



April 6, 2026

To: Department of Justice, Office of the Attorney General
Re: Review of State Bar Complaints and Allegations Against Department of Justice Attorneys

28 CFR Part 77

[Docket No. OAG199, AG Order No. 6653-2026-A]
RIN 1105-AB82

My name is Daniel Greenberg. I am a licensed attorney and a senior legal fellow at the Cato Institute. I write to comment on a proposed rule, “Review of State Bar Complaints and Allegations Against Department of Justice Attorneys.” This rule was proposed by the Department of Justice on March 5, 2026. The rule’s docket number is **OAG199**.

I am familiar with the sort of regulation that is the focus of this proposed rule. For over three years, I served as senior policy advisor in the U.S. Department of Labor (USDOL), and my chief duty there was to advise the Secretary and my colleagues on the nature and consequences of occupational regulation. I have written and published studies through both USDOL and in law reviews about the nature and consequences of occupational legislation. While at USDOL, I testified before legislative committees in many different states about matters related to occupational licensing. Before that, I was a state legislator in the Arkansas General Assembly, where I wrote and passed (among other things) legislation that reformed occupational regulations as well as other kinds of regulations. I also served as the Chair of that state’s Alcohol Beverage and Control Commission, and during that time I helped to write regulations pertaining to trade in intoxicating substances into law.

I write this comment to argue that the proposed rule is defective in at least five respects.

1. The proposed rule’s language is overly vague, because it fails to explain with reasonable precision the nature of the federal compulsion over state authorities that it would establish.

The proposed rule states that – if it is alleged that a government attorney has violated a rule of professional conduct – the Attorney General “shall have the right to review the allegations in the first instance,” before state bar committees “undertake any investigative steps ... that require participation from an attorney.” Review of State Bar Complaints, 91 Fed. Reg. 10787, at § 77.5 (a). If the Attorney General then decides to “exercise her right to review the allegations,” then “she or her designee shall request that the bar disciplinary authorities suspend any parallel investigations or disciplinary proceedings until the completion of the review.” *Id.* If the request for suspension is refused, then § 77.5 (b) requires DOJ to “take appropriate action to enforce this regulation or to prevent the bar disciplinary authorities from interfering with the Attorney General’s review of the allegations.” *Id.* In short and very generally, this proposed rule envisions

a fundamentally different procedure for the investigation and discipline of one particular class of attorneys – those who work in the Department of Justice (DOJ) – as compared to non-DOJ attorneys.

The proposed rule’s vague and sweeping language does not satisfactorily explain how, if enacted, it would operate in practice. Suppose a state-level disciplinary authority refuses the “request” of the Attorney General to suspend the state-level investigation – in such a circumstance, what can the Attorney General compel the state-level disciplinary authority to do? In that circumstance, suppose the state-level disciplinary authority seeks information from the government lawyer who is the subject of the investigation – would that inquiry constitute “interfering with the Attorney General’s review of the allegations”? More generally, when the proposed rule establishes the Attorney General’s “right to review the allegations in the first instance,” what duties for other actors does this new regulatory right create? In particular, does the new right of the Attorney General that will be created by the proposed rule necessarily imply a new power of the Attorney General to compel state-level disciplinary authorities to suspend or end parallel investigations?

In short, this rule’s language is so vague that central questions about its operation in practice cannot be answered. Such answers are certainly not provided by the proposed rule’s self-referential provision that explains that the Department of Justice “shall take appropriate action to enforce this regulation.” *Id.* When the practical operation of a proposed rule is as mysterious as it is here, that is a fatal defect – and not only because an ambiguous rule like this one will almost certainly be challenged in court and is then likely to force multiple courts to spend time and energy on drawing inferences and decoding ambiguities. More precisely, this rule is defective because it gives both state and federal authorities insufficient direction about their respective enforcement powers in the event that both authorities decide to investigate some instance of attorney misconduct simultaneously. In short, the ambiguity of this rule’s language makes it improper and defective.

2. The proposed rule, in its creation of a special class of government attorneys with practical immunity from state enforcement, cannot be reconciled with the federal statute that it is ostensibly based on.

Federal law requires: “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. However, the proposed rule would establish an unequal and fundamentally different procedure for the investigation and discipline of one particular class of attorneys – those who work in the Department of Justice – than for non-DOJ attorneys. That means the proposed rule would make attorneys for the Department of Justice subject to state laws and rules in an unequal and fundamentally different manner than the way in which non-DOJ attorneys are

subject to state laws and rules. This contradiction between the rule and the federal statute that it rests on cannot be reconciled.

