



Making Pro Bono Work

A Pro Bono Practice in Retirement

By Sharon Katz

The past several years have seen a growing number of lawyers searching for meaningful and interesting post-retirement activities where they can make use of a lifetime's accumulation of skills and experience. The past several years have also seen a growing number of individuals struggling to meet basic needs and to secure justice for themselves and their families, but having problems navigating the complex and arcane administrative and judicial systems that hold the key to their relief. Once becoming aware of these issues, it was only a matter of time before bar associations, law firms and other institutions began developing ways to help retiring lawyers and persons in need by making post-retirement pro bono practice a part of the pro bono landscape.

On January 1, 2010, New York State commenced its Attorney Emeritus Program. The program is designed to engage persons 55 years of age and over, including those who have retired from the practice of law, to help meet the ever-growing need for pro bono legal services. This initiative recognizes that retirement offers tremendous opportunities for lawyers to make use of their skills to aid those in need, to remain active in professional life and connected to colleagues and organizations, to learn new skills and explore new areas of competency and to transmit and share their wisdom and experience with young lawyers.

True Emeriti

The Attorney Emeritus Program Statement of Participation, which law firms are asked to sign, acknowledges that facilitating retired attorneys' meaningful and effective engagement in pro bono requires considerable law firm support. It calls upon participating law firms to provide retired attorneys with four essential items: work space, professional support, administrative and technological support, and malpractice insurance coverage. It further provides that retirement benefits, if any, should not be negatively impacted by the retiree's participation in pro bono activities.

Non-profit legal service providers, such as the Legal Aid Society, have implemented programs, including the Second Acts program, that enable retirees to continue working, often in areas of the law that were not the primary focus of their pre-retirement practices, to the benefit of the retirees and the non-profit's clients. These pro-

grams also recognize the need for law firm involvement, as the non-profit organizations often lack sufficient office space and support services to enable retirees to provide legal services at the requisite level. Law firm/non-profit partnerships thus provide one way to implement a meaningful retiree pro bono practice.

For many years, Davis Polk & Wardwell has provided the benefits and supports noted in the Attorney Emeritus Program Statement of Participation to those partners who seek to remain active after retirement and take on the role of "Senior Counsel." As a result, a pro bono "program" staffed by retired partners has developed organically, as a natural outgrowth of a culture that has long respected and fostered civic, public and pro bono service. The "program" continues to evolve and takes its shape from a melding of Davis Polk's larger pro bono goals with the interests, commitments and availability of the individual retired partners. It is a win-win situation for everyone: the firm, the retired partners, the associates and the clients.

I spoke with five retired partners, each of whom has an active "pro bono practice" at Davis Polk. In our discussions, we look at the very different forms those practices take and see how and why retirees incorporate pro bono work as a part of their post-retirement lives.

It will come as no surprise that every one of these retired partners viewed the firm's support as critical to their ability to engage in pro bono work on behalf of clients. Having a work space, access to administrative assistance, computers, technological support, librarians, legal assistants, a managing attorney's office and all of the other supports of a large law office is not only helpful but also allows a wider range of work to be undertaken. For much of the pro bono work the retired partners do, such support systems are absolutely essential.

Hitting a Trifecta

Number one on everyone's list, again not surprisingly, is the ability to continue to work with associates. The retired partners vary in their approaches, depending on the nature of their work, the age and experience of the associates involved and their own desires to be more or less

SHARON KATZ is Special Counsel for Pro Bono at Davis Polk & Wardwell LLP.

hands-on in a particular matter. But continuing to have contact with young lawyers (who can keep them on their toes), to mentor and help associates enhance and develop skills, all while helping a needy client, is like hitting a trifecta.

The five lawyers I spoke with have more than 186 years of experience as successful litigators and transactional lawyers. In retirement, they have contributed more than 5,500 hours to Davis Polk's pro bono work. Each retiree began doing pro bono work while still in active practice (thus reinforcing the idea that it is easier to make pro bono part of your retirement life if it is already a part

Award for his extraordinary work on behalf of persons on death row. Last year also saw the release of one of his clients who had served 15 years on death row in Tennessee. Nothing is more rewarding.

