March 2013 Vol. 58, No. 9

ILLINOIS STATE BAR ASSOCIATION

TRIAL BRIEFS

The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

The Illinois duty to preserve ESI: A bridge over troubled waters

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On May 29, 2001, three men working on the reconstruction of a bridge in southern Illinois were injured at work when the I-beam they were standing on rolled over, causing the men and the I-beam to fall into the creek below. *Martin v. Keeley.*[1] The following day, May 30, 2001, the men's employer, Keeley & Sons (Keeley), had the I-Beam destroyed with a hydraulic hammer. The injured workers then filed a lawsuit against Keeley for negligent spoliation of evidence,[2] alleging that Keeley owed the men a duty to retain the beam as evidence in potential litigation, that it breached its duty by destroying the beam, and that, as a direct and proximate result of the breach, plaintiffs were unable to prove their underlying claims for negligent design and manufacture against the designer and manufacturer of the beam. The Illinois Supreme Court affirmed the ruling of the circuit court and held that Keeley had no duty to preserve the I-beam.[3] What if the Keeley I-beam was a computer or a smartphone? Would the fact that the evidence was generated electronically and contained electronically stored information ("ESI")[4] change the nature of its use as evidence? The answer is an unequivocal no.

Evidence, as long as it passes the relevance test, is admissible whether it takes the form of a handwritten journal or a Web journal.[5] Due to the dramatic increase in the use of digital technology in business today, the time is ripe for the judiciary and practitioners to take note of how ESI is gathered and used at trial.

Although ESI, as an end result, is no different than the Keeley I-beam, the means of preserving, gathering and using ESI effectively at trial must be addressed. In other words, it is not the use of the evidence on that iPhone that is any different from the I-beam; it is the way you get the evidence from the iPhone that must be addressed.

The Illinois Supreme Court's Rules draw no distinction between evidence in hard copy or electronic form.[6] Potential risk of destroying ESI—which could be evidence—is significantly greater than the risk of destroying evidence in hard copy. The complex and varied means by which data is created, stored and retrieved creates similarly complex opportunities for data to be inadvertently destroyed.

Retrieving data, placing it within a useful context, and maintaining its integrity can be critical for its use at trial.[7] Something as simple as closing a word processing program or as unlikely as the failure of a backup tape can permanently destroy data.

While the intentional destruction of evidence is condemned by most practitioners, there are also many situations involving the unintentional destruction of electronic data which could potentially be useful as evidence. Most attorneys are not computer engineers, yet e-Discovery[8] is confusing and often intimidating. This confusion, however, leads us to one big question with big consequences: To avoid sanctions for spoliation of evidence, what triggers the duty to preserve ESI evidence under Illinois state law? We will try to explain that duty, but first we should return to the Keeley I-beam.

Spoliation of Evidence is a form of Negligence

Under Illinois law, spoliation of evidence is a form of negligence.[9] A plaintiff claiming spoliation of evidence must prove that: (1) the defendant owed the plaintiff a duty to preserve the evidence; (2) the defendant breached that duty by losing or destroying the evidence; (3) the loss or destruction of the evidence was the proximate cause of the plaintiff's inability to prove an underlying lawsuit; and (4) as a result, the plaintiff suffered actual damages.[10]

A finding of spoliation can lead to sanctions, including the imposition of court costs, fines, adverse inference jury instructions, default judgments, civil contempt citations as well as malpractice claims.[11]

Applied to ESI, preservation becomes more complex due to the fact that it is harder to apply the time-honored traditional notions of possession, custody and control which dictate whether a party has an obligation to produce a document or thing in civil discovery.

Consistent with the Rule 201(b)(1) of the Illinois Rules of Civil Procedure, the Federal Rules of Civil Procedure stress that a party or nonparty will be obligated to preserve and potentially produce potentially relevant information within its "possession, custody, or control."[12] Consistent with the Federal Rules, case law demonstrates that a request for electronic data should be treated as "no different, in principle, from a request for documents contained in an office file cabinet."[13]

As applied to that I-beam, possession and control are easy to understand. But, when the issue revolves around a photo on that iPhone as evidentiary use, notions of possession and control become murky because ESI is amorphous, transient and hard to find.

What Triggers the Duty to Preserve Evidence?

