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Promoting Best Practices In Arbitration: The Case For Neutrality In Tripartite Arbitration Panels

The Editor interviews Lee A. Rosengard, Partner, Stradley Ronon Stevens & Young, LLP.

Editor: You recently authored a chapter in the Aspatore/Thomson/Reuters book, *The Role of Ethics in ADR*, entitled “Promoting and Preserving Neutrality and Impartiality in ADR.” Please tell our readers about your professional background and what led to your participation in this book.

Rosengard: I am a commercial litigator with 35 years of experience in the field, the last 15 of which have also been devoted to developing an ADR practice. I serve on the AAA Commercial Panel and Large Complex Case Panel and am a CPR Institute Distinguished Neutral. I am the former chair of Stradley Ronon’s Litigation Department and am currently co-chair of the ADR Practice Group. I chaired the Philadelphia Bar Association Alternative Dispute Resolution Committee in 2006. Since 2004 I have been a Lecturer in Law of the faculty of Villanova University School of Law, where I teach Interviewing and Counseling.

Both as a party representative in arbitrations and as a neutral, I have been concerned about the ambiguity over the issue of impartiality of party-designated arbitrators. It’s important to know the parties’ expectations, and the arbitrators play a role in this, as well. I wanted to write on the topic to explore best practices for arbitrators and to continue a dialogue in the field over whether partisanship in arbitration panels is ever a good idea.

Editor: You identify a natural conflict within the neutral selection process, that is, the very process of selection impairs neutrality. Can you please dis-



Lee A. Rosengard

cuss this conundrum?

Rosengard: If one begins with the premise that a neutral should be just that – neutral – then the selection process should breed neutrality. But it doesn’t. A little investigation into an arbitrator’s background and an examination of his or her reputation and past practice can yield a treasure trove of information. How has he or she ruled in similar cases in the past? Is or was he or she a plaintiff’s lawyer or a defendant’s lawyer in practice? And there is also the subtle tendency of the selected arbitrator to, at least subconsciously, affiliate with the selecting party. If an arbitrator is going to be truly neutral, he or she needs to take affirmative steps to overcome this.

Editor: What guidance is available for arbitrators and/or mediators on ethical issues and the defensible preservation of neutrality?

Rosengard: For arbitrators, guidance on neutrality is found in the Code of Ethics for Arbitrators in Commercial Disputes, originally prepared in 1977 by a joint committee of the American Arbitration Association and a special committee of the ABA. In 2003, an ABA task force and a special committee of the AAA revised it. Neutrality is also a subject of the Uniform Arbitration Act (1955) (UAA), in effect in 24 states, and the Revised Uniform Arbitration Act (2000) (RUAA), in effect in 14 states and the District of Columbia. For mediators, there are the Model Standards of Conduct for Mediators, initially prepared in 1994 by the AAA, the ABA’s Section on Dispute Resolution and the Association for Conflict Resolution and revised in 2005.

Editor: What is the usual selection process for matters arising from arbitration agreements that provide for three arbitrators, and what ethical considerations apply in these three-arbitrator situations?

Rosengard: Typically in a three-arbitrator panel, each party selects one arbitrator and the two party-designated arbitrators select the third. But the question one must ask is whether the party-designated arbitrators are going to serve as partisan or neutral decision makers. The Code of Ethics for Arbitrators recognizes both models. However, it requires arbitrators to ascertain at the earliest possible time whether the party-appointed arbitrators are going to be neutral or predisposed toward the party who appointed them. See Code of Ethics, Canon IX.C and Canon X.

Editor: But aren’t parties allowed to choose arbitrators who are partisan?

Please email the interviewee at lrosengard@stradley.com with questions about this interview.

Rosengard: Absent a dispute resolution agreement that provides otherwise, parties remain free to compose the arbitral tribunal by appointing neutral or non-neutral arbitrators, as long as equal representation is given to each side of the dispute. Courts have been willing to accept that party-appointed arbitrators are not necessarily impartial. “The parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen.” *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983), *cert. denied* 464 U.S. 1009 (1983), *mandate amended* 728 F.2d 943 (7th Cir. 1984) (quoting *American Almond Products Co. v. Consolidated Pecan Sales Co.*, 144 F.2d 448, 451 (2d Cir 1944) (L. Hand, J.)). But from my perspective, partiality is undesirable.

Editor: What about the evident partiality standard?

