April 3, 2026

Mr. Robert Hinchman
Senior Counsel
U.S. Department of Justice
Office of Legal Policy
Washington, DC 20530

Submitted via http://www.regulations.gov

Re: NPRM: Review of State Bar Complaints and Allegations Against Department of Justice Attorneys (91 Fed. Reg. 10780 (Mar. 5, 2026))

Docket No. OAG199, RIN 1105-AB82

Dear Mr. Hinchman,

The American Immigration Lawyers Association (AILA) submits the following comments in response to the above-referenced notice of proposed rulemaking (NPRM) published by the Department of Justice (DOJ or Department) in the Federal Register on March 5, 2026.[1] The NPRM solicits public comments on DOJ's proposed process for reviewing bar complaints and allegations against its attorneys.

AILA is a voluntary bar association of more than 18,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent U.S. businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration law. The collective expertise and experience of our members, many of whom regularly appear in Federal courts and interact with DOJ lawyers, makes us particularly well-qualified to offer views on this matter. We appreciate the opportunity to comment on the proposed rule.

I. Background

A. Stated Purpose of the 1999 Interim Final Rule

As noted in the Supplementary Information to the proposed rule, the current version of 28 CFR part 77, "Ethical Standards for Attorneys for the Government," was promulgated in 1999 as an interim final rule, to comply with a then-new statutory provision, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, and codified at 28 U.S.C. § 530B.[2] That statute provides in relevant part:

[1] 91 Fed. Reg. 10780 (Mar. 5, 2026).
[2] Pub. L. 105– 277. Division A, section 801, "Ethical Standards for Federal Prosecutors." Subsection (b) of 28 U.S.C. § 530B required the Attorney General to "make and amend rules … to assure compliance with [subsection (a)]."

> (a) 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.

An "attorney for the government" is defined to include DOJ attorneys and those exercising federal litigation authority, including federal independent counsel.[3]

In drafting the interim final rule, the Department's stated goal was to be "consistent with the statute's language and its legislative history" and to "ensure that Department attorneys face obligations similar to, but not greater than, those faced by non-Department attorneys."[4] Thus, in addition to reasonably defining the statutory language, the Department sought to draft an interim final rule that "identif[ies] issues that Department attorneys should examine when faced with a question about what state's rule applies [to them]."[5] The Department noted that although 28 U.S.C. § 530B "directs Department attorneys to comply with rules of ethical conduct" it is "silent on enforcement mechanisms. For this reason, section 530B does not change the enforcement authority of the Department of Justice's Office of Professional Responsibility, state authorities, or the federal courts."[6]

B. The Disciplinary Process for Department Attorneys

The Department notes in the NPRM that the DOJ attorney disciplinary process involves three components: (1) the **Office of Professional Responsibility (OPR)**, which has jurisdiction to review allegations of misconduct made against DOJ attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice; (2) the **Professional Misconduct Review Unit (PMRU)**, which reviews OPR's investigative facts, analyses and conclusions and decides whether discipline is warranted; and (3) the **Office of the Inspector General (OIG)**, which has jurisdiction to review allegations of waste, fraud, and abuse against Department attorneys.[7] According to the Department, the PMRU is "the final decisionmaker for the Department with respect to findings of misconduct by career Department attorneys," including whether and what disciplinary actions are warranted and whether to notify the appropriate State bar of its findings.[8] In accordance with 28 C.F.R. 0.39(a)(6), OPR acts as liaison on behalf of the Department with State bar authorities regarding professional misconduct matters.

Without citing any supporting authority, the Department states that when State bar authorities receive a complaint about a DOJ attorney before or during an OPR investigation, "most State bars refrain from taking further action until OPR is able to complete the investigation so that the bar has a full account … of the evidence and OPR's analysis, as well as PMRU's conclusions, when determining whether to open their own investigation."[9] The Department goes on to state, again without supporting authority, that "most State bars do not take additional action" after

---

[3] 28 U.S.C. § 530B(c).
[4] 64 Fed. Reg. 19273, 19274 (Apr. 20, 1999).
[5] 64 Fed. Reg. at 19274.
[6] *Id.*
[7] 91 Fed. Reg. at 10781-82.
[8] *Id*.
[9] 91 Fed. Reg. at 10782.

