

Why do I Need to Understand Alternative Dispute Resolution?

When confronted with conflict, what is your response?

Are you a catalyst for reconciliation or a proponent of discord?

Do you act first and think later or are you calm and encourage resolution?

Prepared by

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Photograph by Matt Gehring

Conflict

When confronted with conflict, what is your response? Are you a catalyst for reconciliation or a proponent of discord? Do you act first and think later or are you calm and encourage resolution?

Conflict calls for cool heads. You have internal responses that need to be in check before entering into a dispute that could lead to a lawsuit, which can be a very long, expensive trek. In the end it is often hard to determine who won the lawsuit because of the cost of attorneys, lost work and the emotional stress caused by the litigation process. At trial, if a judge cannot determine a clear winner, it is not uncommon to use whatever judicial discretion available to “split the baby” in hope of appeasing both sides.

Granted, there may be times when a lawsuit is necessary to right a wrong, enforce or change law. However, more frequently, Alternative Dispute Resolution, or ADR, reaches the same compromise without the costs associated with a lawsuit and trial.

“The white paper is well-written, informative and thorough. As a homeowner, I recently experienced a tree dispute with a “reputable” tree company. I hired them to remove a broken limb with clear instructions to gently “trim and shape,” and returned home to two topped trees at least half their size. I spent a lot of time trying to understand what happened, the extent of damage to my trees, and my options for pursuing action. I ran across this white paper in my research and found it useful in explaining the options and process for handling a tree dispute. As a Family Therapist by profession, I was especially impressed by the appropriateness of the steps for problem-solving and advice to stay calm and not get emotionally reactive. I found this paper very helpful and recommend it highly.”

*Cassandra Erickson, Ph.D.
Family Therapist
Indianapolis IN*



When this tree was damaged the parties were able to work out a resolution.



When this construction project became a dispute an agreement was worked out on site.



Neurological Responses to Conflict



Disputes are inevitable part of life and often not under your control. What is within your control is how you respond to conflict. First you must realize there are natural, neurological responses the body experiences when confronted with a challenge. These responses are commonly called the “fight or flight response”.

According to Dr. Chris Carr, a sports psychologist at St. Vincent Sports Performance Center in Indianapolis:

The ‘fight or flight response’ is based on our sympathetic and parasympathetic nervous system that helps protect humans from harm. In situations where there is a real or perceived threat, this response is accompanied often by increased muscle tension, narrowing of concentration ability, feelings of anxiety or fear and cognitive responses associated with a threat. It is a helpful, survival response in that it strives to keep us alive. However, in relationship management, this response can create negative consequences to both parties.

Understanding your internal response system may help you to change your standard response to conflict. When a client calls with the complaint: Your crew cut off the wrong limb! What is your standard response?

- Hang up (the flight mechanism).
- Put off making the return call (the flight mechanism).
- Answer the phone and get in your client’s face: *Yeah, well your yard looks like a junk yard anyway!* (the fight reaction).
- Tell them to: *Go pound sand! Call your lawyer and sue me!* (Again, the fight reaction).

Realizing that your body has neurological responses that stimulate physical reactions may help you to take a different tact, instead of reacting with your standard response, plan and practice, a different approach.



Neurological Responses to Conflict

For instance, you can take a deep breath, bite your lip, put your hand over your mouth and wait a minute. Tell the client you want to “check the records” and that you will call them back in a minute. This gives you a chance to become informed about the project and to gain your composure.

Practice this because it is hard to change old habits. If you are a real hot head you might practice with a co-worker, spouse or someone else by play-acting conflict situations.

Understanding a body’s internal responses enables you to deal with daily conflicts in a calm, professional manner. With the skilled knowledge of Alternative Dispute Resolution, you may be able to help resolve conflicts for your company, for your clients and even for competitors. Although Abraham Lincoln was addressing young lawyers, the sentiment holds true today:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser: in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good person.

