November 5, 2019

***VIA* Electronic Mail**

Office of Government Ethics
1201 New York Avenue NW, Suite 500
Washington, DC 20005
E-mail: usoge@oge.gov

Re: Advance Notice of Proposed Rulemaking, RIN 3209-AA50
84 Fed.Reg. 15,146-15,147 (April 15, 2019), 84 Fed.Reg. 50,791 (September 26, 2019)

To Whom It May Concern:

The National Employment Lawyers Association (NELA) respectfully submits the following comments concerning the Office of Government Ethics' (OGE) Advance Notice of Proposed Rulemaking (ANPRM) concerning Legal Expense Fund Regulation.

NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. Our mission is to advance employee rights and serve lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have faced illegal treatment in the workplace. NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws and comments on relevant Notices of Proposed Rulemaking (NPRMs). NELA also engages in legislative advocacy on behalf of workers throughout the United States. A substantial number of NELA members' clients are federal employees. NELA therefore, has an interest in regulation affecting NELA members' representation of federal employee clients, and thus affecting NELA members' operations.

We reviewed the June 14, 2019 comments submitted by American Bar Association's Section of Administrative Law and Regulatory Practice (ABA/ALRP) during the original comment period for this Advance Notice of Proposed Rulemaking. We agree with the ABA/ALRP's comments which address our serious concern that the ANPRM is overly broad due to the lack of definition in the term "legal expense fund," and we would add due to lack of definition of the term "contributions toward legal assistance." Along with ABA/ALRP, we strongly believe that this will likely lead to misapplication of the proposed rule when applied to the wide variety of funding mechanisms used by federal employees to finance legal representation. NELA agrees with the ABA/ALRP and also objects to the overreach of the proposed rule which would regulate the operations of private law firms and in so doing would undermine central aspects of attorney-

client relationships. It is critically important to preserve attorney-client privileges and confidentiality for clients, and equally important to ensure that the legal profession retains its independence—the oversight of which is handled by the judicial branch.

In addition to the concerns raised by the ABA, NELA has concerns based on the experience of NELA members in representing federal employees. The vast majority of all NELA members, including those that represent federal employees, are attorneys who work in solo practices or small firms. For the most part, the attorneys who represent federal employees are part of small businesses. The addition of regular reporting requirements concerning the financing arrangements of these solo and small firm practitioners with their federal sector clients would be highly onerous. Representation of federal employees is a specialized niche practice, and the addition of a significant burden on the representation of federal employees will certainly deter many attorneys from agreeing to represent federal employees. This in turn will harm federal employees in need of legal representation. Deterring representation of federal employees is contrary to the public policy concerns that are at the heart of the fee-shifting provisions of several major categories of federal sector employment law, a public policy long recognized by the courts. *See generally, e.g., Blum v. Stenson*, 465 U.S. 886, 892-96 (1986); *Raney v. Federal Bureau of Prisons*, 222 F.3d 927, 931-38, (Fed.Cir, 2000)

NELA believes that additional formal regulation (in the form of amendments to the Code of Federal Regulations) is not necessary to address OGE's concerns. OGE's core concerns—corruption or the appearance of corruption caused by payments being made by improper sources to federal employee recipients—are thoroughly addressed in existing OGE regulations. Present OGE regulations (for example, the definitions for gifts under 5 C.F.R. §§ 2365.203(b, f)) already cover many "legal expense fund" situations because they generally cover situations of concern where a federal employee is given money, irrespective of whether or not the money is allegedly for use in covering legal expenses. The present OGE regulations address OGE's core concern about improper sources of gifts, while not focusing on the means of provision of those gifts (as the latter form of regulation could be more easily circumvented).

