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Case Number: 2009-1007-F

FOIA MARKER

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Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	Handwritten note (1 page)	nd	P2, P5
002. list	Second Circuit - New York (1 page)	nd	P2, P5
003. list	Second Circuit - New York (2 pages)	1/31/96	P2, P5
004. list	Old List 1994 (2 pages)	nd	P2, P5
005. list	Second Circuit - New York (1 page)	nd	P2, P5
006. article	New York Law Journal May 27, 1994 (4 pages)	05/27/94	P2, P5
007. article	New York Law Journal, September 22, 1995 (2 pages)	09/22/95	P2, P5
008. article	New York Law Journal, November 18, 1993 (2 pages)	11/18/93	P2, P5
009. article	New York Law Journal, December 14, 1995 (6 pages)	12/14/95	P2, P5
010. article	New York Law Journal, October 14, 1993 (1 page)	10/14/93	P2, P5
011. letter	Mary Jo White to Sonia Sotomayor (10 pages)	02/02/1996	P2, P5, P6/b(6)
012. letter	Sonia Sotomayor to Peter Erichsen (1 page)	03/13/1996	P2

COLLECTION:
Clinton Presidential Records
Counsel's Office
Peter Erichsen
OA/Box Number: CF 934

FOLDER TITLE:
Second Circuit-New York

2009-1007-F
ry701

RESTRICTION CODES

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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

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008. article	New York Law Journal, November 18, 1993 (2 pages)	11/18/93	P2, P5

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RETURNING MAJESTY TO THE LAW: A MODERN APPROACH[1]

by Sonia Sotomayor[2] and Nicole A. Gordon[3]

Even after participating in many different aspects of the practice of law, it is still possible to retain an enthusiasm and love for the law and its practice. It is also exciting to address future lawyers about the practice of law. This is not easy to do, unfortunately, in the context of recurring public criticism about the judicial process.

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[1]This speech was delivered as part of the Donahue Lecture Series at Suffolk University Law School on February 5, 1996.

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[3] **Executive Director, New York City Campaign Finance Board; A.B., Barnard College, 1974; J.D., Columbia University School of Law, 1977. Ms. Gordon has previously served in other private and government positions, including as Counsel to the Chairman of the New York State Commission on Government Integrity. She is also the current President of the Council on Governmental Ethics Laws, the umbrella organization for ethics, lobbying, campaign finance, and freedom of information agencies in the United States and Canada.

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The public expects the law to be static and predictable. The law, however, is uncertain and responds to changing circumstances. To the public, justice means that an obviously correct conclusion will be reached in every case. But what is "correct" is often difficult to discern when the law is attempting to balance competing interests and principles, such as the need to protect society from drugs as opposed to the need to enforce our constitutional right to be free from illegal searches and seizures. A confused public, finding itself at odds with the results of particular judicial decisions, experiences increased cynicism about the law.

Unfortunately, lawyers themselves sometimes feed that cynicism, by joining a chorus of critics of the system, instead of helping to reform it or helping the public to understand the conflicting factual claims and legal principles involved in particular cases. Similarly, instead of attempting to control criminal or unethical conduct occurring in our profession and promoting the honorable work of most of us, many lawyers respond

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by denigrating the professionals in certain practice areas, like personal injury law, without focusing on the core issues that rightly trouble the public, such as whether there is fraud and deceit in the prosecution of claims, and if so, what we should do about it.

Today we will talk about how we can try to satisfy societal expectations about "the Law" and help create a better atmosphere in which our public officials, and especially lawyers and judges, can inspire more confidence and respect for the "majesty of the law" and for the people whose professional lives are devoted to it.

I.

The Law As A Dynamic System

The law as practiced by lawyers and declared by judges is not a definitive, capital "L" law that many would like to think exists. In his classic work, Law and the Modern Mind, Jerome Frank aptly summarized the paradox existing in society's attitude toward law and its practitioners:

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> The lay attitude towards lawyers is a compound of contradictions, a mingling of respect and derision. Although lawyers occupy leading positions in government and industry, although the public looks to them for guidance in meeting its most vital problems, yet concurrently it sneers at them as tricksters and quibblers.
>
> Respect for the bar is not difficult to explain. Justice, and the protection of life, the sanctity of property, the direction of social control--these fundamentals are the business of the law and of its ministers, the lawyers....
>
> But coupled with a deference toward their function there is cynical disdain of the lawyers themselves.... The layman, despite the fact that he constantly calls upon lawyers for advice on numerous questions, public and domestic, regards lawyers as equivocators, artists in double-dealing, masters of chicane.[4]

Frank, a noted judge of the Court of Appeals for the Second Circuit and a founder of the school of "Legal Realism"[5], postulated that the public's distrust of lawyers arises because the law is "uncertain, indefinite, [and] subject to incalculable changes"[6], and the public instead needs and wants certainty and

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[4] Jerome Frank, Law and the Modern Mind, 1 (Anchor Books 1963) (1930).

[5] Frank in his Preface to the Sixth Printing of Law and the Modern Mind took issue with the notion that his theories and their advocates constituted a school. Instead, Frank preferred to be viewed as a "factual realist" or as he described himself, a "fact skeptic" as opposed to a "rule skeptic". Id. at xii.

[6] Id. at 5.

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clarity from the law. Because a lawyer's work entails changing factual patterns presented within a continually evolving legal construct, it appears to the public that lawyers obfuscate and distort what should be clear. Frank, however, pointed out that the very nature of our common law is based upon the lack of certainty:

> The constant development of unprecedented problems requires a legal system capable of fluidity and pliancy. Our society would be strait-jacketed were not the courts, with the able assistance of the lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial and political conditions; although changes cannot be made lightly, yet law must be more or less impermanent, experimental and therefore not nicely calculable. Much of the uncertainty of law is not an unfortunate accident: it is of immense social value.[7]

Frank believed that in the complex, fast-paced modern era, lawyers do themselves a disservice by responding to the public myth that law can be certain and stable. He advocated that lawyers themselves accept the premise that law is not a fixed concept and that change in the law is inevitable and to be welcomed:

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[7] Id. at 6-7. (Emphasis in original (?))

