CLOUDCOURT

Litigate Like You Mean It™:
How Next Generation Deposition Tech Delivers Superior Outcomes

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"The pessimism lies in relation to those lawyers who are unwilling to change. As we move into the [2020s], unless you are adaptable, entrepreneurial, and really willing to embrace technology, there's a rather grim future ahead."
— Richard Susskind

Abstract

Most cases are not won or lost at trial. Few cases go to trial. They are won and lost during depositions. Skillfully taken and skillfully defended depositions win cases and drive early and favorable resolutions. Poorly taken and poorly defended depositions embolden adverse parties, prolong litigation, and lose cases.

Finding the right document to question a witness during live testimony is a pervasive challenge in almost every deposition but is most acutely felt in depositions involving voluminous discovery. There are numerous services and tools on the market to search discovery productions. However, none of them conveniently search eDiscovery documents based on witness testimony in the time-constrained context of a live deposition.

Armatus™ helps attorneys take down — or rehabilitate — witnesses by providing the right document at the right time. Armatus' patent-pending technology unifies your resources into a single interface. It combines eDiscovery data with realtime transcription, search, and collaboration to identify documents related to what a witness is saying, while they're saying it. Armatus' collaboration allows remote team members to see the same realtime transcript and perform their own independent search to advise attorneys, inconspicuously, during a deposition. Finally, Armatus can effectively leverage the brainpower and insight of your entire team before, during, and after a deposition.

Where Cases Are Really Won or Lost: The Deposition

Documents and facts shape a case. But it's the human testimony that interprets and provides context to those documents and facts that makes or breaks a case. The party who tells the most compelling story by leveraging their case's assets and minimizing liabilities wins.

Statistically, it's unlikely that any witness will ever testify at trial, since the vast majority of cases are settled or resolved before trial. On average, only 2% of filed federal court cases ever make it to trial, and of these many settle before the trial is over. That means an attorney typically gets one shot at taking down an opponent's witnesses. And they get one shot at defending their own witnesses.

Attorneys need to prepare for key depositions with the same care that they prepare for trial. Skillfully taken and skillfully defended depositions—especially key depositions—win cases and drive early and favorable resolutions. Poorly taken and poorly defended depositions embolden adverse parties, prolong litigation, and lose cases.

What Is Missing from Depositions?

The Cloud Court team spoke with attorneys across the litigation landscape – law firms, legal departments at large and small corporations, governmental legal entities, and more. There were three perennial problems they experienced during depositions: a) predicting which documents they would need to reference or use during a deposition, especially in the context of very large document productions; b) finding the right document in the moment, under time pressure, even if they did have the foresight to bring it; and c) collaborating seamlessly with remote members of the litigation team.

Leveraging eDiscovery Under Time Constraints

The problem of referencing and accessing relevant discovery documents in the middle of a deposition is pervasive and universal. If you didn't anticipate your witness having knowledge about a particular topic, the key document on that topic may not be in your exhibit list or among the documents that are readily accessible to you.

Finding that document on the fly during a deposition typically involves contacting your team during a break or via an email or text message. They may come back to you during another break, only to find that what they turned up is not exactly what you had in mind. If you're lucky, your team finds the key document before the deposition is over. At other times, the opportunity to corner (or rehabilitate) your witness may be lost.

Failure to timely find and question witnesses using key documents may require you to notice more depositions, incurring extra costs to your client, to try to get that missing testimony. In the worst case, your chance is lost, and you can try to fix it at trial. But if you settle before trial, the terms of that settlement will not be as favorable as they would be, had you elicited the right testimony using the right document in front of the right witness on the record.

Either way, this capability gap creates significant costs.

Leveraging the Knowledge of Your Entire Dispersed Team

Regardless of where they sit in a matter, attorneys perceive the chasm between the ideal deposition – where they and/or their witnesses perform flawlessly – and the actual deposition – where their expert stumbles, their opponents craft a better story, and they lose advantage. Collaborating with their client, expert, or associate helps close this gap.

