

Judges' Trips Reflect Gray Area in Ethics Rules

Zoe Tillman

November 9, 2015

Federal appeals judges routinely travel across the country to speak and teach, and their hosts pay the cost. Rarely do judges visit legal advocacy groups that appear often in court, according to a National Law Journal review of judges' annual financial reports.

Still, these trips — which involve relationships that judges are warned to handle with caution — reveal a gray area in judicial ethics rules about who judges can affiliate with off the bench, especially when money is involved.

The financial reports show limited interactions between judges and groups that have business, or even the mere likelihood of it, in their courts. Legal advocacy groups paid for only six of the 802 expense reimbursements reported in judges' financial disclosures last year. In three instances, those groups appeared before the judge they hosted in a case decided within the next year and a half.

Judges are allowed to accept money for their travel expenses from groups that have an ideological position or a particular legal focus. However, judges' ties to these organizations can trigger concerns about the “appearance of impropriety” — the public perception of bias, not an actual conflict of interest.

Statistics alone only tell a partial story. Along with a review of the 257 financial reports that federal appeals judges filed last year, the NLJ conducted phone and email interviews with 18 of them about how they apply the judicial ethics guidelines to their own trips.

There was no consensus. Some judges said they considered invitations on a case-by-case basis. Other judges drew a bright line, saying they would decline offers from groups known to participate in litigation in their courts.

“I will not accept any invitation from any entity that might have cases before the court, now or conceivably in the future,” Second Circuit Chief Judge Robert Katzmann said in an email.

Fourth Circuit Judge James Wynn Jr. said he employed a “smell test.” If he was invited to speak to a group “that sounds like they have an agenda, I typically am not going to be there,” he said.

In annual financial reports, federal judges disclose reimbursements for airfare, hotels, meals and other expenses worth at least \$375, but not the exact value. The reports filed last year cover judges' activity in 2013. Most reports filed this year were not yet available.

Events hosted by the conservative Christian legal advocacy group Alliance Defending Freedom highlight the varying practices among judges. Sixth Circuit Judge Alice Batchelder and Tenth Circuit Judge Bobby Baldock last year reported reimbursements for transportation, lodging and meals from the Arizona-based group — trips they've reported annually since 2007 and at least 2003, respectively. Batchelder also reported reimbursements for two trips in her disclosure this year.

Alliance Defending Freedom, which focuses on religious freedom issues, participates in federal court litigation, including in the Sixth and Tenth Circuits. It filed amicus briefs in cases argued in 2014 and decided earlier this year by appellate panels that included Batchelder, who directed questions to a judiciary representative. Both she and Baldock declined interview requests.

Eleventh Circuit Judge William Pryor Jr. said he used to speak at Alliance Defending Freedom programs — previously called Alliance Defense Fund — before he became a judge in 2005, but no longer does so because of the group's activities in court.

“In the old days [Alliance Defending Freedom] didn't litigate. They would just fund litigation by other groups,” Pryor said. “They changed that policy at some point, and, when they did, they started litigating in the Eleventh Circuit, and that made it pretty easy for me to decide early in my career as a judge that I wasn't going to speak to that group anymore.”

THE JUDICIARY'S GUIDANCE

The Code of Conduct for U.S. Judges says judges must avoid the “appearance of impropriety” or influence when they accept expense reimbursements.

The judiciary also publishes advisory opinions with more detailed ethics guidance. One June 2009 opinion warns that judges might face an appearance issue if they accept hospitality from a lawyer organization associated with a “viewpoint regularly advanced in litigation.”

Another opinion, from September 2010, cautions judges about participating in private legal training programs that are hosted by advocacy groups that appear regularly in their court.

“The judge doesn't want the public to think that he or she is ‘in bed with’ an organization with a decided political or ideological or legal position,” said Stephen Gillers, a professor at New York University School of Law who studies judicial ethics. “Repeated attendance at those organizations' meetings can certainly lead to that conclusion.”

Judges generally said they were sensitive to how reimbursed travel might look to the public, but it was rare for those trips to present an actual conflict of interest.

