

March 25, 2026

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Comment of the National Organization of Bar Counsel

Submitted through: <https://www.regulations.gov>

**RE: Department Of Justice – Office of Attorney General
Docket No. OAG199
Comment to Proposed Rulemaking Review of State Bar
Complaints and Allegations against Department of Justice
Attorneys**

The National Organization of Bar Counsel (NOBC) was formed in 1965 to enhance the professionalism and effectiveness of attorney disciplinary counsel throughout the United States. NOBC is a nonprofit organization, formally established in the District of Columbia, whose members work in the regulation of the practice of law, including lawyer and judicial discipline, legal and judicial ethics and education, and the promotion of professionalism. Since 1965, NOBC membership has grown to include attorney discipline and ethics counsel from over 60 state, local, and federal attorney regulatory agencies in the United States.

NOBC submits the following comment on the proposed rulemaking by the United States Department of Justice (DOJ) regarding review of State Bar complaints and allegations against DOJ attorneys.¹ The proposed amendments to 28 C.F.R. Part 77 are unprecedented, unnecessary, inappropriate, and lack both Congressional and Constitutional authority. They do nothing to support the public protection mission of regulating and, when necessary, disciplining licensed attorneys. To the contrary, they will detract from the public trust in attorney regulation. As described in detail below, NOBC opposes the proposed rulemaking.

- I. The Rule Proposal Unlawfully and Unconstitutionally Intrudes on State² Authority to Enforce State Discipline Rules**
 - A. The Proposed Amendments to 28 C.F.R. Part 77 Would Violate Federal Law, Which Mandates That DOJ Attorneys Remain Subject to State Disciplinary Rules to the Same Extent and in the Same Manner as All Other Attorneys***

Under 28 U.S.C. §530C(c)(1), DOJ attorneys must be “duly licensed and authorized to practice as an attorney under the law of a State, a territory of the United States, or the District of Columbia.” To ensure accountability for unethical conduct of attorneys employed by DOJ, Congress enacted 28 U.S.C. §530B (“Section 530B”), which was signed into law on October 21,

¹ This comment expresses the opinion of the NOBC and not necessarily that of any of its individual members.

² This comment uses the term “state” to refer, inclusively, to the states, U.S. territories, and other jurisdictions such as the District of Columbia that, like states, have full licensure and enforcement authority.

1998, and became effective on April 19, 1999. Its mandate is straightforward:

An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

28 U.S.C. §530B(a). Section 530B(b) directed the Attorney General to “make and amend rules of the Department of Justice to assure compliance with this section.”

Acting under this authority, the Attorney General issued regulations in 1999 that, consistent with the text and purpose of Section 530B, did not change “the enforcement authority of the Department of Justice’s Office of Professional Responsibility [OPR], state authorities, or the federal courts.” Ethical Standards for Attorneys for the Government, 64 Fed. Reg. 19273, 19274 (Apr. 20, 1999). Since that time, for some 27 years, consistent with the system of enforcement that predated the 1999 regulations, these different entities have worked under rules that recognize their differing enforcement authorities:

- (1) State attorney disciplinary authorities—generally through authority conferred by the state supreme courts—receive complaints about attorneys licensed or otherwise authorized to practice in their jurisdictions, including DOJ attorneys. Many mid- to larger-sized jurisdictions receive thousands of complaints each year. Using criteria applied consistently across matters, disciplinary authorities review all complaints to determine whether they have sufficient merit to justify further investigation or should be dismissed because they do not implicate rules of professional conduct or because further investigation is unlikely to yield sufficient evidence to prove a violation of the rules. Under these criteria, the great majority of complaints are dismissed without proceeding to investigation. More complaints are dismissed after investigation, with relatively few resulting in disciplinary charges or sanctions imposed when attorneys are found to have engaged in violation of state professional conduct rules.
- (2) Federal courts investigate and impose disciplinary sanctions against attorneys appearing in those courts, including DOJ attorneys, when they are found to have committed professional misconduct under the rules of those courts using standards set out in those rules and applicable case law. While federal courts maintain their own disciplinary authority, they may not have the level of investigative and prosecutorial resources available to state disciplinary authorities and therefore may, and often do, refer matters to state disciplinary authorities. Federal courts also enforce licensure decisions made by state authorities as to attorneys appearing in federal court.
- (3) Using the DOJ Office of Professional Responsibility (OPR) and the more recently established Professional Misconduct Review Unit (PMRU), the Attorney General as employer of DOJ attorneys investigates and imposes employment sanctions on DOJ attorneys who have engaged in professional misconduct, including but not limited to violations of state professional conduct rules, but only if there is a finding “that the attorney

has violated a clear and unambiguous standard either intentionally or recklessly.” Review of State Bar Complaints and Allegations Against Department of Justice Attorneys, 91 Fed. Reg. 10780, 10781 (proposed Mar. 5, 2026). In addition, if PMRU “concludes that a State rule of professional conduct is implicated by the Department attorney’s conduct, it will authorize OPR to refer the matter to the appropriate bar disciplinary authorities.” *Id.* Importantly, these internal DOJ entities may impose consequences that have personnel implications, but they cannot unilaterally affect the underlying law license held by each DOJ attorney.

