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Latham & Watkins gives judge \$3.2 million worth of legal aid.

Latham & Watkins' Maureen Mahoney took on a major assignment when she agreed to represent Jay Bybee, a federal appellate judge who was accused of violating ethics rules for his work at the U.S. Department of Justice on so-called "torture memos." Newly released records show just how big the assignment was.

From 2007 to 2010, Bybee accepted legal and consulting help totaling \$3.4 million as he fought off allegations that he authorized torture, according to financial disclosure reports. Nearly all the assistance, \$3,251,893, came from Los Angeles-based Latham, whose lawyers used to appear before Bybee in the courtrooms of the U.S. Court of Appeals for the 9th Circuit.

Experts on judicial ethics said they could not recall another federal judge receiving so large a benefit. Although the fact that Latham represented Bybee has been widely reported since 2009, the dollar value of the work had not been reported.

Bybee listed the value on financial disclosure reports he's required to complete annually. *The National Law Journal* obtained the reports from 2009 and 2010 through a request made under the Ethics in Government Act. Records from earlier than 2009 were obtained from an online database maintained by Judicial Watch, a conservative group in Washington that archives disclosure reports.

One section of the reports asks judges to disclose gifts, which is where Bybee listed the legal services provided by Latham, the firm that took the lead pro bono in Bybee's defense. He reported \$76,479 in legal services from Davis Polk & Wardwell, which set up a legal expense fund for the judge, and \$9,600 from Geoffrey Hazard Jr., a law professor who specializes in legal ethics. Another \$60,000 in in-kind work came from The Wolf Group for consulting services.

The team was charged with responding to congressional and Justice Department investigations into Bybee's tenure as head of DOJ's Office of Legal Counsel. The office produced memos signed by Bybee and another lawyer, John Yoo, allowing the use of waterboarding and other intense interrogation methods. Opponents of those methods said the memos showed a reckless disregard for ethical duties, and the investigations became a key test of how the U.S. government would reckon with its past use of waterboarding.

Bybee and Yoo won a decisive victory in January 2010, when Justice Department lawyer David Margolis, at the urging of Latham lawyers and others, rejected the idea of referring the two men to state bars for possible discipline. House Democrats also declined to pursue impeachment proceedings against Bybee, as some of his critics wanted.

The episode continues to affect Bybee's role as a judge because of potential conflict of interests involving Latham. The firm has a major presence in the 9th Circuit, but a search of court records shows that, since Bybee's troubles began, he has disqualified himself from cases in which Latham lawyers are representing a client. In at least two votes this year on whether to hold a rehearing *en banc*, Bybee "did not participate in the deliberations or vote," according to orders that 9th Circuit Chief Judge Alex Kozinski signed. One case involved Safeway Inc. and other grocery stores fighting antitrust allegations, while in the other an immigrant from St. Kitts and Nevis is appealing a deportation order.

It's not clear how long the disqualification will last. "Judge Bybee has advised us that he will continue to recuse himself from Latham matters for some time," wrote Mahoney, of counsel to Latham in Washington, in an e-mailed response to questions. Asked whether it could last years or whether there is a record of his policy, she did not answer.

There are some situations that always demand a federal judge's recusal — for example, when he owns stock in a company in litigation — but judges have wide leeway in situations involving gifts. Here, the standard would likely be whether Bybee's impartiality "might reasonably be questioned," said Charles Geyh, a professor at Indiana University Maurer School of Law — Bloomington. Bybee, like any other federal judge, would answer that question himself. If a judge decides not to recuse, a litigant may move for disqualification and then appeal a decision to remain in a case.

Records from the congressional and Justice Department investigations show some of the work done by Latham lawyers. Mahoney and partner Everett "Kip" Johnson Jr. wrote a 157-page rebuttal to lawyers from DOJ's Office of Professional Responsibility who argued that Bybee and Yoo acted improperly. Mahoney, Johnson and Latham associates Gabriel Bell, Sean Krispinsky and Derek Smith accompanied Bybee to an unusual, day-long interview with House Judiciary Committee investigators.

Latham is not currently providing any legal work for Bybee, Mahoney wrote in her e-mail. She, like Bybee, is a Justice Department veteran and prominent Republican. Bybee, a federal judge since March 2003, did not respond to interview requests left with his chambers in Las Vegas.

IMPARTIAL BEHAVIOR

Bybee, 57, may not have been able to afford Latham's fees if the firm hadn't worked pro bono. After spending most of his career in government and academia, he disclosed during his 2003 confirmation process that his household net worth was \$457,000. He has four children.

Geyh, who specializes in ethics and judicial recusal, said there's nothing wrong with Bybee accepting free legal services as long as he's not trading on his position. And by publicly disclosing the value of those services, Geyh said, "Bybee is trying to do the right thing here, it sounds like, by coming up with a figure."

But the question of how long Bybee should sit out cases involving Latham is more difficult, Geyh said. "For most people, a \$3 million legal fee would bankrupt them, and if his financial livelihood and his financial solvency and his ability to support his family all turn on the support he received from them in a point of crisis, I think it will at least be a longer period of time," Geyh said.

The 9th Circuit's executive, Cathy Catterson, declined to say whether Bybee had provided the circuit staff with any written instructions. If he did, the instructions would not be public, Catterson said. "It's just not a public record, and it's up to the judge to make his own decisions as to recusal," she said.

Kozinski said recusal arrangements are usually informal, and deferred further comment to Bybee. "I can only speak for myself," Kozinski said.

SECONDARY ASSISTANCE

Davis Polk's involvement came about because of a friendship. Randall Guynn, a New York partner and head of the firm's financial institutions group, roomed with Bybee in college at Brigham Young University and said someone approached him about setting up a legal expense fund for the judge. Guynn agreed. (He declined to say who made the request.) He and two or three others at the firm who specialize in trusts wrote, for example, the 15-page declaration establishing the fund, which launched publicly in 2009.

"That's something that we just set up, and there is no ongoing attorney-client relationship," Guynn said.

The legal expense fund may have helped defray a fraction of Bybee's costs. His financial disclosure reports list as gifts \$45,106 from the "Bybee Legal Expense Fund" during 2009 and 2010. Neither he nor the fund disclosed the names of donors or where the money went, and the fund's declaration says Bybee, to avoid conflicts of interest, will not know who donates.

Guynn said he does not know whether Bybee disqualifies himself from cases involving Davis Polk, but records show Bybee participated in at least one in which the firm had a client. The client, a Guatemalan woman who was applying for asylum in the United States, nevertheless lost when a three-judge panel including Bybee upheld in January an immigration judge's ruling.

Bybee's financial disclosure reports do not give any identifying details about The Wolf Group. A Dallas-based company by that name, however, describes itself as providing communications consulting and crisis management to corporations. A woman who answered the phone referred questions to another employee, Dan Allen, a former Republican campaign consultant in the Washington area. Allen did not return messages requesting comment.

Hazard's involvement appears to have been a letter he wrote in 2009, concluding that Bybee and Yoo did not violate standards of professional ethics. A professor at the University of California Hastings College of the Law, Hazard declined an interview request, citing a confidentiality obligation. Yoo's lead attorney was Gibson, Dunn & Crutcher partner Miguel Estrada, and as a professor at the University of California, Berkeley School of Law, Yoo has not been required to disclose the value of Estrada's work.

