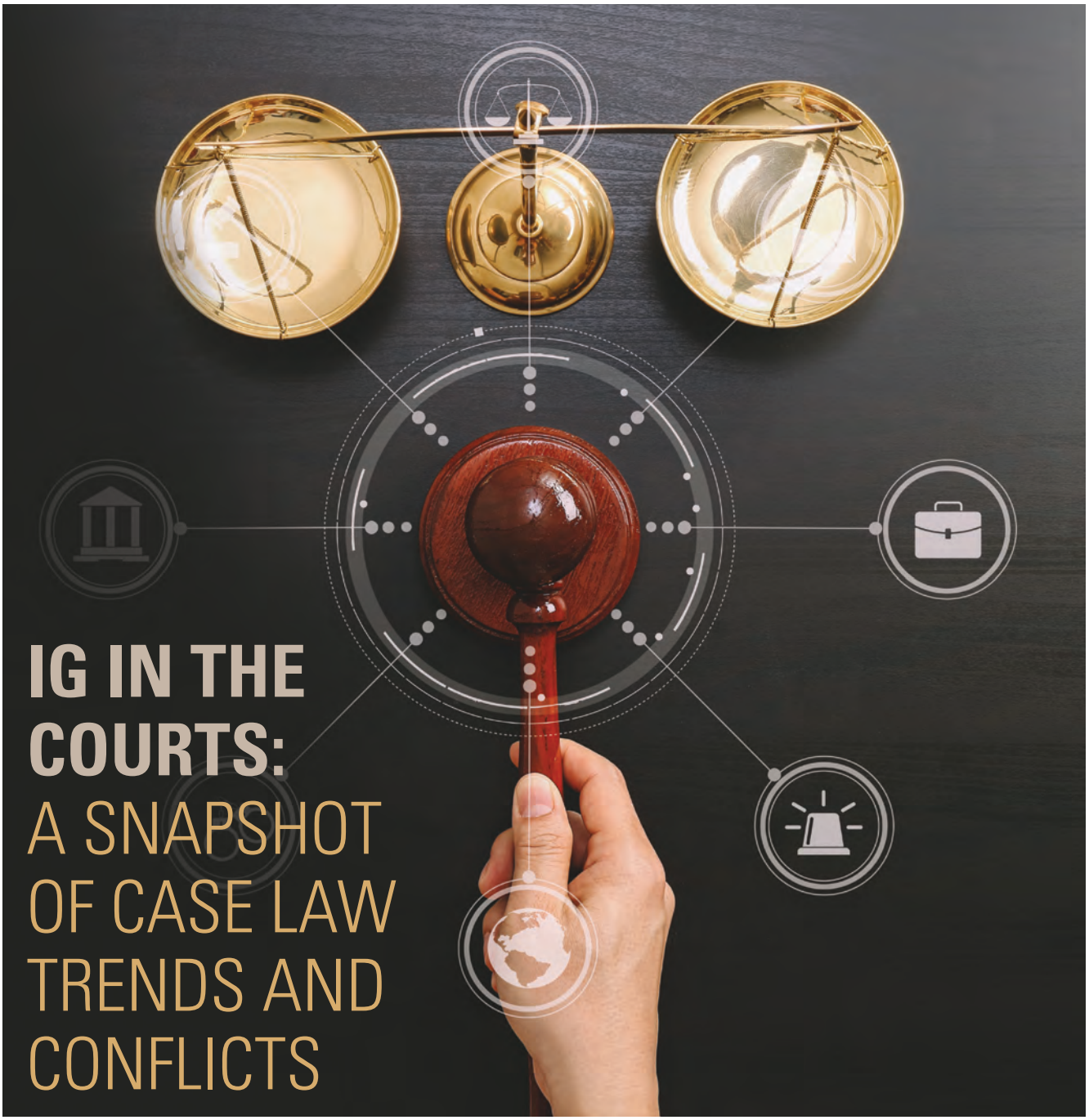

IG IN THE COURTS: A SNAPSHOT OF CASE LAW TRENDS AND CONFLICTS

As information technologies and judges' knowledge of these technologies have advanced, IG-related case law has exploded. This article explores this judicial evolution and a few cases involving the thorny issue of discovery of information on mobile devices.

John C. Montaña, J.D., FAI

Case law involving information governance (IG) has undergone significant changes in the 25 or so years since this area of case law began developing. Initially, case decisions concerned themselves with elementary, and to the information professional, non-controversial, matters such as the appropriateness of having a retention schedule, the validity of electronic documents, and similar matters. In the intervening years, these matters have been exhaustively resolved. There is no longer, for example, any question about the legitimacy of the retention schedule promulgated in the normal course of business or about the validity of electronic records.