The proposed amendments to Rule 77.5(a) would give the Attorney General a right of first review, attempting to mandate that, before state disciplinary authorities “undertake any investigative steps that seek information or otherwise require participation from an attorney for the government in response to allegations that a current or former attorney for the government violated a rule of ethical conduct while engaging in that attorney’s duties for the Department, the Attorney General shall have the right to review the allegations in the first instance.” *Id.* at 10787. It would also provide that if the Attorney General, in her sole discretion, chooses to exercise “her right to review,” the Attorney General or her designee “shall request that the bar disciplinary authorities suspend any parallel investigations or disciplinary proceedings until the completion of the review,” and, if “the relevant bar disciplinary authorities refuse the Attorney General’s request,” the proposed rule threatens unspecified “appropriate action” to “prevent the bar disciplinary authorities from interfering with the Attorney General’s review.” *Id.*

This attempt by the Attorney General to direct and limit state authorities in their conduct of state attorney disciplinary investigations is illegal because it both is inconsistent with Section 530B and improperly intrudes on the long-recognized inherent power of the states to discipline attorneys.

1. Background of Section 530B

The decades-long recognition that DOJ attorneys must be held accountable for violating the rules of professional conduct “to the same extent and in the same manner as other attorneys in that State,” as set forth in Section 530B, did not materialize from thin air. Prior to the enactment of Section 530B, DOJ had repeatedly attempted to exempt its attorneys from portions of the state regulatory system, including by issuing the non-binding Thornburgh Memorandum in 1989, and then promulgating regulations that were invalidated as exceeding the Attorney General’s authority in *U.S. ex rel. O’Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998).³

Section 530B, also known as “the McDade Amendment,” was enacted after members of Congress debated DOJ’s position at that time—that DOJ should handle all disciplinary issues for

³ DOJ’s attempts to exempt its attorneys from oversight not only eventually faced strong Congressional opposition, but they were also rebuffed and strongly criticized by the courts. *See In the Matter of Doe*, 801 F. Supp. 478, 486 (D.N.M. 1992) (“The idea of placing the discretion for a rule’s interpretation and enforcement solely in the hands of those governed by it not only renders the rule meaningless, but the notion of such an idea coming from the country’s highest law enforcement official displays an arrogant disregard for and irresponsibly undermines ethics in the legal profession.”). The Eighth Circuit held the DOJ rule issued as Communications with Represented People, 59 Fed. Reg. 94-4510 (Mar. 3, 1994) (previously codified at 28 C.F.R. pt. 77), was an “invalid promulgation[.]” *McDonnell Douglas*, 132 F.3d at 1257.

its own lawyers—and rejected it.⁴ As detailed by Charles Doyle, Congressional appropriations historically required DOJ attorneys to be duly licensed and authorized to practice under the laws of a state, territory or the District of Columbia—such that compliance with underlying ethics rules was also mandatory. CHARLES DOYLE, CONG. RSCH. SERV., RL30060, MCDADE-MURTHA AMENDMENT: ETHICAL STANDARDS FOR JUSTICE DEPARTMENT ATTORNEYS 2 n.3 (2001) (citing 93 Stat. 1044 (1979); *see also United States v. Ferrara*, 847 F. Supp. 964, 969 (D.D.C. 1993), *aff'd on other grounds*, 54 F.3d 825 (D.C. Cir. 1995)).

As Congress considered whether to codify this long-standing principle despite DOJ's opposition to it, hearing testimony and legislator comments reinforced that Congress deemed the state regulatory system to be the ultimate source of accountability for DOJ attorneys' required compliance with state ethics rules. A leading proponent of ensuring that this system continued was Representative Joseph M. McDade:

I introduced this bill because I believe that they [Federal prosecutors] should be accountable, as all other lawyer[s] in this country are, to charges of misconduct and to ethical standards. The legislation, quite simply, Mr. Chairman and members of the committee, says that an attorney for the Government shall be subject to the same rules, the same laws, and local Federal court rules governing attorneys in each State to the same extent and in the same manner as other attorneys in that State.

Department of Justice prosecutors, as you have pointed out, Mr. Chairman, have always been monitored for ethics compliance by independent outside observers: the State or the Federal court. That is the way it ought to be, and we would be unwise to abandon this longstanding arrangement in favor of some kind of self-regulation internally by DOJ.⁵

Ethical Standards for Federal Prosecutors Act of 1996: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 104th Cong. 7-8 (1996) (emphasis added).⁶

⁴ At the time, NOBC expressed its support of the McDade Amendment. The Effect of State Ethics Rules on Federal Law Enforcement: Hearing on Section 530B of Title 28 Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary, 106th Congress, Appendix 103(1999)(Letter Submitted to Senator Hatch from Michael J. Oths, president, National Organization of Bar Counsel, Inc., dated Mar. 10, 1999).