Rule: Absent a two-part exception, generally there is no duty to preserve evidence.[14]

The Illinois Supreme Court stated in *Martin*[15] that the general rule in Illinois is that there is no duty to preserve evidence. The Court then went on to cite *Boyd v. Travelers Insurance Co.,*[16] which set forth a two-prong test that a plaintiff must meet in order to establish the exception to the general no-duty rule.[17] Under the first, or "relationship," prong of the test, a plaintiff must show that an agreement, contract, statute, special circumstance, or voluntary undertaking has given rise to a duty to preserve evidence on the part of the defendant.[18]

If the plaintiff can prove that a relationship exists, he must then satisfy the second, "foreseeability," prong of the *Boyd* test: a plaintiff must show that the duty extends to the specific evidence at issue by demonstrating that a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action.[19] If the plaintiff fails to satisfy both prongs of the *Boyd* test, the defendant has no duty to preserve the evidence at issue.[20]

Rule: Plaintiff must show that an agreement, contract, statute, special circumstance, or voluntary undertaking has given rise to a duty to preserve evidence on the part of the defendant.

The terms "agreement," "contract," and "statute" are fairly unambiguous. The terms "special circumstance" and "voluntary undertaking," however, have been left to the courts for analysis.

According to *Boyd,* a voluntary undertaking requires a showing of affirmative conduct by the defendant evincing defendant's intent to voluntarily assume a duty to preserve evidence.[21] In *Boyd*, the plaintiff was injured when a propane heater belonging to the plaintiff exploded while he was working in his employer's work van. After the accident, an employee from the company's workers' compensation insurer visited the plaintiff's home and said that they needed to inspect and test the heater. The insurance employee took the heater and promptly lost it.

What the Court in *Martin* found relevant in its analysis of *Boyd* was that the insurer removed the heater from the plaintiff's home, took it into their possession for the purpose of investigating the plaintiff's claim and knew that the heater was evidence relevant to future litigation.[22] Unlike in *Boyd*, the defendant in *Martin* never manifested an intention to preserve the I-beam as evidence in potential future litigation. Although the Keeley employees visually inspected the I-beam, and Keeley allowed IDOT and OSHA investigators to inspect the I-beam and the accident site, these actions fall short of taking affirmative steps to preserve the I-beam as evidence.[23] A voluntary undertaking requires some affirmative acknowledgment or recognition of the duty by the party who undertakes the duty.[24]

Moreover, the Court in *Martin* specifically pointed to dicta from the Illinois Appellate Court's analysis regarding segregation and its implication on voluntary undertakings in *Jackson v. Michael Reese Hospital and Medical Center*.[25] In *Jackson,* the Appellate Court took issue with the fact that the defendant, knowing X-rays were material to future litigation, chose to treat the X-rays in a specific manner because of pending litigation. The Appellate Court held that "[b]y such conduct defendant *may* have voluntarily assumed a duty to preserve the X-rays and breached its duty by losing them, not unlike the employees who lost the heater in the *Boyd* case.[26] This suggests that segregation of evidence could be one of the factors which the Illinois Supreme Court might consider when deciding whether a voluntary undertaking has triggered a duty to preserve evidence.

Nevertheless, in *Martin,* Keeley never manifested an intention to preserve the I-beam as evidence in potential future litigation. "Although Keeley employees visually inspected the I-beam, and Keeley allowed IDOT and OSHA investigators to inspect the I-beam and the accident site, these actions fall short of taking affirmative steps to preserve the I-beam as evidence."[27] A voluntary undertaking requires some affirmative acknowledgment or recognition of the duty by the party who undertakes the duty.[28]

As an alternative to agreement, contract, statute or voluntary undertaking, a plaintiff can also argue that a special circumstance existed which gave rise to a duty to preserve evidence. Illinois courts have not precisely defined a "special circumstance" in the context of recognizing a duty in a spoliation of evidence claim.[29] There is considerable caselaw, however, which suggests that notions of possession and control are fundamental, but not the sole requirements, to a finding of special circumstances. In *Dardeen v. Kuehling*, the central issue was whether a homeowner's insurer has a duty to instruct the homeowner to preserve evidence which may be relevant to a potential personal injury claim brought by someone injured on the homeowner's property. While the *Dardeen* court held that the plaintiff failed to establish the relationship prong of Boyd it did expressly decline to decide whether *actual* possession of the evidence is necessary to impose a duty to preserve evidence. *Jones.*[30] The court held only that the *opportunity* to control evidence, standing alone, does not impose that duty. *Jones* citing *Dardeen.* Control is defined as the "power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee. The ability to exercise a restraining or directing influence over something." Black's Law Dictionary 329 (6th ed. 1990).[31]

In *Martin*, the Court also briefly discussed *Miller v. Gupta*[32] regarding what special circumstances might give rise to a duty to preserve evidence. *Miller* involved a medical malpractice plaintiff claiming spoliation after she requested X-rays from her doctor, who had at one time possessed the X-rays, segregated the X-rays and then allowed them to be discarded. The Court in *Martin* distinguished *Miller* from *Dardeen* by pointing out that, unlike in *Miller*, in *Dardeen*, the plaintiff never requested the evidence from the homeowner's insurer.

