Alternative Dispute Resolution is a Strategic Business Tool. Here's How to Help In-House Counsel Leverage It

Alternative dispute resolution (ADR) often crosses the desk of outside counsel in a primarily legal context, focused on procedural advantages, jurisdictional considerations and precedential implications. But for clients, ADR is something fundamentally different; it's a strategic business tool that must align with broader organizational objectives, resource constraints and relationship dynamics.

Consider when you last advised on an ADR contract provision, for instance. While you may have concentrated on crafting legally sound language and ensuring enforceability, your in-house counterpart was likely wrestling with another set of questions: How will this impact our supplier relationships? What resources will we need to allocate? Does this align with our company's risk tolerance? Will this help or hinder our market position?

ADR offers various methods for resolving conflicts, but — similar to how a conductor leads an orchestra by selecting the right instruments to create harmonious music — its effectiveness lies in the skillful selection and application of the most suitable approaches to a business's specific needs at any given time. This might mean recommending approaches that, while perhaps not the most comprehensive legal solution, better serve the client's business needs.

Here's what outside counsel need to know about providing ADR guidance that aligns with the needs of in-house counsel.

1 Shift your perspective from legal counsel to strategic advisor

When an in-house counsel reaches out about a potential dispute, their first thought isn't necessarily, "What's our strongest legal position?" but instead, "How will this impact our business?" This can create a subtle but significant gap between how outside and in-house counsel approach dispute resolution, and bridging it requires a shift in perspective. While ADR is first and foremost a legal mechanism, it's also a strategic lever that can either advance or hinder organizational objectives.

Think of your legal strategy as one piece of a larger business puzzle. While attorneys are trained to spot legal issues and craft solutions, in-house counsel must fit that advice into a mosaic of business considerations. A legally "perfect" solution that strains key business relationships or depletes operational resources might ultimately harm the company more than a "good enough" solution that preserves business continuity.

For in-house counsel, every dispute resolution decision cascades through the organization, affecting operations, relationships, resources and strategic positioning. When they seek outside counsel's guidance on ADR, they're not just looking for legal advice — they're looking for a strategic partnership that helps them:

- Navigate complex business relationships while resolving disputes
- Allocate limited resources effectively across competing priorities
- Maintain operational continuity during conflict resolution
- Preserve strategic opportunities even in adversarial situations
- Balance short-term resolution with long-term business objectives

Effective strategic advisors develop fluency in their clients' business contexts, which means understanding:

- **Industry dynamics**: This can affect how companies approach disputes. A conflict resolution strategy that works in a highly consolidated industry might be inappropriate in a fragmented market with numerous potential business partners.

  Stay on top of industry dynamics by reading your client's annual reports and strategic announcements and following industry news and trends.

- **Operational realities**: Every dispute resolution process demands internal resources. A company with a sophisticated legal department might handle certain ADR processes internally, while another might need more extensive outside support. Understanding your client's operational capabilities helps you recommend the right approach.

  Understand your client's operations by having regular discussions with key personnel about processes and constraints, conducting site visits and reviewing internal reports and performance metrics.

- **Strategic priorities**: Most companies have complex — and sometimes competing — strategic initiatives. A dispute resolution strategy that seems logical in isolation might conflict with broader business objectives. For instance, a company focusing on market expansion might prefer mediation approaches that preserve potential business relationships, even if arbitration offers a stronger legal remedy.

  Align strategies with your client's strategic goals by participating in strategic planning sessions, reviewing corporate mission statements and strategic plans, and having regular check-ins with leadership.

When advising on dispute resolution options, consider the following questions to frame your recommendations in business terms:

- How would different resolution approaches affect ongoing business operations?
- What resources (financial and human) can the company realistically dedicate to this dispute?
- How might various ADR options impact similar business relationships?
- What precedent would this resolution set for future business dealings?
- How does this dispute fit into the company's broader strategic initiatives?

2 Weigh the pros and cons of ADR vs. litigation

When advising in-house counsel on ADR options, translate the advantages and disadvantages into meaningful business implications to provide more nuanced, valuable guidance. Here are some key considerations.

