CODE OF CONDUCT
FOR UNITED STATES JUDGES[1]
(Effective July 1, 2009)

Introduction

This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges. Certain provisions of this Code apply to special masters and commissioners as indicated in the "Compliance" section. The Tax Court, Court of Appeals for Veterans Claims, and Court of Appeals for the Armed Forces have adopted this Code.

The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions about this Code only when requested by a judge to whom this Code applies. Requests for opinions and other questions[2] concerning this Code and its applicability should be addressed to the Chair of the Committee on Codes of Conduct as follows:

Chair, Committee on Codes of Conduct
c/o General Counsel
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

202-502-1100

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[1] The Code of Conduct for United States Judges was initially adopted by the Judicial Conference on April 5, 1973, and was known as the "Code of Judicial Conduct for United States Judges." Since then, the Judicial Conference has made the following changes to the Code:

March 1987:	deleted the word "Judicial" from the name of the Code;
September 1992:	adopted substantial revisions to the Code;
March 1996:	revised part C of the Compliance section, immediately following the Code;
September 1996:	revised Canons 3C(3)(a) and 5C(4);
September 1999:	revised Canon 3C(1)(c);
September 2000:	clarified the Compliance section.

[2] Procedural questions may be addressed to: Office of the General Counsel, Administrative Office of the United States Courts, Thurgood Marshall Federal Judiciary Building, Washington, D.C., 20544, 202-502-1100.

CANON 1: A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

COMMENTARY

Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn on their acting without fear or favor. Although judges should be independent, they must comply with the law and should comply with this Code. Adherence to this responsibility helps to maintain public confidence in the impartiality of the judiciary. Conversely, violation of this Code diminishes public confidence in the judiciary and injures our system of government under law.

The Canons are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law, and in the context of all relevant circumstances. The Code is to be construed so it does not impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and nominees for judicial office. It may also provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§ 332(d)(1), 351-364). Not every violation of the Code should lead to disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the improper activity, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system. Many of the restrictions in the Code are necessarily cast in general terms, and judges may reasonably differ in their interpretation. Furthermore, the Code is not designed or intended as a basis for civil liability or criminal prosecution. Finally, the Code is not intended to be used for tactical advantage.

CANON 2: A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES

A. *Respect for Law.* A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. *Outside Influence.* A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

C. *Nondiscriminatory Membership.* A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

COMMENTARY

Canon 2A. An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen. Because it is not practicable to list all prohibited acts, the prohibition is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code.

Canon 2B. Testimony as a character witness injects the prestige of the judicial office into the proceeding in which the judge testifies and may be perceived as an official testimonial. A judge should discourage a party from requiring the judge to testify as a character witness except in unusual circumstances when the demands of justice require. This Canon does not create a privilege against testifying in response to an official summons.

A judge should avoid lending the prestige of judicial office to advance the private interests of the judge or others. For example, a judge should not use the judge's judicial position or title to gain advantage in litigation involving a friend or a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office.

A judge should be sensitive to possible abuse of the prestige of office. A judge should not initiate communications to a sentencing judge or a probation or corrections officer but may provide information to such persons in response to a formal request. Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration and by responding to official inquiries concerning a person being considered for a judgeship.

Canon 2C. Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Canon 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. *See New York State Club Ass'n. Inc. v. City of New York*, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed.

2d 1 (1988); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). Other relevant factors include the size and nature of the organization and the diversity of persons in the locale who might reasonably be considered potential members. Thus the mere absence of diverse membership does not by itself demonstrate a violation unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted to membership.

Although Canon 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, a judge's membership in an organization that engages in any invidiously discriminatory membership practices prohibited by applicable law violates Canons 2 and 2A and gives the appearance of impropriety. In addition, it would be a violation of Canons 2 and 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion, or national origin in its membership or other policies, or for the judge to use such a club regularly. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A.

When a judge determines that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Canon 2C or under Canons 2 and 2A, the judge is permitted, in lieu of resigning, to make immediate and continuous efforts to have the organization discontinue its invidiously discriminatory practices. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within two years of the judge's first learning of the practices), the judge should resign immediately from the organization.

CANON 3: A JUDGE SHOULD PERFORM THE DUTIES OF THE OFFICE FAIRLY, IMPARTIALLY AND DILIGENTLY

The duties of judicial office take precedence over all other activities. In performing the duties prescribed by law, the judge should adhere to the following standards:

A. *Adjudicative Responsibilities.*

(1) A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.

(3) A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity.

A judge should require similar conduct of those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

(4) A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may:

(a) initiate, permit, or consider ex parte communications as authorized by law;

(b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;

(c) obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received; or

(d) with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should not make public comment on the merits of a matter pending or impending in any court. A judge should require similar restraint by court personnel subject to the judge's direction and control. The prohibition on public comment on the merits does not extend to public statements made in the course of the judge's official duties, to explanations of court procedures, or to scholarly presentations made for purposes of legal education.

B. *Administrative Responsibilities.*

(1) A judge should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court personnel.

(2) A judge should not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when that conduct would contravene the Code if undertaken by the judge.

(3) A judge should exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.

(4) A judge with supervisory authority over other judges should take reasonable measures to ensure that they perform their duties timely and effectively.

(5) A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge's conduct contravened this Code or a lawyer violated applicable rules of professional conduct.

C. *Disqualification.*

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or lawyer has been a material witness;

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is:

(i) a party to the proceeding, or an officer, director, or trustee of a party;

(ii) acting as a lawyer in the proceeding;

(iii) known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(iv) to the judge's knowledge likely to be a material witness in the proceeding;

(e) the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

(2) A judge should keep informed about the judge's personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system; the following relatives are within the third degree of relationship: parent, child, grandparent, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece, and nephew; the listed relatives include whole and half blood relatives and most step relatives;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(d) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation.

(4) Notwithstanding the preceding provisions of this Canon, if a judge would be disqualified because of a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge (or the judge's spouse or minor child) divests the interest that provides the grounds for disqualification.

D. *Remittal of Disqualification.* Instead of withdrawing from the proceeding, a judge disqualified by Canon 3C(1) may, except in the circumstances specifically set out in subsections (a) through (e), disclose on the record the basis of disqualification. The judge may participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate. The agreement should be incorporated in the record of the proceeding.

COMMENTARY

Canon 3A(3). The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate.

The duty under Canon 2 to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all the judge's activities, including the discharge of the judge's adjudicative and administrative responsibilities. The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias.

Canon 3A(4). The restriction on ex parte communications concerning a proceeding includes communications from lawyers, law teachers, and others who are not participants in the proceeding. A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities. A judge should make reasonable efforts to ensure that law clerks and other court personnel comply with this provision.

A judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts.

Canon 3A(5). In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court personnel, litigants, and their lawyers cooperate with the judge to that end.

Canon 3A(6). The admonition against public comment about the merits of a pending or impending matter continues until the appellate process is complete. If the public comment involves a case from the judge's own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary's integrity and impartiality, which would violate Canon 2A. A judge may comment publicly on proceedings in which the judge is a litigant in a personal capacity, but not on mandamus proceedings when the judge is a

litigant in an official capacity (but the judge may respond in accordance with Fed. R. App. P. 21(b)).

Canon 3B(3). A judge's appointees include assigned counsel, officials such as referees, commissioners, special masters, receivers, guardians, and personnel such as law clerks, secretaries, and judicial assistants. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

Canon 3B(5). Appropriate action may include direct communication with the judge or lawyer, other direct action if available, reporting the conduct to the appropriate authorities, or, when the judge believes that a judge's or lawyer's conduct is caused by drugs, alcohol, or a medical condition, making a confidential referral to an assistance program. Appropriate action may also include responding to a subpoena to testify or otherwise participating in judicial or lawyer disciplinary proceedings; a judge should be candid and honest with disciplinary authorities.

Canon 3C. Recusal considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship.

Canon 3C(1)(c). In a criminal proceeding, a victim entitled to restitution is not, within the meaning of this Canon, a party to the proceeding or the subject matter in controversy. A judge who has a financial interest in the victim of a crime is not required by Canon 3C(1)(c) to disqualify from the criminal proceeding, but the judge must do so if the judge's impartiality might reasonably be questioned under Canon 3C(1) or if the judge has an interest that could be substantially affected by the outcome of the proceeding under Canon 3C(1)(d)(iii).

Canon 3C(1)(d)(ii). The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. However, if "the judge's impartiality might reasonably be questioned" under Canon 3C(1), or the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii), the judge's disqualification is required.

CANON 4: A JUDGE MAY ENGAGE IN EXTRAJUDICIAL ACTIVITIES THAT ARE CONSISTENT WITH THE OBLIGATIONS OF JUDICIAL OFFICE

A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects. However, a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification, or violate the limitations set forth below.

A. *Law-related Activities.*

(1) *Speaking, Writing, and Teaching.* A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

(2) *Consultation.* A judge may consult with or appear at a public hearing before an executive or legislative body or official:

(a) on matters concerning the law, the legal system, or the administration of justice;

(b) to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in the area; or

(c) when the judge is acting pro se in a matter involving the judge or the judge's interest.

(3) *Organizations.* A judge may participate in and serve as a member, officer, director, trustee, or nonlegal advisor of a nonprofit organization devoted to the law, the legal system, or the administration of justice and may assist such an organization in the management and investment of funds. A judge may make recommendations to public and private fund-granting agencies about projects and programs concerning the law, the legal system, and the administration of justice.

(4) *Arbitration and Mediation.* A judge should not act as an arbitrator or mediator or otherwise perform judicial functions apart from the judge's official duties unless expressly authorized by law.

(5) *Practice of Law.* A judge should not practice law and should not serve as a family member's lawyer in any forum. A judge may, however, act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

B. *Civic and Charitable Activities.* A judge may participate in and serve as an officer, director, trustee, or nonlegal advisor of a nonprofit civic, charitable, educational, religious, or social organization, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will either be engaged in proceedings that would ordinarily come before the judge or be regularly engaged in adversary proceedings in any court.

(2) A judge should not give investment advice to such an organization but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

C. *Fund Raising.* A judge may assist nonprofit law-related, civic, charitable, educational, religious, or social organizations in planning fund-raising activities and may be listed as an officer, director, or trustee. A judge may solicit funds for such an organization from judges over whom the judge does not exercise supervisory or appellate authority and from members of the judge's family. Otherwise, a judge should not personally participate in fund-raising activities, solicit funds for any organization, or use or permit the use of the prestige of judicial office for that purpose. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.

D. *Financial Activities.*

(1) A judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should refrain from financial and business dealings that exploit the judicial position or involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves.

(2) A judge may serve as an officer, director, active partner, manager, advisor, or employee of a business only if the business is closely held and controlled by members of the judge's family. For this purpose, "members of the judge's family" means persons related to the judge or the judge's spouse within the third degree of relationship as defined in Canon 3C(3)(a), any other relative with whom the judge or the judge's spouse maintains a close familial relationship, and the spouse of any of the foregoing.

(3) As soon as the judge can do so without serious financial detriment, the judge should divest investments and other financial interests that might require frequent disqualification.

