

# **Public Comment Opposing Proposed DOJ Rule**

**Docket No.: OAG199**

**RIN: 1105-AB82**

**Agency: U.S. Department of Justice,  
Office of the Attorney General**

**Rule: Review of State Bar Complaints and Allegations Against Department of Justice Attorneys**

**Regulation: 28 C.F.R. Part 77**

**Submitted by: Concerned Citizen**

## **I. Introduction**

**This comment opposes the Department of Justice's proposed rule entitled "Review of State Bar Complaints and Allegations**

**Against Department of Justice Attorneys."**

**The proposal would authorize the Attorney General to conduct an internal review of**

**ethics complaints against Department attorneys and request that state bar authorities suspend disciplinary proceedings pending completion of that internal review.**

**The rule represents a significant departure from long-established principles governing attorney accountability in the United States. Specifically, it risks undermining:**

**The statutory mandate imposed by Congress through the Citizens Protection Act (McDade Amendment).**

**The historic authority of states to regulate the legal profession.**

**Independent oversight of federal prosecutors and government attorneys.**

**If adopted, the rule would create a mechanism by which the executive branch could delay or interfere with disciplinary investigations conducted by state bar**

authorities. Such a system threatens to erode public confidence in the justice system by creating the perception that federal attorneys operate under a separate and insulated system of professional accountability.

## II. Congressional Intent Under the McDade Amendment

Congress addressed the ethical obligations of Department of Justice attorneys through the Citizens Protection Act of 1998, commonly referred to as the McDade Amendment, codified at 28 U.S.C. § 530B.

The statute provides:

“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.”<sup>1</sup>

**Congress enacted this provision in response to a long-standing dispute between federal prosecutors and state disciplinary authorities. Prior to the statute's enactment, the Department of Justice had taken the position that federal prosecutors were not necessarily bound by state professional responsibility rules. Congress rejected that interpretation and enacted §530B specifically to ensure that federal prosecutors remain subject to the same ethical rules and disciplinary authority as every other attorney practicing within a state jurisdiction. The proposed rule risks circumventing that statutory mandate by establishing a regulatory framework through which the Department may delay state disciplinary proceedings while conducting its own internal review.**

**Although the proposal does not formally**

prohibit state bar investigations, the ability of the Attorney General to request suspension of those investigations creates a functional mechanism for delaying enforcement of the very ethical standards Congress intended to apply to federal prosecutors.

Administrative regulations cannot override congressional intent. Any regulatory interpretation that undermines the purpose of §530B is inconsistent with the statutory framework established by Congress.

**III. State Authority to Regulate Attorneys**  
Regulation of the legal profession has historically been a core function of state authority. Courts have consistently recognized that states possess inherent authority over attorney licensing, discipline, and professional conduct.

The Supreme Court has affirmed this principle in numerous decisions: *Leis v. Flynt*, 439 U.S. 438 (1979), recognizing the authority of states to regulate admission and discipline of attorneys.<sup>2</sup>

*Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), confirming that states bear primary responsibility for regulating the conduct of lawyers.<sup>3</sup>

*Sperry v. Florida*, 373 U.S. 379 (1963), acknowledging that regulation of legal practice is ordinarily a matter of state law unless Congress explicitly provides otherwise.<sup>4</sup>

The proposed rule risks intruding upon this longstanding allocation of authority. Nothing in 28 U.S.C. §530B authorizes the Department of Justice to suspend or delay state disciplinary investigations.

Allowing federal officials to intervene in

state bar disciplinary processes raises serious federalism concerns and undermines the traditional role of states in maintaining professional standards within the legal profession.

#### **IV. Structural Conflict of Interest**

The proposed rule assigns internal review authority to the Department itself—primarily through the Office of Professional Responsibility (OPR)—before state disciplinary authorities may proceed with their investigations.

This arrangement creates an inherent conflict of interest.