While it is undisputed that both the doctor in *Miller* and the insurer in *Dardeen* were on notice that an injury was alleged, the Court found that a request to preserve evidence would be crucial to any potential determination as to preservation of duty. More plainly, the Court in *Martin* stated, "it is clear from the context of the *Dardeen* decision that something more than possession and control are required, such as a request by the plaintiff to preserve the evidence and/or the defendant's segregation of the evidence for the plaintiff's benefit."[33]

The ideas of possession and control in relation to a special circumstance when applied to ESI, however, become very hard to conceptualize. For example, who has possession and control of a work email? Is it the sender, the recipient, the company? Could it be that they all have possession and control of the ESI?

This exponential growth in the potential number of people that we would have to consider in order to make a determination regarding who had the duty to preserve that

email as evidence becomes staggering. And to muddy the water further, does possession and control become more or less important when dealing with ESI?

Although the Court indicated in *Martin* that something more than possession and control are required to trigger a duty to preserve evidence, there they were talking about one tangible I-beam. If a plaintiff's request to preserve evidence can be a factor to consider in making a determination regarding duty to preserve such as in *Martin*, a request to preserve ESI changes that concept completely. Regarding the e-mail, to whom must the plaintiff articulate this request to preserve evidence?

The "Foreseeability" Prong of the *Boyd* Test

Rule: Plaintiff must demonstrate that a "reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action."

Under the second prong of the *Boyd* test, a plaintiff must show that the duty to preserve evidence "extends to the specific evidence at issue by demonstrating that a reasonable person in the defendant's position should have known the evidence would be material to potential litigation." *Dardeen*.[34]

Although the Illinois state courts have not provided much in the way of analysis as to what might trigger a duty to preserve evidence under the foreseeability prong of the *Boyd* test, there is a substantial body of case law from the Federal Courts that might be useful in understanding this issue. For example, pre-litigation demands, either oral or written can trigger a duty to preserve.[35] More specifically, a letter threatening litigation can often trigger the duty to preserve evidence.

In *D'Onofrio v. SFX Sports Group, Inc*., the Court held there was "no ambiguity in this letter in regards to the plaintiff's intent to pursue her claims in court, if necessary, or to the type of data she requested defendants to preserve…The defendants…were on notice and should have undertaken steps to preserve potentially relevant information."[36]

However, in *Viramontes v. U.S. Bancorp*, the Northern District of Illinois held that the defendant's duty to preserve ESI was not triggered at the beginning of a human resources investigation, stating that the plaintiff's complaint to human resources "was not enough to put [defendant] on notice of potential litigation and did not trigger a duty to preserve documents."[37] Thus, there seems to be a distinction between seeking a business resolution and threatening litigation that parties need to be aware of.

In *Shimanovsky v. General Motors Corp*., the Illinois Supreme Court held that the plaintiff's destructive testing of allegedly defective power-steering components prior to the commencement of a lawsuit triggered the duty to preserve evidence and therefore warranted imposition of discovery sanctions.[38] The Court went on to explain its concern that "were it unable to sanction a party for the pre-suit destruction of evidence, a potential litigant could circumvent discovery rules or escape liability simply by destroying the proof prior to the filing of a complaint."[39]

Practical Applications for Illinois Attorneys

As we have seen from *Martin*, the dearth of Illinois case law specifically applying the duty to preserve evidence articulated in *Boyd* to the emerging field of ESI's application as evidence in Illinois is confusing. There was a time not long ago when courts, worried about authenticity and data integrity, had to decide whether a fax was admissible. Ultimately, the law caught up with the technology. When it comes to ESI, however, we cannot wait for these cases to wind their way through the court system.