The OGE should consider use of subregulatory guidance as the best vehicle for addressing its concerns, by explaining in layman's terms the proper application of preexisting restrictions on payments from improper sources to legal expense funds. An example of this sort of guidance document is OGE Legal Advisory LA-19-01, "Ethics Guidance for Employees in Non-Pay Status During a Lapse in Appropriations" (February 15, 2019). OGE Legal Advisory LA-19-01 provides guidance based on current OGE regulations, contextualized in a form accessible to federal employees. OGE Legal Advisory LA-19-01 also did not require a formal revision of the CFR, instead explaining how the preexisting OGE CFR provisions applied to the situation of concern. A plain-language guidance document similar to OGE Legal Advisory LA-19-01—such as, for example, a more expanded and plain-language version of OGE Legal Advisory LA-17-10 (September 28, 2017)—would also have the advantage of plain-language drafting contextualized to the relevant circumstance of "legal expense funds," making OGE's guidance more accessible to lay federal employees and thus helping to facilitate compliance.

In addition to its broad recommendations outlined above, our responses to OGE's specific questions as noted in the ANPRM as follows:

1. Donors and donations to legal expense funds. For example:

a. Should there be limitations on the types of donors to legal expense funds? If so, what should those limitations be? Why?

The best limits for donations to legal expense funds are OGE's existing limits on prohibited gift and prohibited sources, if the donation was made to a legal expense fund structured specifically to benefit an individually named federal employee. These concerns would only apply if the legal expense fund in question was structured specifically to benefit an individually named federal employee. These concerns are not relevant if the legal expense fund was providing funds for all federal employees. These same concerns also are not relevant to donations to organizations providing legal services to all federal employees or offering services to particular classes of government employees that do not discriminate on the basis of official duties or rank (for example, federal employee unions, women's legal defense funds or LGBTQ legal defense funds). This is especially true where the recipient organization then exercises discretion on which employees later receive those funds (as opposed to the funds being earmarked by the donor for a specific federal employee recipient).

No such limitations should apply for funds deriving from banks or financial institutions on terms available to the general public, whether provided directly to the beneficiary federal employee, or else as provided to a law firm representing a federal employee (e.g., a loan to a law firm from a financial institution under the law firm's line of credit). Similarly, such limitations should not apply for funds deriving from legal services plans and insurance companies on terms available to the general public.

b. Should there be contribution limits to legal expense funds? If so, what should that amount be? Why?

The best contribution limits for donations to legal expense funds are OGE's existing limits on prohibited gift and prohibited sources, if the donation was made to a legal expense fund structured specifically to benefit an individually named federal employee. These concerns apply only if the legal expense fund in question was structured specifically to benefit an individually named federal employee. There should not be contribution limits to legal expense funds that provide funds for all federal employees or to particular classes of governmental employees on a non-discriminatory basis as explained above.

c. Should donations of *pro bono* legal services to legal expense funds be permitted? Why or why not? Should employees be allowed to accept *pro bono* services outside of a legal expense fund? Why or why not?

To the extent that a donation of legal services is directly solicited and provided to an individually named federal employee, then current OGE regulations regarding gifts of services provided in-kind and prohibited sources already apply and such donations should be permitted provided that they do not raise a prohibited source or prohibited gift concern under present regulations. Otherwise, there should be no limits for donations of *pro bono* (or 'low bono' or other discounted or contingent fee) legal services to legal expense funds, and no limitation on provision of *pro bono* (or 'low bono' or other discounted or contingent fee) legal services outside of legal expense funds.

2. Beneficiaries of and use of funds from legal expense funds. For example:

a. Should there be limits on the permissible beneficiaries? If so, what should those limits be and why?

Limits on beneficiaries of legal expense funds should track OGE's existing limits on prohibited gifts and prohibited sources. These concerns would only apply if the legal expense fund in question was structured specifically to benefit an individually named federal employee. Therefore, these concerns and the corresponding limitations would not apply if the legal expense fund was providing funds available for any federal employees or providing services to particular classes of government employees in a way that does not discriminate on the basis of official duties or rank.

b. Should there be limits on the number of eligible beneficiaries for a legal expense fund? Why or why not?

