APRL ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS

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By Rulemaking Portal https://www.regulations.gov and First-Class Mail

Attorney General Pam Bondi
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Review of State Bar Complaints and Allegations Against Department of Justice Attorneys Docket No. OAG199

Dear Attorney General Bondi:

I submit this comment on behalf of the Association of Professional Responsibility Lawyers ("APRL") on the notice of proposed rulemaking identified above (the "Proposed Rule"). In short, APRL respectfully submits that the Proposed Rule is inconsistent with the mandate of the McDade Amendment, codified as 28 USC § 530B, and seeks to interfere with the state regulation of lawyers to which the McDade Amendment explicitly requires that federal lawyers be subject.

APRL's Interest in the Proposed Rule

APRL is comprised of hundreds of attorneys in 49 U.S. jurisdictions and in three foreign countries. Its members include lawyers who regularly represent other lawyers (and other lawyers' clients) in all kinds of legal ethics and professional responsibility matters, including issues involving attorney discipline, risk management, legal malpractice, and other aspects of the laws governing the practice of law. The organization's members also include academics and judges. APRL is the largest organization of private practitioners in the United States devoted exclusively to legal ethics and professional responsibility.

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APRL and its members are deeply committed to professional responsibility and to advancing and improving the laws governing the practice of law. APRL marshals the talent, energy, and perspectives of its members to bring about positive change to legal ethics and professional responsibility law. APRL's efforts in this regard include issuing public statements and filing amicus curiae briefs in both state and federal court. *See, e.g., Bahlul v. United States,* No. 23-1072 (U.S. 2024); *In re Grand Jury,* No. 21-1397 (U.S. 2022); *Schoenefeld v. New York,* No. 16-780 (U.S. 2016); *National Assoc. for the Advancement of Multijurisdictional Practice v. Lynch,* No. 16-404 (U.S. 2016).

The issue raised by the Proposed Rule is whether state regulators should be required to treat investigations into possible violations of the Rules of Professional Conduct (the "Rules") by lawyers the federal government employs differently than investigations involving all other lawyers. That issue directly touches APRL's mission. APRL members are called on regularly to advise lawyers and judges about the scope of their ethical obligations, not only in federal matters, but also in matters in the other jurisdictions where APRL members practice. APRL has an interest in ensuring that the Rules are applied evenhandedly to all lawyers. The confidence of our citizenry in the regulatory systems governing lawyers depends upon the belief that all lawyers must adhere to their ethical responsibilities. Uniform application of those ethical rules is part of our nation's commitment to the rule of law, which the McDade Amendment-- upon which the Proposed Rule purports to be base—requires in the case of Department attorneys.

Background of the McDade Amendment

In *United States v. Hammad,* 678 F. Supp. 397 (E.D.N.Y. 1987), 846 F.2d 854 (2d Cir. 1988), *revised* 858 F.2d 834 (2d Cir. 1988), the defendant owned a department store and was being investigated for Medicaid fraud, in connection with which he was known to have retained counsel. A federal prosecutor, however, armed one of the store's suppliers with a fictitious grand jury subpoena to Hammad

and the supplier engaged him in an incriminating conversation. Although the district court and court of appeals disagreed on whether to suppress the evidence, both courts concluded that the prosecutor had violated New York's version of the disciplinary rule requiring that a lawyer have no contact with a represented party other than through counsel (the "no-contact" rule).

The Department of Justice responded to *Hammad* with a 1989 memorandum to its attorneys (the "Thornburgh Memorandum"), contending that "some defense counsel" were applying an "expansive reading" of the no-contact rule. The Thornburgh Memorandum took the position that federal prosecutors were not bound by the no-contact rule and invoked the Supremacy Clause "if any disciplinary authority other than the United States attempts to interfere with the legitimate investigative prerogatives of the government." *See In re Doe,* 801 F Supp 478, 394 (DNM 1992) (quoting the Thornburgh Memorandum). The memorandum (later revised and restated by Attorney General Reno) was not well received by the courts. *United States v Lopez,* 765 F. Supp. 1433 (N.D. Cal. 1991), *vacated & remanded* 4 F.3d 1455 (9th Cir. 1993); *In re Twitty,* 2 Cal. State Bar Ct. Rptr. 664 (1993) (disciplinary case arising out of *Lopez*); *United States v Ferrera,* 847 F Supp 964 (DDC 1993), *aff'd* 54 F3.d 825 (D.C. Cir. 1995); *In re Doe, supra* (related case on *Ferrera* facts); *United States ex rel O'Keefe v. McDonnell Douglas Corp,* 961 F. Supp. 1288 (E.D. Mo. 1997), *aff'd* 132 F.2d 1252 (1998).

In 1994, Attorney General Reno issued *former* 28 C.F.R. §§ 77.1-77.12, which purported to limit federal lawyers' duties to comply with the no-contact rule, specifically authorizing communications with represented parties in the context of investigations and again relying on the Supremacy Clause as a basis for the rules' validity. As justification, Attorney General Reno opined that "The threat of disciplinary proceedings (and the possible resulting loss of license and livelihood) against a government attorney engaged in legitimate law enforcement activities has had a chilling effect on

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the responsible exercise of law enforcement duties." 59 Fed. Reg. 39910-01 at 39913.

