

# Managing discovery in

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Advances in technology have enabled in-house lawyers to take a larger role in helping outside counsel manage and coordinate discovery in complex, document-intensive cases or pattern litigation. As a result, when plaintiffs' trial lawyers, on behalf of cities, counties, and the State of New York, orchestrated lawsuits against Colt's Manufacturing Company and others in the firearm industry, Colt's legal department was prepared. The lawsuits accused the firearm defendants of negligent marketing, defective firearm design, and creating a public nuisance. They claimed that Colt's and the firearm industry caused criminals and others to acquire and misuse firearms, thereby causing government entities to incur significant increased costs of police, emergency services, pension benefits, and medical care, as well as diminished property values and lost tax revenues. What followed in succession was the commencement of 24 separate lawsuits against Colt's in state and federal district courts across the country. In addition, plaintiffs' trial lawyers coordinated the filing of another 15 separate lawsuits against Colt's on behalf of individuals and organizations, such as the NAACP.

At Colt's, in-house counsel knew that waves of defensive discovery would soon arrive and that the plaintiffs in each case would be requesting essentially the same documents from the same document pool.

This litigation involved multiple parties, both defendants and plaintiffs, and their respective attorneys, who would have an interest in distributing and sharing information among themselves. With that in mind, Colt's evaluated early in the litigation process whether technology could improve coordination and management of the pending litigation, especially in responding to, housing, and managing discovery. The question for Colt's and its outside counsel was how to devise a document management system that would realize increased efficiency and cost savings.

Rather than react to the case-by-case receipt of each set of interrogatories and requests for the production of documents from the multitude of plaintiffs, Colt's, with the help of outside counsel, devised a strategy and implemented a cost-effective plan to manage this potentially overwhelming amount of discovery. Colt's came to realize that computerizing and storing information upfront could save time, energy, resources, and money down the road and ensure uniformity in discovery responses. Although the initial costs seemed large, these methods proved to be significantly less expensive than traditional document handling because repeated copying and storage costs were avoided. Moreover, full-text document searches could be performed to identify responsive material as opposed to repeatedly hand reviewing thousands of pages.

# Large-scale and

# pattern litigation



Use Technology  
for Efficiency  
and Cost  
Effectiveness

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Given that plaintiffs had focused their complaints on the design, manufacturing, marketing, sales, and distribution of handguns, Colt's anticipated that key areas of interest would include research, development, testing, and marketing of firearm safety devices, including "smart guns."<sup>1</sup> Other areas that Colt's believed plaintiffs' discovery demands would dwell on were Colt's position on firearm safety and design issues, warnings, advertising/marketing/sales strategy, and use of advertising agencies and advertisements. Concerning distribution issues, Colt's believed that plaintiffs would hone in on Colt's distribution practices, distributor agreements, and firearm control policies and procedures. Colt's assessments ultimately proved to be correct.

This experience helped Colt's to realize that technology, when used strategically, could play a critical role in dealing with large-scale or pattern litigation as opposed to more commonplace judicial or arbitration proceedings. Although there is no single correct approach for use by all companies in all cases, this article provides guidance in helping you to plan and implement a strategy for using technology to

cope with discovery issues arising in large-scale or pattern litigation if your company becomes a target.<sup>2</sup>

## TECHNOLOGY AS AN IMPORTANT DISCOVERY TOOL

Traditionally, responding to discovery requests often meant amassing years' worth of documents in one centralized location and then repeatedly reviewing these documents for relevance, responsiveness, and privilege. If you were lucky, a thumbnail index of the material would be created by hand and saved in a nonsearchable word processing document. These boxes then were stored in a case or file room at your company's or outside counsel's office for future use and a similar review when the next case was filed. This process would repeat itself every time litigation ensued and usually was time consuming, inefficient, and very costly.

Similarly, deposition transcripts would be delivered to your outside counsel in hard copy, often without a word index or other means by which to search the testimony. Lawyers involved in the case would review the transcripts, making notes to themselves in the margins, and then store the transcripts in binders or redwells that overpopulated their offices. As with document production and storage, this way to review testimony for later use was time-consuming.

