DC BAR Communities

The views expressed herein are presented on behalf of the Litigation, Criminal Law and Individual Rights, and D.C. Affairs Communities of the D.C. Bar Communities, voluntary associations of individuals, most, but not necessarily all, of whom are members of the D.C. Bar. The D.C. Bar itself made no monetary contribution to fund the preparation or submission of this statement. Moreover, the views expressed herein have been neither approved nor endorsed by, and do not necessarily reflect the views of, the D.C. Bar, its Board of Governors, or all members of the D.C. Bar or the Litigation, Criminal Law and Individual Rights, or D.C. Affairs Communities.

Litigation Community Steering Committee of the D.C. Bar Communities

Public Statement Opposing DOJ's Proposed Rule to Displace State and D.C. Bar Ethics Investigations of DOJ Attorneys

March 19, 2026

The Litigation Community of the D.C. Bar Communities opposes the Department of Justice's proposed rule, "Review of State Bar Complaints and Allegations Against Department of Justice Attorneys," 91 Fed. Reg. 10780 (Mar. 5, 2026) (Docket No. OAG199, AG Order No. 6653-2026-A), which would give the Attorney General (through Office of Professional Responsibility (OPR)) "the right to review the allegations in the first instance" whenever a state, territorial, or D.C. bar investigates alleged ethics violations by current or former DOJ lawyers acting in their official duties, would "request that the bar disciplinary authority suspend any parallel investigations," and, if a bar refused, would direct DOJ to "take appropriate action to…prevent the bar disciplinary authorities from interfering with the Attorney General's review."[1] For the reasons below, we urge the Department to withdraw the proposal.

Our Community's mission is to support education, professional development, and the integrity of the legal profession and the courts. This statement addresses a core issue within our expertise—the independence and impartiality of attorney ethics enforcement—and advances the values of high-quality, legally accurate analysis that protects the public's confidence in our system of justice.

Summary of Our Concerns

[1] Review of State Bar Complaints and Allegations Against Department of Justice Attorneys, 91 Fed. Reg. 10780, 10786–87 (Mar. 5, 2026) (proposed 28 C.F.R. § 77.5(a)–(b)) ("shall have the right to review the allegations in the first instance"; "shall request that the bar disciplinary authorities suspend any parallel investigations"; "shall take appropriate action to … prevent the bar disciplinary authorities from interfering…"). Federal Register docket: 2026-04390,https://www.federalregister.gov/documents/2026/03/05/2026-04390/review-of-state-bar-complaints-and-allegations-against-department-of-justice-attorneys.

- State and D.C. bar authorities—and ultimately state supreme courts and the D.C. Court of Appeals—hold the sovereign and long-recognized authority to regulate admission and discipline of lawyers. The practice of law is a privilege governed by the States, and discipline is an exercise of judicial power to protect the public and the courts.[2] The McDade Amendment codifies that DOJ lawyers are subject to state ethical rules "to the same extent and in the same manner as other attorneys in that State."[3] Displacing or gatekeeping state disciplinary processes is inconsistent with that statutory command.
- The proposal creates a structural conflict of interest. Allowing DOJ—whose officials may have directed or approved the very conduct at issue—to decide in the first instance whether a DOJ lawyer violated ethical rules risks circular, self-vindicating determinations. Although *Caperton v. A.T. Massey Coal Co.* addressed judicial recusal, its animating principle—that due process is violated where the probability of actual bias is intolerably high—applies with equal force here.[4] OPR's proposed gatekeeping role is functionally quasi-adjudicative: it would determine whether independent disciplinary review proceeds at all, on what timeline, and with access to what information. Placing that authority in the hands of the very institution whose attorneys' conduct is under scrutiny inserts a corruptible cog in the process and undermines the foundational requirement of a neutral and disinterested decisionmaker.
- DOJ lacks statutory authority to preempt state disciplinary enforcement. Section 530B(b) authorizes the Attorney General to adopt rules "to assure compliance" with state ethical standards. It does not authorize DOJ to strip state bars of their disciplinary role or to instruct DOJ personnel to withhold nonpublic information to stall bar investigations.[5] DOJ's own 1999 rulemaking recognized that "attorneys are principally subject to discipline by their state of licensure and the courts before which they practice," and that § 530B "does not change the enforcement authority" of state bars and the courts.[6]