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> Without abating our insistence that the lawyers do the best they can, we can then manfully [sic] endure inevitable shortcomings, errors and inconsistencies in the administration of justice because we can realize that perfection is not possible.[8]

Frank's thesis, set forth in 1930, should continue to be examined today. It supports a pride that lawyers can take in what they do and how they do it. The law can change its direction 180°, as it did when Brown v. Board of Education[9] overturned Plessy v. Ferguson[10], or as the common law has done by altering the concept of products liability directly contrary to the originally restricted view that instructed, "caveat emptor". As the Brown case shows, change -- sometimes radical change -- can and does happen in a legal system that serves a society whose social policy itself changes. It is our responsibility to explain to the public how an often unpredictable system of justice is one that serves a productive, civilized, but always evolving, society.

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[8] Id. at 277.

[9] 347 U.S. 483 (1954).

[10] 163 U.S. 537 (1896).

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Lawyers must also continuously explain some of the varied reasons for the law's unpredictability: First, as Frank explains[11], laws are written generally and then applied to different factual situations. The facts of any given case may not be clear or within the original contemplation of the law when written. Second, many laws as written give rise to more than one interpretation (or, as happens among the circuit courts, differing or even majority and minority views). Third, a given judge (or judges) may see and develop a novel approach to a specific set of facts or legal framework that pushes the law in a new direction. Fourth, the function of the law at a trial is not only to search for truth, as understood by the public, but it is to conduct that search limited and sometimes undermined by the need to protect constitutional rights.[12] Against these and other

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[11] Frank, supra note 7, at xii.

[12] See, e.g., United States v. Filani, Nos. 95-1051, 73, 1996 WL 15919, at *6 (2d Cir. Jan. 11, 1996) ("One of the reasons for allowing an English judge greater latitude to interrogate witnesses is that a British trial, so it is said, is a search for the truth. In our jurisprudence a search for the truth is only one of the trial's goals; other important values--individual freedom being a good example--are served by an attorney

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uncertainties, including, as Frank observed, the vagaries of which "facts" a judge or jury will credit,[13] competent lawyers are often unable to predict reliably what the outcome of a particular case will be for their clients.

This necessary state of flux, as well as our reliance on the adversary system, give rise to a cynicism expressed by Benjamin Franklin in the mid-seventeen hundreds, but equally reflective of the public mood today:

> I know you lawyers can with ease
> Twist words and meanings as you please;
> That language, by your skill made pliant,
> Will bend, to favor every client;
> That 'tis the fee limits the sense
> To make out either side's pretense,
> When you peruse the clearest case,
> You see it with a double face,
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> . . .
>
> Hence is the Bar with fees supplied;
> Hence eloquent takes either side;
>
> . . .
>
> <u>And now we're well secured by law,</u>

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insisting on preserving the accused's right to remain silent or by objecting to incriminating evidence seized in violation of an accused's Fourth Amendment rights. The successful assertion of these rights does not aid--and may actually impede--the search for truth.").

[13] Frank, <u>supra</u> note 7, at xiv.

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till the next brother find a flaw.[14]

This image raises perhaps the greatest fear about the role of law and lawyers: that on the same facts, and presented with the same law, two judges or two juries would reach different results in the same case because of a lawyer's presentation. Whether the concern is that only the rich can afford the best lawyers, or simply that the more "eloquent" attorney can get a better result, it is an intimidating possibility to a public that seeks certainty and justice from the law. From the vantage of a judge, however, it is not a correct or complete picture of what happens in the courtroom. In extreme cases, of course, a lawyer (or a judge or a jury) can be entirely incompetent or otherwise entirely fail to do a proper job. But in general, even the best-paid and most competent lawyers can only put "spin on the ball". To the extent judges and juries come to different results, much more, as Frank observed, may be attributable to the fact that judges and juries have different reactions to facts based on

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[14] Benjamin Franklin, Poor Richard's Opinion, in Law: A Treasury of Art and Literature, supra note 14, at 151.

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their life experiences.[15] Working from the same facts and within the confines of the same law, however, gross disparities in result do not frequently occur.[16] But the law does evolve, and to assist its evolution and at the same time maintain credibility, lawyers must dispel the view that they are dishonest, dissembling, hypocritical, or that Franklin's derisive description correctly characterizes the situation.

Frank's book suggests that the public fails to appreciate the importance of indefiniteness in the law. This may well be true, and education by public officials and lawyers should be the response to this misapprehension. But there are other needs of the public relating to the law: the need, for example, for lawyers to act honorably, beyond what any law,

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[15] Frank, supra note 7, at xii-xiii.

[16] This conclusion is based both on personal experience as a judge and on the statistically small number of jury verdicts set aside or new trials ordered by judges. Of course, caselaw principles require that jury verdicts be given a great deal of deference. See Dunlap-McCuller v. Riese Org., 980 F.2d 153, 158 (2d Cir. 1992); Smith v. Lightning Bolt Prods., 861 F.2d 363, 370 (2d Cir. 1988); Binder v. Long Island Lighting Co., 57 F.3d 193, 201; Piesco v. Koch, 12 F.3d 332, 345 (2d Cir. 1993).

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regulation, or professional rule may require, and this need requires a different response.

II.

Morality in Public Service

What are our expectations of lawyers, judges, and of public servants generally? Over the years, the response to scandal and disappointment in our public officials and in lawyers has been to pass laws and regulations intended to curb unworthy behavior. Yet this may not always be adequate. Indeed, some would argue that reliance on regulations alone defuses the notion of personal responsibility and accountability.

Charles Dickens on a visit to the United States in the eighteen hundreds described his sorrow when confronted with the American approach to regulating gifts to public servants:

> The Post Office is a very compact and very beautiful building. In one of the departments, among a collection of rare and curious articles, are deposited the presents which have been made from time to time to the American ambassadors at foreign courts by the various potentates to whom they were the accredited agents of the Republic, gifts which by the law they are not permitted to retain. I confess that I looked upon this as a very painful exhibition, and one by no

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> means flattering to the national standard of honesty and honor. That can scarcely be a high state of moral feeling which imagines a gentleman of repute and station likely to be corrupted, in the discharge of his duty, by the present of a snuff-box, or a richly-mounted sword, or an Eastern shawl; and surely the Nation who reposes confidence in her appointed servants is likely to be better served, than she who makes them the subject of such very mean and paltry suspicions.[17]

We as a Nation have not sufficiently emphasized the importance of professional morality in public service, whether among our government officials or our lawyers. Instead, we may over-emphasize social morality, concentrating on personal scandals that we can not regulate, then hoping to elevate professional behavior merely by passing detailed rules, sometimes listing do's and don'ts that ought not require articulation. By limiting our expectations to what is specifically regulated (and sometimes over-regulated), we may in effect degrade the offices and the people who hold them.