⁵ The rulemaking notice claims that Section 530B “preserves” the authority of the Attorney General to enforce substantive state rules because “Congress did not expressly confer to the States enforcement authority.” Fed. Reg., Vol. 91 at 10783. However, it is clear through both the U.S. Supreme Court authorities discussed below as well as this legislative history that Congress knew that states already had enforcement authority through the Tenth Amendment powers reserved to the states. There is no federal power under the U.S. Constitution to “confer” to states authority that they already have.

⁶ Representative McDade was not alone in his concerns. *See id.*, at 1, Representative Carlos J. Moorhead (“Historically, States have had the exclusive authority to determine the membership of its bars and to regulate the conduct of its members. . . . One of the fundamental requirements to maintain the benefits of membership to a State bar is adherence to the bar's rules of ethics. . . . The highest court of each jurisdiction has the authority to investigate and discipline the members of its bar who fail to comply with these rules of ethics and ultimately to disbar one of its members.”); *id.* at 93, Roger Pilon, Ph.D., J.D., Senior Fellow and Director, Center for Constitutional Studies, Cato Institute (noting that “the Attorney General's authority to regulate the Department's attorneys . . . is delegated by Congress, to be sure, but it is not a plenary authority. . . . [T]he courts . . . are the proper authority because they are a

2. The Proposed Rulemaking Is Antithetical to Both the Text and History of Section 530B

The proposed rulemaking ignores Section 530B's actual text, as well as its history, and argues that its lack of any explicit provision about enforcement leaves a mystery as to what Congress intended. To the contrary, Congress spoke to the ongoing debate about how DOJ attorneys should be regulated through simple provisions that include DOJ involvement, but ultimately must be effectuated through state disciplinary authorities, who alone have the ability to take action affecting attorney licenses, and in doing so necessarily rely on state procedural rules regarding investigations, hearings, and decisions. Otherwise, "to the same extent" and "in the same manner" in subsection (a) mean nothing.

The proposed right of first review applicable only to DOJ attorneys is inconsistent with the requirement in Section 530B(b) that the Attorney General make and amend rules "to assure compliance with this section." By categorically requiring a right of first review and reserving to herself the authority to seek to compel state disciplinary authorities to suspend their disciplinary investigations in favor of an OPR investigation, the Attorney General seeks to carve out differential treatment for selected DOJ attorneys (as determined by the Attorney General). This is directly contrary to Section 530B, which requires that DOJ attorneys be subject to state laws and rules "to the same extent and in the same manner as other attorneys in that State," and that any DOJ implementing regulations be designed to "assure compliance" with that mandate.

The Attorney General's proposed rulemaking points to Section 530B's language, which does not explicitly address enforcement authority, to suggest that she is now trying to fill some sort of void. It is no accident, however, that Section 530B commands that DOJ attorneys be subject to state regulation to both "the same extent" and "same manner" as other attorneys. "Extent" ensures that DOJ cannot pick and choose the state ethical rules to which it will be subject, as it had attempted to do in the years preceding Section 530B's passage. "Manner" ensures that DOJ cannot push state disciplinary authorities to the side, requiring instead that DOJ attorneys remain accountable to those same state authorities, in accordance with existing procedures and the concerns voiced by the legislation's primary sponsor. This is consistent with the absence from the statute of any language explicitly altering the existing balance of enforcement authority.⁷

Both the text and history of the legislation make clear that Congress chose to leave in place and not change the respective and different enforcement authority of OPR, state authorities, or the federal courts. At the time Section 530B was enacted, states could enforce rules of professional conduct without any procedural or substantive limitations imposed by the Attorney General. Section 530B intentionally left this enforcement authority in place.

neutral as between the opposing parties. The Department is a party-in-interest. It is hardly in a position, strictly speaking, to set rules. It is the court's business to set the rules for parties that appear before it or for business that is related to litigation, which is, of course, what we're talking about here."); *id.* at 94, Pilon, *see supra* ("The Department's argument comes down in the end to a very simple and very old proposition: 'Trust us; we can police ourselves.' We should resist that proposition. . . . The founders understood what Lord Acton later said, that power corrupts; absolute power corrupts absolutely.").

⁷ As the Attorney General's 1999 rulemaking notice recognized, Section 530B was "silent on enforcement methods" and "for this reason" did "not change the enforcement authority of the Department of Justice's Office of Professional Responsibility [OPR], state authorities, or the federal courts." *See Fed. Reg.*, Vol. 64 at 19275 (Apr. 20, 1999).

The voice of Congress on this issue was consistent with the Supreme Court's recognition of state primacy in the context of attorney discipline:

Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers.