(4) A judge should comply with the restrictions on acceptance of gifts and the prohibition on solicitation of gifts set forth in the Judicial Conference Gift Regulations. A judge should endeavor to prevent any member of the judge's family residing in the household from soliciting or accepting a gift except to the extent that a judge would be permitted to do so by the Judicial Conference Gift Regulations. A "member of the judge's family" means any relative of a judge by blood, adoption, or marriage, or any person treated by a judge as a member of the judge's family.

(5) A judge should not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's official duties.

E. *Fiduciary Activities.* A judge may serve as the executor, administrator, trustee, guardian, or other fiduciary only for the estate, trust, or person of a member of the judge's family as defined in Canon 4D(4). As a family fiduciary a judge is subject to the following restrictions:

(1) The judge should not serve if it is likely that as a fiduciary the judge would be engaged in proceedings that would ordinarily come before the judge or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary, a judge is subject to the same restrictions on financial activities that apply to the judge in a personal capacity.

F. *Governmental Appointments.* A judge may accept appointment to a governmental committee, commission, or other position only if it is one that concerns the law, the legal system, or the administration of justice, or if appointment of a judge is required by federal statute. A judge should not, in any event, accept such an appointment if the judge's governmental duties would tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary. A judge may represent the judge's country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

G. *Chambers, Resources, and Staff.* A judge should not to any substantial degree use judicial chambers, resources, or staff to engage in extrajudicial activities permitted by this Canon.

H. *Compensation, Reimbursement, and Financial Reporting.* A judge may accept compensation and reimbursement of expenses for the law-related and extrajudicial activities permitted by this Code if the source of the payments does not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

(1) Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

(2) Expense reimbursement should be limited to the actual costs of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or relative. Any additional payment is compensation.

(3) A judge should make required financial disclosures, including disclosures of gifts and other things of value, in compliance with applicable statutes and Judicial Conference regulations and directives.

COMMENTARY

Canon 4. Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge's time permits and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization

dedicated to the law. Subject to the same limitations, judges may also engage in a wide range of non-law-related activities.

Within the boundaries of applicable law (*see, e.g.*, 18 U.S.C. § 953) a judge may express opposition to the persecution of lawyers and judges anywhere in the world if the judge has ascertained, after reasonable inquiry, that the persecution is occasioned by conflict between the professional responsibilities of the persecuted judge or lawyer and the policies or practices of the relevant government.

A person other than a spouse with whom the judge maintains both a household and an intimate relationship should be considered a member of the judge's family for purposes of legal assistance under Canon 4A(5), fund raising under Canon 4C, and family business activities under Canon 4D(2).

Canon 4A. Teaching and serving on the board of a law school are permissible, but in the case of a for-profit law school, board service is limited to a nongoverning advisory board.

Consistent with this Canon, a judge may encourage lawyers to provide pro bono legal services.

Canon 4A(4). This Canon generally prohibits a judge from mediating a state court matter, except in unusual circumstances (*e.g.*, when a judge is mediating a federal matter that cannot be resolved effectively without addressing the related state court matter).

Canon 4A(5). A judge may act pro se in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies. In so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family.

Canon 4B. The changing nature of some organizations and their exposure to litigation make it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if the judge's continued association is appropriate. For example, in many jurisdictions, charitable hospitals are in court more often now than in the past.

Canon 4C. A judge may attend fund-raising events of law-related and other organizations although the judge may not be a speaker, a guest of honor, or featured on the program of such an event. Use of a judge's name, position in the organization, and judicial designation on an organization's letterhead, including when used for fund raising or soliciting members, does not violate Canon 4C if comparable information and designations are listed for others.

Canon 4D(1), (2), and (3). Canon 3 requires disqualification of a judge in any proceeding in which the judge has a financial interest, however small. Canon 4D requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of the judge's judicial duties. Canon 4H requires a judge to report

compensation received for activities outside the judicial office. A judge has the rights of an ordinary citizen with respect to financial affairs, except for limitations required to safeguard the proper performance of the judge's duties. A judge's participation in a closely held family business, while generally permissible, may be prohibited if it takes too much time or involves misuse of judicial prestige or if the business is likely to come before the court on which the judge serves. Owning and receiving income from investments do not as such affect the performance of a judge's duties.

Canon 4D(5). The restriction on using nonpublic information is not intended to affect a judge's ability to act on information as necessary to protect the health or safety of the judge or a member of a judge's family, court personnel, or other judicial officers if consistent with other provisions of this Code.

Canon 4E. Mere residence in the judge's household does not by itself make a person a member of the judge's family for purposes of this Canon. The person must be treated by the judge as a member of the judge's family.

The Applicable Date of Compliance provision of this Code addresses continued service as a fiduciary.

A judge's obligation under this Code and the judge's obligation as a fiduciary may come into conflict. For example, a judge should resign as a trustee if it would result in detriment to the trust to divest holdings whose retention would require frequent disqualification of the judge in violation of Canon 4D(3).

Canon 4F. The appropriateness of accepting extrajudicial assignments must be assessed in light of the demands on judicial resources and the need to protect the courts from involvement in matters that may prove to be controversial. Judges should not accept governmental appointments that could interfere with the effectiveness and independence of the judiciary, interfere with the performance of the judge's judicial responsibilities, or tend to undermine public confidence in the judiciary.

Canon 4H. A judge is not required by this Code to disclose income, debts, or investments, except as provided in this Canon. The Ethics Reform Act of 1989 and implementing regulations promulgated by the Judicial Conference impose additional restrictions on judges' receipt of compensation. That Act and those regulations should be consulted before a judge enters into any arrangement involving the receipt of compensation. The restrictions so imposed include but are not limited to: (1) a prohibition against receiving "honoraria" (defined as anything of value received for a speech, appearance, or article), (2) a prohibition against receiving compensation for service as a director, trustee, or officer of a profit or nonprofit organization, (3) a requirement that compensated teaching activities receive prior approval, and (4) a limitation on the receipt of "outside earned income."

CANON 5: A JUDGE SHOULD REFRAIN FROM POLITICAL ACTIVITY

A. *General Prohibitions.* A judge should not:

(1) act as a leader or hold any office in a political organization;

(2) make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office; or

(3) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate.

B. *Resignation upon Candidacy.* A judge should resign the judicial office if the judge becomes a candidate in a primary or general election for any office.

C. *Other Political Activity.* A judge should not engage in any other political activity. This provision does not prevent a judge from engaging in activities described in Canon 4.

COMMENTARY

The term "political organization" refers to a political party, a group affiliated with a political party or candidate for public office, or an entity whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office.

COMPLIANCE WITH THE CODE OF CONDUCT

Anyone who is an officer of the federal judicial system authorized to perform judicial functions is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

A. *Part-time Judge.* A part-time judge is a judge who serves part-time, whether continuously or periodically, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

(1) is not required to comply with Canons 4A(4), 4A(5), 4D(2), 4E, 4F, or 4H(3);

(2) except as provided in the Conflict-of-Interest Rules for Part-time Magistrate Judges, should not practice law in the court on which the judge serves or in any court subject to that court's appellate jurisdiction, or act as a lawyer in a proceeding in which the judge has served as a judge or in any related proceeding.

B. *Judge Pro Tempore.* A judge pro tempore is a person who is appointed to act temporarily as a judge or as a special master.

(1) While acting in this capacity, a judge pro tempore is not required to comply with Canons 4A(4), 4A(5), 4D(2), 4D(3), 4E, 4F, or 4H(3); further, one who acts solely as a special master is not required to comply with Canons 4A(3), 4B, 4C, 4D(4), or 5.

(2) A person who has been a judge pro tempore should not act as a lawyer in a proceeding in which the judge has served as a judge or in any related proceeding.

C. *Retired Judge.* A judge who is retired under 28 U.S.C. § 371(b) or § 372(a), or who is subject to recall under § 178(d), or who is recalled to judicial service, should comply with all the provisions of this Code except Canon 4F, but the judge should refrain from judicial service during the period of an extrajudicial appointment not sanctioned by Canon 4F. All other retired judges who are eligible for recall to judicial service (except those in U.S. territories and possessions) should comply with the provisions of this Code governing part-time judges. A senior judge in the territories and possessions must comply with this Code as prescribed by 28 U.S.C. §§ 373(c)(5) and (d).

APPLICABLE DATE OF COMPLIANCE

Persons to whom this Code applies should arrange their financial and fiduciary affairs as soon as reasonably possible to comply with it and should do so in any event within one year after appointment. If, however, the demands on the person's time and the possibility of conflicts of interest are not substantial, such a person may continue to act, without compensation, as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of the person's family if terminating the relationship would unnecessarily jeopardize any substantial interest of the estate or person and if the judicial council of the circuit approves.

<u>EXHIBIT 1</u>

A Latina Judge's Voice

Hon. Sonia Sotomayor†

Judge Reynoso, thank you for that lovely introduction. I am humbled to be speaking behind a man who has contributed so much to the Hispanic community. I am also grateful to have such kind words said about me.

I am delighted to be here. It is nice to escape my hometown for just a little bit. It is also nice to say hello to old friends who are in the audience, to rekindle contact with old acquaintances and to make new friends among those of you in the audience. It is particularly heart warming to me to be attending a conference to which I was invited by a Latina law school friend, Rachel Moran, who is now an accomplished and widely respected legal scholar. I warn Latinos in this room: Latinas are making a lot of progress in the old-boy network.

I am also deeply honored to have been asked to deliver the annual Judge Mario G. Olmos lecture. I am joining a remarkable group of prior speakers who have given this lecture. I hope what I speak about today continues to promote the legacy of that man whose commitment to public service and abiding dedication to promoting equality and justice for all people inspired this memorial lecture and the conference that will follow. I thank Judge Olmos' widow Mary Louise's family, her son and the judge's many friends for hosting me. And for the privilege you have bestowed on me in honoring the memory of a very special person. If I and the many people of this conference can accomplish a fraction of what Judge Olmos did in his short but extraordinary life we and our respective communities will be infinitely better.

I intend tonight to touch upon the themes that this conference will be discussing this weekend and to talk to you about my Latina identity, where it came from, and the influence I perceive it has on my presence on the bench.

Who am I? I am a "Newyorkrican." For those of you on the West Coast who do not know what that term means: I am a born and bred New Yorker of Puerto Rican-born parents who came to the states during World War II.

Like many other immigrants to this great land, my parents came because of poverty and to attempt to find and secure a better life for themselves and the family that they hoped to have. They largely succeeded. For that, my brother and I are very grateful. The story of that success is what made me and what makes me the Latina that I am. The Latina side of my identity was forged and closely nurtured by my family through our shared experiences and traditions.

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† Judge Sotamayor grew up in a South Bronx housing project and graduated from Princeton University and Yale Law School. She was a former prosecutor in the office of the District Attorney in Manhattan and an associate and then partner in the New York law firm of Pavia & Harcourt. She was also a member of the Puerto Rico Legal Defense and Education Fund. Nominated to the Second Circuit in 1997, she became the first Latina nominated to sit on a federal appellate court.

