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April 2, 2026

Department of Justice
Notice of Proposed Rulemaking
Docket No. OAG 199

Re: “Review of State Bar Complaints and Allegations Against Department of Justice Attorneys”

Dear Acting Attorney General Todd Blanche:

The Oregon State Bar’s (OSB) Board of Governors submits the following comments on the United States Department of Justice (DOJ) Notice of Proposed Rulemaking Docket No. OAG 199: Review of State Bar Complaints and Allegations Against Department of Justice Attorneys (Proposed Rule).

The Board has significant concerns about the Proposed Rule’s impact on the OSB’s ability to regulate and discipline Oregon attorneys, and in turn on whether the public can be assured that all Oregon attorneys will be held to the same standards, regardless of their employer.

The Oregon State Bar employs an extremely transparent discipline system, with nearly all records of complaints and discipline against attorneys publicly available. The Proposed Rule would allow for complaints against DOJ employees to be treated extremely differently. Oregonians would have no way of knowing the status of investigations or the reasons for the outcomes of these complaints, if the OSB is prevented from conducting its own investigations and then acting accordingly.

Additionally, there are substantial legal and operational concerns about such a rule, were it to go into effect. As described below, the OSB’s Board of Governors is opposed to this rule.

The Oregon State Bar

The Oregon State Bar (“OSB”) was created in 1935 by the Oregon Legislature through statute. OSB’s enabling statute, known as the State Bar Act, establishes the OSB as a “public corporation and an instrumentality of the Judicial Department of the Government of the State of Oregon.” ORS 9.010(2). Currently, the OSB has over 15,000 active licensees that practice law. OSB’s statutory functions, as outlined in ORS 9.080(1), are to: regulate the legal profession and improve the quality of legal services; support the judiciary and improve the administration of justice; and advance a fair, inclusive, and accessible justice system.

All lawyers seeking to practice law in Oregon must be active licensees of the OSB. ORS 9.160(1). The OSB, with oversight from the Oregon Supreme Court, regulates lawyers by administering bar examinations; investigating applicants’ character and fitness; formulating and enforcing rules of professional conduct; and establishing minimum requirements for the practice of law in Oregon, including minimum continuing legal education requirements. ORS 9.210; ORS 9.490; ORS 9.114; *see also Crowe v. Or. State Bar*, 989 F.3d 714, 720 (9th Cir. 2021).

OSB’s regulatory and disciplinary system enforces the Oregon Rules of Professional Conduct (RPCs) adopted by the Oregon Supreme Court. The Oregon RPCs govern the conduct of legal professionals and protect the public from negative conduct. The system seeks to provide strong public trust in the justice system through accountability by providing a fair, transparent, accessible, and thorough review of complaints about lawyers.

The disciplinary process involves multiple stages, including intake and preliminary review; investigation by the Disciplinary Counsel’s Office (DCO); review by the State Professional Responsibility Board; prosecution; and adjudication by the Disciplinary Board (DB), a tribunal made of volunteer lawyers and nonlawyer members of the public. Contested decisions of the DB ultimately are reviewed by the Oregon Supreme Court. The OSB’s Bar Rules of Procedure (BRs), a set of rules promulgated by the Oregon Supreme Court, govern the procedures utilized by OSB in the review, evaluation, and prosecution of respondents.

Oregon’s discipline is a transparent and unbiased system through its reliance on volunteers, including nonlawyer members of the public, and its openness through the public records process. Staff attorneys conduct disciplinary investigations and when warranted, refer matters to the State Professional Responsibility Board (SPRB), a volunteer board, for all prosecutorial and settlement determinations under BR 2.6(3) and BR 3.6(4),

with staff prosecutors having limited discretion. The tribunal for disciplinary proceedings consists of a professional Adjudicator, and volunteer lawyers and nonlawyer members appointed by the Oregon Supreme Court. The participation of volunteers throughout the disciplinary process lends confidence and trust to the public in OSB's capabilities of disciplining attorneys that run afoul of the Rules of Professional Conduct.