While Jimmy is a great mentor, he is the first to acknowledge that the dedication and commitment of the associates who go above and beyond is essential to his work. And like the other retired partners working on pro bono matters, he is grateful to a partnership that recognizes the importance of pro bono work – which, notwithstanding its name, can be very expensive.

Continuing to have contact with young lawyers, to mentor and help associates enhance and develop skills, all while helping a needy client, is like hitting a trifecta.

of your DNA). Two were members of the firm's Pro Bono Committee and continue post-retirement in an emeritus capacity. All of them were and continue to be active members of boards of environmental, educational, civil rights, arts and legal services organizations, and of bar committees. They are, in short, a public-spirited bunch. When it came to pro bono, no arm-twisting was needed.

James W.B. Benkard

James Benkard has been at this the longest, having retired in 2005 after a 45-year career in the firm's litigation department. Upon his retirement, Jimmy, who had done some criminal appeals and death penalty work over the years, simply shifted gears, taking a deeper dive into the world of criminal defense work. As he explains, it was a perfect segue. While an active partner, pro bono could have been characterized as somewhat of a "hobby" – a serious "hobby" but nevertheless something that was limited by time constraints. So retirement presented an opportunity to build on the "hobby," and the firm's support made it possible.

This is now very much a full-time job for Jimmy, though he spends his summers out of the office – a luxury made possible by today's technology. He works extensively with organizations such as the Legal Aid Society and the Innocence Project. He has supervised associates on many dozens of pro bono criminal appeals and resentencing matters. He cares deeply about seeing justice done and spent five years litigating *Disability Advocates, Inc. v. New York State Office of Mental Health*,¹ a challenge to New York State's practice of locking seriously mentally ill prisoners in segregated housing units, and another two years on *D.B. v. Richter*,² a challenge to New York City's failure to provide adequate housing for young adults being discharged from the foster care system. He has immersed himself in death penalty litigation and wrongful conviction work. In July 2013, the City Bar honored him with the Norman Redlich Capital Defense Pro Bono

Jimmy's plunge into pro bono work charged the imaginations of others for whom pro bono in post-retirement became a real option.

John Fouhey

John Fouhey was a partner in Davis Polk's bank financing and restructuring area for almost 30 years. He also, on a regular basis, handled a wide variety of corporate pro bono matters, including ongoing representation and multiple projects for two significant non-profits which have been clients for over 20 years. Like Jimmy, John was a member of the Pro Bono Committee (and remains an emeritus member) and clearly has a passion for doing this work and doing it well.

When John approached retirement in 2009, he realized that "the model of allowing retired partners to provide pro bono assistance was evolving in a way that was beneficial to the firm, the non-profit clients, the associates, and those retired partners who seek to continue with an active and meaningful practice." Because the firm's support of his efforts makes it possible, he is able to continue being the senior lawyer on matters for existing pro bono clients as well as taking on new projects. Even when out of the office, technology allows him to stay actively engaged.

Having trained as a lawyer during a time when there was less of an emphasis on specialization, he has a breadth of experience and knowledge that allows him to take on non-profit corporate matters of all stripes, including incorporations of non-profit entities, corporate governance, facility financings, government contracts and mergers. In addition, he is actively involved in pro bono business development, trying to identify new opportunities and helping evaluate requests for legal assistance from organizations such as Lawyers Alliance of New York. And he provides additional supervision and mentoring whenever attorneys need greater support or run up against new issues.

Jack McCarthy

Jack McCarthy retired at the end of 2010, after 35 years of practice in the corporate department. While an active partner, Jack became interested in the work being done on behalf of veterans who were having terrible difficulty securing benefits from the Veterans Administration. Jack took the training offered by the City Bar and supervised litigation and corporate associates handling these matters. He chose an area of pro bono that was very far removed from his “day job” but to which he was drawn by a generational affinity: so many of the clients were Vietnam veterans and evoked an era with which Jack identified.