Leis v. Flynt, 439 U.S. 438, 442 (1979). Indeed, as the Supreme Court also has recognized, state interests in enforcing their own state attorney discipline rules are so important that they may override federal interests, including any asserted interest in having federal courts resolve federal constitutional claims that can be raised in a state proceeding. *See Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 425, 435 (1982) (as to "whether a federal court should abstain from considering a challenge to the constitutionality of disciplinary rules that are the subject of pending state disciplinary proceedings" the Court found that the "importance of the state interest in the pending state judicial proceedings and in the federal case calls *Younger* abstention into play.").

One cannot infer a Congressional intent to federally preempt state regulatory enforcement. DOJ now presumes an intent to preempt from Section 530B(b), which states that DOJ must promulgate regulations "to assure compliance with this Section." When analyzing whether there is Congressional intent to preempt, the Supreme Court applies a presumption against preemption, particularly as to "the historic police powers of the States." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). As *Leis v. Flynt* makes clear, and as further discussed below, attorney licensure and discipline incontrovertibly are a historic state police power. And far from indicating any Congressional intent to preempt state disciplinary authority, the plain language of Section 530B does exactly the opposite, recognizing state authority to discipline government attorneys "to the same extent and in the same manner as other attorneys in that State."

Section 530B's text and history are both consistent with Congressional recognition that DOJ attorneys would be admitted to the bar by states, required to comply with state rules to maintain licensure, and subject to state enforcement of the state rules applicable to practicing law under those licenses. DOJ's 1999 regulations correctly recognized that Congress left in place the enforcement authority of state regulators, without any improper and unjustified requirement that they defer to OPR investigations. Nothing has changed that provides any new legal basis for the Attorney General to upend the existing rules and instead attempt to mandate limitations on the enforcement authority of state regulators.

B. The Proposed Amendments to 28 C.F.R. Part 77 Would Violate the Constitution

The proposed rulemaking runs afoul of not only the Attorney General's statutory authority but also the Constitution. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The Tenth Amendment to the Constitution underscores both that the Attorney General lacks constitutional authority to direct the activity of state disciplinary authorities and that she cannot rely on "silence" as proof of preemptive intent when it comes to state regulation of the legal profession, a traditional state police power reserved to the states.

The work of state attorney disciplinary authorities is a long-recognized traditional state police power of the kind reserved to the states. *See Leis v. Flynt*, 439 U.S. at 442 (“Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions.”); *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. at 434-35 (Supreme Court recognition of the “importance of the state interest” in enforcing state attorney disciplinary rules); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 460 (1978) (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (“The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been ‘officers of the courts.’”)); *Cohen v. Hurley*, 366 U.S. 117, 123-124 (1961) (“History and policy combine to establish the presence of a substantial state interest in conducting an investigation of this kind. That interest is nothing less than the exertion of disciplinary powers which English and American courts (the former primarily through the Inns of Court) have for centuries possessed over members of the bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied.”), *overruled on other grounds by Spevack v. Klein*, 385 U.S. 511 (1967).

The proposed rule would not survive a constitutional challenge. It matters not if DOJ contends that the proposed rule seeks to prohibit state action rather than compel it. The anti-commandeering doctrine of the Tenth Amendment applies when federal law prohibits states from pursuing a regulatory scheme not otherwise preempted. The Supreme Court addressed that scenario in *Murphy v. Nat’l Collegiate Athletic Ass’n*, 584 U.S. 453, 470-475 (2018), concerning a federal law that, generally speaking, prohibited states from legalizing sports gambling. Proponents of the law contended that the anti-commandeering doctrine of the Tenth Amendment was not applicable, since the law did not compel states to do anything in particular. In holding the law unconstitutional, the Court rejected the proponents’ position and held the anti-commandeering doctrine applied to an attempt by Congress to prohibit a state action that was not subject to federal preemption: “It was a matter of happenstance that the laws challenged in *New York* [*v. United States*, 505 U.S. 144 (1992)] and *Printz* [*v. United States*, 521 U.S. 898 (1997)] commanded ‘affirmative’ action as opposed to imposing a prohibition. The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event.” *Murphy*, 584 U.S. at 475.

Here, the text of the Attorney General’s proposed rule expressly reserves to the Attorney General, in the exercise of her sole discretion, the right to somehow force a state to defer, potentially indefinitely,⁸ the state’s own investigation by taking undefined “appropriate action” to “prevent the bar disciplinary authorities from interfering with the Attorney General’s review of the allegations.” 91 Fed. Reg. at 10787 (Proposed 28 C.F.R. 77.5(b)). In so doing, the rulemaking broadly sweeps the entire state bar complaint process into the concept of “interference,” effectuating the type of improper prohibition of state action that offends the Tenth Amendment.⁹

⁸ The proposed rule sets no time limits either for the conduct of the Attorney General’s investigation or for notification to state disciplinary authorities of the results of the investigation, posing the risk that indefinite delay may result in effective preclusion of any meaningful state enforcement action.

