



**AMERICAN COLLEGE
OF TRIAL LAWYERS**

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The Honorable Todd Blanche
Acting Attorney General
U.S. Department of Justice
950 W. Pennsylvania Avenue, NW
Washington D.C. 20530

Notice of Proposed Rulemaking, Docket No. OAG199 | Comment Tracking #mnj-0mho-1hee
Re: "Review of State Bar Complaints and Allegations Against Department of Justice Attorneys"

Dear Acting Attorney General Blanche:

This letter is submitted on behalf of the American College of Trial Lawyers ("the College"). The College is an invitation-only fellowship of trial lawyers of diverse backgrounds from the United States and Canada. The College seeks to maintain and improve the standards of trial practice, professionalism, ethics, and the fair administration of justice through education and public statements on important legal issues relating to its mission, including protecting the Rule of Law.

The College respectfully submits these comments in connection with the Department of Justice's ("DOJ's") proposed rule, *Review of State Bar Complaints and Allegations Against Department of Justice Attorneys* ("Proposed Rule"). As drafted, the Proposed Rule would inappropriately insert DOJ into state disciplinary proceedings at their inception, giving DOJ the right to preempt state bar investigations against DOJ attorneys by requesting that state disciplinary authorities suspend investigations indefinitely while DOJ conducts its own review – and then authorizing unspecified "appropriate actions" against state disciplinary authorities that decline to accede to such requests. This framework would undermine public confidence in the integrity of government attorneys by delaying or eliminating disciplinary investigations by neutral outside parties.

DOJ's proposed rule raises serious concerns about independence, accountability, and public confidence in the administration of justice and the Rule of Law. It should not be implemented in its present form.

1. The Proposed Rule is Unnecessary

DOJ justifies its proposed rule by referencing "weaponization" of the bar complaint process, but DOJ has identified no concrete examples of systematic abuse by state disciplinary authorities that would justify a significant restructuring of existing review processes. To the contrary, DOJ acknowledges that those processes are functioning well. For example, DOJ notes that, as a matter of longstanding practice, state bars already typically defer to DOJ investigations and often decline further action after referral. In addition, DOJ "commend[s]" state bars for regularly "filter[ing] obviously meritless complaints before forwarding them to the affected lawyer." In the absence of evidence that existing processes are inadequate, DOJ's allegations of "weaponization" do not appear to be well-supported, and its proposal to overhaul those processes is without an apparent factual foundation.

2. The Proposed Rule is Inconsistent with Current Law

The proposed rule is also contrary to existing law. Under the McDade Amendment, 28 U.S.C. § 530B, "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." The Proposed Rule renders this statutory requirement superfluous and contradicts that controlling federal law when it carves out special rules for DOJ attorneys. A process that permits DOJ to control the initial handling of complaints against its own attorneys undermines the statute's requirement that DOJ counsel abide by state disciplinary rules on the same terms as other counsel who practice in the same jurisdiction.

3. The Proposed Rule Permits Indefinite DOJ Control Over Complaints

The Proposed Rule contains no meaningful limitation on DOJ's "first review" process. As drafted, DOJ could initiate review and request suspension of state proceedings without any deadline for completion. The absence of clear timeframes creates a substantial risk that valid complaints could languish for extended periods, including until after an attorney has left government service. This could significantly delay (and functionally preclude) state disciplinary action, raising serious concerns about the fair and timely



administration of justice. The Proposed Rule also risks creating a situation where attorneys could evade review of their conduct during the period in which oversight is most critical, including while they remain in active government service. In practice, the Proposed Rule could increase delay while simultaneously limiting accountability, a result that is unacceptable in a profession that demands timely and effective self-regulation.

4. The Proposed Rule Interferes with State Disciplinary Authority

State supreme courts across the United States hold inherent and primary authority to regulate the practice of law, including disciplining attorneys admitted to their bars. The Proposed Rule's instruction that DOJ "*shall* take appropriate action to ... prevent the bar disciplinary authorities from interfering" with DOJ's own review process undermines that authority by exempting one category of state-barred lawyers from the state's uniform disciplinary process. Worse, the Proposed Rule appears to *compel* DOJ interference with state bar disciplinary authorities. DOJ's assertion that the Proposed Rule has no federalism implications ignores the fact that, as drafted, the Proposed Rule empowers the federal government to enforce a requirement that states suspend their own disciplinary proceedings whenever federal authorities so request. As DOJ acknowledges, there is no factual record of state bars refusing to delay investigations where appropriate, and there is no reason to impose a mandatory, federally controlled process that would compromise the independence of state bar disciplinary systems. Such an usurpation of state processes would undermine public confidence that misconduct allegations will be promptly and impartially evaluated.

5. The Proposed Rule Insulates DOJ Attorneys from Meaningful Oversight

Attorney turnover, both within DOJ today and as attorneys regularly transition into and out of government service, increases the risks posed by DOJ's Proposed Rule. Because the rule permits DOJ to assume primary control and review over complaints without any defined timeframe, complaints arising during a lawyer's government service may remain unresolved until after that lawyer has departed. Such delay could be significant. State regulators could face significant obstacles in resuming their investigations, including statutes of limitations, faded memories, and lost evidence. These risks are particularly important where courts have identified potential misconduct, such as findings of lack of candor or contempt, yet no disciplinary process has been completed during the attorney's tenure. Although the Proposed Rule ostensibly preserves the authority of state bars to impose discipline, including suspension or disbarment, its structure (including mandatory deferral at the outset, restricted information sharing, and the prospect of federal



enforcement action should a state bar decline to comply) impedes a state's ability to exercise that authority in a timely and independent manner.

6. The Proposed Rule Will Harm Government Attorneys

The Proposed Rule will also harm government attorneys who may find themselves subject to two separate and inherently incompatible processes. Under the Proposed Rule, the DOJ could ask state bar authorities to suspend their disciplinary investigations and proceedings, pending DOJ review. The Proposed Rule notes that DOJ could direct its attorneys in such a situation to refuse requests from state authorities to sit for interviews or to provide information as part of the investigation. If the state bar declines to stay its proceedings and persists in its requests for information, the individual DOJ attorney would be presented with a classic Hobson's choice: comply with the DOJ directive and risk sanctions from the state bar, or comply with the state bar request and risk sanctions, including loss of employment, from the DOJ. The current rule, which involves cooperation and coordination, avoids putting DOJ attorneys in this unfair situation.

For the reasons discussed above, the College respectfully urges DOJ to withdraw the Proposed Rule. The Rule is unnecessary and unsupported in law or fact, invites delay and obstruction in the resolution of serious misconduct allegations, intrudes upon the longstanding disciplinary authority of the states, puts individual DOJ attorneys in an unfair situation, and weakens the independence and credibility of existing disciplinary processes. The public's confidence in the administration of justice and Rule of Law requires assurance that government lawyers are subject to the same ethical oversight as other members of the bar. DOJ should maintain the existing system of cooperation with state bar authorities and refrain from adopting the Proposed Rule, which would create a separate set of rules and procedures for DOJ attorneys.

Thank you for the opportunity to submit these comments. The College appreciates DOJ's consideration of its views and remains available to provide any further input that may be helpful.

Respectfully submitted,



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American College of Trial Lawyers