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For me, a very special part of my being Latina is the *mucho platos de arroz, gandoles y pernir* – rice, beans and pork – that I have eaten at countless family holidays and special events. My Latina identity also includes, because of my particularly adventurous taste buds, *morcilla*, -- pig intestines, *patitas de cerdo con garbanzo* -- pigs' feet with beans, and *la lengua y orejas de cuchifrito*, pigs' tongue and ears. I bet the Mexican-Americans in this room are thinking that Puerto Ricans have unusual food tastes. Some of us, like me, do. Part of my Latina identity is the sound of *merengue* at all our family parties and the heart wrenching Spanish love songs that we enjoy. It is the memory of Saturday afternoon at the movies with my aunt and cousins watching *Cantinflas*, who is not Puerto Rican, but who was an icon Spanish comedian on par with Abbot and Costello of my generation. My Latina soul was nourished as I visited and played at my grandmother's house with my cousins and extended family. They were my friends as I grew up. Being a Latina child was watching the adults playing dominos on Saturday night and us kids playing *lotería*, bingo, with my grandmother calling out the numbers which we marked on our cards with chick peas.

Now, does any one of these things make me a Latina? Obviously not because each of our Carribean and Latin American communities has their own unique food and different traditions at the holidays. I only learned about tacos in college from my Mexican-American roommate. Being a Latina in America also does not mean speaking Spanish. I happen to speak it fairly well. But my brother, only three years younger, like too many of us educated here, barely speaks it. Most of us born and bred here, speak it very poorly.

If I had pursued my career in my undergraduate history major, I would likely provide you with a very academic description of what being a Latino or Latina means. For example, I could define Latinos as those peoples and cultures populated or colonized by Spain who maintained or adopted Spanish or Spanish Creole as their language of communication. You can tell that I have been very well educated. That antiseptic description however, does not really explain the appeal of *morcilla* – pig's intestine – to an American born child. It does not provide an adequate explanation of why individuals like us, many of whom are born in this completely different American culture, still identify so strongly with those communities in which our parents were born and raised.

America has a deeply confused image of itself that is in perpetual tension. We are a nation that takes pride in our ethnic diversity, recognizing its importance in shaping our society and in adding richness to its existence. Yet, we simultaneously insist that we can and must function and live in a race and color-blind way that ignore these very differences that in other contexts we laud. That tension between "the melting pot and the salad bowl" -- a recently popular metaphor used to described New York's diversity – is being hotly debated today in national discussions about affirmative action. Many of us struggle with this tension and attempt to maintain and promote our cultural and ethnic identities in a society that is often ambivalent about how to deal with its differences. In this time of great debate we must remember that it is not political struggles that create a Latino or Latina identity. I became a Latina by the way I love and the way I live my life. My family showed me by their example how wonderful and vibrant life is and how wonderful and magical it is to have a Latina soul. They taught me to love being a Puerto

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Riqueña and to love America and value its lesson that great things could be achieved if one works hard for it. But achieving success here is no easy accomplishment for Latinos or Latinas, and although that struggle did not and does not create a Latina identity, it does inspire how I live my life.

I was born in the year 1954. That year was the fateful year in which *Brown v. Board of Education* was decided. When I was eight, in 1961, the first Latino, the wonderful Judge Reynaldo Garza, was appointed to the federal bench, an event we are celebrating at this conference. When I finished law school in 1979, there were no women judges on the Supreme Court or on the highest court of my home state, New York. There was then only one Afro-American Supreme Court Justice and then and now no Latino or Latina justices on our highest court. Now in the last twenty plus years of my professional life, I have seen a quantum leap in the representation of women and Latinos in the legal profession and particularly in the judiciary. In addition to the appointment of the first female United States Attorney General, Janet Reno, we have seen the appointment of two female justices to the Supreme Court and two female justices to the New York Court of Appeals, the highest court of my home state. One of those judges is the Chief Judge and the other is a Puerto Riqueña, like I am. As of today, women sit on the highest courts of almost all of the states and of the territories, including Puerto Rico. One Supreme Court, that of Minnesota, had a majority of women justices for a period of time.

As of September 1, 2001, the federal judiciary consisting of Supreme, Circuit and District Court Judges was about 22% women. In 1992, nearly ten years ago, when I was first appointed a District Court Judge, the percentage of women in the total federal judiciary was only 13%. Now, the growth of Latino representation is somewhat less favorable. As of today we have, as I noted earlier, no Supreme Court justices, and we have only 10 out of 147 active Circuit Court judges and 30 out of 587 active district court judges. Those numbers are grossly below our proportion of the population. As recently as 1965, however, the federal bench had only three women serving and only one Latino judge. So changes are happening, although in some areas, very slowly. These figures and appointments are heartwarming. Nevertheless, much still remains to happen.

Let us not forget that between the appointments of Justice Sandra Day O'Connor in 1981 and Justice Ginsburg in 1992, eleven years passed. Similarly, between Justice Kaye's initial appointment as an Associate Judge to the New York Court of Appeals in 1983, and Justice Ciparick's appointment in 1993, ten years elapsed. Almost nine years later, we are waiting for a third appointment of a woman to both the Supreme Court and the New York Court of Appeals and of a second minority, male or female, preferably Hispanic, to the Supreme Court. In 1992 when I joined the bench, there were still two out of 13 circuit courts and about 53 out of 92 district courts in which no women sat. At the beginning of September of 2001, there are women sitting in all 13 circuit courts. The First, Fifth, Eighth and Federal Circuits each have only one female judge, however, out of a combined total number of 48 judges. There are still nearly 37 district courts with no women judges at all. For women of color the statistics are more sobering. As of September 20, 1998, of the then 195 circuit court judges only two were African-American women and two Hispanic women. Of the 641 district court judges only twelve were African-American women and eleven Hispanic women. African-American women

comprise only 1.56% of the federal judiciary and Hispanic-American women comprise only 1%. No African-American, male or female, sits today on the Fourth or Federal circuits. And no Hispanics, male or female, sit on the Fourth, Sixth, Seventh, Eighth, District of Columbia or Federal Circuits.

Sort of shocking, isn't it? This is the year 2002. We have a long way to go. Unfortunately, there are some very deep storm warnings we must keep in mind. In at least the last five years the majority of nominated judges the Senate delayed more than one year before confirming or never confirming were women or minorities. I need not remind this audience that Judge Paez of your home Circuit, the Ninth Circuit, has had the dubious distinction of having had his confirmation delayed the longest in Senate history. These figures demonstrate that there is a real and continuing need for Latino and Latina organizations and community groups throughout the country to exist and to continue their efforts of promoting women and men of all colors in their pursuit for equality in the judicial system.

This weekend's conference, illustrated by its name, is bound to examine issues that I hope will identify the efforts and solutions that will assist our communities. The focus of my speech tonight, however, is not about the struggle to get us where we are and where we need to go but instead to discuss with you what it all will mean to have more women and people of color on the bench. The statistics I have been talking about provide a base from which to discuss a question which one of my former colleagues on the Southern District bench, Judge Miriam Cederbaum, raised when speaking about women on the federal bench. Her question was: What do the history and statistics mean? In her speech, Judge Cederbaum expressed her belief that the number of women and by direct inference people of color on the bench, was still statistically insignificant and that therefore we could not draw valid scientific conclusions from the acts of so few people over such a short period of time. Yet, we do have women and people of color in more significant numbers on the bench and no one can or should ignore pondering what that will mean or not mean in the development of the law. Now, I cannot and do not claim this issue as personally my own. In recent years there has been an explosion of research and writing in this area. On one of the panels tomorrow, you will hear the Latino perspective in this debate.

For those of you interested in the gender perspective on this issue, I commend to you a wonderful compilation of articles published on the subject in Vol. 77 of the *Judicature*, the Journal of the American Judicature Society of November-December 1993. It is on Westlaw/Lexis and I assume the students and academics in this room can find it.

Now Judge Cedarbaum expresses concern with any analysis of women and presumably again people of color on the bench, which begins and presumably ends with the conclusion that women or minorities are different from men generally. She sees danger in presuming that judging should be gender or anything else based. She rightly points out that the perception of the differences between men and women is what led to many paternalistic laws and to the denial to women of the right to vote because we were described then "as not capable of reasoning or thinking logically" but instead of "acting intuitively." I am quoting adjectives that were bandied around famously during the suffragettes' movement.

While recognizing the potential effect of individual experiences on perception, Judge Cedarbaum nevertheless believes that judges must transcend their personal sympathies and prejudices and aspire to achieve a greater degree of fairness and integrity based on the reason of law. Although I agree with and attempt to work toward Judge Cedarbaum's aspiration, I wonder whether achieving that goal is possible in all or even in most cases. And I wonder whether by ignoring our differences as women or men of color we do a disservice both to the law and society. Whatever the reasons why we may have different perspectives, either as some theorists suggest because of our cultural experiences or as others postulate because we have basic differences in logic and reasoning, are in many respects a small part of a larger practical question we as women and minority judges in society in general must address. I accept the thesis of a law school classmate, Professor Steven Carter of Yale Law School, in his affirmative action book that in any group of human beings there is a diversity of opinion because there is both a diversity of experiences and of thought. Thus, as noted by another Yale Law School Professor -- I did graduate from there and I am not really biased except that they seem to be doing a lot of writing in that area – Professor Judith Resnik says that there is not a single voice of feminism, not a feminist approach but many who are exploring the possible ways of being that are distinct from those structured in a world dominated by the power and words of men. Thus, feminist theories of judging are in the midst of creation and are not and perhaps will never aspire to be as solidified as the established legal doctrines of judging can sometimes appear to be.

That same point can be made with respect to people of color. No one person, judge or nominee will speak in a female or people of color voice. I need not remind you that Justice Clarence Thomas represents a part but not the whole of African-American thought on many subjects. Yet, because I accept the proposition that, as Judge Resnik describes it, "to judge is an exercise of power" and because as, another former law school classmate, Professor Martha Minnow of Harvard Law School, states "there is no objective stance but only a series of perspectives—no neutrality, no escape from choice in judging," I further accept that our experiences as women and people of color affect our decisions. The aspiration to impartiality is just that--it's an aspiration because it denies the fact that we are by our experiences making different choices than others. Not all women or people of color, in all or some circumstances or indeed in any particular case or circumstance but enough people of color in enough cases, will make a difference in the process of judging. The Minnesota Supreme Court has given an example of this. As reported by Judge Patricia Wald formerly of the D.C. Circuit Court, three women on the Minnesota Court with two men dissenting agreed to grant a protective order against a father's visitation rights when the father abused his child. The *Judicature Journal* has at least two excellent studies on how women on the courts of appeal and state supreme courts have tended to vote more often than their male counterpart to uphold women's claims in sex discrimination cases and criminal defendants' claims in search and seizure cases. As recognized by legal scholars, whatever the reason, not one woman or person of color in any one position but as a group we will have an effect on the development of the law and on judging.

In our private conversations, Judge Cedarbaum has pointed out to me that seminal decisions in race and sex discrimination cases have come from Supreme

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Courts composed exclusively of white males. I agree that this is significant but I also choose to emphasize that the people who argued those cases before the Supreme Court which changed the legal landscape ultimately were largely people of color and women. I recall that Justice Thurgood Marshall, Judge Connie Baker Motley, the first black woman appointed to the federal bench, and others of the NAACP argued *Brown v. Board of Education.* Similarly, Justice Ginsburg, with other women attorneys, was instrumental in advocating and convincing the Court that equality of work required equality in terms and conditions of employment.