⁹ We recognize the Attorney General’s authority to seek to limit or protect the disclosure by DOJ attorneys and former attorneys of confidential information contained in DOJ files or acquired by the attorney as part of the performance of that attorney’s official duties. Such regulation, however, must be directed at DOJ attorneys, not at state disciplinary authorities that the Attorney General lacks any ability to regulate. Moreover, these concerns are already addressed by DOJ’s existing *Touhy* regulations. *See* U.S. Dep’t of Just., Just. Manual §§ 1-6.100 to -6.640 (2026); *see also* 28 C.F.R.

Nothing identified in the rulemaking comes even close to justifying such an unbridled, unconstitutional usurpation of state authority. Indeed, there is no actual evidentiary basis presented in the proposed rulemaking. Instead, the proposal rests on a series of unsupported assertions that: (1) there has been an increase, undocumented and unquantified, in complaints submitted by individuals or groups that the Attorney General asserts, without any specifics or supporting evidence, are “political activists”; (2) states have decided to “give credence to” and investigate some subset of these complaints, again without providing any specifics or explaining why any such state decision was improper or unsupported; (3) this has resulted in what the Attorney General characterizes, again without quantification or specifics, as an “unprecedented weaponization” of the state bar complaint process; (4) this “risks” chilling zealous advocacy by DOJ attorneys, without any specific explanation of legal arguments or positions that the attorneys can no longer assert solely because of the “credence” being given to complaints; (5) due to all of the above, there is some sort of interference “with the broad statutory authority of the Attorney General to manage and supervise Department attorneys.” 91 Fed. Reg. at 10782.

On the basis of these unsupported assertions, the Attorney General proposes a solution that would usurp the authority of state regulators. This solution fails to acknowledge the scope of the Attorney General’s statutory duty to comply with section 530B’s broad command that DOJ attorneys be subject to state disciplinary rules “to the same extent *and* in the same manner as other attorneys.” (emphasis added). And the unbridled discretion the Attorney General seeks, to enjoin a state-based attorney discipline investigation or proceeding, falls squarely within the prohibition of commandeering enshrined in the Tenth Amendment.

II. The Proposed Amendment to 28 C.F.R. Part 77 Would Materially Interfere with the Public Protection Function of State Disciplinary Authorities

The proposed regulatory amendments are illegal and unenforceable. But were they to have effect, they would severely hinder state disciplinary authorities’ ability to pursue state disciplinary investigations, undermining the public protection mission that undergirds the state attorney regulatory system.

As an initial matter, while the proposed rules would give the Attorney General discretion to review a complaint in the first instance, they impose no time limits either for the completion of the Attorney General’s review or for notification to state disciplinary authorities of the results of that review. Indefinite delay would cause numerous states to face constraints imposed by statutes of limitation. Most states have them to promote both fairness and diligence in investigating and prosecuting attorney regulatory matters. *See, e.g.*, Ohio Gov. Bar R. V(9)(D); Texas R. Disc. P. 17.06; R. Disc. Miss. State Bar 4(d). Even where a statute of limitation does not pose a likely legal barrier, state disciplinary matters could face challenges or fail as witness memories fade, witnesses become unavailable, documentary evidence is lost, and other evidentiary problems mount. The

§ 16.1 *et seq.* Notably, these regulations specify that, “[a]s a general policy, the Department favors cooperation in state and federal cases in which the testimony of one of its employees is sought or in which information obtained by the Department is sought. Authorization in one form or another is usually granted if it is appropriate under the rules of procedure governing the case or matter in which the demand arose and if it is appropriate under the relevant substantive law concerning privilege, unless one of the factors set forth in 28 C.F.R. 16.26(b) is present.” U.S. Dep’t of Just., Just. Manual §§ 1-6.240. In contrast to the proposed rule amendments, this approach is consistent with Section 530B’s command that government attorneys remain “subject to State laws and rules . . . governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.”

proposed rule does nothing to address the inevitable and potentially indefinite delay created by the Attorney General’s review of a complaint. Such indefinite delay poses significant risks of undermining states’ ability to pursue their public protection mission and effectively precluding any meaningful state disciplinary action.

The proposal also raises the specter of attempting to require substantive—not just sequential—deference to the Attorney General’s review. The rulemaking notes that the “proposed rule does not require State bar disciplinary authorities to defer to OPR’s findings that a Department attorney violated an ethics rule.” 91 Fed. Reg. at 10784. While the rulemaking thus calls out the possibility that a state disciplinary authority may reach a result more favorable to the DOJ attorney, it is conspicuously silent about the scenario in which OPR finds that a DOJ attorney did not violate an ethics rule, but a state disciplinary authority concludes otherwise.

