REPORT BY THE NEW YORK CITY BAR ASSOCIATION

OPPOSITION TO PROPOSED DEPARTMENT OF JUSTICE RULE TO REVIEW STATE BAR COMPLAINTS AND ALLEGATIONS AGAINST DEPARTMENT OF JUSTICE ATTORNEYS

28 CFR Part 77
Docket No. OAG199, AG Order No. 6653-2026-A
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I. INTRODUCTION

The New York City Bar Association ("City Bar") submits this comment in response to the Department of Justice's ("DOJ's") proposed rule concerning state bar complaints and allegations against DOJ attorneys (the "Proposed Rule"). The Proposed Rule is unlawful and contrary to the public interest. It would purport to empower DOJ to delay and displace state professional bodies that license attorneys and ordinarily decide whether a lawyer's conduct should be investigated or disciplined under state professional rules. The Proposed Rule would not formally extinguish state licensing or disciplinary authority, but it would substantially undercut the states' exercise of that authority by requiring them to defer to DOJ's review of allegations against its own lawyers under threat of "appropriate action" if they refuse.

The New York City Bar Association has a longstanding interest in the development of legal ethics standards and in the integrity and independence of the legal profession and of government lawyers. The formal opinions of the City Bar's Committee on Professional Ethics are widely relied on by attorneys, courts and disciplinary bodies. The City Bar frequently issues reports and statements concerning matters of central importance to the legal profession and in support of the Rule of Law. Over the course of the past year, it has repeatedly expressed concerns about the adherence of DOJ attorneys to the ethical standards of our profession.

The interests of the New York City Bar Association are directly implicated here. The proposed rule would pressure state disciplinary authorities to stand down while DOJ reviews allegations of misconduct "in the first instance." DOJ's Notice of Proposed Rulemaking (the "NPRM") states that if a bar disciplinary authority refuses DOJ's request to suspend its investigation or proceeding, the Department will take "appropriate action" to enforce the regulation or prevent interference with DOJ's review.

About the Association
The mission of the New York City Bar Association, which was founded in 1870 and has over 20,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

This proposed scheme is flatly inconsistent with the legislation known as the McDade Amendment.[1] Congress enacted the McDade Amendment precisely to confirm the longstanding requirement that federal government lawyers are subject to state ethics rules and state disciplinary systems "to the same extent and in the same manner" as other attorneys. The Proposed Rule would do the opposite. It would treat DOJ lawyers differently from other lawyers regulated by the same state rules, obstruct state enforcement of those rules, and effectively make DOJ the arbiter of whether its own lawyers may have violated state professional obligations.

The Proposed Rule is also contrary to the public interest. State disciplinary systems are independent in two important senses in which DOJ is not. First, state disciplinary bodies exist to regulate the legal profession in the public interest, not to protect an institutional client or employer. DOJ, by contrast, is the employer of the lawyers whose conduct is at issue. DOJ's conflict of interest is obvious and would bar DOJ personnel from even participating in state disciplinary proceedings against another DOJ lawyer, let alone controlling the investigation and determining the outcome as would be the case under the Proposed Rule.

Second, state disciplinary bodies are part of a system of self-governance that states rely on to oversee the legal profession. Principles of self-governance are reflected in the choice to vest both the establishment of professional standards and their enforcement in the state courts or mandatory bars, rather than in the political branches of government. Self-governance is a critical check on governmental overreach because it assures that the political branches cannot manipulate the disciplinary rules or their enforcement to produce a quiescent and compliant bar. It is also essential to judicial independence as courts rely on the honesty and integrity of the bar to ensure full and fair consideration of the issues. The proposed rule undercuts this long history of self-governance by substituting executive branch investigators and adjudicators for the independent and impartial bodies established by the states.

These concerns are heightened in an environment where DOJ's commitment to standards of professional conduct has been called into question. Literally hundreds of DOJ attorneys have resigned, many citing departmental pressure to violate rules of conduct, and dozens of federal judges have complained about the candor and reliability of DOJ attorneys appearing before them. In this context, it is small wonder that DOJ would surface the Proposed Rule as a device to shield DOJ lawyers from independent scrutiny.

For these reasons, DOJ should withdraw the Proposed Rule. The Proposed Rule is so legally flawed that no DOJ lawyer should expect to be protected by it and no state attorney disciplinary body should be intimidated by it. DOJ should focus instead on rebuilding confidence in the Department, rather than devising unlawful approaches such as this that further undermine public trust.

II. THE PROPOSED RULE

The McDade Amendment establishes as a matter of federal law that DOJ attorneys are subject to state ethics rules "to the same extent and in the same manner" as other lawyers in the

[1] 28 U.S.C. § 530B.

jurisdictions where they practice.[2] The statue expressly delegates to DOJ the authority to "make and amend rules . . . to assure compliance with this section."[3] In the past, DOJ has done just that, promulgating the rules that comprise Part 77 of Chapter 1 of Title 28 of the CFR. These rules are primarily focused on the process by which DOJ attorneys choose which state ethics rules apply to them and how to manage conflicts between multiple states' rules which may be applicable.[4]

DOJ now proposes to revise and supplement the Part 77 rules in operative part by adding, as the Proposed Rule, a new Part 77.5 with the following language:

> (a) Before the bar disciplinary authorities of the States, the Territories, or the District of Columbia undertake any investigative steps that seek information or otherwise require participation from an attorney for the government in response to allegations that a current or former attorney for the government violated a rule of ethical conduct while engaging in that attorney's duties for the Department, the Attorney General shall have the right to review the allegations in the first instance. The Attorney General shall have this right whether the allegations are made in a complaint filed by a third party or the bar disciplinary authorities open an investigation into the allegations without a complaint. The Attorney General or her designee shall notify the appropriate bar disciplinary authorities whether she intends to exercise her right to review the allegations and, if she does, she or her designee shall request that the bar disciplinary authorities suspend any parallel investigations or disciplinary proceedings until the completion of the review. If the Attorney General decides not to complete her review, she or her designee shall notify the appropriate bar disciplinary authorities so they may resume their investigations or disciplinary proceedings. The Attorney General or her designee shall inform the appropriate bar disciplinary authorities of the completion of her review. As appropriate, the Attorney General or her designee shall also inform the appropriate bar disciplinary authorities of the results of her review, including if the review finds that the attorney for the government did not violate any rule of ethical conduct while engaging in that attorney's duties.
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> (b) Should the relevant bar disciplinary authorities refuse the Attorney General's request, 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.

