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POTENTIAL OF ADR FOR ENHANCING COMMUNICATIONS PRACTICES AND CLIENTS' BUSINESS OBJECTIVES

I. USEFULNESS OF ADR IN COMMUNICATIONS ISSUES

A. Big Picture

- Many disputes between communications companies amenable to ADR. Important to determine when ADR (and mediation specifically) can add value
- Any type of matter that can be settled, can be mediated. Counsel settle many cases directly with opposing counsel without the assistance of a mediator, settlement facilitator, or other third party neutral, although in appropriate circumstances a third party neutral can be very helpful to avoid problems and reach a better settlement
- Simply settling a case doesn't mean that additional value for one or more parties wasn't missed in the process, or that the process wasn't more stressful on the parties (and counsel) than it needed to be
- ADR can be used for much more than just settling litigation

B. Helpfulness of ADR in Range of Communications Matters

- Private commercial conflicts (such as between carriers and with business customers)
- Retransmission consent
- Spectrum reallocation
- Interconnection agreements
- Billing disputes
- Policy issues

C. Dispute Resolution Alternatives

- Trend toward greater use of ADR in its various forms
    - Parties are incorporating ADR provisions into contracts and voluntarily turning to dispute resolution processes

  - Counsel who have experienced quality ADR processes see them as better ways to resolve clients' problems and deepen relationships with clients
  - FCC pushing the ADR model – Nextel Reconfiguration, DirectTV retransmission, UNE Remand Interconnection Arrangements
  - Courts frequently encourage or require parties to try mediation before consuming judicial resources at trial
  - Bankruptcy court uses mediation models
- No one is eager to roll the dice with a randomly chosen judge or jury; ADR gives parties more control over the outcome (as in mediation) or at least the decision-maker (as in arbitration)
- ADR generally is private and confidential, so parties have more control over their public images and particular disputes can often be resolved without setting precedent or affecting other matters – may not be the case with interconnection disputes
- Mediation and arbitration, discussed below, are the primary ADR processes
- Many other ADR variations are possible, including:
  - Early Neutral Evaluation – helps the parties to be more realistic about their prospects to get an informed view on the merits of the case
  - Arb-Med – arbitrate for a set time period, seal decision, and then mediate, opening the arbitration decision only if mediation is unsuccessful
  - Med-Arb – mediate first, with arbitration following if mediation was not fully successful; however, can't use the mediator as arbitrator or parties may hold back in mediation discussions to keep from impacting future arbitration decision
  - Other important variations are facilitation, mini-trials and fact-finding, among others (many of which differ more in name than concept)
- Mediation, arbitration and other ADR processes are quite different from one another – the main thing in common is that they are not litigation

II. PROS AND CONS OF MEDIATION

A. Mediation v. Arbitration

- Mediation is a form of ADR in which a neutral facilitator helps the parties reach a voluntary, mutually agreeable resolution of their dispute
  - The mediator is not a decision-maker and does not decide the case, as would a judge or arbitrator

  - The mediator helps the parties focus on their business interests and concerns and see where interests converge and where the parties can find common ground; many mediator will evaluate the merits of the case when helpful

- Mediation is more versatile and creative than arbitration, and permits the parties to control the outcome, but does not ensure there will be a final resolution

- Mediation is typically faster than arbitration; mediations are often convened quickly and may be resolved within a day or two, although complex communications cases may take longer

- Mediation legal fees and expenses are typically far less than in arbitration, and the distraction of business executives is reduced

- Arbitration relies on a neutral third party – essentially a private judge – to hear evidence from the parties and render a decision that can be binding (if the parties have agreed that it will be)

- Arbitration ensures that there will be some outcome, but the parties lose control over the outcome, just as in litigation

- Arbitration and mediation are not mutually exclusive – parties can mediate first and arbitrate only if the mediation is unsuccessful (in whole or part)

B. <u>Benefits of Mediation</u>

- Mediation's best known benefits– savings of time and money – are desirable, but often the most significant benefit can come from achieving better outcomes by addressing underlying interests

- Control of outcome by parties – mediation does not force an outcome that is unacceptable to the parties, so there is no fear of a "bad" decision by a third party judge or arbitrator

- Creative results – mediation is more flexible than other alternatives and can reach novel solutions to satisfy interests of all parties

- Restores or preserves relationships – mediation can help parties resolve conflicts in a way that restores positive business relationships or permits them to continue

- Saves time and money – mediation is much quicker and far less expensive than litigation, without lengthy discovery, motions practice, extensive briefing, trial or appeals.