Whether born from experience or inherent physiological or cultural differences, a possibility I abhor less or discount less than my colleague Judge Cedarbaum, our gender and national origins may and will make a difference in our judging. Justice O'Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. I am not so sure Justice O'Connor is the author of that line since Professor Resnik attributes that line to Supreme Court Justice Coyle. I am also not so sure that I agree with the statement. First, as Professor Martha Minnow has noted, there can never be a universal definition of wise. Second, I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.

Let us not forget that wise men like Oliver Wendell Holmes and Justice Cardozo voted on cases which upheld both sex and race discrimination in our society. Until 1972, no Supreme Court case ever upheld the claim of a woman in a gender discrimination case. I, like Professor Carter, believe that we should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group. Many are so capable. As Judge Cedarbaum pointed out to me, nine white men on the Supreme Court in the past have done so on many occasions and on many issues including *Brown.*

However, to understand takes time and effort, something that not all people are willing to give. For others, their experiences limit their ability to understand the experiences of others. Other simply do not care. Hence, one must accept the proposition that a difference there will be by the presence of women and people of color on the bench. Personal experiences affect the facts that judges choose to see. My hope is that I will take the good from my experiences and extrapolate them further into areas with which I am unfamiliar. I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.

I also hope that by raising the question today of what difference having more Latinos and Latinas on the bench will make will start your own evaluation. For people of color and women lawyers, what does and should being an ethnic minority mean in your lawyering? For men lawyers, what areas in your experiences and attitudes do you need to work on to make you capable of reaching those great moments of enlightenment which other men in different circumstances have been able to reach. For all of us, how do change the facts that in every task force study of gender and race bias in the courts, women and people of color, lawyers and judges alike, report in significantly higher percentages than white men that their gender and

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race has shaped their careers, from hiring, retention to promotion and that a statistically significant number of women and minority lawyers and judges, both alike, have experienced bias in the courtroom?

Each day on the bench I learn something new about the judicial process and about being a professional Latina woman in a world that sometimes looks at me with suspicion. I am reminded each day that I render decisions that affect people concretely and that I owe them constant and complete vigilance in checking my assumptions, presumptions and perspectives and ensuring that to the extent that my limited abilities and capabilities permit me, that I reevaluate them and change as circumstances and cases before me requires. I can and do aspire to be greater than the sum total of my experiences but I accept my limitations. I willingly accept that we who judge must not deny the differences resulting from experience and heritage but attempt, as the Supreme Court suggests, continuously to judge when those opinions, sympathies and prejudices are appropriate.

There is always a danger embedded in relative morality, but since judging is a series of choices that we must make, that I am forced to make, I hope that I can make them by informing myself on the questions I must not avoid asking and continuously pondering. We, I mean all of us in this room, must continue individually and in voices united in organizations that have supported this conference, to think about these questions and to figure out how we go about creating the opportunity for there to be more women and people of color on the bench so we can finally have statistically significant numbers to measure the differences we will and are making.

I am delighted to have been here tonight and extend once again my deepest gratitude to all of you for listening and letting me share my reflections on being a Latina voice on the bench. Thank you.

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EXHIBIT 2

WOMEN IN THE JUDICIARY

Panel Presentation - the 40th National Conference of Law Reviews
March 17, 1994, The Condado Plaza Hotel, Puerto Rico

When I finished law school in 1979, there were no women judges on the Supreme Court or on the highest court of my home state, New York. This past year alone there has been a quantum leap in the representation of women in the legal profession, and particularly in the judiciary. In addition to the appointment of the first female United States Attorney General, Janet Reno, and the election of the first female, and only Hispanic, President, Roberta Cooper Ramos, of the American Bar Association, an institution founded in 1878, we have seen the appointment of a second female justice on the Supreme Court, Associate Justice Ruth Bader Ginsburg, the appointment of a female chief judge, Justice Judith Kaye, to the Court of Appeals, the highest state court of New York, and the appointment to that same court of a second female judge, also not insignificantly, the first hispanic, Judge Carmen Beauchamp Ciprack.

As of 1992, women sat on the highest courts of almost all of the states and the territories including Puerto Rico, who can claim with pride the service of my esteemed co-panelist, The Honorable Miriam Naveira de Rodon, Associate Judge of the Supreme Court of Puerto Rico. One Supreme Court, that of Minnesota, has

a majority of women justices.

As of September 1992, the total federal judiciary, consisting of circuit, district, bankruptcy and magistrate judges, was 13.4% women. As recently as 1965, the federal bench had had only three women serve. Judges who are women on the federal bench are likely to increase significantly in the near future since the New York Times reported on January 18, 1994, that 39% of President Clinton's nominations to the federal judiciary in his first year have been women and he has vowed to continue that statistical pace in his future nominations.

These figures and the recent appointments are heartwarming. Nevertheless, much still remains to happen. Let us not forget that between the appointment of Justice Sandra Day O'Conner in 1981 and Justice Ginsburg in 1992, 11 years had passed. Similarly, between Justice Kaye's initial appointment as an associate judge to the New York Court of Appeal in 1983 and Judge Ciprack's appointment this past year, 10 years had also passed. Today, there are still two out of 13 circuit courts and about 53 out of 92 districts courts in which no women sit. There are no district women judges in the federal courts in at least 22 states. Our 13.4 percentage of the federal judiciary translates to only 199 female judges of a total of 1,484 judges in all

levels of the judiciary. Similarly, about 10 state supreme courts still have no women. Even on the courts which do have women, many have only one woman judge. Amalya Kearse, a black woman appointed in 1979, is still the only woman on the Second Circuit of New York. The second black woman to be nominated to a court of appeals. Judith W. Rogers, Chief Judge of the District of Columbia, was only recently named by President Clinton. The first hispanic female federal judges were only appointed in the fall of 1992. We had a banner year with 3 appointments -- myself in the S.D.N.Y. and two colleagues, Judges Baird and Gonzalez to districts in California. We this year will have a fourth female hispanic with the nomination and likely appointment of Martha Vasquez in New Mexico. Yet, we still have no female hispanic circuit court judges or no hispanic, male or female, US Supreme Court judge.

In citing these figure, I do not intend to engage you in or address the polemic discussion of whether the speed or number of appointments of women judges is commensurate with the fact that women have only entered the profession in any significant numbers in the last twenty years. Neither do I intend to engage in the dangerous and counterproductive discussion of whether the speed and number of appointments of

female judges is greater or lesser than that of people of color. Professor Stephen Carter of Yale Law School in his recent book on Affirmative Action points out that we excluded people do ourselves a disservice by comparative statistics or analysis. I accept and endorse his proposition that each of our experiences should be valued, assessed and appreciated independently.

I have, instead, raised these statistics as a base from which to discuss what my colleague Judge Miriam G. Cedarbaum of the S.D.N.Y. in a speech addressing "Women on the Federal Bench" and reprinted in Vol. 73 of the Boston University Law Review [page 39, at 42], described as "the difficulty question of what the history and statistics mean?" In her speech, Judge Cedarbaum expressed her belief that the number of women on the bench was still statistically insignificant and that therefore, we could not draw valid scientific conclusions from the acts of so few.

Yet, we do have women in more significant numbers on the bench, and no one can or should ignore asking and pondering what that will mean, or not mean, in the development of the law. I can not and do not claim this issue as personally my own. In recent years there has been an explosion of research and writing in this area. For those of you interested in the topic, I commend to you a wonderful compilation of articles written on the

subject in Volume 77 of Judicature, The Journal of the American Judicature Society for November-December 1993. This Journal is published out of Chicago, Illinois.

Judge Cedarbaum in her speech, however, expresses concern with any analysis of women on the bench which begins, and presumably ends, with a conclusion that women are different than men. She sees danger in presuming that judging should be gender or anything else based. She rightly points out that the perception of differences between men and women is what led to many paternalistic laws and to the denial to women of the right to vote because we could not "reason" or think "logically" but instead acted "intuitively".

While recognizing the potential effect of individual experiences on perceptions, Judge Cedarbaum nevertheless believes that judges must transcend their personal sympathies and prejudices and aspire to and achieve a greater degree of fairness and integrity based on the reason of law. From a person, who happens to be a women, like Judge Cedarbaum, one can easily see the genesis of her conclusions. She is a wonderful judge -- patient, kind, and devoted to the law. She is the epitome of fairness. She has been tremendously supportive of me this past year and a half and she serves as an example of what all judges

should aspire to be.

Yet, although I agree with and attempt to work toward Judge Cedarbaum's aspirations, I wonder whether achieving the goal is possible in all, or even most cases, and I wonder whether by ignoring our differences as women, men or even people of color, if differences exist, we do a disservice both to the law and society.

Just this month, the Supreme Court in Liteky v. United States, has recognized that personal bias and partiality are inherent in the task of judging. In deciding when judges should recuse themselves from cases, the Supreme Court recognized the existence of "appropriate" bias born of reactions that develop during a case from the facts of the case and "inappropriate" bias which stems from "extrajudicial" sources like information passed on by a non-party or ex parte, or from deep seated opinions that make fair judgment impossible. Justice Kennedy in his concurring opinion, joined by three other justices -- a split in our High Court, not something new -- expresses a concern similar to that voiced by Judge Cedarbaum which is that good and bad bias are impossible to determine because they depend so much on historical context and self-perception. Therefore, Justice Kennedy advocates a return to an objective standard in which what a reasonable

person would perceive as unbiased and impartial controls whether a judge disqualifies him or herself. I am not sure this is any less objectionable or more objective than Justice Scalia's majority approach in Liteky that presumed that a "reasonable person" could only be measured within the societal context with its current moraes.

Whatever the reasons why we may have a different perspective as women -- either as some theorists suggest because of our cultural experiences or as others postulate like Prof Carol Gilligan of Harvard University in her book entitled In a Different Voice because we have basic differences in logic and reasoning, is in many respects a small part of the larger practical questions we as women judges and society in general must address. I accept Prof Carter's thesis in his Affirmative Action book that in any group of human beings, there is a diversity of opinions because there is both a diversity of experiences and of thought. Thus, as stated by Prof. Judith Resnik in her article in Vol. 61 of the S. Cal L. Rev. 1877 (1988), entitled On the Bias: Feminist Reconsideration of the Aspirations for Our Judges:

> ...there is not a single voice of feminism, not a feminist approach, but many who are exploring the possible ways of being that are distinct from those structured in a world

> dominated by the power and words of men. Thus, feminist theories of judging are in the midst of creation and are not (and perhaps will never inspire to be) as solidified as the legal doctrine as the legal doctrines of judging can sometimes appear to be"

No one person, judge or nominee, will speak in a feminine or female voice. Yet, because I accept the proposition that, as Prof. Resnik explains, "to judge is an exercise of power" [pg 7] and because as Prof. Martha Minnow of Harvard Law School explains, there is no "objective stance but only a series of perspectives. ... [N]o neutrality, no escape from choice" [Resnik page 10] in judging, I further accept that our experiences as women will in some way affect our decisions. In short, as aptly stated by Prof. Minnow, "Th[e] aspiration to impartiality ... is just that an aspiration rather than a description because it may suppress the inevitable existence of a perspective ... ." What that means to me is that not all women, in all or some circumstances, or me in any particular case or circumstances, but enough women, in enough cases, will make a difference in the process of judging.