There is a national plethora of legislation at every level of government restricting activities of government

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[17] Charles Dickens, American Notes 319 (1842). [Cf. Lord Nolan.]

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officials. This legislation controls the receipt of gifts; limits the amounts of fees and honoraria and outside employment; restricts post-employment contact with government; curbs the extent of political activities; requires the acceptance of the lowest (but not necessarily best) bids on government contracts; and sets prohibitions on the manner and ways in which financial and other conflicts are to be addressed.[18] These rules are extremely important. They protect the public from many kinds of inappropriate influences on government officials. Public servants have sometimes walked a fine line or walked over the line between gifts and bribes.[19] But we seem to have limited the standard we apply to public officials to the technical question whether a rule has been broken, rather than aspiring to the highest in moral behavior. In other countries, public morality is approached differently. In Europe, for example, public officials

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[18] See, e.g., COGEL Blue Book (9th ed., 1993).

[19] See, e.g., Jane Fritsch, The Envelope Please: A Bribe's Not a Bribe When It's a Donation, N.Y. Times, Jan. 28, 1996, § 4, at 1.

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often have greater discretion, are better paid, and are held to higher standards of behavior, in some instances resigning their office if there is the hint of financial scandal.[20]

In the political arena, we find ourselves debating what the quid pro quo's are for campaign contributions. Our system, which permits extensive private, including corporate, financing of candidates' campaigns, raises again and again the question in the public's mind about how it can distinguish between contributions and bribes and how legislators or other officials can operate objectively on behalf of the electorate.[21] Can elected officials say with credibility that they are carrying out the mandate of a "democratic" society, representing only the public good, when private money plays such a large role in their campaigns? To the extent they can not, ways of ensuring that politicians are not influenced in their legislative decision-

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[20] See, e.g., Davies, The Public Administrative Law Context of Ethics Requirements for West Germany and American Public Officials: A Comparative Analysis, 18 Georgia Journal of International and Comparative Law 319 (1988).

[21] Fritsch, supra note 25, at 1.

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making by the interests that give them contributions will have to be devised.

The public also wonders whether lawyers have a defined morality. Professional codes tend to speak in terms of ethical presumptions, without prescribing what lawyers should do in specific situations that the public may not perceive as presenting dilemmas. For example, almost all professional codes require that a lawyer should represent a client zealously within the bounds of the law and may not suborn perjury or the creation of false documents.[22] But no rule guides a lawyer who is merely left with a firm and abiding conviction that what is being said or proffered by a witness or client is false. Rules might be ill suited to answer such dilemmas, but moral imperatives, or what Lord Moulton described in 1924 as "Obedience to the Unenforceable" may be more helpful.[23]

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[22] See, e.g., Model Code of Professional Responsibility, EC 7-1, EC 7-6.

[23] The Rt. Hon. Lord Moulton, Law and Manners, The Atlantic Monthly, July 1924, at 1.

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Lord Moulton, to be sure a man of his time, spoke of Obedience to the Unenforceable as a standard that people live up to despite the fact that no law can force them to do so. He gave as an example the conduct of the men aboard the Titanic who, facing imminent death, nevertheless adhered to the principle that women and children should be saved first.

> Law did not require it. Force could not have compelled it in the face of almost certain death. It was merely a piece of good Manners in the sense in which I have used the phrase. The feeling of Obedience to the Unenforceable was so strong that at that terrible moment all behaved as, if they could look back, they would wish to have behaved.[24]

Perhaps we should ask of our public officials and lawyers that they be prepared to adopt a culture that depends upon subjective accountability as much as on rules and regulations:

> The difference between the true lawyer and those men who consider the law merely a trade is that the latter seek to find ways to permit their clients to violate the moral standard of society without overstepping the letter of the law, while the former look for principles which will persuade their clients to keep within the limits of the spirit of

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[24] Id. at 4.

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the law in common moral standards.[25]

This may be an easier alternative in civil cases than in criminal practice, but if different lawyers respond differently to similar situations, perhaps we need to identify those situations and set clearer guidelines.

Yet as Frank's thesis suggests, given the ever-changing views of society and the myriad factual variations presented in cases, situational morality is a necessity in legal practice. Nevertheless, we have to advocate and adhere to moral presumptions in the legal profession if we are to maintain any sense of respect and pride.

III.

The Bar's Responsibility

What is the responsibility of a practicing lawyer, and how could lawyers' behavior be changed in ways to encourage greater respect for the legal profession? To take one example of a tolerated but unacceptable pattern, let us examine the lying

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[25] Piero Calamandrei, Eulogy of Judges, in 2000 Famous Legal Quotations 202 (M. Francis MacNamara ed., 1967). [better cite.]

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and misrepresentation that occurs in court.

Lawyers are rarely confronted with the clear-cut dilemma that a client proposes to "lie" on the stand. A client presents a version of the facts, and lawyers rarely have independent, first-hand knowledge of them. (In criminal cases, clients frequently choose not to take the stand, often on the advice of an attorney, advice that is given for any number of reasons, including the risk of presenting perjured testimony.) What more commonly occurs is that witnesses, often unconsciously, allow selectivity, prejudice, and emotion to color their perceptions. Even when two witnesses directly contradict one another, both may be "telling the truth" from their own point of view or to the best of their recollection. Real life is complex, and we have chosen to use the adversarial system to sort out the truth as best it can.[26]

To maintain credibility in the system, however, we must

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[26] See generally Sissela Bok, Lying (Vintage Books, 1978). [good cite?]

