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DOJ Ethics Proposal: An Unwelcome '90s Reboot

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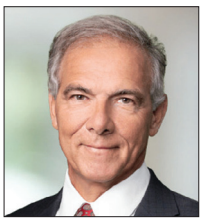

By **Robert J. Anello**

And **Richard F. Albert**

For those of us who remember the original, a recently proposed Justice Department regulation that effectively would exempt its attorneys from state bar professional regulation feels like the reboot of an unloved 1990s television drama. The Justice Department has its own self-regulatory process for investigating and penalizing government attorneys accused of ethical misconduct, but only state bars can impose professional penalties such as suspension and disbarment, which traditionally have served as a useful outside check on federal prosecutors. In recent months ethics complaints have been lodged against Trump administration attorneys, such as Deputy Attorney General Todd Blanche, former Principal Associate Deputy Attorney General Emil Bove, and former U.S. Attorney Lindsey Halligan, which the DOJ has framed as a "weaponization" of the state bar complaint process by "political activists." In response, the department proposed a regulation of dubious legality, posted in the Federal Register at 91 FR 10780 on March 5, 2026, which amends 28 C.F.R. Part 77 to allow the Attorney General to halt state bar investigations into ethics complaints against current or former government attorneys while the DOJ conducts its own review. The proposed rule, which state bar associations, former grievance attorneys, and political advocates frame as a power grab by the current administration, represents an attempt to re-open a long-ago resolved feud between the DOJ and the states over who regulates the ethical conduct of federal prosecutors.

In 1998, Congress enacted the McDade Amendment (28 U.S.C. Section 530B), which expressly states that federal prosecutors "shall be subject to state laws and rules ... to the same extent and in the same manner as other

attorneys in that state." The amendment—it was thought—resolved a long-simmering clash between the DOJ and state bar associations in the late 1980s and early 1990s over whether the "no-contact rule," which prohibits lawyers from communicating with represented parties without their counsel's consent, applied to federal prosecutors conducting investigations. Against this historical backdrop, DOJ's March 2026 proposed rule reads as an attempt to avenge its prior loss and wrest to itself an unreviewable authority over its own professional ethics that Congress wisely denied it decades earlier.

The McDade Amendment: Congress Settles the Question

In the late 1980s, defense attorneys increasingly raised legal challenges to the conduct of federal criminal investigations based on application of the so called "no contact" rules to federal prosecutors.Such state ethical prohibitions, typically modeled after Rule 4.2 of the American Bar Association Model Rules of Professional Conduct (ABA Model Rule) and developed primarily to govern private attorneys in civil litigation, broadly prohibit attorneys from directly contacting individuals represented by counsel. In its defense, the DOJ typically invoked the ABA Model Rule's "authorized by law" exception, arguing that the no-contact rule did not apply to federal prosecutors' pre-charge investigative efforts.

The conflict intensified after the U.S. Court of Appeals for the Second Circuit held in *United States v. Hammad*, 858 F.2d 834, 837 (2d Cir. 1988), that the rule applied to federal prosecutors who had wired a cooperating witness to record conversations with a represented target of a fraud investigation, and that evidence obtained in violation of the rule potentially could be suppressed. In response, Attorney General Richard Thornburgh issued an internal memorandum to all DOJ litigators in 1989 declaring that federal prosecutors were not bound by state ethics rules when those rules conflicted with federal law enforcement interests. The "Thornburgh Memo" purported to exempt federal prosecutors engaged in "legitimate law enforcement activities" from anti-contact rules, invoking the supremacy clause as legal justification.