referral by OPR, because "they may determine that the Department attorney's conduct does not warrant the use of their resources" or they "view the Department's disciplinary actions as sufficient to accomplish the purposes of attorney discipline, including deterring future misconduct."[10]

C. Overview of the 2026 NPRM

The proposed rule would amend 28 CFR part 77 to establish a process for the Attorney General to intervene in State bar disciplinary matters involving DOJ attorneys. If finalized as proposed, the process would provide the Attorney General, or her designee, with the right to review in the first instance, "any allegations that a current or former Department attorney violated an ethics rule while engaging in the attorney's duties for the Department," whether the allegations originate from a third party complaint or the State bar disciplinary authorities open an investigation into the attorney's conduct on its own.[11]

Under proposed 28 CFR § 77.5(a), upon receiving notice of the filing of a complaint or opening of an investigation, if the Department opts to exercise its right to review, the Department must notify the State bar disciplinary authorities of its intent to do so, and request that such authorities suspend any investigation or proceedings until the Department completes its review.[12] Although not specified in the rule, DOJ notes in the Supplementary Information, its intent to designate the OPR as the investigative authority for these purposes, with the PMRU continuing its role in reviewing OPR's conclusions and determining whether discipline is appropriate.[13] Upon completion of OPR's investigation and the rendering of a decision by the PMRU, proposed 28 CFR § 77.5(a) requires the Department to notify the State bar disciplinary authorities that its investigation is complete, and "as appropriate," the results of its review.[14]

If the Department begins a review but decides not to complete it, proposed 28 CFR § 77.5(a) would require the Department to notify the State bar authorities so that they may resume their investigation or disciplinary proceedings.[15] Lastly, proposed 28 CFR § 77.5(b) notes that if the State bar authorities refuse to suspend an investigation or proceedings involving a DOJ attorney, "the Department shall 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."[16]

---

[10] *Id*.
[11] 91 Fed. Reg. at 10784; Proposed 28 CFR § 77.5(a).
[12] *Id*. "To ensure that OPR is aware of all bar complaints filed against Department attorneys and all investigations opened into Department attorneys by bar disciplinary authorities, the Department will amend title 1 of the Justice Manual to require Department employees to report to OPR through their supervisors, all State bar complaints filed against them and all investigations opened into them by bar disciplinary authorities of which they are informed (whether by service or other means). Department attorneys who end their service with the Department will receive appropriate training on how to contact OPR if they later become the subject of State bar complaints or investigations into allegations that they engaged in ethical misconduct while working for the Department." 91 Fed. Reg. at 10784.
[13] *See generally* 91 Fed. Reg. 10781-82; 10784.
[14] 91 Fed. Reg. at 10784, 10787.
[15] *Id*.
[16] 91 Fed. Reg. at 10787.

D. Stated Purpose of the 2026 NPRM

In explaining the need for amending the rule after more than a quarter century, DOJ notes several recent events, including the issuance of Executive Order 14147, "Ending the Weaponization of the Federal Government," and the presidential "Memorandum on Preventing the Abuses of the Legal System and the Federal Courts," directing the Attorney General "to prioritize enforcement of … regulations governing attorney conduct and discipline."[17] The Department also points to recent bar complaints filed against senior Department officials and attorneys by "political activists" and "the willingness of some State bar disciplinary authorities to give credence to such complaints" as prompting the need for revisiting the rules. DOJ states, without citing supporting authority, that in some of these instances, State bars have initiated investigations of Department attorneys without coordinating with OPR and claims that 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," and "interferes with the broad statutory authority of the Attorney General, as the head of the Department of Justice, to manage and supervise Department Attorneys." [18]

II. The Proposed Rule is Unlawful and Should be Withdrawn

A. The Proposed Rule is *Ultra Vires* to 28 U.S.C. § 530B

Federal law is clear. Under 28 U.S.C. § 530C(c)(1), DOJ attorneys, just like all other attorneys, are required to be licensed to practice under the laws of a U.S. State, a U.S. territory, or the District of Columbia.[19] Under 28 U.S.C. § 530B, DOJ attorneys are subject to such State laws and rules "*to the same extent and in the same manner as other attorneys in that State*." (emphasis added). By elevating DOJ disciplinary proceedings over State bar disciplinary proceedings, the proposed rule would change the "manner" in which DOJ attorneys "are subject" to State rules of professional conduct—in particular, how such rules are enforced against them. In place of the current system, where all licensed attorneys are treated the same, the proposed rule would create a bifurcated system whereby DOJ attorneys are effectively shielded from State bar investigations while OPR engages in its own internal review. This is a clear violation of the statute in that DOJ attorneys will no longer be held accountable for professional misconduct "to the same extent and *in the same manner* as other attorneys…." As such, the proposed rule is *ultra vires* to the statute, and this rulemaking effort should be withdrawn.