While some form of notice ultimately seems to be the cornerstone of one's duty to preserve evidence, this poses distinct problems when it comes to ESI because it is very easy to unintentionally destroy. For example, simply copying files using Microsoft Windows will cause the new files to "alter" the current date and time; however, the last modified date will remain the same.[40]

If the timestamp on a certain file is meant to be your smoking gun, proper investigation techniques through the use of "metadata" can make or break your case and proper care must be taken immediately in order to preserve ESI. Moreover, you may have just breached a duty to preserve discoverable evidence for which your opponent will be able to successfully argue that they are unable to have the opportunity to prove their case that will lead to sanctions for spoliation.[41]

Fortunately, there is plenty of advice available regarding the what, where, and why of proper data retrieval and usage. Keep in mind that there is a growing trend toward judicial intolerance for the attorney who has not done his homework. Ignorance of technology is no longer a defense to a cause of action for spoliation.[42]

The Amended Federal Rules and the Federal Courts Provide Guidance

In 2004, Judge Scheindlin of the U.S. District Court for the Southern District of New York handed down her first decision in *Zubulake v. UBS Warburg LLC*.[43] The *Zubulake* line of cases have come to be regarded as groundbreaking in the field of e-discovery because they spell out a clear-cut duty to discover, safeguard and produce relevant electronic information.

Zubulake is generally considered the first definitive case in the United States on a wide variety of electronic discovery issues. These issues, decided in what is commonly known as *Zubulake I, III, IV and V* , include: 1) the scope of a party's duty to preserve electronic evidence during the course of litigation; 2) a lawyer's duty to monitor his clients' compliance with electronic data preservation and production; 3) data sampling; 4) the ability for the disclosing party to shift the costs of restoring "inaccessible" back-up tapes to the requesting party; and 5) the imposition of sanctions for the spoliation (or destruction) of electronic evidence.[44]

In *Zubulake* the Court stated quite clearly, "Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched."[45] Moreover, *Zubulake* created an ongoing duty to preserve electronic data when it stated: "the continuing duty to supplement disclosures strongly suggests that parties also have a duty to make sure that discoverable information is not lost. Indeed, the notion of a 'duty to preserve' connotes an ongoing obligation."[46]

The Federal Rules of Civil Procedure were amended in 2006 to address confusion and create consistency for handling electronically stored information in discovery and the *Zubulake* cases were used to help formulate the rules. Rules 16, 26, 33, 34, 37, 45 now require attorneys to pay specific attention to e-discovery issues.

In 2010, Judge Scheindlin issued a follow-up to the *Zubulake* opinion in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities LLC*[47] in which the court stressed that the duty to preserve documents falls on both litigants and counsel. *Pension Committee* also articulates new standards for e-discovery and provides guidance for those parties who anticipate

litigation. Judge Scheindlin's opinion states that "it is important to recognize what this case involves and what it does not.

This case does not present any egregious examples of litigants purposely destroying evidence. This is a case where plaintiffs failed to timely institute written litigation holds and engaged in careless and indifferent collection efforts after the duty to preserve arose."[48] Therefore, according to *Pension Committee*, a party who anticipates litigation should first issue written instructions in the form of a litigation hold to preserve documents and ESI.

In May 2009, in light of the growing influence of e-discovery, the 7th Circuit Electronic Discovery Pilot Program was created to help improve pretrial litigation procedure. The program codified its best practices in the Principles Relating to the Discovery of Electronically Stored Information and was designed to facilitate an efficient, expeditious, cost-effective, and fair e-discovery process.[49] Critically important to all practitioners is the issuance of a preservation letter to opposing parties, third-party witnesses and other depositories of information. Applying the proportionality standard outlined in FRCP 26(b)(2)(c), the preservation letter and related responses should be "reasonably targeted, clear, and as specific as practicable."[50]

The importance of a preservation letter cannot be overestimated—it is an attempt to ensure the preservation of relevant and discoverable information and to facilitate cooperation between requesting and receiving counsel and parties by transmitting specific and useful information. Included in any preservation letter should be: (1) names of the parties; (2) factual background of the potential legal claim(s) and identification of potential cause(s) of action; (3) names of potential witnesses and other people reasonably anticipated to have relevant evidence; (4) relevant time period; and (5) other information that may assist the responding party in assessing what information to preserve.

Also outlined in the 7th Circuit's principles is a duty to meet and confer on discovery and to identify disputes for early resolution. Moreover, the principles call for each party to designate an individual(s) to act as e-discovery liaison(s) to insure that both counsel and client are taking proactive measures to preserve evidence and relevant information.