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study how well we do in fact get at the "truth". Lying is risky in the courtroom, but not generally because of the threat of a perjury indictment. It is risky because the other side has the opportunity, through discovery, independent investigation, and cross-examination, to expose falsehood. But the adversarial system may not always be wholly adequate to the task of exposing wrong-doing and false or inflated claims. Empirical studies have been performed, for example, that examine the reliability of witnesses and jurors.[27] We should not close our eyes to the many factors that influence witnesses and juries, including subconscious racism and other prejudices. As a profession, we should seek, based upon empirical evidence, ways in which to improve our ability to arrive at the truth, and if we undertake this seriously, we will not only do well by the cause of justice, but we will justifiably improve the public's opinion of our

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[27] For jury reliability, see, e.g., Frederich, Jeffrey T., Judging the Jury: The Psychology of the American Jury (The Michie Co., 1988); Kassin & Wrightsman, The American Jury on Trial (Hemisphere Publishing Corp. 1988). For witness reliability, see, e.g., Walters, Admission of Expert Testimony on Eyewitness Identification, 73 Calif. L. Rev. 1402 (1985).

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profession.

The adversary system may also be ill-suited to resolve certain types of disputes such as those presented by "battles of the experts" in medical malpractice and many other kinds of cases. There is recurring debate about the ability of jurors to evaluate such evidence. The Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., has reacted to this debate by tightening the judge's functions in reviewing scientific testimony before it is presented to the jury.[28] Certainly, the battle of the experts undermines public confidence not only in the certainty of the law, but in another sacred cow, the certainty of science. We must revisit whether other methods of inquiry into specialized areas--such as the use of court-appointed experts or Special Masters who share their conclusions with juries-- may be more useful to resolve these kinds of disputes. The current system, in this particular respect, should

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[28] Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993).

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somehow be made to work better, or should be critically evaluated, and if necessary, replaced.

Finally, the adversary system, almost by definition, cannot address the gray of the "truth" present in most cases, because the system tends to produce all-or-nothing winners and losers. This is why settlements and new forms of "alternative dispute resolution" are so important. It is often said, indeed, that "a bad settlement is better than a good litigation,"[29] and Dickens' troubling remark that honorable lawyers admonish their clients to "suffer any wrong that can be done you, rather than come here [to the courts]",[30] is still timely for too many of our litigants. As the adversary system has its limitations under the best of circumstances, we must examine and explain why the benefits of this system outweigh those limitations. As has been

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[29] See, e.g., Lincoln, Abraham, cited in The Oxford Dictionary of American Legal Quotations 302. ("As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.") [better cite.]

[30] Charles Dickens, Bleak House, p. 51 (1853) (Penguin Books 1977 ed.)

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said of democracy, the adversary system may be the worst system except for all the other systems,[31] and, if so, that is the way in which the public should understand it. We must be clear about what it can accomplish and what it cannot.

As we ponder how effective our legal system is, we should also use it to best effect. We ourselves must be part of a process of creating greater credibility in the existing system. A number of years ago, Justice Harold Rothwax of the Supreme Court of the State of New York at a symposium on ethics in government noted his concern that illegal activities occur in the judicial system sometimes for years and that lawyers do not report them.[32] In a heartening exception to this generalization, insurance kick-backs were recently exposed by a lawyer who was

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[31] Winston Churchill, House of Commons (Nov. 11, 1947) *in* OXFORD DICTIONARY OF QUOTATIONS (3d ed. 1979). [better cite.]

[32] Nicholas Scopetta, Harold Rothwax & Rudolph Giuliani, Ethics in Government: A Symposium, City Almanac (New York), Winter 1987, at 20.

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offered one in New York.[33] Generally, however, lawyers, instead of engaging in genuinely useful projects to ferret out fraud, tend to denigrate the role and the quality of work performed by lawyers in a field, for example, of personal injury.

The response that can give the public confidence in our profession is our own leadership in weeding out the fraudulent and wrongful conduct that the public rightly condemns and opposing overreactions that undermine the principles of our judicial system. For example, lawyers often join the public outcry over excessive verdicts and seemingly ridiculous results reached in some cases. Legislators begin to introduce bills that place arbitrary limits on jury verdicts in personal injury cases. But we should not limit jury verdicts simply because some of them are excessive; inherent in the premise of the jury system is that the jury should not be limited in this way. The focus must be

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[33] See George Janas, 47 Accused in an Insurance Claim Scheme, N.Y. Times, Sept. 12, 1995, at B3; Matthew Goldstein, 23 Lawyers Arrested in Insurance Scheme, Inflating of Settlements in Tort Claims Charged, N.Y. Law J., Sept. 22, 1995, at 1.

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shifted back to monitoring frivolous claims and educating the public that no system of justice is perfect and that despite occasional disappointing results, our system does have mechanisms in place that moderate jury verdicts, such as judges' discretion to set aside or reduce unreasonable verdicts.

Criminal defense lawyers are another group whose role is not well understood or sufficiently appreciated by many lawyers, much less the public. Prosecutors in particular should be sensitive to and publicly supportive of the fundamental place the defense bar has in our system. We must take an aggressive role in cleaning our own house by educating ourselves and publicly supporting our colleagues and their important work in asserting and protecting the constitutional rights of defendants.[34]

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[34] See United States v. Filani, Nos. 95-1051, 73, 1996 WL 15919 at *6 (2d Cir. Jan. 11, 1996) ("As Chief Justice Warren declared in Miranda v. Arizona, 384 U.S. 436, 480 (1966), an attorney carries out a sworn duty to the best of his or her ability when advising a client to remain silent in the face of police questioning, and such advice is not a reason 'for considering the attorney a menace to law enforcement.'").

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At another level, we have an obligation to address professional conduct perceived by the public to be wrong even if it is not necessarily illegal. As discussed above, we should attempt to set forth concrete guidelines concerning conduct, particularly when the public perceives that wrongful conduct is occurring. For example, in New York State, a recent study of the matrimonial bar concluded that a very significant negative sense exists of matrimonial practice, based on the perception that matrimonial lawyers often take unfair financial advantage of emotionally fragile clients.[35] California found that sexual exploitation of clients was a pervasive enough problem in divorce and other areas of legal practice, that a very hotly debated professional rule was passed setting forth a lawyer's professional obligations in these situations.[36] The rule is not

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[35] Report to the Administrative Board of the Courts by the Committee to Examine Lawyer Conduct in Matrimonial Cases, May 4, 1993. See also, Green, Mark, "Women in Divorce: Lawyers, Ethics, Fees & Fairness," City of New York, Dept. of Consumer Affairs, March 1992.