OSB's disciplinary system is also extremely transparent, as all materials related to a complaint of misconduct and its outcome are publicly available through Oregon's public records laws, with very limited exemptions. OSB regularly responds to requests and questions on attorney discipline from members of the public and the media. The availability of such records demonstrates the OSB's commitment to accountability and openness within the disciplinary system, which is fundamental to fostering trust between the public and legal professionals.

The Impact of the DOJ's Proposed Rule on OSB's Disciplinary System

OSB has substantial concerns about the impact that the DOJ's Proposed Rule would have on the integrity of lawyer self-regulation and ultimately the public's trust in that system. Impeding the impartiality of the regulatory system undermines the public's trust in the system, and erodes trust in lawyers, judges, the legal system, and the rule of law.

The Proposed Rule provides that the Attorney General has the right to review any allegations that a lawyer for the DOJ violated a rule of ethical conduct and request that bar disciplinary authorities suspend any parallel investigations until the completion of the Attorney's General review. See Proposed 28 CFR § 77.5 at 91 FR 10787. Such a rule would render many of the systems for attorney discipline that generate public trust in place ineffective.

In instances where the OSB receives a complaint against an attorney licensed in Oregon working for the DOJ, the Proposed Rule would require that the OSB suspend its investigation at the request of the Attorney General, the employer of the licensed attorney. In no other instance has the employer of a licensed attorney had the ability to request the suspension of a complaint of potential misconduct by that attorney. Such a suspension of an investigation by the employer would create suspicion and an air of impropriety surrounding not only the ethical conduct of DOJ attorneys, but around the entire regulatory system for attorneys. While the DOJ's Notice of Proposed Rulemaking provides substantial detail on the DOJ's attorney disciplinary process (see 91 FR 10781-82), the perception of the public around such a process is one of concern: it is invisible and has no accountability except to the Attorney General. It would harken back to the widespread belief in the 1960s that certain attorneys are immune from disciplinary action and foster public mistrust and

dissatisfaction with attorney discipline processes as catalogued by the American Bar Association.¹

Additionally, the Proposed Rule would require the OSB to suspend any investigation until the DOJ either completes the investigation, declines to investigate, or decides not to complete an investigation. See 91 FR 10781. The suspension of the investigation delays the conclusion of the regulatory body's investigation, which can undermine the public's trust in the entirety of the regulatory system.² The OSB has recognized delay as a significant factor in public trust in the disciplinary system.

The DOJ's Proposed Rule would erode trust in the independence of the disciplinary system by allowing a delay in the state bar's findings until the completion of the DOJ's findings and would not allow the state bar to decide about an attorney's licensure status. While the DOJ may be able to investigate misconduct accusations by their attorneys, the DOJ cannot impose any sanctions on an attorney's state licensure. The Proposed Rule notes that DOJ can discipline an attorney by "reprimand, suspension, termination, counseling, or additional training," (91 FR 10781), but such disciplinary actions by the DOJ are *employment actions*, and do not affect that attorney's licensure with the state (see 91 FR 10784-85 ("[T]he Department is limited to reprimanding, suspending, or terminating the employment of a Department attorney who has engaged in misconduct, whereas the bar disciplinary authorities may suspend or revoke an attorney's license to practice law")).

The Proposed Rules would delay any sanctions against an attorney's licensure until the conclusion of the DOJ's investigation. While the Proposed Rule notes that the DOJ and a state bar such as the OSB have different objectives, it does not account for the delay that would occur between a state bar waiting for the resolution of DOJ's investigation before being able to impose any sanction on an attorney's license. Such a delay erodes trust in the attorney disciplinary system and the ability of the legal system, and the courts, to

¹ In 1967, the American Bar Association convened a committee led by U.S. Supreme Court Justice Thomas C. Clark to evaluate lawyer discipline throughout the United States. The committee published a report in 1970 titled "Problems and Recommendations in Disciplinary Enforcement." The "Clark Committee Report" cataloged several problems within the disciplinary system that led to public distrust in attorney regulation. Its recommendations are the foundations of state lawyer disciplinary systems today.

² Indeed, the Clark Commission Report frequently cited delay as one of the greatest hazards of the with the disciplinary system:

The delay between receipt of a complaint and final imposition of discipline is a disservice to effective enforcement. It permits the violator to continue to practice, and in some instances to continue his misconduct, and undermines the confidence of the public in the bar's determination to enforce the canons of ethics.