Technological developments in recent years have altered these traditional methods for managing documents and depositions and how you and your outside counsel might manage large document cases. These developments have made specific types of technology vastly more affordable, functional, and accessible to corporate America in general. With that thought in mind, you must evaluate how you and your company can use technology. Just as you repeatedly determine whether your litigation strategy is being implemented and succeeding, you should reassess the use and effectiveness of technology for managing discovery throughout the litigation.

Technological developments, advancements, and solutions can aid you and outside counsel during the discovery phase in the following areas:

- Document databases or repositories.
- Deposition databases.
- Communication, including intranets/extranets, chat rooms, and videoconferencing.

- Storage mechanisms for briefs, pleadings, and discovery responses.
- Information management, such as timeline and issue organization programs.

You should be aware of these developments and advances, understand how they can assist in managing discovery and document production, and assess their applicability to your company's business and litigation management.

### **ASSESSING YOUR COMPANY'S GOALS AND OBJECTIVES**

Before deciding what technology is suitable in a particular situation, it is imperative that you define your company's general goals and primary objectives in litigation and figure out how you will use specific technology to assist in attaining these goals and objectives. For example, if your company outsources all of its litigation, your goal might be to improve outside counsel's efficiency and accuracy by decreasing travel time and long distance costs attendant to document review, retrieval, and production and, thereby, decrease the time and expense of the discovery process. Similarly, if your company is involved in pattern litigation, the ability to share information among counsel around the country and consistency in discovery responses may be your primary objectives. Conversely, if your company handles significant litigation in-house, a primary goal might be to establish a system whereby paralegals or other members of your team can track and manage large caseloads. In each of these circumstances, technology can be used to streamline discovery and, ultimately, greatly assist you in accomplishing your objectives.

Whatever your goal or objective, once you have defined or established it, you must assess a number of items to determine the system(s) that would be most appropriate. Initially, determine how your company's documents have been or are maintained. Are old documents microfiched or imaged electronically, or are they still stored in a warehouse in paper form? If in paper form, are the documents in multiple locations, and do they need to be centralized? Have the company's document retention policies changed in any way in recent years? This assessment is particularly important for public companies that, with the passage of the Sarbanes-Oxley

Act, now have additional requirements for document retention and information maintenance. You should determine what your company's retention policies are (or should be) for voicemail, email, and equipment disposal, which might affect the preservation of additional discoverable information.<sup>3</sup>

### **BEFORE DECIDING WHAT TECHNOLOGY IS SUITABLE IN A PARTICULAR SITUATION, IT IS IMPERATIVE THAT YOU DEFINE YOUR COMPANY'S GENERAL GOALS AND PRIMARY OBJECTIVES IN LITIGATION AND FIGURE OUT HOW YOU WILL USE SPECIFIC TECHNOLOGY TO ASSIST IN ATTAINING GOALS AND OBJECTIVES.**

Likewise, the software package used by both the company and the company's outside counsel is particularly important when determining whether systems are user friendly. If a particular technology is not compatible with your word processing or email system or your company's operating system, it will not improve efficiency or cost-effectiveness during the litigation. If sharing information is important and your system is incompatible with your various outside counsel's systems, its usefulness again should be questioned. For a list of websites that evaluate software and infrastructure options, see the sidebar on page 64.

### **DOCUMENT STORAGE, PRODUCTION, AND MANAGEMENT**

Computer-assisted methods for classifying, storing, retrieving, and disseminating documents and other information have significantly altered the litigation landscape. Especially for an industry embroiled in multidistrict litigation, there is a clear advantage to being able to share information between and among local counsel, common counsel, and national coordinating counsel for the multiple codefendants. Today, such systems are essential, and

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few outside counsel would suggest handling complex or document intensive litigation without them.

Document databases or repositories permit documents to be centrally located on a system that usually can be accessed 24/7 from anywhere with an internet connection, depending on the host used to store the documents. These systems also permit companies to pool their resources and efforts and, in certain cases, permit parties to share costs if appropriate. Such systems do, however, have disadvantages. Specifically, the upfront costs associated with establishing such a sys-

tem can be very expensive, running into hundreds of thousands of dollars or more on document-intensive cases. It is not uncommon for an outside vendor to charge \$1.20–\$1.80 per document for coding, \$.15–\$.18 per page for imaging, and an additional \$.07 per page for optical character recognition (“OCR”). See the sidebar below for a calculation comparison regarding cost savings.