Rosengard: A court cannot set aside an award under § 10(a)(2) of the Federal Arbitration Act where a party-appointed arbitrator on a tripartite panel exhibited an appearance of partiality, because “in the main, party-appointed arbitrators are *supposed* to be advocates.” *Sphere Drake Ins. Ltd. C. All American Life Ins. Co.*, 307 F.3d 617, 620 (7th Cir. 2002), *cert. denied* 538 U.S. 961 (2003). But where an arbitrator exhibits evident partiality – requiring something between mere appearance of bias and some evidence of actual bias, or at least sufficient evidence of circumstantial facts that would give rise to a question of bias – courts will vacate an arbitration award. *See, e.g., Merit Ins. Co. v. Leatherby* (holding that although the neutral arbitrator’s failure to disclose the fact that one of the parties to the arbitration was his former employer violated governing legal and ethical standards for arbitrators, it did not constitute “evident partiality.”)

Editor: What are best practices regarding party-appointed arbitrator neutrality?

Rosengard: The main premise of my chapter in *The Role of Ethics in ADR* is that neutrality on the part of all three arbitrators in a tripartite panel is preferable to partisanship on the part of two. The integrity of the party-designated arbitrators is heightened by a decision that they will serve without preference for the posi-

tions being advanced by the side that selected them. If all three arbitrators are truly neutral, they can rely on the fact that in discussions among the panel members, no arbitrator is advancing the position of one party over the other simply because the party whose position is being advanced is the one that appointed that arbitrator.

The drive toward neutrality requires that the three arbitrators take special steps to insure that once impaneled, they exhibit no favoritism toward their designating party and act with impartiality in discharging their office. A fully neutral panel can be more open in discussing the parties’ presentations. Their decision making is improved by the free and unbiased review of the evidence. Assuming agreement of all parties that the three arbitrators should orally affirm to each other that they will so act. Further, the third arbitrator should be designated the chair, suggesting an administrative capacity, rather than the umpire – a value-laden term suggesting sole decision-making authority as between two opposing members of the panel.

Editor: What kinds of relationships can trigger the appearance of impropriety? Is prior casual social contact with a mediation participant enough to call the mediator’s impartiality into question?

Rosengard: The key is full disclosure of prior relationships. It is up to the proposed arbitrator to disclose even the most casual of relationships, whether social, professional or political. Only then can adversaries in a dispute have equal access to information about the potential candidate and make their own determinations as to whether they should object. Under § 23(a)(2) of the RUAA, an arbitrator appointed as a neutral who does not disclose a known, direct and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party is presumed to act with evident partiality.

Editor: If a party initiates litigation, seeking to vacate an award because of a party-appointed arbitrator’s alleged bias, does that undercut one of arbitration’s biggest benefits – litigation time and cost savings?

Rosengard: It is the hallmark of binding

arbitrations that they be final and not subject to being set aside, save for the very few reasons enumerated in the Federal Arbitration Act, such as evident partiality or corruption in the arbitrators. The selling point of arbitration is that it is supposed to be faster, more cost efficient, and more private than litigation in court. All of these benefits are lost if the unsuccessful party seeks post-award judicial relief on the grounds that one of the arbitrators was biased. The arbitrators have a duty to the parties to make full disclosures at the outset to prevent their award from being attacked on the grounds of evident partiality.

Editor: Does the expectation that party-appointed arbitrators will behave as advocates create a disincentive for parties to appoint unbiased arbitrators?

Rosengard: The answer is that it’s all about the parties’ agreement on arbitrator neutrality. The parties should discuss this facet of the arbitration before they begin the arbitrator selection process. If the parties want the panel to be entirely neutral, they should confirm this and should so advise their designees during the selection process. It is also the job of the arbitrators to confirm to their designating party and to each other that they will be neutral.

Editor: Is *ex parte* communication between party-appointed arbitrators and parties common? What kinds of problems can occur if the party has contact with the arbitrator?

Rosengard: In some situations there is *ex parte* communication between a party-appointed arbitrator and his or her designating party up until some future date, such as the date of the filing of pre-hearing memoranda or the start of hearings. Such an agreement severely undercuts the premise of arbitrator neutrality and suggests an arbitrator’s allegiance to his or her designating party. This behavior is highly undesirable, and the participants in an arbitration – the parties, their counsel and the members of the panel – should agree at the outset to prohibit it. *Ex parte* discussions should cease immediately upon the selection of the third arbitrator, at which time the chair should request a pledge of neutrality by all three arbitrators.