“I think a judge owes a responsibility to be involved with the law and the evolving nature of the law,” Wynn said. “The fact that you go to an entity with a particular bent doesn’t put you in with that bent.”

One factor that judges consider when weighing an invitation to speak is whether the event is open to the public.

“The rules preclude one from, for example, going to a program that’s closed to the public. A particular law firm or a particular company or a closed organization. So I don’t do that,” said Seventh Circuit Chief Judge Diane Wood. “If Firm A, B & C says, ‘We want you to talk to our summer associates,’ I say no, because that’s not the way we’re supposed to do things.”

When judges do travel, their reimbursed trips can reflect their political affiliations. Republican-appointed judges were more likely to frequent right-leaning organizations, and the same was true for Democratic appointees and left-leaning groups.

Some judges said they were mindful of balancing their speaking engagements between groups that represent opposite sides in litigation — not favoring prosecutors over defense lawyers, for instance.

“The question is, if I’m willing to talk to this group, do they have counterparts, and am I willing to talk to them, too,” Seventh Circuit Judge David Hamilton told the NLJ.

‘RUBBING ELBOWS’

Asked about judges who said they would decline invitations from groups that litigate, Alliance Defending Freedom spokesman Greg Scott said in an email that “each judge is free to make her or his own judgment on where they speak and has an independent duty to assess the judicial canons of ethics’ applicability to their nonjudicial activities.” A federal judiciary spokesman said in a statement that Batchelder addressed students at Alliance Defending Freedom’s summer training program for Christian law students, the Blackstone Legal Fellowship, “about the challenges of maintaining their faith in a secular profession. On a few occasions, she also has addressed the interns about whether to seek clerkships in state or federal courts and what she expects in a clerk.”

Charles Geyh, a professor at Indiana University Maurer School of Law who studies judicial ethics, said he did not believe Batchelder’s trips violate any ethics rules. A judge who spoke at an event was less likely to run afoul of ethics rules than a judge with closer ties, such as serving on a group’s board, he said.

“The topic of [Batchelder’s] talk implies that the judge is a devout Christian who thinks it is important for lawyers to reconcile their faith and work — a sentiment presumably shared by the organization that she addressed,” Geyh said. “But that doesn’t strike me as calling her impartiality into question.”

Other groups that regularly participate in court cases that reimbursed judges' travel include the liberal American Civil Liberties Union; the libertarian Cato Institute; and the Claremont Institute, a conservative think tank, according to last year's financial reports.

Ninth Circuit Judge Diarmuid O'Scannlain reported a reimbursement from the Claremont Institute for a 2013 event in Washington. At the time, the institute's litigation arm, the Center for Constitutional Jurisprudence, had an amicus brief pending in a case before the judge.

The center's founding director, John Eastman, said the center was not involved with the event and was walled off from institute programming.

O'Scannlain declined an interview request. A Ninth Circuit official said in a statement: "Like many of his colleagues, Judge O'Scannlain does not recuse when the filer is neither a party nor counsel, except when there is an appearance of conflict of interest. As for invitations, he gives careful consideration to appearances of potential conflict of interest before accepting."

Legal advocacy groups take different approaches to their interactions with judges.

Roger Pilon, Cato's vice president for legal affairs, said he was skeptical that hosting judges, especially by groups that mostly participate as amicus parties, could jeopardize judges' impartiality. Organizations invite judges to hear what they have to say, not to influence what they think, he said.

James Burling, director of litigation at the conservative Pacific Legal Foundation, said his group doesn't invite judges, in part out of concern that it could put judges in an ethical bind. "The only kind of judge we'd invite is one whose legal reasoning we like, and we wouldn't want to put that judge in the place of having to recuse him or herself," Burling said.

Keith Swisher, a lawyer in Arizona who has taught and written about judicial ethics issues, said judges should be mindful of the perception that they're "rubbing elbows" with groups that paid for their travel expenses.

"Part of it is appearances-based, that the judge is associating and benefiting, at least in terms of travel, from the organization, and just allying with the organization," Swisher said. "I don't think judges a lot of time see it that way, from the perspective of the public."