In-House Counsel – in Both Plaintiff and Defense Cases	• They often know more about critical facts in a case than outside counsel does, but they can't be at every deposition to provide insights or documents when it matters. • Litigation counsel provides in-house counsel with case updates but it's difficult to understand the true posture of a case unless they are present during key moments. • In-house counsel often have corporate subject matter experts (SMEs) with knowledge that litigation attorneys could use to great effect during depositions to take down opposing technical, liability, or damages experts. But these SMEs are rarely present during depositions. • The optics of having your corporate counsel and their SMEs attend a physical deposition may inadvertently signal that they believe the case represents a significant risk, which can erode your settlement posture.
Plaintiff's Counsel	• Witnesses for the defense are often evasive and have selective memories. It's difficult to pin them down without bringing all potentially useful documents to every deposition. Even when this is feasible, it's challenging to find them in time to use them. • Adverse expert witnesses for the defense are smart, quick on their feet, and they are SMEs in their fields. They are adept at diminishing or refuting your experts and their reports. Finding additional documents on-the-fly while simultaneously taking their deposition is challenging.
Defense Counsel	• It is difficult to prepare in-house witnesses: employees, executives, 30(b)(6) witnesses. They often don't have time to learn everything about the case. When they get nervous, they make mistakes. It's difficult to claw those mistakes back once they're on the record. • You can try to rehabilitate them during a break and re-frame the narrative. But that can be difficult without supporting documents to refresh or correct your witness's memory. • For companies with significant litigation, preparing corporate witnesses to testify uniformly — and in concert with testimony offered by the company in similar cases — presents additional difficulties. Sophisticated litigation attorneys are getting better at confronting the company with prior witness testimony and documents that clash with present day testimony.

Current Solutions and Tools in the Marketplace

How are people solving the issues of delays in transcription, information overload, remote colleagues who can't be present, and the ticking clock in a deposition?

- ## Realtime Human Transcription

    Attorneys can purchase realtime transcription from a court reporter. Those transcripts are expensive, for good reason. Only a fraction of court reporters is realtime certified. Many certified reporters dislike providing the service because providing it is extremely stressful, so they offer it at a significant premium to discourage its use. Often, attorneys simply forgo the expense because of client pressure to keep costs down, even when they need a transcript quickly (same day) so that they can prepare for a related deposition the following day. Not having realtime can leave the attorney handicapped during their next deposition, forcing them to rely on their own notes or memory.

- ## Multi-Tasking Between Ediscovery and Transcript

    Attorneys could search an eDiscovery database live during a deposition, but eDiscovery platforms are complex, and few litigators are proficient in their use. Most rely on their colleagues to search off-line and report their findings during a break. While eDiscovery software is powerful, that power is focused on the process of collecting, reviewing, and analyzing documents for the purpose of production, not on the work done by litigation teams after production (see Figure 1).

- ## Juggling Chat, Text, Email, and Search

    Your document review team members have an intimate knowledge of what is in a million-plus page-equivalent eDiscovery database. But their knowledge often isn't leveraged during depositions. Collaboration is possible using online tools such as Microsoft Teams, Slack, and the like, but it's cumbersome. Having your deposition software running, eDiscovery search going, and text messages, emails or team chats functioning at the same time is inelegant and cumbersome. This creates a confusing tangle of apps that an attorney must navigate, all while taking a deposition. That is a herculean task.
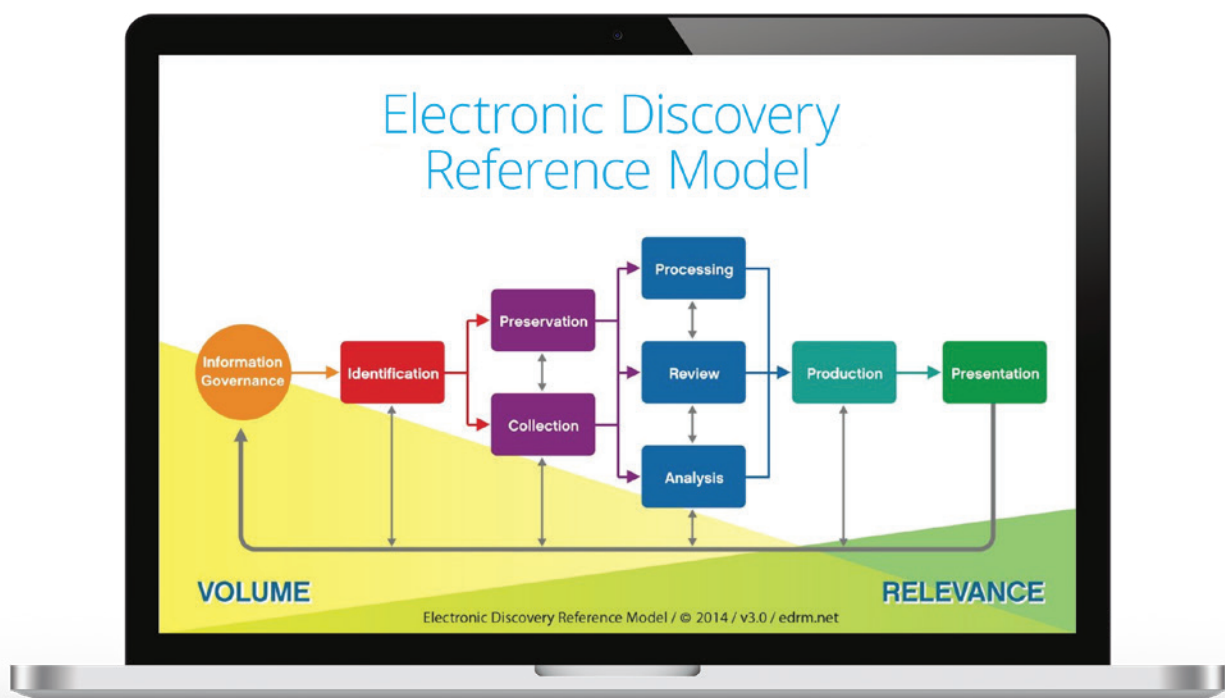