Last summer a court in the Northern District of California sanctioned the electronics giant Samsung for failure to discontinue use of its auto-delete feature on the company's proprietary e-mail system named mySingle, and for failing to follow up with those employees who were subject to a litigation hold meant to ensure compliance with its preservation duties.[51] In its analysis, the Court reasoned that Samsung's duty to preserve arose at the issuance of Apple's litigation hold which directly stated that there was a "reasonable likelihood of future patent litigation."[52] Additionally, the Court stated, "the Defendant had a duty to verify whether its employees were actually complying with the detailed instructions."[53]

What makes *Apple v. Samsung* particularly important is the fact that Samsung was able to provide e-mail production from custodians who had been using a different e-mail system and had not been using the proprietary e-mail system mySingle—two different e-mail systems! Indeed, while those custodians using mySingle were able to provide very few e-mails, the custodians using the other system produced thousands of e-mails.

If nothing else, *Apple* should serve as a wake-up call to all practitioners because it offers a glimpse of what is on the horizon in terms of future litigation. Multiple e-mail platforms combined with the potential distinction between private e-mails and company e-mails only makes an attorney's job more complicated. At Samsung, mySingle was set up to auto delete employees' e-mails after two weeks. In addition to mySingle, however, Samsung also gave its employees the option of using Microsoft Outlook.

While this case does not in any way discuss whether these two systems were meant to distinguish between company and personal e-mail usage, it becomes clear rather quickly that having two systems is bound to create another layer of problems during discovery and it is something that attorneys need to be mindful of. Just when you think you have crafted a well- written litigation hold that covers all of the bases, a case comes along which highlights a new potential problem.

Creating New Obligations

The subject of preservation is ripe for litigation and discussion as the law evolves with the glut of information being created electronically and needed for trial. Practitioners must be alert to the possibility of abuse and the obligations of our business and individual clients to preserve evidence or relevant information.

The most important thing to remember about ESI preservation is that the duty to preserve arises when litigation is anticipated which is often long before the filing of a formal complaint with the court system.

That being said, practitioners need to think outside the box because the data they might want preserved can be located anywhere ESI is available: personal computers, work computers, servers, USB drives, social media, cloud storage, instant messages, spreadsheets, databases, graphics, audio and video recordings, text messages, voice mails and e-mails.[54]

And finally, a promptly-sent, well-drafted and carefully thought out litigation hold letter to an adversary is essential. ■

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1. *Martin v. Keeley & Sons*, Inc., 2012 IL 113270, 365 Ill.Dec. 656, 979 N.E.2d 22 (2012).

2. Black's Law Dictionary defines spoliation as "the destruction of evidence… or significant and meaningful alteration of a document or instrument."

3. *Id.*

4. The Sedona Conference defines electronically stored information (ESI) as "the information that is stored electronically, regardless of the media or whether it is in the original format in which it was created, as opposed to stored in hard copy (i.e. on paper)." The Sedona Conference®, *The Sedona Conference® Glossary: E-Discovery & Digital Information Management,* p. 20 (3d ed. 2010), <www.thesedonaconference.org/publications_html>.

5. Illinois Rules of Evidence, Rule 402. All relevant evidence is admissible, except as otherwise provided by law.

6. Illinois Supreme Court Rule 201(b)(1) provides:

> Full Disclosure Required. Except as provided in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party, including the existence, description, nature, custody, condition, and location of any documents or tangible things, and the identity and location of persons having knowledge of relevant facts. The word "documents," as used in these rules, includes, but is not limited to, papers, photographs, films, recordings, memoranda, books, records, accounts, communications *and all retrievable information in computer storage.* (emphasis added)

Rule 214 Comments also addresses revisions to

Rule 201(b) which have been amended to include in the definition of "documents" all retrievable information in computer storage, "so that there can be no question but that a producing party must search its computer storage when responding to a request to produce documents pursuant to this rule."

7. Rice, Paul R. *Electronic Evidence Law and Practice.* P.6.

8. The Sedona Conference defines E-Discovery as, "the process of identifying, preserving, collecting, preparing, reviewing and producing electronically stored information (ESI) in the context of the legal process." *The Sedona Conference® Glossary,* p. 18.

9. See: *Boyd v. Travelers Insurance Company*, 166 Ill.2d 188, 209 Ill.Dec. 727, 652 N.E.2d 267 (1995), and *Dardeen v. Kuehling*, 344 Ill.App.3d 832, 280 Ill. Dec. 15, 801 N.E.2d 960 (5th District 2003).

10. *Dardeen*, *supra*.

11. *Krumwiede v. Brighton Associates, LLC*, No. 05 C 3003, 2006 WL 1308629 at *8 (N.D.Ill. May 8, 2006).

