The Mediation Explosion:
A Relationship between Pre-Trial Discovery and Speed of Communication[1]

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Prior to the expansion of pre-trial discovery in the 1960s and 1970s, there were significant hurdles before parties to a lawsuit got their day in court. These included fatal errors that could be made at the pleading stage that would end the lawsuit based purely on form and little substance. Accompanying these procedural impediments was a "trial by ambush" or "surprise" mentality fostered by limited pre-trial discovery. If you talk to or were trained by trial attorneys who have tried 400-plus jury trials, you find that many trials consisted of showing up[3] without a complete or clear idea of what may happen. And in those halcyon days, because trial was a bit more of a sport, so were settlement negotiations. As to the sum and substance of settlement negotiations, they too were (and always have been) a reflection of the state of technology. For instance, one reason settlements occurred "on the courthouse steps" was because of the speed of communication. Offers and counter-offers by phone, confirmed by letters that were saved using carbon paper and transmitted by United States Postal Service first-class mail via electronic typewriter technology took longer.

In the 1970s there was a shift. Notice pleading became the norm and motions to dismiss and for summary judgment became less successful: substance began to win over form. Also, the ability to obtain almost complete information concerning the opposition's case allowed parties to better assess the risk of and probability of success

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[1] I used to hope to have an original idea; now I am satisfied with just having an idea that is original to me. In this article I offer no empirical evidence to support my theories or opinions. But they are my theories and opinions based on experience, observation, and a liberal arts education.

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[3] Woody Allen is credited with coining the phrase, "90% of life is just showing up."

at trial. This new approach also had a new technology: the facsimile. Offers and counter-offers by fax and confirmed by letter sent by first-class mail took less time. As the time to send, receive and respond to offers and counter-offers decreased, settlements began to occur earlier in the litigation process. During the same period, the office/personal computer began to make its way into the law office. Running 8086 chips and having a whopping 10MB of hard drive capacity, the exponential technology era we live in had dawned.

Now we find ourselves in an era of open (but, oxymoronically, sometimes limited) discovery. In federal court, "initial disclosures" are mostly "full disclosures." In addition, the preparation for and the filings required in federal court to try a case occur one or more months in advance of the trial date leaving very little "trial preparation" proximate to the actual trial.

Mediation was formalized as a procedure in Indiana in the early 1990s. While it was resisted at first by those who had always done things differently, it originally became a way to avoid trial only after the parties learned everything they needed to know to try their case. Judges, who initially opposed mediation as a usurpation of authority, began to order mediation once they discovered it would reduce their dockets. Parties found that reducing risk to zero, along with saving additional time and expense, was not a loathsome but a lofty goal. And the speed of offers and counter-offers depended not on pen, paper or even ink, but simply on electronic information transmitted via the World Wide Web (and safely stored on a nightly back-up). It was no longer necessary to wait for the confirming letter sent by first-class mail and not necessary to stand by the fax waiting for the transmission report to ensure the message had been delivered.

What remains is a dispute resolution system that is being turned over to this present and coming generation that is committed to obtaining a rapid resolution of a case and a quick answer to every question.[4] There is no better example of this "current transition" than the genre of "pre-suit" mediation. At first, it was a "guideline" in the

[4] The only issue I have with this generation is this: any fool can come up with an answer; the art is in knowing the right questions to ask so you arrive at a correct answer.

Indiana Alternative Dispute Resolution system. Now it has become just another means of alternative dispute resolution. (i.e., Indiana's ADR Rule 8. Optional Early Mediation). It is a process particularly well-suited to the resolution of claims existing at both ends of the spectrum (i.e., catastrophic and marginal). The reason for its use in the context of marginal claims is self-evident: neither side can afford to conclude these claims through the litigation process. In the catastrophic setting, it reduces risk and the expense of litigation exponentially while providing comfort to the litigants that a "shot" made somewhat in the dark is actually hitting something. Couple this procedure with a generation raised in the initial/full disclosure marketplace that has a willingness to "send a hasty e-mail in response" explaining why the other side is wrong, we now find ourselves in joint sessions with young lawyers sharing all manner of information that previous generations would have guarded jealously.

The comparison and contrast between those first days of mediation in 1992 and the present shows us where we have come from and where we are going. When mediation made its debut, it was the conclusion to trial preparation before the trial. Now, *even in matters pending in court (i.e., not pre-suit controversies)*, we are trending toward more limited pre-trial discovery prior to mediation. This shift shows that the litigation process is being pushed further out to the edge of the litigation galaxy while the pre-suit model becomes the sun around which all things litigation revolves.

In every transition in history there are constants.[5] In broaching this entire subject with a lawyer with our firm who has 50-plus years of experience and has participated in every generation described above, he noted it still comes down to the preparation of your case for trial. That is, everything you do and say and think about your case must be a constant projection of those activities into a court room. For whether you reach the now illusive court room or simply resolve the dispute pre-suit (*nee* in suit but with limited discovery), you still must think like a trial lawyer and prepare yourself, your client and your arguments as if everything will end up in court.

[5] I still recall the premise of *The Anatomy of Revolution* by Crane Brinton being that almost every revolution, save the American Revolution, consists of one form of despotism merely replacing another.

Of course, with less matters being tried to a conclusion, a new question has emerged: who will be the next generation of mediators? My experience and belief is that you are indispensable at work until the day you die; then someone else becomes indispensable. The consistency of change will ensure adaptation to a new system and the law will continue to be merely a reflection of the society it serves. So, while the "sunset" mediators are by and large those with significant jury trial experience, the "horizon" mediators will be well-prepared attorneys who ask the right questions, arrive at well-reasoned answers, and have the gifts and desire to resolve conflict that impacts the lives of litigants whether or not they have as much trial experience as the previous generation.

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