[36] Rules of Professional Conduct of the State Bar of California Rule 3-120 (1992).

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absolute. It does not require lawyers automatically to end their professional representation of a client at the time sexual relations occur.

Whether the rule will have an effect in California on the public's perception of lawyers depends largely on how vigilantly their colleagues and others hold lawyers to the rule: will lawyers actually be reported to the bar association when they are suspected of having sexual relations with a client, how thoroughly will they be investigated, and will they be held accountable for continuing to represent a client with whom they are having an impermissible sexual relationship?

To be effective once we have addressed a perceived problem with a rule, we must obviously create a climate in which reporting violations of the law and professional rules is encouraged, remembering that the laws and rules -- as well as the process -- must be reasonable. We must determine whether we think a rule is correct, and, if we confirm that it is, find ways to enforce it routinely.

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Having said that, we must acknowledge another reason for public mistrust: the feeling that lawyers (and public officials), whose conduct is generally self-policed, protect themselves from proper regulation. In New York, for example, disciplinary proceedings have until recently been closed to protect lawyers from unjust criticism and harm to their reputations. Despite a recommendation by its Task Force on the Profession that the proceedings be made public, the House of Delegates of the New York State Bar Association is opposing the measure.[37] Unquestionably, unjust criticism of a professional can be devastating. But it is worth examining whether that concern is better addressed by creating a quick, fair process for determining whether a charge is unfounded than by continuing a practice of not airing complaints publicly. Alternatively, we must find other ways to assure the public that closed proceedings are effective in disciplining lawyers, and we must do more to

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[37] Spencer, State Bar Opposes and Public Discipline Procedures, N. Y. Law J., June 27, 1995, at 1.

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monitor lawyers. Judges, for example, spend little time discussing or attempting to formulate processes that will create a record and document a lawyer's performance over time. Such documentation would not necessarily have to be immediately available to the public, but a system that objectively monitors lawyers' conduct and results in suggestions for improvements on a continuing basis might prove extremely useful. Judges must also heed the necessity for adhering to standards, monitoring themselves, and being monitored. They, too, should not be above criticism, and a mechanism should be developed that similarly permits lawyers and the public to monitor judges' performance and to make concrete suggestions to improve it.[38]

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[38] Evaluation of judges leads to many potential problems, not the least of which is the danger that evaluations may become popularity contests which can endanger the independence of the judiciary, at least those who are not appointed for life. Moreover, litigants in offering criticisms may not fully appreciate they are basing their reactions to how they fared in the litigation. Hence, evaluations of judges must be carefully structured to elicit meaningful ratings on specified performance criteria. (The same can be said of any evaluations, including those of lawyers by judges.)

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In the political sphere, we use partisanship as the "adversarial" system that is supposed to maintain checks and balances and protect the public in the fields of elections and campaign finance. Are bi-partisan commissions, such as the Boards of Elections or most campaign finance agencies, properly constituted? The experience of the New York City's Campaign Finance Board -- a pioneer agency regulating New York City's program of optional public financing of political campaigns -- has been that of a deliberative, non-partisan Board that nearly always acts unanimously and certainly always without regard to party affiliation. The non-partisan culture of that Board is a model for decision-making in the political sphere. But few legislators -- including the federal Congress -- are prepared to have their campaign finances monitored by a genuinely non-partisan, objective body. As a result, we have an area of activity -- campaign finance -- whose regulation is vital to the health of our democracy, but which is regulated largely by bi-

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partisan agencies with weak claim to the public's trust.[39] The legislators' failure to submit to meaningful scrutiny also heightens the public distrust of our elected officials. As Congress revamps many troublesome practices, such as allowing the receipt of gifts from lobbyists, it must monitor both whether inappropriate activity is being left unregulated and whether laws and regulations that are put in place will be enforced. Unenforced or unenforceable regulations undermine public confidence.

In short, we must find ways to re-evaluate and, if necessary, alter our methods of attaining justice. Next, we must find effective, confidence-building mechanisms for policing ourselves. And we must be prepared to entrust judgements on our own professional fitness to our colleagues and the public.

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[39] The Federal Election Commission is, for example, bi-partisan by law. See 2 U.S.C. §437c(a)(1)(1985).

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IV.

The Responsibility of Others

The changing nature of the law and the conduct of lawyers give the public understandable pause. We must not, however, fall prey to the public's cynicism, but must instead expect more of our profession. There is a limit to how far an individual lawyer can elevate the bar as a whole. What a lawyer can do, as argued above, is educate the public -- at the very least in the person of his or her clients -- and he or she can personally raise standards by living up to a code of conduct beyond what is "enforceable". This responsibility should not, however, be confined to attorneys in private practice. The others who operate in or around the legal construct -- judges, prosecutors, juries, witnesses, public officials, and the press -- must also educate themselves, and others, and apply a higher code of conduct to their own behavior.

The fact that the general public does not fully appreciate the meaning of legal events, such as Supreme Court

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decisions, can be laid at much over-simplistic reporting by the press. The law cannot attain Jeremy Bentham's ideal, to be so simply stated as to be readily understood by all.[40] Much public distrust arises from a lack of understanding, whether about the purpose and role of the adversary system, the presumption of innocence, the right of every party to be represented by an attorney, or the facts and proceedings of a specific case -- even a case as highly publicized as the O. J. Simpson trial. The limitations of the law are also poorly understood. We need the help of the schools, our media, and our public officials to communicate the values and limitations of our system of justice and to free us from simplistic analysis that breeds contempt.

What we should also acknowledge, to broaden the true reach of the law's majesty, is the role of so many other influences, including the press and the lay public, that all contribute to this intricate and, in the end, impressive system.

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[40] WE NEED TO FIND CITE FOR THIS QUOTE.

CLINTON LIBRARY PHOTOCOPY

What we propose is as follows:

First, lawyers must make a greater effort at educating themselves, their clients, and the public about the key underpinnings of our legal system: the reasons for the law's uncertainty; the values and limitations of the adversary system; the importance of respecting every kind of legal practice and the role it plays in helping our society to achieve its goals and progress.