Figure 1. Stages of eDiscovery as defined by the EDRM model. <https://edrm.net/edrm-model/>

Artificial Intelligence
A Building Block for Solutions

Neither court reporters nor speech-to-text engines are 100% accurate. However, an AI natural language processing system, augmented with specialized dictionaries, performs very well when compared to realtime court reporters. And the more we use it, the better it will get. It's faster and far less expensive than human transcription. AI will not replace the court reporter, but it can augment their capabilities.

When it comes to search, AI can outperform the traditional Boolean search. EDiscovery companies have already incorporated concept searching and clustering in their solutions. Technology Assisted Review or Predictive Coding relies on such machine learning technologies and has been in use for a while. Applying AI models to documents produced in a case to help the litigation team during live testimony will be a game changer.

The Deposition Lifecycle

Depositions are a bit of a black box. While they are public, the general public never know where or when one is happening. Deposition rules and practices vary from venue to venue and from one type of matter to the next. One judge may allow for five non-expert depos, another may allow twenty. When a case does not go to trial, perhaps some or even none of the depositions in a matter are not published to the record. Only if we're very lucky, we can point to something in a deposition that drove the resolution.

The deposition is really a space that begs for a methodology to improve preparation and outcomes. There are myriad published "best practices" articles about mastering depositions: witness preparation, preparing to depose an expert, questioning strategies, and more. In most matters, there is a "deposition lifecycle." It consists simply of three phases:

Preparation: What follows production of eDiscovery. The preparation of your litigation team and/or your witness, ideally with plenty of time prior to the deposition. This might include a mock deposition and a rough transcript.

Deposition: Recording questions and testimony from your witness or the opposing witness. There are strategies on both sides of the table for eliciting more favorable testimony to a case. You might hire a realtime court reporter or you may wait for the official transcript.

Post-deposition Review: Using the transcript as a reference for the next day, or to conduct additional searches. For example, an attorney needs a rough transcript because the deposition spans multiple days, or he or she wants to reference it at the next one. Or the litigation team wants to review what was said so they can conduct additional eDiscovery searches or perhaps add more documents to the production.

In each phase, a litigation team can achieve excellence by augmenting its capabilities with technology that encompasses eDiscovery production, collaboration amongst the team, automated realtime transcription, and rapid search of the eDiscovery database.

The Armatus Solution

How can an attorney better deal with the stress of time constraints within a deposition? How can we solve for the unpredictable or uncooperative witness? How can we better intervene to protect our witnesses and defuse threats before or during a deposition? Can we take full advantage of the total reservoir of knowledge contained in our eDiscovery as well as the minds of our counsel, expert, and document review team?

In response to these challenges, we've developed a tactically packaged set of tools that leverage next-gen technologies and collaboration tools to deliver material advantages during depositions. Armatus provides a single interface that combines live realtime transcription, auto-search capabilities, document preview, and remote collaboration. The total solution consists of:

- AI-driven speech-to-text transcription based on millions of hours of testing coupled with custom dictionaries for cases involving technical terminology

- Role-based, secure access to eDiscovery databases usable by teams with zero familiarity with complex eDiscovery platforms

- Secure, live collaboration with remote participants

- Side-by-side realtime transcription and eDiscovery search results

- Instant auto-search as the witness is testifying

This is for starters. We are also building smarter search that refines and prioritizes your results based on experience. Using machine learning, our patent-pending smart search will leverage your team's data together with historical data, enabling you to amplify the collective thinking of your entire team.

How Armatus Works

Attorney questions and witness testimony are captured via inconspicuous microphone. Armatus instantly converts audio into text and displays the realtime transcript to all participants. As a deponent speaks, participants can select content of interest in the transcript. Armatus instantly launches a search to identify documents most closely related to what a witness is saying, prioritizing them based on factors your select, including relevance and the document's relationship to the deponent.