Take cost analysis beyond the bottom line

While ADR is typically less expensive than litigation due to limited discovery, the true cost analysis is more complex, as financial resources aren't just about legal fees.

When discussing costs with in-house counsel, explore how different ADR approaches affect operational expenses. For instance, a seemingly cost-effective arbitration might actually prove more expensive when accounting for the time that employees will need to spend preparing for and participating in proceedings. Help your in-house colleagues evaluate those hidden costs by considering the full spectrum of resource allocation.

Assess the impact of timing

A faster resolution through ADR might align perfectly with a company's strategic initiatives — or create unwanted pressure on other business priorities. Your role is to help in-house counsel evaluate speed in the context of their broader business timeline.

Work with in-house counsel to understand how dispute resolution timing would affect:

- Product launch schedules
- Fiscal year planning
- Market entry strategies
- Investor relations
- Resource allocation cycles

Consider the value of subject matter expertise

Encourage in-house counsel to consider how subject matter expertise in dispute resolution can enhance the efficiency and effectiveness of the process. Selecting mediators or arbitrators with specific skills and technical knowledge can reduce the time and resources needed to explain complex industry details, leading to more informed decision-making and — potentially — more satisfactory outcomes.

For example, an arbitrator with deep industry knowledge might not just resolve the immediate dispute more efficiently — they might shape the resolution in ways that preserve important relationships due to their industry-specific sensitivity.

Factor in the importance of privacy

Confidentiality in ADR isn't merely about keeping disputes private and out of the news — it's about protecting business assets. Help in-house counsel evaluate privacy benefits in terms of:

- Trade secret protection
- Stock price stability
- Brand reputation management
- Competitive advantage preservation
- Stakeholder confidence

Seek opportunities to be creative

While litigation is naturally adversarial, ADR doesn't have to result in a win-lose situation. The flexibility of many ADR remedies provides opportunities to be more flexible with business-oriented solutions.

Walk in-house counsel through how creative remedies might:

- Open up new business opportunities.
- Restructure beneficial relationships.
- Create strategic partnerships.
- Address underlying business issues beyond the immediate dispute.

3 Review contract provisions carefully

Mediation provisions

When drafting contracts, include **clear mediation clauses** specifying the process, rules and any exclusions. Be sure to define who will bear the mediation costs and consider offering to contribute a portion to demonstrate goodwill and encourage the other party's active participation. The agreement can also outline the qualifications required for the mediator to ensure they possess the necessary expertise.

Arbitration provisions

Carefully drafted arbitration clauses are more likely to be found enforceable and serve your clients' needs. Key considerations include:

- **The scope of arbitration**: Decide whether the clause should allow or prohibit civil litigation. While arbitration clauses can be broad, they should be carefully tailored to avoid unintended exclusions.
- **Explore alternative formats**: One benefit of arbitration proceedings is their customizable mechanisms. In a **"baseball" arbitration**, for example, each party submits a proposed final award, and the arbitrator selects one without modification. This approach can expedite dispute resolution by limiting the arbitrator's discretion. Likewise, arbitration clauses can also allow an advisory jury panel, allowing the parties to still try their cases before a jury without getting tangled in the court system or requiring appellate review.
- **The inclusion or exclusion of certain disputes**: Clearly define which types of disputes are subject to arbitration. Broad language like "arising under or related to" **can be interpreted broadly**, potentially encompassing various claims.
- **Clarity and visibility**: Use large, bold type and require all parties to initial the provision, **especially if their bargaining power is unequal**. Note that arbitration provisions in real estate contracts **must also use specific language**.

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Stand in your client's shoes throughout the ADR process

Effective legal advice stems not from knowing every procedural nuance — though that remains important — but in understanding how to help in-house counsel leverage legal strategies for business success.

For outside counsel, that means obtaining a deep understanding of your client's business and strategy to help them leverage ADR when appropriate. By considering factors such as industry dynamics, operational realities and strategic priorities, outside counsel can guide in-house counsel in selecting methods that not only resolve disputes efficiently but also advance the organization's broader goals.

Add CEB and its checklists for resolving disputes to your strategic toolbox by scheduling a demo — and check out these frequently asked questions.

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