As a historical matter, it is reasonable to understand this statutory text – which was signed into law by President Clinton in 1998 – as a direct response to the “Thornburgh memo” of 1994. *See* Review of State Bar Complaints, 91 Fed. Reg. 10781. The “Thornburgh memo” took the position that DOJ lawyers were immune from state ethics rules, and the proposed rule appears to be an attempt to breathe new life into that position. Nonetheless, a thought experiment about the statutory text will illuminate the incompatibility between the federal statute and the proposed rule. Imagine that, some years ago, Congress was asked to decide whether, as a matter of policy, attorneys of the Department of Justice could ever be subject to disciplinary laws and rules in a fundamentally different manner than the way in which non-DOJ attorneys are subject to disciplinary laws and rules – and imagine that Congress desired to signal, through exercise of its legislative power, that it wanted to oppose and reject any state of affairs in which DOJ attorneys were treated unequally to non-DOJ attorneys. In such circumstances, it is hard to see how Congress could express its desire for procedural equality in a more unambiguous way than by establishing, in legislation, that government attorneys must be subject to state laws and rules “to the same extent and in the same manner” that other attorneys licensed by the relevant state bar authority are.

Nonetheless, the authors of the notice of the proposed rule appear to argue that Congress’s requirement of 28 U.S.C. § 530B to apply disciplinary laws “to the same extent and in the same manner” to all attorneys licensed by a given state is entirely satisfied, so long as the substantive content of all relevant rules can be enforced against both DOJ attorneys and non-DOJ attorneys; the explanation for the proposed rule therefore takes the position that 28 U.S.C. § 530B does not require the same enforcement procedures to be exercised upon both DOJ and non-DOJ attorneys. Review of State Bar Complaints, 91 Fed. Reg. 10785. But the authors’ explanation appears to be a non sequitur, in that the statutory language does not appear to permit the split between (preserved) substance and (rejected) procedure that the authors’ explanation would require. As a matter of plain language, it is difficult to see how a law that requires all attorneys within its scope to be subject to it “to the same extent and in the same manner” could ever allow for a different and unequal manner of enforcement to be applied to some members of the class but not to others. The wording of the statute is not confined to an order that all substantive aspects of the attorney discipline rules must be applied to everyone within the state bar’s jurisdiction. Rather, the language of 28 U.S.C. § 530B necessarily requires, *inter alia*, that the statute must be applied “to the same extent and in the same manner” to all attorneys that are within its domain. If two attorneys face two different kinds of investigative and disciplinary procedures, it appears undeniable that one of them is not subject to the law “in the same manner” as the other. In short, the contradiction between the statute and the proposed rule that it is meant to rest on cannot be

reconciled – and so it follows from a proper reading of the statute that the proposed rule is fatally defective.

3. The proposed rule would establish a new power for the Attorney General that, when exercised, would create consequences that are unnecessary and counterproductive.

The proposed rule would establish a new power for the Attorney General that, when exercised, would jeopardize the orderly function of the nation’s current framework of attorney supervision and discipline.

The notice for the proposed rule argues that the Attorney General may choose from a number of design options when exercising her rulemaking authority under 28 U.S.C. § 530B. Review of State Bar Complaints, 91 Fed. Reg. 10783. More precisely, the authors of the notice read the statute to require the creation of regulations that ensure that Department attorneys comply with applicable ethics rules, but the choice of the administrative structure that is meant to accomplish this goal is left to the Attorney General’s discretion. *Id.* “The regulations could leave the responsibility for enforcing ethics rules up to the bar disciplinary authorities of the States, the Territories, and the District of Columbia. Alternatively, the regulations could establish a process wherein the Department assumes the responsibility for enforcing State ethics rules directly against Department attorneys.” *Id.* Furthermore, the notice of proposed rulemaking argues that the Attorney General “retains the discretion to displace State bar enforcement and to create an entirely Federal enforcement mechanism, or to displace State bar enforcement in part when it is inconsistent with the Federal Government’s determinations regarding the regulation of Federal attorneys.” Review of State Bar Complaints, 91 Fed. Reg. 10784.

The regulatory scheme that the proposed rule would establish would create unnecessary and counterproductive consequences. The particular regulatory scheme chosen by the architects of the proposed rule is unnecessary, because the current system of dual federal and state regulation has not been shown to be defective. Furthermore, this particular scheme is counterproductive, because the proposed rule would likely force state bars to suspend or terminate instances of legitimate attorney supervision and discipline.

4. The justifications supplied for the proposed rule are groundless.

According to the notice of the proposed rule, two sets of events have prompted DOJ’s consideration of a new framework for the discipline of DOJ attorneys. First, the proposed rule is motivated by the President’s directive “to examine attorney discipline and its role in government weaponization.” Review of State Bar Complaints, 91 Fed. Reg. 10782. Second, the proposed rule is motivated by claims that “political activists have weaponized the bar complaint and investigation process.” *Id.* Neither of these justifications support the creation of a fundamentally different procedure for attorney discipline.