In addition, while the system initially is being created, you should consider a number of potential problems and security issues, including who will have access to the database, who will be able to edit information in the database, and who will be responsible for ensuring that the database will be on a platform that can support the amount of information that it will contain. More significantly, with the creation of the database comes the risk that your adversary will learn of it and serve a document request seeking its production. Only a handful of courts, in inconsistent rulings, have addressed the issue of whether such a system is attorney work product and, therefore, not discoverable.<sup>4</sup> Consequently, when creating such a system, you should give thought to involving your outside litigation counsel in its setup, integrating yours and outside counsel’s notes and opinions regarding specific documents, and limiting access to the system to select company representatives involved in the litigation and your outside counsel.

Many options are available to facilitate the efficient processing, managing, and retrieval of documents. Understanding their primary function and purpose will permit you, along with outside counsel, to determine which of these options is right for your particular company or litigation.

#### **Document Databases or Repositories for Storing Documents**

Traditionally, documents relevant to a particular litigation were housed in paper form, occupying room after room of space at your company’s or outside counsel’s offices. Now, paper documents can be stored in an electronic format on disk, CD-ROM, or the internet, making document retention, review, and production easier and more cost-efficient. The method by which the documents are housed and who is responsible for housing them are key items to consider before you decide what system would be best for the particular litigation.

## **SAMPLE OF COST COMPARISON BETWEEN ELECTRONIC AND MANUAL DOCUMENT SEARCH METHODS**

### **TASK**

Search 10,000 documents for a total of 30,000 pages to find relevant documents on a key issue by a specific author.

### **SEARCH METHODS**

#### **Cost Calculation for Electronic Coding, Imaging, and Database Search:**

- Coding: \$17,500 (10,000 documents x \$1.75 per document).
- Imaging: 4,800 (30,000 pages x \$.16 per page).
- Number of relevant documents found in electronic search: 20.
- Cost in time (after coding, imaging, and setting up database): 4 seconds.
- Cost in dollars: \$22,300.

#### **Cost Calculation for Paralegals Conducting Manual Search:**

- Number of relevant documents found in manual search: 15.
- Cost in time: 67 hours.
- Cost in dollars: \$7,370 (67 hours x \$110 per hour).

### **QUESTION**

Is electronic coding, imaging, setting up a database, and searching the database worth the cost?

For example, an outside law firm can serve as the host for a document database or repository. Because law firms often have a number of clients for which this service is necessary, they may already have the equipment required to house the documents, as well as the essential internal IT staff to maintain and service the equipment.

In the same way, an independent third party can serve as a host for the document database. This alternative does not require you or outside counsel to have in-house IT support capability. The costs will vary depending on the individual vendor selected and the type of search capability and access required.<sup>5</sup> Before hiring any particular third party to serve as host, you and outside counsel should interview potential vendors and consultants, evaluate their experience in creating document databases or repositories, and consult with others who have used their services to determine their strengths and weaknesses.

You can also use the web as a host by imaging and housing documents centrally on an internet website created precisely for this purpose. You would need to make any such website secure from the general public, permitting access only to certain authorized users. To do so, you could use encryption software to secure the website and give all authorized users a user ID and a password to gain access. The benefit of an internet-based system is that it typically can be accessed from any location in the world at any time by anyone with an internet connection, a browser, and appropriate passwords. Dozens of users in multiple locations can access and view documents simultaneously, improving efficiency and reducing photocopying and shipping costs, especially if multiple individuals around the country need access to the same documents. Such a system is particularly useful in complex, multiparty litigation because you can store documents produced by each party in separate files, yet they are available to everyone with a few keystrokes.

### **The Three-headed Monster for Document Indexing and Review: Coding, Imaging, and OCR**

#### *Document Coding*

After documents have been identified for inclusion in your database, they will need to be indexed by document type and other important characteris-

tics. Software programs permit attorneys, paralegals, and other authorized users to establish categories of information, known as fields, that will be entered into the database for each document, becoming that document's summary record. Indexing documents in such a way is known in the information technology world as coding.

