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## Judicial Interpretation of State Ethics Rules Under the McDade Amendment: Do Federal or State Courts Get the Last Word?

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## NOTES

### **JUDICIAL INTERPRETATION OF STATE ETHICS RULES UNDER THE MCDADE AMENDMENT: DO FEDERAL OR STATE COURTS GET THE LAST WORD?**

*Hopi Costello\**

*The McDade Amendment (“the Act”) is a federal law that requires federal prosecutors to abide by the state ethics rules of the jurisdiction in which they practice. The Act does not say, however, whether federal or state courts are definitive when it comes to interpreting state ethics rules as they apply to federal prosecutors. Those testifying before Congress raised this issue and noted that the Act left the issue unresolved. Despite this, Congress did not address this matter in either its legislative history or in the Act itself. No court has tackled this question and scholarship attends to it only in passing. At this time, both federal and state courts interpret state ethics rules as they apply to federal prosecutors.*

*As it currently stands, with both court systems interpreting the rules and no determination as to which is definitive, federal prosecutors must comply with both federal and state court interpretations. This is likely to chill federal prosecutors in the exercise of their official duties because they are bound to be unsure of the rules they must abide by. More importantly, concurrent interpretation creates unsolvable conflicts when a federal and state court in the same jurisdiction interpret the same rule differently.*

*This Note explores whether federal or state courts’ interpretations of state ethics rules are definitive as applied to federal prosecutors under the McDade Amendment. It considers the plain text of the Act, its legislative history, and the purposes and policies of the legislation. Ultimately, this Note argues that the legal community should regard state courts’ interpretations as definitive. This Note concludes by proposing a framework for federal courts to defer to state courts’ interpretations of ethics rules as they apply to federal prosecutors.*

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\* J.D. Candidate, 2016, Fordham University School of Law; B.A., 2010, Macalester College. I owe my deepest gratitude to Professor Bruce A. Green for his invaluable feedback, his steady guidance, and his enviable expertise. I would also like to thank my family for their love, B for providing the impetus for this idea and for being my support group throughout, and the S.W.s, who made this process fun.

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#### INTRODUCTION

In 2012, the Kentucky Bar Association (KBA) promulgated an ethics advisory opinion finding that the use of ineffective assistance of counsel waivers (“IAC waivers”) in plea agreements violates both prosecutors’ and defense attorneys’ ethical obligations under the Kentucky Rules of Professional Conduct.<sup>1</sup> The KBA prohibited all prosecutors practicing in

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1. See Ky. Bar Ass’n, Ethics Op. E-435 (2012). The majority of state ethics boards that have considered the issue have reached the same conclusion. For an in-depth analysis of state ethics boards’ opinions regarding IAC waivers, see Peter A. Joy & Rodney J. Uphoff, *Systemic Barriers to Effective Assistance of Counsel in Plea Bargaining*, 99 IOWA L. REV. 2103 (2014). For a detailed analysis of the situation in Kentucky specifically, see Michelle

the state, including federal prosecutors, from requesting or requiring such waivers as part of a plea agreement.<sup>2</sup> For the following two years, federal prosecutors ignored the KBA's opinion and continued to include IAC waivers in plea agreements.<sup>3</sup> They did so even though federal legislation referred to as the McDade Amendment<sup>4</sup> (or, "the Act") requires federal prosecutors to abide by state ethics rules in the jurisdiction where they practice.<sup>5</sup> The United States Attorneys argued that the KBA's opinion conflicted with federal law, which allows IAC waivers.<sup>6</sup> The federal prosecutors also claimed that "the KBA's opinion was an unreasonable interpretation of the ethics rules."<sup>7</sup> Additionally, the KBA's opinion was only advisory.<sup>8</sup>

In 2014, the Supreme Court of Kentucky intervened.<sup>9</sup> The state's highest court concluded that, under the McDade Amendment, federal prosecutors must abide by the KBA's prohibition of IAC waivers in plea agreements.<sup>10</sup> The Kentucky Supreme Court reached this conclusion by interpreting a number of state ethics rules. Nowhere do the Kentucky ethics rules explicitly prohibit IAC waivers; rather, the state court read certain ethics rules as prohibiting this particular attorney conduct.<sup>11</sup>

After the Kentucky Supreme Court's decision, federal courts in that jurisdiction had a choice of whether to accept plea bargains that included IAC waivers. Federal courts could either defer to the state court's interpretation of the ethics rules that IAC waivers were not allowed or decide on their own whether IAC waivers breached attorneys' ethical duties. Federal courts in Kentucky avoided having to make this choice because soon after the Kentucky Supreme Court's decision, former-Attorney General Eric Holder ("AG Holder") announced that federal

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Harrison, *Under Attack: The De-Legitimization of State Ethics Rules in the Face of Prosecutorial Discretion*, 27 GEO. J. LEGAL ETHICS 521 (2014).

2. See Ky. Bar Ass'n, Ethics Op. E-435 at 1.

3. See, e.g., Reply Brief for Petitioner at 1–2, *United States v. Ky. Bar Ass'n*, 439 S.W.3d 136 (Ky. 2014) (No. 2013-SC-000270), 2013 WL 4736435, at \*1 (arguing that the KBA opinion should be vacated).

4. The McDade Amendment was enacted with the Citizens Protection Act and has the subtitle "Ethical standards for attorneys for the Government." See 28 U.S.C. § 530B (2012). This Note refers to the amendment as both the "McDade Amendment" and "the Act." For an explanation of the Act, see *infra* Part I.A.3.

5. See 28 U.S.C. § 530B.

6. See Reply Brief for the Petitioner, *supra* note 3, at 1. The majority of the federal appellate courts hold that IAC waivers are enforceable as long as they are knowing and voluntary. For a discussion of the federal courts' opinions, see Nancy J. King, *Plea Bargains That Waive Claims of Ineffective Assistance—Waiving Padilla and Frye*, 51 DUQ. L. REV. 647, 651–55 (2013).

7. Reply Brief for Petitioner, *supra* note 3, at 1.

8. See Howland W. Abramson & Gary Lee, *Judicial Ethics Advisory Committees Should Render Opinions Which Adhere to Binding United States Constitutional Precedents*, 41 DUQ. L. REV. 269, 269 n.1 (2003) ("[S]uch judicial ethics advisory opinions are not binding . . .").

9. See *United States v. Ky. Bar Ass'n*, 439 S.W.3d 136 (Ky. 2014).

10. See *id.* at 157–58.

11. See *id.* at 152–57.

prosecutors would no longer seek IAC waivers.<sup>12</sup> This effectively mooted the issue in Kentucky.<sup>13</sup>

However, it is inevitable that this issue will arise again, with different prosecutorial conduct and different state ethics rules. When it does, the federal court will have to decide whether to defer to the state court's interpretation of the ethics rule or to interpret the rule itself. The answer to how federal courts should proceed in this scenario depends on whether federal courts' or state courts' interpretations of state ethics rules are definitive under the McDade Amendment.

The McDade Amendment requires federal prosecutors to follow state ethics rules.<sup>14</sup> However, the Act does not say whether federal prosecutors must also abide by state courts' *interpretations* of those rules.<sup>15</sup> Currently, both federal and state courts interpret state ethics rules as they apply to federal prosecutors.<sup>16</sup> Therefore, the question arises: Must federal courts defer to state courts' interpretations of ethics rules or may they interpret these rules themselves? Put another way, do federal courts or state courts get the last word when it comes to interpreting state ethics rules as they apply to federal prosecutors under the McDade Amendment?

This question was discussed when the McDade Amendment was enacted, but it has not been resolved.<sup>17</sup> In a hearing before the House of Representatives, Seth Waxman, then-Associate Deputy Attorney General, explicitly asked, "Whose interpretation of the bar rules will count for purposes of enforcement?"<sup>18</sup> Waxman pointed out that the Act did not address this question.<sup>19</sup> He stated, "[T]he bill leaves [this question] open, and confused."<sup>20</sup> Waxman went on to say, "These are not easy questions. I raise them not because I have the answers, but because the answers are necessary to any consideration of this bill."<sup>21</sup> There was no further

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12. See Joe Palazzolo, *Government Rethinks Waivers with Guilty Pleas*, WALL STREET J. (Sept. 26, 2014, 12:19 PM), <http://online.wsj.com/articles/u-s-government-seeks-to-curb-appeals-over-bad-legal-advice-1411745218> [<http://perma.cc/P7VR-CMJ3>].

13. Although unlikely, Kentucky could still bring disciplinary proceedings against United States Attorneys who included IAC waivers in plea agreements prior to AG Holder's announcement because there is no statute of limitations on attorney discipline. See 7A C.J.S. *Attorney & Client* § 125 (2004) ("General statutes of limitations are not applicable to disciplinary proceedings.").

14. See 28 U.S.C. § 530B (2012). For a detailed explanation of the Act, see *infra* Part I.A.3.

15. See *infra* Part II.A.

16. See *infra* Part I.B.

17. See *infra* Part II.B.

18. *Ethical Standards for Federal Prosecutors Act of 1996: Hearing on H.R. 3386 Before the H. Subcomm. on Courts and Intellectual Property of the H. Comm. of the Judiciary*, 104th Cong. 47 (1996) [hereinafter 1996 Legislative Hearings] (statement of Seth P. Waxman, Assoc. Deputy Att'y Gen., Dep't of Justice).

19. See *id.*

20. *Id.*

21. *Id.*

discussion on this point.<sup>22</sup> No court has resolved this question and the academic literature has addressed it only in passing.<sup>23</sup>

Federal prosecutors can either abide by the state court ethics rules as interpreted by state courts or they can abide by these rules as interpreted by federal courts. As it stands now, with no answer as to which interpretation is definitive and both court systems interpreting the rules, federal prosecutors must abide by both. This has the potential to create irresolvable conflicts. Having to abide by two sets of interpretations is likely to chill federal prosecutors in the exercise of their official duties and confusion over which rules to follow will hinder them in prosecuting to the fullest extent of the law.<sup>24</sup> Additionally, there is no solution for when federal and state interpretations clash. Therefore, it is imperative that the legal community regard either federal or state courts as the definitive source for judicial interpretation of ethics rules as they apply to federal prosecutors under the McDade Amendment.

This Note explores the puzzle of whether federal or state courts' interpretations of ethics rules are definitive under the McDade Amendment. Part I describes how federal prosecutors are regulated in general and under the McDade Amendment and illustrates that both federal and state courts interpret state ethics rules. Part II lays out the problems with federal and state courts interpreting the same ethics rules and explores the arguments in favor of both regarding federal and state courts' interpretations as definitive. Part III argues that, considering the underlying purposes and policies of the McDade Amendment, federal courts should defer to state courts' interpretations of state ethics rules.

#### I. REGULATING FEDERAL PROSECUTORS: ETHICS RULES AND JUDICIAL INTERPRETATIONS

There is a long history of ethical regulation of attorneys in the United States.<sup>25</sup> The American Bar Association (ABA) first adopted ethics regulations, called the Canons of Professional Ethics, in 1908.<sup>26</sup> Since then, the ABA, states, and federal courts have all participated in the ethical regulation of attorneys, including federal prosecutors. This section discusses how federal prosecutors are regulated, both through ethics rules and through judicial interpretations of these rules. First, Part I.A discusses the ethics rules that apply to federal prosecutors. Next, Part I.B describes how both federal and state courts interpret these rules as they pertain to federal prosecutors.

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22. *See id.*

23. *See sources cited infra* note 198.

24. *Cf. infra* notes 223–27 and accompanying text (explaining that this was the case before Congress enacted the McDade Amendment because federal prosecutors were similarly unsure of which interpretations of ethics rules applied to them).

25. *See generally* David Ray Papke, *The Legal Profession and Its Ethical Responsibilities: A History*, in *ETHICS AND THE LEGAL PROFESSION* 35, 36 (Michael Davis & Frederick A. Elliston eds., 1986).

26. *See id.* at 47.

### A. Regulating Federal Prosecutors Through Ethics Rules

This section explains the number of mechanisms that regulate federal prosecutors. Part I.A.1 briefly discusses the general framework for regulating attorney ethics as it existed before the McDade Amendment and as it still exists separate from the Act. Part I.A.2 describes the historical background that led to the McDade Amendment. Finally, Part I.A.3 explains the McDade Amendment and how it changed the ethical regulation and obligations of federal prosecutors.

#### 1. Attorney Ethics Regulation Separate from the McDade Amendment

In the United States, state courts primarily regulate attorneys.<sup>27</sup> For example, state courts admit lawyers to the bar, create attorney ethics rules, and discipline attorneys who do not comply with their rules.<sup>28</sup> For the most part, state courts adopt rules promulgated by the ABA, or at least rely on these rules in crafting their own regulations.<sup>29</sup> State courts generally have a single code of ethics rules that regulates attorney conduct.<sup>30</sup> States' ethics authorities may discipline attorneys who violate these rules while practicing within the state.<sup>31</sup>

Federal courts also regulate attorney conduct. Unlike most state courts,<sup>32</sup> "federal courts have no uniform or focused approach" to regulating attorney ethics.<sup>33</sup> Rather, federal courts do so through a variety of methods.<sup>34</sup> These methods fall into two main categories: First, federal courts may enact rules governing attorney conduct. Second, federal courts regulate attorney ethics through common law decision making.<sup>35</sup>

Federal courts may promulgate ethics rules for attorneys practicing in federal court.<sup>36</sup> This includes federal prosecutors.<sup>37</sup> Despite federal courts' authority to develop rules of conduct for attorneys appearing before them, federal courts primarily regulate their attorneys through state ethics rules.<sup>38</sup> For instance, federal district courts largely adopt state courts' ethics rules into their own local court rules.<sup>39</sup> The extent to which federal courts adopt

27. See Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 875 (2012) ("Regulation of the bar in the United States has principally been the province of state courts . . .").

