The High Price

In a recession, death penalty work feels especially expensive, but firms are maintaining their dockets.

By Drew Combs

Illustration By Edel Rodriguez

IN

JULY 2008 Nixon Peabody signed on to its first pro bono death penalty case ever, representing Thomas Porter, a Virginia man convicted of killing a police officer. And like nearly all capital cases, this one is a heavy lift. It started with a nine-month investigation that included document requests to schools and hospitals and interviews with jurors, court officers, family members, former teachers, and fellow inmates.

"These were not situations where you could just Google someone and get an address," says Brian French, a Boston-based Nixon Peabody partner who is working on the case. "It requires a lot of going to the streets and knocking on doors." Last August the firm and its cocounsel, the Virginia Capital Representation Resource Center, filed a 60-page habeas petition with the state supreme court based in part on ineffective assistance of counsel and juror bias.
This sort of case—the multitiered, years-long postconviction death penalty appeal—has long been a pro bono staple at many Am Law 200 firms. In a flash survey conducted by The American Lawyer in May, 77 of the 121 respondent firms said they were handling at least one pro bono capital case. Fourteen firms, including Nixon Peabody, said that death penalty work accounted for their biggest expenditure of pro bono hours in 2009. (Last year Nixon took on a second capital case, in Louisiana.)

It’s the timing that makes Nixon’s dive into the expensive world of death penalty work noteworthy, occurring as the recession has forced firms to take a hard look at costs. French says that Nixon Peabody, where revenue per lawyer fell 7.1 percent last year, knew that the downturn might create challenges but steamed ahead because “it is a real important issue for the firm when you have inadequate processes and counsel that are not up to the task.”

Just how much it costs to represent a death row defendant during a postconviction review process depends on many variables, but it’s not cheap. “We ask a lot of our volunteers,” says Robin Maher, head of the American Bar Association’s Death Penalty Representation Project. “We ask them to donate a number of hours, sometimes over many years, to learn an area of the law they are not familiar with, and to represent someone in a far-off state.”

So far, she says, Am Law 200 firms have remained committed to their current pro bono dockets. “None of the law firms we’ve recruited have called us to say they won’t work on their cases anymore, despite the downturn in the economy and financial problems many firms are facing,” Maher says. But merely maintaining the status quo may not be sufficient, as the demand for big-firm counsel jumps: “All of the problems caused by the poor economy have landed in the (public) defender community, and that is why requests for pro bono assistance have skyrocketed.”

Maher says she doesn’t provide cost estimates to firms she is recruiting for capital cases because of the “unpredictable nature” of the work, but Am Law 200 firms are well aware of the financial commitment. “They are expensive cases,” says Susan Hoffman, public service partner at Washington, D.C.’s Crowell & Moring, which is currently representing two death row defendants, in Alabama and Mississippi. “You pay for investigators, expert witnesses, and travel expenses for lawyers. In attorney time and resources, it is going to be over $1 million [per case] spread out over a number of years.”

At Chicago’s Schiff Hardin, which is also handling three death penalty matters, managing partner Ronald Safer says that “I gulp every time before I agree to take a case because of the resources that must be devoted.” Safer estimates that one matter that recently went to the Georgia Supreme Court cost the firm more than $800,000 in lawyer time and out-of-pocket expenses. Over the past five years, Safer says, Schiff Hardin has spent more than $7 million in attorney time and additional expenses on capital cases. Nonetheless, both Crowell and Schiff Hardin say they remain committed to doing death penalty work.

One of The Am Law 200’s largest docket of capital cases is at Sidley Austin, which is currently representing 19 death row inmates in Alabama. (At one point, Sidley had 21, but the firm was fired by one client, and another client died of natural causes on death row.) The firm’s heavy caseload can be traced back to a plea to Chicago firms by the ABA and federal judges in 2005. Sidley created a staff attorney position specifically to coordinate its death penalty effort. Kelly Huggins, a former associate at Sidley who holds the position, estimates that the docket costs the firm more than $1 million a year in attorney hours and expenses. Since 2005, she says, the firm has spent more than $2 million on such out-of-pocket expenses as expert witnesses, investigators, and travel.