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[2] *See, e.g.*, *Theard v. United States*, 354 U.S. 278, 281 (1957) (discipline "designed to protect the public" and courts), https://supreme.justia.com/cases/federal/us/354/278/; *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (federal courts "control admission to [the] bar and … discipline attorneys"), https://supreme.justia.com/cases/federal/us/501/32/; *Leis v. Flynt*, 439 U.S. 438, 442 (1979) (no federal right to pro hac vice admission; regulation of admission is a matter of state control), https://supreme.justia.com/cases/federal/us/439/438/.

[3] 28 U.S.C. § 530B(a)–(b) (McDade Amendment) ("to the same extent and in the same manner as other attorneys in that State"; "The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section."), https://www.govinfo.gov/link/uscode/28/530B.

[4] *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876–87 (2009) (Due Process Clause requires recusal when "extreme facts" create a "serious risk of actual bias"), https://supreme.justia.com/cases/federal/us/556/868/. *Cf. In re Snyder*, 472 U.S. 634, 643 (1985) (discussing court's authority and standards in attorney discipline), https://supreme.justia.com/cases/federal/us/472/634/.

[5] *See* proposed 28 C.F.R. § 77.5(a)–(b), 91 Fed. Reg. at 10786–87 (directing deferral of bar investigations and empowering DOJ to prevent bar "interfer[ence]").

[6] Ethical Standards for Attorneys for the Government, 64 Fed. Reg. 19273, 19274 (Apr. 20, 1999) (interim final rule) ("Section 530B does not change the enforcement authority of the Department of Justice's Office of Professional Responsibility, state authorities, or the federal courts." "The regulations thus recognize that attorneys are principally subject to discipline by their state of licensure and the courts before which they practice."), https://www.govinfo.gov/app/details/FR-1999-04-20/99-9845.

- The proposal threatens federalism and the independence of the bar. State bars operate under the authority of state supreme courts (and in the District, the D.C. Court of Appeals) to protect the public and the administration of justice. The rule's threat to "take appropriate action to … prevent" bar investigations intrudes upon that judicial authority and undermines the comity that has long governed federal–state coordination in professional discipline.[7]
- Practical harm outweighs any stated benefits. The rule's required deferrals would delay or derail independent fact-finding, impede bars' lawful use of compulsory process, and reduce transparency. OPR has no power to compel cooperation from former DOJ lawyers; state bars do. DOJ's internal processes, conducted in confidence, cannot substitute for impartial, public-accountable discipline when warranted. Rather than displacing state authority, DOJ should formalize existing coordination practices—such as through a memorandum of understanding or joint protocol with state and D.C. bar authorities—to address legitimate confidentiality concerns, avoid duplication of effort, and facilitate information sharing on a case-by-case basis, without sacrificing the independence of bar disciplinary processes.

Legal Framework

1) The McDade Amendment requires parity with state disciplinary systems. Congress mandated that "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."[8] The phrase "to the same extent and in the same manner" is most naturally read to encompass the full regulatory regime applicable to attorneys in a given jurisdiction—not merely the substantive ethical standards, but also the investigative, enforcement, and disciplinary mechanisms through which those standards are applied.[9] Any other reading would render "manner" superfluous: if Congress intended only that the same rules apply, "to the same extent" would have sufficed. By adding "and in the same manner," Congress ensured that DOJ attorneys would be subject to the same processes of accountability—including investigation and discipline by state bar authorities and courts—as every other licensed attorney. The proposed federal gatekeeping regime conflicts with this text.