There are two types of coding: bibliographic and substantive. For bibliographic or objective coding, the coder summarizes basic information about a document, such as author, recipient, others named in the document, date, and whether the document is a letter, a memo, or email. Bibliographic coding does not require the coder to make any judgment as to the significance of a document. Usually, an outside vendor can undertake bibliographic coding at a rate per document or per box. With substantive or subjective coding, the coder is using some subjective understanding of the case to determine what is important about the document, including summariz-

## EXAMPLES OF FIELDS FOR CODING DOCUMENTS

### **STANDARD BIBLIOGRAPHIC FIELDS**

- Author.
- Recipient.
- Date of document.
- Type of document.
- Courtesy copy/blind courtesy copy ("CC/BCC").
- Attachment.
- Bates numbers.
- Page amount.
- Source.

### **FIELDS TO USE FOR SUBJECTIVE CODING**

- Mentions.
- Summary of document.
- Attorney notes.
- Hot document.
- Issues to which document relates.
- Confidential.
- Privileged.
- Witnesses with whom to use document.

ing the document's contents, making notes about the issues that it relates to, and identifying key words that may be used as a search device. See the sidebar below for a list of examples of fields for coding documents. Attorneys or, in some instances, paralegals ideally should subjectively code documents because this process requires an understanding of the legal issues involved in the case or the use for which a particular document will be made.

**AS PEOPLE OFTEN SAY, GARBAGE IN EQUALS GARBAGE OUT. BECAUSE PEOPLE HAVE TO CODE THE DOCUMENTS, THERE IS ALWAYS THE INHERENT RISK THAT HUMAN ERROR COULD DIMINISH THE VALUE OF ANY SYSTEM CREATED.**

The benefits of coding and indexing documents in this manner are endless. These document "summaries" allow rapid identification of documents for depositions, provide immediate search capability to the documents, and assist in preparation by providing a concise descriptor. Thus, with a few key-strokes on a computer, you can identify all documents of a certain kind on a particular subject matter, written by the same author, received by certain recipients, and falling within certain time frames. The database, however, is only as useful as the information put into it. As people often say, garbage in equals garbage out. Because people have to code the documents, there is always the inherent risk that human error could diminish the value of any system created. A typographical error in coding a person's name, for example, would make a document irretrievable on a subsequent search of the database for all documents containing the person's name. For this reason, you should consult your outside counsel regarding quality control measures during coding to ensure that the database created is accurate and, ultimately, useful. Typographical errors can be reduced by choosing names and other items from a prepopulated pick list, rather than typ-

ing the information, which also increases efficiency and consistency.

#### *Document Imaging*

The scanning, or imaging, of paper documents into an electronic database is often a convenient and efficient tool for facilitating document production and internally locating key documents. An effective image will have all the characteristics of the original, including signatures, handwritten notes, graphics, and photographs. Such imaging eliminates the need to have hard copies of paper documents, thus reducing physical storage space requirements and permitting documents to be housed and managed in a central location. The images can be stored on a hard drive, a floppy disk, a CD-ROM, or a password protected site, known as a file transfer protocol ("FTP"), accessible on computer by selected individuals with the need and permission to view the information. The images can be linked to the database description of the document if one has been created.

Imaging also protects the integrity of the image by using a nonerasable format as the storage medium, known as read-only access. It also saves the time and expense of making duplicate copies of documents every time that a particular lawyer needs to review them. Instead, the lawyers simply can be given access to the medium in which the documents are stored, making reams of paper easily transportable. Any document can be printed on a laser printer, reproducing an exact copy of the image of the original.

By way of example, available as a free download from the internet is Adobe Acrobat Reader, a program that allows users to read documents in a portable document format ("pdf"). The advantage of pdf files is that they are easily viewable, but not so easily editable. These files are exchangeable with other lawyers and parties. They are not, however, searchable without purchasing the full version of Adobe Acrobat. Once you have bought and installed the full version, you can organize pdf files by case matter and an index created for directories and subdirectories using the catalog function. More recent versions of this software permit full-text searching, including text searches in Computer Aided Design ("CAD") drawings. This capability enables you to save and view in electronic format



## TO IMAGE OR NOT TO IMAGE: CONSIDERATIONS

- Volume of documents.
- Number of parties.
- Anticipated duration of litigation.
- Number of cases or venues if pattern litigation.
- Experience of outside counsel.
- Whether court allows or requires electronic filing.

drawings, photographs, and large-format files. You can then exchange these documents with others and archive the documents as paperless, searchable pdf files, making it quicker, easier, and less expensive to maintain, review, and retrieve files.