B. The Proposed Rule Is Arbitrary and Capricious in Violation of the Administrative Procedure Act

The Administrative Procedure Act (APA) "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020) (citations

---

[17] 91 Fed. Reg. at 10782.
[18] *Id*.
[19] "No funds available to the Attorney General may be used to pay compensation for services provided by an individual employed as an attorney ... unless such individual is 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."

omitted); *see also Transportation Div. of the Int'l Ass'n of Sheet Metal, Air, Rail, & Transportation Workers v. Fed. R.R. Admin*., 988 F.3d 1170, 1178 (9th Cir. 2021). The APA's "arbitrary and capricious" standard requires agency actions to be reasonable and reasonably explained. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). The agency must articulate a rational connection between the facts found and the conclusions made. *See Transportation Div.*, 988 F.3d at 1182. The proposed rule fails in this regard. In describing the recent events that have prompted the Department to seek changes to the rule, as well as the Department's interpretation of its legal authority to enforce State ethics rules, DOJ neglects to acknowledge the legislative history of 28 U.S.C. § 530B and settled law affirming that the licensing and discipline of lawyers is a matter left to the States. Further, the Department's justification is based on numerous assertions that are unsupported by any facts. For these reasons, the proposed rule is arbitrary and capricious in violation of the APA.

1. The Proposed Rule Ignores Well-Settled Law Leaving Disciplinary Authority to the States and Congressional Intent Behind 28 U.S.C. 530B

Section 530B of title 28 of the United States Code is derived from the McDade-Murtha Citizens Protection Act, which originated out of concerns raised by the House Government Operations Committee in 1990, with "the problems inherent in any system of self-policing and regulation" of the ethics rules applicable to DOJ attorneys.[20] Though there has been disagreement as to the purpose of the statute—proponents say it is necessary to prevent prosecutorial overreach; detractors argue that it impedes effective law enforcement—there has never been disagreement as to *how* State laws and rules of professional conduct should be enforced against DOJ attorneys. Until this proposal, it has been undisputed that State Rules of Professional Conduct are to be enforced against DOJ attorneys by the States that administer such rules and the courts that interpret them. Indeed, when speaking on his bill, Rep. Joseph M. McDade affirmed, "[t]hese rules are currently enforced, *and must continue to be enforced*, by the [States]."[21]

The Supreme Court has also recognized that the enforcement of professional conduct rules is to be left to the States. In *Leis v. Flynt*, the Court stated:

> 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 are also responsible for the discipline of lawyers.[22]

While DOJ's internal disciplinary bodies have the authority to impose personnel-related sanctions on an attorney, they have no authority to restrict or strip the attorney's license to practice law. The Department of Justice acknowledged this in the 1999 interim final rule when it stated, "*attorneys are principally subject to discipline by their state of licensure and the courts before which they practice*." The Department went on to state, "[A]lthough Department attorneys are also subject to discipline by the [OPR] … Department attorneys [are] to look, according to

[20] H.Rept. 101-986
[21] Cong. Rec. March 5, 1989, at page E301. (emphasis added).
[22] 439 U.S. 438, 442; 99 S. Ct. 698, 700 (1979) (per curiam).

the circumstances, to the rules of the court before which they are appearing and the rules of their licensing jurisdiction."[23]

In making state bar licensure a pre-requisite for employment as a DOJ attorney under 28 U.S.C. 530C(c)(1), DOJ must necessarily rely upon State bar disciplinary authorities to assess and monitor the attorney's fitness to practice law and ongoing eligibility to possess a license in good standing. By providing DOJ with the right to review allegations against a DOJ attorney in the first instance and mandating that States indefinitely suspend their investigations while DOJ conducts its own review, the proposed rule conflicts with 28 U.S.C. 530C(c)(1) and undermines the authority of State bars to enforce their rules of professional conduct.