2) Longstanding doctrine recognizes state (and federal court) control over lawyer discipline. The Supreme Court has emphasized the States' "especially great" interest in regulating

[7] *See, e.g., Theard*, 354 U.S. at 281 (state and federal courts each possess disciplinary authority), https://supreme.justia.com/cases/federal/us/354/278/; ABA Model Rule of Professional Conduct 8.5(a) (disciplinary authority in jurisdictions where a lawyer is admitted or provides services), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_5_disciplinary_authority_choice_of_law/.

[8] *See* FN 3.

[9] The statutory phrase "to the same extent and in the same manner" is best read to cover the full regime applicable to attorneys in that jurisdiction, including investigative and disciplinary processes. *See also* 64 Fed. Reg. at 19274 (DOJ's 1999 understanding that state bars and courts retain enforcement roles), https://www.govinfo.gov/app/details/FR-1999-04-20/99-9845.

lawyers,[10] and the judiciary's inherent authority "to suspend or disbar attorneys" and to "control admission to its bar and to discipline attorneys who appear before it."[11] Federal and state systems exercise autonomous disciplinary authority; one does not foreclose the other.[12] DOJ's rule would skew that balance by interposing an executive branch veto over state disciplinary proceedings involving DOJ lawyers.

3) DOJ's claimed § 530B(b) authority does not extend to supplanting state bar enforcement. Section 530B(b) permits internal DOJ rules to "assure compliance" with state rules—e.g., training, internal reporting, and coordination—not to seize "first-instance" control or to order deferral of independent state investigations. DOJ's own 1999 interpretation acknowledged that § 530B "is silent on enforcement mechanisms" and "does not change the enforcement authority of the Department of Justice's Office of Professional Responsibility, state authorities, or the federal courts."[13] The proposed rule is a sharp and unauthorized departure from that position.

Structural Conflict and Circularity

No system of professional discipline can command public confidence if those who may have authorized, encouraged, or benefited from contested conduct decide whether a violation occurred. The proposal's "first-instance" review and instruction to withhold nonpublic information during parallel bar investigations invite circular, self-referential outcomes. Due process demands a neutral decision maker where the probability of bias is intolerably high.[14] While OPR's expertise is valuable, it is not a substitute for independent, disinterested review by the licensing authority.

We recommend that the proposal be withdrawn. The proposed amendments to 28 C.F.R. Part 77 conflict with the sovereign authority of the States, Territories, and the District of Columbia over attorney discipline, exceed the Department's statutory authority under § 530B, and undermine the independence of the bar disciplinary process.

We support the essential role that the D.C. and state legal communities play in safeguarding an independent, ethical legal profession. The Department should withdraw this proposal and, in its place, pursue a cooperative framework—such as a memorandum of understanding or joint protocol with state and D.C. bar authorities—that facilitates coordination, protects legitimate confidentiality interests, and avoids unnecessary duplication, while respecting Congress's command in § 530B and the States' sovereign authority over attorney discipline.

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[10] *Goldfarb v. Va. 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…."), https://supreme.justia.com/cases/federal/us/421/773/.

[11] *Chambers*, 501 U.S. at 43, https://supreme.justia.com/cases/federal/us/501/32/; *In re Snyder*, 472 U.S. at 643, https://supreme.justia.com/cases/federal/us/472/634/.

[12] *Theard*, 354 U.S. at 281 ("The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included."), https://supreme.justia.com/cases/federal/us/354/278/.

[13] See FN 6.

[14] See FN 4.

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The members of the Steering Committee of the Litigation Community of the D.C. Bar Communities unanimously approved this statement on March 19, 2026.

The Criminal Law and Individual Rights and D.C. Affairs Communities of the D.C. Bar Communities have joined in this statement.

FOR MORE INFORMATION CONTACT:
Litigation Community Steering Committee, D.C. Bar Communities
dcbarlitcommunity@gmail.com