It is not necessary to image all documents. For a list of considerations in determining whether to image documents, see the sidebar on page 70. Lawyers often use the coding process to sort through documents and cull them down to a manageable number of key documents, which are then imaged for easy review and storage for later use. If a document database has been created summarizing the documents, the images of those documents can then be linked to the coded database entry, making a review of the documents even more efficient and cost-effective. Increasingly, parties are agreeing to create electronic document databases to facilitate document production and review in large, document intensive, or pattern litigation.

### *OCR*

OCR or optical character recognition is a process by which every word in a document is coded, permitting full-text searching of documents using Boolean search methods similar to those used to search online databases. OCR capability exists, however, only when documents have been imaged. Full-text search capability eliminates, to some extent, the need to objectively or subjectively code documents or to index them through any other format because every word on the page will be searched to identify documents meeting your search criteria. Although OCR increases the search capability of your data-

base, the search capability should not be thought of as 100 percent accurate, because there could be abbreviations or errors in the original documents, such as misspellings and other typos.

### **DEPOSITION TRANSCRIPTS AND DATABASES**

As with document indexing and storage, major technological advances have been made in court reporting and the way in which deposition testimony is recorded. For example, court reporters can now send a direct, instantaneous feed of a witness's testimony to any laptop computer with the proper connection simply by plugging into a network. Although the transcript would not be proofread or cleaned up, the witness's substantive testimony could be reviewed, digested, and marked as it is being created. Real time deposition transcripts, as they are known, are especially helpful in cases in which expedited relief is sought or the court has imposed a short discovery schedule and many depositions are occurring simultaneously.

Regardless of when they are received in electronic form, deposition transcripts should be stored in full-text searchable databases similar to those used to store other documents. Court reporting services can make transcripts available on diskette, which can then be loaded into a database, such as Summation Blaze™. Such databases are full-text searchable and often contain ways to annotate the transcript with an attorney's notes regarding particularly helpful—or harmful—testimony. Additionally, if documents have been imaged, those images can be linked to the deposition transcript at the point that they are introduced or discussed, to permit efficient review of the deposition testimony and the exhibits used without counsel being required to transport a lot of paper. You or someone else at your company can also review the deposition simply by having access to the database and can view exhibits and outside counsel's notes regarding specific pieces of testimony already contained therein, thereby decreasing copying and mailing costs.

Deposition databases also assist with witness preparation. Because these databases are full-text searchable, a witness's name can be used to search for relevant testimony for use in their preparation, at either deposition or trial.

## COMMUNICATION TOOLS

In the high-tech world in which we now live, more technologically advanced means of communication have replaced such traditional communication methods as letters and telephone calls. When facing large-scale or pattern litigation, in which daily and sometimes hourly contact with outside counsel is necessary to coordinate or finalize discovery responses or motions in jurisdictions around the country, these innovative communication tools can make the process more time effective and cost-efficient.

For example, courts have increasingly used video teleconferencing to reduce court costs, travel time, and billable hours, especially in cases in which out-of-state counsel are involved. These systems permit face-to-face contact between lawyers and the court, without requiring hours of driving or flying to get from the office to the courthouse. Similarly, you can use web-based conferencing to review draft discovery responses and provide input on drafts, as if you were sitting in the same room.<sup>6</sup> Web- or data-conferencing involves the sharing of data over an internet browser while the parties use a teleconference to communicate.

An extranet is a secure platform for exchanging and managing litigation. It allows parties in different locations to collaborate and view materials, thereby reducing the costs of long distance telephone calls, faxes, travel, and photocopies. Many outside law firms have begun investing in the development of extranets to communicate with clients for whom they are handling significant or pattern litigation and with whom they need to speak on a regular basis.

Similar to an extranet, an electronic chat room permits counsel from around the country to engage in a real-time discussion regarding strategy without hefty long distance bills. Chat rooms can be hosted on a web page owned by your company, outside counsel, or a third party. They are low-cost and take a short time to set up. Private chats also can be hosted and attended by specific or designated individuals on a regular basis. They are particularly helpful in large-scale or pattern litigation because they permit regular, low-cost methods for communicating about issues arising daily. Before using a chat room, however, you should consider who will be responsible for deciding what topics are discussed, what parameters, if any, should be put on the sub-

stance of the discussions, and whether the chat-type application proposed keeps a copy of the communication in any format, to ensure that outside third parties are not privy to otherwise privileged communications. Chat rooms must be password protected on a person-by-person basis to protect against improper participants. Although the risk has decreased greatly as chat rooms have become more prevalent, you need to take into account that computer hackers can breach chat rooms. To minimize this risk, the chat room host should establish a firewall in the host's system.