If adopted by DOJ and acquiesced in by state disciplinary authorities, the Proposed Rule would allow DOJ to effectively exempt its lawyers from the state professional conduct rules by impeding and displacing state enforcement of their own rules. As such, the Proposed Rule is

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[2] *See* 28 U.S.C. § 530B(a).

[3] *Id.* § 530B(b).

[4] *See, e.g.*, 28 C.F.R. § 77.4.

directly at odds with the text of the McDade Amendment and reflects a significant departure from DOJ's prior rulemaking under that law.

III. THE PROPOSED RULE IS UNLAWFUL

A. The Proposed Rule Violates the McDade Amendment

The McDade Amendment confirms that DOJ lawyers are subject to state professional conduct regulation to the same extent and in the same manner as other attorneys. The Proposed Rule by contrast would purport to allow DOJ to displace state enforcement mechanisms thus effectively exempting its lawyers from state regulation.

The regulation of lawyers has been the prerogative of the states from before the Revolution.[5] States, in turn, have developed licensing and disciplinary systems that rely heavily on the self-governance of the legal profession placing the issuance of rules and operation of enforcement procedures largely under the purview of their court systems. The federal courts understood that arrangement and respected it even before the McDade Amendment was passed. Indeed, the McDade Amendment did not change the law; rather, it confirmed and clarified what tradition and the courts had already settled—that *all* lawyers licensed by a state or practicing in a state must abide by state ethics rules and are subject to state disciplinary processes.

Congress confirmed this longstanding approach by explicitly rejecting a theory of federal preemption developed by DOJ that would have immunized DOJ lawyers from certain state professional conduct regulation. In a 1992 internal memorandum, then Attorney General Richard Thornburgh argued, "although the states have the authority to regulate the ethical conduct of attorneys admitted to practice before their courts, that authority permits regulation of federal attorneys only if the regulation does not conflict with the federal law or with the attorneys' federal responsibilities."[6]

DOJ had sought to avoid the application of state professional conduct rules because during the 1980s and early 1990s, some of its lawyers engaged in *ex parte* contacts with represented parties in apparent violation of the state "no contact" rules, such as current Rule 4.2 or DR 7-104 under the prior ABA Code of Professional Responsibility.

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[5] *Leis v. Flynt*, 439 U.S. 438, 442 (1979) (noting that regulation of lawyers has been a function of the states since the founding of the republic). The first association of lawyers was formed in New York City in 1709. *See* Paul M. Hamlin, *New York's First Bar Association*, 5 N.Y.L. Sch. L Rev. 348 (1959), *available at* https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=2462&context=nyls_law_review. (All websites last accessed April 6, 2026)

[6] Mem. from Attorney General Thornburgh to All Justice Department Litigators (June 8, 1980), reprinted as Exhibit E in *Matter of Doe*, 801 F. Supp 478, 490 (D.N.M. 1992) (citations omitted); *see also Ethical Restraints of the ABA Code of Professional Responsibility on Federal Criminal Investigation*, Mem. Op. for the Deputy Attorney General (Apr. 18, 1980) at p. 601-02 (citations omitted), available at https://www.justice.gov/file/151341/dl ("A strong, and we believe persuasive, argument may be lodged against any attempt by a state bar association to impose sanctions on a government attorney who is acting lawfully and in pursuance of his federal enforcement responsibilities.").

Relying on these state rules, some criminal defendants sought to suppress evidence and even have their cases dismissed, on the grounds that the DOJ attorneys involved had violated state "no contact" rules. The courts hearing such defenses struggled to determine the consequences of such violations. But, crucially, none of those courts held that the DOJ lawyer was exempt from the rules.[7] To the contrary, a number of those DOJ lawyers were disciplined, and internal DOJ guidance, such as the Thornburgh memorandum proved unavailing. In *Matter of Doe*, relying on the Thornburgh memorandum, a DOJ lawyer sought to remove his state disciplinary proceeding to federal court, arguing that when acting as a federal employee, federal law controlled. The court rejected his removal petition, and showed its disdain for DOJ's position by attaching the Thornburgh memorandum to its decision, and writing: "Were this Court to recognize the memorandum as law, it would allow an agency to issue a regulation exempting itself from ethical restrictions in the absence of any delegated authority or congressional mandate to do so. Such a result is clearly unacceptable."[8]

DOJ did not back down, promulgating regulations in 1994 that purported to continue to exempt DOJ lawyers from state "no contact rules," and eventually Congress acted—passing the McDade Amendment in response.

The McDade Amendment provides that "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." In effect, the McDade Amendment clarifies and confirms that federal prosecutors must abide by the professional conduct rules of the state in which they practice, and subjects them to the same state disciplinary processes as those applicable to other lawyers in that state.

The Proposed Rule

The Proposed Rule runs directly contrary to the text and meaning of the McDade Amendment. It purports to create a sequenced process whereby state disciplinary bodies must stay—for a potentially indefinite period of time—an investigation or proceeding against a DOJ lawyer until DOJ conducts its own internal investigation of that lawyer.[9] The Proposed Rule also

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[7] *See, e.g., United States v. Lopez*, 4 F.3d 1455, 1463-64 (9th Cir. 1993); *United States v. Hammad*, 858 F.2d 834, 840 (2d Cir. 1988); *United States v. Ferrara*, 847 F. Supp. 964 (D.D.C. 1993), *aff'd* 54 F.3d 825 (D.C. Cir. 1995); *Matter of Doe*, 801 F. Supp. 478 (D.N.M. 1992). *See generally*, Congr. Research Service Report for Congress, *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys* (updated Dec. 18, 2001), available at https://www.everycrsreport.com/reports/RL30060.html.

