers engaged in electronic discovery need (or are made to think they need) has emerged. It is now impossible to attend a conference on electronic discovery not sponsored in whole or in part by such vendors, who, if nothing else, produce T-shirts for lawyers, essentially converting them into overeducated sandwich boards.

• Finally, one particular problem, the cost of reviewing electronically stored information to locate potentially privileged information, led to a case that, in turn, inspired a new Federal Rule of Evidence.

We will track all of these developments, but we must first begin with the emergence of a district judge whose influence on this one area of law is unique in American history.

2. The New York judge—Shira A. Scheindlin

The early cases were few and far between, and statements in them seem, in retrospect, almost quaint. But, as has so often been true, the revolution began in a law review article entitled *Electronic Discovery in Federal Civil Litigation: Is Rule 34 up to the Task?*, by Judge Shira A. Scheindlin and her former law clerk, Jeffrey Rabkin.

The central theme of the article was that Rule 34 of the Federal Rules of Civil Procedure, promulgated in 1937, was unequal to the questions that arose in the new world of information technology and that a substantial revision of the rule was in order. The article was remarkably prescient in identifying the problems that the later amendments to the Federal Rules would address; indeed some remain open problems despite the amendments.

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The first problem was the word “documents” in Rule 34. Did it include new and unprecedented types of information buried in the computer’s memory but not apparent on the screen, such as backup, cookies, cache, and history files? Rule 34 spoke of the inspection or copying of designated documents. But if the producing party insisted on printing the requested computer files, did that comply with the Rule’s other requirement that the documents be produced as they are kept in the ordinary course of business? If the demanding party demanded both hard copy and electronic format, who should bear the cost of producing the duplicate hard copies?

The sheer size of a computer’s memory raised other problems: the more that must be kept means the more costly the production might be for what is legitimately demanded. How were courts to strike the appropriate balance between cost and value now that even a small business maintained large computer memories that collected information, both apparent and embedded, indiscriminately? Since this memory also captured files that had been removed from active memory, was a litigant required to search for this material and other data embedded in the computer’s capacious memory? How were traditional privileges such as the work-product privilege to be accommodated in this new world? Who was to pay for the search?

Judge Scheindlin and Mr. Rabkin ultimately concluded that Rule 34 would be up to the task of dealing with the new world of information technology only if Rule 34 was amended to (1) include electronically stored information and (2) require that all electronically stored information be produced in the same form in which it is stored. Hence, if the party represented by counsel demanded the production of electronically stored information in printed form in addition to, or instead of, its electronic form, then that party shall bear all costs associated with the requested production.

Since there is no such thing as a coincidence, Judge Scheindlin was forced to cure some of the very deficiencies she had written about when into her courtroom walked Laura Zubulake.

4. Id. at 347.
6. Id. at 34(e)(1).
7. Scheindlin & Rabkin, supra note 3, at 347.
8. Id. at 374.