### SIMILAR TO AN EXTRANET, AN ELECTRONIC CHAT ROOM PERMITS COUNSEL FROM AROUND THE COUNTRY TO ENGAGE IN A REAL-TIME DISCUSSION REGARDING STRATEGY WITHOUT HEFTY LONG DISTANCE BILLS.

## OTHER USEFUL TOOLS FOR THE DISCOVERY PROCESS

Reinventing the wheel is an inefficient way to handle complex or pattern litigation, especially in cases in which the same issue is litigated repeatedly throughout the country. Similarly, in such cases, consistency of position and uniformity of response are paramount to accomplishing your company's goals. Brief, pleading, or discovery banks are a simple, cost-efficient way to keep track of standard discovery responses and objections, as well as sample motions used on discovery issues. By storing this information electronically, you can share it among counsel without constantly having to mail, courier, or overnight hard copies. In addition, you and your litigation team can formulate form responses to cut down on outside counsel's need to draft new responses for every request received. Colt's and its municipal adversaries in the consolidated California cases, *People v. Arcadia Machine & Tool*, Nos.

303753, BC 210894, and BC 214794 (Cal. Sup. Ct. San Diego Co., for example, agreed that Colt's could provide copies of its prior responses to document production requests or interrogatories in similar cases in other jurisdictions. This arrangement saved Colt's considerable effort and cost.<sup>7</sup>

**IT IS IMPORTANT TO TAILOR THE USE OF TECHNOLOGY TOOLS TO THE IDIOSYNCRASIES OF THE LITIGATION AT HAND, RATHER THAN ADOPT A ONE-SIZE-FITS-ALL APPROACH. SUCCESSFUL USE OF TECHNOLOGY IN DISCOVERY MANAGEMENT DEPENDS UPON YOUR KNOWING WHAT IS AVAILABLE, AS WELL AS ATTENDANT COSTS, ADVANTAGES, AND DRAWBACKS.**

An additional benefit of electronically storing briefs and pleadings is that you or your outside counsel can provide such documents to a court on disk or CD-ROM, together with full-text versions of the cases cited. This system permits you or outside counsel to hyperlink the citation to the case, allowing the judge and law clerk to open the full-text opinion at the same time that they review the brief.

If your company faces constant litigation involving a product or service, the same expert witnesses begin to appear over and over. Establishing an internal data bank on these experts can prove to be a valuable resource in defending your company. Such a data bank would contain background information, articles written by experts and colleagues, and prior testimony. You could assign someone in your office to maintain such a data bank by collecting, updating, and maintaining information from pending cases involving not only your company but also other companies in your industry. You could then provide this information to outside counsel as needed for deposition preparation and trial.

Likewise, information management programs, such as Timemap™ and Casemap™, are essential for organizing and outlining the factual information

needed to defend the litigation and recording when events occurred. As discovery progresses and additional information becomes known, these tools become even more useful to organize facts and force you to think in a hierarchy. Used together, these two tools, for example, allow you to organize factual information both chronologically and by issue and to compare plaintiffs' and defendants' versions of facts, highlighting inconsistencies and creating a timeline of events to use at any eventual trial of the matter.

Last, electronic calendars and task lists are vital to tracking the course of the litigation, specifically all significant motions, discovery deadlines, and hearings in each case. Assign someone to be responsible for updating and maintaining the calendar, which can be made available on the internet and be accessed by all counsel who possess appropriate passwords.