Using these documents, case teams can work together to determine whether a deponent is lying, contradicting themselves or others, or omitting key information. They can then craft questions tailored to elicit testimony favorable for their case or devastating to their opponent's.

Attorneys defending depositions can use Armatus to assist their witnesses. During the deposition, built-in collaboration features enable remote team members to search for and share documents and communicate, essentially "crowdsourcing" depositions.

If your own witness is being deposed, in-house counsel can remotely "sit in." If the witness makes a misstep, in-house counsel will hear it and can send documents to the defending attorney that they can use to refresh the witness's memory during a break, cleaning up unfortunate testimony then and there instead of hoping to clean it up or explain it during a trial that is unlikely to happen.

Armatus allows in-house counsel, experts, and other litigation team members to collaborate in real time. Participants see the witness' testimony in real time. They can highlight search terms in the transcript and, based on their individual access permissions, search the eDiscovery database to find relevant documents, then chat live with the deposing attorney to assist in questioning.

After the deposition, within minutes litigation teams can review and share the rough transcript to prepare for the next deposition, to detect any missed opportunities, and/or to conduct more searches of the eDiscovery database for additional useful documents.
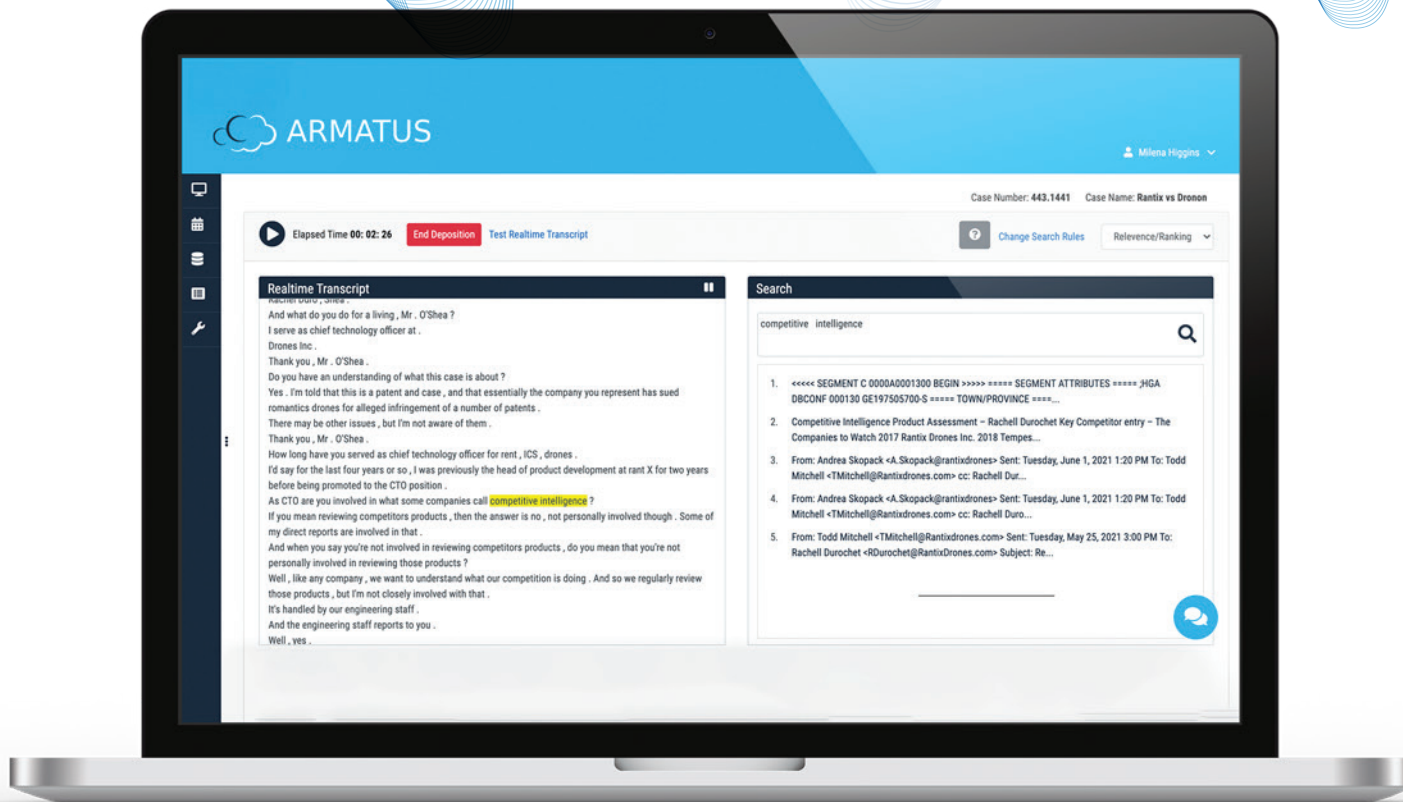
Figure 2: As people speak, Armatus captures questions and answers in real time. As participants highlight words on the left, Armatus instantly searches and returns relevant results on the right, with snippets and highlighted search terms.
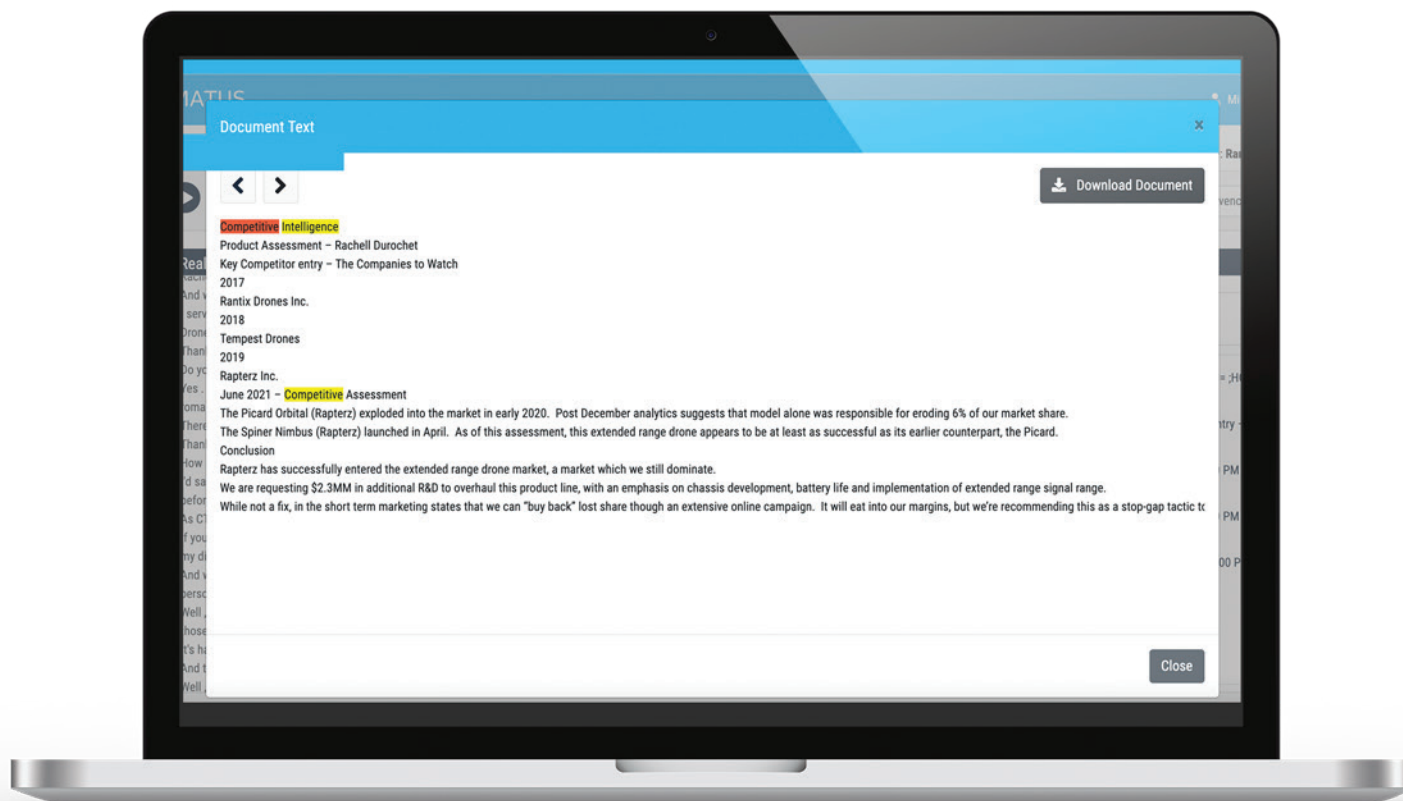

