The McDade Law:

Necessary for Justice or a Burden for Federal Attorneys?

At the center of a storm of controversy since its enactment in 1998, the McDade law states that all lawyers, including Department of Justice lawyers, are subject to existing state ethics laws and rules governing attorney conduct. Do these rules conflict with the discharge of federal duties? How do we strike a balance?

The McDade Law is Good for the Profession

By Larry D. Thompson

Notwithstanding the broad-based support the McDade law received when enacted in 1998, the Department of Justice stubbornly and unwisely continues to urge its repeal. McDade makes it clear that DOJ lawyers, like all other lawyers, are subject to existing state ethics laws and rules governing attorney conduct. McDade was supported not only by the National Association of Criminal Defense Lawyers, but also by the American Corporate Counsel Association, the American Civil Liberties Union, the U.S. Chamber of Commerce, and General Motors Corporation.

The McDade legislation was a reaction to the DOJ's efforts to exempt its lawyers from the independent supervision of state supreme courts and local federal district courts. In 1989, then Attorney General Richard Thornburgh issued a memorandum that stated that any ethics rule for the profession that would place a burden on DOJ attorneys was invalid under the supremacy clause of the Constitution and that state ethics rules uniformly prohibiting unauthorized contact by lawyers with represented persons are unenforceable against DOJ attorneys. If left to stand, the Thornburgh memo would make DOJ lawyers the *only* lawyers in America, including the state prosecutors who handle the vast majority of criminal cases, not subject to ethical regulation by state supreme courts or local federal district courts.

The DOJ's position was strongly criticized by the Conference of Chief Justices representing all 50 state supreme courts and solidly rejected by federal courts. *See U.S. ex rel. O'Keefe v. McDonnell Douglas Corporation*, 132 F.3d 1252 (8th Cir. 1998); *U.S. v. Lopez*, 765 F. Supp. 1433 (N.D. Cal. 1991), *rev'd on other grounds*, 4 F.3d 1455 (9th Cir. 1993); *In re Doe*, 801 F. Supp. 478 (D.N.M. 1992).

The negative reaction to the improvident and unnecessary Thornburgh position was predictable and deserved. The position was another unfortunate example of "cause" lawyering, this time by one of our country's most revered institutions, the Department of Justice. Under this approach to the law, if your "cause" is just, then nothing else matters. The end justifies the means, including, in this case, abandoning the traditional role played by state ethics provisions in governing attorney conduct. Indeed, the Thornburgh approach ignored the fact that DOJ lawyers are really unique in our legal system and are obligated above all to serve justice (*see Berger v. U.S.*, 295 U.S. 78 (1935)), and that compliance with ethical provisions applicable to *all* lawyers advances that end while engendering trust among the bench, the profession and the public.

In my home district, the Northern District of Georgia, the conduct of all lawyers who practice before the court is governed by the code of professional responsibility and standards of conduct contained in the rules and regulations of the State Bar of Georgia. The judges of the Northern District of Georgia find it so important that all lawyers be bound by the same standards of professional and ethical conduct that, during my tenure as U.S. attorney, the

McDade and the FBA

The current Legislative Issues Agenda of the Federal Bar Association, adopted by the FBA National Council in September, calls for the association "to encourage and contribute to efforts to analyze and reconcile the competing considerations of the McDade Amendment as they relate to effective law enforcement and conformance with state laws and rules governing attorney conduct." This balanced approach promoting reasonable and measured efforts toward the application of state laws and ethics rules to federal prosecutors has represented FBA's position on this controversial issue since 1998, when the McDade law first was proposed.

The McDade Amendment takes its name from former Rep. Joseph McDade, the original sponsor of the law, who was charged with bribery and acquitted after an eight-year battle with federal prosecutors. Maintaining that he was the victim of an investigation run amok and damaged both personally and politically by prosecutorial intimidation and recklessness, Rep. McDade singlehandedly convinced Congress to adopt his seemingly innocuous measure just days before his retirement from the House of Representatives after serving 18 terms. Enacted as an amendment to an omnibus appropriations law and without congressional hearings, the McDade Amendment requires Department of Justice attorneys to comply with "state laws and rules and local federal court rules" in each state where the department attorney "engages in that attorney's duties." Since its passage, it has generated a considerable amount of attention in the federal law enforcement community, the criminal bar, and even the national media.

