



DEPOSITIONS IN THE DIGITAL AGE

Bloomberg Law Survey commissioned by Esquire Deposition Solutions, “Depositions in the Digital Age,” 2018.

In 2018, Bloomberg Law completed a survey of litigators, which was commissioned by Esquire Deposition Solutions, to determine the role of pretrial depositions in current litigation practice. The survey's goal was to gauge the number of depositions conducted in a typical engagement and to try to understand the reasons why depositions might be increasing, or decreasing, among litigators. The survey focused particularly on the impact of *electronically stored information* (ESI) on deposition practice.

The survey showed that, for most litigators, depositions remain a key component of pretrial preparation. Seventy-nine percent of survey respondents indicated that they are conducting the same or more depositions compared to two years earlier. Regarding ESI, 31% of attorneys reported that they are taking more depositions today specifically due to the need to discover ESI and to properly use those digital materials in their trial preparations.

Survey Highlights Role of ESI in Deposition Practice

Attorneys who cited ESI as a reason for conducting more depositions today than in pre-digital trial preparation days offered four principal reasons for doing so. They indicated that digital evidence and new electronic discovery technologies frequently revealed:

- 81% Additional witnesses whose depositions were required.
- 72% Additional evidence, increasing the number of witnesses to be deposed.
- 53% Additional parties, also increasing the number of witnesses to be deposed.
- 53% Additional factual bases for the assertion of legal theories not found in the original complaint.



Unlike traditional evidence, ESI presents unique challenges to litigators. Digital evidence, whether it's under the direct control of an opposing party or controlled by third-party technology providers, is frequently difficult to locate. Depositions of opposing parties' representatives – authorized by Federal Rule of Civil Procedure 30(b)(6) -- are often necessary in order to identify and locate all relevant ESI. Also, ESI custodians, who may be party employees or employed at third-party telecommunications and cloud services providers, are critical to ensuring that ESI, having been discovered, will be admissible at trial.

Finally, depositions of forensic experts are frequently useful to explain the significance of ESI to judges and juries. There is little doubt that all of these factors are driving the survey's key finding that, in most cases, depositions continue to be a fixture in modern litigation practice.



Recent changes to federal court rules highlight the continuing vitality of depositions as a discovery tool in the age of ESI. In 2015, Rule 1 of the Federal Rules of Civil Procedure was amended to emphasize that it is trial counsel's responsibility – not just the court's – to secure “the just, speedy, and inexpensive determination of every action and proceeding.” If a party's justification for an ESI demand can be met by an alternative form of discovery – such as interrogatories or depositions – then both counsel and the court should consider whether depositions are in fact the most efficient and cost-effective means of obtaining the information.

In *United States v. Univ. of Neb. at Kearney*, No. 11-3209 CV (D. Neb., Aug. 25, 2014), the trial court denied the government's request for ESI, finding that ESI was not the best or most economical means for obtaining discovery of the same information. “Standard document production requests, interrogatories, and depositions should suffice—and with far less cost and delay,” the court said.

Additional support for the idea that depositions can be a suitable substitute for an burdensome ESI request is found in amended Rule 26(b)(1), which provides that all discovery requests must be “proportional to the needs of the case.”

According to the Bloomberg Law survey, 29% of respondents said that judicial opinions and recent changes to federal civil procedure rules had created a need to conduct additional depositions.

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Deposition Technology: Puts Entire Litigation Team in the Room

Although contemporary information technologies have given rise to electronic discovery and its attendant challenges and costs, the digital age has also seen the emergence of many new tools to efficiently manage litigation. In the area of pretrial depositions, for example, two relatively new deposition technologies allow litigators to extract more value from their depositions than ever before: real-time transcription and live-streaming audio and video from the deposition room to the firm's entire litigation team.

Real-time transcription is created when court reporters use real-time text technologies to deliver text to computer screens within a few seconds of the words being spoken. Specialized software allows participants to make notes in the text and highlight portions for future reference. With real-time transcription, all members of the litigation team have rapid access to the testimony, whether they are in the deposition room or a thousand miles away. With digital text in hand, attorneys are able to:

- Verify their understanding of the deponent's answer.
- Verify that all necessary testimony has been obtained from the deponent.
- Quickly scan the deponent's testimony for inconsistencies or areas that warrant additional questioning.
- Collaborate in real-time with other members of the litigation team.
- Highlight key passages in the deponent's testimony.
- Upload testimony into litigation support software for later use in motion practice or trial preparation.

The need to verify in real-time their understanding of the deponent's answers (77% of survey respondents) and ensure that all necessary testimony was obtained from the deponent (76%) were far and away the most often-cited reasons for using real-time transcripts.

60% of attorneys reported integrating digital deposition-related materials into their litigation support software systems. The primary reason was that integration leads to better organization, which ultimately saves clients money (74% of respondents said they are using integration technologies).

The second promising deposition technology is live-streaming audio or video from the deposition room. Video live-streaming permits the entire litigation team to participate in the deposition and to assess the deponent's credibility and strengths or weaknesses as a witness, without the need for multiple attorneys to travel the deposition location. Live-streaming also allows the client to participate in the deposition without incurring travel expenses.

Litigators surveyed by Bloomberg Law cited four main reasons for live-streaming a deposition. Live-streaming, they said:



- 67% Permits co-counsel and clients to participate in the deposition & to suggest follow-up questions or new lines of questioning.

- 54% Saves travel time & expense for all members of the litigation team.



- 49% Allows the client to directly observe the deposition, providing a sound basis for future strategy discussions.

- 44% Enables expert witnesses to observe & better understand the significance of the deponent's testimony.



Among all survey respondents, 56% agreed with the statement "Depositions that use digital technology are more effective." 61% of relatively busy attorneys — e.g., those handling 20 litigation matters or more — agreed with the same statement.

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Conclusion

The prevalence of pretrial depositions in modern trial engagements, typically freighted with the need to uncover and effectively deploy large amounts of electronically stored information, is increasing somewhat among the attorneys surveyed by Bloomberg Law. Reasons most often cited are ESI's tendency to reveal additional witnesses, additional evidence, potential new parties, and promising new legal theories not found in the original complaint.

The survey also finds that many attorneys are successfully incorporating new deposition technologies such as real-time transcripts & live-streaming into their litigation practices.

To learn more, please read the first in a series of blogs: "[The Five Types of Depositions That Flow from Obtaining E-Discovery](#)".