Defense attorneys, bar associations, and courts widely criticized the memo. See, e.g., *Lopez v. United* States, 4 F.3d 1455 (9th Cir. 1993) (rejecting government's argument that memo constituted authorization "by law" sufficient to exempt prosecutors from no contact rule). After continued controversy and unsuccessful reconciliation efforts during the Bush administration, in 1994 Attorney General Janet Reno tried a different approach. After multiple rounds of comments, which the agency claimed legitimized the rule-making process, the DOJ promulgated regulations under the Attorney General's claimed authority to regulate the conduct of DOJ lawyers. See Communications with Represented Persons, 59 Fed. Reg. 39,910, 39,915-16 (Aug. 4, 1994), codified at 28 C.F.R. Sections 77.1-77.5. The "Reno Regulation" largely echoed the ABA Model Rule, including the exception, and referenced the regulation itself as the "law" authorizing effectively all pre-charge communications. The Conference of Chief Justices characterized the regulation as "substituting the Attorney General's regulation on lawyers for the independent

control and supervision that has historically been the province of the state and federal judiciary," and numerous federal courts rejected the regulation. See, e.g., *United States ex rel. O'Keefe v. McDonnell Douglas*, 132 F.3d 1252 (8th Cir. 1998) (striking down Reno Regulation as exceeding Attorney General's authority).

Congress ultimately resolved the issue by enacting the McDade Amendment as part of the Omnibus Appropriations Law for Fiscal Year 1999. Republican congressman Joseph McDade of Pennsylvania proposed the amendment following his acquittal on all charges after an eight-year federal criminal investigation and prosecution. The law, which expressly requires that federal prosecutors "shall be subject to state and local rules ... to the same extent and in the same manner as other attorneys in that state," passed the House of Representatives with overwhelming bipartisan support—345 members voted in favor. Following the McDade Amendment, the DOJ replaced the Reno Regulations with regulations implementing Section 530B. See Ethical Standards for Attorneys for the Government, 64 Fed. Reg. 19273-01 (1999) (1999 Rule). The 1999 Rule gave state authorities control over prosecutors' compliance with the jurisdiction's no contact rule, meaning that depending on state ethics rules, federal prosecutors' conduct may or may not trigger an "authorized by law" exception as interpreted by that individual state.

The 2026 Proposed Rule: Re-opening a Settled Dispute?

The March 2026 proposed rule, "Review of State Bar Complaints and Allegations Against Department of Justice Attorneys," appears to be the DOJ's attempt to take a second run at what it failed to accomplish in the 1990s. The proposed rule comes at a time described by the DOJ as a purportedly "unprecedented weaponization of the state bar complaint process" against DOJ attorneys. In the last year, a number of state ethics complaints have been brought against current and former Trump officials. Perhaps the most high-profile has been a demand in June 2025 by over 70 legal experts and organizations for the Florida Bar to bring an ethics investigation into Attorney General Pam Bondi for allegedly compelling DOJ attorneys to advance Trump administrative objectives over state ethics obligations. The Florida Bar declined, reportedly on the basis that it does not take actions against sitting federally appointed officers, and the Florida Supreme Court ultimately refused to force the Florida Bar to investigate. Last month, after initially issuing a conflicting statement, the Florida Bar ultimately denied that it was investigating Lindsey Halligan. Halligan, a former personal attorney for President Trump with no prior prosecutorial experience, served briefly as U.S. Attorney for the Eastern District of Virginia until she resigned following court rulings rejecting the legitimacy of her appointment and dismissing indictments she obtained against Trump's avowed high-profile enemies, James Comey and Letitia James. In New York, complaints also have been brought against U.S. Deputy Attorney General Todd Blanche for an alleged conflict of interest while officially interviewing Ghislane Maxwell, and former top DOJ official and current Third Circuit Judge Emil Bove for allegedly coercing DOJ attorneys to dismiss criminal charges against New York City Mayor Eric Adams. The preamble to the proposed rule states that after a quarter

century operating under the rule implementing the McDade Amendment, during which the department "worked collaboratively" with state bar disciplinary authorities, recent complaints and disciplinary proceedings that "target internal department deliberations" have prompted the DOJ to revise the attorney discipline process.