To be abundantly clear: the Attorney General has no statutory or constitutional authority to require such deference. Indeed, such deference would be inappropriate given that OPR, in making determinations relevant to potential personnel actions, employs standards different than those applied by many state disciplinary authorities. Nonetheless, the silence is concerning. The rulemaking—if not abandoned for its multiple infirmities—should make clear that such deference to OPR’s findings is not required in any context. For example, if a state disciplinary authority voluntarily delays its investigation pending OPR review, its subsequent ability to obtain information from DOJ relevant to its investigation should not be conditioned on any agreement with OPR’s conclusion. And of course, DOJ has no legal authority to require a state disciplinary authority to adopt the same position as OPR or the Attorney General. Accordingly, if the proposed rulemaking is finalized, it should affirmatively state that no substantive deference is required, period.¹⁰

The Attorney General’s “right to review” state bar allegations in the first instance also is patently designed to pressure state disciplinary authorities to (1) disclose the allegations they are investigating to the Attorney General, and then (2) defer their own regulatory investigations, or risk significant litigation. Effectively forcing disclosure and deferral, rather than leaving it up to state disciplinary authorities, raises numerous problems that are inherent in prematurely disclosing an investigation of an employee to that person’s employer, and then stepping aside in favor of the employer’s investigation. There are various ways an employer’s decision to investigate the employee first, before cooperating with outside authorities, may hinder state disciplinary authorities’ ability to meaningfully complete their own subsequent investigation and take appropriate regulatory action, undermining states’ ability to pursue their public protection mission.¹¹ For example, even if the Attorney General fires a DOJ attorney for unethical conduct, in the absence of state discipline, the DOJ attorney will retain their state license and may return to

¹⁰ The rulemaking notes that “the proposed rule permits the State bar disciplinary authorities to impose additional sanctions beyond those already imposed by the Department, including suspension or permanent disbarment.” 91 Fed. Reg. at 10784. This is nothing more than a necessary recognition that, as discussed above, the regulatory remedies pursued by the states as part of their public protection mission are different than the personnel actions to which OPR and PMRU are limited.

¹¹ Conditioning the ability to complete an investigation on disclosure of a complaint’s allegations also may pose significant issues for states in which confidentiality rules limit the ability of state disciplinary authorities to disclose a disciplinary complaint or its allegations to an attorney’s employer, including the Attorney General, or may vest in state disciplinary authorities limited discretion to make disclosures to particular individuals or entities. *See, e.g.*, Cal. Bus. & Prof. Code § 6086.1(b); Calif. R. of Proc. of the State Bar 2302(e); Md. Rules 19-707(b)-(c), (f).

practice, posing a risk to the public in the very state whose disciplinary investigation was hindered or foreclosed by the Attorney General's "right of review."

We have no doubt that the Attorney General would strenuously oppose any new legislative requirement that she defer to and await the completion of an internal investigation by a private or public employer—putting a DOJ criminal or civil investigation on hold while awaiting the results. The reasons are obvious. An employer's motivations and methods in investigating its own employees may lead to an investigation that diverges significantly from what would be done by a truly independent, outside regulator. Moreover, the employer's investigation, no matter how well meaning, may make any subsequent investigation by outside regulators more difficult. Even friendly witnesses may be reluctant to agree to additional interviews, and adverse witnesses will be aware of and have a chance to prepare, to evade, or to obfuscate in response to likely questions. There are also significantly increased risks of evidence spoliation by witnesses now more fully aware of the nature of the investigation.

States' policy interests in protecting their own investigative rules and discretionary decisions are no less important than DOJ's interest in its investigative procedures. That state disciplinary authorities cannot, or choose not to, immediately notify and coordinate with OPR on a particular disciplinary investigation reflects nothing more than a determination that this is the best way for the state disciplinary authorities to get to the bottom of the relevant facts.

Overall, the proposed rule would significantly increase—by years in many cases—the time that complaints about DOJ attorneys must sit in abeyance with state disciplinary authorities, with a corresponding degradation to the quantity or quality of information available to support the state investigation and the resulting risk that the delay will effectively preclude state regulatory action. The public at large, including other licensed attorneys, judges, court staff, and lay people, sometimes view prolonged investigations, dismissed complaints, or failed prosecutions as proof that the attorney disciplinary system cannot be trusted. The proposed rule would amplify this lack of trust as to DOJ attorneys.

III. The Notice of Rulemaking Fails to Establish that State Enforcement of State Discipline Rules Would Meaningfully Interfere with the Attorney General's Authority to Manage and Supervise DOJ Attorneys

As noted above, the rulemaking asserts that the proposed amendments are necessary to prevent state disciplinary investigations from interfering with "the broad statutory authority of the Attorney General to manage and supervise Department attorneys." 91 Fed. Reg. at 10782. The rulemaking supports this claim with vague references to the filing of "bar complaints against senior Department officials" by alleged "political activists," the "willingness of some State bar disciplinary authorities to give credence to such complaints," and that "certain State bar disciplinary authorities have undertaken investigations of Department attorneys without notifying and coordinating with OPR." This, the rule making notice claims, "risks chilling the zealous advocacy by Department attorneys on behalf of the United States, its agencies, and its officers," and the "chilling effect, in turn, would interfere with the broad statutory authority of the Attorney General . . ." *Id.* These vague assertions provide no valid basis for the proposed rule changes for several reasons.

