STRADLEY RONON

The ADR Advisor℠

Business Disputes / ADR Solutions

WWW.STRADLEY.COM

MARCH 2016

Stradley Ronon Stevens & Young, LLP
2005 Market Street
Suite 2600
Philadelphia, PA 19103-7018
215.564.8000 Telephone
215.564.8120 Facsimile
www.stradley.com
—
Philadelphia
Washington
New York
Chicago

Save the (Mediation) Day

By Karl S. Myers

Imagine a typical civil litigation mediation. The parties try to negotiate a settlement but struggle to bridge the gap. They agree a mediator might be able to help. So the parties propose mediators, and eventually agree on one. They arrange schedules and book conference rooms. Client principals travel from faraway places. The attorneys prepare. The mediation day arrives, and the lawyers, parties and mediator spend a long day and try to forge a compromise. In the end, the parties will have invested significant money, time and effort.

But now imagine that when the parties inevitably become inflexible during the mediation session, the mediator prematurely signals an impasse or becomes exasperated too easily. Or imagine the mediator lacks creativity and does not know what to do after simply going back and forth between the parties. Perhaps the mediator does not have the strength to challenge the weaknesses of the parties' legal positions in order to try to alter the settlement dynamics.

continued on page 2

Pennsylvania Supreme Court Rejects Arbitration Agreement That Incorporates Invalid Procedures

By Lee A. Rosengard and Chelsea Biemiller

In a split decision, the Supreme Court of Pennsylvania recently affirmed that parties could be compelled to proceed to trial when their arbitration agreement incorporated invalid procedures.[1] When admitting her mother to the Golden Living Center, a long-term care facility, the plaintiff signed admission papers that included an arbitration provision. Specifically, the plaintiff agreed that, should any disputes arise regarding her mother's care, she would submit them to arbitration conducted under the National Arbitration Forum (NAF) Code of Procedures. Those procedures, however, were void at the time the agreement was signed, as NAF had entered into a consent decree with the attorney general of Minnesota, promising to no longer accept arbitration cases in consumer disputes.

continued on page 3

Save the (Mediation) Day

continued from page 1

What are the parties to do now? One option, of course, is to let the mediation fail, and then undertake an after-the-fact examination of what went wrong in the mediator-vetting process. A better alternative is to accept mediator weaknesses as a fact of life and attempt to save the mediation. The lawyers and parties, recognizing the immediate opportunity, should try to overcome the mediator's weaknesses and continue the mediation session.

In particular, when a mediator evidences a lack of strength, stamina, creativity or some other key ability, one of the parties' lawyers can step into the void and assume the role of adjunct mediator. For example, when the mediator signals an impasse, counsel can take the mediator aside and observe that the mediator is giving up too early and should instead keep at it. Suggesting creative ideas – such as a hypothetical scenario for the mediator to adopt as his or her own strategy (i.e., "Maybe if you were able to get them to do X, I could try to convince my client to do Y.") – often can break through the logjam.

An ideal way to share these approaches is in a side conversation between lawyer and mediator. This setting lends these communications an air of lawyer-as-helper. It also shows the client that his or her lawyer is nimble at mediating and the client's time is well-spent in continuing with the process. Further, it allows counsel to help the mediator resolve a dispute that the parties believed could be settled with the mediator's help.

*For more information, please contact **Karl S. Myers** at 215.564.8193 or kmyers@stradley.com.*

Another approach is engaging in direct discussions between the lawyers, or even direct talks among the parties. If the mediator is rendered ineffective by his or her own actions, counsel can address the situation directly with counterparts and encourage the parties to work together to avert the failure of the mediation. This approach can be particularly helpful in cases with several defendants or plaintiffs, where co-parties with shared interests can directly approach one another without those discussions becoming adversarial.

Participants in a mediation process must be ready if the mediator does not live up to his or her advance billing. Be prepared for creativity, when needed, to prevent mediation failure. Flexibility in role can lead to resolution, or can at least get the mediation back on the path to settlement. That, of course, is the ultimate goal of the mediation process. ■

Alternative Dispute Resolution Practice Group

Lee A. Rosengard, *Chair*	215.564.8032	lrosengard@stradley.com
Jonathan F. Bloom	215.564.8065	jbloom@stradley.com
Kevin R. Casey	610.640.5813	kcasey@stradley.com
Benjamin E. Gordon	215.564.8752	bgordon@stradley.com
Patrick R. Kingsley	215.564.8029	pkingsley@stradley.com
John J. Murphy III	215.564.8019	jmurphy@stradley.com
Karl S. Myers	215.564.8193	kmyers@stradley.com
John A. Nader	202.507.6415	jnader@stradley.com
Bennett G. Picker	215.564.8054	bpicker@stradley.com
Brandon Riley	215.564.8147	briley@stradley.com
Ellen Rosen Rogoff	215.564.8058	erogoff@stradley.com
Steven A. Scolari	610.640.8005	sscolari@stradley.com

Supreme Court Rejects Arbitration

continued from page 1

The plaintiff sued the nursing home, claiming it had caused her mother's death through inadequate care, and the facility moved to compel arbitration. The nursing home argued that the provision reflected an intention to refer disputes to arbitration and did not necessarily *require* the use of NAF procedures. It further argued that the NAF provision could not be integral to the agreement because the plaintiff admitted that she had not read or formed an opinion about it at the time she signed the admission papers.

The Supreme Court affirmed the lower courts' finding that because the agreement called for NAF arbitration, which no longer allowed consumer disputes, the entire arbitration agreement was unenforceable. The court rejected the facility's arguments, holding that the plaintiff's subjective understanding of the agreement was irrelevant, so her failure to read or understand the NAF provision was immaterial. Specifically, the court found that premising the enforceability of a contract term "on the subjective understanding of a far less sophisticated non-drafting party is ill-advised public policy[.] … [A] similarly situated non-drafting party could not use her failure to read as a means of disavowing an otherwise valid arbitration agreement." Because the agreement expressly incorporated the NAF procedures, the court found the provision integral and non-severable.

With two empty seats on the court, a diminished five-justice bench decided the case, two justices voting for affirmance and Chief Justice Saylor concurring in the result. The chief justice wrote separately to note that it was not the courts' role to compensate for the negligence of an entity utilizing a form contract in a consumer setting, which it "knew or should have known could not be enforced on its own terms."

Lee A. Rosengard

Chelsea Biemiller

*For more information, please contact **Lee A. Rosengard** at 215.564.8032 or lrosengard@stradley.com; or **Chelsea Biemiller** at 215.564.8550 or cbiemiller@stradley.com.*

Justice Eakin dissented, concluding that the provision was not integral to the arbitration agreement, as the NAF code still existed, although NAF is no longer in the business of conducting consumer arbitrations. And Justice Baer, also in dissent, expressed concern with the court's finding the entire agreement invalid despite the strong public policy of favoring arbitration.

While the majority opinion in Wert does not represent controlling law because it was decided by a two-judge plurality, the decision should prompt parties to arbitration agreements to carefully review their selected procedures. Parties should draft language that provides an alternative, should the governing procedures selected later be invalidated. As seen in Wert, the failure to do so could result in a later holding that the parties must proceed to trial because a court finds that where the selected rules are no longer effective, the entire arbitration agreement is invalid. ■

---

[1] See Wert v. Manorcare of Carlisle PA, LLC, No. 62 MAP 2014, 2015 WL 6499141 (Pa. Oct. 27, 2015).