28. See *id.*

29. See *id.* at 875–76.

30. See Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 400 (2002).

31. See *id.* at 391 n.17.

32. See *supra* text accompanying note 30.

33. Green & Zacharias, *supra* note 30, at 400.

34. See *id.*

35. See Judith A. McMorrow & Daniel R. Coquillette, *The Federal Law of Attorney Conduct*, in MOORE'S FEDERAL PRACTICE § 8, § 801.02 (3d ed. 2006).

36. See Green, *supra* note 27, at 875.

37. See *id.*

38. See *id.* See generally McMorrow & Coquillette, *supra* note 35, § 8.

39. As of 2006, eighty-four of the ninety-four federal district courts had adopted the state ethics rules of the jurisdiction in which they are located into their local rules. See McMorrow & Coquillette, *supra* note 35, § 802.02[1]. Conversely, as of 2010, only six

state ethics rules differs among courts.<sup>40</sup> Some district courts adopt wholesale the standards of the state in which the district court is located, including any future changes made by the state.<sup>41</sup> Others adopt the state standards only as they exist at a fixed point in time.<sup>42</sup> Still others adopt certain state ethics rules but do not adopt them all.<sup>43</sup> In addition, states have authority to apply their own ethics rules to federal attorneys who work within their borders.<sup>44</sup> Therefore, even though federal courts have authority to promulgate rules for their own district, in practice the state ethics rules are often in effect.

Important for the purposes of this Note is how federal courts that adopt state ethics rules approach judicial interpretation of those rules. Some such federal district courts view themselves as free to interpret the state ethics rules when there is no state authority directly on point.<sup>45</sup> In these districts, if a state court has interpreted the rule in a prior case, the federal court feels constrained “to exercise *Erie* style deference to state authority.”<sup>46</sup> On the other hand, if the state court has not interpreted the rule, the federal court will interpret the rule itself.<sup>47</sup>

However, the majority of federal district courts that have adopted state ethics rules do not take this approach.<sup>48</sup> Rather, when adopting state ethics rules, most federal district courts do not also adopt the state courts’ *interpretation* of these rules.<sup>49</sup> Some federal district courts adopt the state ethics rules but in doing so plainly state that they reserve the right to interpret these rules themselves.<sup>50</sup> Other federal courts explicitly state that they are adopting only the state’s ethics *rules*.<sup>51</sup>

Therefore, before Congress enacted the McDade Amendment, deciding which court system should interpret state ethics rules in a particular federal court would have been an easy inquiry. The only information required was whether the federal district court had adopted the state rules and, if so,

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district courts had adopted no state ethics rules. *See id.* § 801.02 (citing the Western District of Wisconsin as an example, where ethical issues are dealt with “on an ad hoc basis with complete discretion in the judge . . .”).

40. *See* McMorrow & Coquillette, *supra* note 35, § 801.02 (explaining that “some federal courts have adopted very few rules, or none at all, governing attorney conduct” and that others essentially adopt the state rules wholesale).

41. *See id.* § 802.02[1].

42. *See id.* § 802.02[2].

43. *See id.*

44. *See* Green & Zacharias, *supra* note 30, at 391 & n.17 (citing *Attorney Grievance Comm’n v. Johnson*, 770 A.2d 130, 148 (Md. 2001), as an example).

45. *See* McMorrow & Coquillette, *supra* note 35, § 802.02[1].

46. *See id.*

47. *See id.*

48. *See id.*

49. *See id.*

50. *See, e.g.*, S.D.N.Y. R. 1.5 (specifying that the federal court will use the state rules exclusively as “interpreted and applied by the United States Supreme Court, the United States Court of Appeals for the Second Circuit, and this court”).

51. *See* W. DIST. PA. R. 83.3 (explicitly adopting only the state *rules*).



whether it had also adopted the state's interpretation of those rules.<sup>52</sup> Under the McDade Amendment, though, this question becomes complicated.<sup>53</sup>

Federal courts also regulate federal attorneys, including federal prosecutors, through common law decision making.<sup>54</sup> One way federal courts do this is by "deciding issues in individual cases in a way that signals the court's view of appropriate conduct."<sup>55</sup> For example, if a federal judge believes an attorney misbehaved in a particular case, he may "dismiss [the] case, exclude evidence, instruct the jury in a way benefitting the defense, or make other trial and pretrial rulings that respond to the prosecutorial conduct."<sup>56</sup> Federal courts also issue ethics rules through common law adjudication by punishing or criticizing individual attorneys.<sup>57</sup> Judges both criticize attorneys in written opinions and admonish them off the record.<sup>58</sup>

## 2. The Lead-Up to the McDade Amendment

In the late 1980s and early 1990s, a series of events brought the issue of regulating federal prosecutors to the national stage. Two separate controversies erupted, both over the ethical oversight of federal prosecutors. First, the Department of Justice (DOJ) attempted to exempt itself from certain ethics rules through internal memoranda and federal regulations.<sup>59</sup> Second, Congressman Joseph McDade was criminally prosecuted on allegations of bribery-related conduct,<sup>60</sup> and he publically criticized the ethical behavior of the federal prosecutors on his case.<sup>61</sup> Both of these controversies motivated Congress to enact the McDade Amendment.<sup>62</sup> For the purposes of this Note, only the DOJ's attempts to exempt itself from ethics regulations are particularly relevant.<sup>63</sup>

Starting in 1980, the DOJ and state ethics authorities began to express disagreement regarding the "no-contact rule."<sup>64</sup> The no-contact rule is a longstanding ethics regulation that prohibits attorneys from contacting

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52. See *supra* text accompanying notes 38–51.

53. See *infra* Part II.

54. See McMorrow & Coquillette, *supra* note 35, § 801.02; see also Green & Zacharias, *supra* note 30, at 401–05.

55. Green & Zacharias, *supra* note 30, at 401.

56. *Id.* at 401–02 nn.74–77 (citing examples of each).

57. See *id.* at 404.

58. See *id.* (citing examples).

59. See *infra* notes 64–90 and accompanying text.

60. See *United States v. McDade*, No. 92-249, 1992 WL 151314, at \*1 (E.D. Pa. June 19, 1992) (federal grand jury indicting the congressman on five counts).

61. See Michael deCourcy Hinds, *Top Republican on a House Panel Is Charged with Accepting Bribes*, N.Y. TIMES (May 6, 1992), <http://www.nytimes.com/1992/05/06/us/top-republican-on-a-house-panel-is-charged-with-accepting-bribes.html> [<http://perma.cc/X6EP-VPQC>].

62. See *infra* Part I.A.3.

63. The full history of Congressman McDade's criminal prosecution, and his complaints over the federal prosecutors who worked on it, are beyond the scope of this Note. For a recounting of this history, see Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 211–12 (2000).

64. See MODEL RULES OF PROF'L CONDUCT r. 4.2 (AM. BAR ASS'N 2004).

represented parties without their lawyers' consent.<sup>65</sup> In 1980, the DOJ Office of Legal Counsel distributed a memorandum stating that federal prosecutors did not violate the no-contact rule by contacting witnesses and suspects, without their lawyers' knowledge, before formal adversarial proceedings began, if done in accordance with DOJ policy.<sup>66</sup> In support of its position, the DOJ pointed out that the no-contact rule permits contact with represented parties if "authorized by law."<sup>67</sup> The DOJ claimed that it had authority to adopt regulations that were a "reasonable and necessary means to effectuate" the U.S. Attorney's statutorily imposed duty<sup>68</sup> to "prosecute . . . all offenses against the United States."<sup>69</sup> According to the DOJ, this was one such regulation and authorized the otherwise-prohibited contacts.<sup>70</sup>

In 1988, in *United States v. Hammad*,<sup>71</sup> the U.S. Court of Appeals for the Second Circuit questioned the legitimacy of the DOJ's position. In *Hammad*, the federal court adopted the no-contact rule through its local rulemaking process.<sup>72</sup> The defendant claimed that the DOJ violated the rule when it directed an informant to contact him without his attorney's knowledge or consent.<sup>73</sup> Although the Second Circuit admitted the evidence obtained in this manner,<sup>74</sup> the court held that the no-contact rule was applicable to criminal investigations, including pre-indictment contacts.<sup>75</sup> The appellate court recognized that, in certain circumstances, the use of an informant would be allowed under the "authorized by law" exception.<sup>76</sup> However, the court declined to explain the exact scenarios in which the no-contact rule would allow these contacts.<sup>77</sup> Therefore, *Hammad* created uncertainty as to the rules applying to federal prosecutors who engaged in undercover contacts of represented parties and as to the consequences of violating these rules.

Attorney General Richard Thornburgh ("AG Thornburgh") responded to the uncertainty created by *Hammad* by circulating an internal memorandum

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65. The current no-contact rule is Model Rule 4.2. *See id.* The predecessor rule was DR 7-102. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102 (AM. BAR ASS'N 1969). This Note refers to both as the "no-contact rule" and cites to the rule that was in effect at the time of the source or history it is discussing.

66. *See* Ethical Restraints of the ABA Code of Prof'l Responsibility on Fed. Criminal Investigations, 4B Op. O.L.C. 576, 576 (1980) [hereinafter 1980 DOJ Memo].

67. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104.

68. 1980 DOJ Memo, *supra* note 66, at 582.

69. 28 U.S.C. § 547(1) (2012).

70. *See* 1980 DOJ Memo, *supra* note 66, at 576.

71. 858 F.2d 834 (2d Cir. 1988).

72. *See id.* at 837.

73. *See id.* at 836.

74. *See id.* at 842.

75. *See id.* at 838.

76. *See id.* (finding that there was "no principled basis in the rule to constrain its reach" to post-indictment contacts).

77. *See id.* at 840 ("Notwithstanding requests for a bright-line rule, we decline to list all possible situations that may violate [the no-contact rule].").

to all DOJ attorneys.<sup>78</sup> The memo purported to exempt DOJ attorneys from the no-contact rule, as well as from ethics rules limiting prosecutors' ability to subpoena witnesses.<sup>79</sup> AG Thornburgh stressed that broad interpretations of the no-contact rule would have a "substantial burden on the law enforcement process" by restricting the government's routine contact with witnesses and use of undercover investigations.<sup>80</sup> The memo promised to challenge state disciplinary proceedings against federal prosecutors who engaged in these contacts "on Supremacy Clause grounds."<sup>81</sup>

In 1994, Attorney General Janet Reno ("AG Reno") promulgated formal regulations ("the Reno Regulation") continuing the exemption of federal prosecutors from the no-contact rule.<sup>82</sup> Through the Reno Regulation, federal prosecutors were allowed to formally exempt themselves from state ethics rules, creating a special and distinct set of rules applicable only to them.<sup>83</sup> The DOJ claimed that the Supremacy Clause sanctioned this preemption of state ethics rules<sup>84</sup> and invoked separation of powers to argue that federal courts may not adopt or apply state rules to federal prosecutors.<sup>85</sup> However, AG Reno did state that the DOJ would voluntarily comply with most professional rules.<sup>86</sup>

The DOJ's actions drew much attention from the media and scholars alike.<sup>87</sup> Additionally, numerous lawsuits challenged the DOJ's Supremacy Clause and separation of powers arguments.<sup>88</sup> Congress considered taking action in 1990<sup>89</sup> but instead warned the DOJ of future congressional oversight.<sup>90</sup>

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78. See Memorandum from Att'y Gen. Richard L. Thornburgh to all Justice Dep't Litigators 1 (June 8, 1989), reprinted in *In re Doe*, 801 F. Supp. 478, 489 (D.N.M. 1992) [hereinafter Thornburgh Memo].

79. See *id.* at 489, 493.

80. See *id.* at 489, 492.

81. *Id.* at 489, 493.

82. 28 C.F.R. § 77 (1994) [hereinafter Reno Regulation]. For an explanation of the Reno Regulation, see Communications with Represented Persons, 59 Fed. Reg. 39,910 (1994).

83. See generally Reno Regulation, *supra* note 82.

84. See *id.* at 39,916.

85. See *id.* at 39,917.

86. See *id.* at 10,086 ("[F]ederal attorneys generally continue to be subject to state bar ethical rules where they are licensed to practice, except in the limited circumstances where state ethical rules clearly conflict with lawful federal procedures and practices.").

87. See Zacharias & Green, *supra* note 63, at 213.

88. See, e.g., *United States v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998) (rejecting the validity of the Reno Regulation); *United States v. Lopez*, 4 F.3d 1455, 1461 (9th Cir. 1993) (rejecting the claim that "general enabling statutes" legitimized the DOJ's definition of which contacts were "authorized by law"); see also Zacharias & Green, *supra* note 63, at 213 (citing and describing cases challenging the DOJ's separation of powers arguments).