[8] *Matter of Doe*, 801 F. Supp at 487.

[9] Although styled as a "request" that state authorities suspend their proceedings, Subsection (b) of proposed new Part 77.5—addressing "appropriate action to enforce this regulation"—makes clear that DOJ would take coercive measures should state authorities fail to accede to the request. DOJ might simply refuse to permit its lawyers to provide information to or participate in a state disciplinary proceeding. And, indeed, DOJ states in the NPRM that the Department intends to prohibit its attorneys from participating in state proceedings that it has requested be suspended. 91 F.R. 10784. DOJ might also take more aggressive action, like seeking to enjoin the continuation of the state disciplinary proceeding in its entirety.

appears to assume for DOJ the power to bind state authorities to its findings of fact and conclusions of law following its internal investigation.[10]

A system of processing attorney misconduct allegations that divests the states of jurisdiction to timely enforce their own professional conduct regulations against DOJ lawyers is inconsistent with the McDade Amendment's requirement that DOJ lawyers be subject to state rules "*in the same manner* as other attorneys in that State." Under the Proposed Rule, a non-DOJ lawyer facing misconduct allegations is subject to state process, whereas a DOJ lawyer is not—at least until DOJ finishes its internal review.

To the extent the Proposed Rule purports to empower DOJ to bind state authorities to its own determinations, it is contrary to the McDade Amendment in another respect as well. In addition to treating DOJ attorneys in a different "manner" than other lawyers subject to the same state rules, DOJ attorneys would not be subject to such rules "to the same extent" as other lawyers, because state disciplinary authorities are independent and impartial, while DOJ, as its attorneys' employer, is not.

B. The Proposed Rule Exceeds Congress's Delegation of Rulemaking Authority

The Proposed Rule Does Not "Assure Compliance" with the McDade Amendment

The McDade Amendment grants DOJ rulemaking authority only "to assure compliance" with its provisions.[11] Those provisions require DOJ to assure that DOJ lawyers "are subject to State laws and rules, and local Federal court rules . . . to the same extent and in the same manner as other attorneys in the State." The rulemaking authority under the Amendment provides no authorization to supplant, supersede or delay state attorney disciplinary processes. DOJ's bald assertion that it "does not interpret [the McDade Amendment] to require that Department attorneys must be subject to the same procedures for enforcing substantive State ethics rules" as non-DOJ attorneys is simply wrong.[12] To the contrary, the only rulemaking authority conferred by the McDade Amendment is the authority to issue rules that compel compliance with the standards and manner that states have established to regulate attorney licensure and conduct.

The existing rules promulgated under the McDade Amendment's rulemaking authority bear this out. These rules are limited to guiding DOJ lawyers on how to determine which states' rules

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[10] 91 F.R. 10784 ("The Attorney General retains the discretion to displace State bar enforcement and to create an entirely Federal enforcement mechanism, or to displace State bar enforcement in part when it is inconsistent with the Federal Government's determinations regarding the regulation of Federal attorneys."). The proposed rule does not explicitly assert that DOJ would consider its own findings that state rules were not violated to bind the state, but the NPRM's assertion of this power coupled with the fact that the proposal only provides that the states can alter the sanctions proposed by DOJ in cases in which DOJ has found a violation, implies that DOJ is indeed intending that the proposed Rule would prohibit states from imposing sanctions in situations in which a state finds its rules to be violated despite DOJ's opposite conclusion.

[11] 28 U.S.C. sec. 530B(B).

[12] 91 F.R. at 10785 col. 2.

apply to them in different circumstances, and what to do if two or more sets of rules apply and conflict with one another.

By contrast, the Proposed Rule does nothing to "assure compliance" with the state professional conduct rules. Instead, it would exempt DOJ lawyers from the states' processes for applying their rules—in direct contravention of the McDade Amendment's requirement that DOJ lawyers be subject to the same "manner" of enforcement of state regulations.

Congress Did Not Authorize the Preemption of State Law that the Proposed Rule Effects

The Supreme Court has made clear that while Congress can preempt state policies and procedures, respect for federalism and state sovereignty requires that for issues which have historically been the subject of long standing state regulation, state authority may only be displaced by Congress' "clear and manifest purpose" to do so.[13] The Supreme Court has also recognized that regulation of attorney conduct is plainly one such area that has historically been the domain of the states: "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 also are responsible for the discipline of lawyers."[14]

Far from demonstrating a clear intent to displace this long tradition of state authority, the language and purpose of the McDade Amendment are directly to the contrary, reaffirming state authority by directing DOJ to adhere to state policies and procedures

Against this backdrop, the NRPM's first approach to the federalism issue is to pretend it does not exist. The NPRM states in pure *ipse dixit* that the Proposed Rule "will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. It does not dictate the substance of the ethical standards a State may adopt."[15]

But, as explained above, the Proposed Rule's entire purpose is to displace state regulatory authority over DOJ's lawyers. Subsection (b) of proposed new Part 77.5 purports to give DOJ the power to act against state authorities that refuse to honor DOJ's "request" to suspend state proceedings. Seeking to enjoin state disciplinary proceedings, even temporarily, has direct substantial effect on a state's right to enforce its own attorney ethics codes. Even the more limited act of prohibiting DOJ lawyers from cooperating with state disciplinary authorities impacts the states since it forces DOJ lawyers to violate ABA Model Rule 8.3(b), in force in New York as in most states, which requires that lawyers with knowledge or evidence of attorney impropriety "shall

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[13] *Rice v. Sante Fe elevator Corp.*, 331 U.S. 218, 230 (1947); s*ee also Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) ("when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'").

[14] *Leis v. Flynt*, 439 U.S. 438, 442 (1979).

[15] 91 F.R. at 10786 col. 1-2.

not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct."

