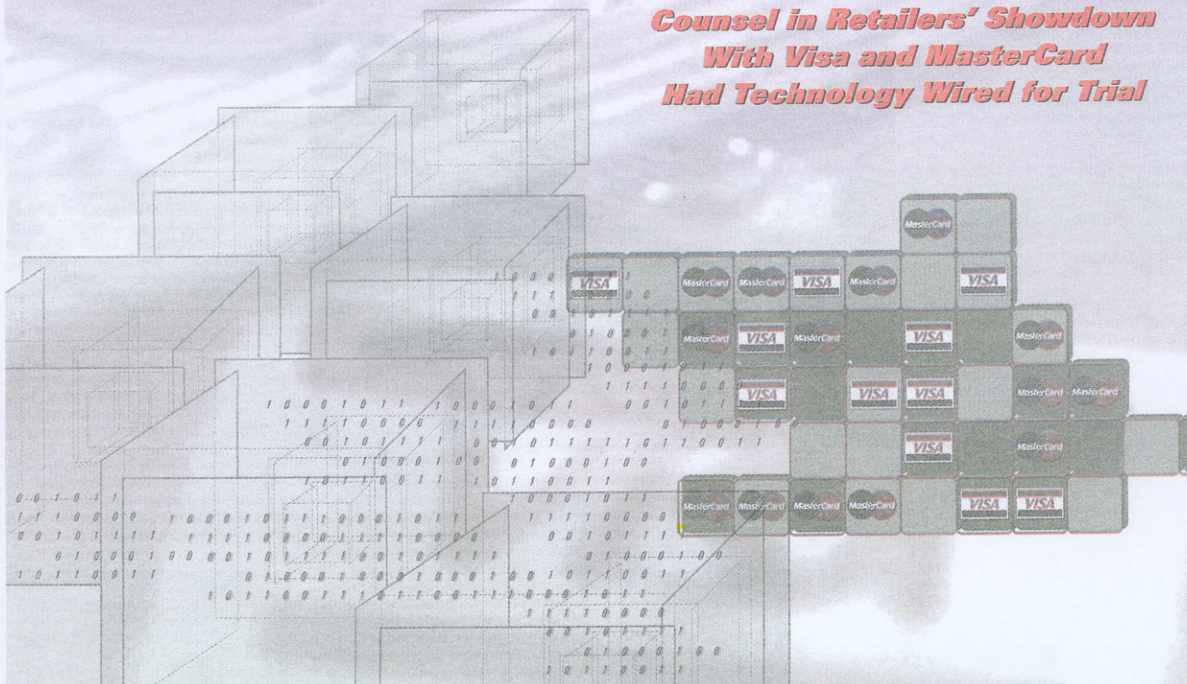


# Tech trends

Monday, July 21, 2003

Volume 7, No. 3

***Counsel in Retailers' Showdown  
With Visa and MasterCard  
Had Technology Wired for Trial***



## Inside

**Latest Technology Was Wired for the Visa/MasterCard Trial**

BY PAUL J. NEALE JR. ....T2

**Beware the Underlying Costs of Using Dated Technology**

BY M. LEWIS KINARD .....T3

**Small-Firm Lawyers Get Big-Firm Bang With New Systems**

BY MICHAEL J. MARCIN .....T4

**Litigation Support Software Helps Level the Playing Field**

BY JOSHUA K. LEADER .....T5

**Avoiding Duplications With Electronic Document Filtering**

BY E. JANE WARNSHUIS .....T6

**Avoiding Disaster: Planning for Recovery Is Not Enough**

BY GREGORY HANNA .....T7

**Law Ware**.....T11

# Latest Technology Was Wired For the Visa/MasterCard Trial

BY PAUL J. NEALE JR.

I was extremely disappointed the antitrust litigation against Visa and MasterCard filed on behalf of the nation's retailers (*In Re Visa Check/MasterMoney Antitrust Litigation*) didn't get to the jury.

Of course, it's no surprise that the case ultimately settled on the eve of trial given the tens of billions of dollars that were potentially at stake. The plaintiffs reached a \$2 billion settlement with Visa USA Inc. and a \$1 billion settlement with MasterCard International Inc., along with reductions in the fees the credit card associations would charge retailers who accepted their debit cards. And, most importantly, tying arrangements were ended that forced merchants who accept Visa/MasterCard credit cards to accept their debit cards at credit card prices.

Aside from being a casual observer interested in the size and scope of the matter, DOAR was hired by plaintiffs' lead counsel, Lloyd Constantine of Constantine & Partners, to help prepare the case for trial.

As a litigation consultant, even before our retention nearly three years ago, I was amazed by the complexity of the matter and became intrigued by the way the issues would be presented to a jury — no other litigation matter in my experience approached the Herculean effort undertaken by the law firms and their support firms on both sides in this case.