2. DOJ's Justification Rests on Unsupported Assertions—Not Evidence

In addition, in setting forth its justification for the proposed rule, the Department makes several unsupported assertions of fact. First, the Department states that "most State bars do not take additional action" after a disciplinary matter is referred to them by OPR, because "they may determine that [it] does not warrant the use of their resources" or they "view the Department's disciplinary actions as sufficient to accomplish the purposes of attorney discipline, including deterring future misconduct."[24] Although we defer to the expertise and experience of State disciplinary authorities, we note that the difference in the penalties that can be imposed by State bars as compared to DOJ disciplinary authorities make DOJ remedies utterly insufficient in certain instances: State bar sanctions against lawyers who violate ethical rules range from admonishment to disbarment, whereas DOJ sanctions include reprimand, suspension, and removal from Federal service. Given these critical differences, when a State opts to forego an investigation that arises out of a DOJ referral, it is reasonable to assume that they do so because they have determined that there is no reasonable basis for concluding that an ethics violation has occurred, not because of any deference to the conclusions drawn by DOJ disciplinary bodies.

The Department also states, without citing supporting authority, that the recent filing of bar complaints against senior Department officials and attorneys by "political activists" along with "the willingness of some State bar disciplinary authorities to give credence to such complaints" has prompted the Department to revisit the rules.[25] DOJ also claims that State bars have initiated investigations of DOJ attorneys without coordinating with OPR and says 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."[26]

First, we note that DOJ provides no data as to the number, frequency, or time frame within which these State bar complaints have allegedly been filed, or whether they were ultimately deemed to be actionable. Without such evidence, the public is left to rely on conclusory language in the proposed rule that assumes such complaints are baseless and politically motivated. This is an insufficient basis on which to justify the proposed rule, which would upend more than 25 years of DOJ disciplinary enforcement policy. That said, to the extent that the State bar complaint

---

[23] *Id*. (emphasis added).
[24] 91 Fed. Reg. at 10782.
[25] *Id*.
[26] *Id*.

process is used as a weapon to unfairly malign the reputation of an attorney for the sole purpose of advancing a political agenda, we condemn such practices, which waste State bar resources and undermine the integrity of the legal system as a whole.

If misuse of the State bar complaint process against DOJ attorneys is of significant concern, we note that existing State bar mechanisms are already designed to dismiss complaints that are without merit. Further, as the filing of a frivolous complaint by an attorney itself is an ethical violation, the DOJ attorney that is the subject of such a complaint could in turn file a complaint of their own. DOJ could also address this problem in a way that is more narrowly tailored than the proposed rule. Rather than intervening in every State bar disciplinary investigation against a DOJ attorney, DOJ could deter politically motivated complaints by coordinating parallel investigations and establishing a process whereby State bar and DOJ disciplinary authorities mutually agree to cede investigatory authority to one party, as appropriate to the individual situation. Where a State bar initiates an investigation on its own, DOJ should welcome the State bar's resources and assistance in resolving the matter as expeditiously as possible rather than intervening and impeding the investigation.

Regarding DOJ's concern that misuse of the State bar complaint process may chill the zealous advocacy of Department attorneys, we note that among other things, State bars are charged with ensuring that zeal doesn't cross the line into misconduct.[27] Under the proposed rule, the unbiased oversight of State bar authorities would be replaced by a system whereby DOJ would effectively be permitted to draw its own line between zealous advocacy and misconduct. The duty of a DOJ attorney to be a zealous advocate should be regulated by the jurisdiction that issued their license, not their employer.

Lastly, that the DOJ is seemingly concerned about the potential chilling effect that the State bar complaint process has on the zealous advocacy of Department attorneys is notable, since the presidential memorandum that prompted the Attorney General to review and reconsider 28 C.F.R. part 77 is the same memorandum that has been challenged by the American Bar Association as unconstitutional.[28] This memorandum has also been roundly criticized by others, including AILA, as itself an attempt to chill zealous representation by weaponizing government resources to intimidate non-government lawyers, undermine the independence of the legal profession, and weaken its role as an independent check on government power.[29]

---

[27] Under Model Rule 1.3, Cmnt. 1, "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful *and ethical measures* are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." (emphasis added).

