

# 'I'll See You in Court?' There's a Better Way for Businesses

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When we think about legal help, we often picture a judge, a courtroom full of people, and enormous media involvement if the companies are well-known. Navigating court procedures is a time-intensive process. With over 40 million lawsuits filed annually in the United States, each case contributes to a vast collection of legal disputes. The next most significant concern is the financial aspect. Attorney fees are also not trivial. However, even for those who spend a fortune on the litigation, the outcome is unpredictable.

It's imperative that justice prevails. To survive in the business world, entrepreneurs and small business owners should calculate their risk and return on every step forward. The same applies when they face a dispute. Even if they've gone to court in the past to resolve an issue, they should focus on the implications for the future. What if they could secure justice and safeguard their business financially, without dueling it out in court to uphold their business affairs and reputation?

One important solution to know about is "Alternative Dispute Resolutions (ADR)." The American Bar Association defines ADR as a method for resolving disputes outside of litigation, allowing disputing parties to voluntarily reach a compromise without the involvement of a judge or other authorities. This approach is less formal and more flexible than traditional court procedures, and it is typically less costly due to reduced fees and the absence of lengthy court delays.

The New York State Unified Court System identifies neutral evaluation, mediation, and arbitration as common ADR methods. In this article, I'll provide an overview of ADR by: explaining how these three types of ADR methods can pre-empt litigation; discussing online dispute resolution; and providing tips on finding qualified mediators or arbitrators, including the American Arbitration Association®, the world's largest provider of ADR services. But first, let's cover the topic of

negotiation, which is a core aspect of ADR.

## Negotiation within ADR: Do This First

Within ADR, negotiation means that the parties in a dispute engage directly with each other to reach a mutually acceptable resolution. The parties can either negotiate on their own or seek an attorney's expertise. Even if a business is involved in an active court case, negotiations are still possible during the trial, after the trial concludes, and before an appeal is initiated.

Most entrepreneurs, while experts in their fields, are often legal amateurs, making negotiations particularly challenging. To navigate these waters without exacerbating issues or suffering losses, they should consider a few key strategies. First, the parties should seek preliminary legal advice to gain a foundational understanding of their rights and obligations. (In the US, [Small Business Development Centers](https://www.sba.gov/local-assistance/resource-partners/small-business-development-centers-sbdc) (<https://www.sba.gov/local-assistance/resource-partners/small-business-development-centers-sbdc>) can help entrepreneurs find basic legal advice.) Second, entering negotiations without clear objectives is like groping in the dark, so setting clear goals, objectives and priorities before the negotiation is crucial. Lastly, adopting a collaborative rather than confrontational approach can lead to more constructive discussions and mutually beneficial outcomes, even when legal complexities loom large.

## Option 1: Neutral Evaluation

This process is also called "Early Neutral Evaluation." ENE involves a neutral expert assessing the strengths and weaknesses of each party's position in a dispute. This "evaluator" delivers an unbiased assessment of the potential outcomes of the case, aiming to facilitate settlement discussions. The evaluator's insights are non-binding and typically consultative, offering guidance and suggestions. The evaluator helps the parties to understand their legal positions more clearly and can



guide them in negotiating a resolution before proceeding further into litigation. While the evaluator's expertise focuses on the subject matter, they are not necessarily experts in strategic negotiations, a skill typically possessed by mediators.

### Option 2: Mediation

In mediation, a third party, called a "mediator," collaborates with the parties and their lawyers, facilitating a process that allows both sides to achieve the best solution on their terms. If the parties struggle to find a solution, the mediator will propose a resolution that is not legally binding. If parties are unsatisfied with the solution, they can opt for litigation.

Mediation is particularly beneficial for parties in long-term relationships. For example, many startups face co-founder disputes, which can kill a company before it becomes established. The mediator aims to diminish anger and assist them in restoring their former relationship. Seeking help from a mediator can save the relationship and company because the mediator separates the problem, parties, and their interests tangled in the dispute to create a win-win solution. However, in case business negotiations and mediation fail, the next step will be proceeding to arbitration. Litigation may serve as the subsequent course of action.

### Option 3: Arbitration

In arbitration, disputing parties agree to resolve their dispute through involving a neutral third party, called an arbitrator. In contrast to mediation, an arbitrator evaluates the arguments and evidence presented by each side and then renders a decision at a formal hearing. Unlike mediators, arbitrators are often experts in a specific field or have a legal background. Therefore, they have the authority to issue legally binding decisions, called "awards."