Constantine & Partners spent a significant part of the past seven years handling this matter. There were nearly 3 million pages of documents produced during discovery that the firm had imaged and coded early on. This image-based system became the most critical piece of the trial preparation process and was the basis from which Mr. Constantine's trial notebook would be created.

More than 400 depositions were taken, most of which were videotaped and ultimately converted to digital MPEG files with synchronized text for presentation at trial. As the parties approached the trial date, they exchanged exhibit lists, and exhibits in hard copy and a CD, consisting of more than 15,000 trial exhibits comprising approximately 250,000 pages.

The trial team spent nine months of weekday nights and weekend days reviewing videotaped depositions as a group to isolate key testimony and build elaborate witness presentations. These multimedia presentations combining video testimony with documents, demonstrative exhibits and analytical charts pushed the limits of trial presentation and raised the bar for trial lawyers' use of videotaped testimony. Many of the presentations also were converted to VHS tape for review by plaintiffs' expert economists in Boston and Washington, D.C.

On top of imaging all the evidence gathered over the years of discovery, we were working with the plaintiffs' firms to develop hundreds of demonstrative graphics and presentations to help convey the more complex issues to the jury. There were animated charts and graphs explaining the drastic rate increases in the debit interchange fee over various periods. We also used company documents that were produced in black and white to recreate hundreds of full-color proofs of credit and debit cards to describe the design approval process of the defendants.

All of these presentation strategies and techniques were employed during a high-tech motion for summary judgment heard on Jan. 10, 2003. The old-fashioned



NEWSCOM/PHOTO BY RICHARD B. LEVINE

lawyering skills evident in the plaintiffs' powerful summary judgment submissions — focused and enhanced by the use of technology — won favorable rulings on many key issues and denied all of the defendants' motions entirely.

As a result of the judge's subsequent imposition of strict time limits on each side, the lawyers revamped the entire trial strategy and reconsidered which evidence would be used and which witnesses to present. This would not have been possible if the entire case had not been managed with document and evidence management tools, and if the technology was not shared with the firm's co-counsel, experts and trial consultants.

## Mock Jury Trial

During the final few months, as the intensity of the trial preparation process grew, the firm decided to test its case before a mock jury of 80 people. This exercise, held at DOAR's Digital Court Facility, confirmed that the firm was ready for trial.

All of the technological tools that counsel intended to use at trial were incorporated and demonstrated the effectiveness of the presentation. The presentation of evidence and witness testimony — both live and on video — was a multimedia

event that took full advantage of the facility's capabilities, including multi-streamed closed-captioning, evidence annotation and trial technicians supporting all of the parties that were played by various members of the trial team.

Plaintiffs even arranged for a retired federal judge to preside over the mock trial. The seven-day process had a direct impact on the confidence of the law firm and its client that they would prevail. Although the plaintiffs' trial presentation strategy was never tested at trial, the mock jurors provided overwhelmingly favorable feedback on the plaintiffs' case and the lawyer's rhetorical and graphic presentations to the jury.

To accommodate the entire trial team



At the court's urging, the parties reached a compromise but the plaintiffs' counsel walked away with control of the majority of the technology that was to be used, including a 5800 lumens projector, flat panel monitors, annotation monitors, a document camera and the mini-DEFS, which controlled all the video distribution and audio amplification as well as all of the display devices.

It also included an override switch that provided the judge with control of what the jury was shown through the projector while allowing the witness' and counsels' display devices to remain active so admissibility issues could be argued and ruled on.

Since many corporate representatives from the retailers and credit associations were scheduled to attend the trial as observers and/or witnesses, and to accommodate the media covering the trial, a 50-inch plasma display was put in place to display evidence to the gallery.

Wireless communications, a relatively new technology in the courtroom, was also incorporated. This required some last-minute maneuvering to get the judge and the parties to agree to its use and a lot of pressure on Verizon to get the connection in place to allow for high-speed Internet connectivity. This technology is increasingly being added to courthouses to provide trial lawyers with wireless networking, printing and Internet access for communications (e-mail and instant messaging) and streaming of real-time transcription.

While the case ultimately did not get in front of the jury that was empaneled and neither the presentation strategies nor the trial technology were put to the test, this matter is a perfect case study on the advantages of being "trial ready" regardless of the size and scope of the case.

New York Law Journal

Tech trends

Kris Fischer  
Editor-in-Chief

Michael J. Paquette  
Section Editor

Lee Hill  
Art Director

Cynthia Mok  
Section Designer

## Technology Control

The battle among the parties regarding use of technology at trial was in keeping with the intensity with which they had fought over legal issues since the case's inception.

Each party had its own trial consultant conduct a site inspection of the courtroom and submit a proposed technological floor plan. Plaintiffs' counsel had long ago decided to maintain control of the technology due to its integral role in the presentation of its case to the jury. The defendants were unified and equally adamant about maintaining control.