That is not to say, however, that IG has ceased to be a topic of interest in the courts. To the contrary, the volume of IG-related case law has exploded. Case law has now extended into new and novel areas as technologies have advanced into areas beyond the scope of statutory law. And, even in routine areas of case law, covering relatively mundane topics, the comparison between current legal doctrine and older cases is illustrative of the changes that occurred within the legal system and in the community of litigants it serves.

Sophistication of Judicial Remedies

Electronic record systems took the judicial system by surprise when their use became widespread in the early 1990s. Judges with little or no familiarity with the size and scale of such systems, or the complexity and dynamic nature of their internal workings, had to determine what constituted acceptable or good practice, what constituted spoliation destruction of evidence, and other consequential matters. They were often prodded (or manipulated, depending on your point of view) by lawyers and expert witnesses who understood far more about the subject than the judges and who were therefore often able to obtain oppressive and expensive rulings against their opponents.

That is no longer the case. The judicial system has undergone a long process of educating itself, with the result that judges are far more sophisticated now.

Balancing Difficulty/Cost and Value

Consider the case of *AAB Joint Ventures vs. the United States* (75 Fed. Cl. 432 [Fed. Cl. 2007]). There, the question arose whether e-mail should be restored from backup tapes for a discovery lawsuit.

The custodian of the tapes conceded there might or might not be e-mail on the backup tapes that was not found on the active system, but resisted production based on the concept of burden: the cost and difficulty of restoring backup tapes to search for e-mail far outweighed the value that might be obtained from the e-mail that might be there. In this case, as was always the case, the court was obligated to undertake a balancing test – was the potential value of the e-mail that might be there sufficient to justify the difficulties of obtaining it?

The judicial system has undergone a long process of educating itself, with the result that judges are far more sophisticated now.

In years past, courts often required the restoration of vast libraries of backup tapes with little or no thought as to the cost for the difficulties of doing so, resulting in extremely high expenditures that often dwarfed the value of the case itself.

In *AAB Joint Ventures*, however, the court did in fact conduct the balancing test, and it ordered a measured, incremental approach. First, it called for the restoration of one quarter of the backup tapes, which would be analyzed for their relevance. Next, the court would rule on whether restoration of the remaining tapes was justified.

This may seem a relatively straightforward solution, but compared to 20 years ago, it was a sophisticated approach that sought to minimize the cost of discovery as much as possible, consistent with full discovery.

Determining the Scope of Discovery

Likewise, in *United States vs. New Mexico State University* (WL 4386358 [D.N.M. Sept. 29, 2017]), the court was forced to impose a solution when the parties could not agree upon the scope of discovery. The defendant had conducted discovery, but, contrary to the requirements of rule 37 of the Federal Rules of Civil Procedure (FRCP), had not come to agreement with its opponent respecting the scope of the discovery – specifically, the keywords to be used, the repositories to be searched, and other specific search parameters.

Rather than ordering more conferences, the court decided of its own accord the appropriate keywords, repositories, and other search parameters, and ordered the defendant to conduct additional searches in accordance with them. The court stated:

> Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI. Moreover, where counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI's custodians as to the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of "false positives." It is time that the Bar – even those lawyers who did not come of age in the computer era – understand this.

The party's duty to preserve and deliver to its opponent discoverable information is limited to that information that is within its custody and control.

To those who have come of age in the era of electronic records, this may not seem a surprising statement, but the remedy ordered by the court, and this statement, together illustrate a degree of sophistication that would have been unheard of 20 years ago.

Uncharted Territory: Mobile Devices

The expanded use of such mobile technology as tablets and phones has likewise required both the extension of traditional legal doctrines and more sophisticated judicial approaches and solutions to the problems they raise.

One such area has been the thorny issue of discovery as it relates to mobile devices:

- Technologies such as messaging are messy from a management and retention standpoint and are difficult to subject to a traditional legal hold.
- Mobile devices typically do not have long life spans, meaning that information stored on them can be lost through the normal course of changing devices, which may happen every year or two. Given that the average lawsuit may not be filed until three or four years after the events that it relates to, this makes preservation inherently problematic.
- Devices owned by the individual are increasingly used for business purposes. Traditional notions of custody and control – the long-standing test for whether information is subject to discovery – are thus increasingly challenged.

Loss of ESI During Routine Operations

Consider the case of *In re NuVasive, Inc. v. Madsen Med. Inc.* (No. 13cv2077 BTM(RBB) (S.D. Cal. Jan. 26, 2016), in which text messages relevant to the case were lost. Though a legal hold had been issued, mobile devices were routinely replaced before and during the pendency of the litigation.