Elsewhere the NPRM appears to concede (as it must) that the Proposed Rule affects the states' authority to regulate attorneys that practice in their jurisdictions but argues that the displacement of state law is authorized. According to the NPRM:

> The Department has concluded that section 530B permits the Attorney General to establish an enforcement mechanism for assuring that Department attorneys comply with State ethics rules. The general presumption is that absent a clear statement from Congress, federal law "control[s] the constitution and laws of the respective [S]tates, and cannot be controlled by them." . . . From this principle is deduced [a] corollary" the "effect" of which "is 'that the activities of the Federal Government are free from regulation by any [S]tate.'"[16]

An extension of this logic leads directly to DOJ's view, expressly stated in the NPRM, that it "retains the discretion to displace State bar enforcement and to create an entirely Federal enforcement mechanism."[17]

This position is plainly wrong. The "general presumption" is exactly the opposite, that federal law will *not* preempt traditional state functions like the regulation of lawyers absent a "clear and manifest" congressional intent that it do so. While DOJ may have authority as an employer to establish internal enforcement mechanisms for attorney violations of state rules of professional conduct as well as the Department's own rules, there is nothing in the McDade Amendment, or elsewhere in the federal code, that shows a "clear and manifest" purpose to preempt state attorney disciplinary mechanisms. To the contrary, as explained above, the McDade Amendment expressly requires that DOJ lawyers be subject to enforcement of state rules "*in the same manner*" as other lawyers, which means that DOJ lawyers must remain subject to state investigation and enforcement processes.

This statutory emphasis on DOJ compliance with *the manner* of state enforcement is not surprising. States have developed their attorney disciplinary processes to emphasize key values and attributes that are essential to the proper functioning of a vigorous and independent bar, which, in turn, is essential to independent judicial review. As explained *infra*, these processes rely on principles of professional self-governance to emphasize impartiality, fairness, and independence from the political branches. In contrast, DOJ's internal processes cannot provide any measure of impartiality and independence that is comparable to state procedures and provide no protection from political interference and control.

For over 25 years since the passage of the McDade Amendment, DOJ interpreted the law to recognize the applicability of state disciplinary standards, providing that when DOJ discovers

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[16] *Id.* at 10783 col. 1.

[17] *Id.* at 10784 col. 1. The NPRM's admission that is in fact displacing state disciplinary enforcement mechanisms belies its claim that no consultation with state and local government was required under Executive Order 13132. To the contrary, the absence of such consultation is a direct violation of Executive Order 13132.

an ethical violation by one of its own, it would refer the DOJ lawyer to the appropriate court or state disciplinary authorities. In essence, DOJ has deferred to the states, rather than the other way around. As the NPRM frankly acknowledges:

> [W]hen the [Professional Misconduct Review Unit "PMRU"] concludes that a State rule of professional conduct is implicated by the Department attorney's conduct, it will authorize [the Office of Professional Responsibility "OPR"] to refer the matter to the appropriate bar disciplinary authorities. . . . OPR is responsible for acting as a liaison with the bar disciplinary authorities of the States, the Territories, and the District of Columbia on behalf of the Department. In practice, OPR advises the relevant State bars of attorney misconduct after authorization from the PMRU; assists the State bars in obtaining evidence in the control of the Department, unless disclosure is precluded by law or a significant law enforcement interest; and coordinates with the State bars on matters of mutual interest to improve attorney ethical standards and conduct.[18]

From a practical perspective, this quarter-century of consistent DOJ deference to state authorities in the enforcement of state ethics codes also demonstrates that DOJ can work effectively with state authorities without any need to displace their investigative and enforcement roles. Thus, it is little wonder that Congress has not reconsidered this traditional balance.

IV. THE PROPOSED RULE IS CONTRARY TO THE PUBLIC INTEREST

A. The Proposed Rule Would Undermine Independent Application of State Professional Conduct Rules

The Structure of State Lawyer Disciplinary Process is Designed to be Fair and Impartial

The states have carefully developed their procedures for investigating and adjudicating issues of lawyer misconduct to assure that their professional conduct rules are applied and enforced independently and impartially.[19]

For example, New York has a comprehensive and independent process for lawyer discipline that is under the jurisdiction and ultimate control of the New York State Supreme Court, Appellate Division, which is the same court with responsibility for the admission of lawyers to practice.[20] Under New York's Rules for Attorney Disciplinary Matters, in any case in which discipline is imposed, it is the Appellate Division that makes the ultimate decision.[21]

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[18] *Id.* at 10781-82.

[19] *See generally* ABA Model Rules of Disciplinary Enforcement (establishing principles for protecting the independence, fairness and impartiality of attorney disciplinary proceedings).

[20] *See generally*, Rules for Attorney Disciplinary Matters, 22 NYCRR Part 1240.

[21] *See* 22 NYCRR 1240.8(b).

Each Department of the Appellate Division has an Attorney Grievance (disciplinary) Committee, whose members are appointed by the Justices of the Appellate Division. The Committee must have at least 21 members, of whom at least 3 must be non-lawyers.[22] The Committee has a staff, including a Chief Attorney, who are appointed by the Justices of the Appellate Division. 22 NYCRR 1240.5. When a complaint proceeds beyond investigation to formal hearing, the Appellate Division appoints a referee to hear and report to the Appellate Division. 22 NYCRR 1240.8(b). Both the Committee, through its Chief Attorney, and the respondent attorney can move in the Appellate Division to affirm or disaffirm the referee's report. The Appellate Division can affirm, disaffirm, or modify findings and can impose what, in its discretion, is an appropriate discipline.

Proceedings can be initiated by complaint, *sua sponte* by the Committee, or by self-reporting by a lawyer who has been subjected to discipline in a foreign jurisdiction (22 NYCRR 1240.13). Notably, a "foreign jurisdiction" includes the U.S. federal courts, including the federal courts in the State of New York. 22 NYCRR 1240.2(h). Thus, if a U.S. District Court imposes discipline on a lawyer subject to discipline in New York (*i.e.* admitted to practice in or practicing in New York, 22 NYCRR 1240.1), the lawyer is required to report the discipline to the appropriate Appellate Division. 22 NYCRR 1240.13(d). The lawyer must then demonstrate why discipline should not be imposed in New York for the underlying misconduct. 22 NYCRR 1240.13(a).