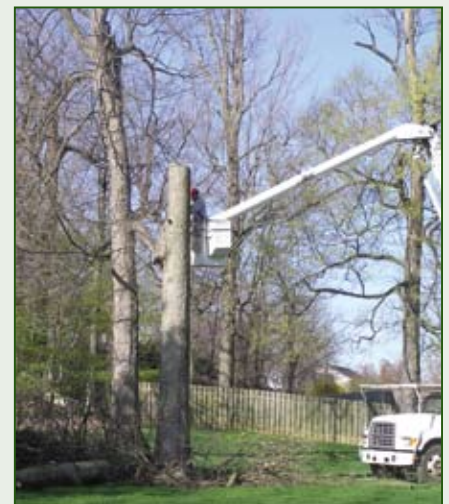
(“Notes for a Law Lecture,” July 1, 1850, Abraham Lincoln and His Books by William Barton, Marshall Field & Co., Chicago, Ill., 1920.)

You Can Make a Difference

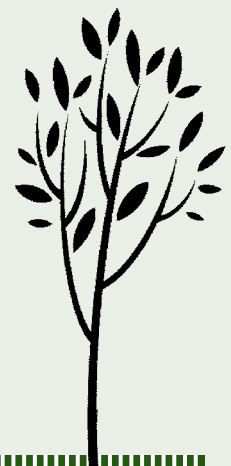
As a Professional Arborist, you often have opportunity to change outcomes for better or worse. Although the legal process is centuries old, it is not always the best way to resolve a conflict. There are other means that should be exhausted first before calling a lawyer for an off-putting letter that leads to a lawsuit.



When these trees were mistakenly cut, alternative solutions to a lawsuit were sought.



An agreement was reached for this dispute with an arbitrator.



Alternative Dispute Resolution

For more than 25 years, various forms of Alternative Dispute Resolution have been used as an alternative to the traditional method of litigating a case. While you may be most familiar with arbitration and mediation, these are just two methods used to resolve conflict outside the courtroom.

Why choose Alternative Dispute Resolution?

One reason to choose Alternative Dispute Resolution is that litigating a case before a judge or jury carries inherent risk that you will not prevail in the dispute. While it is true that a judge or jury must apply the law to the facts, they often view the facts quite differently. Quite often, especially in a jury trial, jurors infer facts from evidence, such as testimony or documents, which may or may not be accurate. In the case of a bench trial (held in front of a judge without a jury), the judge may use discretion in a way that ends up with you losing. It is this risk at trial that generally encourages parties to consider Alternative Dispute Resolution.

Judge Susan L. Macey, a mediator with Judicial Arbiter Group Inc., explains:

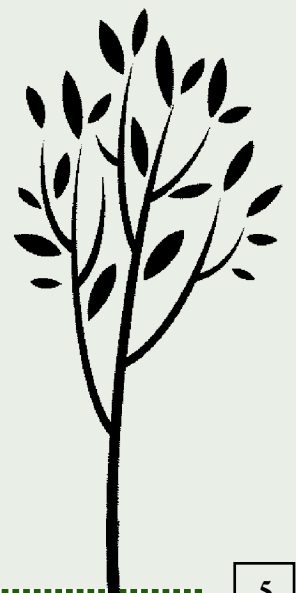
The premise of mediation is that the parties can fashion a remedy (with the assistance of a mediator) and avoid the imposition of a ruling by an outside third person (such as a judge, jury, or arbitrator) that may disappoint both litigants. Mediation focuses on problem-solving; litigation is inherently adversarial and focused on producing a winner and a loser. Both parties have the best chance of meeting their interests if they decide the outcome. After all, who understands what you want or need better than you!

“The authors are providing great advice to anyone who has an issue that is better resolved through negotiation rather than litigation. Pre-suit mediation works and it helps keep the focus on solutions rather than “winners and losers.”

*Douglas Church Esq.
Church, Church, Hittle and Antrim
Past President Indiana State Bar Association*



When these trees were cut without permission the property owner was able to work an agreement with the utility!