12. Fed.R.Civ.P. 34(a)(1).

13. *Linnen v. A.H. Robins Co.,* No. 97-2307, 1999 WL 462015 at *6 (Mass.Super. June 16, 1999).

14. *Martin v. Keeley & Sons, Inc*., 2012 IL 113270, 365 Ill.Dec. 656, 979 N.E.2d 22 (2012).

15. *Id.*

16. 166 Ill.2d 188, 194-95 (1995).

17. *Id.*

18. *Id.*

19. *Boyd*, 166 Ill.2d 195.

20. *Dardeen*, 213 Ill.2d 336.

21. *Boyd*, 166 Ill.2d 195 (citing *Nelson v. Union Wire Rope Corp*., 31 Ill.2d 69, 74, 199 N.E.2d 769 (1964)).

22. *Boyd*, 166 Ill.2d 192.

23. *Martin v. Keeley & Sons, Inc*., 2012 IL 113270, 365 Ill.Dec. 656, 979 N.E.2d 22 (2012).

24. *Martin, citing Rogers v. Clark Equipment Co*., 318 Ill.App.3d 1128, 1134-35, 253 Ill. Dec. 82, 744 N.E.2d 364 (2nd Dist. 2001).

25. *Jackson* v. *Michael Reese Hospital & Medical Center*, 294 Ill.App.3d 1, 228 Ill. Dec. 333, 689 N.E.2d 205 (1st Dist. 1997).

26. *Martin v. Keeley & Sons, Inc.,* 2012 IL 113270, ¶ 35, citing *Jackson*.

27. *Martin v. Keeley & Sons, Inc*., 2012 IL 113270.

28. *Martin*, citing *Rogers v. Clark Equipment Co*., 318 Ill.App.3d 1128, 1134-35 (2001).

29. *Martin v. Keeley & Sons, Inc*., 365 Ill.Dec. 656, 979 N.E.2d 22 (2012).

30. *Jones* v. *O'Brien Tire and Battery Service Center, Inc*., 374 Ill.App.3d 918 (2007).

31. Black's Law Dictionary.

32. *Miller v. Gupta*, 174 Ill.2d 120, 220 Ill. Dec. 217, 672 N.E.2d 1229 (1996).

33. *Martin v. Keeley & Sons, Inc*., 2012 IL 113270.

34. *Dardeen*, 213 Ill.2d 336, citing *Boyd*, 166 Ill.2d 188 195.

35. *Wm. T. Thompson Co. v. General Nutrition Corp*., 593 F.Supp. 1443, 1446 (C.D.Cal. 1984).

36. *D'Onofrio v. SFX Sports Group, Inc*. No. 06-687 (JDB/JMF), 2010 WL 3324964 at *8 (D.D.C. Aug. 24, 2010).

37. *Viramontes v. U.S. Bancorp*, No. 10 C 761, 2011 WL 291077 (N.D.Ill. Jan 27, 2011).

38. *Shimanovsky v. General Motors Corp*., 181 Ill.2d 112, 229 Ill.Dec. 513, 692 N.E.2d 286 (1998).

39. *Shimanovsky v. General Motors Corp*., 181 Ill.2d 122.

40. Rice, Paul R. *Electronic Evidence Law and Practice.* Chicago: American Bar Association, 2005. Print.

41. *See Shimanovsky v. General Motors Corp*., 181 Ill.2d 112, 229 Ill.Dec. 513, 692 N.E.2d 286 (1998).

42. *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec. LLC*, Amended Op. and Order, Case No. 05 Civ. 9016 (SAS), 2010 WL 184312, at *1 (S.D.N.Y. Jan. 15, 2010).

43. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004).

44. Rice, Paul R. *Electronic Evidence Law and Practice.* Chicago: American Bar Association, 2005. Print.

45. *Id.*

46. *Id.* at 433.

47. *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec. LLC*, Amended Op. and Order, Case No. 05 Civ. 9016 (SAS), 2010 WL 184312, at *1 (S.D.N.Y. Jan. 15, 2010).

48. *Id.*

49. <www.discoverypilot.com/sites/default/files/Principles8_10.pdf>.

50. *Id.*

51. *Apple, Inc*. v. *Samsung Elecs. Co. Ltd*., No. C 11-1846 LHK (PSG) (N.D. Cal. July 25, 2012).

52. *Id.*

53. *Id.*

54. E-discovery essentials: The 4 W's of preservation. (2012). Retrieved February 26, 2013, from <http://www.americanbar.org/newsletter/publications/youraba/201207article05.html>.