When a complaint is received, the Chief Attorney has the power to investigate, including authority to direct the respondent lawyer to be interviewed, to submit documents, and to be questioned under oath. 22 NYCRR 1240.7(b). If the respondent lawyer fails to cooperate, the lawyer can be suspended pending the completion of the proceedings. 22 NYCRR 1240.9. Refusal of the lawyer to cooperate does not abate the proceedings. 22 NYCRR 1240.20.

The Chief Attorney has the discretion to decline to investigate further or to refer the matter to a more appropriate body, such as a fee arbitration panel. Assuming the Chief Attorney does not decline or refer, following the Chief Attorney's investigation the Committee may take action that can include dismissal, diversion (e.g., to a substance abuse program), a letter of advisement (which is not deemed to be discipline), and private admonition (which is deemed to be discipline). If the Committee finds probable cause that the lawyer committed a violation of the Rules of Professional Conduct, the Committee refers the matter for a formal disciplinary hearing.[23]

Formal disciplinary hearings are conducted before a referee to hear and report. As detailed in 22 NYCRR 1240.8, formal hearings include many of the attributes and protections of a civil lawsuit, including pleadings, statements of undisputed and disputed facts, disclosure concerning disputed facts, subpoenas for the attendance of witnesses and production of books and papers (issued by the Clerk of the Appellate Division on application of a party), additional disclosure as the referee deems justice requires, and examination and cross-examination before the referee. The hearing must be concluded within 60 days of the Appellate Division's order of reference.

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[22] *Id.* 1240.4.

[23] *Id.* 1240.7(d)(2)(vi).

Following post-hearing submissions by both parties, the referee submits a report to the Appellate Division. As noted earlier, the parties may then move in the Appellate Division to affirm or disaffirm the report. The ultimate determination on discipline is made by the Appellate Division: "Upon a finding that any person covered by these Rules has committed professional misconduct, the Court may impose discipline or take other action that is authorized by law and, in the discretion of the Court, is appropriate to protect the public, maintain the honor and integrity of the profession, or deter others from committing similar misconduct."[24]

The Court's determination on discipline is a published opinion. As stated in the First Department Attorney Grievance Committee's 2024 Annual Report[25]: "Public discipline requires an order of the Court." Otherwise, in the absence of public discipline imposed by the Appellate Division, attorney disciplinary proceedings are confidential. 22 NYCRR 1240.18.

Finally, the Attorney Grievance Committees publish annual reports which detail their actions in the past year. The Annual Report of the Attorney Grievance Committee for the First Department (covering Manhattan and the Bronx) provides biographical information about each of the Committee members, a description of the disciplinary process, descriptions of the types of discipline imposed with the number of cases for each type and citations to the published opinions, and descriptions of representative cases. The annual reports provide significant transparency into the lawyer disciplinary process.

As can be seen from this summary, New York's process for lawyer discipline contains substantial due process protections. Because of the independent nature of the Attorney Grievance Committees and the active involvement of the Appellate Division, the process is well insulated from political influence.

DOJ's Proposed Disciplinary Process is Neither Fair nor Impartial

Leaving the application of state professional conduct rules to DOJ lawyers exclusively in DOJ's hands, as the Proposed Rule would wish, would not provide a fair and unbiased process because DOJ has a direct interest in the outcome of those proceedings.

DOJ's Office of Professional Responsibility ("OPR") is a component of its HR responsibilities as an employer—it provides nothing equivalent to the safeguards that state licensing and disciplinary boards provide. First and foremost, as the employer of the DOJ attorneys who are subject to investigations, DOJ has a stake in their outcomes. Findings that DOJ attorneys acted improperly could well impact DOJ's litigation posture in pending cases, cast doubt on outcomes of past cases and undermine DOJ's reputation more generally. It could also call into question conduct and decisions made by DOJ leadership, including the leadership which appoints and directs the operation of OPR itself. For these reasons, under New York Rules and those of most states, DOJ attorneys who sit on any grievance committees would be required to recuse

[24] *Id.* 1240.8(b).

[25] The Annual Report is available at https://www.nycourts.gov/courts/ad1/Committees&Programs/DDC/index.shtml.

themselves from the consideration of any grievances against another DOJ attorney.[26] Recusal in such situations would not be exceptional—rather it would mandated by the regular operation of rules which prohibit grievance committee members from participating in matters concerning lawyers with whom they are associated. In contrast, DOJ's investigation and adjudication would be conducted entirely by lawyers who have professional associations with the attorney whose conduct is subject to review.

Under the Proposed Rule, DOJ would displace state authorities in investigating and adjudicating complaints against its lawyers, despite having interests at stake in the outcome of the process and despite the fact that DOJ leadership may well have directed DOJ lawyers to undertake the conduct that gives rise to a complaint.

The Proposed Rule Undercuts the Self-Governance of the Legal Profession which is an Important Check on Governmental Overreach

The ABA Model Rules of Professional Conduct explains:

> The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.[27]

States' reliance on professional self-regulation is thus an important safeguard against governmental overreach, both by ensuring an active and independent bar that can challenge government conduct and by placing professional limits on the conduct of government attorneys. By holding government attorneys to externally established obligations that govern all lawyers, such as the duty of candor to courts and tribunals (Model Rule 3.3), duty of fairness to opposing parties and counsel (Model Rule 3.4), the duty of respect for the impartiality and decorum of tribunals (Model Rule 3.5), duty of truthfulness to third parties (Model Rule 4.1) and respect for the rights of third persons (Model Rule 4.4), states have constrained the potential for governmental abuse of power. These limits are critical to the full independent functioning of the judiciary which depends on lawyers to advocate based on a clear set of professional obligations.[28]

As the ABA Model Rules affirm, states have protected the independence of the legal profession by situating both the establishment of standards and their enforcement in their judicial branches. As a result, executives and executive agencies cannot overreach by manipulating either rules of attorney conduct or their enforcement to suppress challenges to governmental authority by the private bar, or to shield misconduct by government lawyers. State disciplinary processes are

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[26] See ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 2(F) (disciplinary committee members should apply the same disqualification standards as judges).