Although a preservation hold is mandatory when litigation is actual or reasonably foreseeable, current doctrine recognizes the fact of data loss during routine operation of data systems, and so it discourages sanctions for such instances. In this case, the court initially imposed severe sanctions in the form of an adverse inference (a jury instruction stating that the information was destroyed because the party was aware that it was adverse to its case), but then it reconsidered.

Based on revisions to the FRCP, it concluded that *intentionality* was required – that is to say, if the information was lost unintentionally or through mere negligence, severe sanctions were not warranted. Instead, the court concluded the appropriate remedy was to allow testimony about the loss of the text messages and the reason for it. Thus, the defendant had at least an opportunity to persuade the jury that the loss of the text messages did not impair its opponent's case and that no bad motives were behind the data loss. That's a considerable improvement over the potentially devastating effect of an adverse inference instruction.

Custody and Control in BYOD Environment

Next, consider the issue of custody and control of mobile devices, a very important issue in discovery. The party's duty to preserve and deliver to its opponent discoverable information is limited to that information that is within its custody and control. But, what is custody and control in a bring-your-own-device (BYOD) environment? Courts have taken different approaches to this matter, resulting in different legal doctrines in different parts of the country.

In Ronnie Van Zant, Inc. v. Pyle, (No. 17 Civ. 3360 (RWS) (S.D.N.Y. Aug. 28, 2017), for example, text messages relevant to the litigation resided on the mobile phone of an independent contractor who had done work for the defendant. The contractor was a nonparty and was not an employee of the defendant. The defendant asserted that it had no duty to preserve or deliver the text messages on the phone because it did not have custody and control of the phone.

The court disagreed and issued an adverse inference instruction. The court observed that:

> [T]he "concept of 'control' has been construed broadly. Documents are considered to be under a party's control if the party has the practical ability to obtain the documents from another, irrespective of his legal entitlement.
> . . . In sum, while determining practical control is not an exact science, "common sense" indicates that [the contractor's messages] were within [defendant's] control, and . . . should have been preserved."

In effect, the court reasoned that the relationship between the defendant and the contractor was such that the defendant could simply order the contractor to preserve the information and deliver it to the plaintiff's attorney, presumably upon pain of monetary sanctions in the form of loss of income. Extrapolated further to other employment-type situations, the reasoning in this case is that an employer is in a position to order its employees to preserve information and make it available for collection in a lawsuit, and has a duty to do so.

Contrast that with *Hatfill v. New York Times* (242 F.R.D. 353 E. Dist. Va. 2006). In this case, the plaintiff

sought discovery of a nonparty reporter's notes on a flash drive owned by and in possession of the reporter. The plaintiff asserted essentially the doctrine cited above, that the *Times* could simply order the reporter to turn the material over, on pain of dismissal.

The *Times* countered with the argument that its long-standing policy was to give ownership of notes and unpublished material to its reporters, and that it therefore did not have custody and control of them.

The court agreed with the *Times*. The newspaper was determined to have no obligation to preserve or collect the information in question, and no sanctions resulted.

Conflicting Legal Doctrine

These two cases are illustrative of the split of legal doctrine within the United States. Depending on the jurisdiction within which the lawsuit is being litigated, an employer may or may not have a duty to extend litigation holds, preservation and collection activities, and other discovery activities to devices owned by its employees and contractors.

For multijurisdictional employers, this presents a complication in the development and implementation of its discovery strategies since it may be subject to different duties in different jurisdictions. And, employers subject to such a duty have the additional complication of dealing with employees who may be none too happy to discover this.

Employers are therefore well advised to make their employees aware of this issue so they can rationally determine whether allowing BYOD in the workplace is appropriate for them.

The Bottom Line

These are just a few cases that illustrate an increasingly complex and changing legal landscape. Technology usage grows by leaps and bounds. Core legal doctrines change much more slowly, but courts faced with this dichotomy in a case must nonetheless rule on the issues presented to them. The result will be continually evolving legal doctrines as courts interpret existing rules and doctrines in novel ways to fit the novel facts that will inevitably present themselves in future cases. E

About the Author: John C. Montaña, J.D., FAI, is founder and a principal of Montaña and Associates, a full service records and information management and information governance consulting firm. In addition to writing *How to Develop a Retention Schedule*, Montaña has co-authored several other books and written dozens of articles. Montaña is a Fellow of ARMA International and a member of the group that developed the Generally Accepted Recordkeeping Principles®. He holds a juris doctor degree from the University of Denver. Montaña can be contacted at *jcmontana@montana-associates.com*.