Second, we must re-examine what does and does not work to bring about justice and consider whether we can improve aspects of our system. Is the adversary process the best way of determining whether witnesses are telling the truth or for dealing with the "battle of the experts"? If not, let us improve what we have, or find a better way, recognizing that perfection cannot be achieved. We must be forthright about the limitations of our system.

Third, we must instill among ourselves and our public

CLINTON LIBRARY PHOTOCOPY

officials a culture of a high morality, as best we can. We must determine what ethical guidelines are appropriate and then enforce them seriously. We must adopt concrete ways to recognize those among us who practice law at the highest moral levels. We must combine to act more honorably both within our own sphere and collectively as a profession, supporting each other in the inevitable controversies that arise when lawyers properly carry out responsibilities that are ill understood by the public.

And finally, we must enlist not only every group of our profession, including judges, lawyers, legislators, and other public officials, to adhere to higher standards. We must also enlist clients, jurors[41], journalists, and

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[41] Judges are generally criticized if they ask or let juries ask too many questions. See United States v. Filani, Nos. 95-1051, 73, 1996 WL 15919, at *8 (2d Cir. Jan 11, 1996); United States v. Ajmal, 67 F.3d 12, 14-15 (2d Cir. 1995). See also Bill Alden, Juror Inquiries Require Retrial for Defendant, N.Y. Law J., Sept. 22, 1995, at 1. In today's media-dominated world, jurors are more informed about legal issues than ever before. More explanation by judges why certain legal principles are important or why certain

CLINTON LIBRARY PHOTOCOPY

all our fellow citizens, because we all are touched by the law, and we can all have an influence on how it evolves.

We cannot delay in addressing these moral issues of professional conduct. As noted at the beginning, we are faced with on-going instances of erosion in public confidence. The O.J. Simpson trial and the constantly recurring investigations of public officials continue to subject our profession to public scorn and ridicule. The response, if we do not act, will be an increasing amount of legislation criminalizing conduct and a demoralization in the practice of law and public service. We are losing many fine elected officials to retirement who no longer care to operate in a bitterly partisan and hostile atmosphere. Too many of our senior practitioners complain bitterly of the loss of professional courtesy among lawyers and office holders.

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evidentiary rulings have been made may be helpful to contain speculation that can lead juries astray. Similarly, if jurors ask questions that seek to clarify evidence, and if the practice is properly controlled, this may preserve rather than interfere with a jury's impartiality.

CLINTON LIBRARY PHOTOCOPY

Boston lawyers call their adversaries "brother" or "sister" in court. Anyone who experiences the practice appreciates the grace it adds to the proceedings. This grace is created by the aura of respect the titles seek to convey. In light of the increasing call by lawyers to return to greater professional civility[42], it is clear we ourselves feel and regret the loss of professional courtesy and respect. We must first give respect to each other -- in word and in deed -- before we can expect to receive it from the public.

We believe that the public discourse, and ultimately, the behavior of our lawyers and public officials as well as their reputations, will be greatly enhanced if these items are seriously discussed and acted upon expeditiously.

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[42] See e.g., Louis P. DiLorenzo, Civility and Professionalism, N.Y. St. Bar J., January 1996, p. 8; Civility in Litigation, A Voluntary Commitment, The New York State Bar Association Guidelines on Civility in Litigation.

CLINTON LIBRARY PHOTOCOPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v. S1 93 crim. 69

CHRISTOPHER AGUSTIN,

Defendant.

----------x

March 13, 1996

Before:

HON. SONIA SOTOMAYOR,

District Judge

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York
ELIZABETH GLAZER
Assistant United States Attorney

JAY KORLICK
Attorney for Defendant

CLINTON LIBRARY PHOTOCOPY

1 (Case called)

2 THE COURT: Counsel, I've read the presentence

3 report. It seems to me that 20 years seems awfully high. I

4 wanted to ask the government if -- it seems high to me

5 because it appeared as if the maximum sentence got increased

6 after defendant cooperated and gave you the information that

7 permitted the higher charges; or, am I mistaken?

8 What were the original charges before his

9 cooperation and what was his exposure at that time?

10 MR. HORLICK: He started with a controlled

11 delivery of narcotics, judge, and after this cooperation,

12 the plea agreement was worked out so that, in a sense, what

13 your Honor is alluding to is correct.

14 THE COURT: What was he facing before he

15 cooperated and gave you the information?

16 MR. HORLICK: I don't think there is a mandatory

17 minimum on the amount of drugs delivered, judge.

18 MS. GLAZER: Your Honor, my understanding is that

19 when the original criminal complaint was filed, it was a

20 narcotics conspiracy which was a (b)(1)(A) conspiracy, which

21 would have been a mandatory ten, a maximum of life; but, you

22 are exactly right, and I think it is set out in the letter

23 that, with respect to the murders that make it essentially a

24 mandatory life under the Guidelines, that was information

25 that we learned because of Mr. Agustin telling us.

CLINTON LIBRARY PHOTOCOPY

1 THE COURT: Do you know, counsel, what his
2 Guideline range would have been absent that information? I
3 think it is counter-intuitive, or I believe it would be
4 unjust to sentence him according to things that you would
5 not have been able to convict him of because you didn't know
6 about them except given his cooperation. So, to the extent
7 I would like to know what his exposure was at the moment he
8 cooperated, or I should say before he cooperated, what could
9 you have convicted constricted him of and what sentence?
10 That would be my starting point in determining the
11 appropriate sentence.
12 MS. GLAZER: Your Honor, would you give me a
13 moment?
14 (Pause)
15 MS. GLAZER: Your Honor, when the original
16 complaint was filed, it was based on a controlled delivery
17 that we had, which was essentially (b)(1)(B) quantities,
18 which would have been a mandatory five to a maximum of 20
19 years. The conspiracy was a (b)(1)(A) conspiracy, that is
20 ten to life, because we knew of other packages, and we knew
21 that there was more involved in this narcotics trafficking
22 than simply the one controlled delivery that we had
23 obtained.
24 However had we gone to trial upon that complaint
25 with only the information we had at that point, I think we

CLINTON LIBRARY PHOTOCOPY

may have hard-pressed to actually to have ultimately proved up the (b)(1)(A) quantities.