The McDade Amendment

Although no single source exists explaining precisely what motivated Congress in 1998 to pass the McDade Amendment, its roots extend back to 1990 when the 101st Congress held hearings on its first iteration and recommended a thorough examination of the ethics rules applicable to Department of Justice attorneys, expressing in a report by the Committee on Government Operations a concern over "the problems inherent in any system of self-policing and regulation … much like the fox guarding the chicken coop." HR

Rep. 101-986 at 35 (1990). That committee report noted that the American Bar Association had "characterized the Attorney General's Supremacy Clause argument as 'specious'" given that "Congress has recognized the power of States to license lawyers to practice in their courts."

Representative McDade reintroduced the Amendment in the 104th and 105th Congresses. The Amendment was enacted in 1998 as an appropriations rider, the intent of which was described by the report of the House Appropriations Committee in connection:

> 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.

HR Rep. 105-636 (1998) at 154 (emphasis added). This language demonstrates that Congress believed that the Department was not adequately policing itself and therefore that government lawyers needed *as a matter of federal law* to be required to conform to state laws governing lawyers.

The McDade Amendment, unchanged in the 28 years since its enactment, reads in part:

> (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.
>
> (b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.

28 U.S.C. §§ 530B(a)-(b). In 1999, the federal regulations that Attorney General Reno had issued at 28 C.F.R. §§ 77.1 *et seq.* were amended to conform to this requirement, removing the sections that purported to limit the application of certain state requirements to federal attorneys and that claimed the right for the Department to preempt state laws in this field.

The McDade Amendment makes plain that no Supremacy Clause argument can now credibly be made in this arena, Congress itself

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having affirmatively embraced state regulation of Department attorneys.

The Department's Argument for a New Regulation

The Department stated this Proposed Rule is needed because "over the past several years, political activists have weaponized the bar complaint and investigation process," citing complaints against four unnamed senior officials without comment on the merits of those complaints. "Even more troubling," the Proposed Rule continues, "is the willingness of some State bar disciplinary authorities to give credence to such complaints," again without specifying how such complaints lacked merit and without identifying which state disciplinary authorities even processed allegedly "weaponized" complaints. Echoing Attorney General Reno's comment in issuing the former regulations to which the McDade Amendment was a response, this Proposed Rule contends that "[t]his unprecedented weaponization of the State bar complaint process risks chilling the zealous advocacy by Department attorneys."

APRL disagrees that the Department has demonstrated a need for the Proposed Rule. The Proposed Rule simply assumes that unidentified Department lawyers were named in unspecified complaints that lacked merit and that other improper complaints will be made in the future.

For many years, federal courts have emphasized the importance that state bar ethics proceedings have to protecting the public. For example, the Seventh Circuit (long before the McDade Amendment) stated that "when state courts do initiate an inquiry into an attorney's conduct, they deal with a matter of such great importance to the state and its citizens that federal courts should be as slow to intervene in these proceedings as in state criminal proceedings" and "because the quality of the practice of law so vitally affects the public welfare, the states maintain a paramount interest in requiring high standards for their attorneys." *In re*

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Daley, 549 F.2d 469, 476-77 (7th Cir. 1977), *in part quoting Erdman v Stevens,* 458 F.2d 1205, 1213, (2d Cir.), *cert denied,* 409 U.S. 889 (1972). The same principles should give the Department of Justice pause here.

The Proposed Rule Is Not a Proper Implementation of the McDade Amendment

As noted above, subsection (b) of the McDade Amendment gives the Attorney General the power to issue rules "to assure compliance" with its mandate. The substance of the McDade Amendment, however, is to *require* that Department of Justice attorneys be fully subject to the state laws governing lawyers, "to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. § 530B(a).

Contrary to that express statutory directive, the Proposed Rule would deflect the application of state law to Department attorneys by deferring state action in favor of whatever process the Department may want to follow in a given case, delaying and therefore interfering with those state processes. The Proposed Rule contains no deadline for completing the Department's "review." Even if it did, that Department review would displace and, therefore, interfere with state proceedings without any time frame. In so doing, the Department could indefinitely delay state proceedings.

Federal law therefore requires—and APRL believes—that all lawyers licensed or practicing in a given jurisdiction are and should be subject to the same laws and rules, except where the state laws or rules themselves provide otherwise, such as in the various state counterparts to ABA Model Rule 1.11 which lays out special rules for government lawyers. The Proposed Rule, therefore, does not ensure compliance with the McDade Amendment, but undermines it.