First, that complaints are filed by so-called "political activists" does not render those complaints invalid. State disciplinary authorities generally have an obligation to review and assess

the merits of every complaint submitted to them. *See, e.g.*, Ind. Admis. and Disc. R. 23, (10)(a); Iowa Court Rule 35.1; Minn. R. Lawyers Prof. Resp. 6(a). State disciplinary authorities routinely filter through the large number of complaints submitted and determine which have sufficient merit to warrant investigation and, potentially, the pursuit of disciplinary charges. That state disciplinary authorities may have given sufficient credence to some of the complaints referenced in the rulemaking to move them forward to investigation reflects nothing more than a determination by those disciplinary authorities, exercising judgment and discretion developed through years of experience, that the facts underlying the complaint warrant investigation. It does not mean that a state disciplinary authority has simply accepted the entirety of a complainant's allegations as true.

Second, as discussed above, similar to DOJ attorneys conducting investigations of criminal or civil violations, state disciplinary authorities have broad discretion to determine how best to proceed with their investigations of violations of ethics rules, including when to notify and coordinate with the employer of the attorney being investigated. The fact that state disciplinary authorities may exercise this broad discretion to proceed without notifying and coordinating with OPR does not indicate any improper motive.

Finally, requiring state disciplinary authorities to defer their investigations pending OPR review would not negate the purported "chilling effect" cited in the rulemaking notice. As discussed above, even if it were to take effect, the proposed rule would leave state disciplinary authorities free to pursue disciplinary investigations and seek regulatory remedies (including suspension and disbarment) after OPR review is complete and after DOJ has imposed any personnel remedies. Assuming that the purpose of the rule is not to use indefinite delay as a means of forestalling states from pursuing regulatory remedies, regardless of any coordination and resulting deferral of the state investigation, DOJ attorneys will continue to face potential state disciplinary charges and sanctions. That possibility would pose the very "chilling effect" the rulemaking notice claims must be eliminated. This is entirely consistent with Section 530B, which Congress passed over objections from DOJ precisely to ensure that DOJ attorneys, like other attorneys, understand that they must comply with state disciplinary rules or face the consequences for their state licenses. To the extent the existence of state disciplinary authority deters unethical conduct, that is a good thing and serves to protect the public.

In a similar vein, the rulemaking suggests that state disciplinary investigations conducted without notice to and coordination with OPR may interfere with the Attorney General's statutory authority to assign and authorize staff to perform DOJ functions. This is incorrect. If unaware of a state disciplinary investigation, the Attorney General of course could not be affected by it in making staffing decisions. Awareness of a state disciplinary investigation also does nothing to alter the Attorney General's ability to make staffing decisions. The Attorney General may discount the investigation, or factor knowledge of the investigation into her staffing decisions. This remains the Attorney General's choice, which must be made even if OPR is notified of and coordinating with a state disciplinary investigation.

Further, the proposed regulation's coverage of **former** DOJ attorneys has no connection to any legitimate regulation of DOJ attorneys. The OPR and PMRU review process would have no impact on licensure or continued employment. Further, as the proposed rulemaking acknowledges, OPR has no authority to compel the participation of attorneys who have left the employment of DOJ—in stark contrast to state disciplinary authorities' ability to compel such participation. 91 Fed. Reg. at 10785. So, reserving to the Attorney General the ability to preempt state disciplinary proceedings to allow DOJ to first investigate a former DOJ attorney serves no purpose other than

unwarranted delay: it depends on the attorney voluntarily submitting to the investigation and, if it concludes the attorney engaged in misconduct, there is no sanction that DOJ can impose.

DOJ cannot justify stalling a state investigation under such circumstances. If, for example, a complaint concerns allegations of prosecutorial misconduct by a former DOJ attorney that were later affirmed on appeal, DOJ has no reason (at least no reason relating to upholding attorney ethics) to prevent a state disciplinary authority from commencing an investigation. Indeed, it is **only** a state disciplinary authority that can effectively act, as that former DOJ attorney is still a member of the bar of the state in which the attorney was licensed.

IV. The Notice of Rulemaking Contains Other Infirmities and Should Be Abandoned in Light of the Continuing Legitimacy of the 1999 Regulations

The rulemaking seems to suggest that the 1999 regulations have less force or are otherwise inconsequential because they were promulgated as an interim final rule. The rulemaking goes on to recite various regulatory certifications (Section III) that imply the current public comment process is unnecessary. The unusual framing of the past regulatory process and current effort should be rejected.

First, the 1999 regulations have remained in place and have been followed for over two decades, and any question about that rulemaking process is a distraction from the present effort to upend a settled framework governing DOJ attorneys. The 1999 regulations were accompanied by a public comment period, which ended on June 21, 1999. 91 Fed. Reg. at 10786. But by its terms, the interim final rule became effective April 19, 1999, and it was never rescinded, remaining in place through the present.

