

Changes in Litigation

When I started in the civil trial practice in the early 1960s, discovery and trial preparation disclosures were practically non-existent in Indiana State Courts.

You could not address written questions (interrogatories) to the opposing party. Document production from the opposing party and non-parties was very limited. The circumstances of taking and using oral questioning (conditional examinations) of parties and oral questioning (depositions) of witnesses were extremely limited in scope and use. Orders for submission of lists of witnesses and exhibits expected to be used at trial were non-existent.

For all practical purposes, the only vehicle to determine the nature of the claim or defense was to refine the pleadings. The complaint required a detailed statement of facts necessary to constitute a cause of action on behalf of the plaintiff, rather than only conclusions. The specific basis for any defense had to include facts, rather than only conclusions. This resulted in a protracted “motion practice” trying to force the other party to make as many statements as possible to determine the nature of a claim or defense in advance of trial. This manner of pleading did, at least, include a detailed statement of the damages claimed and the amount requested, which usually was the maximum that could be recovered.

The overall proceedings were often said to result in “trial by surprise or ambush” because counsel did not know the identity of the witnesses until the witness appeared on the witness stand at trial and counsel did not know the identity of any document (exhibit) being offered in evidence until the item was identified and offered into evidence in front of the trier of fact whether it be a court or jury.

Needless to say, these circumstances placed importance upon trial preparations and experience of counsel in being able to react to the happenings during trial.

By contrast, currently civil cases are commenced by the filing of a notice form of complaint consisting only of the date, place and time of a generally stated occurrence or a skeleton statement of circumstances as a basis for a claim. Damages claimed are in an unstated amount, but seeking as much as the plaintiff can convince the court or jury to award.

This is followed by a “flurry” of discovery. Discovery is by written questions (interrogatories); depositions (oral questioning) and production of documents from parties and non-parties. The scope of these inquiries now includes facts and matters that not only might be admissible at trial, but also those that might possibly lead to admissible evidence.

Discovery procedures are enhanced by the parties being required to submit their preliminary lists of witnesses and exhibits during the discovery process and then final lists of witness and exhibits after discovery is completed and before trial. In fact, with respect to “expert witnesses” who are expected to be qualified to express opinions, the opinions must be specifically reduced to writing and a basis for each of the opinions must be documented. All exhibits that are going to be submitted at trial must be shown to opposing counsel timely before trial.

Then all counsel must appear before the trial Judge at a final pre-trial conference, the general purpose of which is to finalize all issues to be tried, determine all witnesses and exhibits that will be offered into evidence at trial and to eliminate or minimize

disputes with respect to the issues and witnesses and exhibits, thereby “streamlining” the trial proceedings.

All during this process the parties are encouraged, and often by order of the Court required, to participate in a mediation session or sessions in an attempt to resolve the parties’ differences, thereby avoiding the necessity of trial and avoiding the uncertainties of the results of trial by court or jury.

The point of this article is to demonstrate that civil court proceedings in Indiana Courts have moved from “trial by ambush or surprise” to “full discovery disclosure” in an effort to encourage the parties’ to resolve their differences without the necessity of a trial.

Currently, the proportionate number of trials is lower because disclosure of facts and determining the issues results in more settlements. However, fewer trials by court or jury make it more difficult for counsel to develop the skills of an experienced trial counsel.

Comment of the writer (a Plea): Do not be surprised when your counsel discusses settlement of your case. Counsel is “still on your side”, but counsel is following the current procedures dictated by the Courts of Indiana.

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