Figure 3: Clicking on a search result calls up the document viewer with your search terms highlighted.
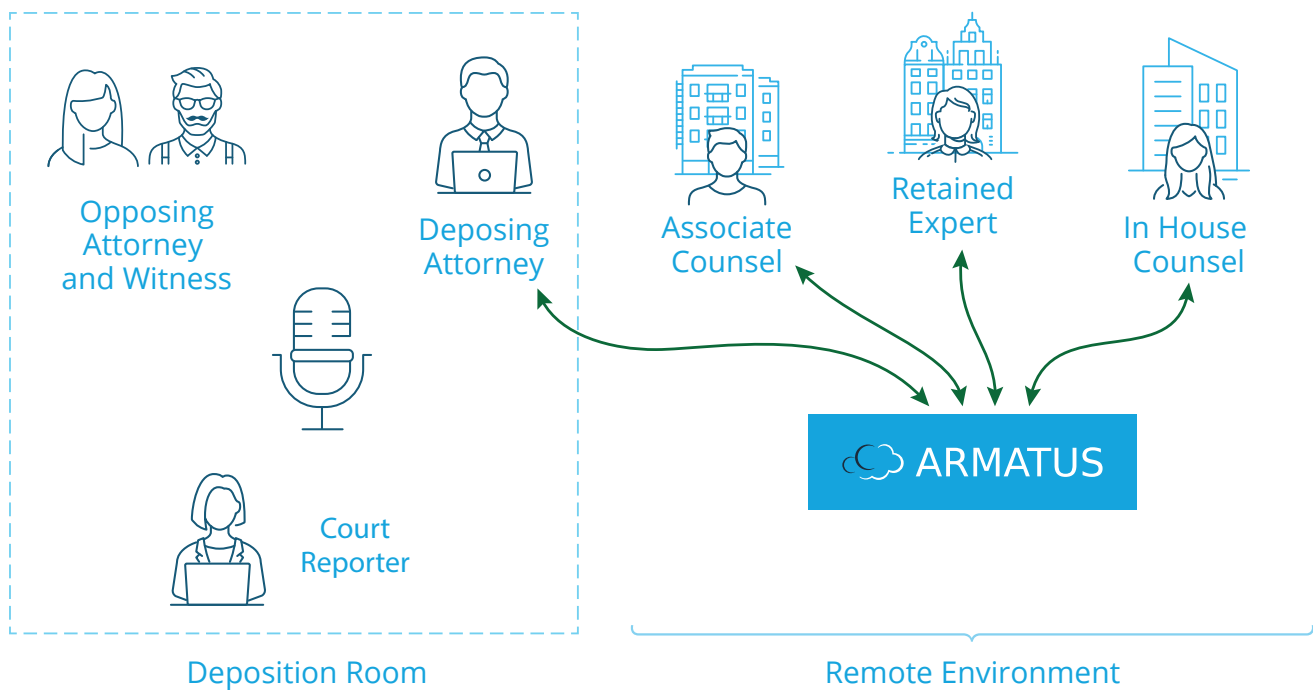
Figure 4: Questions and testimony are captured by a microphone on the deposing attorney's computer.
Armatus' speech-to-text engine instantly converts speech to text and serves the realtime "rough" transcript to all participants.
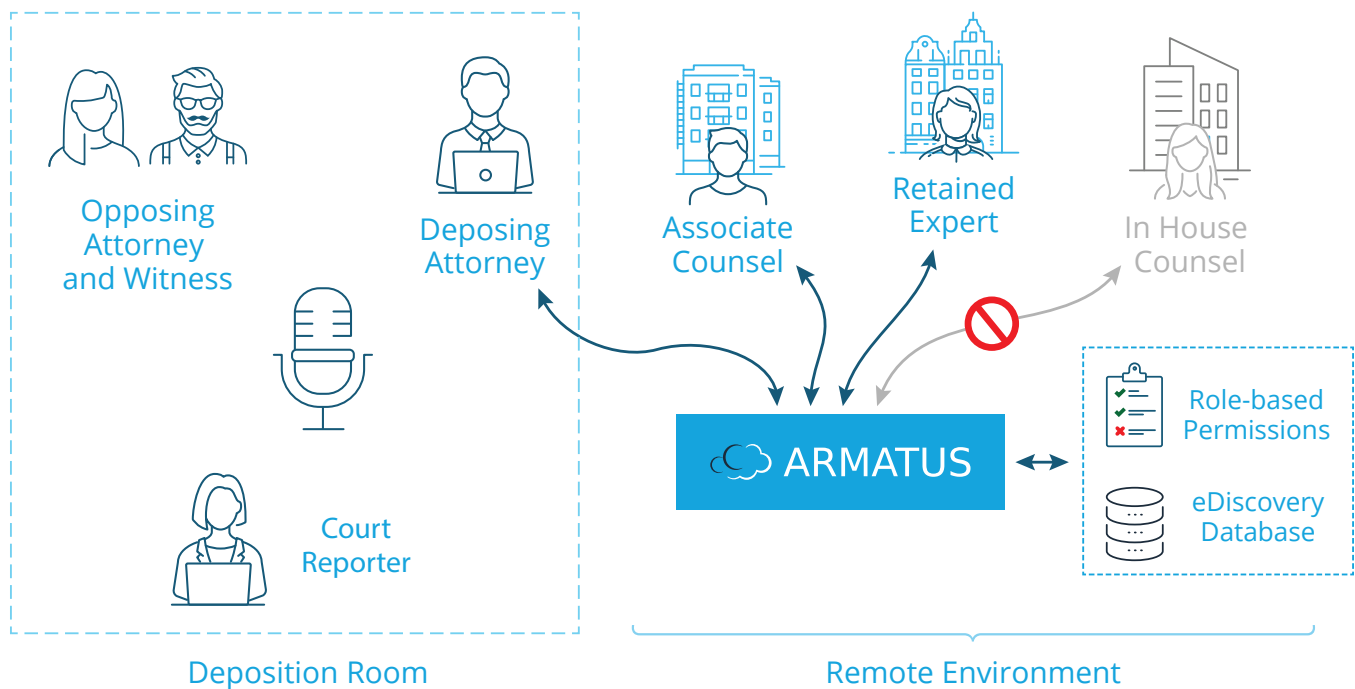

