International Institute for
CONFLICT PREVENTION & RESOLUTION

Steering from Your Chair: Why In-House Counsel are Uniquely Positioned to Drive ADR Solutions—and How to Do So Effectively

David H. Burt

As originally appeared in *InsideCounsel*

BYLINED ARTICLE | JULY 2015

By David Burt, CPR

Inside counsel's strongest contributions to dispute resolution flow directly from being positioned as the intermediary between inside business objectives and outside legal forces.

To exploit being thus situated to greatest effect, recognize and take advantage of your strongest tools:

You are Known and Trusted

You are a business-oriented lawyer with industry knowledge and open access to a business unit that knows and trusts you. You understand the enterprise – not just the importance of the current challenge, but also your firm's history and long-term objectives as it constantly reshapes itself. Because you are a leveraged resource, your clients know that they can freely call you without additional expense, a concern that can inhibit contact with the private law firm. They know that you are "bilingual," and can be counted on to translate business talk to legalese and back. In an unspoken way, they may even expect you diplomatically to buffer outside disruptions to company politics.

"You understand the enterprise – not just the importance of the current challenge, but also your firm's history and long-term objectives as it constantly reshapes itself."

You Keep Up the Drumbeat of Serving Commercial Goals

Achieving business objectives often may be different from merely "winning the case." As you advocate for ADR as a business risk mitigation engine, for the sake of all, you should begin every client contact by revisiting this question: "What are our business goals in this matter?" You can then forearm your outside

counsel with the wisdom necessary to achieve an acceptable outcome: an understanding of the client's true underlying interests. Serving those interests optimally (despite the pressures of fact and law) is victory, even if the result of the legal maneuvering superficially may resemble a controlled crash landing.

"Achieving business objectives often may be different from merely "winning the case." As you advocate for ADR as a business risk mitigation engine, for the sake of all, you should begin every client contact by revisiting this question: "What are our business goals in this matter?"

You Bring Critical Institutional Knowledge

Savvy outside counsel recognize that your access to the company and experience resolving prior controversies for the firm can increase their own effectiveness. While outside counsel should be granted early and thorough direct interchange with the business team, as well as continuing visits, successful collaboration between the two of you depends on your superior power to fetch concepts, data and true goals from inside.

Your 'Cred' Allows You to Venture Where Others Might Fear to Tread

You alone dare to take certain actions which will further adjustment of a business controversy. It may be necessary to "sell" ADR to executives who had an earlier bad experience and require convincing that a good compromise leaves both sides equally unhappy. If a manager has been instructed to make an unreachable goal, you can furnish cover by explaining the legally-driven risks of the best alternative to a negotiated or arbitrated outcome through public adjudication. That might require an artfully timed request to the outside lawyer for an updated case assessment, which will aid your immediate client in communication with senior management, legitimately portrayed as the legal team's consensus. Conversely, your urgings to stand strong can hearten an overly conservative and wavering client who needs your experienced perspective to predict how complex facts likely will emerge from the legal mill to an acceptable outcome.

Think of Yourself as the Secret Weapon

Direct action by inside counsel can emphasize the importance of a point or principle. If you speak up – or collar your opposite counterpart privately during a mediation conference that has bogged down despite your law firm's best

conduct, the counterparty will take note of that point in bold relief. The mediator will thank you for a willingness to move, a creative idea for value exchange, or a firm and fair explanation of a limit caused by business imperative. Of course, you will have coordinated with your team before moving. Be an energetic voice to the other side when it can count most.

"You alone dare to take certain actions which will further adjustment of a business controversy. It may be necessary to "sell" ADR to executives who had an earlier bad experience and require convincing that a good compromise leaves both sides equally unhappy."

You Can Also Serve as the "Control Tower"

In arbitration, consider being the active expert in a defined subject area, personally handling witnesses and documents. You might be the best person for the job due to long commercial participation. During case development and hearing, it also is valuable to be in a (slightly) detached role, relaying a trained perspective on how the arguments, personalities and tone are going over with the neutrals and opponent.

Put Together the Nuts and Bolts

Before you get the chance to try out the preceding advice, you must lay the foundation of making appropriately tailored dispute resolution practices available to your clients consistently over time, especially assuring that each contract uses a competent clause that will lie ready to assist the parties during future discord.

It often is repeated, but remains true: in the closing moments of many deals, the drafters realize a need to plan for some combination of negotiation, mediation, arbitration and/or litigation, so someone fishes out a good-looking clause from a prior contract and inserts it. It is among the last provisions added. And yet when trouble erupts, what is the first thing researched? That clause. There's something wrong with that. Too often, an ill-suited or even "pathological" clause confuses proceedings or disadvantages even the party that proposed it.

To prevent mishaps from ADR clauses, a legal department does well to promote the idea that just as every business arrangement is different, so should there be a different dispute procedure, fashioned by someone who a) understands the deal underway and b) is expert in ADR. Establishing a departmental expert – a seasoned litigator or commercial lawyer – can be a foundation of promoting the company's ADR culture.

Many easily-located resources from provider organizations can help with clause drafting at the time of contract (or even after disagreement surfaces, if

need be). The best overall advice is to keep the provision as simple as possible, guiding a straight path to resolution using the fewest steps and special features.

When describing the panoply of ADR options, or predicting the likely course of an impending proceeding to either executives or in-house colleagues, try to build from the most basic concepts. A manager who has been through litigation before may think she knows how arbitration will go, but don't allow anyone to be surprised by things you take for granted, such as the lack of appeal from arbitration or the ability to instruct a mediator to keep a secret. Your care will enhance connection and trust. As an in-house practitioner, my consistent experience was that never was another professional insulted by a return to elemental grounding; they were grateful.

—By David H. Burt, International Institute for Conflict Prevention & Resolution Inc.

David H. Burt

Executive Consultant
dburt@cpradr.org

David H. Burt recently retired as Corporate Counsel for DuPont, where he was responsible for commercial litigation, international arbitration and leadership of the team advising DuPont's 200+ lawyers in planning and executing alternative conflict resolution worldwide. He has arbitrated in the US, Asia and Europe and has achieved many commercial dispute settlements through mediation. Past co-chair of the Executive Advisory Committee to the International Institute for Conflict Prevention and Resolution (CPR), he now serves as Executive Consultant to CPR and others.

ABOUT CPR

CPR is the only independent nonprofit organization whose mission is to help global business and their lawyers resolve commercial disputes more cost effectively and efficiently. For over 30 years, the legal community has trusted CPR to deliver superior arbitrators and mediators and innovative solutions to business conflict.

CPR

575 Lexington Avenue, 21st Floor
New York, New York 10022
Phone: +1.212.949.6490
Fax: +1.212.949.8859
www.cpradr.org