Refusing to Yield Fee Data: How Far Can Bar Go?

By Tom Dunlavey

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"Legal hardball" and "unfair," says a member of the District of Columbia Bar's board of governors. "Normal" and "appropriate," says a U.S. attorney's office spokesman.

Both sides remain sharply at odds over the propriety of the government's tactic of seeking contempt citations against individual board members in the long-running and often bitter dispute between the two over the U.S. attorney's access to the bar's fee information. It was a confrontation that led to a split among board members: How far a principle should be pursued, they asked, in the face of practical and professional considerations?

The controversy grew out of government discovery efforts, beginning in November 1982, to secure records of rates charged in Title VII suits handled by attorneys participating in the bar's lawyer referral and information service (LRIS). According to government lawyers, the records show that fee awards requested by the victorious LRIS attorneys in *Chewning, et al. v. Hodel*, a sex discrimination suit, are inflated far above what it says are the actual "market rates" charged by LRIS attorneys in other Title VII cases. The government further maintains the information should be available to help courts, Congress, and administrative agencies determine what proper fee awards should be—all as part of its efforts to hold down what it considers the unreasonable costs in such suits.

The bar board stubbornly resisted a government subpoena for the files, ultimately yielded, and is now fighting a government effort to remove the files from the shelter of a protective order. The board's attorney, David K. Perdue of the D.C. office of Chicago's Kirkland & Ellis, calls the government effort "a fishing expedition," claiming the information is confidential, irrelevant, and that its release could harm LRIS programs seriously by discouraging participation by lawyers willing to offer reduced rates to low- and moderate-income clients. Bar officials also complain that compliance would entail heavy administrative burdens.

After more than a year of complex legal maneuvering on the matter, tempers have frayed and accusations have flown freely. And there is no indication that the acrimony will abate any time soon, as both sides predict that the case eventually will work its way to the D.C. Circuit.

A climactic moment in the standoff occurred on Nov. 29 when board members, in an emergency meeting, voted by a narrow margin to finally release the records under a protective order. The vote came just a few hours after a show-cause hearing in which Judge Thomas J. Flannery (D.D.C.), acting at the government's request, threatened each resisting board member—as well as LRIS and its director, Alice Bodley—with $100-a-day contempt fines plus costs and attorney's fees if the materials were not turned over.

Although board members previously had voted to put the bar in contempt if necessary to pursue an appeal, they were caught off guard by the government ploy of demanding individual sanctions, according to D.C. Bar President David Isbell of D.C.'s Covington & Burling. This "astonishing" and "unnecessary" government strategy, Isbell says, forced the board members to choose between being held personally in contempt or backing down from their stand on principle and releasing the records.

At the hearing, Perdue, who has served as pro bono counsel to the bar in the dispute, had argued unsuccessfully to Flannery that imposing individual penalties was unfair in that the bar, under precedent, had no choice but to resist to the point of contempt in order to take an appeal. Perdue further argued that government reliance on cases in which directors of corporations had been held individually in contempt was

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misplaced. In this case, board members were making a stand on principle, he said, and as volunteers, they had no financial stake in the outcome.

Stance Called 'Inappropriate'

"We felt it was inappropriate to require persons in that position to stand personally in contempt for something that affects the institution, not them personally," Perdue says. He calls the individual contempt threats "coercive," adding that they were "obviously calculated to place the maximum pressure on members to comply with the subpoena."

Royce C. Lamberth, chief of the civil division in the U.S. attorney's office, says he found the bar's arguments "shocking." "We didn't think it was fair to hold the entire bar responsible for the conduct of a handful of individuals," Lamberth says. "I didn't understand at the time why they were shocked to be held in contempt. They were telling the court, 'Don't hold us responsible for voting to defy your order.' That makes a mockery of the whole contempt process."

The government's contention that the entire bar would be affected is nonsense, according to Isbell. "There's no conceivable way that was possible," he comments. The contempt fines against LRIS would have been paid solely out of LRIS voluntarily contributed funds, not from mandatory dues, and would have been treated as an "expense of the program," he says. That financial risk would not have been "crippling" if the bar had been granted a stay of the penalties that it planned to request along with its appeal.

Rethinking Position

The prospect of individuals having to board members to rethink their position, Isbell says, especially in view of the fact that the bar's request for a protective order had been granted. "Some felt the board had gone as far as it could go," Isbell says. Although there was concern that the government might succeed in overturning the order, Isbell joined a majority of voting board members that decided, six to five, against going into contempt, with two abstentions. Seven of the 20 members were not present.