Figure 5: Participants individually highlight any content in the transcript in real time, which initiates a unique search for that participant within any data that the participant is authorized to see. Participants with different access to case documents are walled off from documents they are not permitted to see.
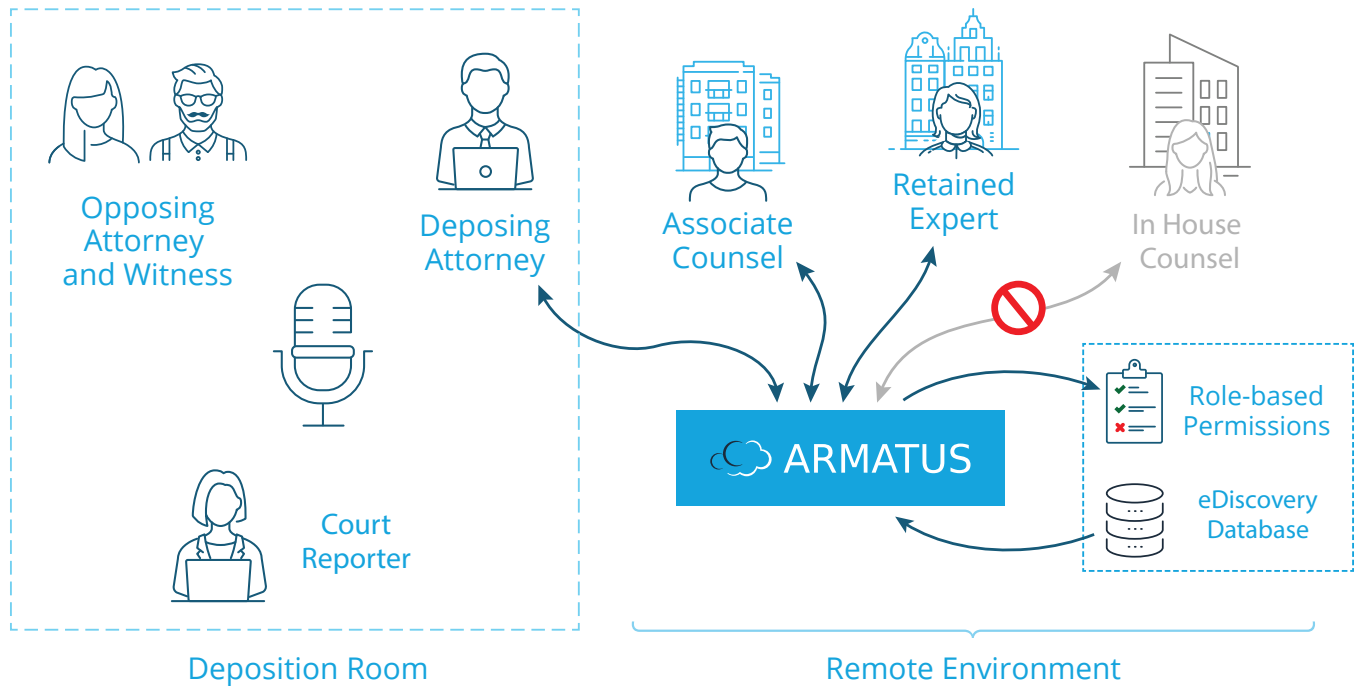
Figure 6: Armatus sends individual search queries to a connected database that houses production or other documents. Unique search results, ranked by relevancy, instantly appear in the screen of the user performing the search. Armatus adheres to the access rights set within eDiscovery production. Individuals without permissions can't run searches.
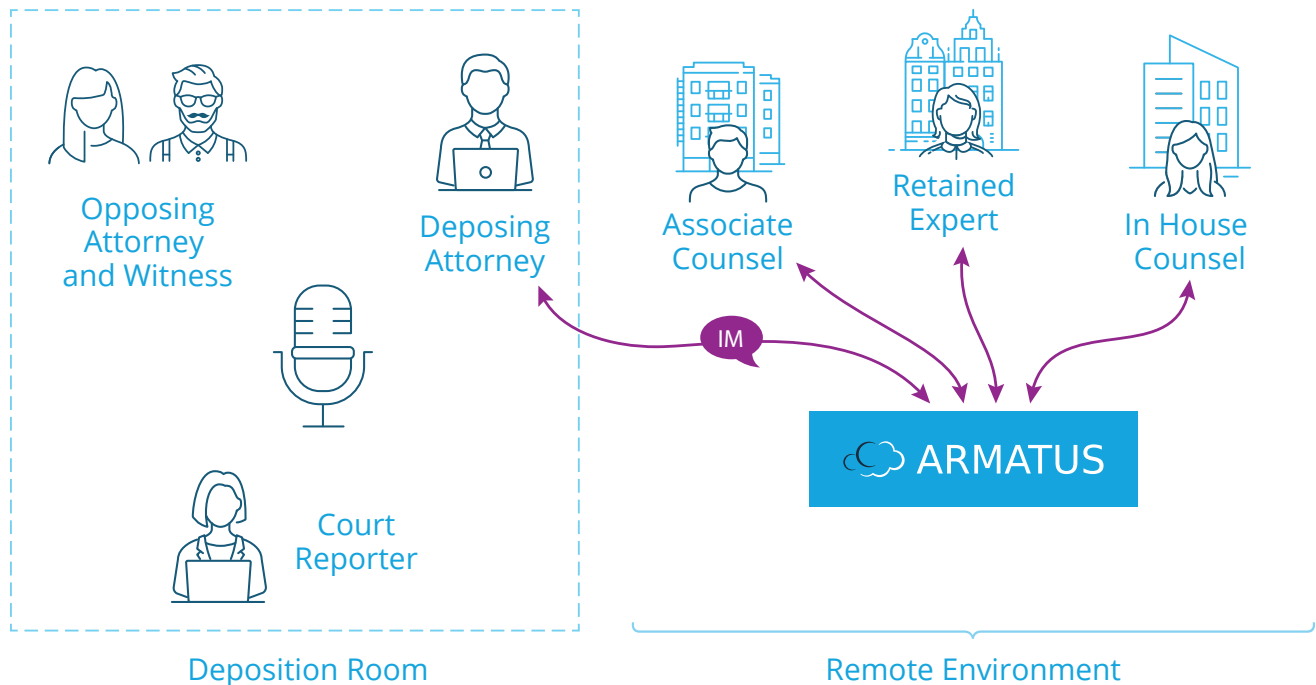