89. See H. Comm. on Gov't Operations, Fed. Prosecutorial Authority in a Changing Legal Environment: More Attention Required, H.R. REP. NO. 101-986, at 32 (1990) ("We disagree with the Attorney General's attempts to exempt departmental attorneys from compliance with the ethical requirements adopted by the State bars to which they belong and in the rules of the Federal courts before which they appear.").

90. See *id.* at 36.

### 3. The McDade Amendment: What It Is and How It Regulates Federal Prosecutors

In 1996, Congress took steps toward this threatened oversight. Congressman McDade introduced a bill in the House of Representatives to increase ethical regulation of federal prosecutors.<sup>91</sup> This bill would eventually become the McDade Amendment.<sup>92</sup> Congressman McDade introduced the legislation several times before Congress finally enacted it.<sup>93</sup> Additionally, the Congressman introduced multiple versions of the bill, with differing provisions regulating federal prosecutors, before Congress enacted it in its current form.<sup>94</sup> Eventually, in 2000, the bill was enacted as the Act that regulates federal prosecutors today.<sup>95</sup>

The McDade Amendment 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, to the same extent and in the same manner as other attorneys in that State.”<sup>96</sup> In effect, the Act requires federal prosecutors to “play by” the ethics rules of the state in which they practice.<sup>97</sup> The Act also requires federal prosecutors to abide by local federal court rules.<sup>98</sup>

The purpose of the McDade Amendment was to subject federal prosecutors to heightened ethical regulation,<sup>99</sup> motivated by the then-recent controversies over the ethical behavior of federal prosecutors<sup>100</sup> and Congressman McDade’s personal experience with federal prosecutors.<sup>101</sup> But in a larger sense, the Act was a response to the DOJ’s attempts to exempt its attorneys from the no-contact rule.<sup>102</sup> Witnesses who testified on the bill before the House of Representatives made this clear.<sup>103</sup> The Act

91. See H.R. 3386, 104th Cong. (1996).

92. 28 U.S.C. § 530B (2012).

93. The full history of the McDade Amendment’s enactment is beyond the scope of this Note. For this history, see Green & Zacharias, *supra* note 63, at 214–15.

94. The substance of the proposed versions of the McDade Amendment are also beyond the scope of this Note. For more information on these alternative versions of the Act, see *id.*

95. See 28 U.S.C. § 530B.

96. *Id.*

97. See *id.*

98. See *id.*

99. See Green & Zacharias, *supra* note 63, at 215 (stating that the Act was “intended to regulate federal prosecutors more stringently and to limit their powers”); *cf.* 1996 Legislative Hearings, *supra* note 18, at 10 (statement of Rep. Joseph McDade) (“The power of prosecutors is tremendous and the problem of misconduct is serious.”).

100. See *supra* Part I.A.2.

101. See 1996 Legislative Hearings, *supra* note 18, at 7 (statement of Rep. Joseph McDade) (referring to his “firsthand knowledge of the overzealousness and excessiveness of [f]ederal prosecutors”). A detailed analysis of how Congressman McDade’s own criminal prosecution influenced his legislation is beyond the scope of this Note. For more information on this topic, see Green & Zacharias, *supra* note 63, at 214–15.

102. See Zacharias & Green, *supra* note 63, at 214 (explaining that witnesses who testified on the bill in the House “focused on the Reno [Regulation] and its effect on state ethics provisions forbidding contacts with represented persons . . .”).

103. See 1996 Legislative Hearings, *supra* note 18, at 60 (statement of Tim Evans, Dir., Nat’l Ass’n of Criminal Def. Lawyers) (describing the bill as “a much needed, long overdue measure to reign in professed self-policing prosecutors run amuck, and to end the reign of

prohibits federal prosecutors from exempting themselves from ethics rules,<sup>104</sup> as the DOJ did with the no-contact rule.<sup>105</sup> The Act rejects the idea that federal prosecutors should be subject to a distinct and specialized ethics regime.<sup>106</sup> Rather, the Act requires that federal prosecutors abide by the same ethics rules as all other attorneys in the state.<sup>107</sup> In this way, the idea that federal prosecutors are not unique and do not require specialized ethical regulation is central to, and implicit in, the Act.<sup>108</sup>

Prior to the McDade Amendment, federal prosecutors were already required to heed state ethics rules in two scenarios.<sup>109</sup> First, federal prosecutors were required to follow state ethics rules if the federal court had adopted them into their local rules.<sup>110</sup> Second, a state could hold a federal prosecutor to its rules when that prosecutor performed work within the state.<sup>111</sup> The McDade Amendment did away with the need for a federal court to adopt the state rules or for work to be performed in the state in order for federal prosecutors to be bound by state rules.<sup>112</sup> Instead, under the McDade Amendment, all federal prosecutors are bound by the state ethics rules of the jurisdiction where they practice.<sup>113</sup> The framework for regulating federal prosecutors that existed prior to the McDade Amendment<sup>114</sup> is still intact. For example, federal courts may still enact their own rules governing federal attorneys<sup>115</sup> and may still adopt the state's ethics rules.<sup>116</sup> The McDade Amendment adds to this framework, rather than replacing it.

The McDade Amendment's directive that federal prosecutors follow state ethics rules does nothing to change the fact that federal prosecutors are bound by the rules of *federal* procedure and *federal* substantive law.<sup>117</sup> The

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prosecutorial imperialism begat by the roundly condemned 'Thornburgh Memorandum' of June 1989"); *id.* at 96–97 (testimony of Roger Pilon, CATO Institute) (“[H]owever prudent the [Reno Regulation] may or may not be, it is presumptuous at least for the department to be telling the rest of us that it and it alone will set the rules for the conduct of its attorneys.”).

104. *See* 28 U.S.C. § 530B (2012).

105. *See supra* notes 64–86 and accompanying text (explaining the controversy over the no-contact rule).

106. *See supra* note 103 (citing legislative history to this effect); *see also supra* notes 64–86 and accompanying text (explaining the history of the DOJ's treatment of the no-contact rule that led Congress to enact the McDade Amendment).

107. *See* 28 U.S.C. § 530B.

108. *See supra* notes 64–107 and accompanying text.

109. *See supra* Part I.A.1.

110. *See supra* notes 39–44 and accompanying text.

111. *See supra* note 31 and accompanying text.

112. *See* 28 U.S.C. § 530B.

113. *See id.*

114. *See supra* Part I.A.1.

115. *See supra* note 36 and accompanying text.

116. *See supra* notes 39–44 and accompanying text.

117. *See* 28 C.F.R. § 77.1(b) (1999) (stating that the McDade Amendment “should not be construed in any way to alter federal substantive, procedural, or evidentiary law”); 28 C.F.R. § 77.2(h)(1) (defining the phrase “state laws and rules and local federal court rules governing attorneys” as it is used in the McDade Amendment as excluding “any statute, rule, or regulation which does not govern ethical conduct, such as rules of procedure, evidence, or substantive law”).

Supremacy Clause of the U.S. Constitution mandates this by dictating that the Constitution, laws, and treaties of the United States “shall be the supreme law of the land.”<sup>118</sup> In practice, the Supremacy Clause invalidates state laws that “interfere with, or are contrary to,” federal law.<sup>119</sup> Because federal rules of procedure and substance do not fall under the McDade Amendment,<sup>120</sup> federal prosecutors must follow these federal rules and not state rules that interfere with them.<sup>121</sup> Therefore, if a rule governs ethics, it binds federal prosecutors under the McDade Amendment and the Supremacy Clause is not implicated.<sup>122</sup> However, if the rule is substantive or procedural and inconsistent with a federal rule, the Supremacy Clause mandates that federal prosecutors follow only the federal rule.<sup>123</sup>

Very few cases have interpreted the McDade Amendment.<sup>124</sup> One question that courts have addressed is whether federal prosecutors are bound by every rule in a state’s ethics code, just by virtue of it being labeled an “ethics rule.”<sup>125</sup> Federal courts have said they are not.<sup>126</sup> As explained above, federal prosecutors are not bound by state procedural rules.<sup>127</sup> Federal courts have concluded that a rule may be procedural in

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118. See U.S. CONST. art. VI, cl. 2.

119. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824).

120. See 28 C.F.R. § 77.1; 28 C.F.R. § 77.2(h)(1); see also sources cited *supra* note 117.

121. See *United States v. Ky. Bar Ass’n*, 439 S.W.3d 136 (Ky. 2014).

122. See *United States v. Colo. Supreme Court*, 189 F.3d 1281, 1284 (10th Cir. 1999).

123. See *id.*

124. A total of thirty-six reported cases cite to the McDade Amendment. This includes federal and state court cases at all levels, but cases that were appealed are only counted once. See *Montejo v. Louisiana*, 556 U.S. 778 (2009); *In re Auerhahn*, 724 F.3d 103 (1st Cir. 2013); *United States v. Lopez-Avila*, 678 F.3d 955 (9th Cir. 2012); *United States v. Williams*, 698 F.3d 374 (7th Cir. 2012); *United States v. Carona*, 660 F.3d 360 (9th Cir. 2011); *United States v. Brown*, 595 F.3d 498 (3d Cir. 2010); *United States v. Olson*, 450 F.3d 655 (7th Cir. 2006); *Augustine v. Dep’t of Veteran Affairs*, 429 F.3d 1334 (Fed. Cir. 2005); *United States v. Whittaker*, 268 F.3d 185 (3d Cir. 2001); *United States v. Plumley*, 207 F.3d 1086 (8th Cir. 2000); *Stern v. U.S. Dist. Court for the Dist. Of Mass.*, 214 F.3d 4 (1st Cir. 2000); *United States v. Talao*, 222 F.3d 1133 (9th Cir. 2000); *Colo. Supreme Court*, 189 F.3d 1281; *United States v. Condon*, 170 F.3d 687 (7th Cir. 1999); *United States v. Lowery*, 166 F.3d 1119 (11th Cir. 1999); *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999); *Cox v. United States*, 105 Fed. Cl. 213 (Ct. Fed. Cl. 2012); *United States v. Koerber*, 966 F. Supp. 2d 1207 (D. Utah 2013); *United States v. Bunday*, 908 F. Supp. 2d 485 (S.D.N.Y. 2012); *In re Telfair*, 745 F. Supp. 2d 536 (D.N.J. 2010); *SEC v. Lines*, 669 F. Supp. 2d 460 (S.D.N.Y. 2009); *United States v. Syling*, 553 F. Supp. 2d 1187 (D. Haw. 2008); *In re Grand Jury Subpoena*, 533 F. Supp. 2d 602 (W.D.N.C. 2007); *In re Lucas*, 317 B.R. 195 (D. Mass. 2004); *United States v. Bowman*, 277 F. Supp. 2d 1239 (N.D. Ala. 2003); *In re Chan*, 271 F. Supp. 2d 539 (S.D.N.Y. 2003); *United States v. Dwyer*, 287 F. Supp. 2d 82 (D. Mass. 2003); *United States v. Grass*, 239 F. Supp. 2d 535 (M.D. Pa. 2003); *N.Y. Bar Ass’n v. F.T.C.*, 276 F. Supp. 2d 110 (D.D.C. 2003); *United States v. Reid*, 214 F. Supp. 2d 84 (D. Mass. 2002); *United States v. Acosta*, 111 F. Supp. 2d 1082 (E.D. Wis. 2000); *Mendoza Toro v. Gil*, 110 F. Supp. 2d 28 (D.P.R. 2000); *United States v. Medina*, 41 F. Supp. 2d 38 (D. Mass. 1999); *United States v. Ky. Bar Ass’n*, 439 S.W.3d 136 (Ky. 2014); *In re Crossen*, 880 N.E.2d 352 (Mass. 2008); *State ex rel. York v. W. Va. Office of Disciplinary Counsel*, 744 S.E.2d 293 (W. Va. 2013).

125. See, e.g., *Colo. Supreme Court*, 189 F.3d 1281; *Stern*, 214 F.3d 4.

126. See *Stern*, 214 F.3d at 20 (citing 28 C.F.R. § 77.2(h)(1), which states that the applicability of the McDade Amendment does not depend on “whether or not [the state] rule is included in a code of professional responsibility for attorneys”).

127. See *supra* notes 117–23 and accompanying text.

nature even though it is adopted as an ethics rule and published in an ethics code.<sup>128</sup> For example, the U.S. Court of Appeals for the First Circuit concluded that a rule limiting the ability of prosecutors to subpoena lawyers for information on their clients, “though doubtless motivated by ethical concerns, ha[d] outgrown those humble beginnings” and become, in substance, a procedural rule.<sup>129</sup> Federal courts are clear that rules such as these—that appear to be ethics rules but are really procedural in nature—do not apply to federal prosecutors under the McDade Amendment.<sup>130</sup> These decisions reflect an understanding that “[s]ubstance, not form, must control.”<sup>131</sup>

However, courts have not addressed the issue of whether federal or state court interpretations of ethics rules are definitive under the McDade Amendment. Although no court has discussed this issue, both federal and state courts interpret state ethics rules as they apply to federal prosecutors.