[27] Preamble, Paragraph 10, ABA Model Rule of Professional Conduct.

[28] *See Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) ("An informed, independent judiciary presumes an informed, independent bar.

particularly important with respect to attorney conduct which is undertaken outside the purview of a court, either because no proceeding is pending or because the conduct is not disclosed to the court.

In adopting the McDade Amendment, Congress embraced this system developed by the states, explicitly mandating that DOJ lawyers be subject to the state systems for governance of the legal profession. By making states rather than the federal government the source of attorney obligations with responsibility for enforcement, Congress limited the potential for overreach by the executive branch of the federal government.

The Proposed Rule, in contrast, strips away these layers of protection, freeing DOJ lawyers from the risk of discipline by state licensing authorities in instances in which DOJ chooses to protect them. The Proposed Rule thus undermines a long tradition of deliberately separating attorney discipline from the control of the political branches,

B. The Proposed Rule is an Attempt by DOJ to Immunize its Lawyers from any Independent Accountability

As the NPRM acknowledges, DOJ internal disciplinary proceedings have coexisted harmoniously with state disciplinary processes for over a quarter of a century. Moreover, based on decades of experience, DOJ notes that "most State bars do not take additional action after referrals are made concerning current or former Department attorneys."[29] Why, then, does DOJ assert that the Proposed Rule is needed now?

The NPRM complains that "over the past several years, political activists have weaponized the bar complaint and investigation process" by filing complaints and grievances with state authorities against senior DOJ officials.[30] But the filing of complaints and grievances is not problematic if the filings are backed up by good-faith, supported allegations of violations of state professional conduct rules. It is clear that many of the recent complaints raise serious issues of concern:

- Former Attorney General Bondi: Complaint was filed on June 5, 2025, with the Florida Bar alleging that the Former Attorney General's insistence on "zealous advocacy" resulted in various DOJ subordinate lawyers violating Florida's versions of Rules 5.1, 8.4(a) and giving 8.4(d), and giving three detailed examples.[31]

- Todd Blanche, Deputy Attorney General: Complaint was filed on September 11, 2025, alleging that Mr. Blanche violated his responsibilities as a supervisory attorney under New

[29] 91 F.R. at 10782, col. 1

[30] *Id*. at 10782, col. 2-3.

[31] Complaint available at https://ldad.org/wp-content/uploads/2025/06/Pamela-Bondi-Ethics-Complaint-6.5.25-1.pdf. The Florida Bar declined to consider complaints against Ms. Bondi while she was holding office, a circumstance which has recently changed. *See Group Accuses Bondi of 'Misconduct' as Attorney General; Florida Bar Rejects Complaint* (Miami Herald, June 7, 2025), available at https://www.miamiherald.com/news/politics-government/article307770070.html.

York's rules in instances in which DOJ attorneys were cited for misrepresentations to courts and that Mr. Blanche violated conflict of interest rules relating to his representation of President Trump prior to his role at DOJ.[32]

- Emil Bove, Former Acting Deputy Attorney General: Complaint was filed March 27, 2025 alleging that Mr. Bove violated New York rules of professional conduct by making false representations to the court in the Eric Adams case.[33]

- Edward R. Martin, Former Interim U.S. Attorney (D.C.) Complaint was filed March 6, 2025 alleging abuse of office in threats made to Georgetown Law School and seeking to engage in ex parte communications in responding to the complaint in violation of D.C. rules[34]

- Aakash Singh, Associate Deputy Attorney General: Complaint was filed March 3, 2025 alleging Mr. Singh instructed subordinate attorneys to engage in politically motivated investigations and prosecutions and to disregard judicial orders in violation of Maryland rules.[35]

- Eric Hamilton, Deputy Assistant Attorney General for the Federal Programs Branch, Civil Division; Brad P. Rosenberg, Special Counsel; and Liam C. Holland, Trial Attorney: Complaints were filed July 31, 2025 alleging misrepresentations to court in violation of D.C., Nebraska, Massachusetts, Texas and Virginia rules.[36]

Thus, what appears to be motivating DOJ to divest states of regulatory jurisdiction over DOJ lawyers is not political "weaponization" of the state disciplinary process, but rather an attempt to immunize DOJ lawyers from serious scrutiny of questionable conduct.

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[32] Complaint available at https://static1.squarespace.com/static/67367bde1a5ffd49c54fcf7e/t/68cab126dfdd2b081f36d6e0/1758114086895/Blanche+Complaint.pdf.

[33] Complaints available at https://static1.squarespace.com/static/67367bde1a5ffd49c54fcf7e/t/68adaea01c1c0d64b16336dc/1756212896044/E.+Bove+-+SDNY+Grievance+Cmte.+Compl.+%28Public%29.pdf; See also, https://www.judiciary.senate.gov/imo/media/doc/2025-03-04%20SJC%20Bar%20Complaint%20re%20Bove.pdf. (Complaint filed March 4, 2025 by four senators).

[34] Complaint available at https://static1.squarespace.com/static/67367bde1a5ffd49c54fcf7e/t/68adbaf00cf927275445eb73/1756216048469/Martin%2C+Edward+%28MO%29+%28Public%29.pdf; https://assets.law360news.com/2450000/2450953/2026-03-06%20specification%20of%20charges.pdf.

[35] Complaint available at https://static1.squarespace.com/static/67367bde1a5ffd49c54fcf7e/t/69a76fca29f6fe4e070bb210/1772580810432/LAC+-+A.+Singh+MD+Compl.+3.3.2026+Signed+PDF.pdf.

[36] See *Legal Watchdog Files Bar Complaints Against Justice Dept. Lawyers* (NY Times, July 31, 2025) available at https://www.nytimes.com/2025/07/31/us/politics/justice-department-lawyers-complaint.html.