OGE's ethics concerns here apply only to the identity or type of beneficiary, rather than the number of beneficiaries. This aligns with the approach used in present OGE regulations for prohibited gifts and prohibited sources.

c. What limits, if any, should there be on permissible uses of donated funds?

NELA, noting the existence of charities for employees to provide support during pending litigation that is not limited to directly paying for legal services, does not believe that limitations on permitted uses of funds would be needed, provided that the funds do not otherwise constitute prohibited gifts or are from prohibited sources.

3. Transparency of legal expense funds. For example:

a. Should the document establishing the legal expense fund be required to be publicly disclosed? Why or why not?

NELA opposes the creation of a new independent disclosure requirement. Given the vagueness of the term "legal expense fund," such disclosure requirements risk intruding in attorney-client relationships that are protected by privilege and confidentiality, and further intruding into the

prerogative of the judicial branch in regulation of attorneys and law firms. Further, OGE's ethics concerns pertain to the transmittal of prohibited gifts from prohibited sources to federal employees and the effect of receipt of such moneys on individual federal employees and the probity of the federal service, not the internal governance of non-federal legal services or donor organizations.

b. Should contributions be subject to reporting requirements? If so, should there be a threshold amount for disclosure? What type of information should be disclosed and what should the requirements for disclosure be? Why?

The current reporting requirements for prohibited gifts and prohibited sources by federal employees under the existing OGE regulations adequately provide for any necessary reporting. No additional reporting requirement should be imposed on non-federal entities. Given the vagueness of the term "legal expense fund," such reporting requirements would intrude in attorney-client relationships that are protected by privilege and confidentiality, and further intruding into the prerogative of the judicial branch in regulation of attorneys and law firms. Further, OGE's ethics concerns pertain to the transmittal of prohibited gifts from prohibited sources to federal employees and the effect of receipt of such monies on individual federal employees and on the probity of the federal service as a whole. Addressing OGE's concerns does not require regulation of the internal governance of non-federal legal services or donor organizations.

c. Should any disclosure information be made publicly available? If disclosure information is made publicly available, how and where should the information be disclosed?

The existing OGE regulations adequately provide for any necessary public disclosure, consistent with present regulations concerning prohibited gifts and prohibited sources. As noted above, NELA opposes imposition of new independent disclosure and reporting requirements for non-federal entities.

4. Establishment, management, and termination of legal expense funds. For example:

a. Should legal expense funds be the exclusive mechanism for employees to receive contributions toward legal assistance? Why or why not?

We strongly oppose any such restriction, given the wide variety of funding sources currently available (discussed in greater detail above) that do not invoke concerns regarding prohibited gifts or prohibited sources under present OGE regulations. Further, we vigorously oppose restrictions on contributions to unions, *pro bono* or 'low bono' legal services organizations and law firms, and law firms that otherwise provide discounted representation terms to federal employees, except to the extent that those contributions are earmarked for individually named federal employee beneficiaries and would violate present OGE regulations on prohibited gifts and prohibited sources. We strongly object to any regulation that would limit provision of

representation of federal employee clients by attorneys and law firms on a contingent fee basis, on a *pro bono* basis, on a 'low bono' basis, or limit writing off billable attorney time in the normal exercise of attorney billing discretion. There is no basis for regulation that would limit provision of representation by attorneys and law firms to their federal employee clients, and such regulation would cause grave harm to federal employees seeking representation arising from their federal employment.

b. What types of requirements should be imposed on legal expense fund trustees or managers, if any?