Second, and more importantly, the 1999 regulations are addressed to DOJ's internal process, appropriately recognizing the backdrop of state disciplinary authorities and Section 530B's mandate that DOJ attorneys "shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." That backdrop includes state laws and rules that impose specific professional obligations relating to state regulatory investigations on attorneys. For example, Rule 8.1(b) of the ABA Model Rules of Professional Conduct, adopted in many states, provides that a lawyer, in connection with a disciplinary matter, shall not "knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority; except that this rule does not require disclosure of information otherwise protected by Rule 1.6." *See also, e.g.,* Ohio R. Prof'l Conduct 8.1(b); Wyo. R. Prof'l Conduct 8.1(b); Wash. R. Prof'l Conduct 8.4(l) ("It is professional misconduct for a lawyer to . . . violate a duty or sanction imposed by or under the Rules for Enforcement of Lawyer Conduct in connection with a disciplinary matter, including but not limited to, the duties catalogued at ELC 1.5" which includes duties to respond to inquiries about matters under investigation, comply with a subpoena, and answer a formal complaint); Cal. Bus. & Prof. Code § 6068(i) ("duty of attorney" to cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself").¹² In other words, a component of compliance with state ethics rules is compliance with rules relating to regulatory enforcement, and the substance of state ethics obligations is inextricably intertwined with state enforcement mechanisms.

¹² As another example, many states have rules requiring attorneys to report known misconduct by other attorneys and/or to self-report to state disciplinary authorities certain events that may trigger a state disciplinary investigation. *See, e.g.,* Pa. R. Prof'l Conduct 8.3(a); Colo. R. Civ. Proc. 242.11; W.Va. R. Lawyer Disciplinary Proc. 3.18-3.19.

The 1999 regulations did not change the enforcement authority of OPR, state authorities, or the federal courts. The 1999 regulations did not exempt DOJ attorneys from their duties to report misconduct or to cooperate with disciplinary investigations. As the current rulemaking recognizes, in some instances, based on practical concerns, “State bars refrain from taking further action until OPR is able to complete the investigation so that the bar has a full account, through OPR’s report of investigation, of the evidence and OPR’s analysis, as well as the PMRU’s conclusions.” *Id.* at 10782. But both Section 530B and the 1999 regulations leave this to the discretion of state disciplinary authorities and do not in any way mandate such a deferral of state action. This approach has worked well for more than 27 years, reflects the differing roles of the Attorney General (employer) and state disciplinary authorities (regulators), and is consistent with Section 530B in that it ensures that DOJ attorneys are subject to state laws and rules regulating attorney conduct “to the same extent and in the same manner as other attorneys in that State.”

The current notice of proposed rulemaking fails to advance the public protection mission that is foundational to state attorney regulation and disciplinary processes. Instead, the proposed rules would hinder this mission by imposing unwarranted burdens on state regulators.

Additionally, Section III, Regulatory Certifications, contains several misstatements leading to incorrect legal conclusions. For example:

- Section III.A. “Administrative Procedure Act” states: “This proposed rule relates to a matter of agency management or personnel and is a rule of agency organization, procedure, or practice.” *Id.* at 10786. As noted above, the proposed rule goes well beyond these limits and attempts to compel state regulatory authorities to handle investigations in a certain way; as such the proposed rule should not be exempt from the usual requirements of the APA.
- Section III.I. “Congressional Review Act” states that because the proposed action “pertains to agency management, personnel, and organization and does not substantially affect the rights or obligations of non-agency parties,” “it is not a ‘rule’ as that term is used in the Congressional Review Act, 5 U.S.C. 804(3)(B), (C), and the reporting requirements of 5 U.S.C. 801 do not apply.” *Id.* For the same reasons noted above, this is incorrect.
- Section III.E, “Executive Order 13132—Federalism” states: “This proposed rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. It does not dictate the substance of the ethical standards a State may adopt. The proposed rule would merely better reflect the existing balance of responsibilities between State bar authorities and the Department, whereby the State bar authority should wait for OPR to conduct its review of the allegations and reach a conclusion before deciding whether to pursue its own disciplinary investigation.” *Id.* As noted above, the proposed rule indeed would have a substantial direct effect on the federal relationship with states. Indeed, the very content of the

federalism statement insists that state authorities cannot even decide whether to move forward until a federal decision has been made, a substantial change from the existing balance of responsibilities among DOJ and state disciplinary authorities. Indeed, the very purpose of the proposed rule is to alter the existing balance of responsibilities established by Section 530B and the 1999 regulations.

The notice and proposed rulemaking are procedurally as well as substantively deficient. Fortunately, there is an existing regulatory framework, consistent with Section 530B and the constitution, that adequately addresses the balance of responsibilities among DOJ and state disciplinary authorities in addressing allegations of state ethics rules violations by DOJ attorneys, and there is no void to address. This new rulemaking effort should be abandoned.

NOBC opposes the proposed amendments to 28 C.F.R. Part 77.

Respectfully submitted,

The National Organization of Bar Counsel