

THE CHANGING FACE OF LITIGATION: PRE-SUIT MEDIATION

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Indiana has been in the forefront of court annexed mediation of civil disputes since 1992 (all of Indiana's alternative dispute resolution rules, including the pre-suit rule, are available on-line at <http://www.in.gov/judiciary/rules/adr/adr.pdf>). At the outset, Indiana's system of alternative dispute resolution sought to send cases pending on the docket of the state's courts to mediation. Expressed reasons for creating such a process were to relieve court dockets and to save litigants time and expense. During Indiana's early days of mediation practitioners handled those cases much like the pre-mediation period; that is, written information was exchanged according to the rules of trial procedure, depositions of the parties to the lawsuit and the fact and expert witnesses were taken, and *then* the matter was mediated. But, as the mediation process has matured, so has the litigation practice. While cases may be filed in court and some written information exchanged, not all the depositions related to the case may be taken before a matter is mediated. This progression, and the reasons for mediation, has also generated a shift in the number and kind of cases that are mediated pre-suit.

In those early days of mediation, disputes that had not yet ripened into lawsuits were not governed by rules but by guidelines. Now there are specific rules governing pre-suit mediation (i.e., disputes not yet filed and pending on the docket of a state court). The willingness and ability to mediate a dispute before a lawsuit is ever filed is driven by three principal factors: youth; expense; and comfort. This generation of litigators has grown up in an atmosphere where there are very little surprises at trial given the requirements of disclosure and discovery rules that allow each side to fully find out what the other will argue at trial. Thus, younger lawyers are more willing to reveal their side of the story. In my generation (I began practicing law in 1980) I was trained by lawyers who had grown up in a system where information was not shared, pre-trial disclosure of evidence was not routine, and cases were merely taken to court and tried. The element of surprise was exalted. The "greatest generation" would not willingly reveal a scrap of evidence about the case in an effort to settle the case. As we transition from the generation that pre-dates my age group to the new generation, the system evolves into one that resolves disputes earlier not later. As to expense, I have *almost* never met a client that did not want to save legal fees. This is accomplished by resolving cases. And as to comfort, resolution is also highly prized by the client because of certainty. A mediocre but certain result often trumps an uncertain and expensive victory.

So what does the present and future hold? Cases that are filed in court go to mediation earlier than ever before. Contracts that are entered into require pre-suit mediation, non-binding arbitration (and, in many cases, binding arbitration that never allows a dispute to darken the halls of justice). Disputes that will be settled pre-suit will continue to grow in number and stature. It will not be the minor traffic accident that is resolved early; but also the wrongful death of a minor child.

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