- Other options remain – if a satisfactory outcome cannot be achieved for all parties through mediation, they can arbitrate or pursue other remedies

- High success rate – commercial cases have a high rate of settlement through mediation, and even narrowing the issues in dispute can be a significant benefit

C. Disadvantages of Mediation

- Loss of image and position – party may be viewed as weak and willing to compromise if suggest negotiation or mediation
- Loss of information – party or counsel may reveal information or perspective on case that will be detrimental in future proceedings
- Loss of focus – possible distraction from trial preparation

III. NUTS AND BOLTS OF TIMING AND MEDIATION PROCESSES

- Parties influence process – parties have significant input into the form of mediation, ranging from choice of mediator and style of mediation to details such as when and where meetings are held and whether to proceed by teleconferences
- Choice of mediator – success of mediation often depends on the skill and effort of the mediator; key factors in selecting a mediator include:
    - Expertise in mediation process, substantive knowledge and experience are critical
    - Style of mediation is important; some mediators prefer a facilitative style (which emphasizes helping the parties resolve the dispute based on the parties' own determination of what is reasonable and proper) while other mediators prefer an evaluative style (which involves the mediator providing an evaluation of the case from the mediator's perspective); "transformative" and other mediation styles also exist
    - Use of caucuses is significant; some mediators rely very heavily on private caucuses and shuttle back and forth between parties who do not talk directly to one another, while other mediators encourage the parties to talk directly to one another as much as possible, with only occasional caucuses
    - Neutrality is essential, although the mediator does not act as decision-maker
    - Personality, temperament, flexibility and the parties' ease in working with the mediator should also be considered
- Timing of mediation – considerations:
    - Mediation should be considered at various points – in litigation, consider mediation before filing the complaint, after some discovery, prior to summary judgment motions, after summary judgment decision, prior to trial, and after verdict but before appeal
    - Mediating when there is time to consider how to satisfy the underlying goals and interests of the parties is superior to hasty resolution on the courthouse steps
    - Early mediation that does not reach settlement may clarify issues that need more attention in discovery or lay the groundwork for future resolution

- Binding outcomes – achieved only if the parties reach an agreement that is satisfactory to them
- Written agreements – desirable to document and sign at least an outline of the agreement before the parties leave the mediation; counsel may later finalize the language and complete documentation of the settlement

IV. SUGGESTIONS FOR EFFECTIVE ADR ADVOCACY – TIPS FOR MEDIATION

- Importance of preparation – mediation can be more free form than arbitration and requires broader preparation to handle unexpected issues
- Focus on interests, rather than positions
  - Clearly identify your client's interests and goals
  - Realistically analyze your client's BATNA (best alternative to a negotiated agreement) and WATNA (worst alternative)
  - Think through opposing party's needs and interests
  - Listen actively to opposing side; be sure to ask yourself "why" and "why not"
  - Don't assume that the case and the parties' interests are just about money, even when presented that way
- Prepare clients
  - Explain process and role of all participants, especially involvement of clients, who are likely to have a much larger role than in arbitration or litigation
  - Be conscious of requirement of settlement authority
  - Carefully determine best individuals from client to be at the mediation; often will be those most involved, but not always
  - Role play so client can explain situation and interests in compelling way while avoid defensiveness
  - Take the high road; avoid sinking to level of opposing parties when matters become contentious
- Look for mutual gain whenever possible in order to avoid zero-sum outcomes
- Focus on problem-solving, putting the dispute behind the parties and looking to the future
- Always look for and note any areas of agreement between parties
- Negotiate at optimal points; don't wait for settlement on courthouse steps

- Share facts and information about your case and client's goals and concerns, keeping in mind that mediation may not succeed

- Counsel must be careful not to get in the way; mediation is rare opportunity for clients to communicate directly with opposing parties

- Treat opposing counsel and parties with respect; make it easy for them to agree to your proposals

- Use mediator:

  - To ask questions of the other side that cannot be asked directly

  - To convey information and proposals to opposing side that would be treated with suspicious or devalued if heard directly; suggest how mediator might articulate proposals to make them most appealing

- Think through what is important for settlement to be comprehensive; bring draft settlement agreement on disk to mediation

- Be ready to litigate, if necessary