The Minnesota Supreme Court has given us an example of this. As reported by Judge Wald in her article entitled Some Real-Life Observations about Judging contained in a comment in Vol. 26 of the Indiana Law Review 173 (1992), the three women on

that court, with the two men dissenting, agreed to grant a protective order against a father's visitation rights when the father abused his child. The Judicature Journal has at least two excellent studies on how women on the U.S. Court of Appeals and on state supreme courts have tended to vote more often than their male counterparts to support claimants in sex discrimination cases and more often in cases involving euphemistically as I refer to them "underdogs" like criminal defendants in search and seizure cases. In a another real life example, in the Menendez trial in California, a jury split six men to six women on whether a lesser verdict should be returned against a son charged, with his brother, in killing their parents. For those of you law students, particularly editors on law journals, lost in the bowels of the law library and intricacies of the Uniform Book on Legal Citations, the Menendez brothers defended the homicides as an act of despair generated by years of abuse. The state prosecuted on the theory of financial gain from the rather sizeable inheritance the brothers may collect if acquitted of the charge. Although the brothers were tried together, they were tried before two separate juries because certain evidence came in against one but not the other brother. Both juries hung but the press has been fascinated by the gender split in the Eric

Menendez verdict voting in which the women wished to acquit or at least bring in a verdict less than the highest count and the men did not.

As recognized by Professor Resnik, Judge Wald, and others, whatever the causes, not one women in any one position, but as a group, we will have an affect on the development of the law and on judging.

In private discussions with me on the topic of differences based on gender in judging, Judge Cedarbaum has pointed out to me that the seminal decisions in race and sex discrimination have come from Supreme Courts composed exclusively of white males. I agree that this is significant except I choose to emphasize that the people who argued the cases before the Supreme Court which changed the legal landscape were largely people of color and women. I recall that Justice Thurmond Marshall, Judge Constance Baker Motley from my court and the first black women appointed to the federal bench and others of the then NAACP argued Brown v. Board of Education. Similarly, Justice Ginsburg, with other women attorneys, was instrumental in advocating and convincing the court that equality of work required equality in the terms and conditions of employment. Whether born from experience or inherent physiological

differences, a possibility I abhor less or discount less than my colleague Judge Cedarbaum, our gender makes and will make a difference in our judging.

Justice O'Connor has often been cited as saying that "a wise old man and a wise old woman reach the same conclusion" in deciding cases. I am not so sure Justice O'Connor is the author of that line since Professor Resnik attributes the line to Supreme Court Justice Coyle. I am also not so sure that I agree with the statement. First, if Prof. Martha Minnow is correct, there can never be a universal definition of "wise." Second, I would hope that a wise woman with the richness of her experiences would, more often than not, reach a better conclusion. What is better?

I like Professor Resnik hope that better will mean a more compassionate, and caring conclusion. Justice O'Connor and my colleague Miriam Cedarbaum would likely say that in their definition of wise, these characteristics are present. Let us not forget, however, that wise men like Oliver Wendel Holmes and Cardozo voted on cases upholding both sex and race discrimination. That until 1972, no Supreme Court case ever upheld the right of a women in a gender discrimination case. I like Prof. Carter believe that we should not be so myopic as to

believe that others of different experiences or backgrounds are incapable of understanding the values of a different group. As Judge Cedarbaum pointed out, nine white men (or at least a majority) on the Supreme Court in the past have done so on many occasions for different issues. However, to understand takes time and effort, components not all people are willing to give. For others, their experiences limit their ability to identify. Yet others, simply do not care. In short, I accept the proposition that a difference there will be by the presence of women on the bench and that my experiences will effect the facts I choose to see as a judge. I hope that I will take the good and extrapolate it further into other areas than those with which I am familiar. I simply do not know exactly what that difference will be in my judging, but I accept there will be some based on my gender and the experiences it has imposed on me.

As pointed out by Elaine Martin in her forward to the Judicature volume:

> Scholars are well placed, numbers-wise-to begin the proposition that the presence of women judges makes a difference in the administration of justice. Yet, a new set of problems arises for such researchers. Just what is meant by difference, and how is it measure? Furthermore, if differences exist, why do they exist and will they persist over time? .... In addition to these empirical questions, there are normative ones. Are these possible gender differences good or bad? Will they improve our system of

laws or harm it?

In summary, Prof. Martin quote informs me that my quest for answers is likely to continue indefinitely. I hope that by raising the questions today, you will start your own evaluations. For women lawyers, what does or should being a women mean in your lawyering. For men lawyers, what areas in your experiences and attitudes do you need to work on to make you capable of reaching those great moments of enlightment which other men in different circumstances have been able to reach.?

For me, since Senator Moynihan sent my name to President Bush in March of 1990, as a potential federal judicial nominee, I have struggled with defining my judicial philosophy. The best I can say now four-and-a-half years later, one-half year since I assumed my responsibilities, is that I have yet to find a definition that satisfies me. I do not believe that I have failed in my endeavor because I do not have opinions or approaches but only because I am not sure today whether those opinions and approaches merit my continuing them. Each day on the bench, I learn something new about the judicial process and its meaning. I am reminded each day that I render decisions that affect people concretely and that I owe them constant and continuous vigilance in checking my assumptions, presumptions and

perspectives and ensuring that to the extent my limited abilities and capabilities permit me, that I reevaluate and change them as circumstances and cases before me require. I can and do, like my colleague Judge Cedarbaum, aspire to be greater than the sum total of my experiences but I accept my limitations, I willingly accept that we who judge must not deny the differences resulting from experience and gender but attempt, as the Supreme Court suggests, continuously to judge when those opinions, sympathies and prejudices are appropriate. There is always danger in relative morality but since there are choices we must make, let us make them by informing ourselves on the questions we must not avoid asking and continuously ponder.

EXHIBIT 3

WOMEN IN THE JUDICIARY

Woman's Bar Association of the State of New York
April 30, 1999 Tarrytown Conference Center

Thank you Karen for that lovely introduction. I am absolutely delighted to be here tonight. This is the first time I have had the opportunity publicly to express my gratitude and appreciation to this organization and to its leaders for the critical and important role you all played in my nomination to the Second Circuit. What impressed me more than anything was that people like Melinda Aitkins Bass, Meg Gifford of WABSNY and Laurie Berke-Weiss, former President of the NYWBA—women who barely knew me rallied to my side in the most personal and totally committed ways. I owe a personal debt of gratitude to my friend, Karen Milton, the outgoing president of the NYWBA. Karen and I have been friends since the beginning of our professional careers at the DA's office. Karen took the lead in introducing my situation to Melinda, Meg and Laurie. Melinda went back and forth to Washington on numerous occasions to meet with senators on my behalf. I am told that her eloquence moved and persuaded many Senate staff members to look at my nomination more carefully. Melinda, Meg, Laurie and many of this year's chapter presidents cajoled, prodded and urged hundreds of you to write letters and make calls to your Senators. Laurie signed a letter on my behalf over the objections of others. My nomination was in trouble last year and I hope that all of you know that the presence of your leadership, backed by your voices and votes, made a tremendous difference in the final outcome. I am the personal recipient of "sister power and can personally attest to

its force. My sincerest and deepest thanks to all of you and my most personal thanks to Melinda.

As I prepared to write the speech for tonight and thought of your help in my struggles last year, I realized that as female lawyers and judges, we have come a very long way but we still have a very long way to go. When I finished law school in 1979, there were no women judges on the Supreme Court or on the highest court of my home state, New York. In the last twenty years of my professional life, I have seen a quantum leap in the representation of women in the legal profession, and particularly in the judiciary.

In addition to the appointment of the first female United States Attorney General, Janet Reno, we have seen the appointment of a two female justices on the Supreme Court and two female justices on the New York Court of Appeals, one a Chief Judge. As of 1998, women sat on the highest courts of almost all of the states and the territories including Puerto Rico. One Supreme Court, that of Minnesota, for a period of time had a majority of women justices.

As of September 30, 1998, the total federal judiciary, consisting of circuit, district, bankruptcy and magistrate judges, was 17.88 % women. In 1992, when I was first appointed a district court judge, the percentage of woman in the federal judiciary was 13.4%. As recently as 1965, however, the federal bench had only three women serving. Changes are happening.

These figures and appointments are heartwarming. Nevertheless, much still

remains to happen. Let us not forget that between the appointment of Justice Sandra Day O'Conner in 1981 and Justice Ginsburg in 1992, eleven years passed. Similarly, between Justice Kaye's initial appointment as an associate judge to the New York Court of Appeal in 1983 and Judge Ciprack's appointment in 1993, ten years passed. Six years later, we are waiting for a third appointment to both courts.

In 1992, when I joined the bench, there were still 2 out of 13 circuit courts and about 53 out of 92 districts courts in which no women sat. At the end of 1998, there are women sitting in all 13 circuit courts, although the First Circuit, the Eighth Circuit and the Federal Circuit each have only one female judge out of a combined total number of 29 judges. As of the end of 1998, of the 49 district courts with five or more judges, seven had no female judges.

For woman of color, the statistics are even more sobering. As of September 20, 1998, of the 195 circuit court judges, only two were African American women and there were only two Hispanic women. Of the 641 district court judges, only 12 were African American women and only 11 were Hispanic women. African American women comprise only 1.56% of the federal judiciary and Hispanic women comprise only 1.02%. No African Americans, male or female, sit on the First, Ninth and Tenth Circuits, and no Hispanics, male or female, sit on the Third, Sixth, Eighth and District of Columbia Circuits.

As gratifying as it has been to see more women and people of color on the federal

bench in the last six years, there are storm warnings we must keep in mind. Eight of 11 judges whom the Senate delayed more than a year before finally confirming in 1998 were women or minorities. Eight of 12 nominees who remained pending and unconfirmed for more than six months at the end of the 1998 Congressional session were women or minorities. Of those pending for more than a year, seven of eight were women or minorities. When the Senate adjourned in 1998, three of the four nominees who had been voted out of the Judiciary Committee, but were not confirmed, were minorities.

For those of you who are interested, the figures I have been quoting come from the Annual Report on the Judiciary Equal Employment Opportunity Program issued by the Administrative Office of the United States Courts for 1992 and 1998. I have also quoted liberally from the Judicial Selection Project: Annual Report 1998 issued by the Alliance for Justice.

These figures demonstrate that there is a real and continuing need for organizations like WABSNY, NYWBA and the many other women's groups throughout the country to exist and to continue their efforts in promoting women of all colors in their pursuit for equality in the judicial system. My speech tonight, however, is not about the struggle to get us where we are and were we need to go, but instead to discuss what it will mean to have more women on the bench.

I have raised these statistics as a base from which to discuss a question that my colleague, Judge Miriam G. Cedarbaum, in a speech addressing "Women on the Federal

Bench"[1] raised -- "the difficult question of what the history and statistics mean?" In her speech, Judge Cedarbaum expressed her belief that the number of women on the bench was still statistically insignificant and that therefore, we could not draw valid scientific conclusions from the acts of so few.