### *B. Judicial Interpretation of Ethics Rules Under the McDade Amendment*

Despite the McDade Amendment’s clear directive that federal prosecutors must abide by state court ethics rules,<sup>132</sup> the Act says nothing about whether federal or state courts’ *interpretations* of such rules are definitive under the Act.<sup>133</sup> Therefore, both state and federal courts currently interpret state ethics rules as they apply to federal prosecutors.<sup>134</sup> As a threshold matter, if a rule is not an ethics rule (for example, if it is a procedural or substantive rule), federal courts have ultimate interpretive authority.<sup>135</sup> This section discusses judicial interpretation of state ethics rules as they apply to federal prosecutors. Part I.B.1 begins by illustrating that federal courts interpret these ethics rules. Part I.B.2 then shows that state courts also interpret ethics rules as they apply to federal prosecutors.

#### 1. Federal Courts Interpret State Ethics Rules As They Apply to Federal Prosecutors

Federal courts frequently interpret state ethics rules as they apply to federal prosecutors.<sup>136</sup> The no-contact rule<sup>137</sup> is one ethics provision that

128. *See Stern*, 214 F.3d at 20–21; *Colo. Supreme Court*, 189 F.3d at 1287–88 (developing a test to determine if a rule is procedural or ethical).

129. *Stern*, 214 F.3d at 20.

130. *See id.*

131. *Id.*

132. *See* 28 U.S.C. § 530B (2012); *see also supra* Part I.A.3 (explaining the Act).

133. *See* 28 U.S.C. § 530B; *see also infra* Part II.A (explaining that the plain text of the Act does not state which courts’ interpretations are final).

134. *See infra* Part I.B.1–2.

135. *See supra* notes 117–23 and accompanying text.

136. *See, e.g., United States v. Lowery*, 166 F.3d 1119, 1121 (11th Cir. 1999) (interpreting a Florida ethics rule stating lawyers shall not “fabricate evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness”); *United States v. Syling*, 553 F. Supp. 2d 1187, 1190–91 (D. Haw. 2008) (discussing whether federal prosecutors have an ethical obligation to disclose exculpatory evidence to the grand jury); *In re Grand Jury Subpoena*, 533 F. Supp. 2d 602, 607–10 (W.D.N.C. 2007) (interpreting a North Carolina professional conduct rule providing circumstances where a prosecutor may

federal courts have repeatedly interpreted.<sup>138</sup> For example, in *United States v. Lopez*,<sup>139</sup> the U.S. Court of Appeals for the Ninth Circuit interpreted California's version of the no-contact rule as it applied to a federal prosecutor. Rule 2-100 of the Rules of Professional Conduct of the State Bar of California, the state's equivalent of the no-contact rule, prohibits a member of the California State Bar from communicating with represented parties without their counsel's consent.<sup>140</sup> In *Lopez*, the prosecutor, Lyons, had met with a represented defendant to discuss the possibility of a plea deal without the defendant's lawyer present and without the lawyer's knowledge or consent.<sup>141</sup> The Ninth Circuit concluded that Lyons breached his ethical duties under Rule 2-100 by doing so.<sup>142</sup>

The Ninth Circuit had to interpret Rule 2-100 in order to determine if Lyons breached it. For instance, the court interpreted the rule as imposing an ethical obligation on a prosecutor "at the latest upon the moment of indictment."<sup>143</sup> In addition, Rule 2-100 contains an exception for "communications otherwise authorized by law."<sup>144</sup> The federal court interpreted that exception as not applying to Lyons's conduct.<sup>145</sup> The Ninth Circuit explained that federal statutes permitting prosecutors to communicate with represented parties in order to detect and prosecute federal offenses did not come under the "authorized by law" exception.<sup>146</sup> Rather, the court interpreted the "authorized by law" exception to Rule 2-100 as "requir[ing] that a statutory scheme expressly permit contact between an attorney and a represented party."<sup>147</sup> The court stated that the federal statutes the government pointed to as authorizing the communication were "nothing more than general enabling statutes."<sup>148</sup>

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subpoena a lawyer in a grand jury proceeding to present evidence about a past or present client); *see also* *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, Note, 113 HARV. L. REV. 2080, 2092–93 (2000) (noting that federal courts interpret state ethics rules) [hereinafter Harvard Note].

137. *See* MODEL RULES OF PROF'L CONDUCT r. 4.2 (1983); *see also supra* notes 64–90 and accompanying text (discussing this rule and how it relates to the history of the McDade Amendment).

138. *See, e.g.*, *United States v. Lemonakis*, 485 F.2d 941, 955–56 (D.C. Cir. 1973) (interpreting the no-contact rule as not requiring a prosecutor to refrain from communication with represented parties prior to their indictment); *see also* Grievance Comm. for the S. Dist. of N.Y. v. Simels, 48 F.3d 640 (2d Cir. 1995) (interpreting the no-contact rule); *United States v. Lopez*, 989 F.2d 1032 (9th Cir. 1993) (same); *In re Chan*, 271 F. Supp. 2d 539 (S.D.N.Y. 2003) (same); *In re Searer*, 950 F. Supp. 811 (W.D. Mich. 1996) (same).

139. 989 F.2d 1032 (9th Cir. 1993).

140. *See* CA. RULES OF PROF'L CONDUCT r. 2-100(A) ("While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.").

141. *See Lopez*, 989 F.2d at 1034–35.

142. *See id.* at 1041.

143. *Id.* at 1038.

144. CA. RULES OF PROF'L CONDUCT r. 2-100(C)(3).

145. *See Lopez*, 989 F.2d at 1038–39.

146. *See id.*

147. *Id.* at 1039.

148. *See id.*



Rule 2-100 is not unambiguous on its face. For instance, it only applies where the lawyer “knows” the party is represented, the party must be represented “in the matter” at issue, and there is an exception for conduct that is “authorized by law.”<sup>149</sup> These terms and others in the rule are vague, such that they require judicial interpretation in order to be applied. *Lopez* illustrates that federal courts undertake this interpretation as it applies to federal prosecutors.

## 2. State Courts Interpret State Ethics Rules As They Apply to Federal Prosecutors

State courts also interpret state ethics rules as they apply to federal prosecutors.<sup>150</sup> As an example, consider the Kentucky Supreme Court’s decision<sup>151</sup> discussed above.<sup>152</sup> Recall that the KBA held in an advisory opinion that IAC waivers in plea agreements violate both defense attorneys’ and prosecutors’ ethical obligations under the state’s ethics rules.<sup>153</sup> As such, the KBA banned IAC waivers.<sup>154</sup>

As to the defense attorney, the KBA found that advising a client on whether to sign an IAC waiver violates two provisions of the Kentucky ethics rules.<sup>155</sup> First, the rules state, “[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest”<sup>156</sup> and define a concurrent conflict of interest as creating “a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer.”<sup>157</sup> The KBA found such a conflict of interest when a defense attorney advises a client on whether to sign an IAC waiver.<sup>158</sup> The KBA explained that a defense attorney is personally interested in the client signing the IAC waiver because she has a personal interest in preventing a court from finding that she was ineffective.<sup>159</sup> In addition, a successful IAC claim is a prerequisite to a malpractice suit in the state of Kentucky.<sup>160</sup> As such, the KBA concluded that defense counsel

149. CA. RULES OF PROF’L CONDUCT r. 2-100.

150. *See, e.g.*, *United States v. Ky. Bar Ass’n*, 439 S.W.3d 136 (Ky. 2014) (state supreme court interpreting state ethics rule against waivers of ineffective assistance of counsel in plea agreements as they apply to united states attorneys practicing in the jurisdiction); *In re Howes*, 940 P.2d 159 (N.M. 1997) (interpreting the state’s no-contact rule as prohibiting an investigator from speaking with a defendant without his lawyer’s consent where the defendant initiated the communication); *In re Gatti*, 8 P.3d 966, 974–76 (Or. 2000) (state court interpreting state ethics rule to forbid all lawyers, including federal prosecutors, from using deceit in investigations).

151. *Ky. Bar Ass’n*, 439 S.W.3d 136.

152. *See supra* notes 1–11 and accompanying text.

153. *See Ky. Bar Ass’n*, Ethics Op. E-435 (2012); *see also supra* notes 1–2 and accompanying text.

154. *See Ky. Bar Ass’n*, Ethics Op. E-435; *see also supra* notes 1–2 and accompanying text.

155. *See Ky. Bar Ass’n*, Ethics Op. E-435 at 2.

156. KY. ST. S. CT. R. 3.130(1.7)(a).

157. *Id.* 3.130(1.7)(a)(2).

158. *See Ky. Bar Ass’n*, Ethics Op. E-435 at 2.

159. *See id.*

160. *See id.*

advising on an IAC waiver violates the state's rule<sup>161</sup> prohibiting agreements that prospectively limit a lawyer's liability to a client for malpractice.<sup>162</sup>

The KBA also found that prosecutors violate the Kentucky ethics rules by including IAC waivers in plea agreements.<sup>163</sup> The state ethics rules prohibit an attorney from inducing or assisting another to breach the rules.<sup>164</sup> As explained above, the KBA concluded that a defense attorney breaches her ethical duties by advising on an IAC waiver.<sup>165</sup> Therefore, the KBA found, by including or requiring such a waiver, the prosecutor induces or assists the defense attorney to violate the ethics rules.<sup>166</sup> In addition, comments to the Kentucky ethics rules state that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate."<sup>167</sup> The KBA concluded that a prosecutor breaches his duty to act as a "minister of justice" when he includes an IAC waiver in a plea agreement.<sup>168</sup> Because the KBA concluded that IAC waivers violate the Kentucky ethics rules, it prohibited all prosecutors practicing in the state, including federal prosecutors, from requesting or requiring them as part of a plea agreement.<sup>169</sup>

The United States Attorney's Offices for the Eastern and Western Districts of Kentucky ("the USAO") asked the Kentucky Supreme Court to review the ethics opinion.<sup>170</sup> The USAO argued that it was not bound by the KBA's opinion under the McDade Amendment.<sup>171</sup> The Kentucky Supreme Court disagreed with the USAO and found instead that federal prosecutors must comply with the KBA's opinion.<sup>172</sup>

In reaching this conclusion, the state supreme court interpreted the state ethics rules as they applied to federal prosecutors.<sup>173</sup> Specifically, it interpreted the state's conflict of interest rule as prohibiting defense attorneys from advising on IAC waivers.<sup>174</sup> The state supreme court also interpreted the state's rule against limiting malpractice liability as prohibiting defense counsel from discussing an IAC waiver with her client.<sup>175</sup> Further, the Kentucky Supreme Court interpreted the state's rule prohibiting lawyers from inducing or assisting others to violate the ethics

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161. KY. ST. S. CT. R. 3.130(1.8)(h).

162. See Ky. Bar Ass'n, Ethics Op. E-435 at 2.

163. See *id.* at 3.

164. See KY. ST. S. CT. R. 3.130(8.4)(a).

165. See *supra* notes 155–62 and accompanying text.

166. See Ky. Bar Ass'n Ethics Op. E-435 at 3.

167. KY. ST. S. CT. R. 3.130(3.8), cmt. 1.

168. See Ky. Bar Ass'n Ethics Op. E-435 at 3.

169. See *id.* at 1.

170. See Brief for Respondent, *United States v. Ky. Bar Ass'n*, 439 S.W.3d 136 (Ky. 2014) (No. 2013-SC-000270), 2013 WL 8610407, at \*2 (stating that the USAO sought review of the KBA's opinion and asked that the Kentucky Supreme Court vacate it).

171. See Reply Brief for the Petitioner, *supra* note 3, at \*1–2.

172. See Ky. Bar Ass'n, 439 S.W.3d 136.

173. See *id.*

174. See *id.* at 151–55.

175. See *id.* at 155–56.

rules as disallowing prosecutors from requesting IAC waivers.<sup>176</sup> Finally, it read Kentucky's rule stating that prosecutors are "minister[s] of justice" to preclude prosecutors from including IAC waivers in plea agreements.<sup>177</sup>

It is clear that state ethics rules contain ambiguities<sup>178</sup> and require judicial interpretation in order to be applied.<sup>179</sup> In *United States v. Kentucky. Bar Ass'n*,<sup>180</sup> the state supreme court provided this interpretation.<sup>181</sup> Nowhere do the Kentucky ethics rules explicitly prohibit IAC waivers.<sup>182</sup> Rather, the state supreme court interpreted ambiguous ethics rules as prohibiting this specific attorney conduct.<sup>183</sup> In short, the Kentucky Supreme Court interpreted the state's ethics rules, as the KBA had, as prohibiting IAC waivers.<sup>184</sup>

In September 2014, the DOJ effectively mooted the issue of attorney ethical obligations surrounding IAC waivers in plea agreements. Then-AG Holder announced that federal prosecutors would no longer seek IAC waivers in plea agreements.<sup>185</sup> Going forward, federal prosecutors will not seek IAC waivers because of internal DOJ policy.<sup>186</sup> Prior to this, though, federal prosecutors in Kentucky could not have sought IAC waivers under the Kentucky Supreme Court's interpretation of the state ethics rules.<sup>187</sup>

## II. THE ULTIMATE AUTHORITY TO INTERPRET STATE ETHICS RULES AS THEY APPLY TO FEDERAL PROSECUTORS: ARE FEDERAL COURTS' OR STATE COURTS' INTERPRETATIONS DEFINITIVE?