In binding arbitration, the parties forgo their right to a court trial, agreeing to treat the arbitrator's decision as conclusive. Typically, there's no avenue to appeal the award given by the arbitrator. On the other hand, non-binding arbitration allows the parties the option to pursue a court trial if they find the arbitrator's decision unacceptable.

In arbitration, the disputing parties have the flexibility to choose the arbitrator and schedule hearings with the arbitrator at a convenient time. However, disputing parties don't get that luxury in court proceedings.

Arbitration is much easier than following court calendars and keeping up with the number of necessary court appearances.

Arbitration hearings are held privately, meaning they are confidential and inaccessible to the public, unlike court hearings. However, parties should be aware that this lack of transparency could lead to bias in the process. It can be problematic because if the decision is binding and unfavorable, there are limited opportunities to correct it, as courts rarely review arbitration decisions.

"Arbitration clauses" in contracts are crucial to understand. These clauses allow parties to agree to settle disputes through arbitration instead of the court system. As a business owner, incorporating arbitration clauses into your employment contracts is a strategic consideration if you prefer to address employment disputes through arbitration.

The Federal Arbitration Act (FAA) validates arbitration agreements while providing a framework for the arbitration process. However, businesses can opt to apply a specific state's arbitration law by agreement. Nevertheless, these state laws cannot override the FAA. They are applicable only if they do not contradict or impede the principles and enforceability of arbitration established by the FAA. For information about state-specific arbitration laws, the most accessible resources are state legislature websites and state court websites.

If a business engages in cross-border trade, owners can turn to institutions like the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the United Nations Commission on International Trade Law (UNCITRAL) to understand the applicable arbitration rules. These organizations provide established frameworks for resolving international disputes through arbitration, ensuring a clear and consistent process for businesses worldwide.

### How to Find a Mediator or Arbitrator

Several respected programs confer the titles of qualified Mediator or Arbitrator. Among them, the Association for Conflict Resolution (ACR) and the National Association of Certified Mediators (NACM) are prominent organizations that certify skilled mediators. On the other hand, the Chartered Institute of Arbitrators (CIArb) offers a globally recognized certification for arbitrators. Additionally, the International Mediation Institute (IMI) Certification indicates that a professional has achieved

international standards in mediation expertise. Furthermore, court-approved mediators and arbitrators are also available to assist the business owners in resolving their disputes.

American Arbitration Association® (AAA®) is a non-profit entity recognized globally as the leading provider of arbitration, mediation, and a diverse array of ADR services. In 2022, they administered 450,000 domestic cases and 10,273 business-to-business (B2B) cases (Figure 01), highlighting the popularity of arbitration as a dispute resolution method.

AAA® has released a list of 10 essential insights for CEOs and CFOs on how to use the arbitration process to achieve their goals. These include:

- Pay attention to your arbitration clause.
- Select attorneys experienced in arbitration.
- Request and enforce budgets.
- Choose the right arbitrator.
- Limit discovery to what is essential for the arbitrator.
- Participate in the preliminary hearing.
- Limit [motion practice](https://www.irmi.com/term/insurance-definitions/motion-practice#:~:text=Motion%20practice%20is%20habitual%20application,reach%20agreement%20between%20the%20parties.) (<https://www.irmi.com/term/insurance-definitions/motion-practice#:~:text=Motion%20practice%20is%20habitual%20application,reach%20agreement%20between%20the%20parties.>) .
- Remain open to settlement.
- Trust the expertise of the arbitrator.
- Present the case efficiently and professionally.