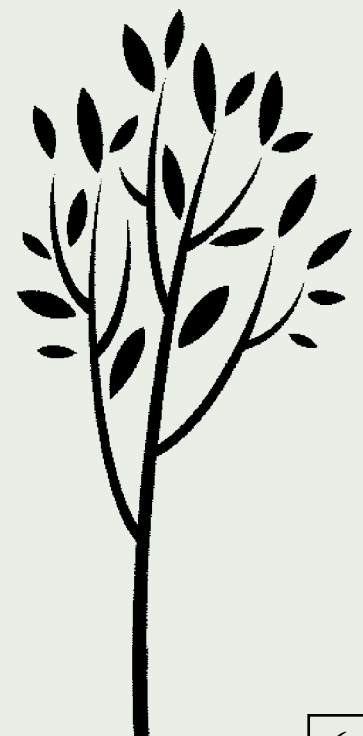
Party-to-Party Negotiation

The most direct and least costly method of Alternative Dispute Resolution when dealing with your own disputes with clients is to swallow your pride, get control of your internal defense mechanisms, and try to negotiate an acceptable agreement. Talk to the offended party and see what it would take to negotiate a resolution that both of you find acceptable. Often, reconciliation is as easy as letting the outraged party blow off some steam. Encourage the client to express him- or herself fully, don't be dismissive or sarcastic and make sure you let the client know you are listening.

Some people have taken issue with Lincoln's use of the word "compromise" in the above quote, saying there is no such thing. Before you dismiss the outraged party, think about the ramifications of a long, expensive, drawn-out legal battle. Compromise comes in many forms and may, in the long run, be much more cost-effective than a lawsuit.



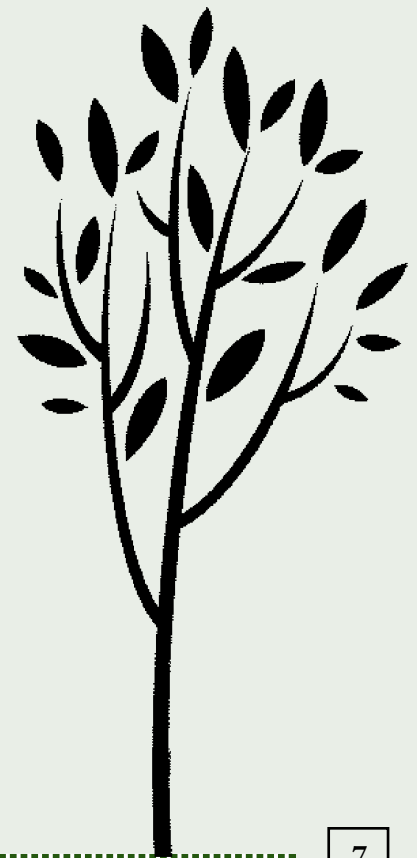
Damage to your favorite tree can be infuriating!



Assisted Negotiation (Mediation)

When direct, party-to-party negotiation breaks down, consider bringing in an objective third party to help with the negotiations. This objective third party might be a manager, business owner, a Professional Consulting Arborist, or a respected competitor. The person should be chosen because he or she is independent and understands the nature of the dispute and has expertise in the area. Mediation with an objective third party may cost the parties some money, but in the end, it often saves time and the additional expense of a lawsuit.

Sometimes, parties choose another type of mediator — someone who may not have the specific knowledge about the subject matter but is an expert on the process of negotiations and litigation. Because of the ever-increasing caseloads in the court systems in many cities, some courts require that parties in a lawsuit try Alternative Dispute Resolution before having the case set for a trial. Traditionally, lawyers for each side use their negotiation skills to get the case settled before it goes to trial. But within the last 20 years, lawyers have sought the assistance of a third-party neutral or mediator to help settle the case. This person is often another lawyer who is skilled in the art of negotiation and works as a full-time mediator. There are a variety of styles of mediation, but the most common ones are a form of “facilitative” or “evaluative” style. Facilitative mediators try to encourage a dialogue between the parties to help each side know the interests of the other side. An evaluative mediator goes a step further, and will let each side know what he or she believes to be the strengths or weaknesses of the case and perhaps even what each believes to be a fair and reasonable result in the case.