## **CONCLUSION**

The availability of technology as a litigation tool can be of enormous value in handling document discovery. Its use is particularly helpful in complex commercial or pattern litigation. It is important to tailor the use of technology tools to the idiosyncrasies of the litigation at hand, rather than adopt a one-size-fits-all approach. Successful use of technology in discovery management depends upon your knowing what is available, as well as attendant costs, advantages, and drawbacks. Sorting out the choices could be a daunting task. Early assessment of the needs of your case(s) and communication and coordination with your litigation counsel and business people are key. Enlisting the help of your company's IT and document management personnel is critical. Proper planning also includes preparing your management to brace for upfront costs, some of which could be significant. The long-term benefits of using these technology tools, however, can save your company significant dollars and time over more conventional methods. Just as important, if not more so, proper use of these tools will better prepare you, your outside litigation counsel, and your business people not only to handle the discovery process but also to improve your company's chances of prevailing at trial. ■

## NOTES

1. "Smart guns" commonly refer to firearms equipped with a user recognition system employing an electronic device to prevent unauthorized persons from firing them. The device uses advanced technology, such as radio frequency, magnetic wave transmission, or biometrics, such as voice, fingerprint, or grip recognition.
2. Government recoupment lawsuits are no longer limited to politically disfavored industries, such as tobacco and firearms. Pharmaceutical and chemical companies have become targets of class action lawsuits for product liability toxic torts, environmental pollution, and other causes of action. Credit card, health insurance, and telephone companies also have become favorites of class action lawyers for allegedly failing to disclose or accurately calculate fees or charges. In another line of cases, individuals have brought hundreds of personal injury lawsuits against "big box" stores for injuries allegedly caused by falling merchandise. Targets of large-scale or pattern litigation also have included alcoholic beverage, automobile, gaming, entertainment, telemarketing, and fast food industries. Precedents established against one industry could extend to others, allowing this trend against American business to expand. See amicus curiae brief dated May 13, 2003, of the National Association of Manufacturers ("NAM") in support of defendants-appellants manufacturers in *City of Chicago v. Beretta U.S.A. Corp.*, Nos. 95253, 95243, 95256, and 95280 (Ill. Sup. Ct.), at [www.nam.org](http://www.nam.org). NAM, the nation's largest trade association of industrial manufacturers, commented in its brief that, if the Illinois Appellate Court's decision were to be affirmed, the trend toward this type of pattern litigation could expand to other industries. The First District had earlier upheld a public nuisance theory of liability for harm caused by a lawfully manufactured and nonnegligently sold product. NAM argued that "[a]llowing the holding of the appellate court to stand will expose all manufacturers to liability for lawful and lawfully sold, nondefective products that are later criminally misused. Subjecting manufacturers of lawful products to such liability would have a chilling effect on all commerce."
3. Efficient and cost-effective ways to respond to requests for electronically stored information and the question of whether those costs can be borne by the party seeking the

information are outside the scope of this article. Note, however, that Judge Shira Scheindlin, in *Zubulake v. UBS Warburg*, No. 02 Civ. 1243(SAS), 2003 WL 21087884 (S.D.N.Y. May 13, 2003), announced a seven-part test for determining who should bear the cost of responding to electronic discovery requests, rejecting the prevailing standard test announced in *Rowe Entertainment Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002).

4. For a discussion of cases addressing the issue of whether computerized litigation support systems are discoverable, see David Lender, *Use of Computers in Litigation: Computerized Litigation Support Systems: Can You Keep Your Adversary from Getting a Free Ride on All of Your Work Product?* 6 COMP. & INTERNET LIT. J. 3 (2001).
5. See specifically Catherine Palo, *Computer Technology in Civil Litigation*, 71 AM. JUR. TRIALS 111, §§ 48-49.
6. See James Keane, *Web Conferencing Enhancing Client Communications*, 19 GP SOLO 36 (2002).
7. The operative provision in the stipulation and order regarding document production by Colt's reads:

The parties agree that if plaintiffs in the participating jurisdiction served on Colt's any document production requests or interrogatories which are the same or similar to requests or interrogatories which have been served on Colt's in one of the other participating jurisdictions and Colt's responses to the document production requests or interrogatories would be substantially similar to those given in the other participating jurisdiction, Colt's may respond by producing a copy of its prior responses to the document production requests or interrogatories in the other participating jurisdiction with a new verification, as applicable . . . . If plaintiffs in the participating jurisdiction believe that further responses to such interrogatories or requests are required, they shall notify Colt's in writing identifying the specific requests or interrogatories which they believe require further response and the basis for their belief that each such response is inadequate. Thereafter, Colt's shall, at its election, have the opportunity to supplement or change its responses to the requests or interrogatories. Prior to filing any motion to compel, plaintiffs shall meet and confer with Colt's in an effort to resolve any remaining differences with respect to Colt's discovery response.