

## Depositions: The Impact Of Electronic Discovery

### *Technology Is Changing The Game*

By Ramana Venkata

These are exciting times in the legal technology realm. Advanced electronic-discovery software can revolutionize depositions. For the first time, attorneys taking a deposition can have the entire document set at their fingertips in real time. They can understand the documents in a case more completely, and be more flexible following up unanticipated answers by investigating new lines of inquiry during the deposition itself.

Depositions, as we know, are among the most valuable types of discovery. Although many of the questions and answers in a deposition will be predictable, a savvy litigator is attuned to unexpected answers that might lead to different lines of questioning, and, with those, to new information. Depositions are worthwhile precisely because they are unscripted and unpredictable: The most valuable information is often the most unexpected and unanticipated.

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**Ramana Venkata** is co-founder and CEO of e-discovery firm Stratify Inc. ([www.stratify.com](http://www.stratify.com)). You can reach him at [ramana@stratify.com](mailto:ramana@stratify.com).

And so, a valuable truth in the conference rooms and other locations where depositions are taken is that it's fortunate that depositions rarely, if ever, go exactly according to plan, even though conscientious attorneys prepare for them comprehensively — examining documents that reference or otherwise concern each deponent, and reviewing other deposition transcripts and evidence in the case to plan various inquiries about the claims and defenses at issue. They then narrow that wide swath of documents into a more manageable set that they will carry into the deposition, including an even narrower set that they intend to introduce as exhibits, depending on the testimony of the deponent. Prior to the deposition, they make several paper copies of each potential exhibit so that they are available to the witness, opposing counsel, the court reporter and the attorneys' own team attending the deposition.

Inevitably, though, something unexpected happens. Perhaps the deponent knows more than the deposing attorneys expected him or her to know, or is more talkative than

anticipated. Perhaps the deposition reveals that the deponent worked closely with a key person in the case, or that the deponent participated in a key set of meetings. Perhaps the deponent will avoid answering questions directly; or worse, will purposely distort reality, thinking that the questioning attorney will not be able to establish the true state of affairs within the confines of the deposition.

### **ELECTRONIC DOCUMENTS CREATE NEW OPPORTUNITIES**

For an attorney taking a deposition, the benefits of being able to access the entire universe of case documents electronically are clear: He or she has available a vast repository of documents (electronic and paper documents that are scanned and interpreted by optical character recognition technology) with which to refresh a deponent's recollection. Different versions of electronic documents will frequently be saved and turned over in response to document requests — potential gold for a litigator taking a deposition.

e-Mail is especially valuable in this context. Thanks to e-mail, casual conversations that previously would not have been recorded are

now preserved and can be used as exhibits. e-Mail archives contain countless individual conversations. Even more valuable are the patterns of communication between different people that have been preserved. e-Mail messages can demonstrate relationships between people that may not be apparent from a formal organizational chart.

Because attorneys have access to so many more documents (including e-mail messages), in theory they should be able to introduce more exhibits directly relating to the deponent's specific knowledge about a particular person, document or meeting. In practice, however, these additional documents are valuable only if a litigator can quickly locate them in real time. If an attorney does not have the tools to effectively examine a voluminous document collection, then he or she could lose the chance to question a deponent about an important document.

At the same time, the large number of documents turned over in today's cases makes it even more difficult to anticipate every document that may be relevant to a deposition. With so many more documents available, then, it becomes more likely that a previously unexamined document will become important based on the deponent's responses. In the past, the attorney's hands were often tied if the deponent mentioned a document that the attorney did not have with her at the deposition.

### USING ELECTRONIC-DISCOVERY SOFTWARE IN DEPOSITIONS

If the attorney taking the deposition, the second chair or a paralegal could access the entire

document set on a laptop computer during the deposition, then that person would be well positioned to react quickly to unexpected turns in a deponent's testimony. When an attorney uncovers a formerly unknown, but potentially interesting, fact pattern from a deponent, he or she naturally follows up on that set of facts. Ideally, of course, the attorney would be in an even stronger position if he or she could show the deponent an exhibit pertinent to the new series of questions.

But locating the relevant exhibit on the fly is difficult. For example:

- If the deponent mentions that he was familiar with a certain witness in the case, then the attorney will want to be able to examine all e-mails between the deponent and the witness.
- If the deponent mentions someone whose name has not appeared in the deposition preparations, then the attorney will want to examine memos that person wrote, or e-mail communications involving that person to see whether this person is someone who might help the case yet has been overlooked.
- If the deponent is surprisingly knowledgeable about a disputed set of facts, then the attorney will want to show that witness documents about that issue to learn more.