'I thought it was important to live up to the promise [of confidentiality] made to the [LRIS] attorney,' says Gorelick. 'I thought [the government] played hardball to stop us from pursuing an appeal by placing inordinate and unfair pressure on board members. I thought we should do what we could do to stand up to that.'

"It was my feeling—and still is my feeling—that the bar ought not to expect board members, indeed all our employees, to take the black mark on our records that a finding of contempt involves," Isbell notes, adding, "It's a bad thing, a negative thing for lawyers," and "different for lawyers than for other people. It's the sort of thing asked on bar applications. It carries a certain connotation of thumbing your nose at the court."

Making a Sacrifice

Though Isbell says, "I wasn't concerned for my own skin," the fact that some were willing to go into contempt "didn't take the curse off." He adds, "It would have been setting a standard others are going to feel they have to live up to. The bar shouldn't expect such a personal sacrifice."

Board member Jamie S. Gorelick of D.C.'s Miller, Cassidy, Larroca & Lewin, though, was willing to make that sacrifice. "I thought it was important to live up to the promise [of confidentiality] made to the [LRIS] attorney," she says. "I thought [the government] played hardball to stop us from pursuing an appeal by placing inordinate and unfair pressure on board members. I thought we should do what we could do to stand up to that." A board vote for contempt would not have been "flouting the court's power or in any way disrespectful" if seen in the context of pursuing that appeal, she adds.

Gorelick, a white-collar criminal defense attorney, says that although she has never had to choose contempt, she

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has "often contemplated the possibility" and would not hesitate to do so if she believed it necessary. "It doesn't seem so terrible to me," she notes, adding that it is not unusual in attorney-client privilege matters because it is the only way of obtaining appellate review. She feels that this represented a "similar situation."

Calling the situation a "very personal decision," Gorelick concedes that she understood the concerns of other board members who felt it "unseemly" to put themselves, as officers of the court, into contempt. "I can understand why other attorneys would think differently," she says, especially those unaccustomed to such confrontations. Gorelick believes it "quite appropriate where it's a matter of principle and it's clear no disrespect is intended."

However, Gorelick adds that she would not have consented to a board vote to go into contempt if only a small majority or a plurality had voted that way, not wanting to pressure reluctant members. She says that she would have persevered only until a decision on a stay was made because of financial considerations.

Photo by Julie Wiatt

Gorelick: 'A personal decision'

'The U.S. attorney's office is not campaigning against LRIS,' Isbell says. 'They're just going after us with an extra amount of energy' because they are 'resentful that the bar failed cheerfully to comply with their request.' The accusations of misconduct were the result of the government's frustration, he says.

Accusations of Foul Play

Once the records were handed over, the government then moved to have them unsealed, an action prompting further accusations of foul play. In its pleadings, the government charged that the bar and Bodley had been "misleading" the court in claiming that they showed that LRIS lawyers charged reduced rates in Title VII cases. The bar's response called these statements "libelous charges of misconduct" that could be attributed only to an "extreme excess of adversary zeal." The government lost this round on Jan. 18, when Magistrate Jean F. Dwyer (D.D.C.) denied its motion to unseal the protective order. The government since has appealed Dwyer's ruling to Flannery.

Why, in the bar's view, has the government pursued this matter so vigorously? Isbell declines to divulge his views on that subject, but he did say that the government's intimation that the board's real motive in the matter was to get higher fees for LRIS attorneys is "utterly without substance."

Perdue calls the government's actions "desperate," and sees them as "part of a concerted effort on a number of different fronts to reduce fee awards." "The information so tenaciously sought from us will be of little use to the court," he predicts.

Meanwhile, Lamberth maintains that the information will prove "very relevant." And he insists that speculation that the government is opposed to the bar's support of the LRIS program is "absolutely not true." He says, "We've been very moderate in what we've done, compared to their actions.

Photo by Gary Weinstein

Isbell: Unfair standard

Some people in this office think that the bar's conduct warrants more action than we've taken so far. I think the bar's intransigence in withholding this information for more than a year, based on a frivolous legal argument and then caving in at the last minute . . . caused our reaction."

"The U.S. attorney's office is not campaigning against LRIS," Isbell responds. "They're just going after us with an extra amount of energy" because they are "resentful that the bar failed cheerfully to comply with their request." The accusations of misconduct were the result of the government's frustration, he says.

And none of the participants in the fray are willing to concede defeat, or even that the contest is nearing a conclusion. Lamberth contends the government will ultimately win in the court of appeals, while Perdue retorts that the government is just engaged in "wishful thinking." ■