



# NEW YORK STATE BAR ASSOCIATION

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## **Via Electronic Submission and US Mail**

The Honorable Pamela Bondi

Attorney General of the United States

U.S. Department of Justice

950 Pennsylvania Avenue, NW

Washington, DC 20530

*Re: Opposition to Changes Proposed in 28 CFR Part 77*

Dear Attorney General Bondi,

The New York State Bar Association strongly opposes the Department of Justice (DOJ) proposed rule, “*Review of State Bar Complaints and Allegations Against Department of Justice Attorneys*” which would exempt DOJ attorneys from the normal process of investigation and discipline by independent bar association and state court disciplinary bodies for violations of the rules of professional responsibility.

The McDade Amendment to the 1998 Consolidated Appropriations measure is unambiguous: “[a]n 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...”.<sup>1</sup>

This explicit enacted language had bipartisan support and was developed after hearings and debate in Congress. The legislative record illustrates the concerns that Congress and the American people had 26 years ago. Unfortunately, these concerns exist again today due to instances of federal prosecutorial abuse and the erosion of traditional checks on that abuse. Back in 2001 Congress did not accept the DOJ’s claim to have authority to waive the ethical standards to which federal prosecutors must otherwise adhere.<sup>2</sup> The Federal Judiciary has these concerns today, and the law should not be changed and weakened.

Respectfully, you do not have the authority to override Congress or federal law. The McDade Amendment was not the first time Congress passed such a measure. A 1938 law states that attorneys can only be “duly licensed and authorized to practice” if he or she agrees to adhere to the ethical standards required of members of the bar, and the courts have understood this to

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<sup>1</sup> 28 U.S.C. 530B, *emphasis added*.

<sup>2</sup> Charles Doyle, McDade-Murtha Amendment: Legislation in the 107th Congress Concerning Ethical Standards for Justice Department Litigators, Cong. Rsch. Serv. RL31221 (Dec. 18, 2001).

require that Justice Department attorneys follow the ethical standards prescribed by the states in which they were admitted to practice.<sup>3</sup>

The regulation advanced by you would violate federal law. It would also undermine the independence and credibility of attorneys working at the DOJ. A central purpose of disciplinary systems is to ensure that alleged violations of professional responsibility are reviewed by bodies institutionally independent from the attorney whose conduct is at issue. Requiring disciplinary authorities to defer to an investigation conducted by an attorney's employer is obviously insufficient to protect against abuse.

The New York State Bar Association's *Task Force on the Core Values of the American Legal Profession* issued a report emphasizing the importance of the independence of the legal profession to preserving the rule of law and maintaining public confidence in the justice system.<sup>4</sup> Allowing an executive-branch employer to exert control over the timing and substance of an initial review of disciplinary complaints against its own attorneys would undermine these foundational principles.<sup>5</sup>

While the Justice Department urges that the rule is needed to "end the weaponization of the bar complaint and investigation process," in fact, it is the proposed rule that will politicize the process. The proposal would allow the DOJ to protect its allies by delaying and suppressing its own "investigations" within the federal bureaucracy with no timeline for action, while denying oversight by the lawful stewards of professional ethics, state bars and courts. There is of course nothing in federal law or the state disciplinary process that would prevent the DOJ from investigating and disciplining its attorneys should the Department deem it necessary.

Any lawyer who abandons their oath to the Constitution by intentionally misrepresenting facts or law in court should be properly subject to the same discipline as every other attorney, even if they work for the Department of Justice.

Respectfully,



Kathleen Marie Sweet, Esq.,  
President

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<sup>3</sup> *United States v. Ferrara*, 847 F. Supp. 964, 969

<sup>4</sup> New York State Bar Ass'n Special Comm. on the Law Governing Firm Structure & Operation, *Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers* (Apr. 2000), <https://nysba.org/wp-content/uploads/2022/03/2000-MACRATE-REPORT-Preserving-the-Core-Values-of-the-American-Legal-Profession-April-2000.pdf>. 269

<sup>5</sup> In New York, regulation of attorney conduct is a core judicial function vested in the Appellate Divisions under Judiciary Law § 90, exercised through court-supervised grievance committees that investigate and adjudicate attorney misconduct. The New York State Bar Association is a voluntary, nonprofit membership association and has no role in the licensing or discipline of attorneys.