The rash of recent state bar complaints and judicial rebukes against DOJ lawyers is not a coincidence. It is apparent that the views of DOJ's current leadership about attorney ethical obligations are far outside of the mainstream. Over the course of the past year there has been a mass exodus of hundreds of lawyers from DOJ who have resigned rather than carry out instructions from supervisors which they determined could constitute violations of their professional obligations. Many of these attorneys, such as Acting U.S. Attorney Danielle Sassoon, Acting Head of the Public Integrity Section, John Keller, U.S. Attorney Erik Siebert, Deputy Assistant Attorney General Kevin Driscoll and Acting U.S. Attorney Joseph H. Thompson, were in senior leadership positions in the Department.[37]

For those DOJ attorneys who have stayed and followed legally questionable directives, the conduct apparently demanded of them by the DOJ has repeatedly generated judicial rebukes. Judges across the nation have called out DOJ lawyers for a range of conduct appearing to violate both the letter and the spirit of applicable disciplinary rules: apparent false statements made to courts, failure to comply with court orders, inappropriate prejudicial public comments about defendants whose cases are pending, failure to cite adverse controlling authority in *ex parte* proceedings, refusal to abide by statutory requirements for filling vacant US Attorney positions, and vindictive investigation and prosecution of individuals to serve the political purposes of the Administration.[38]

The Proposed Rule is part of an effort by DOJ to impose its no-holds-barred approach to legal ethics on its own attorneys and to insulate them from independent review. In February 2025, then Attorney General Pam Bondi issued a directive concerning what she referred to as "zealous advocacy." The directive purported to require DOJ lawyers to place the directives of their supervisors and DOJ leadership, however legally dubious, above any contrary independent judgment they might have about their ethical obligations. Indeed, support for this zealous advocacy policy is one of DOJ's express rationales for the Proposed Rule: "the State bar complaint process risks chilling the zealous advocacy by Department attorneys on behalf of the United States, its agencies, and its officers."[39]

This internal DOJ memorandum, entitled "General Policy Regarding Zealous Advocacy on Behalf of the United States" describes the "zealous advocacy" policy:

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[37] *See generally, The Unraveling of the Justice Department,* (NY Times, Nov. 16, 2025) available at https://www.nytimes.com/interactive/2025/11/16/magazine/trump-justice-department-staff-attorneys.html. (Interviews with 60 former DOJ attorneys describing DOJ Leadership's pressure on attorneys to violate their ethical obligations.) Thousands of DOJ attorneys have likely departed in little over a year, *See ABA, Justice Department Struggles as Thousands Exit and Few are Replaced* (Nov. 19, 2025) available at https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/november-25-wl/outside-the-gao-1125wl/.

[38] See Federal Judges Scold DOJ Lawyers Over Courtroom Conduct in 2025 (Bloomberg News Dec. 29, 2025) available at https://news.bloomberglaw.com/us-law-week/federal-judges-scold-doj-lawyers-over-courtroom-conduct-in-2025?utm_source=chatgpt.com.

[39] 91 F.R. at 10782.

> It is the job of an attorney privileged to serve in the Department of Justice to zealously defend the interests of the United States. Those interests, and the overall policy of the United States, are set by the Nation's Chief Executive, who is vested by the Constitution with all "[E]xecutive Power." More broadly, attorneys are expected to zealously advance, protect, and defend their client's interests. Department of Justice attorneys have signed up for a job that requires zealously advocating for the United States.
>
> The responsibilities of Department of Justice attorneys include not only aggressively enforcing criminal and civil laws enacted by Congress, but also vigorously defending presidential policies and actions against legal challenges on behalf of the United States. The discretion afforded Department attorneys entrusted with those responsibilities does not include latitude to substitute personal political views or judgments for those that prevailed in the election.
>
> When Department of Justice attorneys, for example, refuse to advance good-faith arguments by declining to appear in court or sign briefs, it undermines the constitutional order and deprives the President of the benefit of his lawyers. It is therefore the policy of the Department of Justice that any attorney who because of their personal political views or judgments declines to sign a brief or appear in court, refuses to advance good-faith arguments on behalf of the Administration, or otherwise delays or impedes the Department's mission will be subject to discipline and potentially termination, consistent with applicable law.[40]

Since February 2025, "zealous advocacy" has become DOJ's banner to cover its lawyers for a host of illegal and/or unethical DOJ directives and positions, ranging from apparently corrupt dismissals of indictments and politically motivated prosecutions to the defense of facially unconstitutional executive actions.[41] The voluntary dismissal of the Government's indictment of former New York City mayor Eric Adams, which the New York City Bar Association condemned,[42] is one such example.

In refusing to seek dismissal of the indictment against Eric Adams, Acting U.S. Attorney Danielle Sassoon detailed that such action would violate a number of rules of conduct, including

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[40] Memorandum from Attorney General (Feb. 5, 2025), available at https://www.justice.gov/ag/media/1388521/dl?inline. This Memorandum featured prominently in the ethics complaint against Attorney General Bondi.

[41] In fact, "zealous advocacy" has not been a primary principle of legal practice for decades, if it ever was. Today, "zealous advocacy" is an anachronism rooted in Canon 7 of the old Code of Professional Responsibility: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." The ABA Model Rules of Professional Conduct upon which, for example, the New York rules of professional conduct are based completely replaced the concept of "zeal" with that of "diligence" when they were adopted in 1983. The ABA and the states have shifted from use of the term "zealous advocacy" to the idea of diligence to make clear that the obligation to represent a client is not a basis for riding roughshod over lawyers' responsibilities to the court, third parties and the public. It is telling that DOJ continues to adhere to this antiquated terminology.

[42] Statement of the New York City Bar Association, available at https://www.nycbar.org/press-releases/new-york-city-bar-association-statement-on-united-states-v-eric-adams/.

both DOJ's internal rules and New York Code of Professional Responsibility Rule 3.3. In particular, she cited the comment to the rule which provides: "A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal."[43]

By invoking Rule 3.3, Ms. Sassoon argued that she could not comply with DOJ leadership's demand that she seek dismissal of the Mayor Adams indictment without making false statements of fact about the reasons for the dismissal.