Since April 1999, when McDade became effective, the Department of Justice has sought corrective legislation to temper the scope and impact of the law upon the exercise of federal law enforcement efforts. The Justice Department has argued that the McDade law has impeded important criminal prosecutions, chilled the use of traditional federal investigative techniques and posed multiple hurdles for federal prosecutors. In response, McDade's proponents have contended that federal attorneys should be subject to the same state and federal court ethics rules that govern all attorneys.

During the past two years, Congress has considered several legislative proposals to repeal or modify McDade, the foremost of which has been S. 855, the Professional Standards for Government Attorneys Act, introduced by Sen. Patrick Leahy (D-VT), the ranking minority member of the Senate Judiciary Committee. According to Leahy, the proposed legislation would "preserve the traditional role of the state courts in regulating the conduct of attorneys licensed to practice before them, while ensuring that federal prosecutors and law enforcement agents will be able to use traditional federal investigative techniques." The Justice Department and a number of law enforcement organizations have supported the bill. However, the measure stalled in the Senate during the 106th Congress. Further legislative proposals addressing McDade are likely to be introduced this year with the start of the 107th Congress.

The coverage of the McDade law in this issue of *The Federal Lawyer*, and the spirited debate on these pages between its proponents and opponents, advances the FBA's goal, as expressed in the association's Issues Agenda, "to analyze and reconcile McDade's competing considerations." That goal will be promoted further by the expansion of the McDade discussion among our members. To that end, the FBA Government Relations Committee invites FBA members to voice their views about McDade, its merits and its impact. Please address your comments to:

Hon. Delissa Ridgway
Chair
FBA Government Relations Committee
Federal Bar Association
2215 M Street, NW
Washington, DC 20037-1416

Or

Bruce Moyer
FBA Government Relations Consultant
e-mail: brumoyer@bellatlantic.net

court required all new assistant U.S. attorneys and federal agency attorneys who appeared before it to take and pass the Georgia bar exam within 12 months from the date of their appointments in the district.

The judges of the Northern District realize that even law enforcement concerns do not justify the creation of less-demanding ethics rules for DOJ lawyers. As a practical matter, neither the Northern District rule nor any other ethical rule generally presents any serious problems for DOJ lawyers. In the Northern District, the government has successfully prosecuted significant cases involving organized crime, drug trafficking, health care fraud, procurement fraud, and public corruption. Across the country, courts have almost always interpreted state ethics provisions so as to permit DOJ lawyers to do their important work, such as conducting and supervising preindictment

undercover operations. *See U.S. v. Hammad*, 858 F.2d 834 (2nd Cir. 1988), *revising* 846 F.2d 854 (2nd Cir. 1988). In fact, Delonis and Leibson do not cite a single case in their argument in which the McDade law has hampered federal prosecutors in carrying out their duties. The only instance that may even be remotely relevant is a much-discussed recent decision in which the Oregon Supreme Court held that a private practitioner violated the deceit provisions of the Oregon Code of Professional Responsibility when he posed as a doctor in gathering information for a lawsuit. *See In re Gatti*, 8 P.3d 966 (August 2000). Yet, a majority of the task force established by the Oregon Bar after the *Gatti* decision clearly agrees that it should be modified so as to permit prosecutors to supervise undercover law enforcement operations.

Seth Waxman, now U.S. solicitor general, conceded in 1996 hearings on McDade that instances of state ethics rules being used to impede legitimate law enforcement efforts were "not common." Of course, a DOJ lawyer can always seek a court order for sensitive investigative purposes, including contacting represented corporate employees when necessary. *See In re Criminal Investigation of John Doe, Inc., et al.*, 194 F.R.D. 375 (D. Mass. 2000) (allowing contact with represented persons subject to certain restrictions). In fact, prior to the Thornburgh memo, DOJ's Office of Professional Responsibility referred matters to the District of Columbia Bar Counsel involving attorneys at Main Justice in Washington, D.C., who had been subject to OPR investigations and who were members of the D.C. bar. OPR then cooperated with the Bar Counsel's inquiries.