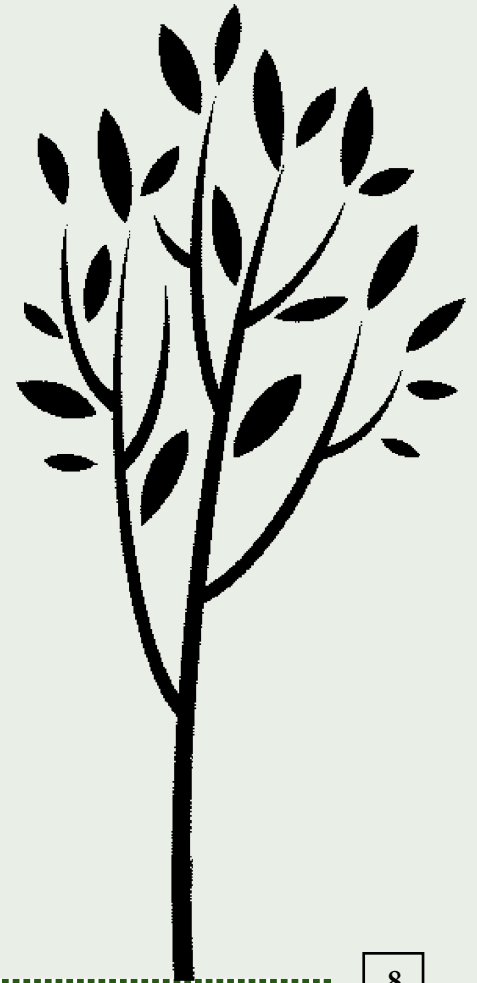


How do I choose the best kind of mediator for my case?

In many states, a mediator can be any person both parties mutually agree upon to assist in settling the dispute. If the parties have a good understanding of the nature of the dispute, they may be best served by using a person who is skilled in the art of negotiation and the process of mediation. Sometimes the parties need the assistance of a skilled expert, such as a Professional Consulting Arborist, to help them navigate through the more technical questions. Some parties choose to use this expert as an advisor to the mediator as he or she assists the parties in negotiating an agreement. The mediation may be take place in a formal setting, such as the mediator's office, or it may take place in the backyard, where everyone can see what's being discussed. Despite which kind of mediator you select, he or she must strive to remain objective, unbiased, neutral and professional. A mediator should insist that each party be allowed to explain his or her position, whether in writing or in person, and that each party read or listen to the entire narrative before offering a counter position. Difficult situations are often resolved simply when both parties meet personally to air their differences. The face-to-face aspect of the process can often bring closure and a satisfactory resolution because each party was part of the process and had opportunity to be heard.



A Professional Consulting Arborist can assist with value.



How is a mediator different from a judge?

A judge is the decision maker in a case. In mediation, the parties are the decision makers, not the mediator. The mediator, whether more facilitative or evaluative in style, works with the parties to help them decide the outcome.

Do I need a lawyer in mediation?

Although it is not required, many people choose to use a lawyer to assist them in mediation. Remember, the mediator should be neutral, and his or her role is not to help one side or the other, but to help both sides reach an agreement.

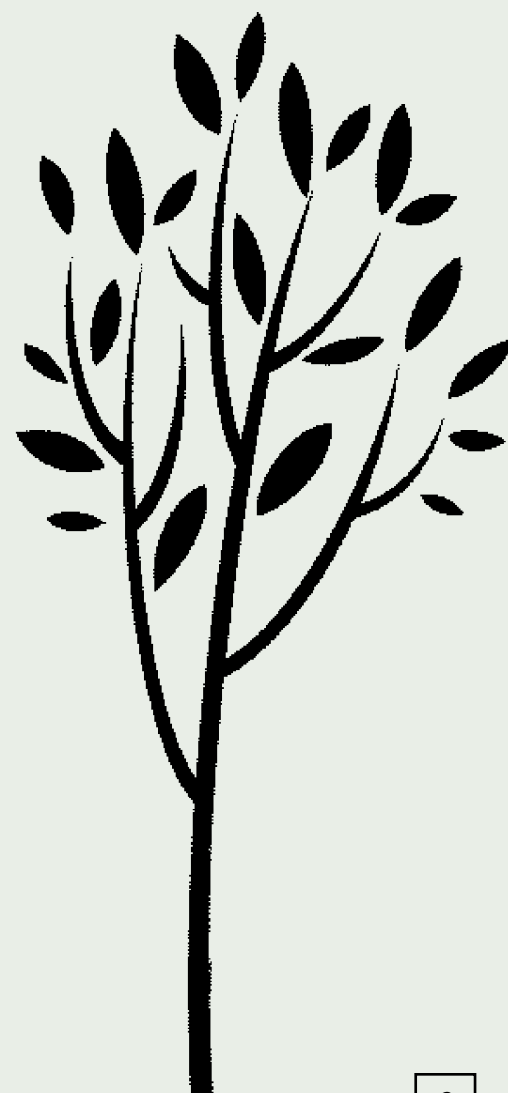
Most lawyers are quite familiar with the mediation process, know local mediators and can help their clients navigate through the process. Many states have regulations that govern the mediation process and the mediator, so always check the rules for what applies in your case.