As the proceeding sections show, both federal and state courts interpret state ethics rules as they apply to federal prosecutors.<sup>188</sup> If state courts are the definitive source of interpretation of ethics rules as they apply to federal prosecutors, then federal prosecutors must abide by the state rules as interpreted by state courts. If federal courts' interpretations are definitive, then federal prosecutors must abide by the state rules, as interpreted by federal courts. However, as it currently stands, with both court systems interpreting the rules and no authority on which is definitive, federal prosecutors must abide by *both* state court *and* federal court interpretations of state ethics rules.

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176. *See id.* at 157.

177. *See id.*

178. *See, e.g.,* KY. ST. S. CT. R. 3.130(8.4(a)) ("It is professional misconduct for a lawyer to: . . . knowingly assist or induce another [attorney] to . . . violate or attempt to violate the Rules of Professional Conduct . . ." (emphasis added)).

179. *See, e.g.,* Ky. Bar Ass'n, 439 S.W.3d at 157 (interpreting the words "knowingly" and "induce" in the ethics rules).

180. 439 S.W.3d 136 (Ky. 2014).

181. *See id.* at 151–57.

182. *See* KY. ST. S. CT. R. 1–9.

183. *See* Ky. Bar Ass'n, 439 S.W.3d at 151–57.

184. *See id.* at 157–58.

185. *See* Palazzolo, *supra* note 12.

186. *See id.*

187. *See* Ky. Bar Ass'n, 439 S.W.3d at 157–58.

188. *See supra* Part I.B.1–2.

This is a recipe for insanity for at least two reasons. First, the need to abide by two courts' interpretations of ethics rules is likely to chill federal prosecutors in performing their official duties. With both federal and state courts interpreting ethics rules, federal prosecutors are bound to be uncertain of which courts' interpretations apply to them.<sup>189</sup> Uncertainty over their ethical obligations is likely to hinder federal prosecutors' ability to effectively perform their jobs because they may not take action for fear of being sanctioned.<sup>190</sup>

Second, the conflict over interpretation is most pronounced where a federal and a state court in the same jurisdiction disagree over the interpretation of the same ethics rule. For example, consider a hypothetical. Imagine that a federal district court in Kentucky has reached the opposite conclusion from the Kentucky Supreme Court's decision discussed above concerning IAC waivers<sup>191</sup>: the state court has interpreted the state ethics rules as prohibiting IAC waivers,<sup>192</sup> but the federal court has interpreted the same rules as allowing them. In this way, imagine that the state supreme court and the district court in the same jurisdiction have reached opposing interpretations of the same state ethics rules. Federal prosecutors cannot comply with both interpretations—one allows them to include IAC waivers in plea agreements but the other prohibits them from doing so. Which court's interpretation prevails in this situation?

The answer depends on the McDade Amendment.<sup>193</sup> If being “subject to State laws and rules . . . governing attorneys in each State where such attorney engages in that attorney's duties”<sup>194</sup> includes state courts' interpretation of those rules, then the state court's interpretation reigns. If, however, this language does not include state courts' interpretations of ethics rules, but only the rules themselves, then federal courts are the definitive source for interpreting the state rules as they apply to federal prosecutors.<sup>195</sup> No court has addressed this question. Although it was

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189. *Cf. infra* note 224 and accompanying text (explaining that federal prosecutors were confused as to which interpretations of the ethics rules applied to them before the McDade Amendment was enacted and that the Act was meant to remedy this confusion).

190. *Cf. infra* notes 223–27 and accompanying text (describing that this was the case before the McDade Amendment was adopted and that the legislation was enacted in part to address this issue); *cf. Harvard Note, supra* note 136, at 2093 (explaining the same phenomenon where prosecutors are unsure of whether a federal or state ethics rule applies).

191. *See supra* notes 172–84 and accompanying text.

192. *See supra* notes 172–84 and accompanying text.

193. 28 U.S.C. § 530B (2012).

194. *Id.*

195. Of note, however, is that, in the case of Kentucky, a clever district court could have dodged the issue of whether federal or state courts' interpretations of state ethics rules are definitive. A federal judge could have found that she must defer to state court interpretations of ethics rules as they apply to federal prosecutors under the McDade Amendment but noted that she is not required to defer to state court interpretations of the rules as they apply to federal *defenders* because the Act only pertains to federal prosecutors. The judge would then not be required to defer to the state court's finding that IAC waivers breach defense attorneys' ethical obligations. If the defense attorney breached no ethical duty, the prosecutor would not have breached his duty not to induce or assist others in violating the ethics rules. If the court so found, the state court's prohibition of IAC waivers would not

raised when the McDade Amendment was enacted,<sup>196</sup> this issue was not solved in the legislative history or text of the Act.<sup>197</sup> The scholarship addresses this question only in passing.<sup>198</sup>

This section explores the question of which court system's interpretation is definitive, presenting the arguments in favor of both federal and state court interpretation. First, Part II.A discusses how the plain text of the McDade Amendment does not address the question of judicial interpretation in any meaningful way. Second, Part II.B illustrates how the legislative history also fails to resolve this issue. Finally, Part II.C lays out the policies and purposes of the McDade Amendment and discusses how they may help to answer the question of judicial interpretation.

#### A. *The Plain Text of the McDade Amendment*

The McDade Amendment reads:

(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.<sup>199</sup>

As seen in the text, the Act does not explicitly answer the question of interpretation.<sup>200</sup> The Act does not say whether federal or state courts are definitive for purposes of interpretation of the ethics rules.<sup>201</sup> In fact, the

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apply to federal prosecutors even if the federal court deferred to the state court generally on matters of ethics interpretation.

196. See *supra* notes 17–21 and accompanying text.

197. See *supra* Part II.A–B.

198. There has been very little scholarly discussion on this subject and virtually no in-depth treatment. A handful of scholars have assumed, without discussion, that state courts have the ultimate authority to interpret state ethics rules. However, these scholars mention this assumption in passing, do not explore the issue in any detail, and do not offer a reason for their assumption. See J. Nick Badgerow, *Honor in Battle: The Conflict Between Candor and Zealous Advocacy*, 70-OCT J. KAN. B.A. 16, 21 (2001) (“Thus, under the McDade Amendment, all government lawyers must comply with the rules of ethics applicable in the state(s) where they practice. This would include the *state’s interpretation* and application of the no-contact provisions of Rule 4.2.” (emphasis added)); Megan Browdie & Wei Xiang, Note, *Chevron Protects Citizens: Reviving the Citizens Protection Act*, 22 GEO. J. LEGAL ETHICS 695, 696 (2009) (“[A] proper construction of the [McDade Amendment] requires *district courts* to rely on *state interpretations* and remedies when applying that state’s ethics rules to federal prosecutors.” (emphasis added)); Rima Sirota, *Reassessing the Citizens Protection Act: A Good Thing It Passed, and a Good Thing It Failed*, 43 SW. L. REV. 51, 75–76 (2013) (“Both [McDade Amendment] supporters and opponents expected that the new law would subject federal prosecutors to *state interpretations* of the no-contact rule—just like ‘other attorneys in that State’—and that state law would narrow or eliminate the availability of the pre-charge investigatory exemption.” (emphasis added)).

199. 28 U.S.C. § 530B.

200. See *id.*

201. See *id.*

Act makes no clear mention of judicial interpretation whatsoever.<sup>202</sup> Further, the plain text can be read in at least two different ways.<sup>203</sup>

On the one hand, the McDade Amendment can be read as favoring state court interpretation. The Act requires federal prosecutors to comply with the state ethics rules “to the same extent and in the same manner as other attorneys in that State.”<sup>204</sup> Other attorneys in the state<sup>205</sup> are required to abide by the state court’s interpretations of the rules. Therefore, the language requiring federal prosecutors to follow the state ethics rules “*to the same extent as . . . other attorneys in that State*”<sup>206</sup> may include a requirement that federal prosecutors abide by state court interpretations. Under this reading of the Act, the text implicitly renders state courts definitive for purposes of interpreting state ethics rules as they apply to federal prosecutors.

On the other hand, an argument may be made that the Act is silent as to judicial interpretation. The portion of the text stating that federal prosecutors are subject “to the same extent and in the same manner as other attorneys in that State”<sup>207</sup> can be read to attach *only* to the earlier portion of the text requiring federal prosecutors to abide by “State . . . rules.”<sup>208</sup> Under this reading, the text may be said to require only that federal prosecutors follow the *rules* to the same extent as other attorneys in the state, but to be silent as to interpretation.

The plain text of the McDade Amendment does little to answer the question of whether federal or state courts are the ultimate source of interpretation under the Act. The Act does not explicitly address this issue.<sup>209</sup> Moreover, that the text can be read in multiple ways<sup>210</sup> suggests that it is not a meaningful source to answer the question of interpretive authority.

### B. The McDade Amendment’s Legislative History

Moving beyond the plain text, the McDade Amendment’s legislative history also does not answer whether Congress intended federal or state courts to be the definitive source of ethics rule interpretation. The legislative history shows that the issue was raised in Congress in the debate over whether to enact the McDade Amendment.<sup>211</sup> Despite this, the issue was not resolved, either by members of Congress while debating the Act<sup>212</sup>

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202. *See id.*

203. *See infra* notes 204–08 and accompanying text.

204. 28 U.S.C. § 530B(a).

205. *Id.*

206. *Id.* (emphasis added).

207. *Id.*

208. *Id.* (emphasis added).

209. *See id.*

210. *See supra* notes 204–08 and accompanying text.

211. *See infra* notes 215–34 and accompanying text.

212. *See infra* notes 215–34 and accompanying text.

or in the Act itself.<sup>213</sup> In fact, those testifying before Congress explicitly remarked that the McDade Amendment left the issue of judicial interpretation open and unsolved.<sup>214</sup>

There are multiple references to interpretation of ethics rules generally in the McDade Amendment's legislative history.<sup>215</sup> For example, in explaining why the DOJ adopted the Reno Regulation,<sup>216</sup> a spokesman for the Department explained that broad judicial interpretations of the no-contact rule interfered with law enforcement's ability to carry out its official duties.<sup>217</sup> On the other side of the debate, proponents of the Act argued that it was necessary because the DOJ had interpreted the no-contact rule itself so as not to apply to federal prosecutors and the DOJ should not have this authority.<sup>218</sup> These proponents of the Act explained that allowing those who are governed by a rule to interpret it "renders the rule meaningless" and that the manner in which the DOJ had interpreted the rule "displays an arrogant disregard for . . . ethics in the legal profession."<sup>219</sup>

Beyond debate about interpretation of ethics rules generally, the legislative history also includes discussion over the inherent problems with conflicting state and federal court interpretations of ethics rules.<sup>220</sup> Those opposed to the Act explained that the DOJ's concern over differing interpretations of ethics rules by federal and state courts<sup>221</sup> motivated it to promulgate the Reno Regulation.<sup>222</sup> For instance, Seth P. Waxman, then-Associate Deputy Attorney General, testified before the House that, prior to the McDade Amendment's enactment, federal and state courts interpreted no-contact rules differently.<sup>223</sup> Waxman stated that prosecutors were left uncertain as to which courts' interpretation would be enforced against

213. See *supra* Part II.A (explaining that the plain text of the McDade Amendment does not address this issue).

214. See *infra* note 233 and accompanying text.

215. See generally 1996 Legislative Hearings, *supra* note 18.

216. 28 C.F.R. § 77 (1994). For an explanation of the Reno Regulation, see *supra* notes 82–86.

217. See 1996 Legislative Hearings, *supra* note 18, at 13 (statement of Seth P. Waxman, Assoc. Deputy Att'y Gen., Dep't of Justice) ("[T]he expansive application of the contacts rule in some jurisdictions has threatened legitimate and essential law enforcement activities."); accord Communications with Represented Persons, 59 Fed. Reg. 39,911 (Aug. 4, 1994) (explaining that broad interpretations of the no-contact rule in some states chilled prosecutors in the exercise of their duties).

218. See 1996 Legislative Hearings, *supra* note 18, at 62 (statement of Tim Evans, Dir., Nat'l Ass'n of Criminal Def. Lawyers).

219. *Id.* (quoting U.S. Dist. J. Juan Burciaga).

220. See 1996 Legislative Hearings, *supra* note 18, at 14 (statement of Seth P. Waxman, Assoc. Deputy Att'y Gen., Dep't of Justice).

221. See *id.*

222. 28 C.F.R. § 77 (1994).

