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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

BigLaw Directs Pro Bono Efforts At Trump Admin Policies

By **Sam Reisman**

Law360, New York (November 6, 2017, 7:09 PM EST) -- Since President Donald Trump's inauguration, multiple BigLaw firms have taken on pro bono matters responding to the policies of Trump's administration, including his controversial travel ban, the uptick in detention of immigrants and the executive branch's revised stances on the rights of LGBT Americans.

The matters include a class action against the administration alleging unlawful detentions of immigrants suspected of being in gangs; a flurry of challenges to the president's travel ban, originally implemented in January; counseling recipients of the Deferred Action for Childhood Arrivals program, which the president has said he wants to roll back; and amicus briefs filed on behalf of transgender students amid recent shifts in federal guidance.

Maureen Alger, a Cooley LLP partner who oversees the firm's pro bono practice, said that since January, the organizations with which Cooley partners in pro bono matters were bringing both a greater number of potential cases and that there was increased urgency behind them.

"We're not approaching our pro bono practice in a political manner at all. We're just here to do important work that we believe has merit and that the organizations with which we partner believe is important," she said. "So we're using the same criteria that we have in the past. ... There just have been many more opportunities as a result of some of the changes in policy."

Urgent Challenges to Travel Ban

On Jan. 28, the night after Trump signed his initial executive order barring travelers from seven majority-Muslim countries, Sue Finegan, chair of the pro bono committee at Mintz Levin Cohn Ferris Glovsky and Popeo PC, was helping to file one of the first legal challenges against the ban, a complaint launched on behalf of two lawful permanent residents, both professors at the University of Massachusetts-Dartmouth, Iranian nationals and Muslims, who were being held at Logan Airport in Boston.

Finegan and Susan Cohen, chair of Mintz Levin's immigration group, recalled a hastily convened meeting at the federal courthouse in Boston, assembling attorneys from the ACLU of Massachusetts and the New England chapter of the American Immigration Lawyers Association, researching case law and drafting the complaint entirely on cellphones.

The situation was "unusually informal because everyone had raced over to the courthouse, because we had an emergency judge," Cohen said. "Everyone was in a range of attire."

The team was successful in securing one of the first temporary restraining orders issued by federal judges against the ban — one of several efforts in the ensuing days and weeks, in which lawyers from BigLaw partnered with various legal organizations to file suits on behalf of individuals detained in airports across the country.

Paul Hughes, a partner at Mayer Brown LLP, recalled that the day after the first travel ban executive order came down, he reached out to a friend from law school, Simon Sandoval-Moshenberg, legal director of the Immigrant Advocacy Program at the Legal Aid Justice Center of Virginia, to see what

he could do.

"We started batting around what litigation and legal theories would look like if we put together a case," Hughes said. "And then we said, 'Okay, we think we can do something, let's go out and see if we can find a case.'"

Sandoval-Moshenberg asked publicly on his personal Facebook wall if anybody knew someone who had been affected by the ban. ("That's the last time I set a Facebook post to public," he told Law360.)

They were connected with a pair of Yemeni brothers, who had been on their way to visit their father, a U.S. citizen, in Michigan when they were detained during a layover in Dulles International Airport. The attorneys completed their motion in about 90 minutes, Hughes said, and filed it in the Eastern District of Virginia that night. The court granted a temporary restraining order on the heels of a similar order that same night in the Eastern District of New York.

Hughes described the situation as "completely uncharted water. There was nothing we had, no model that we knew of in order to respond to a circumstance like this, with the urgency of the issue and the national attention on the travel ban."

Andrew Pincus, a partner at Mayer Brown who worked on the case with Hughes and Sandoval-Moshenberg, said he was particularly proud that the team was able to get relief for the Yemeni brothers and another family.

"A lot of the work that I do is representing corporations — not that they're not wonderful clients," he said. "But there's something rewarding to stand at Dulles Airport and see these families reunited and able to stay together."

Akin Gump Strauss Hauer & Feld LLP attorneys represent the Fred T. Korematsu Center for Law and Equality as the organization has filed amicus briefs challenging the president's travel ban in its various iterations. Their strategy has been to identify similarities between the administration's justification of the travel ban and the U.S. Supreme Court decision in *Korematsu v. U.S.* that allowed for the interning of Japanese-Americans during World War II.

"The government had argued that the president has unreviewable authority to suspend admissions of aliens to the country based on the plenary power doctrine," said Robert Johnson, a partner in Akin Gump's litigation practice. "We wanted to make the connection that just as *Plessy v. Ferguson* was based on the now-rejected doctrine of 'separate but equal,' the *Korematsu* decision was based on the plenary power doctrine. And here today, just as the courts should reject the *Korematsu* decision from 1944, this court also should reject the use of the plenary power doctrine."

Pratik Shah, co-head of Akin Gump's Supreme Court and appellate practice, said that the alignment of the client and the historical underpinnings of the issues in play made for a particularly persuasive argument.

"We had a theme that I think would resonate with the court, which is drawing a historical parallel with the *Korematsu* decision — which holds kind of an especially toxic legacy within the Supreme Court," Shah said.