Yet we do have women in more significant numbers on the bench, and no one can or should ignore asking and pondering what that will mean, or not mean, in the development of the law. I cannot and do not claim this issue as personally my own. In recent years there has been an explosion of research and writing in this area. For those of you interested in the topic, I commend to you a wonderful compilation of articles written on the subject in Volume 77 of Judicature, The Journal of the American Judicature Society for November-December 1993. This Journal is published out of Chicago, Illinois.

Judge Cedarbaum expresses concern with any analysis of women on the bench that begins, and presumably ends, with a statement that women are different than men. She sees danger in presuming that judging should be gender (or anything else) based. She rightly points out that the perception of differences between men and women is what led to many paternalistic laws and to the denial to women of the right to vote because we could not "reason" or think "logically" but instead acted "intuitively".

While recognizing the potential effect of individual experiences on perceptions,

[1] Reprinted in Vol. 73 of the Boston University Law Review 39.

Judge Cedarbaum nevertheless believes that judges must transcend their personal sympathies and prejudices and aspire to and achieve a greater degree of fairness and integrity based on the reason of law. Although I agree with and attempt to work toward Judge Cedarbaum's aspirations, I wonder whether achieving the goal is possible in all, or even most cases, and I wonder whether by ignoring our differences as women, men or even people of color, if differences exist, we do a disservice both to the law and society.

A few years ago, the Supreme Court in Liteky v. United States, recognized that personal bias and partiality are inherent in the task of judging. In deciding when judges should recuse themselves from cases, the Supreme Court recognized the existence of (1) "appropriate" bias born of reactions that develop during a case from the facts of the case, and (2) "inappropriate" bias that stems from "extrajudicial" sources like information passed on by a non-party or ex parte, or from deep seated opinions that make fair judgment impossible. Justice Kennedy in a concurring opinion, joined by three other justices, expressed a concern similar to that voiced by Judge Cedarbaum, which is that good and bad biases are impossible to determine because they depend so much on historical context and self-perception. Justice Kennedy advocated a return to an objective standard in which what a reasonable person would perceive as unbiased and impartial controls whether a judge disqualifies him or herself. I am not sure that this is any less objectionable or more objective than Justice Scalia's majority approach that presumed that a "reasonable person" could only be measured within the societal context with its current

mores.

Whatever the reason why we may have a different perspective as women—either as some theorists suggest because of our cultural experiences or, as others postulate like Professor Carol Gilligan of Harvard University in her book entitled In a Different Voice, because we have basic differences in logic and reasoning—it is in many respects a small part of the larger practical questions we as female judges and society in general must address. I accept Professor Stephen Carter's thesis in his book, Reflections of an Affirmative Action Baby, that in any group of human beings, there is a diversity of opinions because there is both a diversity of experiences and of thought. Thus, as noted by Prof. Judith Resnik in an article [2]entitled On the Bias: Feminist Reconsideration of the Aspirations for Our Judges:

> ...there is not a single voice of feminism, not a feminist approach, but many who are exploring the possible ways of being that are distinct from those structured in a world dominated by the power and words of men. Thus, feminist theories of judging are in the midst of creation and are not (and perhaps will never aspire to be) as solidified as the legal doctrines of judging can sometimes appear to be

No one person, judge or nominee, will speak in a feminine or female voice. Yet because I accept the proposition that, as Professor Resnik explains, "to judge is an

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[2]Vol. 61 of the S. Cal L. Rev. 1877 (1988)

exercise of power" [p. 7] and because as Professor Martha Minnow of Harvard Law School explains, there is no "objective stance but only a series of perspectives. ... [N]o neutrality, no escape from choice" [Resnik page 10] in judging, I further accept that our experiences as women will in some way affect our decisions. In short, as aptly stated by Professor Minnow, "Th[e] aspiration to impartiality ... is just that an aspiration rather than a description because it may suppress the inevitable existence of a perspective ... ." What Professor Minnow's quote means to me is that—not all women, in all or some circumstances, or me in any particular case or circumstance, but—enough women, in enough cases, will make a difference in the process of judging.

The Minnesota Supreme Court has given us an example of this. As reported by Judge Wald in an article entitled Some Real-Life Observations about Judging,[3] three women on that court, with two men dissenting, agreed to grant a protective order against a father's visitation rights when the father abused his child. The Judicature Journal has at least two excellent studies on how women on the U.S. Court of Appeals and on state supreme courts have tended to vote more often than their male counterparts to support claimants in sex discrimination cases and more often in cases involving criminal defendants in search and seizure cases.

As recognized by Professor Resnik, Judge Wald, and others, whatever the causes, not one women in any one position, but as a group, we women will have an affect on the

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[3]Vol. 26 of the Indiana Law Review 173 (1992)

development of the law and on judging.

In private discussions with me on the topic of differences based on gender in judging, Judge Cedarbaum has pointed out to me that the seminal decisions in race and sex discrimination have come from Supreme Courts composed exclusively of white males. I agree that this is significant except I choose to emphasize that the people who argued the cases before the Supreme Court that changed the legal landscape were largely people of color and women. I recall that Justice Thurgood Marshall, Judge Constance Baker Motley from my court and the first black women appointed to the federal bench and others who were then associated with the NAACP argued Brown v. Board of Education. Similarly, Justice Ginsburg, with other female attorneys, was instrumental in advocating and convincing the court that equality of work required equality in the terms and conditions of employment. Whether born from experience or inherent physiological differences—a possibility I abhor less or discount less than my colleague Judge Cedarbaum—our gender makes and will make a difference in our judging.

Justice O'Connor has often been cited as saying that "a wise old man and a wise old woman reach the same conclusion" in deciding cases. I am not so sure Justice O'Connor is the author of that line since Professor Resnik attributes the line to Supreme Court Justice Coyle. I am also not so sure that I agree with the statement. First, if Professor Martha Minnow is correct, there can never be a universal definition of "wise." Second, I would hope that a wise woman with the richness of her experiences would,

more often than not, reach a better conclusion.

Let us not forget that wise men like Oliver Wendel Holmes and Cardozo voted on cases upholding both sex and race discrimination. Until 1972, no Supreme Court case ever upheld the right of a women in a gender discrimination case. I, like Professor Carter, believe that we should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group. As Judge Cedarbaum pointed out, nine white men (or at least a majority) on the Supreme Court in the past have done so on many occasions for different issues. However, to understand takes time and effort, something not all people are willing to give. For others, their experiences limit their ability to understand the experiences of others. Yet others, simply do not care. In short, I accept the proposition that a difference will be made by the presence of women on the bench and that my experiences will affect the facts that I choose to see as a judge. I hope that I will take the good and extrapolate it further into other areas than those with which I am familiar. I simply do not know exactly what that difference will be in my judging, but I accept there will be some based on my gender and the experiences it has imposed on me.

As pointed out by Elaine Martin in her forward to the Judicature volume:

> Scholars are well placed, numbers-wise-to begin the proposition that the presence of women judges makes a difference in the administration of justice. Yet, a new set of

> problems arises for such researchers. Just what is meant by difference, and how is it measured? Furthermore, if differences exist, why do they exist and will they persist over time? .... In addition to these empirical questions, there are normative ones. Are these possible gender differences good or bad? Will they improve our system of laws or harm it?

Prof. Martin's quote informs me that my quest for answers is likely to continue indefinitely. I hope that by raising the questions today, you will start your own evaluations. For female lawyers, what does or should being a women mean in your lawyering? For male lawyers, what areas in your experiences and attitudes do you need to work on to make you capable of reaching those great moments of enlightenment that other men in different circumstances have been able to reach? How do we, men and women, cope with and alter the fact, as noted by Judith Resnik, that in every task force, study of gender bias in the courts, female lawyers and female judges report in significantly higher percentages than men that gender shapes their careers from hiring and retention to promotion and that a statistically significant number of female lawyers and judges have both experienced and seen gender bias in the courtroom?

Each day on the bench, I learn something new about the judicial process and its meaning, about being a professional woman in a world that sometimes looks at us with

suspicion. I am reminded each day that I render decisions that affect people concretely and that I owe them constant and continuous vigilance in checking my assumptions, presumptions and perspectives and ensuring that to the extent my limited abilities and capabilities permit, that I re-evaluate and change them as circumstances and cases before me require. I can and do, like my colleague Judge Cedarbaum, aspire to be greater than the sum total of my experiences but I accept my limitations. I willingly accept that we who judge must not deny the differences resulting from experience and gender but attempt, as the Supreme Court suggests, continuously to judge when those opinions, sympathies and prejudices are appropriate. There is always danger in relative morality but since there are choices we must make, let us make them by informing ourselves on the questions we must not avoid asking and continuously ponder.

We must all continue, individually and in voices united in organizations like the WABSNY, to think about these questions and figure out how we go about creating the opportunity for there to be more women on the bench, so we can finally have statistically significant numbers to measure the differences we will and are making.

I am delighted to have been here tonight and extend, once again, my deepest gratitude to all of you for the letters and calls you all made and for the affection, support and caring for me that went with them.

EXHIBIT 4

Women as Judges: A Latina Judge's Voice
Seton Hall School of Law
October 22, 2003

Thank you for that lovely introduction. I am delighted to be here tonight at a law school, Seton Hall, for which a woman, Miriam T. Rooney, served as the first woman law school dean in the history of American legal education in 1950. That was only four years before my birth. During the year of my birth in 1954, the seminal case in race desegregation, Brown v. Board of Education, was decided. This is the 50th year anniversary of that case and many colloquies are being held discussing the impact of that decision in our society.

Being a Latina woman who has been fortunate enough to achieve a prominent position in the legal profession and who is therefore one of the direct recipients of the Brown legacy, it is a particularly privileged feeling to have been invited to speak here by the Latin American Law Students Association. I also thought that this invitation provided a wonderful opportunity for me to discuss with you how far women and people of color have come in the legal profession during my lifetime but also my reflections of what we contribute as judges to the profession. I intend to talk to you about my Latina identity, where it came from, and the influence I perceive gender, race and national origin representation will have on the development of the law.

The Hispanic side of my identity was forged and closely nurtured by my family through our shared experiences and traditions. For me, a special part of my being a Latina are the muchos platos de arroz, guandoles y pernir that I have eaten at countless family functions, and the pasteles I consume every Christmas holiday meal. Part of my Latina identity is the sound of merengue at all our family parties. It is the memory of seeing Cantiflas, the famous comic, when

I was a kid with my aunt and cousins at the Saturday afternoon movies. My Latina soul was further nourished each weekend that I visited and played in abuelita's (grandma's) house with my cousins and other extended family members who were my friends as I grew up. Being a Latina child was watching the adults play dominos on Saturday night and us kids playing lotteria with chick peas as abuelita called out the numbers.

Does any one of these things make me a Latina? No, obviously not, because each of our Caribbean and Latin American communities has their own unique foods and different traditions at the holidays. I happen to speak Spanish, but my brother, only three years younger, like too many of us educated here, barely speaks Spanish. And even those of us who do speak Spanish, speak it poorly.