223. See 1996 Legislative Hearings, *supra* note 18, at 14 (statement of Seth P. Waxman, Assoc. Deputy Att'y Gen., Dep't of Justice) ("Federal prosecutors are facing conflicting interpretations of contacts regulations by various State and Federal authorities. For example, while the Federal courts have almost uniformly held that the contacts rules have no application to pre-indictment noncustodial communications, some State courts have reached the opposite conclusion."); accord Communications with Represented Persons, 59 Fed. Reg. 39,911 (Aug. 4, 1994) (explaining that "state courts and state bar organizations have varied widely in their interpretation of the scope" of the no-contact rules).

them.<sup>224</sup> This uncertainty, Waxman claimed, chilled prosecutors in the execution of their official duties.<sup>225</sup> Waxman explained that the DOJ issued the Reno Regulation<sup>226</sup> to free federal prosecutors from confusion over whether to follow federal or state court interpretations of the no-contact rule.<sup>227</sup>

These statements make clear that interpretation of ethics rules was raised as a potential issue before Congress while debating the McDade Amendment.<sup>228</sup> Further, they show that the issues surrounding conflicting federal and state court interpretations of state ethics rules were raised during the debate.<sup>229</sup> Judicial interpretation of ethics rules was a part of the conversation over the McDade Amendment.<sup>230</sup> Despite this, the issue of whether federal or state court interpretation would be definitive under the Act was not resolved in these debates.<sup>231</sup>

Moreover, those testifying before Congress explicitly stated that the McDade Amendment left the issue of judicial interpretation unresolved. The DOJ complained that, under the Act, federal and state courts would both interpret ethics rules as they applied to federal prosecutors.<sup>232</sup> Even more explicit is Waxman's statement:

[T]he bill leaves open, and confused, the question of enforcement . . . . Whose interpretation of the bar rules will count for purposes of enforcement? These are not easy questions. I raise them not

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224. See 1996 Legislative Hearings, *supra* note 18, at 14 (statement of Seth P. Waxman, Assoc. Deputy Att'y Gen., Dep't of Justice) (referring to "[t]he uncertainty resulting from these and other conflicting decisions").

225. See *id.* ("The uncertainty resulting from these and other conflicting decisions hinder the ability of prosecutors to conduct law enforcement investigations. Our attorneys were hesitant to authorize undercover contacts without reassurance that they would not be subjected to unwarranted disciplinary action by bar authorities applying vague and broad rules in widely varying manners."); *accord* Communications with Represented Persons, 59 Fed. Reg. 39,911 (explaining that uncertainty over which state's interpretation of ethics rules governs has chilled prosecutorial performance).

226. 28 C.F.R. § 77.

227. 1996 Legislative Hearings, *supra* note 18, at 14 (statement of Seth P. Waxman, Assoc. Deputy Att'y Gen., Dep't of Justice) ("Under this regime, the Attorney General was left with the unpalatable choice of reducing reliance on such essential law enforcement techniques or returning complete control of law enforcement investigations to investigators, who are not subject to an attorney's ethical constraints and who also typically lack an attorney's legal training and appreciation of the fine points of the legal constraints on investigative activity. Instead, the Attorney General promulgated the contacts regulation."); *accord* Communications with Represented Persons, 59 Fed. Reg. 39,927 (stating that the DOJ policy is necessary to protect against variation in "state and local rules *and in interpretations of those rules*" (emphasis added)); *id.* at 39,928–29 (stating that the purpose of the Reno Regulation is "eliminating the uncertainty and confusion arising from the variety of interpretations given to that rule and analogous rules by state and federal courts").

228. See *supra* notes 215–27 and accompanying text.

229. See *supra* notes 220–27 and accompanying text.

230. See *supra* notes 220–27 and accompanying text.

231. See generally 1996 Legislative Hearings, *supra* note 18.

232. See Communications with Represented Persons, 59 Fed. Reg. 39,927 (stating that, under the Act, it would be "left to the various state and federal district courts to interpret [ethics] rules and determine on their own whether they had been violated in any particular case").



because I have the answers, but because the answers are necessary to any consideration of this bill.<sup>233</sup>

There was no further discussion on this point.<sup>234</sup> Therefore, while the legislative history shows that those testifying on the Act raised the issue of judicial interpretation, it does not indicate any congressional intent as to which court system has ultimate interpretive authority under the Act.<sup>235</sup>

### C. *The Purposes and Policies of the McDade Amendment*

Unlike the plain text and legislative history of the McDade Amendment, which do little to answer the question over judicial interpretation of state ethics rules,<sup>236</sup> the underlying purposes and policies of the Act provide guidance on this issue. This section describes the arguments in favor of both federal and state court interpretation based on the purposes and policies of the Act. Part II.C.1 explains how the primary purposes of the McDade Amendment suggest that state courts' interpretations of ethics rules should be definitive as they apply to federal prosecutors. Part II.C.2 describes how federal prosecutors are unique as compared to state prosecutors and why this supports federal court interpretation. Finally, Part II.C.3 lays out why state courts' expertise in ethics regulation weighs in favor of state court interpretation.

#### 1. The Underlying Purposes of the McDade Amendment Support State Court Interpretation

The primary function of the McDade Amendment is to make federal prosecutors subject to state ethics rules.<sup>237</sup> Rules, however, mean little in our common law system standing alone.<sup>238</sup> Rather, rules get their meaning from judicial interpretation.<sup>239</sup> One may argue that making federal prosecutors subject to state ethics rules, but not states' interpretations of those rules, ignores the centrality of judicial interpretation to the meaning of rules in our common law system.

Further, under the McDade Amendment, federal courts may not trump state ethics rules with their own ethics regulations for federal prosecutors;<sup>240</sup> rather, the state rules govern.<sup>241</sup> If federal courts have definitive interpretive authority, they may adopt ethics rules for federal

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233. 1996 Legislative Hearings, *supra* note 18, at 47 (statement of Seth P. Waxman, Assoc. Deputy Att'y Gen., Dep't of Justice).

234. *See generally id.*

235. *See supra* notes 215–34 and accompanying text.

236. *See supra* Part II.A–B (discussing the Act's plain text and legislative history, respectively).

237. *See* 28 U.S.C. § 530B (2012); *see also supra* Part I.A.3 (explaining the Act).

238. *See* Barbara K. Bucholtz, *Rules, Principles, or Just Words? The Interpretive Project and the Problem of Legitimacy*, 11 TEX. WESLEYAN L. REV. 377, 379 n.5 (2005) (“[A]ll law, whether codified or customary requires interpretation or elaboration in particular court cases.”).

239. *See id.*

240. *See* 28 U.S.C. § 530B.

241. *See id.*

prosecutors through their opinions.<sup>242</sup> This would effectively allow federal courts to supersede state ethics rules with their own rules for federal prosecutors.<sup>243</sup> One may argue that allowing federal courts to essentially create rules through interpretation contradicts the McDade Amendment's prohibition on federal courts trumping state courts' ethics rules for federal prosecutors.<sup>244</sup>

Moreover, allowing federal courts to definitively interpret the rules may be inconsistent with the McDade Amendment's attempt to make federal prosecutors subject to the same ethics regulations as all attorneys.<sup>245</sup> Congress enacted the McDade Amendment in response to the Reno Regulation,<sup>246</sup> under which federal prosecutors had exempted themselves from certain ethics rules and created a specialized set of regulations applicable only to them.<sup>247</sup> Through the McDade Amendment, Congress prohibited this behavior.<sup>248</sup> Congress bound federal prosecutors to the same ethics rules as all other attorneys.<sup>249</sup> In so doing, Congress rejected the idea that federal prosecutors require a special set of ethics rules.<sup>250</sup>

Federal courts' interpretations of state ethics rules are generally not definitive.<sup>251</sup> One may argue that if federal courts are allowed to definitively interpret state ethics rules as they apply to federal prosecutors—where they do not definitively interpret state ethics rules as they apply to other attorneys—federal prosecutors are not truly subject to the same ethics rules as all other attorneys. Rather, under such a framework, federal prosecutors alone are bound by federal court interpretations of the ethics rules. Therefore, regarding federal courts' interpretations as definitive may be contrary to the function and purposes of the Act.<sup>252</sup>

## 2. The Uniqueness of Federal Prosecutors Supports Federal Court Interpretation

Even though the McDade Amendment rejected the idea that federal prosecutors require a distinct set of ethics regulations,<sup>253</sup> there is a strong

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242. *Cf. supra* notes 54–58 and accompanying text (explaining that federal courts regulate attorney ethics through common law decision making).

243. *Cf. supra* notes 54–58 and accompanying text.

244. *See supra* Part I.A.3 (explaining that the McDade Amendment seeks to apply *state* ethics rules to federal prosecutors).

245. *See* 28 U.S.C. § 530B; *see also supra* Part I.A.3. (describing the McDade Amendment).

246. 28 C.F.R. § 77 (1994). For an explanation of the Reno Regulation, *see supra* notes 82–86 and accompanying text.

247. *See supra* notes 64–90 and accompanying text.

248. *Cf.* 28 U.S.C. § 530B (requiring federal prosecutors to abide by *all* state ethics rules in the jurisdiction where they practice); *see also supra* Part I.A.3. (explaining the McDade Amendment).

249. *Cf.* 28 U.S.C. § 530B.

250. *See supra* notes 102–08 and accompanying text.

251. *See supra* Part I.B.2 (explaining that state courts interpret state ethics rules on their own).

252. *Cf.* 28 U.S.C. § 530B; *see also supra* Part I.A.3. (describing the McDade Amendment).

253. *See supra* notes 102–08 and accompanying text.

argument that federal prosecutors are, in fact, unique.<sup>254</sup> One may argue that allowing federal courts to definitively interpret state ethics rules accounts for this uniqueness while still complying with the McDade Amendment.<sup>255</sup> This argument posits that federal prosecutors are unique from state prosecutors in multiple ways,<sup>256</sup> federal litigation is distinct from state litigation,<sup>257</sup> and federal substantive law differs from state substantive law.<sup>258</sup> As a result, ethics rules apply differently to federal prosecutors than to state prosecutors<sup>259</sup> and operate differently in federal court than in state court.<sup>260</sup> To account for these differences, this argument suggests, ethics rules should be tailored to federal prosecutors and federal court.<sup>261</sup> However, this argument acknowledges that the McDade Amendment was enacted in part as a response to the Reno Regulation<sup>262</sup> and that federal prosecutors should not be able to exempt themselves from ethics rules as they did in that instance.<sup>263</sup> Therefore, this argument concludes that federal courts should tailor ethics rules through interpretation of state rules, and the McDade Amendment allows for this.<sup>264</sup>

Federal prosecutors are unique from state prosecutors in at least three ways.<sup>265</sup> First, as Senator Orrin Hatch emphasized when opposing the McDade Amendment, there are differences between the job of a federal and a state prosecutor.<sup>266</sup> Senator Hatch explained that federal prosecutors more often work on cases involving “complex, ongoing, conspiratorial conduct,”<sup>267</sup> for instance, cases of “multistate terrorism, drug, fraud or organized crime conspiracies . . . fraud against federally funded programs . . . [violations of] civil rights laws . . . complex corporate crime, and . . . environmental crime.”<sup>268</sup> Second, scholars have noted “[a] related distinction involv[ing] the context and mechanics of federal prosecutions.”<sup>269</sup> These scholars point out that federal prosecutors more often work across state lines, are more often personally involved in pre-indictment investigations, and more often use grand juries than state

254. *See infra* notes 265–80 and accompanying text.

255. *See infra* notes 300–04 and accompanying text.

256. *See infra* notes 265–80 and accompanying text.

257. *See infra* notes 282–88 and accompanying text.

258. *See infra* notes 289–91 and accompanying text.

259. *See infra* notes 276–81 and accompanying text.

260. *See infra* notes 283–88, 291 and accompanying text.

261. *See infra* notes 292–99 and accompanying text.

262. 28 C.F.R. § 77 (1994); *see supra* notes 64–90 and accompanying text (explaining the Reno Regulation and its history); *supra* notes 102–08 (describing how the McDade Amendment responded to the Reno Regulation).

263. *See infra* notes 300–04 and accompanying text.

264. *See infra* notes 300–04 and accompanying text.

265. *See* Green & Zacharias, *supra* note 63, at 235–42 (summarizing the many arguments for why federal prosecutors are different from state prosecutors).

266. *See* S. 250, 106th Cong. (1999); *see also* Green & Zacharias, *supra* note 63, at 237 (“Hatch relied upon a perceived distinction between the nature of the conduct that state and federal criminal laws cover.”).

267. Green & Zacharias, *supra* note 63, at 237.

268. *The Effect of State Ethics Rules: Hearing on S. 250 Before the Subcomm. on Criminal Justice Oversight*, 106th Cong. (1999) (Statement of Sen. Hatch).