When Ms. Sassoon's request for a meeting with the Attorney General was denied, she resigned. Acting Deputy Attorney General Emil Bove accepted Ms. Sassoon's resignation by letter, adding revealing commentary about DOJ leadership's fundamental rejection of the proposition that its lawyers have independent ethical obligations. Writing to Ms. Sassoon, Mr. Bove invoked the "zealous advocacy" policy and stated:

> You lost sight of the oath that you took when you started at the Department of Justice by suggesting that you retain discretion to interpret the Constitution in a manner inconsistent with the policies of a democratically elected President and a Senate-confirmed Attorney General.[44]
>
> The weaponization finding in my February 10, 2025 memorandum was made pursuant to a policy set forth by President Trump, who is the only elected official in the Executive Branch, in connection with a decision that was authorized by the Senate-confirmed Attorney General of the United States, and entirely consistent with guidance issued by the Attorney General shortly after that confirmation. Your Office has no authority to contest the weaponization finding, or the second independent basis requiring dismissal set forth in my memorandum. The Justice Department will not tolerate the insubordination and apparent misconduct reflected in the approach that you and your office have taken in this matter. [45]

Thus, according to DOJ leadership, "zealous advocacy" means DOJ lawyers must follow orders even when those lawyers determine that such orders require violating ethical obligations imposed on them by state professional conduct rules.

In contrast, state ethics rules require attorneys to make <u>their own</u> independent judgments about professional obligations that they bear. As the New York City Bar Association opined in Formal Ethics Opinion 2025-01 and as the New York Rules make clear, "just following orders" does not excuse government lawyers from their ethical obligations. Lawyers who violate rules of

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[43] Letter from Danielle R. Sassoon (Feb. 12, 2025) at 6 (citation omitted), available at https://www.documentcloud.org/documents/25526537-sassoon-bondi-letter/.

[44] Letter from Emil Bove III (Feb. 13, 2025), at p. 1, available at https://www.documentcloud.org/documents/25527112-boves-response-to-acting-us-attorneys-resignation/.

[45] *Id.* at p. 3.

professional conduct can be disciplined, including suspension and disbarment, even when they happened to do so at the behest of superior government officials.[46]

For DOJ lawyers, the Proposed Rule would effectively end the long-standing tradition that each and every lawyer has an obligation to ensure that their conduct meets the standards of applicable ethics rules. If the Proposed Rule had been as effective when Ms. Sassoon and Mr. Bove had their exchange, DOJ itself would have been the arbiter of whether New York's Rule 3.3 would be violated and Ms. Sassoon and her colleagues would not have been subject to any independent process established by the state which promulgated Rule 3.3 in the first place. Thus, the Proposed Rule would indeed make the executive branch the ultimate arbiter of New York's disciplinary rules, despite the clear intent of Congress to the contrary.

To make matters even worse, DOJ has taken steps to eliminate any internal independence its Office of Professional Responsibility has had. It has purged the experienced career attorneys who staffed OPR, depriving that office of the experience and expertise that it boasts of in the NPRM.[47] Jeffrey Ragsdale, the head of OPR, was fired over a year ago and never replaced. Joseph Tirrell, the Director of DOJ's Departmental Ethics Office (which provides ethics training), was fired in July 2025, and also not replaced. Bradley Weinsheimer, a three-decade career lawyer who reviewed disciplinary recommendations from OPR, was induced to resign rather than accept a demotion, and was replaced by one of President Trump's former criminal defense lawyers and a recent law school graduate.[48]

Under the regime established by the Proposed Rule, the independent accountability of lawyers would be inapplicable to attorneys at DOJ. Uniquely among American attorneys, they could only be held accountable to their employer's view of the ethical requirements. The Proposed Rule, coupled with the Attorney General's "zealous advocacy" policy and the removal of the professional staff at OPR, is a formula for a stream of future, professional ethics violations on an unprecedented scale. Robust enforcement of the state rules of professional conduct is needed to remedy and deter these violations, and—as explained above—the state bars and courts, not DOJ itself, are the only independent bodies competent to provide such enforcement.

V. CONCLUSION

For all these reasons, The New York City Bar Association opposes promulgation of the Proposed Rule. It is highly unlikely that courts would defer to the Proposed Rule to prevent state

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[46] *Ethical Responsibilities of Lawyers Representing Government Officers and Agencies*, N.Y.C. Bar Ass'n Formal Opinion 2025-1 (Apr. 4, 2025), available at https://www.nycbar.org/reports/formal-opinion-2025-1-ethical-responsibilities-of-lawyers-representing-government-officers-and-agencies/.

[47] The NPRM asserts "OPR has 50 years of experience in evaluating allegations of professional misconduct . . . [and] is intimately familiar with all State rules of professional conduct,".

[48] *Trump DOJ Assigns Sensitive Ethics Powers to Political* Aides (Bloomberg News Feb. 16, 2025) available at https://news.bloomberglaw.com/us-law-week/trump-doj-delegates-sensitive-ethics-powers-to-political-aides; *Bondi Fires her Professional Ethics Chief as DOJ Purge Continues* (Bloomberg News July 13, 2025) available at https://news.bloomberglaw.com/us-law-week/bondi-fires-her-personal-ethics-chief-as-doj-purge-continues. The highest position at OPR has been vacant for more than a year.

authorities from continuing to conduct disciplinary proceedings against DOJ lawyers. But even if unenforceable, the Proposed Rule sends a dangerous message to DOJ lawyers that they need not fear discipline by state authorities if they follow orders, however dubious, because DOJ's leadership has both validated the conduct and controls enforcement of the applicable ethical standards. As Congress recognized in enacting the McDade Amendment, attorneys should always be subject to independent accountability. Accountability is a critical dimension of what it means to be a lawyer in the United States. Rather than seeking to insulate DOJ lawyers from independent accountability, DOJ should focus on rebuilding the trust of the judiciary and the public. Re-establishing the Department's tradition and reputation for integrity should be DOJ's highest priority.

For the reasons explained in this comment, the Proposed Rule should be withdrawn.

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