AMERICAN BAR ASSOCIATION

Administrative Law and Regulatory Practice Section

American Bar Association
Administrative Law and Regulatory Practice Section
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June 14, 2019

Office of Government Ethics
1201 New York Avenue NW, Suite 500
Washington, DC 20005

Re: Office of Government Ethics Advance Notice of Proposed Rulemaking and Notice of Public Hearing—Legal Expense Fund Regulation; RIN 3209-AA50; 84 Fed. Reg. 15146 (April 15, 2019)

Dear Sir/Madam:

On behalf of the Section of Administrative Law and Regulatory Practice of the American Bar Association (the Section), I write in response to the above-referenced advance notice of proposed rulemaking and notice of public hearing (ANPRM) issued by the Office of Government Ethics (OGE) regarding legal expense fund regulation. The views expressed herein are presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association (ABA) and, accordingly, should not be construed as representing the policy of the ABA.

The Section has prepared the following comments for OGE's consideration regarding several key issues identified in the ANPRM. The Section is a nonpartisan organization that is interested in the powers and responsibilities of government agencies at the federal, state and local levels, the processes by which they operate, review of their actions, their executive, legislative, and judicial branch relationships, and their relationship with the public. Both politically and geographically diverse, the Section is composed of specialists in administrative law and includes private practitioners, government attorneys, judges, law professors, and members of nonprofit organizations. Officials from all three branches of the federal government sit on its governing Council. The Section is interested in the subject matter of the ANPRM as affecting an important topic relevant to good government—ethics regulations for the federal civil service—and wishes to help ensure that any OGE regulatory action deriving from the ANPRM avoids unintended conflicts.

The Section supports OGE's goals of ensuring ethical conduct in service and fighting corruption and the appearance of corruption in government. The Section believes that providing additional guidance to federal employees on how to comply with OGE regulations could be useful in this area, and to that end supports potential issuance of additional OGE guidance for the "legal expense fund" issues cited in the ANPRM. However, the Section wishes to ensure that OGE's efforts in this area

are not inadvertently hampered due to risks of overbreadth or unintended conflict with other regulations.

The Section urges OGE to proceed cautiously in its rulemaking on this particular subject and to avoid improperly regulating the manner in which legal representation is financed or otherwise impinging on the confidential attorney-client relationship. The ABA has long opposed laws or regulations which, in the name of effectuating other policy goals, "would compel lawyers to disclose confidential information to government officials or otherwise compromise the lawyer-client relationship or the independence of the bar."[1] The Section recommends that any future OGE rulemaking in this area that seeks to regulate how attorneys and clients fund legal representation of federal employees or requires reporting concerning the funding of legal representation should be narrowly tailored to preserve the important policies underlying the independence of the legal profession under the sound oversight of the judicial branch.

To avoid unintended consequences, the Section recommends that any regulation in this area take proper account of the vast panoply of legal funding mechanisms used by federal employees to fund their own legal representation. The ANPRM's vagueness in describing what OGE considers a "legal expense fund" for purposes of its rulemaking creates a potentially expansive scope that could have unintended negative consequences. In practice, federal employees use a wide variety of funding mechanisms to fund their representation, including but not limited to drawing on their own savings (both private savings and public sources such as Thrift Savings Plan (TSP) accounts); commercial borrowing (including credit cards, commercial personal loans, and mortgages); private borrowing and/or gifts from family members and close friends; private legal insurance plans and prepaid legal services plans which provide legal representation as benefit of coverage; and litigation finance companies and crowdsource funding (which can include loans or donations).

If OGE adopts a rule that seeks to regulate "low bono" or contingent fee representation, then OGE potentially might be regulating the internal finances of private attorneys and private law firms. If OGE seeks to regulate representation of union-member federal employees by their unions, then OGE potentially might be regulating internal union finances. If OGE seeks to regulate *pro bono* representation, then OGE potentially might be regulating the internal finances of bar associations and charitable entities (including in some instances law school legal clinics), as well as the Military Departments (whose Judge Advocate General offices provide certain legal assistance to retired military officers and their families, among others) and private attorneys and law firms who independently offer *pro bono* representation, all of which provide representation to federal employee clients. The Section accordingly urges OGE to be extremely specific in any regulations that it proposes for legal expense funds to closely define which forms of legal finance it desires to regulate, and which it does not.

Further, the Section is concerned about possible disclosure requirements referenced in the ANPRM. The ABA strongly supports the preservation of the attorney-client privilege and the work product doctrine and opposes governmental policies, practices, and procedures that have the effect of

[1] *See, e.g.,* ABA Resolution 104, which was adopted by the ABA House of Delegates in February 2003. Resolution 104 and the related background Report are available at https://www.americanbar.org/content/dam/aba/directories/policy/2003_my_104.pdf.

eroding these protections.[2] Information concerning the financial arrangements underlying legal representation implicates issues of privileged attorney-client communications and attorney work product privilege, which should be protected from disclosure.

The Section recognizes the importance of ensuring ethical conduct in the federal civil service and believes that OGE regulation or guidance in this area could potentially be beneficial, provided that the concerns noted above are reviewed and addressed. We would be pleased to answer any questions you may have. Thank you for your consideration of the Section's views.[3]

Sincerely,

Linda D. Jellum
As Chair Elect, ABA Section of Administrative Law & Regulatory Practice

[2] *See* ABA Resolution 111 adopted by the ABA House of Delegates in August 2005. Resolution 111 and the related Report are available at https://www.americanbar.org/content/dam/aba/directories/policy/2005_am_111.pdf.

[3] The following individuals abstained: Hon. Judith Boggs, Hon. Alexander Manuel, Daniel Flores and Louis George.