269. *See, e.g.*, Green & Zacharias, *supra* note 63, at 237.

prosecutors.<sup>270</sup> Finally, there are differences in the executive offices that govern federal and state prosecutors.<sup>271</sup> Most states have multiple prosecutorial bodies, for instance statewide and local units, and these make up a fragmented collection of prosecutorial offices.<sup>272</sup> Additionally, the State Attorney General's Office usually oversees only portions of the state's prosecutions.<sup>273</sup> Therefore, no one state prosecutor's office may speak on behalf of all state prosecutors.<sup>274</sup> In comparison, the DOJ "represents the law enforcement authority for the entire federal executive branch" and "[i]ts positions are authoritative."<sup>275</sup>

Some argue that these distinctive qualities mean that ethics rules should apply differently to federal prosecutors than they do to state prosecutors.<sup>276</sup> For example, federal prosecutors themselves point to three ethics rules that hamper their ability to perform their official duties.<sup>277</sup> First, according to the DOJ, the no-contact rule hinders federal prosecutors' ability to carry out undercover investigations.<sup>278</sup> Second, the DOJ argues that rules limiting attorney subpoenas obstruct the government's effective use of grand juries.<sup>279</sup> Third, the DOJ maintains that interpretations of ethics rules requiring prosecutors to share exculpatory evidence with grand juries interfere with the unique federal interests in grand jury proceedings.<sup>280</sup> In each of these cases, the DOJ contends that the distinctive qualities of federal prosecutors mean that ethics rules apply more onerously to federal government attorneys than to state prosecutors. Despite this, no state's ethics rules distinguish between federal and state prosecutors or provide different rules for the two groups.<sup>281</sup>

In addition to federal prosecutors being unique as compared to state prosecutors, federal litigation is different from state litigation in important ways.<sup>282</sup> Some of these differences are relevant to the regulation of prosecutors.<sup>283</sup> For instance, in some states, counsel may accompany a witness in grand jury proceedings and provide advice throughout.<sup>284</sup>

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270. *See id.*

271. *See id.* at 241.

272. *See id.*

273. *See id.*

274. *See id.*

275. *Id.*

276. *See, e.g., id.* at 238 (explaining that the uniqueness of federal prosecutors means that "a restriction may be reasonable for the state's prosecutors, while being inappropriate for federal prosecutors"); Green & Zacharias, *supra* note 30, at 426–31 (arguing that ethics rules apply differently to federal prosecutors in some situations); *cf.* Harvard Note, *supra* note 136, at 2083 ("Many ethics rules hold implications for federal prosecutors that are not raised by their application to attorneys more generally.").

277. *See* Harvard Note, *supra* note 136, at 2083–84.

278. *See id.* at 2084.

279. *See id.*

280. *See id.*

281. *See* Green & Zacharias, *supra* note 30, at 394.

282. *See id.* at 428–29.

283. *See id.*

284. *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE 486–87 (3d ed. 2000); *see also* Kathryn E. White, Note, *What Have You Done with My*

Federal grand jury proceedings do not provide for this.<sup>285</sup> The absence of this protection in federal court may justify additional ethical obligations for federal prosecutors—for example, a duty to advise the witness of the right against self-incrimination or to take care not to mislead the witness.<sup>286</sup> Additionally, federal court itself differs from state court, and these differences may affect ethics regulation.<sup>287</sup> For example, differences in the courts' workloads may affect how much time judges have to address ethics issues and how great of an interest courts have in easily applied, predetermined ethics rules.<sup>288</sup>

Finally, federal substantive law differs from state substantive law. Substantive law and ethics regulations often interplay.<sup>289</sup> Federal courts are arguably more expert on federal law than state courts.<sup>290</sup> Moreover, state courts may not consider the implications ethics regulations have on federal substantive law.<sup>291</sup>

The distinctiveness of federal prosecutors, federal courts, and federal law, and the differences in how ethics rules apply in these situations, has led some to argue that federal prosecutors should be regulated differently than other attorneys. Importantly, some have advocated for different ethics rules for federal prosecutors because they are unique and because ethics rules apply differently to them.<sup>292</sup> This was one of the DOJ's reasons for the Reno Regulation that led to the McDade Amendment in the first place.<sup>293</sup> Similarly, arguments for distinct ethics regulations for federal prosecutors drove the opposition to the McDade Amendment in Congress.<sup>294</sup> Arguments that federal prosecutors should have special ethical obligations did not end when the McDade Amendment was enacted, though. Rather, scholarly conversation continues over whether the uniqueness of federal prosecutors warrants a distinct set of ethics regulations for this group.<sup>295</sup>

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*Lawyer?: The Grand Jury Witness's Right to Consult with Counsel*, 32 LOY. L.A. L. REV. 907, 935–36 (1999).

285. See Green & Zacharias, *supra* note 30, at 429.

286. See *id.*

287. See *id.*

288. See *id.*

289. See *id.* at 430.

290. See *id.*

291. See *id.*

292. See *infra* notes 293–95 and accompanying text.

293. See *supra* notes 64–90 and accompanying text (explaining the Reno Regulation and how it led Congress to enact the McDade Amendment).

294. See *supra* notes 103–09, 217, 250 and accompanying text (explaining that the DOJ opposed the McDade Amendment because of a belief that federal prosecutors required specialized ethics rules).

295. See, e.g., Stephen B. Burbank, *State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform*, 19 FORDHAM URB. L.J. 969, 974 (1992) (advocating for the creation of a federal ethics regime); Green & Zacharias, *supra* note 63, at 237 (exploring whether distinctions between federal and state prosecutors justify separate ethics regulations and stating “[t]o the extent federal cases truly tend to be more complex than state cases, there thus may be grounds for applying different ethical standards to the prosecutors involved”); Harvard Note, *supra* note 136, at 2081, 2095–97 (arguing that “Congress and the federal courts must remain involved in crafting reasoned exceptions to state ethics rules for federal prosecutors”); Gregory B. LeDonne, Note, *Revisiting the McDade Amendment:*

Some scholars have also argued that the differences between federal and state court prosecutors, litigation, and substantive law mean that federal courts should regulate federal prosecutors.<sup>296</sup> First, the uniqueness of federal prosecutors has led some scholars to argue that federal courts are better situated to regulate this group.<sup>297</sup> Additionally, some scholars have argued that federal courts are better suited to regulate federal prosecutors in areas where federal litigation is distinctive because federal courts understand federal litigation better than state courts.<sup>298</sup> Finally, some scholars argue that “[w]hen federal constitutional law or substantive federal law is important to the question of how federal prosecutors should be regulated, federal courts should be free to address the regulatory question independently.”<sup>299</sup>

The view that federal prosecutors should have a distinct ethics regime was rejected by the McDade Amendment.<sup>300</sup> However, one way to accomplish ethics rules that are tailored to the needs of federal prosecutors without completely doing away with the McDade Amendment may be to allow federal courts to interpret state ethics rules as they apply to federal prosecutors. This approach keeps the McDade Amendment intact by applying state ethics rules to federal prosecutors.<sup>301</sup> At the same time, it allows federal courts to use their expertise regarding federal prosecutors, litigation, and law when interpreting ethics rules and to interpret the rules with the uniqueness of federal prosecutors and litigation in mind.<sup>302</sup> Allowing federal courts definitive interpretive authority strikes a balance between complying with the McDade Amendment<sup>303</sup> and accounting for the distinctiveness of federal prosecutors, litigation, and law.<sup>304</sup>

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*Finding the Appropriate Solution for the Federal Government Lawyer*, 44 HARV. J. ON LEGIS. 231, 232, 242–44 (2007) (proposing “the creation of a Federal Rules of Ethical Procedure that would be similar to the previous federal rules projects in the areas of civil procedure, criminal procedure, and evidence” and “which would be applicable to all lawyers practicing in federal courts”); Ted Schneyer, Comment, *Professional Discipline in 2050: A Look Back*, 60 FORDHAM L. REV. 125, 127 (1991) (supporting the creation of federal ethics rules).

296. See *infra* notes 297–99 and accompanying text.

297. For example, Professors Green and Zacharias argue that “Federal courts . . . are likely to be better regulators of federal prosecutors when there is something distinctively federal about the regulation—situations in which federal courts have superior access to relevant information, greater experience in dealing with the prosecutorial conduct in question, or a better feel for the potential impact of regulation.” Green & Zacharias, *supra* note 30, at 426.

298. See, e.g., *id.* at 426–27.

299. See *id.* at 430.

300. Cf. 28 U.S.C. § 530B (2012); see also *supra* notes 102–08 and accompanying text (explaining the underlying purposes of the Act).

301. See 28 U.S.C. § 530B; see also *supra* Part I.A.3 (describing the functions and purposes of the Act).

302. See *supra* notes 265–99 and accompanying text.

303. See *supra* Part II.A.3 (describing the directive and purposes of the McDade Amendment).

304. See *supra* notes 265–99 and accompanying text.

### 3. State Courts' Expertise in Ethics Supports State Court Interpretation

While federal courts are expert in federal prosecutors, litigation, and law,<sup>305</sup> state courts have “acknowledged expertise in the area of legal ethics.”<sup>306</sup> One may argue that this expertise in ethics regulation means that state courts should be definitive for purposes of interpreting ethics rules as they apply to federal prosecutors.<sup>307</sup> Further, states’ expertise in ethics regulation suggests that state courts are able to tailor ethics rules to account for the uniqueness of federal prosecutors when necessary.<sup>308</sup>

Historically, states have always been responsible for ethics regulation.<sup>309</sup> Today, states remain largely in charge of regulating attorney ethics, including federal prosecutors’ ethics.<sup>310</sup> States regulate attorneys, including federal prosecutors, in three primary ways.<sup>311</sup> First, federal courts rely on state courts to determine if applicants to their bar are qualified.<sup>312</sup> Federal courts do not conduct their own bar examinations or character investigations, but rather require attorneys appearing before them to be members of a state bar.<sup>313</sup> Second, the majority of federal district courts adopt the ethics provisions of the states where they are located.<sup>314</sup> Finally, federal courts rely on states to discipline attorneys who violate the ethics rules.<sup>315</sup> State disciplinary bodies enforce ethics violations through proceedings for attorney sanctions and disbarment.<sup>316</sup>

State courts are also more familiar with prosecutorial conduct than federal courts.<sup>317</sup> Criminal cases are tried in state court far more frequently than in federal court.<sup>318</sup> Therefore, state court judges have more opportunities to witness prosecutorial conduct that is subject to ethics rules and to see the impact of these rules on prosecutors and criminal cases.<sup>319</sup>

305. *See supra* Part II.C.2.

306. *See Green & Zacharias, supra* note 63, at 244 n.182; *see also infra* notes 309–20 and accompanying text.

307. *See infra* notes 321–23 and accompanying text.

308. *See infra* notes 324–28 and accompanying text.

309. *See Green & Zacharias, supra* note 30, at 419 (“The practice of law historically has been regulated by the states.”); Andrew L. Kaufman, *Who Should Make the Rules Governing Conduct of Lawyers in Federal Matters*, 75 TUL. L. REV. 149, 162 (2000) (“It is appropriate to recognize the historical lodging of control of attorney behavior in the state systems . . .”).

310. *See Green & Zacharias, supra* note 63, at 244 n.182; *see also supra* Part I.A.1.

311. *See Green & Zacharias, supra* note 30, at 419.

312. *See Green & Zacharias, supra* note 63, at 244 n.182; *see also Green & Zacharias, supra* note 30, at 419–20.

313. *See Green & Zacharias, supra* note 63, at 244 n.182; *see also Green & Zacharias, supra* note 30, at 419–20.

314. *See Green & Zacharias, supra* note 63, at 244 n.182; *see also Green & Zacharias, supra* note 30, at 420; *supra* Part I.A.1.

315. *See Green & Zacharias, supra* note 63, at 244 n.182; *see also Green & Zacharias, supra* note 30, at 420.

316. *See Green & Zacharias, supra* note 63, at 244 n.182; *see also Green & Zacharias, supra* note 30, at 420.

317. *See Green & Zacharias, supra* note 30, at 422 (“State courts are likely to have a greater familiarity than federal district courts with the professional conduct of lawyers, including prosecutors.”).

318. *See id.*

319. *See id.*

Additionally, states hold disciplinary proceedings more often, and these “provide another window into the need for and impact of ethics regulation—one that is essentially unavailable to federal courts.”<sup>320</sup>

State courts’ expertise in ethics regulation and greater familiarity with attorney conduct suggests that state courts may be best situated to interpret state ethics rules.<sup>321</sup> Because state courts are the authority on ethics regulation,<sup>322</sup> they likely best understand ethics rules and their impact on the legal system. Further, state judges’ greater familiarity with both prosecutorial conduct and the interplay between this conduct and ethics rules<sup>323</sup> may mean that state judges are better situated to interpret the ethics rules as they apply to all prosecutors, including federal prosecutors.

Moreover, if one accepts that the uniqueness of federal prosecutors warrants some form of specialized regulation under the ethics rules and that the McDade Amendment allows for this through judicial interpretation,<sup>324</sup> there is reason to trust that state courts, and not just federal courts, are able to tailor the rules to the needs of federal prosecutors.<sup>325</sup> State courts have long played a central role in the ethical regulation of federal attorneys.<sup>326</sup> Therefore, they understand the ethics issues facing this group.<sup>327</sup> This means that state courts, in addition to federal courts, are likely capable of interpreting ethics rules with the uniqueness of federal prosecutors in mind.<sup>328</sup>

The purposes and policies underlying the McDade Amendment point in different directions, suggesting reasons to favor both state and federal courts as the final interpreter of ethics rules.<sup>329</sup> The primary purposes of the Act suggest that state courts’ interpretations should be definitive.<sup>330</sup> Despite this, there is an argument to be made that federal prosecutors are unique such that the ethics rules apply differently to them and that federal courts can, and should, account for this uniqueness through interpretation.<sup>331</sup> At the same time, state courts are expert in ethics regulation and attorney conduct, and there is reason to believe that state

320. *Id.*

321. *See id.* at 421 (“Given the regulatory tradition assigning state courts the lead in regulating lawyers, it makes sense for federal courts to accept state law as a starting point for the oversight of federal prosecutors in their role as lawyers.”).