Department attorneys accused of misconduct would be evaluated first by the same institution responsible for supervising their work. The Attorney General, who ultimately oversees the Department, is also a political appointee

responsible for implementing the policy priorities of the administration.

Independent oversight is a fundamental principle in systems of professional discipline. When the subject of an investigation is permitted to control the timing and scope of external oversight, the credibility of that oversight is significantly weakened.

Concerns regarding the transparency and effectiveness of internal disciplinary mechanisms within the Department have been raised repeatedly in oversight reports and academic research examining prosecutorial accountability.

Independent review by state disciplinary authorities provides a critical safeguard against institutional bias.

## V. Importance of Independent Oversight of Prosecutors

**Government attorneys occupy a unique role within the justice system. Unlike private lawyers, federal prosecutors exercise substantial discretionary power that can directly affect liberty, property, and constitutional rights.**

**The Supreme Court has repeatedly emphasized the heightened responsibilities imposed on prosecutors: “The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation is to govern impartially.”<sup>5</sup>**

**This special role requires strict adherence to ethical standards and robust oversight mechanisms.**

**Independent disciplinary authority serves several critical purposes:**

**Ensuring compliance with professional responsibility rules**

**Maintaining public confidence in**

**prosecutorial integrity**

**Protecting the rights of defendants and the public**

**A regulatory framework that permits executive branch officials to delay or influence disciplinary proceedings risks undermining these objectives.**

## **VI. Risks to Public Confidence in the Justice System**

**Public confidence in the justice system depends on the perception that all attorneys—especially those exercising government authority—are subject to the same professional standards.**

**Research on public trust in legal institutions consistently demonstrates that transparency and independent accountability are essential components of institutional legitimacy.**

**When disciplinary oversight is perceived as controlled internally by the same**

**institution responsible for alleged misconduct, public confidence declines. Allowing federal prosecutors to benefit from procedural mechanisms that delay state disciplinary investigations may create the appearance that government attorneys are shielded from the same scrutiny faced by private practitioners. Such perceptions can damage the credibility of both the Department of Justice and the broader legal system.**

## **VII. Practical Consequences of the Proposed Rule**

**The proposed rule could produce several practical consequences that weaken disciplinary enforcement.**

**A typical scenario could unfold as follows: A state bar authority initiates an investigation into alleged misconduct by a DOJ attorney.**

**The Department invokes the rule and initiates internal review.**

**The state disciplinary authority is asked to suspend its investigation.**

**The internal review proceeds for an extended period of time.**

**Evidence becomes more difficult to obtain and witness recollection diminishes.**

**Even without formally blocking disciplinary proceedings, this delay mechanism could significantly impair the ability of state bar authorities to conduct effective investigations.**

## **VIII. Less Intrusive Alternatives**

**If the Department seeks to address legitimate concerns regarding privileged information, national security matters, or sensitive investigative materials, far narrower mechanisms already exist.**

**These include:**

**Protective orders in disciplinary**

**proceedings**

**Limited privilege assertions**

**Coordination agreements between federal agencies and state bar authorities**

**Such tools allow legitimate federal interests to be protected without creating a broad regulatory framework that interferes with state disciplinary authority.**

## **IX. Conclusion**

**The proposed amendments to 28 C.F.R.**

**Part 77 should not be adopted.**

**Congress has already determined that federal attorneys are subject to state ethical rules through 28 U.S.C. §530B. The proposed rule risks undermining that statutory framework by enabling the Department of Justice to delay state disciplinary investigations through internal review procedures.**

**Maintaining independent oversight of government attorneys is essential to preserving the integrity of the legal profession and ensuring public confidence in the justice system.**

**For these reasons, the Department should withdraw the proposed rule.**

## **References**

**28 U.S.C. § 530B (Citizens Protection Act of 1998).**

**Leis v. Flynt, 439 U.S. 438 (1979).**

**Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).**

**Sperry v. Florida ex rel. Florida Bar, 373 U.S. 379 (1963).**

**Berger v. United States, 295 U.S. 78, 88 (1935).**

