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June 21, 2022

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

Re: Office of Government Ethics Proposed Rule—Legal Expense Fund Regulation;
RIN 3209-AA50; 87 Fed. Reg. 23769-23780 (April 21, 2022)

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 proposed rule by the Office of Government Ethics (OGE) regarding its legal expense fund regulation. The views expressed herein have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

The Section has prepared the following comments for OGE's consideration regarding several key issues identified in the proposed rule. 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 proposed rule 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 proposed rule 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. However, the Section is concerned that the proposed rule in its current form improperly invades the privileged attorney-client relationship and the power of the judicial branch to govern the bar. 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] Such protected information includes the terms of retainer agreements between attorneys and clients, and the client's funding arrangements for paying for representation. The ABA

[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/midyear-2003/2003_my_104.pdf

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 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 opposes the proposed rule (in particular, proposed 5 C.F.R. §§ 2635.1007, 2635.1009), which requires the disclosure of terms of representation and funding sources for most subject employees, because it forces disclosure of this privileged information.

The requirement under proposed 5 C.F.R. § 2635.1007(a)(2) to publicly disclose to the opponent party agency the "date(s) of distribution, amount, and purpose of any distribution from the legal expense fund exceeding $250 during the quarterly reporting period" is also problematic because of its vagueness. The proposed rule in requiring the disclosure of "date(s) of distribution, amount and purpose" requires the subject employee to report to the opposing party agency a portion of billing statements, which often contain privileged and otherwise protected attorney client communications and attorney work product. In the alternative, through its vagueness in defining what level of detail is required to comply with the regulation, the proposed rule risks tricking unwary clients into waiving privilege and disclosing privileged and confidential matter unnecessarily.

As the disclosures under proposed 5 C.F.R. § 2635.1007 are to be placed in a publicly searchable database under proposed 5 C.F.R. § 2635.1007(g), there is no restriction whatsoever on this financial disclosure information being provided straight to the attorneys representing the opposing party agency (to be then used to the benefit of that agency and the detriment of the employee). Disclosure of such privileged information to the client's opponent (here, the employing agency of the client) puts the client at strategic disadvantage, especially while representation is ongoing. For example, if the opposing party agency learns that a hypothetical client is on an hourly representation basis and has limited funds available for representation, that information can be used to prejudice the client in the opposing party agency's litigation and settlement strategy.

The proposed rule further creates a moral hazard by delegating approval authority for legal expense funds and for *pro bono* representation agreements in most cases to agents of the opponent party agency, who must approve such arrangements in most cases prior to representation commencing. *See* proposed 5 C.F.R. §§ 2635.1004(g)(1), 2635.1009(b). This creates a conflict of interest that would incentivize the opposing party agency to withhold or delay approvals under the regulations to benefit its position in litigation, especially in cases where the subject employee may be facing imminent deadlines.

The ABA supports expanded provision of *pro bono* legal services and performance of public service activities.[3] Requiring approval of the opposing party agency of any *pro bono* representation under proposed 5 C.F.R. § 2635.1009(b) is problematic as creating a possibly deterrent hurdle to provision of *pro bono* representation, and is thus objectionable. Further,

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[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/annual-2005/2005-am-111.pdf

[3] *See, e.g.,* ABA Resolution 121A, which was adopted by the ABA House of Delegates in August 2006; and ABA Resolution 114, which was adopted by the ABA House of Delegates in August 1995.

the definition of "*pro bono"* legal services present proposed 5 C.F.R. § 2635.1003 is further problematic due to its vagueness. For example, the present definition does not make clear whether or not it is limited to *direct* provision of legal services in a representational capacity. Without that limit, the definition would appear to extend to ethically unobjectionable matters such as provision of *amicus* briefing in federal employment matters, if those *amicus* briefs happen to be favorable to the subject employee's position in litigation. The present definition further does not clarify whether it includes contingent fee representation within the ambit of "legal services provided without charge to the employee beneficiary or for less than market value as defined in § 2635.203(c)." A contingent fee is a recognized form of market valuation for legal services; it is not a form of discounted service even when the client does not pay due to lack of recovery from the opposing party in the legal matter. Accordingly, the proposed rule should be clarified to exclude contingent fee representation from any reporting requirements.

The present proposed rule further fails to adequately justify why the regulation is restricted to just those legal matters which are "arising in connection with the employee's past or current official position." Selectively hindering a federal employee's ability to fund litigation because the opposing party happens to be the subject employee's employing agency raises serious concerns. If the corruption concern is that the subject employee would then misuse their position to benefit legal expense donors, presumably the same concern would apply to donations for non-employment matters to the same degree as it would apply to employment matters. If corruption or appearance of corruption is the concern animating the proposed rule, a simple restriction focused on prohibiting donations from impermissible donors (for example, prohibiting acceptance of funds from those funding sources who fail to meet the definition of "permissible donors" under proposed 5 C.F.R. § 2635.1006(b), or alternatively from prohibited sources as defined in present 5 C.F.R. § 2635.203(d)) would appear more narrowly tailored to meeting this concern.

The proposed rule's vagueness in describing what OGE considers funds which must be routed through a "legal expense fund" renders the proposed rule objectionably broad in its ambit as it requires non-gifted funds to be routed through regulated "legal expense funds." In practice, federal employees use a wide variety of funding mechanisms to fund their legal representation, including but not limited to commercial borrowing (including credit cards, commercial personal loans, and mortgages); private borrowing from family members and close friends; private legal insurance plans and prepaid legal services plans which provide legal representation as benefit of coverage; and loans from litigation finance companies. None of these sources would appear to create corruption or the appearance thereof, so long as the funding sources meet the definition of "permissible donors" under proposed 5 C.F.R. § 2635.1006(b) (or alternatively so long as the funding sources are not prohibited sources as defined in present 5 C.F.R. § 2635.203(d)), and so they should not be covered by any "legal expense fund" regulations. *Cf., e.g.,* 5 C.F.R. §§ 2635.203(b)(3), 2635.203(c) (excluding "Loans from banks and other financial institutions on terms generally available to the public") from gift restriction regulations.

Finally, the Section wishes to note that the requirement in proposed 5 C.F.R. § 2635.1004(a) creates an additional burden for lower income subject employees by requiring that any "legal expense fund" be constituted as a trust under applicable state law. The ABA supports

facilitating access to legal services by low income clients.[4] Many federal employees are lower income, and could find the additional legal expense of setting up a trust in addition to their ongoing litigation expenses to be financially onerous.

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.

Sincerely,

Andrew Emery
Chair, ABA Section of Administrative Law & Regulatory Practice

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[4] *See generally, e.g.* ABA Resolution 105, adopted by the ABA House of Delegates in August 2010.