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Contrary to how it's described in the Proposed Rule, The McDade Amendment unambiguously mandates that Department lawyers shall be subject not only to "state ethics rules" (the phrase used in the explanation for the Proposed Rule) but to *all* "State laws and rules . . . governing attorneys in each State." 28 U.S.C. § 530B(a). Each of the States and the District of Columbia have detailed statutes or court rules empowering their attorney regulatory agencies to investigate and to sanction attorneys' violation of professional duties. If the Proposed Rule is promulgated, a complaint against a Department attorney would be given a type of preferential treatment not afforded any other attorney subject to the identical "State laws and rules." The Proposed Rule would disrupt and abate investigatory procedures in the case of a Department attorney. It would moreover halt the ability of a state disciplinary to undertake even an initial screening of a complaint to give the Attorney General "the right to review the allegations in the first instance," a review for which it sets no deadline for completion. Among other things, this pause in the procedures state law requires would, for whatever time the Department chose to take, relieve Department attorneys from the obligation applicable to all other licensed attorneys to respond to their regulators. The McDade Amendment proscribes that.

So, APRL opposes this Proposed Rule and respectfully suggests that the Proposed Rule is unlawful under the very statute that the Proposed Rule purports to implement.

The Proposed Rule Incorrectly Concludes that the McDade Amendment Gives the Department Authority Independent of the States to Enforce State Ethics Rules

The Proposed Rule cites the superseded 1989 Thornburgh Memorandum, with its Supremacy Clause claims, as a reason to undermine Attorney General Reno's conclusion, in the 1999 revision of 28 C.F.R. §§ 77.1 *et seq.*, that the McDade Amendment did "not change the enforcement authority of the [OPR], *state authorities*, or the federal courts." (Emphasis added.) The Proposed

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Rule would now claim for the Department authority "to establish an enforcement mechanism for assuring that Department attorneys comply with State ethics rules." The proposed new § 77.5 would give the Attorney General the "right to review [disciplinary] allegations in the first instance" and to "take appropriate action … to prevent the bar disciplinary authorities from interfering with the Attorney General's review . . . ."

But nothing in the McDade Amendment gives the Department authority to affect the state licensure of any Department attorney. Through its Office of Professional Responsibility, the Department has the power to reprimand a lawyer, to suspend a lawyer from employment, or to terminate the employment of a lawyer. Similarly, the Professional Misconduct Review Unit has the power to take a number of employment actions. But those are all powers that the Department has today. They are in addition to, and not instead of, the state-by-state ethics compliance the McDade Amendment requires. Because the Department already enforces its own standards, no new "enforcement mechanism" is either needed or appropriate.

To the Extent that the Proposed Rule Would Mean that Government Attorneys Will Defy the Authority of State Disciplinary Authorities, It Would Be Contrary to the Express Terms of the McDade Amendment.

Although the Proposed Rule does not expressly say so, the "Summary" contends that "*before a current or former Department lawyer may participate* in any investigative steps initiated by the bar disciplinary authority of a State, Territory, or the District of Columbia in response to allegations that a current or former Department attorney violated an ethics rule while engaging in that attorney's federal duties, the Department will have the right to review the allegations in the first instance . . . ." (Emphasis added). Every attorney in every state has an affirmative obligation to cooperate with their state regulatory agency when asked to do so in a disciplinary investigation. This Proposed Rule would potentially

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permit Department attorneys to be instructed not to comply with that obligation pending the Department's "review," however long that review might take. Such a refusal to cooperate would expressly contradict the mandate of Section 530B(a) that Department attorneys be subject to state "laws and rules . . . to the same extent and in the same manner as other attorneys in that State."

It has long been a truism that "justice delayed is justice denied." The state disciplinary processes protect the public, including a given lawyer's future clients, the integrity of court processes, and others from unethical or incompetent lawyers. On the one hand, the language of the Proposed Rule suggests that it will be within a state bar's discretion whether to accept delay pending the Department's review. On the other, however, are the suggestions that, contrary to the history of past cooperation, the Department both may refuse to permit its attorneys to cooperate with state authorities and may affirmatively seek to "prevent the bar disciplinary authorities from interfering" with the Department's review. Given the Proposed Rule's justification for the regulation as a response to "weaponizing" State bar proceedings, APRL interprets the latter to be a potential outcome of the regulation, should it be enacted. This Proposed Rule is about protecting Department lawyers, not about protecting the public.

The Proposed Rule provides that it "does not create any meaningful conflict" with Rule of Professional Conduct 8.5, which subjects lawyers for the government to the regulatory power of the states in which they are licensed and in the states in which they provide legal services. APRL respectfully disagrees. To the extent that the Proposed Rule would delay, potentially indefinitely, any state proceedings against Department lawyers, it would conflict with Rule of Professional Conduct 8.5.

Summary

APRL applauds the Department's continued affirmation that it "has long been committed to upholding the highest standards of

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ethics among its attorneys." The concerns that were articulated 36 years ago by the Committee on Government Operations about "the problems inherent in any system of self-policing and regulation" are, however, no less concerning today. APRL submits that the Proposed Rule is inconsistent with the clear mandate of the McDade Amendment. For all the reasons Congress put that provision into federal law the Proposed Rule would be poor public policy.

Respectfully submitted,

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Association of Professional Responsibility Lawyers