So, the long way of answering your questions, at the time that we arrested him and what we charged him, what we would have been able to prove was the (b)(1)(B), which was the five to 40 years.

THE COURT: He's a criminal history 3?

MS. GLAZER: That's right, your Honor.

THE COURT: What would that have been that offense level?

MR. HORLICK: I think it was a 26, judge.

THE COURT: Thank you, counsel.

Has that changed since the start

MR. COHEN: I don't think there's been a change, your Honor.

THE COURT: Okay. That would have been 78 to 97. Someone help me with the math.

MS. GLAZER: Your Honor, if I can just for one moment? The criminal history, I believe, was three points; but, I'm not sure that puts him into criminal history 3.

THE COURT: I was using the one found in this one. I don't think that makes a difference. His criminal history category is a 3, and Mr. Horlick concurs.

MS. GLAZER: Seventy-eight is six and a half years, your Honor.

CLINTON LIBRARY PHOTOCOPY

1 THE COURT: I'm balancing here competing
2 concerns. There is no question that the criminal activity
3 that this defendant ultimately admitted to committing was
4 heinous and would otherwise warrant an enormous sentence and
5 even with a downward departure, a very substantial sentence.
6 I am hard-pressed, however, to do that because I
7 may be subverting the very purpose of the Guidelines. The
8 Guidelines permit downward departures to insure we encourage
9 defendants to cooperate. And to the extent I base my
10 sentence on the information the defendant provided after he
11 cooperated, and there would have been no other basis for the
12 government to convict him of this conduct I, would be
13 discouraging cooperation, and I would be doing more harm
14 than good to the process. And given that he has already
15 served more than three years -- he's been in since September
16 of 1992. It's three and a half years.
17 MS. GLAZER: That's right, your Honor.
18 THE COURT: That is more than half of the time
19 that he would have served if he had just pled guilty in
20 1992, accepted responsibility and walked away, frankly.
21 Instead, he's been in jail for three and a half years.
22 I am prepared to give him, despite -- and I
23 understand and I am making this record very clear -- I
24 understand fully the basis for the pretrial sentence people
25 recommending what they have or did. But, I am hard-pressed

CLINTON LIBRARY PHOTOCOPY

1 under the circumstances I just described to impose that kind
2 of sentence in this very unique case where there would have
3 been no information against this defendant about the very
4 crimes that outrage me except for his cooperation.
5 And, so, I am predisposed to sentencing the
6 defendant to time served with special conditions, a
7 participation in mental health and drug programs. That is
8 my inclination.
9 I know the government takes no position on these
10 things, but I am certainly inviting comment in terms of
11 whether the government believes I am not properly assessing
12 this case.
13 By the way, I know the defendant's mental
14 breakdown -- certainly we don't want to call it minimized,
15 but decreased the value of his cooperation. But, I think
16 the government in submitting the 5K1 letter, understood that
17 he was not malingering, and appears the defendant was not
18 feigning his condition, and I cannot discount his
19 cooperation and sentence him to what his Guideline range or
20 to much less than what I am doing right now, or much more
21 than I am doing right now and it be fair.
22 In any event, Ms. Glazer, have you received a
23 presentence report, have you reviewed it?
24 MS. GLAZER: Yes, your Honor.
25 THE COURT: Does the government have any

CLINTON LIBRARY PHOTOCOPY

1 objections to it.

2 MS. GLAZER: No, your Honor.

3 THE COURT: Mr. Horlick, have you and your client

4 received the report, reviewed it, and are you raising any

5 objections to it?

6 MR. HORLICK: We have, your Honor, and we are not

7 raising any objections.

8 THE COURT: Mr. Agustin.

9 THE DEFENDANT: Yes, your Honor.

10 THE COURT: In fact, did you discuss the

11 presentence report with your attorney?

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: Are you objecting to any of its

14 content.

15 THE DEFENDANT: No, your Honor.

16 THE COURT: Are you feeling well today?

17 THE DEFENDANT: Yes, your Honor.

18 THE COURT: Are you feeling mentally clear today?

19 THE DEFENDANT: Yes, your Honor.

20 THE COURT: Please have a seat.

21 Before I sentence the defendant, would the

22 government please respond to the issues I've raised and add

23 to any?

24 MS. GLAZER: Certainly, your Honor, if I can have

25 one moment?

CLINTON LIBRARY PHOTOCOPY

THE COURT: Certainly.

(Pause)

THE COURT: Marshals, are there any detainers on this defendant?

THE MARSHALL: None that we are aware of, your Honor.

(Pause)

MS. GLAZER: Your Honor, just so I am clear, as I understand it, your Honor has indicated the direction that you are going to go in this sentence as an exercise of your discretion, and not because you feel that you are bound in any way by what was initially brought by the government as charges against Mr. Agustin.

THE COURT: No, I am doing it for the reasons I indicated, that I am balancing society's needs with what my sense of what the Guidelines intend as a policy choice.

MS. GLAZER: In light of that exercise of your discretion, the only comment I think the government has is that because of the heinousness of the crimes and the nature of the conduct that Mr. Agustin admitted to, that conduct may be reflected in the kinds of conditions and the length of supervised release that your Honor may decide to impose upon Mr. Agustin.

THE COURT: What conditions would you suggest other than the traditional one, the 13?

CLINTON LIBRARY PHOTOCOPY

1 MS. GLAZER: Well, with respect to the supervised
2 release, you have the option, obviously, of up to life.
3 With respect to special conditions, three things spring to
4 mind in light of the history, both his criminal conduct and
5 his psychiatric conditions since cooperating with the
6 government. One is that he be directed and to be under
7 appropriate psychiatric care and counselling.
8 THE COURT: That I have already mentioned, and a
9 drug abuse program, as well.
10 MS. GLAZER: The second one would be that he,
11 during the term of his lifetime supervision or whatever the
12 term supervision that your Honor decides to impose, that he
13 keep the probation department aware of where it is that he
14 is residing. And the third would be that he not be
15 permitted to have any contact, and that he be prohibited of
16 any contact of any of the victims of his crimes.
17 THE COURT: I'm also going to make it a condition
18 that he cannot have any further contact with any members of
19 the White Tigers that he knew, or any other Asian gang
20 members. He must stay clear of any gang-related employment
21 or activity.
22 Anything else?
23 MS. GLAZER: No, your Honor.
24 THE COURT: Mr. Horlick, would you like to
25 address me before I impose sentence?