If I had pursued my career in my undergraduate history mayor, I could likely provide you with a very academic description of what being Latino or Latina means. For example, I could define Latinos as those people and cultures populated or colonized by Spain who maintained or adopted Spanish or Spanish Creole as their language of communication. That antiseptic description, however, does not really explain the appeal of merengue to an American born child. It does not provide an adequate explanation for why individuals like us, many of us whom were born in this completely different American culture, still identify so strongly with the communities in which our parents were born and raised.

America has a deeply confused image of itself that is a perpetual source of tension. We are a nation that takes pride in our ethnic diversity, recognizing its importance in shaping our society and in adding richness to its existence. Yet, we simultaneously insist that we can and must function and live in a race- and color- blind way that ignores those very differences that in

other contexts we laud. That tension between the melting pot and the salad bowl, to borrow popular metaphors in New York, is being hotly debated today in national discussions about affirmative action. This tension leads many of us to struggle with maintaining and promoting our cultural and ethnic identities in a society which is often ambivalent about how to deal with its differences.

In this time of great debate, we must remember that it is not politics or its struggles that creates a Latino or Latina identity. I became a Latina by the way I love and the way I live my life. My family showed me by their example how wonderful and vibrant life is and how wonderful and magical it is to have a Latina soul. They taught me to love both being a Puerto Riquena and to love America and value its lesson that great things could be achieved if one works hard for it. But achieving success here is no easy accomplishment for woman or for Latinos.

As I said, I was born in the year, 1954, in which *Brown v. Board of Education* was decided. When I was eight in 1961, the first Latino, the wonderful Judge Reynaldo Galarza in California, was appointed to the federal bench. When I finished law school in 1979, however, there were no women judges on the Supreme Court or on the highest court of my home state, New York. There was only one African-American Supreme Court Justice in 1979, and then and now, no Latino or Latina Justice on that Court.

In the last twenty plus years of my professional life, however, I have seen a quantum leap in the representation of women and Latinos in the legal profession, and particularly in the judiciary. In addition to the appointment of the first female United States Attorney General, Janet Reno, we have seen the appointment of two female justices on the Supreme Court and four

female justices on the New York Court of Appeals, one a Chief Judge and another a Puerto Riquena, the Hon. Carmen Beauchamp Ciparick. As of today, women sit on the highest courts of almost all of the states and the territories including Puerto Rico. One Supreme Court, that of Minnesota, for a period of time had a majority of women justices.

As of September 30, 2002, the federal judiciary, consisting of supreme, circuit, and district court judges, was about 23.4% women. In 1992, when I was first appointed a district court judge, the percentage of woman in the total federal judiciary was only 13.4%. The number is less favorable for Latinos or Latinas on the federal bench. As noted, we have no Supreme Court Justices and we are only 4.3% or 67 of the active circuit court and district court judges. In 1992, the number was substantially less. As recently as 1965, however, the federal bench had only three women serving and only one Latino judge on a circuit bench. Changes are thus happening.

These figures and appointments are heartwarming. Nevertheless, much still remains to happen. Let us not forget that between the appointment of Justice Sandra Day O'Conner in 1981 and Justice Ginsburg in 1992, 11 years had passed. Similarly, between Justice Kaye's initial appointment as an associate judge to the New York Court of Appeal in 1983 and Judge Ciprack's appointment in 1993, 10 years had also passed and it took another nine years for the recent women appointments to that court. Ten years later, we are waiting for a third appointment of a woman to the Supreme Court and a second minority - male or female - albeit preferably Hispanic - to the Supreme Court.

In 1992, when I joined the bench, there were still 2 out of 13 circuit courts and about 53 out of 92 districts courts in which no women sat. At the beginning of September, 2001, there are

women sitting in all 13 circuit courts, although the First, Fifth, Eighth Circuit and Federal Circuits, each had only one female judge out of a combined total number of 48 judges, There are still nearly 37 district courts with no woman judges.

For woman of color, the statistics are even more sobering. As of September 20, 1998, of the then 195 circuit court judges, only 2 were African American women and 2 Hispanic women. Of the 641 district court judges, only 12 were African American women and 11 Hispanic women. African American women comprised only 1.56% of the federal judiciary and Hispanic American woman comprised only 1.02%. No African Americans, male or female, sit today on the Fourth or Federal Circuits, and no Hispanics, male or female, sit on the Fourth, Sixth, Seventh, Eighth, District of Columbia and Federal Circuits.

As gratifying as it has been to see more woman and people of color on the federal bench in the last twenty years, there are storm warnings we must keep in mind. In at least the last five years, the majority of nominations and judges whom the Senate delayed more than a year before confirming or never confirming were women or minorities. I need not remind you that Judge Paez of the home Ninth Circuit has the dubious distinction of having had his nomination delayed for the longest period in Senate history.[1]

These figures demonstrate that there is a real and continuing need for Latino and Latina organizations like the student organization sponsoring me today and the many other community

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[1]For those of you interested, the figures I have been quoting come from the Annual Report on the Judiciary Equal Employment Opportunity Program issued by the Administrative Office of the United States Courts for 1992, 1998 and 2001. I have also quoted liberally from the Judicial Selection Project: Annual Report 2001 issued by the Alliance for Justice.

groups throughout the country to exist and to continue your efforts in promoting woman and men, of all colors, in their pursuit for equality in the judicial system. The focus of my speech tonight, however, is not about the struggle to get us where we are and were we need to go, but instead to discuss what it will mean to have more woman and people of color on the bench.

I have raised these statistics as a base from which to discuss a question which my colleague Judge Miriam G. Cedarbaum in a speech addressing "Women on the Federal Bench"[2] raised -- "the difficulty question of what the history and statistics mean?" In her speech, Judge Cedarbaum expressed her belief that the number of women on the bench (and by direct inference people of color on the bench) was still statistically insignificant and that therefore, we could not draw valid scientific conclusions from the acts of so few.

Yet, we do have women and people of color in more significant numbers on the bench, and no one can or should ignore asking and pondering what that will mean, or not mean, in the development of the law. I cannot and do not claim this issue as personally my own. In recent years there has been an explosion of research and writing in this area. Your Professor Solangelo Maldonado can easily provide you with the developing Latino scholarship in this debate.[3]

Judge Cedarbaum expresses concern with any analysis of women (and presumably again people of color) on the bench which begins, and presumably ends, with a statement that women or minorities are different than men. She sees danger in presuming that judging should be gender

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[2] Reprinted in Vol. 73 of the Boston University Law Review 39.

[3] For those of you interested in the topic as it relates to women, I commend to you a wonderful compilation of articles written on the subject in Volume 77 of Judicature, The Journal of the American Judicature Society for November-December 1993. This Journal is published out of Chicago, Illinois

or anything else based. She rightly points out that the perception of differences between men and woman is what led to many paternalistic laws and to the denial to women of the right to vote because we could not "reason" or think "logically" but instead acted "intuitively".

While recognizing the potential effect of individual experiences on perceptions, Judge Cedarbaum nevertheless believes that judges must transcend their personal sympathies and prejudices and aspire to and achieve a greater degree of fairness and integrity based on the reason of law. Although I agree with and attempt to work toward Judge Cedarbaum's aspirations, I wonder whether achieving the goal is possible in all, or even most cases, and I wonder whether by ignoring our differences as women, men or people of color, we do a disservice both to the law and society.

Whatever the reasons why we may have a different perspective as women or people of color—either as some theorists suggest because of our cultural experiences or as others postulate (like Prof Carol Gilligan of Harvard University in her book entitled In a Different Voice) because we have basic differences in logic and reasoning—is in many respects a small part of the larger practical questions we as women and minority judges and society in general must address. I accept the thesis of Professor Stephen Carter of Yale Law School in his Affirmative Action book that in any group of human beings, there is a diversity of opinions because there is both a diversity of experiences and of thought. Thus, as noted by Prof. Judith Resnik[4]

> ...there is not a single voice of feminism, not a feminist approach, but many who are exploring the possible ways of being that are distinct from those structured in a world

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[4] In an article entitled On the Bias: Feminist Reconsideration of the Aspirations for Our Judges.

dominated by the power and words of men. Thus, feminist theories of judging are in the midst of creation and are not (and perhaps will never inspire to be) as solidified as the [established] legal doctrines of judging can sometimes appear to be"

No one person, judge or nominee, will speak in a feminine, female or people of color voice. I need not remind you that Justice Thomas represents a part, but not the whole, of African American thought on many subjects. Yet, because I accept the proposition that, as Professor Resnik explains, "to judge is an exercise of power" [pg 7] and because as Prof. Martha Minnow of Harvard Law School explains, there is no "objective stance but only a series of perspectives. . . . [N]o neutrality, no escape from choice" [Resnik page 10] in judging, I further accept that our experiences as women and people of color will in some way affect our decisions.

In short, as aptly stated by Professor Minnow, "Th[e] aspiration to impartiality . . . is just that–an aspiration rather than a description because it may suppress the inevitable existence of a perspective . . . ." What Professor Minnow's quote means to me is that not all women or people of color, in all or some circumstances, or me in any particular case or circumstance, but enough women and people of color, in enough cases, will make a difference in the process of judging.

The Minnesota Supreme Court has given us an example of this. As reported by Judge Wald in an article entitled Some Real-Life Observations about Judging[5] three women on that court, with two men dissenting, agreed to grant a protective order against a father's visitation rights when the father abused his child. The Judicature Journal has at least two excellent studies on how women on the U.S. Court of Appeals and on state supreme courts have tended to vote

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[5]Vol. 26 of the Indiana Law Review 173 (1992),

more often than their male counterparts to support claimants in sex discrimination cases and more often in cases involving criminal defendants in search and seizure cases. As recognized by legal scholars, whatever the causes, not one women or person of color in any one position, but as a group, we will have an affect on the development of the law and on judging.

In private discussions with me on the topic of differences based on gender in judging, Judge Cedarbaum has pointed out to me that the seminal decisions in race and sex discrimination have come from Supreme Courts composed exclusively of white males. I agree that this is significant except I choose to emphasize that the people who argued the cases before the Supreme Court which changed the legal landscape were largely people of color and women. I recall that Justice Thurgood Marshall, Judge Robert Carter and Judge Constance Baker Motley from my court and the first black women appointed to the federal bench and others who were involved in the NAACP argued Brown v. Board of Education. Similarly, Justice Ginsburg, with other women attorneys, was instrumental in advocating and convincing the court that equality of work required equality in the terms and conditions of employment. Whether born from experience or inherent physiological or cultural differences—a possibility I abhor less or discount less than my colleague Judge Cedarbaum—our gender and national origins make and will make a difference in our judging.

Justice O'Connor has often been cited as saying that "a wise old man and a wise old woman reach the same conclusion" in deciding cases. I am not so sure Justice O'Connor is the author of that line since Professor Resnik attributes the line to Supreme Court Justice Coyle. I am also not so sure that I agree with the statement. First, if Professor Martha Minnow is correct, there can never be a universal definition of "wise." Second, I would hope that a wise Latina

woman with the richness of her experiences would, more often than not, reach a better conclusion.