[28] *See* "American Bar Association files suit to halt government intimidation of lawyers and law firms," (June 16, 2025), https://www.americanbar.org/news/abanews/aba-news-archives/2025/06/aba-files-suit-to-halt-govt-intimidation/.

[29] "AILA Rejects Administration's Dangerous Threats on Immigration Attorneys," (Mar. 22, 2025), https://www.aila.org/library/aila-rejects-administration-s-dangerous-restrictions-on-immigration-attorneys; "ACLU Reacts to President Trump's Latest Directive Threatening Lawyers and Law Firms," (Mar. 22, 2025); https://www.aclu.org/press-releases/aclu-reacts-to-president-trumps-latest-directive-threatening-lawyers-and-law-firms.

For the foregoing reasons, the proposed rule is unreasoned, lacks a rational connection to known facts, and is arbitrary and capricious under the APA.

III. The Proposed Rule Should be Abandoned as a Matter of Public Policy

A. The Proposed Rule Would Obstruct State Obligations to Protect the Public and Undermine Public Trust

As noted, proposed 28 C.F.R. § 77.5 would authorize the Attorney General and OPR to request that State bar disciplinary authorities suspend their investigations into allegations of misconduct against DOJ attorneys until DOJ completes its own internal review of such allegations. There is no time limit on a suspension, and a suspension can only be lifted by DOJ after completion of its review or a decision not to proceed further with its investigation. Thus, the proposed rule would allow DOJ to assume complete control over when and whether State bar disciplinary authorities can proceed with an investigation into allegations of misconduct against a DOJ attorney who is subject to the State's rules of professional conduct.

In any investigation, time is of the essence. Over time, documents may be lost or destroyed and digital communications deleted. Witnesses may relocate or pass away, and their memories may fade. State bar disciplinary authorities may also be subject to statutes of limitations or regulatory deadlines that might ultimately prevent them from proceeding with an investigation if a DOJ review is protracted. Regardless of its good faith efforts, by providing DOJ with the right of first review, any ensuing investigation by State bar authorities will be prejudiced due to the passage of time, hindering the ability of State bar authorities to carry out their missions to protect the public from bad actors and undermining public trust in the system.

B. The Proposed Rule Reduces Transparency and Impartiality in the Disciplinary Process

Although the consequences of some State bar disciplinary actions remain private (such as diversion and resignation in lieu of discipline), in most cases where disciplinary action is warranted, the consequences are public and transparent. By contrast, OPR is an internal office within DOJ that largely operates confidentially. As noted in the FAQs on its website, "the Privacy Act significantly limits the Department from disclosing information concerning individual misconduct investigations."[30] For example, in reviewing OPR's investigative summaries for 2025, of the 10 summaries that are provided, none contain the name of the attorney.[31] Further, OPRs annual reports have been criticized as untimely, lacking transparency and unproductive:

> *Although OPR issues annual reports that summarize its investigative conclusions, the reports are untimely, do not name names, and offer few details. OPR's statistical summaries indicate that most allegations are not investigated and that most*

[30] OPR FAQs, https://www.justice.gov/opr/frequently-asked-questions#public.
[31] OPR Investigative Summaries, https://www.justice.gov/opr/frequently-asked-questions#public.

investigations go nowhere. The annual report does not even say what happened to federal prosecutors charged with misconduct in court opinions.[32]

Whereas State bar disciplinary bodies are independent and impartial, both OPR and PMRU report directly to the Attorney General and Deputy Attorney General, making them susceptible to political influence. Toward that end, we note that while these offices have traditionally been run by nonpartisan career prosecutors, the head of the OPR, a career official with more than 38 years of experience, was recently removed from his position, and to date, a replacement has not been named.[33] Further, simply by virtue of being part of DOJ, OPR and PMRU are less objective than a third-party, outside entity, such as a State bar disciplinary body.[34] The proposed rule would establish a system in which the Department of Justice would be permitted to police itself. By significantly raising the risk that the unethical conduct of DOJ attorneys will go unchecked, the proposed rule is contrary to the public interest.

C. The Proposed Rule Conflicts with a DOJ Attorney's Reporting Obligations Under Rule of Professional Conduct 8.3, Obligation to Report

Under ABA Model Rule of Professional Conduct 8.3(a), "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority." All U.S. jurisdictions and the territory of Puerto Rico have adopted ABA Model Rule 8.3 or a provision substantially like Model Rule 8.3.[35] To avoid a charge of misconduct by their licensing authority, DOJ attorneys therefore have an obligation to report the misconduct of other DOJ attorneys, whether that attorney is opposing counsel, a colleague, a subordinate, or a supervisor.