CLINTON LIBRARY PHOTOCOPY

1 MR. HORLICK: Judge, I'm afraid if I say
2 anything -- I think if I say anything I'll ruin it.
3 THE COURT: I am putting 20 years supervised
4 release. If your client can stay out of trouble that long,
5 I have great hope for him.
6 MR. HORLICK: I agree with the court.
7 THE COURT: Mr. Agustin, before I impose sentence
8 on you, would you like to address, address me, sir.
9 THE DEFENDANT: Your Honor, I have your Honor. I
10 have sinned in thought and word and deed; I repent all my
11 sins with all my heart. God bless America.
12 Thank you.
13 THE COURT: Thank you Mr. Agustin.
14 Do you wish to say something?
15 MS. GLAZER: Your Honor, one matter, which is, in
16 order to arrange to insure that these conditions are in
17 place, most particularly the psychiatric counselling, I
18 would ask the court to consider or reconsider whether time
19 served is appropriate; that is, that we want to have give
20 probation some opportunity to arrange that there as place
21 for Mr. Agustin to go.
22 THE COURT: Mr. Horlick, I am not unsympathetic
23 to that. I think an additional three months may be more
24 than adequate, and I'll make it a condition of sentence that
25 the Bureau of Prisons make sure there is a place for him.

CLINTON LIBRARY PHOTOCOPY

1 MR. HORLICK: Judge, it is my opinion that
2 whatever we can do to stabilize whatever the defendant be
3 involved in is in his best interests. Even if it requires
4 an additional few weeks or months incarceration, it is
5 better for him to go immediately into programs rather than
6 he be out.
7 THE COURT: Can I be frank? I understand that it
8 generally takes longer than three months. It takes about
9 six for placement in programs, etc. I will add six months,
10 Mr. Agustin, not in a sense to punish you, but to ensure
11 your transition out of prison into a supportive environment.
12 I don't want you getting out of jail and ending up back in
13 jail for a long time.
14 Having said that, I have noted and I accepted and
15 adopt the factual findings in the presentence report, its
16 calculation of the offense level and criminal history
17 category.
18 For the reasons stated in the government's 5K1
19 letter, I depart downward, finding that the defendant did
20 substantially cooperate with the government. I note that
21 the defendant's cooperation was not as valuable as it might
22 otherwise have been because of his mental health breakdown
23 during his cooperation. However, I find that certainly the
24 defendant did nothing to provoke that breakdown, at least
25 nothing has been alleged and, hence, determine that a

CLINTON LIBRARY PHOTOCOPY

1 downward departure is in fact warranted.

2 With respect to the amount of the departure, I
3 have already said that I think, and I wish to make the
4 record very clear, when the defendant was first indicted
5 here, I am told that his exposure would realistically have
6 been somewhere in the neighborhood of five to life
7 imprisonment. With the Guideline range it appears between
8 five and ten years.

9 The defendant cooperated and, through his
10 cooperation, shared with the government information about
11 what has turned out to be quite heinous and serious crimes,
12 including murder and a much broader participation in a
13 widespread narcotics enterprise. That conduct does warrant
14 punishment.

15 I am concerned, however, that if I give
16 punishment greater than the amount I am intending to today
17 that I will be subverting or at least undermining the policy
18 considerations under the Guidelines and discouraging
19 defendants from cooperating, and discouraging them from
20 telling the truth when they cooperate, if I in the exercise
21 of my discretion impose a sentence commensurate with the
22 defendant's admitted conduct but conduct that was only
23 admitted as part of a cooperation agreement.

24 In short, it is my exercise of discretion,
25 despite my recognition of the serious crimes this defendant

CLINTON LIBRARY PHOTOCOPY

1 has committed, that a sentence greater than the one I am
2 going to impose would be counter-productive both to society
3 and to Congress' desires that we encourage cooperation by
4 defendants.
5 It is the judgment and sentence of this court
6 that a downward departure to the amount of time served plus
7 six months additionally is warranted. I am imposing
8 supervised release -- originally I said 20, but,
9 Mr. Horlick, I'm going to do 25 years.
10 As terms and conditions of that 25 years, I am
11 requiring the defendant to participate in drug and
12 psychiatric counselling. If recommended by the probation
13 department, he will live in a designated community or
14 program home setting. The defendant may not have any
15 contact with the surviving victims of his crimes, their
16 families or friends, and he may not have any contact with
17 members, not in the formal sense, but anyone with ties to or
18 participation in Asian gangs, particularly the White Tigers.
19 I find this defendant is incapable of paying a
20 fine, and there is no reasonable likelihood that he can in
21 the future. I impose no fine. I do impose the $200 special
22 assessment. The defendant cannot pay it immediately. I
23 know that from his personal situation. It should be paid on
24 a schedule to be set by the probation department in
25 accordance with the defendant's income earnings as he goes

CLINTON LIBRARY PHOTOCOPY

1 along.

2 That is the judgment and sentence of the court.

3 Mr. Agustin, sir, you have ten days from the time

4 I file the judgment in this action, which I hope will be two

5 days from now, to file a notice of appeal. I am sure

6 Mr. Horlick will discuss it with you. If you decide to file

7 it, he will give you information on how to do that. This

8 doesn't suggest you have a ground to appeal. It merely says

9 that if you are, you have to do it within ten days. Do you

10 understand?

11 THE DEFENDANT: Yes.

12 THE COURT: If Mr. Horlick is not your lawyer or

13 you do not want him as your lawyer on appeal, you can apply

14 to the Second Circuit for appointment of different counsel.

15 Is there another indictment?

16 Oh, the sentence will run concurrently on all

17 four counts.

18 MS. GLAZER: There is another indictment, the

19 underlying indictment to be dismissed.

20 THE COURT: I'm sure there is no objection to

21 that.

22 Thank you, counsel.

23 (Adjourned)

24

25

CLINTON LIBRARY PHOTOCOPY