The first justification is driven by Executive Order 14147's announcement that the policy of the United States is "to identify and take appropriate action to correct past misconduct by the Federal Government related to the weaponization of law enforcement." *Id.* But this justification of the proposed rule describes no past misconduct by the federal government at all that is relevant here; furthermore, there is no evident logical relation between any such misconduct by the federal government and a policy that would allow the federal government greater control over attorney discipline. In short, there appears to be no connection at all between the claim of past federal misconduct and the remedy provided by the proposed rule.

In contrast, at least the second justification provides some propositions that are supposed to serve as support for its claim that "political activists have weaponized the bar complaint and investigation process." *Id.* The second justification provides three sub-justifications that ostensibly support its claim: political activists have filed bar complaints against senior DOJ officials; some state bar authorities have given credence to such complaints; and some state bar authorities have undertaken investigations of DOJ attorneys without notifying and coordinating with DOJ's disciplinary office.

The first two of these three sub-justifications provide no substantive support for the enactment of the proposed rule. That is because of the general rule that the personal interests or qualities of a bar complainant are not relevant to the merits of any complaint that he or she files: the demonstration that a bar complainant is a "political activist" is entirely irrelevant to the merits of his or her complaint. Presumably, this label is meant to insinuate that "political activists," as a class, are filing low-merit or no-merit complaints. However, the authors of the proposed rule make no such express claim about meritless complaints, and the notice of the proposed rule provides no evidence that the bar complaints that are singled out were low-merit, no-merit, or defective in any other way. Likewise, the fact that state bar authorities have given credence to bar complaints proves little or nothing; if state bar authorities are attending to meritless complaints, then of course that is a problem of diverted and wasted enforcement resources leading to nuisances for the wrongly accused attorneys, but if state bar authorities are attending to complaints with merit, it is hard to see what conclusions can be drawn from this besides the fact that the nation's attorney discipline system is working as intended. Perhaps if these two sub-justifications had been accompanied by some sort of historical or statistical evidence that demonstrated that the problem that the proposed rule purports to identify is currently worse than it was in previous years, then that evidence could serve as justification for the proposed rule – but as written, these claims fail to provide any substantial justification for the rule's enactment.

Finally, the authors of the proposed rule express concern that state-level bar disciplinary authorities have failed to notify and coordinate with their federal counterparts. It may be true that state-level investigations of unethical DOJ lawyers sometimes pose administrative inconvenience

to DOJ's operations when protocols for notification and coordination are not followed, but this is an administrative problem for DOJ that appears unrelated to the specter of a "weaponized" complaint system. The creation of a system that temporarily or permanently suspends state-level investigations into ethics complaints filed against DOJ lawyers is a poor solution to this problem. That is true not only because it is unclear what portion of such complaints are well-merited or meritless; it is also true because a blanket policy of temporary or permanent suspension of such state-level ethics investigations is a blunt and overextensive remedy for a routine phenomenon – that of state and federal enforcement authorities which simultaneously choose to conduct parallel investigations. Sometimes it happens that two different enforcement authorities discover that they share an interest in a potential defendant; when that happens, the authorities are quite capable of either coordinating or competing with each other, and there is certainly no need for a blanket rule which puts state-level investigations on ice.

More generally, the claims in the proposed rule that rest on concerns about "weaponization" and a "weaponized" process are weightless, essentially because they involve the use of rhetorical and conclusory epithets as a substitute for logical argument. Presumably, the label of "weaponization" implies the use of some tool as a weapon even though the tool in question is not ordinarily or appropriately used as a weapon. But, as shown above, the proposed rule's use of the concept of weaponization simply assumes what it should be demonstrating. Of course, ethics complaints are like weapons in that they can cause harm, but there is nothing extraordinary, inappropriate, or "weaponized" about the use of ethics complaints generally. It might be proper to describe a groundless ethics complaint as "weaponized," but a well-grounded ethics complaint – one that rests on genuine concerns about actual misconduct – is neither extraordinary nor inappropriate. It is therefore a failure of logic to dismiss a class of ethics complaints as "weaponized" while paying no attention to their merits.

