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NYCLA's Fee-Dispute Program: Part 137

Gerald Lebovits

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A MESSAGE FROM THE NYCLA PRESIDENT

Ann B. Lesk

What do these four people have in common: Vanessa Leggett, Judith Miller, Jim Taricani, and Josh Wolf? They are the poster children for the Free Flow of Information Act. They are reporters whose imprisonment was made possible by the lack of a clear and consistent Federal rule governing reporters' privileges.

Vanessa Leggett, writing a book on a notorious murder case, served 168 days for contempt for failing to turn over notes of interviews with persons connected with the murder to a Federal grand jury. Judith Miller, of course, spent 85 days in jail for refusing to testify to a Federal grand jury investigating the source of the leak that identified Valerie Plame as a covert CIA agent. Jim Taricani, a reporter for WJAR in Providence, RI, was sentenced to six months' home confinement for refusing to disclose to a Federal special prosecutor the source who gave him a copy of an FBI videotape showing an FBI informant bribing a municipal official. Finally, Josh Wolf served 226 days in jail for contempt for failing to comply with a subpoena issued by a Federal grand jury seeking all footage that he shot of protests of the G-8 meeting in San Francisco.

In February, the Free Flow of Information Act was introduced in the House of Representatives by Reps. Rick Boucher (D-Va), Mike Pence (R-IN) and 37 co-sponsors, and in the Senate by Sens. Arlen Specter (R-PA), Charles Schumer (D-NY), Richard Luger (R-IN) and Lindsey Graham (R-SC). The bill is substantially the same as one that passed the House of Representatives by an overwhelming 398-21 vote in 2008. Its Senate companion was defeated 53-41 on a cloture vote, and President Bush had threatened to veto it if passed.

In contrast, President Obama and Attorney General Holder have both expressed support for the bill, so it appears that it has a chance for passage as that rarest of all things in Washington: a bill with truly bipartisan support. Its enactment would be a first bipartisan step toward the return to the rule of law. It would provide much-needed uniformity in Federal proceedings, and it would acknowledge the importance of an investigative press to preserving constitutional checks and balances.

The rationale for a Federal reporters' shield law was articulated by Theodore Olson, Solicitor General in the Bush administration, at a hearing on the bill in 2006 (after he had left office):

> [This issue has] important implications not just for reporters and the press, but is particularly critical to the ability of citizens to monitor the activities of, and to exercise a democratic check on, their government. One of the most vital functions of our free and independent press is to function as a watchdog on behalf of the people – working to uncover stories that would otherwise go untold. Journalists in pursuit of such stories often must obtain information from individuals who are unwilling to, or cannot, be publicly identified. Those journalists – often reporting on high-profile legal and political controversies – cannot function effectively without offering some measure of confidentiality to their sources.

The New York County Lawyers' Association recently held a forum to discuss the lack of a Federal reporters' shield law. Forty-nine states and the District of Columbia offer various levels of protection to journalists and their sources through statutes and decisional law. There is no uniform rule applicable to Federal proceedings, although there is a patchwork of rulings in various Federal jurisdictions. Consequently, Vanessa Leggett could be protected from revealing her sources in the state court trial of the first suspect, but could be sentenced for contempt for refusing to share her interview material with a Federal grand jury investigating a second suspect for the same murder.

The Free Flow of Information Act does not grant an unqualified privilege to reporters. Instead, it contains threshold tests establishing that there is no other rea-

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NYCLA Celebrates Law Day 2009

By Jennifer Ni Wang

On Friday, April 24, NYCLA's Supreme Court Committee will host its annual Law Day Luncheon at Cipriani Wall Street, 55 Wall Street, beginning at 11:30 AM. Committee Co-Chairs Morrell Berkowitz and Thomas Smith have announced that this year, the Louis J. Capozzoli Gavel Award will be presented to the Commercial Division of the Supreme Court of New York County. Past and present justices will be in attendance.

Presenting the Capozzoli Gavel Award will be Robert L. Haig, a partner at Kelley Drye & Warren LLP. In addition, a special award for 40 years of Distinguished Service will honor Hon. Norman Goodman, County Clerk and Clerk of the Supreme Court, County of New York, to be presented by Chief Judge Jonathan Lippman. Supreme Court Committee Member Julia Herd will also present Certificates for Distinguished Judicial Service to judges who have served in New York County for 25 years.

Law Day this year honors the bicentennial of the birth of America's 16th president, Abraham Lincoln. Lincoln, widely considered America's most influential president, was born in Kentucky on February 12, 1809. He led the country through the Civil War, ultimately preserving the Union and successfully ending slavery. Before he became president in 1860, Lincoln was a captain in the Black Hawk War of 1832, frontier lawyer, Illinois state legislator and congressman. Among all of his extraordinary achievements, Lincoln believed his most enduring was the Emancipation Proclamation, later calling it both the "central act of his administration" and the "greatest event of the nineteenth century."

Fifty years ago, President Dwight D. Eisenhower proclaimed the nation's first Law Day as a "day of national dedication to the principle of government under law." Law Day explores the meaning of the rule of law, fostering public understanding of the rule of law through discussion of its role in a free society.