Attempts to repeal McDade would upset the traditional balance of responsibility in our federal court system. While I have no objection to Delonis and Leibson's proposal that the statute be amended to provide that state laws and rules governing attorney ethics cannot supersede federal statutes, federal court rules, or federal court decisions, such amendment seems unnecessary, given the well-established pre-emption doctrine that "state law is nullified to the extent that it actually conflicts with federal law." *See Fidelity Federal Savings and Loan Assoc. v. Cuesta*, 458 U.S. 141, 153 (1982). In any event, McDade should not be amended to permit DOJ to unilaterally trump state bar rules.

DOJ lawyers, especially prosecutors, possess extraordinary powers. As then Attorney General Robert H. Jackson noted at the Second Annual Conference of U.S. Attorneys in 1940, "the prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous."

The vast majority of DOJ lawyers conduct themselves in accordance with the highest ethical standards. But the DOJ is an increasingly large organization in which, unfortunately, a few lawyers sometimes run afoul of ethics provisions — most often inadvertently but sometimes deliberately. When this occurs, however infrequently, it is serious. Chief Judge Richard Posner of the Seventh Circuit, who was appointed to the bench by President Reagan, has observed that "the Department of Justice wields enormous power over people's lives, much of it beyond effective judicial or political review. With power comes responsibility, moral if not legal, for its prudent and restrained exercise; and, responsibility implies knowledge, experience, and sound judgment, not just good faith." *See U.S. v. Van Engel*, 15 F.3d 623, 629 (7th Cir. 1993). Judge Posner also noted why DOJ may be experiencing some isolated problems regarding compliance with ethical provisions: "The increase in the number of federal prosecutors in recent years has brought in its train problems of quality control." *Id*. at 626. Judge Alex Kozinski of the Ninth Circuit, also a Reagan appointee, wrote in another decision that although the court was "troubled … by the prosecutor's conduct, we're more troubled still by the lack of supervision and control exercised by those above him. …" Judge Kozinski asked the question in the context of the case before him: "How can it be that a serious claim of prosecutorial misconduct remains unresolved — even unaddressed — until oral argument in the Court of Appeals?" *See U.S. v. Kojayan*, 8 F.3d 1315, 1320 (9th Cir. 1993).

Exempting DOJ lawyers from ethics rules also raises serious constitutional questions. The separation of powers doctrine prohibits one branch of the federal government from assuming power essential to another branch. The regulation of federal prosecutors in federal courts is a power essential to the federal judiciary, and the attorney general should not unilaterally assume that power.

No internal DOJ ethics system can accomplish the objectivity of the independent system of state ethics laws and regulations as interpreted and administered by local federal district courts. Indeed, "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." *See Leis v. Flynt*, 439 U.S. 438, 442 (1979). That system has served us well, and McDade ensures its continuation.

In 1992, the Georgia Supreme Court promulgated the Aspirational Statement on Professionalism, which noted the "unfortunate trends of commercialization and loss of professional community in the current practice of law." The court noted that we lawyers need ideals to help bind us together as a professional community. DOJ's unfortunate attempts to repeal McDade clearly work against the goal of a greater sense of professional community and send the wrong message to the profession and to the public. TFL

Larry D. Thompson is a partner in the Atlanta law firm of King & Spalding. He served as U.S. attorney for the Northern District of Georgia from 1982 to 1986 and as independent counsel for the Department of Housing and Urban Development investigation from 1995 to 1999. Thompson is also a member of the Eleventh Circuit Committee on Lawyer Qualifications and Conduct and the Federal Bar Association's Government Relations Committee. *He wishes to thank his colleague, Shea R. Denning, and legal assistant, Jill E. Howard, for their assistance in preparing this article.*