In this context, the use of rhetorical and conclusory epithets about "weaponization" culminates in a remarkable chain of inferences about this phenomenon's alleged consequences: "This unprecedented weaponization of the State bar complaint process risks chilling the zealous advocacy by Department attorneys on behalf of the United States, its agencies, and its officers. That chilling effect, in turn, would interfere with the broad statutory authority of the Attorney General to manage and supervise Department attorneys." Review of State Bar Complaints, 91 Fed. Reg. 10782. This amounts to a charge that the work of state-level ethics authorities has already placed the work of DOJ attorneys and the authority of the Attorney General at risk. The quoted claim recounts an abstract and fantastical theory of causation that purports to describe damage to governmental operations – a theory that requires more evidence than the deployment of a rhetorical and conclusory epithet can supply.

The bottom line here is that the reliance on claims about "weaponization" underscores a failure to provide a reasoned explanation for the measure that is based on substantial evidence. Such a

reasoned explanation – an explanation that would identify the problem that is to be solved – is a basic requirement of rulemaking, and it is absent here. More particularly, the proposed rule’s authors have provided nothing like a factual record or statistical data that shows an increase in frivolous, bad-faith, or low-merit complaints. Instead, the justification rests on dubious anecdote and political rhetoric, which cannot justify rulemaking that constitutes a policy shift. In short, claims involving the “weaponization” of ethics complaints are by and large empty for a variety of reasons, and they therefore serve as poor justifications for the proposed rule.

5. The proposed rule is incompatible with Presidential Executive Order 13132, entitled “Federalism,” and also is incompatible with broader principles of federalism generally.

Executive Order 13132, entitled “Federalism,” requires a variety of measures aimed at ensuring that federal agencies and executive departments behave consistently with the fundamental principles of federalism. The proposed rule is inconsistent with the Order’s requirements.

In particular, the Order places special requirements on federal agencies when they act so as to pre-empt state law. Those requirements are implicated here: The proposed rule rests on the Department of Justice’s choice to operate in a manner that displaces the framework of state law controlling attorney monitoring and discipline. Under § 4(a) of the Order, federal agencies may only construe statutes to pre-empt state law under three circumstances: if the statute contains an express pre-emption provision; if there is other clear evidence that Congress intended pre-emption; or if the exercise of state authority conflicts with the exercise of federal authority under the statute. Exec. Order No. 13,132, 3 C.F.R 206 (2000). None of these three conditions are satisfied. In fact, the notice of the proposed rule rests its assumed authority for the rulemaking at issue on a theory of an implied “general presumption” that federal law controls the laws of the respective states. Review of State Bar Complaints, 91 Fed. Reg. 10783. Perhaps that theory is correct, but in the context of the Order it creates an obstacle: This “general presumption” provides neither an express provision for pre-emption nor any other clear evidence of congressional intent of pre-emption – which means that it cannot qualify for either of the first two exceptions to the Order’s requirements. Furthermore, because the notice of proposed rulemaking concedes that the “regulations could leave the responsibility for enforcing ethics rules up to the bar disciplinary authorities of the States, the Territories, and the District of Columbia,” *id.*, the authors’ admission of this option demonstrates that it is possible to enact a federal rule that does not conflict with the exercise of state authority – thus also demonstrating that the proposed rule cannot qualify for the third exception to the Order’s requirements. Furthermore, it is unclear whether the DOJ consulted with state bar regulators before issuing this proposal. If there was no such consultation, that is a separate procedural failure under § 6 of the Order. Exec. Order No. 13,132, 3 C.F.R 206 (2000).

Of course, the proposed rule is not only in tension with the federalist values that the Order seeks to provide; rather, the proposed rule is in tension with federalism itself. The language of the proposed rule, especially § 77.5 (a)'s phrase "in the first instance," (*see* Review of State Bar Complaints, 91 Fed. Reg. 10787), suggests an attempt to strip state supreme courts of their inherent authority to regulate the bar; generally, "in the first instance" is a term of art reserved for original jurisdiction. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (remanding an issue because it "should be addressed in the first instance by the lower courts" as opposed to the reviewing court). The regulation of attorneys, like the regulation of most other occupations, is a core attribute of state sovereignty, and the proposed rule jeopardizes the exercise of the states' inherent powers in this sector.

CONCLUSION

As explained above, the proposed rule is defective for multiple reasons. The language that is meant to explain the rule's operation is ambiguous as to its effects; the rule itself cannot be reconciled with its enabling legislation; the rule's consequences are unnecessary and counterproductive; the justifications supplied for the rule are groundless; the rule is incompatible with federalist values. Furthermore, the issuance of this rule is permissive, not mandatory: Nothing requires the Attorney General to depart from the Department of Justice's previous posture, in which it "relied upon the State bar licensing authorities to enforce ... substantive ethics standards." Review of State Bar Complaints, 91 Fed. Reg. 10784. Furthermore, there is some possibility that this rule attempts to address a problem that does not exist. Ultimately, the proposed rule is so defective in so many respects that the Department of Justice should withdraw it.