Clark Committee Report at 30.

effectively self-regulate the profession. Delays of investigations also create practical challenges for regulators, as witnesses become unavailable or their memories fade, documentary evidence is lost or destroyed, and other evidentiary problems mount. The Proposed Rule does not address how the DOJ, or the state bar, would address this loss of trust and confidence if the DOJ requested suspension of a misconduct investigation.

The Proposed Rule seeks to harmonize instances of collaboration between DOJ's OPR and state bars (see 91 FR 10782). The state bar is in the best position to determine whether the risk of suspending an investigation pending DOJ's review is in the best interest of the public it serves. The state bar is ultimately accountable to the state's Supreme Court, which has the best understanding of the regulatory objectives and policies necessary to govern attorney discipline within that state. The Proposed Rule takes the obverse approach and makes those authorities that issue licensure subject to the determinations of the DOJ. Were any other employer to receive such deference related to a disciplinary investigation, it would raise substantial concerns and questions from the public.

The Proposed Rule Address a Concern that is Nonexistent

While the Proposed Rule intends to “end the weaponization of the Bar Complaint and Investigation Process,” 91 FR 10782, there is scant evidence to indicate that such a rule is necessary, or that state bars are not capable of resolving complaints that solely seek to “target internal [DOJ] deliberations.” 91 FR 10783. Disciplinary systems have substantial vetting processes to review and determine which complaints move forward, especially those that are politically targeted or motivated.

Oregon, for instance, received 1,921 complaints in 2025. Of those, only about 10 percent, or 192, were referred to discipline for further investigation and review. Lawyers that are political officials in Oregon are frequent targets of complaints, and those are almost always resolved in an effective manner by the bar. For instance, Oregon's former attorney general received about 29 complaints during their tenure. All of the complaints were reviewed and dismissed. Oregon's past lawyer-governor received 4 complaints that were also reviewed and dismissed.

In OSB's past experience with the DOJ, it has enjoyed ample communication with DOJ's Office of Professional Responsibility (OPR) and Office of the Inspector General (OIG) that has allowed for discipline to be reviewed and effectuated without issue. However, the Proposed Rule could continue to impart delay on disciplining attorneys with DOJ who leave the DOJ amid unethical conduct. In the most recent example, DOJ's OIG specifically reached out to OSB in relation to a U.S. Attorney whose conduct had likely violated

Oregon's ethical rules. DOJ's OPR declined to review the matter, likely as the attorney had resigned from DOJ after the investigation by OIG began. OSB investigated upon receipt of OIG's report and eventually resolved with a stipulated suspension for the attorney for misconduct. Echoing the prior point, the delay in the ultimate resolution of the matter was substantial. The suspension against the attorney's license did not occur until 2018, approximately two years after OIG issued its report, and approximately four years after the issue had been reported to OIG personnel. During that time, the attorney continued in private practice in Oregon serving Oregon clients without any knowledge to the OSB or to the public that the attorney had an allegation of misconduct. OSB cannot effectuate its regulatory obligations to protect the public if it is not made aware of such misconduct due to the employer's own investigations.

Even with the filing of politically motivated complaints by certain organizations, there is no indication that bar organizations cannot effectively review and resolve such complaints against DOJ officials in the same manner as with complaints against other political officials. There has not been any indication that complaints against DOJ officials "risks chilling the zealous advocacy by [DOJ] attorneys." 91 FR 10782. Instead, the proposed rule makes it appear that DOJ attorneys are not subject to the same ethical rules and in the same manner as other licensees in the state, a result that runs counter to the statutory authority in 28 U.S.C. § 530B(a).³ Even the perception of such a differing standard substantially weakens the public's trust in the bar's ability to self-regulate lawyers, the legal system, and the public's confidence in the rule of law.