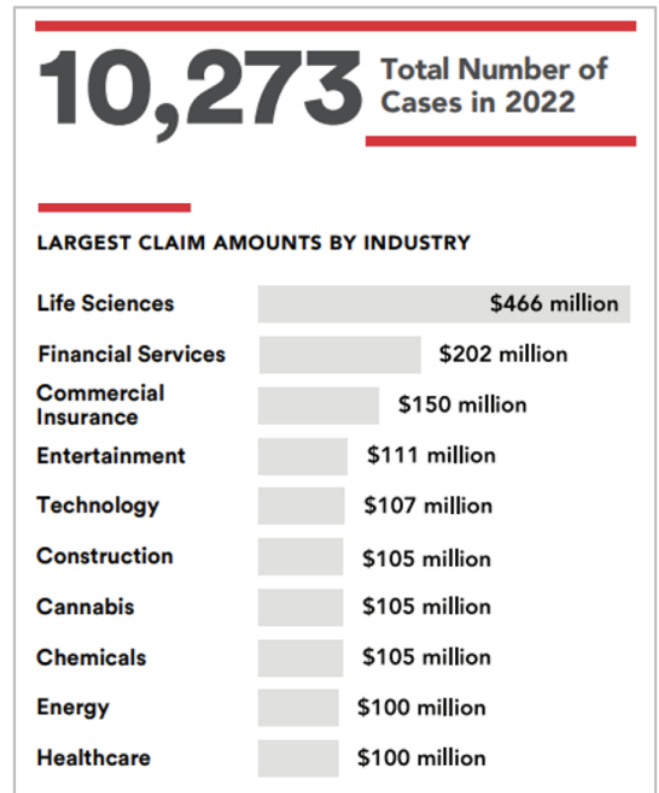


Figure 01: AAA® B2B cases in 2022 (Source: Website, AAA-ICDR)

## ONLINE DISPUTE RESOLUTION

If your business operates in the e-commerce sector, it's crucial to be informed about Online Dispute Resolution (ODR). E-commerce inherently involves buyers, sellers, and trades crossing borders involving different legal jurisdictions, including international ones. In this context, the growth of Internet services and the increase in complaints have elevated ODR to a key role in resolving these cross-border issues. ODR offers a practical method without the challenges of dealing with multiple legal jurisdictions physically.

Nowadays, ODR is accessible and beneficial for many sectors beyond e-commerce. ODR is considered the next generation of ADR. ODR builds on the principles of ADR by incorporating digital technologies to make dispute resolution even more accessible and efficient in handling conflicts without the need for physical presence or travel. It offers an online platform for negotiation, mediation, and arbitration, dedicated to delivering justice in the same way as a physical court. By 2024, many jurisdictions had incorporated ODR into their court systems. American Bar Association stated

that at the end of 2019, there were 66 active sites of court annexed ODR in 12 states (Figure 02).

knowledge sooner rather than later.

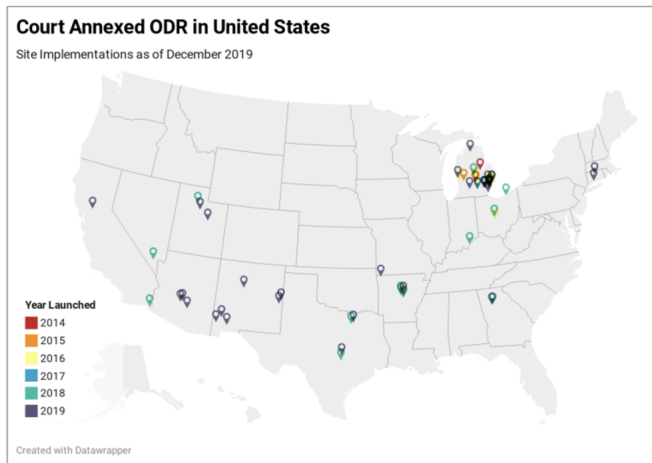


Figure 02: Nationwide Map of ODR Sites (Source: Website, American Bar Association)

In 2020, Michigan became the first state to make ODR available in all 83 counties, fulfilling its initiatives by implementing the MI-Resolve ODR tool, which is now accessible to every citizen of Michigan. These efforts aimed to close the justice gap by enhancing access to justice and streamlining the dispute resolution process across the country.

## CONCLUSIONS

"I'll see you in court" should be a last resort for businesses to save time, resources, and relationships. Alternative Dispute Resolution (ADR), encompassing early neutral evaluation, mediation, and arbitration, offers more control over the outcome in a confidential approach compared to traditional litigation. Startup businesses should proactively consider ADR as a primary strategy, ensuring they are prepared to handle disputes efficiently and effectively preserving their business.

Furthermore, business owners should be mindful that legal and commercial disputes can vary by their complexities, nature, size, and scope. Therefore, ADR may only be suitable for some situations. While this article increases entrepreneurs' legal literacy and educates them on strategies for survival and success in the business world, it does not delve into many preventive, proactive, and reactive measures that can be taken for a specific business dispute.

Remember, the start of every business is a fresh opportunity for a lawsuit, making it wise to acquire legal