If you agree at the mediation to certain things, should you put the agreement in writing?

Whether to put an agreement in writing depends on the rules in your state and if there is a case pending in court. It is always best to put an oral agreement into a written form to make sure each side understands what is specified. Signing the agreement can be viewed as a commitment to action.

Is the written agreement binding and enforceable in court if one side fails or refuses to do what is stated in the agreement?

Most state rules provide that a mediated agreement that is in writing and signed by the parties is valid and enforceable in a court of law, provided the agreement resulted from an inherently fair and voluntary process of negotiation.



Arbitration

Arbitration, which is comparable to a private court system, is another method of Alternative Dispute Resolution. The arbitrator can be selected by agreement of the parties or by court appointment. As a Professional Arborist, your role might be as a consultant to help attorneys understand the technical aspects of the case. Sometimes the parties use a nationally recognized Alternative Dispute Resolution firm to supply an arbitrator who has been pre-qualified to hear and decide your case. Once an arbitrator has been selected, a case management plan is put in place to set timelines for preparation and submission of the case. The formal rules of evidence that are used in a court of law are relaxed, and the arbitrator, like a judge, generally accepts oral testimony and written documents as evidence.

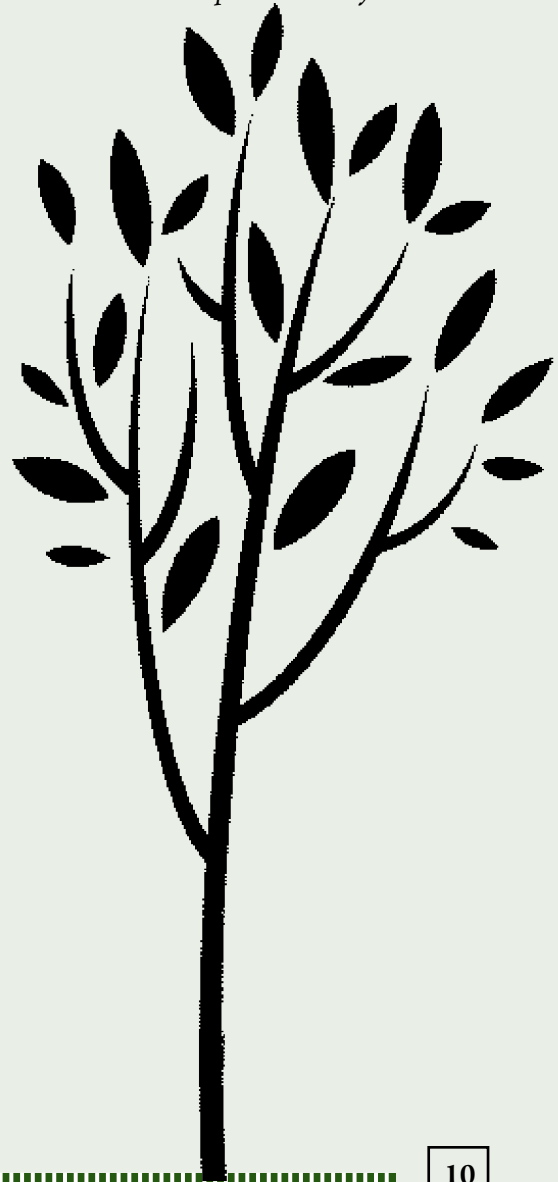
Following the completion of the hearing, the arbitrator will issue a decision. Depending on the arbitration agreement, the decision may be binding and enforceable in court, or it may be advisory and used to inform the parties how the dispute would likely be decided if tried by a judge in a formal court proceeding. In either event, the costs are often reduced and the process moves more quickly than if the case was pending for trial. The parties pay the costs of the arbitration, including a fee for the arbitrator's services, and such costs are often divided equally in accordance with the agreement.

Most forms of Alternative Dispute Resolution are non-binding and voluntary unless the parties specifically agree otherwise or enter into an agreement that is declared a judgment in a court of law. This means that either party can decide to terminate efforts to settle the case through ADR and go to court instead. Before abandoning ADR efforts though, you should know that a lawsuit may cost thousands of dollars and take one or more years from start to finish.