Ethical Issues in Oregon

While the Proposed Rule does not *require* that a disciplinary body suspends its investigation, it is very unclear about what actions would occur if a disciplinary body refused. The Proposed Rule notes that if "relevant bar disciplinary authorities refuse the Attorney General's request, the Department shall take appropriate action to prevent the bar disciplinary authorities from interfering with the Attorney General's review of the allegations." 91 FR 10787. The Proposed Rule does not detail what such specific actions would be, but notes that the DOJ would "direct Department personnel not to provide any non-public information to any parallel investigations or disciplinary proceedings until the completion of OPR's review." 91 FR 10784. These provisions would very likely place attorneys working for DOJ licensed in Oregon in a precarious position to choose between

³ 28 U.S.C. 530B(a) states "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*" (emphasis added).

following their employer's directives or the ethical rules. For instance, Oregon's Rule of Professional Conduct (Oregon RPC) 8.1 requires that:

(a) An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(1) knowingly make a false statement of material fact; or

(2) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or 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.

The Oregon Supreme Court emphatically states that this rule "requires *full* cooperation from a lawyer who is the subject of a disciplinary investigation." *In re Munn*, 372 Or. 589, 611 (2024) quoting *In re Schaffner*, 325 Or. 421, 425 (1997) (emphasis in original; applying former DR 1-103(0) (1995), the predecessor to RPC 8.1(a)(2)). Partial cooperation is not sufficient and does not absolve a lawyer. *Munn* at 611. The only exception under this rule is for information considered confidential under Oregon RPC 1.6, and orders from the attorney's employer would not absolve an attorney from this obligation to fully comply. While Oregon's RPC 8.1 is directly modelled from the ABA Model Rule of Professional Conduct (ABA Model Rule) 8.1, the Proposed Rule does not address this conflict at all, or the subsequent conflict that would arise under Oregon's RPC 5.2 or ABA Model Rule 5.2 if a DOJ lawyer received an order not to cooperate with a bar investigation. Further, attorneys licensed in Oregon are subject to suspension for failure to respond to disciplinary counsel under BR 7.1(1). If the OSB declined to suspend its investigation, this Proposed Rule would place DOJ attorneys in a delicate position where they must choose between insubordination to their employer or suspension of their licensure.

Federalism and Independence of the Judiciary

As noted in multiple comments, including the Conference of Chief Justices Comment to the Proposed Rule dated March 24, 2026 and the National Organization of Bar Counsels (NOBC) Comment to the Proposed Rule dated March 25, 2026, there are substantial legal concerns about whether this rule exceeds the authority granted to the Department of Justice under 28 U.S.C. § 530B and its intrusion on the inherent authority of the judiciary as well as the powers reserved to the states under the Tenth Amendment of the United States Constitution.

The licensing and regulation of lawyers is a power left to the states under the Tenth Amendment. *Leis v. Flynt*, 439 U.S. 438, 442 (1979). Further, it is well established that the

regulation of attorneys is a power inherent to the courts. See *Ex parte Secombe*, 60 U.S. 9, 13 (1856); *Ex parte Garland*, 71 U.S. 333, 378–79 (1866). The licensing and regulation of attorneys is the exclusive jurisdiction of the judiciary and its delegates (i.e., integrated bar associations). See, e.g., *Ex parte Secombe*, 60 U.S. at 13 (“[I]t has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed”); *Ex parte Garland*, 71 U.S. at 378–79 (“From its entry the parties become officers of the court, and are responsible to it for professional misconduct ... and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded. Their admission or their exclusion is not the exercise of a mere ministerial power. It is the exercise of judicial power.”); *Sadler v. Or. State Bar*, 275 Or. 279, 293 (1976) (“There are cases which hold that in the area of admission to the bar and suspension or disbarment, the judiciary has exclusive inherent power which in no way can be limited by the legislature. Courts may honor implementing legislation but are not bound to do so.”).

The same principle of law is true in Oregon. *Sadler*, 275 Or. at 293. The Oregon Constitution establishes that the judicial power of the state is vested in the state Supreme Court and “in such other courts as may from time to time be created by law.” Or. Const., Art. VII, § 1 (amended). The Oregon Supreme Court controls attorney discipline and regulation in Oregon. In 1896, for example, the Oregon Supreme Court held that:

The [Court’s] power itself exists inherently, and independent of the statute, and is necessary for the protection of the court, the proper administration of justice, the dignity and purity of the profession, and for the public good and the protection of clients.

State ex rel. Mays v. Mason, 29 Or. 18, 24-25 (1896).