The proposed rule amends 28 C.F.R. Part 77 to establish a process whereby the Attorney General, acting through the Office of Professional Responsibility, would have "the right to review the allegations in the first instance" whenever a bar complaint is filed or bar disciplinary authorities open an investigation concerning an alleged violation of an ethics rule by a current or former federal prosecutor while engaged in federal duties. 91 FR 10780. The Attorney General would then be permitted to "request that the bar disciplinary authority suspend any parallel investigations until the completion of the Department's review." If the Attorney General finds no misconduct, she could block the state bar from investigating the alleged infraction, and if the bar disciplinary authorities refuse the request, "the department shall take appropriate action to prevent the bar disciplinary authorities from interfering with the Attorney General's review."

The revisions are necessary, the preamble states, to prevent further intrusion on the Attorney General's statutory responsibility and "chilling the zealous advocacy by department attorneys on behalf of the United States." See 28 U.S.C. 510 (authorizing the Attorney General to "make such provisions as he considers appropriate authorizing the performance by any other officer, employee or agency of the Department of Justice"). Relying on federal supremacy principles and the broad language of the McDade Amendment, the DOJ concludes that the Attorney General may displace state bar enforcement entirely or in part when it is inconsistent with the federal government's determinations regarding regulation of federal attorneys. Comments on the proposed rule were open for 30 days, closing on April 6, 2026.

Cracks in the Reg's Foundation

The proposed rule has generated a substantial volume of comments, with many, including state bar associations and legal ethics experts, pointing out cracks in the DOJ's interpretation of the McDade Amendment, the agency's authority to create such a rule, and ultimately the proposal's incompatibility with federal law and principles of separation of powers.

The DOJ takes the position that the current proposal does not conflict with the McDade Amendment, which does not expressly address enforcement mechanisms. Critics have pointed out, however, that the McDade Amendment states that DOJ attorneys "shall be subject to State laws and rules ... *to the same extent and in the same manner as other attorneys in the state*," which would seem to encompass not just substantive ethics rules but also enforcement processes. No other category of lawyer can invoke a supervisor's review to pause or preempt state disciplinary proceedings. Indeed, the phrase "in the same manner" would appear superfluous if it did not mean that DOJ attorneys were subject to the same enforcement procedures as other attorneys. Relatedly, critics have argued that the proposal cannot preserve substantive compliance with state ethics rules, as the McDade Amendment demands, when those

rules may not necessarily be enforced under the DOJ's authority. Because the proposed rule contains no meaningful timelines or deadlines, the DOJ's review could extend indefinitely, effectively immunizing DOJ attorneys from state discipline proceedings for years—a benefit not afforded to private attorneys.

As for DOJ's supremacy arguments, Congress rejected the DOJ's same arguments for special treatment of federal attorneys in enacting the McDade Amendment in 1998. Federalism concerns stem from the new proposal's provision that the DOJ "shall" undertake "appropriate action" to prevent the bar from "interfering" with the DOJ's review. Critics contend that the regulation would undermine state bar authority and independence, effectively subordinating state bar oversight to DOJ's control. For example, NYU School of Law ethics professor Stephen Gillers has warned that the proposal is ultimately an attack on state courts' power to enforce discipline, characterizing it as an "assault on federalism." More such criticisms have likely poured in since the preparation of this column, during the final run up to the April 6 deadline for regulatory comment. The proposed regulation additionally faces the hurdle of Supreme Court authority recognizing, in a unanimous decision, that states have "an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses." See *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 434 (1982). Whether such arguments will have an impact on the proposed rule remains to be seen.

Conclusion

In 1989, the DOJ claimed that subjecting its attorneys to state ethics rules would impair federal law enforcement. Then, as now, the DOJ invoked its supervisory authority over its attorneys as a basis for asserting primacy over state regulation of the profession, a tradition dating back prior to the founding of the Republic. After nearly a decade of controversy, Congress firmly resolved the issue through the McDade Amendment. The need for an outside check on federal prosecutors' professional conduct that motivated Congressman McDade's proposal has not dissipated since its passage.

The DOJ's current proposed regulation appears to ignore the history, and it is exceedingly difficult to see how it can be squared with the law. Hope springs eternal that the administration will heed the well-founded critical comments generated by the proposal and scrap the effort. More realistically, it will likely once again fall to the courts to maintain the traditional checks and balances that have well served our legal system and our country.

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