
ARIAS 2014 Spring Conference

Ethics Breakout Group Wrapup

Presented by:

Edward P. Krugman

Cahill Gordon & Reindel LLP

CAHILL

Should Gina Have Taken the Appointment at the Outset?

The Facts

- She negotiated Mid-American's LPT with Mega/Giga and stayed at Mid-American for about two years after the transaction closed.
- In that two-year period, she got reports from Mega/Giga, which she recalls as "not detailed," and she's had no substantive contact with Mid-American since she left.
- Her work for Empire, all given to her by her friend Fred Forbush, makes up about 65% of her caseload as an arbitrator.
- This is the biggest case Empire has ever had, and Forbush really wants her for his party arbitrator:

"You're the best, Gina. You really understand this stuff, and you get along with people as well. We win with you."

Should Gina Have Taken the Appointment?

The Discussion

- Most people felt that because she had been at Mid-American for two years after the Mid-American LPT and had been privy to Mega/Giga's thoughts about reinsurance collection strategy, among other things, she should not act as a party-appointed arbitrator against Mega/Giga.
- Some felt, however, that it was not that big a deal – no “strategy” issues peculiar to Mega/Giga seemed implicated in this case, at least at the outset
- A number of people said, “if you have to ask [i.e., by getting the opinion of counsel], then it's a gray area, and you shouldn't sit.”
- Some felt that so long as Empire knew about the issue, and still wanted her, it was OK, because the risk (of later having an award vacated) was Empire's, and the risk was probably low in any event.

The Memorandum from Empire's Counsel

Should Gallant have asked counsel for Empire for the memorandum about whether she could sit?

- She made the request after, and in response to, the challenge by counsel for Mega/Giga.
- Pretty much everyone felt that asking ***counsel for Empire*** was wrong.
 - The advice would not be objective
 - It put Gallant in a position of dependence on Empire – and Empire's counsel
 - It made roles murky — who is the client?
- Most people felt that asking for advice — from a mentor, from another arbitrator, or from personal counsel — was ***not*** a problem; it was ***who*** was asked that was the issue.

Forbush: “You’re the best, Gina. *We win with you.*”

- This is both a party rep issue (should he have said it?) and an arbitrator issue (what should Gina have done when he did?)
- Most felt Forbush’s comment was over the line, but only slightly. Some thought it was just “cheerleading,” but most saw it as asserting that the arbitrator is an advocate whose job is to deliver a win.
- Those who felt it was over the line felt that Gina should respond with something like “Thanks, Fred, but I’m sure you understand that I’m going to have to decide this one, like I did all the others, on the evidence in the case.”
 - Fred would then say, “Of course, Gina,” but . . . is it all a charade?
 - Fred knows how many appointments he’s given her, and he knows she knows, and she’s **not** saying, “Thanks, Fred, but I guess I’d better not take this one; I’m getting too dependent on you.”
- **Question:** Isn’t what Fred said at the outset what is really being by a party or lawyer who repeatedly appoints the same arbitrator, ***even if not a word is said on the subject?***

The Bartley Maneuver

- Mega/Giga's party rep planted a story with Gina's former employer to scare her about her pension and get her to withdraw
- Most people who commented felt the Bartley Maneuver was underhanded and inappropriate, but there does not seem to have been a lot of discussion on the subject.

The Forgetful Witness

- Empire's counsel's request of Gina:

“I had to put document after document in front of Kramer and lead him by the nose. Delbert was objecting up, down, and sideways, and there's no way I can do that at the hearing. . . . I wanted to make sure you focused on my examination of Kramer at his deposition. It's really important that as much of it as possible gets out when Kramer testifies at the hearing.”
- Most people felt that asking your party arbitrator to make sure certain testimony comes out was over the line.
- This may be an area where **how** something is done really matters:
 - Many people felt that simply indicating that certain deposition testimony was important would **not** have been over the line

Vetting the Expert Report

- Most people felt that Empire's counsel's reading out chunks of the draft expert report to Gina was well over the line

- There was less consensus about where the line was
 - Asking about whether expert testimony on a particular subject would be useful is clearly OK
 - Not much discussion, and not very clear, as to how much detail (if any) one can get into about specific opinions

Discussion