In the Supplementary Information to the proposed rule, DOJ states, "The proposed rule [] does not create any conflict with Model Rule 8.3 … Under the proposed rule, a Department attorney's obligation[] to report professional misconduct committed by other lawyers remains unchanged. OPR will engage with the bar disciplinary authorities and will inform them of the Department's conclusions with respect to allegations of professional misconduct by current or former Department attorneys."[36]

While the proposed rule may not conflict with Model Rule 8.3 on its face, it does conflict as a practical matter. Because the rule provides that the Attorney General (OPR) shall determine whether referral of a matter to State bar disciplinary authorities is appropriate, DOJ attorneys

---

[32] Bruce A. Greene, "Regulating Federal Prosecutors: Let There Be Light," Yale Law Journal (Mar. 4, 2009), https://yalelawjournal.org/essay/regulating-federal-prosecutors-let-there-be-light.
[33] Perry Stein, et al., "Several Top Career Officials Ousted at Justice Department," Washington Post (Mar. 7, 2025), https://www.washingtonpost.com/national-security/2025/03/07/justice-department-trump-firings/; https://www.justice.gov/archives/opr/former-director-and-chief-counsel-ragsdale
[34] Bruce A. Greene, Rebecca Roiphe, "Who Should Police Politicization of the DOJ?" Notre Dame Journal of Law, Ethics & Public Policy, Vol. 35, Issue 2 (2021), https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1873&context=ndjlepp.
[35] *See* ABA, Variations of the ABA Model Rules of Professional Conduct, Rule 8.3 (11/2022), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-8-3.pdf
[36] 91 Fed Reg. at 10785.

will often forego their own reporting obligations under Model Rule 8.3, in deference to DOJ[37]. If a DOJ attorney who knows that another DOJ attorney has violated an ethics rule relies on the decision of OPR to report the matter to the State bar rather than report the matter themselves, they may become susceptible to disciplinary action. Further, the proposed rule may further chill reporting, as DOJ attorneys may fear retaliation for reporting misconduct to State bars, knowing that any complaint will filter first through OPR.

D. The Proposed Rule Conflicts with Rule of Professional Conduct 5.4, Professional Independence of a Lawyer

The proposed rule also threatens the independence of government lawyers, in violation of ABA Model Rule of Professional Conduct 5.4(c), providing "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." Legal ethics scholarship has long recognized that professional independence is not limited to financial arrangements but extends to the institutional structure by which ethical obligations are defined and enforced. Independence requires that lawyers look to their licensing authorities—and not their employers or clients—as the final source of professional norms.[38]A regulatory scheme that places an employing institution in a gatekeeping role over whether and when state bar authorities may exercise disciplinary oversight blurs that line.

DOJ's assertion that ordinary state bar processes "chill zealous advocacy" implicitly recasts professional discipline as adversarial to lawful representation of the government. That framing is inconsistent with modern understandings of zealous advocacy, which exist within ethical boundaries enforced by independent authorities. State bar oversight does not oppose government advocacy; it defines the conditions under which advocacy remains lawful, ethical, and legitimate.[39]

IV. Conclusion

We appreciate the opportunity to provide these comments on the Department of Justice's proposed rule. For the foregoing reasons, we urge the Department to withdraw the NPRM and endeavor to work collaboratively with State bar authorities to strengthen the integrity of the disciplinary system and ensure that all attorneys—including DOJ attorneys—are treated the same, in accordance with the letter and spirit of 28 U.S.C. § 530B.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

---

[37] We also note that it is already an almost insurmountable hurdle for a subordinate lawyer to report a superior's misconduct, despite their obligation to do so under Model Rule 8.3.

[38] Bruce A. Green, *Lawyers' Professional Independence: Overrated or Undervalued?*, Fordham University School of Law, 2013 available at https://ir.lawnet.fordham.edu/faculty_scholarship/578/.

[39] *See also* ABA Model Rule 2.1, Advisor ("[A] a lawyer shall exercise independent professional judgment and render candid advice") and 5.2(a) ("A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person").