There are a wide variety of funding sources (discussed in greater detail above) that do not raise concerns regarding prohibited gifts or prohibited sources under present OGE regulations. Thus, we oppose any such restriction. In particular, we oppose regulations that reach to the internal operations of unions, *pro bono* or 'low bono' legal services organizations and law firms, and law firms that otherwise provide discounted representation terms to federal employees, except, as we have stated throughout this document, in any instance in which those contributions are earmarked for individually named federal employee beneficiaries and would violate present OGE regulations on prohibited gifts and prohibited sources. Further, given the vagueness of the term "legal expense fund," such requirements risk intruding into the prerogative of the judicial branch in regulation of attorneys and law firms. OGE's ethics concerns pertain to the transmittal of prohibited gifts from prohibited sources to federal employees and the effect of receipt of such moneys on individual federal employees and the probity of the federal service, not the internal governance of non-federal legal services organizations.

c. Should there be any restrictions on the legal structure used to establish a legal expense fund (e.g., trust, limited liability company, etc.)? Why or why not?

NELA opposes any such restriction, given the vagueness of the term "legal expense fund." NELA vigorously opposes regulations on internal operations of unions, *pro bono or* 'low bono' legal services organizations, and law firms. Due to that vagueness, such regulations would intrude in attorney-client relationships that are protected by privilege and confidentiality, and further intruding into the prerogative of the judicial branch in its regulation of attorneys and law firms. Further, OGE's ethics concerns pertain to the transmittal of prohibited gifts from prohibited sources to federal employees and the effect of receipt of such monies on individual federal employees and on the probity of the federal service as a whole. Addressing OGE's concerns does not require regulation of the internal governance of non-federal legal services or donor organizations.

d. What entities, if any, should have oversight authority over legal expense funds? Why?

Licensed attorneys and their law firms are properly regulated and overseen by the judicial branch, and by any licensing authorities that operate under the authority of the judicial branch such as mandatory bar associations or attorney disciplinary authorities. Regulation of prohibited

sources and prohibited gifts has historically fallen under the authority of OGE, in terms of regulating the beneficiary federal employees. Additional regulation of legal expense funds at the level of non-federal entities such as legal services or donor organizations is neither appropriate nor relevant to OGE's purview and goals.

e. Should there be limitations on solicitation of donations to a legal expense fund? If so, what limitations should be placed on solicitations and why?

Again, existing OGE regulations concerning prohibited gifts and prohibited sources are sufficient, and additional limitations are neither appropriate, nor needed.

f. What, if any, requirements should there be concerning how legal expense funds can be terminated? Why?

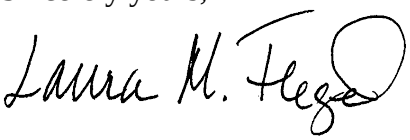
We oppose any such requirement, given the vagueness of the term "legal expense fund." NELA vigorously opposes regulations on internal operations of unions, *pro bono or* 'low bono' legal services organizations, and law firms. Due to that vagueness, such regulations would intrude in attorney-client relationships that are protected by privilege and confidentiality, and further intruding into the prerogative of the judicial branch in its regulation of attorneys and law firms. Further, OGE's ethics concerns pertain to the transmittal of prohibited gifts from prohibited sources to federal employees and the effect of receipt of such monies on individual federal employees and on the probity of the federal service as a whole. Addressing OGE's concerns does not require regulation of the internal governance of non-federal legal services or donor organizations.

g. Should existing legal expense funds be required to conform to new regulations? Why or why not?

NELA opposes any such regulation, given the vagueness of the term "legal expense fund." NELA vigorously opposes regulations on internal operations of unions, *pro bono or* 'low bono' legal services organizations, and law firms. Due to that vagueness, such regulations would intrude in attorney-client relationships that are protected by privilege and confidentiality, and further intruding into the prerogative of the judicial branch in its regulation of attorneys and law firms. Further, OGE's ethics concerns pertain to the transmittal of prohibited gifts from prohibited sources to federal employees and the effect of receipt of such monies on individual federal employees and on the probity of the federal service as a whole. Addressing OGE's concerns does not demand or support a need for regulation of the internal governance of non-federal legal services or donor organizations.

Thank you for your review and consideration of these comments on these important issues. We would be happy to discuss any aspect of these comments further if you have questions or wish to discuss these matters. I can be reached at lflegel@nelahq.org or (202) 898-2880 ext. 115.

Sincerely yours,



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