Firms Respond to Rise in Detention of Immigrants

Beyond the travel ban, Finegan and Cohen, the Mintz Levin attorneys, described a nationwide surge in cases of people being arrested at courthouses and detained as well as a pervasive, general unease in immigrant communities whose members' legal status has come into question and who have limited options for recourse.

"One of the ways in which the effects of policies of the Trump administration is playing out is that there will be more litigation," Cohen said. "There has been and there will be more litigation as the courts are the last protector of the legal rights of people whose rights are being adversely impacted by some of the policies and practices of this administration."

In one notable case, Cooley LLP joined with the ACLU of Northern California and the ACLU Immigrants' Rights Project in a proposed class action accusing the U.S. Department of Justice of unlawfully detaining young people while saying it was an effort to increase enforcement against immigrants suspected of being in gangs.

"This is a situation where there are a number of people picked up without any good information. They're not allowed to see attorneys. They're not allowed to talk to their families and they're shipped across the country," said Alger, the Cooley partner. "It's really surprising, and we wanted to challenge that right away to make sure that it was clear to the administration and the courts that that was not an acceptable way to go about detaining folks."

Asked if the arrests were a direct result of new executive policy, she said, "We certainly weren't seeing those types of detentions a year ago. It's hard to tell sometimes what's the result of a spoken policy and what's an implementation issue."

Regarding DACA, Alger described how Cooley attorneys had pivoted from helping DACA-eligible individuals secure their status one year ago to planning and implementing a series of legal challenges intended to fight the administration's plan to rescind the Obama-era action.

Hughes, the Mayer Brown partner, is litigating cases involving the detention of asylum seekers as well as other shifts in immigration policy, which he says are generating less attention than the travel bans but are still having substantial impacts on people's lives.

He pointed to the increased practice of detaining people whose efforts to seek asylum are still being adjudicated, a process he says can take two or three years. Hughes has two cases pending on this issue, arguing that the administration has invoked the wrong statute in claiming a basis for this mandatory detention, even in cases in which those detained are not considered a threat.

When asked if the election had shifted his firm's pro bono priorities, Hughes responded, "I think, post-election, I think a lot of us wanted to ensure that our work in the pro bono space was fully aligned with our values as lawyers. And the election was perhaps something of a shock to our values system. Or we thought some of the things that many of us believe fundamental to the American system — like giving immigrants a fair shake and a reasonable opportunity — some of those fundamental values seemed to come under assault."

Other firms that have shared with Law360 their pro bono work in matters related to the travel ban or other administration immigration policies, including the threat to defund "sanctuary cities," include Davis Wright Tremaine LLP, Munger Tolles & Olson LLP, Orrick Herrington & Sutcliffe LLP, Reed Smith LLP, Sanford Heisler Sharp LLP, Outten & Golden LLP and Kecker Van Nest & Peters LLP.

Countering a Shift on LGBT Rights

The administration's shift on LGBT issues has been felt on a number of fronts, including the president's stated intention to ban transgender people from the military, a revision in federal guidance regarding transgender children in schools and the solicitor general's position in a potentially precedential case involving a Colorado baker who refused to service a gay wedding.

"The executive actions of the Trump administration pose novel and complex legal challenges," said Christopher Clark, national pro bono director for Lambda Legal, a legal advocacy organization that focuses on LGBT issues. "The assistance of BigLaw firms resources are vital to conducting research and developing strategies to respond."

Cooley has been working with the Transgender Law Center and National Center for Lesbian Rights, among other organizations, submitting amicus briefs outlining the stories of transgender students affected by school policies that mandate which restrooms students can use. These cases predated the Trump administration, and many are pending in appeals courts, but the departments of Justice and Education recently withdrew Obama-era guidance that required schools to accommodate transgender students.

"You put together the pulling of the guidance that protects transgender students and all the questions about how transgender individuals in the military are going to be treated," Alger said. "I

think there is great concern by those in the LGBT community — and transgender community in particular — about their rights under this administration.”

Another high-profile issue on which the administration has likely diverted from its predecessor is in the matter of Masterpiece Cakeshop, whose owner has argued that the First Amendment protects his right not to produce a cake for a gay wedding.

In that matter, Akin Gump filed **an amicus brief** with the Human Rights Campaign on behalf of a wide array of celebrity chefs, restaurateurs and bakers, arguing that, while it can be creative, preparing food is not a form of protected free speech immune from public accommodation laws. The government filed a brief that takes the opposite stance, and the solicitor general will argue in favor of the baker. The case is scheduled for oral argument on Dec. 5.

“I think it’s quite clear that the Obama administration would have taken a different position in this case,” said Shah, the Akin Gump partner, who worked on the brief. While an assistant to the solicitor general under Obama, Shah had argued before the high court against the Defense of Marriage Act during the landmark U.S. v. Windsor case in 2013.

“When the Trump administration filed its brief, I think it raised some eyebrows, not because the Trump administration would support the other side, but that the U.S. decided to file at all in this case,” he said.

--Editing by Brian Baresch and Emily Kokoll.

Correction: An earlier version of this article misstated one of the organizations Cooley partnered with on amicus work.