The DOJ’s basis for authority for the promulgation of the Proposed Rule is under the McDade Amendment (28 U.S.C. § 530B or Section 530B). Section 530B’s purpose was to require that the Attorney General, acting in their role as an employer, require DOJ attorneys to comply with applicable state ethical rules. Nowhere does 28 U.S.C. § 530B expressly authorize DOJ to interfere or suspend state disciplinary proceedings. Congress has not enacted any statute that provides DOJ with explicit oversight for state bar ethics enforcement of its own employees. The plain text and the legislative history do not provide any basis for the authority that the Proposed Rule claims is allowable under Section 530B.

DOJ’s claim that subsection (b) of Section 530B grants the Attorney General total authority for enforcement of substantive ethical standards ignores subsection (a); that

state ethics rules apply to DOJ attorneys “to the same extent and *in the same manner* as other attorneys in that State” (emphasis added). “*In the same manner*” emphasizes that the state’s disciplinary system would be the adjudicator of the review of ethical issues of its licensees, including DOJ attorneys. The plain terms of Section 530B concern compliance with professional standards, not the preemption of state regulation.⁴ Language in the committee report for Section 530B echoes that sentiment:

TITLE VIII--CITIZENS PROTECTION

The bill includes Title VIII, which includes language to make government attorneys subject to laws and rules of the State and the rules of the local Federal court in which they are practicing and to establish conduct standards and procedures for Department of Justice employees. Subtitle A, section 811, addresses the concerns of the Committee about the Department of Justice's issuance of a regulation that exempts its attorneys from the same State laws and rules of ethics which all other attorneys must follow (59 Fed. Reg. 39910, August 4, 1994). Subtitle B, sections 812 et seq., makes it clear that *employees of the Department of Justice must abide by the law. The rule of law in this country is an essential bedrock of our democracy. It must be nurtured and protected.* For informational purposes, a list of cases involving misconduct, researched by the Library of Congress, can be found in the Congressional Record of March 5, 1998, at pages E301-303.⁵

This description of Section 530B frames the DOJ’s role as supervising its own employees in order to ensure their compliance with state laws and rules. Section 530B does not position the DOJ as a regulatory authority, which is the role of state bars. Instead, it instructs that the DOJ should, in its role as an employer, make sure that its attorney-employees abide by state rules.

Any attempt to infer such authority by implication or broad interpretation would violate the rule that significant new regulatory powers must be grounded in unmistakably clear statutory language. Here, the Proposed Rule would rewrite the federal-state balance of lawyer regulation without any Congressional mandate.

The Proposed Rule would displace state bar procedures, a result at odds with the Tenth Amendment. Courts have uniformly declined to adopt the DOJ’s rationale for authority in the Proposed Rule and have held that federal lawyers, like private lawyers, are subject to state licensing and discipline, not exempt from them (see *Matter of Doe*, 801 F.

⁴ To the extent that this provision seeks to enforce compliance with the DOJ’s (a federal executive agency) request to suspend a state bar investigation (a state judicial body), the DOJ has failed to provide a federalism impact statement as required under Executive Order 13132.

⁵ H.R. Rep. No. 105-636, at 154 (1998) (emphasis added).

Supp. 478, 485–86 (D. N.M. 1992) (federal prosecutor “must” comply with state ethics rules); *United States v. Ferrara*, 847 F. Supp. 964, 969 (D.D.C. 1993) (same)). As Congress has given no explicit authorization, the Proposed Rule likely exceeds statutory authority.

Conclusion

For all of the above reasons, the OSB Board of Governors recommends that the DOJ not adopt the Proposed Rule. The rule is superfluous, will only result in substantial delays that will cause harm to the public, cause the loss of public trust and confidence, and potentially create ethical quandaries for DOJ employees. Most importantly, the Proposed Rule implicates a deviation from the perspective that lawyers are capable of self-regulation through a system painstakingly built on the perception of impartiality and trust. The Proposed Rule would ultimately erode the public’s trust in the legal system and the rule of law.

Thank you for the opportunity to provide comments on the Proposed Rule. We look forward to providing any additional commentary that may be helpful in the future.

Sincerely,



Tómas Hernandez
President
Oregon State Bar