Figure 7: Participants can collaborate live with the deposing (or defending) attorney through Armatus, providing questions or referencing their individual search results.

In Action

With Armatus, your team can identify "needle-in-the-haystack" documents that the deposing attorney can use to devastating effect. When deposing an opposing damages or technical expert, you can have your own damages expert listen in, search, and find files, then send you those files and suggestions that you can use to take down the opposing expert on technical points.

One former attorney managed the litigation for private and public companies. He regularly litigated cases where $100 million-plus was at stake. The attorneys he hired often billed out at $500 to $1,000 per hour. His response to the Armatus solution:

"If I could wind back the clock and have two or three folks from my outside document review team ride shotgun on critical depositions (even if it came at an hourly premium), I would have done it in a heartbeat. Even if they found only one helpful document every other deposition, given the dollars at stake and the relatively modest incremental cost of tapping in the extra help, it's a no-brainer."

Contact Cloud Court, Inc. to schedule a personalized review of your deposition process and live demonstration of Armatus.

About Cloud Court, Inc.

Cloud Court, Inc. is a LegalTech company formed by litigation professionals. Our mission is to leverage modern technology to help our clients win difficult cases they could lose, as well as "jump ball" cases that could go either way. We also help our clients win the cases that they should win, only win them earlier and on better terms. Our primary focus is testimony, with a strong initial emphasis on deposition testimony.

Learn more at cloudcourtinc.com.

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