There has been a lot of talk in the legal community during the past several years about the dawn of the “e-discovery era.” This reflects the overwhelming prevalence of electronically stored information (“ESI”) in today’s world. More than ninety-five percent of all information is now created and stored electronically. According to the Sedona Conference, of which I am an advisory board member, “we created, captured and replicated enough digital information to fill all of the books ever created in the world, 3 million times over” in the year 2006 alone. See The Sedona Conference Working Group on Electronic Document Retention and Production, The Sedona Conference Commentary on ESI Evidence and Admissibility (March 2008), available at http://www.thesedonaconference.org/dltForm?did=ESI_Commentary_0308.pdf.

The sheer volume of ESI, together with its unique qualities, has necessitated a new approach to managing discovery in civil litigation. In addition to the volume of ESI available in a routine case, the creation, modification, and deletion of ESI often occurs without human input based on the dynamic nature of a computer’s operating system.

The 2006 Amendments to the Federal Rules of Civil Procedure, first proposed by the Advisory Committee on Civil Rules on which I served, recognized this sea change in the creation and storage of information and provided much-needed guidance on how ESI should be handled in discovery. The new Rules made important changes, including: the Rule 26(f) mandate that the parties discuss certain e-discovery issues—particularly preservation and form of production—early in a litigation; providing a mechanism under Rule 26(b)(5)(B) to seek the return of privileged or protected information after it has been produced to an adversary; and providing a safe harbor, pursuant to Rule 37(e), against sanctions under the Rules of Civil Procedure, for ESI lost as a result of the good-faith routine operation of a computer system.
Although e-discovery is fundamentally different than paper-based discovery, it should not be feared. In fact, the proper conduct of e-discovery can be far less expensive than discovery of an equivalent volume of paper records. Corporations today have many resources available to improve their records management practices, which allow for easier production in the event of litigation. Also, the bulk of discovery costs are attributable to document review for relevance and privilege, and ESI can be much easier to search and review than paper records.

Despite the changes in discovery practice resulting from the era of electronic record-keeping, the purpose of discovery remains unchanged. Discovery continues to be the key component in the search for the truth. Liberal discovery is at the heart of the effective administration of justice in the United States. To that end, counsel’s duty to both seek and provide discovery has not changed. Judges have little tolerance for attorneys (and litigants) who do not give serious attention to their discovery obligations. Failure to preserve, or to collect and review relevant information, may lead to the absence of critical evidence, which defeats the truth-seeking process.

There are now many resources available to the bar and the corporate community to address preservation, production, and spoliation issues. It is vital that attorneys utilize these resources and document their preservation and search efforts so that a reviewing court will be able to determine whether they were reasonable. Moreover, attorneys must be knowledgeable about the emerging case law interpreting the new legal requirements pertaining to e-discovery. While the Rules provide the skeleton, it is the case law that puts flesh on the bones.

In this book, attorneys Kristin Nimsger and Michele Lange have provided an invaluable resource for any litigator who wishes to avoid the pitfalls of e-discovery. Nimsger and Lange have distilled their legal expertise and practical experiences as e-discovery service providers into a comprehensive, yet extremely readable source of practical knowledge. This book touches all the bases that a litigator needs to cover to implement a successful discovery effort—from the technicalities of computer forensics collection to the presentation of electronic evidence at trial. This book is more than a useful tool; it is invaluable.

Judge Shira A. Scheindlin
U.S. District Judge
Southern District of New York