By uncovering these documents during the deposition in real time, the attorney can capitalize on an emerging line of questioning. But perhaps even more important, the mere presence of the technology in the deposition setting could serve as a significant intimidation factor,

keeping in check the deponent who otherwise would be inclined to play fast and loose with the underlying facts in the case.

e-Discovery software can help attorneys taking the deposition find these key documents. Three technologies in particular can be useful: Boolean search, automatic concept organization and e-mail analytics.

**Boolean search.** With Boolean search capability (searching the full text as well as metadata of a document in any combination), attorneys can immediately look for and find all documents that contain specific keywords or phrases. Advances in search technology, sometimes referred to as "conceptual search," expand these capabilities by enabling attorneys to retrieve not only documents containing specific keywords, but related terms, too. And because search technology is term-based, it is designed to quickly retrieve documents that contain specific words. Whether these documents are relevant is another question.

**Concept organization.** New e-discovery solutions, such as the Stratify Legal Discovery service, automatically organize all documents in a case based on an analysis of the documents' content. Organizing documents by subject matter, or concepts, provides an intuitive overview of large, complex collections and can enhance the attorney's grasp of the matter from its inception. Discovery solutions that use this approach can automatically recognize meaningful concepts that describe documents in the collection, organize the concepts into a hierarchy based on

their interrelationships, and then sort documents into relevant concept folders.

Attorneys can take advantage of this conceptual document organization to more effectively prepare for a deposition by focusing attention on the areas they are most likely to encounter. If the deposition starts to expand into new or different areas, then the attorney, second chair or paralegal can quickly examine documents relevant to the new topic and ascertain whether any of them should be printed and used as exhibits.

The combination of concept organization and search is ideally suited to create order out of electronic chaos. For example, the results of a Boolean search can be automatically grouped so that results that match different meanings of the search terms are bucketed into different concept folders. Litigators can also search within a select set of concepts to quickly locate the documents containing the search term and that are relevant to the specific issue at hand. They can then focus immediately on the most important documents based on the concept-folder organization of the search results. They can also navigate back and forth from the search buckets to the full concept folders and easily access closely related documents that weren't exact search hits.

**e-Mail analytics.** e-Mail analytics is perhaps the most powerful discovery capability for attorneys taking depositions. The method provides a graphical representation of e-mail relationships, called an

e-mail map, that enables attorneys to examine the message network among key individuals using the "six degrees of separation" metaphor. Attorneys can easily call up and examine all the direct messages between any two people, as well as those that passed through indirect, intermediary correspondents. Identifying these communication patterns and relationships is critical to developing new lines of questioning. It is, however, extraordinarily difficult to identify these indirect relationships using traditional Boolean search technology. And often messages within these indirect relationships reveal the so-called and so-aptly name "smoking gun."

Litigators can immediately analyze the e-mail messages and relationships contained in an e-mail map using specific e-mail threads, concepts or date ranges to focus on documents critical to an emerging line of questioning. If a deponent mentions an obscure individual during her deposition, for example, then the attorney can use e-mail analytics to quickly examine the deponent's communication patterns with the newly identified individual, including those involving intermediary correspondents that may be of interest. Perhaps the attorney will find that the deponent exchanged several e-mails with this person that were overlooked previously because no one knew the other person's importance in the matter being explored. The attorney can then quickly analyze the message pathways based on pertinent concepts, threads or date ranges to

focus on the most critical messages, and immediately print copies of these messages and attachments, and then introduce them as exhibits.

## CONCLUSION

New electronic-discovery capabilities can dramatically change how litigators approach depositions. Attorneys who adopt new electronic-discovery technology will reap the benefits of using Boolean search capabilities, concept organization, and e-mail analytics inside the deposition setting, and not just as part of the preparatory phase. With real-time access to large collections of documents, e-mails and attachments, attorneys can rigorously pursue lines of questioning far afield of their original deposition outline. Emerging facts can be quickly corroborated or contradicted, conceptually relevant documents can be efficiently identified to shed light on the deponent's testimony and refresh her recollection, and e-mail relationships can be explored in real time to take advantage of unexpected testimony. These new techniques can give attorneys more flexibility in their approach and confidence in following new leads, because they'll know that they have the ability to locate potential exhibits buried in the document set during the actual deposition.



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