322. *See supra* notes 309–16 and accompanying text.

323. *See supra* notes 317–20 and accompanying text.

324. *See supra* Part II.C.2.

325. *See Green & Zacharias, supra* note 63, at 244 n.182. (“Given their acknowledged expertise in the area of legal ethics, one would think that states would be well qualified to draw ethical distinctions between federal and state prosecutors.”).

326. *See supra* notes 309–16.

327. *Cf. Green & Zacharias, supra* note 63, at 244 n.182 (“[O]ne could fairly argue that states have the most expertise in deciding issues relevant to whether state and federal prosecutors should be treated the same.”).

328. *Cf. id.*

329. *Compare supra* Part II.C.1, II.C.3 (describing arguments in favor of state court interpretation), *with supra* Part II.C.2 (laying out arguments in favor of federal court interpretation).

330. *See supra* Part II.C.1.

331. *See supra* Part II.C.2.



courts are also able to specially tailor ethics rules for federal prosecutors when necessary.<sup>332</sup>

### III. STATE COURTS SHOULD HAVE DEFINITIVE AUTHORITY TO INTERPRET STATE ETHICS RULES AS THEY APPLY TO FEDERAL PROSECUTORS

State courts should be definitive when it comes to interpreting ethics rules as they apply to federal prosecutors. As such, federal courts should defer to state courts' interpretations of ethics rules. This part explains why state courts' interpretations should be regarded as definitive and proposes a framework for federal courts to defer to state courts' interpretations.

The plain text and legislative history of the McDade Amendment do not answer which court system has the final say on interpretation.<sup>333</sup> Therefore, it is necessary to look beyond these sources to the policies and purposes of the Act.<sup>334</sup> The policies and purpose of the McDade Amendment dictate that state courts are properly regarded as the authoritative interpreters of ethics rules as they apply to federal prosecutors.

First, reading the McDade Amendment's directive that federal prosecutors comply with state ethics rules to exclude state courts' interpretations of those rules is overly formalistic.<sup>335</sup> Such a reading ignores the centrality of judicial interpretation to the meaning of rules in the U.S. common law system.<sup>336</sup> Although the plain text of the McDade Amendment only states that federal prosecutors are subject to state ethics rules,<sup>337</sup> the McDade Amendment was really meant to apply entire state ethics regimes to federal prosecutors.<sup>338</sup> This includes state courts' interpretations of the rules in addition to the rules themselves. To read the Act any other way subverts its most primary function: to apply state ethics regimes to federal prosecutors.<sup>339</sup>

Moreover, regarding federal court interpretations as definitive undermines the implicit assumptions of the McDade Amendment. The Act responded to federal prosecutors' attempts to exempt themselves from ethics rules and create a specialized set of rules applicable to only them.<sup>340</sup> The Act emphatically rejected this, and instead made federal prosecutors

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332. *See supra* Part II.C.3.

333. *See supra* Part II.A (illustrating how the plain text of the Act does not answer the question over interpretation); *supra* Part II.B (explaining that the Act's legislative history also does not solve this issue).

334. *See supra* Part II.C.

335. *See supra* notes 238–41 and accompanying text.

336. *See supra* notes 238–41 and accompanying text.

337. *See* 28 U.S.C. § 530B (2012).

338. *See supra* Part I.A.2 (explaining the historical background of the McDade Amendment); *supra* notes 99–108 and accompanying text (explaining the purpose of the McDade Amendment).

339. *See supra* Part I.A.3 (explaining the function and purposes of the McDade Amendment).

340. *See supra* notes 82–83 and accompanying text (explaining that, through the Reno Regulation, federal prosecutors attempted to exempt themselves from ethics rules); *see also supra* notes 64–90 and accompanying text (summarizing the controversy over the DOJ and the no-contact rule).

subject to the same ethics rules as all other attorneys.<sup>341</sup> Therefore, implicit in the McDade Amendment is the idea that there is nothing unique about federal prosecutors that requires special ethical regulations.<sup>342</sup> Regarding federal courts' interpretations as definitive as they apply to federal prosecutors, but not to attorneys generally,<sup>343</sup> suggests just the opposite—that federal prosecutors require special treatment.<sup>344</sup> This contravenes the McDade Amendment's most basic assumption.<sup>345</sup>

Most of all, regarding federal court interpretations as definitive thwarts the Act's most basic function: to subject federal prosecutors to the same ethics rules as all other attorneys.<sup>346</sup> Federal courts do not definitively interpret state ethics rules under ordinary circumstances.<sup>347</sup> Allowing federal courts to definitively interpret the rules only as they apply to federal prosecutors subjects federal prosecutors to a separate and specialized set of ethics rules—the rules as interpreted by federal courts.<sup>348</sup> This turns the McDade Amendment on its head.<sup>349</sup>

Conversely, the only policy justification for giving federal courts the ultimate authority to interpret state ethics rules conflicts with the underlying purpose of the Act. The primary justification for giving federal courts definitive interpretive power is that they have greater expertise regarding federal attorneys, federal litigation, and federal law.<sup>350</sup> According to this justification, federal courts are therefore better able to interpret state ethics rules as they apply to federal prosecutors.<sup>351</sup> This argument, however, assumes that ethics rules apply differently to federal prosecutors and that these differences should be considered when applying the rules.<sup>352</sup> This is the very logic that Congress rejected in enacting the McDade Amendment.<sup>353</sup> Therefore, the only justification for federal court interpretation must fail because it is in conflict with the spirit of the Act.

Even if one believes that the McDade Amendment allows courts to consider the uniqueness of federal prosecutors when interpreting ethics rules,<sup>354</sup> state courts are perfectly capable of doing so.<sup>355</sup> There is no reason to think that state courts cannot make distinctions between federal and state prosecutors when applying ethics rules.<sup>356</sup> In fact, state courts'

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341. See 28 U.S.C. § 530B; see also *supra* Part I.A.3 (describing the Act); *supra* notes 102–08 and accompanying text (explaining the purposes of the McDade Amendment).

342. See *supra* notes 102–08 and accompanying text.

343. See *supra* notes 251–52 and accompanying text.

344. See *supra* notes 245–52 and accompanying text.

345. See *supra* notes 102–08 and accompanying text.

346. See *supra* Part I.A.3.

347. See *supra* note 251 and accompanying text.

348. See *supra* notes 245–52 and accompanying text.

349. See *supra* notes 102–08 and accompanying text (explaining the underlying purposes of the Act).

350. See *supra* Part II.C.2.

351. See *supra* Part II.C.2.

352. See *supra* Part II.C.2.

353. See *supra* Part I.A.2–3.

354. See *supra* Part II.C.2.

355. See *supra* notes 325–59 and accompanying text.

356. See *supra* notes 325–59 and accompanying text.

expertise on attorney conduct and ethics regulation,<sup>357</sup> and the frequency with which they observe prosecutorial behavior,<sup>358</sup> suggests they are particularly well suited to perform this task. Therefore, there is little merit to the assertion that only federal courts, with their expertise on federal attorneys and litigation, can appropriately apply ethics rules to federal prosecutors.<sup>359</sup>

Moving beyond the purposes of the Act, there are practical reasons to regard state courts' interpretations of ethics rules as definitive. First, state courts have greater expertise regarding attorney ethics, and this makes state courts better suited than federal ones to interpret ethics rules.<sup>360</sup> Second, allowing federal courts ultimate interpretive authority is impractical. Under the McDade Amendment, federal courts may not make ethics rules that trump state ones.<sup>361</sup> If federal courts are given definitive interpretive authority, a federal court may interpret an ambiguous rule so as to effectively change it.<sup>362</sup> Federal courts should not be allowed to do through common law interpretation what they cannot do through rulemaking. Moreover, the McDade Amendment gives the states the ability to regulate attorney ethics over time.<sup>363</sup> This is a fluid process, allowing states to change ethics rules as needed.<sup>364</sup> If federal courts are given definitive interpretive authority, a federal court may interpret an ambiguous rule and a state may change that rule in response to the federal court's interpretation. The state could continue to revise the rule until the federal court had no room to change it through its own interpretation. Therefore, even if federal courts were given ultimate interpretive power, the states would still have the final say on ethics rules.

In order to properly regard state courts as the definitive authority on ethics rule interpretation, federal courts should exercise *Erie*-style deference<sup>365</sup> to state court interpretations, treating them as they do state law in diversity jurisdiction cases.<sup>366</sup> This is presumptively a feasible framework, because some federal courts did exactly this before the McDade Amendment was enacted when adopting state ethics rules into their own local rules.<sup>367</sup> It is inapposite that this was not the majority approach amongst courts that adopted state ethics rules.<sup>368</sup> Before the McDade Amendment was enacted, this deference was not required. However, the McDade Amendment changed the entire framework for regulating federal

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357. *See supra* notes 306–16 and accompanying text.

358. *See supra* notes 317–20 and accompanying text.

359. *See supra* Part II.C.2.

360. *See supra* Part II.C.3.

361. *See supra* note 240 and accompanying text.

362. *See supra* notes 240–44 and accompanying text.

363. *See supra* Part I.A.3.

364. *See supra* Part I.A.3.

365. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

366. *See id.* (establishing and describing this framework).

367. *See supra* notes 45–47 and accompanying text.

368. *See supra* notes 48–51 and accompanying text.

prosecutors,<sup>369</sup> and this new ethics regime requires deference to state court interpretations.

When faced with an ambiguous ethics rule in a case concerning federal prosecutors, a federal court should apply the interpretation adopted by the state court in its jurisdiction.<sup>370</sup> Where the state court has previously interpreted the ethics rule, the federal court should apply the state court's interpretation to federal prosecutors in cases before it.<sup>371</sup> This is the same principal that the *Erie*<sup>372</sup> doctrine requires when a federal court hears a case through diversity jurisdiction: the federal court applies state substantive law in matters governed by state statutes and common law.<sup>373</sup>

Where a federal court is tasked with interpreting a state ethics rule that the state court in its jurisdiction has not yet interpreted, the federal court should similarly behave as it would in a diversity jurisdiction case.<sup>374</sup> The federal court should try to ascertain how the state court would interpret the rule, and it should adopt this interpretation.<sup>375</sup> As in diversity jurisdiction cases, in order to ascertain how the state court would rule, the federal court should use the sources that the state high court frequently uses to answer interpretive questions.<sup>376</sup> These may include other courts' decisions, restatements, academic works, treatises, and policy considerations.<sup>377</sup> The federal court may also rely on trends of the state high court, for example, a tendency to follow majority rules.<sup>378</sup>

This framework leaves room for courts to account for the unique role and needs of federal prosecutors through interpretation of the ethics rules, while remaining true to the McDade Amendment. Where a federal court perceives that there is a difference between federal and state prosecutors, it may make distinctions between the two through its interpretation if the state court has done so or if it believes the state court would be willing to do so. This creates the flexibility needed to account for the uniqueness of federal prosecutors,<sup>379</sup> while following the McDade Amendment's directive that federal prosecutors are subject to state ethics regimes<sup>380</sup> and honoring the Act's rejection of a separate regulatory framework for federal prosecutors.<sup>381</sup>

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369. *See supra* Part I.A.

370. *Cf. Erie*, 304 U.S. 64.

371. *Cf. id.*

372. *Id.*

373. *See id.*

374. *See, e.g.,* *Webber v. Sobba*, 322 F.3d 1032 (8th Cir. 2003).

375. *See id.*

376. *See id.*

377. *See id.*

378. *See id.*

379. *See supra* Part II.C.2.

380. *See* 28 U.S.C. § 530B (2012); *see also supra* Part I.A.3.

381. *See supra* Part I.A.2–3.

## CONCLUSION

The McDade Amendment was enacted to prevent federal prosecutors from playing by their own set of ethics rules. The Act also responded to complaints from the DOJ that federal prosecutors were unsure of which ethics rules applied to them. Therefore, the McDade Amendment made federal prosecutors subject to state ethics rules. The Act left unresolved, however, the question of which courts—federal or state—are definitive for purposes of interpreting ethics rules as they apply to federal prosecutors. Because of this, the McDade Amendment falls short of both of its purposes. First, allowing federal courts to definitively interpret state ethics rules as they apply to federal prosecutors effectively subjects federal prosecutors to a separate rule regime—one made up of state rules, as interpreted by federal courts. Second, it has fostered uncertainty as to which interpretations of the rules apply, similar to the uncertainty that the Act set out to remedy in the first place.

In order to honor the spirit of the McDade Amendment and conform to its underlying purposes, state courts' interpretations of ethics rules should be definitive as applied to federal prosecutors. Therefore, federal courts should defer to state courts' interpretations of ethics rules in matters regarding federal prosecutors. Federal courts should do so by exercising *Erie*-style deference to state court interpretations. Only by doing so will the purpose of the McDade Amendment be realized.