For more information about the 2009 Law Day Luncheon, please email candujar@nycla.org and write 'Law Day' in the Subject line.

Ms. Wang is the Communications Assistant at the New York County Lawyers' Association.

NYCLA'S Fee-Dispute Program: Part 137

By Hon. Gerald Lebovits

Conflicts between attorneys and their clients harm the legal profession and the public. Among the organized bar's most difficult yet important challenges is to resolve conflict — and to do so effectively, fairly and quickly. Whether the bar can rise to that challenge or succumb to it affects not merely attorneys and clients but also the administration of justice. Because many attorney-client conflicts involve fees, the bar must help solve them.

The bar received the New York State court system's strong endorsement favoring self-regulation of attorney-client conflicts when the courts gave local bar associations the mandate to resolve attorney-client fee disputes. In May 2001, then-Chief Administrative Judge (and now Chief Judge) Jonathan Lippman and the Administrative Board of the Courts promulgated the statewide Fee Dispute Resolution Program, codified as Part 137, Title 22, of the New York Codes, Rules and Regulations.[1] Part 137 places the adjudication of fee disputes into the hands of bar associations before the attorney may sue. The client elects whether to use Part 137. The attorney's participation is mandatory.

The fee-dispute program's goal is set out in section 137.0: to "provide for the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation."

Hon. Gerry Lebovits

The statewide Part 137 program is modeled on the First Judicial Department's well-established and once-voluntary fee-dispute arbitration and mediation program — the Joint Committee on Fee Disputes and Conciliation. The Joint Committee, administered by the New York County Lawyers' Association (NYCLA), is a joint project of NYCLA, the New York City Bar Association and the Bronx County Bar Association.

The Joint Committee encourages mediation. When arbitration is required, the arbitrator or panel of arbitrators will determine the reasonableness of fees for professional services, including costs. The attorney has the burden to prove that the fee is reasonable. The arbitration award becomes final and binding if neither party seeks a trial *de novo* in Civil or Supreme Court within 30 days.

The new Rules of Professional Conduct,[2] which the courts approved on December 16, 2008 and which become effective on April 1, 2009, strengthen the Joint Committee's jurisdiction. Rule 1.5(f) provides that "[w]here applicable, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program established by the Chief Administrator of the Courts and approved by the Administrative Board of Courts." The new Rules require even more than before that every Manhattan and Bronx attorney become familiar with the Joint Committee,[3] with the Joint Committee's rules and forms[4] and with the statewide Part 137 rules.[5] The Joint Committee must refer to a disciplinary or grievance committee any attorney who fails, without good cause, to participate in fee arbitration. The Joint Committee must likewise refer for disciplinary action an attorney whose misconduct becomes apparent during the arbitration process.

Either the attorney or the client may initiate arbitration. An attorney with a fee dispute can seek arbitration or mediation by serving the Joint Committee's notice package personally or by a certified mailing. Arbitration is mandatory for the attorney when the client files for arbitration. The attorney may sue for the fee if the client fails to file for arbitration in a timely manner. As a jurisdictional prerequisite to suing over fees, attorneys must allege that they notified their clients of their right to participate in fee arbitration or that Part 137 does not cover the dispute.

If the client consented in advance to arbitrate the fee dispute, the Joint Committee permits the attorney to file a request for arbitration and serve it on the client. A client's advance consent to arbitrate allows the attorney to compel arbitration.

The Joint Committee applies Part 137 to fee disputes in which the attorney-client relationship began after January 1, 2002; the representation concerns a civil matter; the attorney is admitted in New York; a material portion of the services was rendered in New York or Bronx Counties or the attorney maintains an office in those counties; and the amount in dispute is between $1,000 and $50,000, although the Joint Committee may hear disputes for less than $1,000 and more than $50,000 if the parties consent to arbitration.

The Joint Committee does not apply Part 137 if there are substantial legal questions; if allegations of misconduct or malpractice arise; if there are issues of dam-

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NYCLA Member Challenges DOE Policy And Wins In Critical Decision

By Jennifer Ni Wang

Representing a five-year-old child with cerebral palsy who lives in a non-elevator building and was denied porter service by the New York City Department of Education (DOE), NYCLA member Oroma Homa Mpi, a staff attorney in the Education Law Unit of Legal Services, successfully challenged a long-established policy denying porter service to disabled students living in private housing. While the DOE had granted porter service for wheelchair-bound children living in public housing, they had withheld this service from parents choosing to live in non-accessible private housing. Ms. Mpi demonstrated that her client, whose family was on a waiting list for public housing for years and living in an apartment obtained with the help of their homeless shelter, represented the disabled children who needed porter service but lived in private housing due to uncontrollable circumstances. The final decision concluded that the Individuals with Disabilities Education Act (IDEA) implied that school districts were mandated to provide porter service to all students who need it.

Regarding the case, Ms. Mpi commented: "We are very pleased with the Hearing Officer's interpretation of the federal statute and case law governing the provision of porter services to children with disabilities. For too long, special education students have been denied the assistance to which they are legally entitled because of the DOE's policy. This case is a step toward our larger goal of creating equal access to education in [New York City], regardless of the student's disability or socio-economic background."