It is a good idea to seek legal counsel concerning local and state laws that may determine how and by whom Alternative Dispute Resolution can be used. If, as a Professional Consulting Arborist, you decide to assist a client in his or her negotiation, realize your role: — you are not an attorney. Rather, you are an objective third party assisting two parties to resolve their differences.



When this tree became the center of a dispute the parties were able to find resolution with the help of a Consulting Arborist and a corporate attorney.

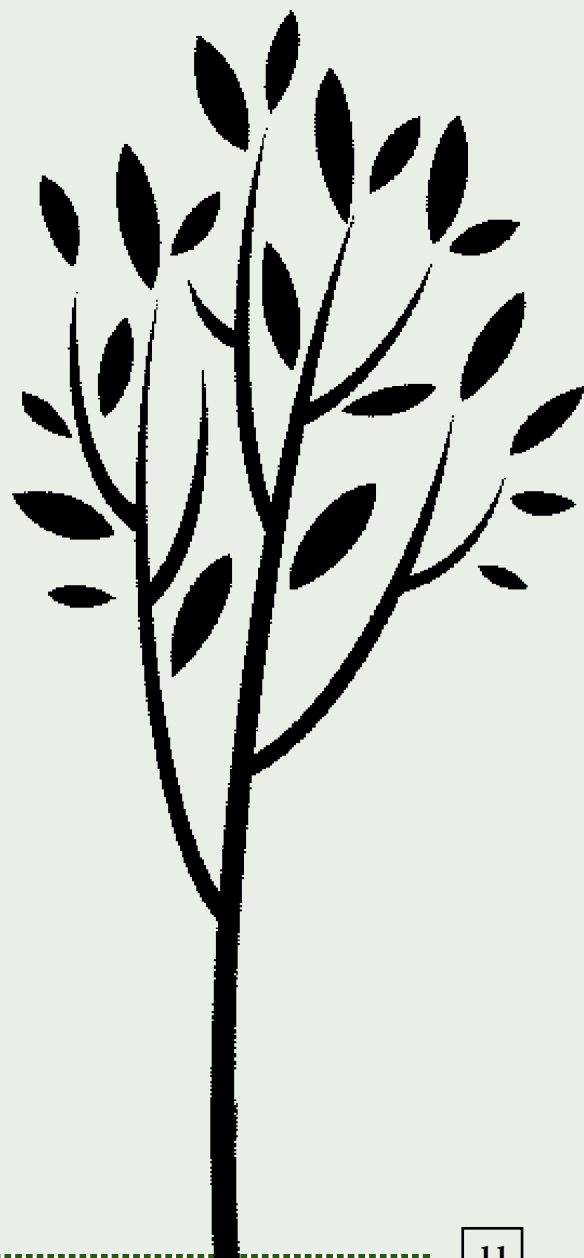


Every means of resolution

Disputes involving trees and landscaping can often be very impassioned. However, it is in the best interest of all parties to exhaust every means of resolution before litigation. Hopefully you can encourage your clients to resolve their own difficulties using the party-to-party negotiation. But, if you can't, find an objective, independent person who understands trees, landscapes and Alternative Dispute Resolution to assist in negotiation or to work as a mediator.

For disputes with trees, look for a Registered Consulting Arborist from the American Society of Consulting Arborists at <http://www.asca-consultants.org>. For an attorney who is trained in Alternative Dispute Resolution, check with your local or state bar associations. Or, call or email us and we'll try to help you find a mediator for your dispute.

Of course, this article is more about common sense than legal advice. Jud Scott is not licensed to practice law nor is he making any implication of legal advice with this article. State and local laws should be consulted and proper legal advice should be sought from your company attorney. Susan L. Macey, formerly an Indiana Superior Court Judge and now an arbiter with Judicial Arbitrator Group, Inc., added judicial perspective on Alternative Dispute Resolution and the legal system.



Note on the Authors



Susan Macey

Susan L. Macey was a state trial court judge in Indianapolis from 1993 to 2000. She also served as Indiana's Utility Consumer Counselor from 2005-2008. In 2008, she joined Judicial Arbitrator Group Inc., of Denver, Colo., a nationally recognized leader in Alternative Dispute Resolution. She is a full-time professional arbitrator with an expertise in public utility, environmental and public policy matters.

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