It was an easy call for Jack, as he approached retirement, to conclude that this work was something he wanted to continue. What was less clear was whether Davis Polk would be comfortable with his continuing those efforts. So he was delighted to find that his desires fit in perfectly with the emerging “pro bono program” for retirees. Jack now spends, on average, 10 hours a month supervising work on veterans’ matters.

Jack speaks eloquently about the recurring scenario of hollowed-out men, clients whose very tough lives are reflected in their demeanor, their stories and their lack of direction. Clients are buoyed by associates who through their doggedness, perseverance, and skill help those clients penetrate the rather convoluted and difficult bureaucracy that is the Veterans’ Administration. The work brings its own rewards.

Dan Kolb

Dan Kolb, who retired in June 2011 after 46 years of practice, sees great benefits in the opportunity to handle significant matters with Davis Polk’s backing and support. Dan has long been active with the boards of the Lawyers Committee for Civil Rights, the Brennan Center and Legal Aid, and remains so. The systemic issues that those organizations themselves face and address in the public forum often serve as the basis for Dan’s pro bono work, enabling him to seamlessly bring together different interests as he continues to practice law post-retirement.

Mediation and arbitration, through state and federal court-sponsored programs, make up a large part of Dan’s post-retirement activities, as does his continued service on the non-profit boards and various bar committees. But Dan spends more than one third of his time engaged in pro bono work with associates, bringing in some of the most interesting and cutting-edge legal issues in civil rights and criminal justice.

For example, building on his work with the Brennan Center, Dan has supervised more than a half dozen amicus briefs to the Supreme Court in the past few years (most recently in *McCutcheon v. FEC*³). He has also represented the Legal Aid Society in landmark case cap and funding efforts which more closely align the public defender system in this state with the effective assistance mandate of

Gideon v. Wainwright. Along with the Lawyers Committee for Civil Rights, Dan has been a leader in the Election Protection program. And he took on the problem of “loan scammers” – people who employ fraudulent tactics to prey on poor and low-income homeowners facing foreclosure. With a team of associates, he developed a litigation model for shutting down loan scam operations. That model is now being used in other parts of the country.

Dan takes great pride in the associates who work on these and other matters. “These cases have offered numerous young lawyers multiple opportunities to stand up in court, develop litigation and alternative problem-solving strategies, and research and write on issues of public concern. It is rewarding to be able to contribute to their development and growth, all while being engaged in good things that are beneficial to the public.”

Scott Wise

Scott Wise, who retired in December 2011 after 32 years of practice, has been able to turn his abiding interest in the arts into a pro bono practice that comprises about 15% of his retirement time. Scott focuses his efforts on matters from Volunteer Lawyers for the Arts, an organization with which he was involved while an associate and an active partner. Scott notes that “being able after retirement to supervise and back up others on pro bono matters would be impossible without the firm’s support.”

Scott has always supported VLA “because it serves an under-represented group of creative people and helps young attorneys at the firm get experience. It’s not just litigation matters, but corporate and tax lawyers who get involved with artists and arts organizations, assisting on 501(c)(3) formations, trademark and IP protection, corporate governance, compliance, tax and First Amendment issues.”

Scott has recently supervised young associates in litigation matters taken from VLA. The size and scope of these matters enable very small teams of associates, with Scott’s supervision, to litigate a case from start to finish, with all of the twists and turns and problems and unexpected difficulties that have to be addressed along the way.

A Model Program

There are many ways in which firms can implement an Attorney Emeritus Program to make pro bono work. Providing the resources to allow retired attorneys to continue to pursue pro bono interests they developed while active partners is only one way – but it is something that has greatly enhanced our firm culture and life. It has benefited everyone: associates, partners, retired partners and clients. ■

1. 02 Civ. 4002 (GEL) (S.D.N.Y. Apr. 2007).

2. Index No. 402759/11 (Sup. Ct., N.Y. Co.) filed Oct. 17, 2011.

3. Docket No. 12-536 argued Oct. 8, 2013.