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A FREE MAN

Michael Bien's firm can pursue cases, like prison litigation, that don't bring in much money

By Petra Pasternak
RECORDER STAFF WRITER

Michael Bien billed about 2,800 hours last year — more than at any point in his career. More than half of it hasn't been paid. And it may never be.

The managing partner at 17-lawyer Rosen, Bien & Galvan is lead counsel on the mental health part of California's high-profile prison overcrowding litigation. He's been working on *Coleman v. Schwarzenegger* for several years, but since the summer of 2007, the case has become the biggest at his San Francisco litigation firm. Media attention on the case hit a crescendo this summer, when a panel of three federal judges issued an unprecedented order telling the state to come up with a way to reduce the inmate population by 40,000 to bring prison conditions into compliance with constitutional standards. California's appeal is taking the firm to the U.S. Supreme Court.

The firm doesn't specialize in pro bono, but its lawyers do believe that taking on public interest matters is important and devote significant time and resources to such cases. The pay, however, isn't always stellar, or predictable. The firm's model only works, Bien said, because its caseload is highly diversified; it includes everything from construction



JASON DOY

BIEN THERE, DONE THAT: Michael Bien, of Rosen, Bien & Galvan, said his old firm — Brobeck — couldn't afford to let him put much time into pro bono cases.

to employment cases, from trial to appellate work. Holding it all together is the shared philosophy that money is only part of the equation.

"A lot of us are attracted to having these constitutional civil rights cases in our practice, because we are the kind of people who want our kids to live in a world that is more fair, safer and that has more opportunities than the ones that we grew up in," said name partner Ernest Galvan, who also has plowed many hours into the prison overcrowding case.

That said, Galvan acknowledges that making the business model work is a recurring worry.

In the last two years, for instance, the overcrowding case has cost Rosen, Bien more than it's brought in. In that time, the firm has put two of its four partners, plus four associates, on the matter; and it's spent nearly \$1 million out-of-pocket, some of it recoverable, some not.

"This is a pro bono case, in a sense," said Bien, whose regular hourly rate is \$650. Because of restrictions placed by the Prison Litigation Reform Act, "the most we can get back in attorney time is \$169 per hour. ... That's a contingent rate, paid if you win."

Such is the nature of prisoner rights litigation, which Bien and other lawyers say is notoriously difficult and risky to handle — one reason the Rosen, Bien firm doesn't find too many competitors in the field.

Bingham McCutchen partner Geoffrey Holtz, who has co-counseled with Rosen, Bien on several parolee rights class actions, says it's amazing what the tiny firm does with limited resources. "At the end of the day, what you get in the best case is your attorneys fees, less some substantial discount," he said. "There aren't a whole lot of firms out there that are willing to work under those terms."

And yet, up to a third of Rosen, Bien's practice is civil or constitutional rights work, where pay is something the firm has to fight over tooth and nail.

The firm survives by balancing such work with plaintiffs' as well as defense work for individuals and private companies, done for hourly pay and contingencies and everything in between. Its practice includes antitrust, contract and construction disputes, a range of employment disputes (almost exclusively on behalf of plaintiffs), and lawyers' fee disputes and professional responsibility matters. The firm also acts as appellate counsel to parties

on both the plaintiff and defense side.

No single area has represented more than 15 percent of the firm's revenue, Bien said. Though there has been at least one year when partners made less than associates, there have also been multimillion-dollar awards at the end of long cases.

"The balance is sometimes precarious," Bien said, "but it's worked out now for almost 20 years."

Last year, for instance, Rosen, Bien split \$4.4 million in fees with co-counsel Bingham McCutchen (Rosen, Bien got between \$2 million and \$3 million) from a juvenile parolee reform case, *L.H. v Schwarzenegger*, which Rosen, Bien had been involved in for about three years. "That balanced out the overcrowding case," Bien said. Also helping with that balance was his work defending Estee Lauder in an antitrust case that concluded in a settlement in January.

Rosen, Bien was founded in 1990 by civil rights specialist Sanford Rosen and Bien, who had previously spent 10 years at Brobeck, Phleger & Harrison.

Bien says his belief that one of the roles of an attorney is to protect constitutional rights was one of the motivating factors behind his decision to leave Brobeck, where he was a partner. With three children and a mortgage, "it was a little scary financially," he recalled.

But it had grown difficult for him to do pro bono given Brobeck's ambitions to go statewide and later, national. He said he got the message from Brobeck that he could put his name on the prison rights case, *Coleman*, that had just come in the door, but that he wouldn't be able to do the work himself. "They wanted me on antitrust and securities cases," he said. "And they were right. For their business model, I needed to be working on profitable stuff."

Rosen, who was a solo at the time, said he got to know Bien well right around the 1989 Loma Prieta earthquake, when they were working on a case involving conditions of confinement at a state medical facility. "Mike and I commuted to Sacramento together, because it was being tried in the Eastern District," Rosen said. "We got on well," and Bien joined him as partner soon after.

Twenty years later, Bien has no regrets. "I never looked at what I could've earned working at Brobeck, but what do I need to earn to live in the Bay Area, and how can I make it rewarding to me as a person, and balance my family obligations," Bien said. "I see people burning out around me in the legal profession. I'm not burning out — I'm still excited about things."

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