Ms. Mpi, who has worked at Legal Services since June 2008, represents low-income children in obtaining appropriate school-related services and engages in policy work to improve educational outcomes. She has also assisted in the defense of students at superintendent suspension hearings and education neglect cases in Family Court and has participated in coalitions dedicated to dismantling the school-to-prison pipeline. Prior to joining Legal Services NYC, Ms. Mpi worked in the Communications & Legislative Affairs Department of the New York City Bar Association.

Ms. Mpi is a member of NYCLA's Education Law and Minorities & the Law Committees and the Young Lawyers' Section. She graduated from Benjamin N. Cardozo School of Law.

Ms. Wang is the Communications Assistant at the New York County Lawyers' Association.

Oroma H. Mpi

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ages; if a rule, statute or court sets the fee; if no attorney services have been rendered for more than two years; or if the request for arbitration is made by a person other than the client or the client's representative.

NYCLA's Part 137 program, by far the state's largest, is currently chaired by Michael C. Lang. Like Daniel M. Weitz, co-counsel to the Attorney-Client Fee Dispute Resolution Program Board of Governors and the state court system's Alternate Dispute Resolution (ADR) coordinator, and former Joint Committee Chair Simeon H. Baum, Mr. Lang is an adjunct law professor at the Cardozo School of Law's Kukin Program for Conflict Resolution. NYCLA's Heidi Leibowitz is the Part 137 program administrator. She is supervised by Lois Davis, NYCLA's director of *Pro Bono* Programs and the former Part 137 program administrator.

The statistics tell the scope of the program. The Joint Committee closed 235 cases in 2008. Serving on the Joint Committee's arbitration and mediation panels are 148 attorneys and 35 non-attorneys. Service is voluntary and requires attendance at an all-day training session. At NYCLA's most recent session, held in December, trainees received a comprehensive packet of materials and were treated to lectures by Lela Porter Love and Lester Brickman, two distinguished ADR professors from Cardozo.

The next training program will take place at NYCLA in fall 2009 or winter 2010. In the meantime, NYCLA is hosting two events as part of its Practice of Law series. On June 11, Martin L. Feinberg, another former Joint Committee chair, and Ms. Leibowitz will speak on "What Every Lawyer Needs to Know about the Part 137 Fee Dispute Resolution Program." On June 25, NYCLA will offer another related program: "Litigating Your Fee Dispute."

The NYCLA-administered Joint Committee on Fee Disputes and Conciliation is a working committee designed to resolve attorney-client conflict through *pro bono* dedication under the highest ideals of the legal profession and the organized bar: safeguarding client wellbeing, assuring public welfare and promoting the due administration of justice through honest and rigorous self-regulation.

Judge Lebovits, a New York County Housing Court judge and St. John's University School of Law adjunct professor, chaired the First Department's Joint Committee on Fee Disputes and Conciliation from 1999-2001.

[1] New York's Part 137 Rules are available at http://www.nycourts.gov/admin/feedispute/pdfs/137.pdf. For the contours of fee-dispute law and procedure, see Gerald Lebovits & Michael Gervasi, *Part 137: The Attorney-Client Fee-Dispute Program*, 8 Richmond County B. Ass'n J. 7 (Winter 2009), available at http://ssrn.com/abstract=1339935.

[2] www.nycourts.gov/rules/jointappellate/NY%20Rules%20of%20Prof%20Conduct.pdf. For a discussion of the Rules of Professional Conduct as they relate to Part 137 and retainer agreements, see Gerald Lebovits & Joseph Capasso, *Pretrial Advocacy: An Ethical Checklist — Part I* , 72 Queens B. Bull. 4, 13 & nn.10-13 (Feb. 2009), *available at* http://ssrn.com/abstract=1348574.

[3] http://nycla.org/index.cfm?section=pro_bono&page=Committee_on_Fee_Disputes_AND_Concilliation.

[4] http://nycla.org/index.cfm?section=pro_bono&page=Rules_and_Forms_for_the_Arbitration_of_Fee_Disputes.

[5] http://www.nycourts.gov/admin/feedispute.

Chamber Orchestra of New York's "Spring to Antiquity" Concert

NYCLA members are invited to attend the "Spring to Antiquity" concert on Friday, April 24 at 8:00 PM at the Church of St. Jean Baptiste on Lexington Avenue and 76th Street. Tickets under this offer are $20 (normally $30).

To take advantage of the 30 percent discount, register as a student/senior at www.ticketweb.com/t3/sale/SaleEventDetail?dispatch=loadSelectionData&eventId=591294 or mail a check to Chamber Orchestra of New York, 305 East 63rd Street, Suite 4K, New York, NY 10065. Tickets will be held at the door.

Program
Respighi, Ancient Airs & Dances No. 1
Stravinsky, Pulcinella Suite
Mozart, Symphony No. 40

If you have any questions, please contact Salvatore Di Vittorio at 646-642-8441 or email info@chamberorchestraofnewyork.org.