Huggins says that Sidley’s commitment to the cases has not been affected by the downturn. “When we did this, we knew we were taking on for the long haul,” she says. However, head count reductions have complicated the staffing of the cases, forcing Huggins to recruit outside Sidley lawyers to replace those who have left.

Birmingham’s Bradley Arant Boult Cummings is Sidley’s local counsel on ten of the cases and also represents six other death row inmates in Alabama and one in Mississippi. (Bradley Arant is teamed with out-of-state firms in all but two of the Alabama representations.) “We thought it made more sense to partner with other firms, where we could work with non-Alabama firms and have more of an impact,” says J.S. Christie Jr., cochair of the firm’s pro bono committee. For each of the past six years, Bradley Arant has devoted more than 2,000 hours to pro bono death penalty matters.

While Christie says that Bradley Arant’s death penalty work has no been affected by the recession, in January 2009 the firm decided not to take on any more capital cases in an effort to diversify its pro bono docket. The firm did take on one more case after that decision because discussions regarding the matter had begun before the decision, but it March it turned down a request by the Alabama attorney general’s office to take on a new matter.

Sidley has also decided not to take on any new death penalty matters. The firm took on its last capital matter in 2007.

In Alabama part of the void has been picked up by Reed Smith, which in 2008 teamed with the Southern Center for Human Rights to represent four death row inmates. Three of the defendants were weeks away from the deadline to file postconviction petitions. “The Southern Center for Human Rights convinced me that Alabama’s weird processes have created a large population of death row inmates that need lawyers,” says Reed Smith senior pro bono counsel Christopher Walters. He points to the fact that the state does not provide funding for attorneys during the postconviction process and allows judges to supplant a jury majority’s life-in-prison sentence with a death sentence.

Walters says that these concerns overruled any financial uneasiness about taking on the cases. He has personally represented a death row inmate in Pennsylvania for the past ten years and knew the size of the commitment that came with the new cases. “Sure, it gave me pause, Walters says. “We agreed to do this about the time that Lehman Brothers was collapsing. I realized it might mean we have to skimp a little bit on some other things, but we have the resources to do this.”

E-mail: dcombs@alm.com.

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PERCENTAGE PLAYS

At five firms, more than 92 percent of all U.S.-based lawyers do at least 20 hours of pro bono work.

* Because of an anomaly in our methodology, firms can record a participation percentage higher than 100 if part-time lawyers perform more than 20 hours of pro bono work. See page 84 for a fuller explanation.

vides extremely valuable training," says Kimball Anderson, a Winston & Strawn litigation partner who chairs the firm’s pro bono committee. “When I’m staffing a [billable] case, the pro bono work a lawyer has handled plays a role in my choice.” Anderson says that with billables down in 2009, the firm actively encouraged its lawyers to take on pro bono work. “Pro bono is definitely a useful way to spend your time, especially if you have more time to give,” he says. (Average pro bono hours per lawyer increased 32.7 percent at Winston, to 73.4 from 55.3, and the number of lawyers with more than 20 hours of work increased 2.8 percent, to 408 from 397.)

Given that training function, Stern, of Equal Justice Works, says that last year’s associate deferrals may be a long-term boost for pro bono at firms. “A lot of deferred associates will be coming back to firms having a substantial amount of experience through pro bono work,” he says. That experience “not only will leave them bitten by the bug to continue with public interest work,” he says, but also leave them better prepared to handle paying work. “If management didn’t realize how valuable pro bono work was before,” he says, “maybe now they will.”

Steven Banks, attorney-in-chief of the Legal Aid Society, a New York-based nonprofit, says that “despite the problems in the marketplace, we’ve had increased pro bono commitment. We’ve certainly had an increased need for our services, and firms have made a substantial contribution.”

E-mail: iplagianos@ulm.com.

AM LAW 200 FIRMS LOGGED 5.7 MILLION PRO BONO HOURS IN 2009, A 2 PERCENT INCREASE FROM 2008. AVERAGE HOURS PER LAWYER ROSE FRACTIONALLY, TO 61.4 FROM 61.1, BUT THE PERCENTAGE OF LAWYERS WHO DID MORE THAN 20 HOURS OF PRO BONO WORK FELL 1.1 PERCENT, TO 47.5.

THE BIGGEST MOVERS

Paul, Hastings had the biggest year-to-year increase in pro bono score; Nelson Mullins had the biggest drop.