Let us not forget that wise men like Oliver Wendel Holmes and Cardozo voted on cases upholding both sex and race discrimination. Until 1972, no Supreme Court case ever upheld the right of a women in a gender discrimination case. I, like Professor Carter, believe that we should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group. As Judge Cedarbaum pointed out, nine white men (or at least a majority) on the Supreme Court in the past have done so on many occasions for different issues. However, to understand takes time and effort, something not all people are willing to give. For others, their experiences limit their ability to understand the experiences of others. Yet others simply do not care. In short, I accept the proposition that a difference will be made by the presence of women and people of color on the bench and that my experiences will affect the facts I choose to see as a judge. I hope that I will take the good and extrapolate it further into other areas than those with which I am familiar. I simply do not know exactly what that difference will be in my judging, but I accept that there will be some based on my gender and my Latina heritage and those experiences my background has imposed on me.

It is clear to me that many law students view me as a role model. When they tell me that, I feel privileged and deeply touched because I understand how hard it is to dream about doing things in life unless you know that the possibility of succeeding does exist. Both women and people of color who have been parties before me have told me that they feel empowered in the legal system when they know someone like them is judging their case. This type of impact is

immediate and the most palpable. The less tangible but perhaps more important is the one I am talking about - how our experiences affect the law.

Borrowing from a concept set forth by Elaine Martin in a forward to a Judicature volume on female voices in the judiciary:

> Scholars are well placed, numbers-wise, to begin the proposition that the presence of women [and minority] judges make[s] a difference in the administration of justice. Yet, a new set of problems arises for such researchers. Just what is meant by difference, and how is it measured? Furthermore, if differences exist, why do they exist and will they persist over time? . . . . In addition to these empirical questions, there are normative ones. Are these possible [gender] differences good or bad? Will they improve our system of laws or harm it?

Professor Martin's quote informs me that my quest for answers is likely to continue indefinitely. I hope that by raising the questions today, you will start your own evaluations. For people of color and female lawyers, what does or should being a women or ethnic minority mean in your lawyering? For male lawyers, what areas in your experiences and attitudes do you need to work on to make you capable of reaching those great moments of enlightenment which other men in different circumstances have been able to reach? How do we, men and women, cope with and alter the fact, as noted by Judith Resnik, that in every task force study of gender bias in the courts, women and people of color lawyers and judges report in significantly higher percentages than white men that gender and race shape their careers from hiring, retention to promotion, and

that a statistically significant number of women and minority lawyers and judges have both experienced and seen bias in the courtroom?

Each day on the bench, I learn something new about the judicial process and its meaning, about being a professional Latina woman in a world that sometimes looks at us with suspicion. I am reminded each day that I render decisions that affect people concretely and that I owe them constant and continuous vigilance in checking my assumptions, presumptions and perspectives and ensuring that to the extent my limited abilities and capabilities permit me, that I reevaluate and change them as circumstances and cases before me require. I can and do, like my colleague Judge Cedarbaum, aspire to be greater than the sum total of my experiences but I accept my limitations. I willingly accept that we who judge must not deny the differences resulting from experience and heritage but must attempt, as the Supreme Court suggests, continuously to judge when those opinions, sympathies and prejudices are appropriate. There is always danger in relative morality but since there are choices we must make, let us make them by informing ourselves on the questions we must not avoid asking and by continuously pondering.

We must all continue, individually and in voices united in organizations like your student association, to think about these questions and figure out how we go about creating the opportunity for there to be more women and people of color on the bench, so we can finally have statistically significant numbers to measure the differences we will and are making.

I am delighted to have been here tonight and extend, once again, my deepest gratitude to all of you for listening to me and letting me share my reflections on being a Latina voice on the bench.

EXHIBIT 5

POLITICO

Sotomayor found friends in elite group

By: Kenneth P. Vogel
June 4, 2009 08:13 PM EST

Supreme Court nominee Sonia Sotomayor last year accepted an invitation to join the Belizean Grove, an elite but little-known women's-only group.

Founded nearly 10 years ago as the female answer to the Bohemian Grove — a secretive all-male club whose members have included former U.S. presidents and top business leaders — the Belizean Grove has about 125 members, including Army generals, Wall Street executives and former ambassadors.

Sotomayor's membership in the New York-based group became public Thursday afternoon in a questionnaire submitted to the Senate Judiciary Committee.

Since then, the group has been deluged with press calls, said its founder, Susan Stautberg, who explained that "we like to be under the radar screen."

The group — which on its website describes itself as "a constellation of influential women who are key decision makers in the profit, nonprofit and social sectors; who build long-term, mutually beneficial relationships in order to both take charge of their own destinies and help others to do the same" — hosts periodic meetings around New York, as well as an annual off-the-record three-day retreat in Central or South America at which its members attend cocktail parties with U.S. diplomats and host-country officials and participate in panel discussions on public policy and business affairs.

At last year's retreat in Lima, Peru, for instance, Sotomayor and the other members attended a reception at the American Embassy with U.S. Ambassador to Peru P. Michael McKinley and several female members of the Peruvian cabinet, Stautberg said.

Sotomayor, a federal appellate judge, gave a presentation on the challenges the judiciary faces in maintaining its independence from the legislative and executive branches.

The Politico 44 Story Widget Requires Adobe Flash Player.

"It was really about how you need to have that balance of power and that the judiciary needed to have the ability to really be itself and not be influenced politically," said Grove member Cathy Allen, the chief executive officer of a financial services firm in Santa Fe, N.M. Allen said she didn't take notes on the speech and added, "Everything we do is off the record."

In a quote on the group's website, Sotomayor called the Grove "an extraordinary grouping of talented, compassionate and passionate women. I am deeply honored to have been included. The joy of participating in your fun in Peru was wonderful."

Mary Pearl, a dean and vice president at New York's Stony Brook University, called the talk "inspiring" and said she came away from it impressed by Sotomayor's "profound respect for the Constitution and our legal framework in this country."

The two became friends through the group, which, Pearl said, is kind of the point of it.

"It's hard if you're someone who's a type 'A' personality, who's achieved a lot and who may be in the public eye — it's hard to make friends, so it's just a mutually supportive wonderful experience. We get together just for socializing and also just for intelligent conversation," said Pearl, adding that the group charges a couple hundred dollar membership fee and also participates in charitable work.

But it's not open to just anyone.

"The way you become a member is people recommend friends to join and we have an advisory board (that makes the final determination)," said Pearl, who is a member of that board. "You have to have achieved something, but you have to have a really good personality, too. You could be the richest person in the world with a resume that goes on for 50 pages, but if you don't have a sense of humor, then people won't want you to be a member."

Pearl called it "elite in the sense that anything that has more people who want to be in it than are in it is elite. But it's not elite in that people from all walks of life who are interesting can become a members."

An out-dated member list on the group's website lists members including former General Services Administration Director Lurita Doan, Army General Ann E. Dunwoody, former Goldman Sachs partner Ann Kaplan and IKEA executive Pernille Spiers-Lopez.

According to Stautberg, a former Washington bureau chief for Westinghouse Broadcasting, Sotomayor was recommended by Mari Carmen Aponte, a former Carter administration official who later served as Executive Director of the Puerto Rico Federal Affairs Administration in Washington.

Sotomayor "came to some events and got to know some of the members" and then was approved by the advisory board, said Stautberg, who called Sotomayor "a very bright, very decent, very nice woman."

Stautberg said she hoped Sotomayor could still be a member of the Grove if she's confirmed to the court, though the White House did not respond to questions about her plans.

And Stautberg brushed off a question about whether the Grove's women-only membership could generate controversy as the Bohemian Grove's exclusively male membership did in 1979, when the state of California sued the club for not hiring female employees as its facility there.

Stautberg stressed that male "spouses, partners and adult children" are permitted to go on the optional post-retreat expeditions (last year's was to Machu Picchu and the Sacred Valley) and said that even though "no man has ever applied to be a member. ... If they did, we would certainly vote on it."

The American Bar Association's judicial codes states that it is inappropriate for judges to belong to groups that "invidiously" discriminate on the basis of race, sex, religion or national origin.

On the questionnaire, Sotomayor wrote that "I do not consider the Belizean Grove to invidiously discriminate on the basis of sex in violation of the Code of Judicial Conduct."

While conspiracy theorists have cast the Bohemian Grove as a cog in a shadowy right-leaning globalist cabal, Pearl said the Belizean Grove is nonpartisan and stressed, "There's

nothing nefarious about it."

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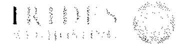


EXHIBIT 6

June 19, 2009

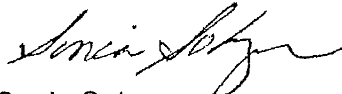
Honorable Patrick J. Leahy
Chairman, United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20515

Honorable Jeff Sessions
Ranking Member, United States Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20515

Dear Chairman Leahy and Senator Sessions:

I am writing to inform you that I have resigned from the Belizean Grove, effective today. I believe that the Belizean Grove does not practice invidious discrimination and my membership did not violate the Judicial Code of Ethics, but I do not want questions about this to distract anyone from my qualifications and record.

Sincerely,



Sonia Sotomayor

EXHIBIT 7

The Black, Latino, Asian Pacific American Law Alumni Association
Annual BLAPA Spring Dinner - April 17, 2009 - Battery Gardens

Being the Change We Need for Our Communities

I am very fond of NYU. My first teaching position as an adjunct professor was at NYU, and I gave up that formal tie a couple of years ago only because I was overextended beyond my time capabilities. Nevertheless, NYU is a very special place and its institutional commitment both to the diversity of its student body and to public service sets a standard among law schools.

I thank the Directors of Alumni Relations (particularly Damali Smith) who invited me to speak tonight and I congratulate the award recipients, Michael Oshima, Joseph Scantlebury, and Keith Harper for the recognition their distinguished service has earned them.

I was asked to speak tonight on the theme for tonight's dinner - "Being the Change We Need for Our Communities. I decided the focus of my talk earlier this week after attending a dinner of the Association of Judges of Hispanic Heritage. As most of you know, I am Puerto Rican and I have been involved as a leader and supporter throughout my life of many Puerto Rican and Latino student and professional groups.

At this recent dinner, one of the speakers was paying tribute to a judicial colleague, Justice Charles Tejada, who died last year and whom we all loved in my community. The speaker described the path-breaking efforts Charlie had expended in forming LALSA when he was here at NYU because of his feeling, probably rightly then, that the BALSA student group was not adequately championing causes unique to the Latino community.

The efforts today of individual community groups are still vital to the identification, promotion, and solution-finding for each community's unique challenges. My focus today, however, is to emphasize that while it is important to continue working in individual community groups, we must nonetheless keep sight always that we must equally continue working together to effect real change for the many problems that affect all of us - poverty, lack of education, and lack of opportunity.

As I look out and see the wide diversity of faces in the audience tonight, my heart swells with hope. Hope that our communities have grown fully to appreciate that, working together, we are more likely to achieve greater change than working alone in isolated groups. The power of working together was, this past November, resoundingly proven.

At every campaign stop I watched on television, I noted that the audiences surrounding the candidates were the most diverse I had ever seen involved in the American electoral process. The wide coalition of groups that joined forces to elect America's first Afro-American President was awe inspiring in both the passion the members of the coalition exhibited in their efforts and the discipline they showed in the execution of their goals.

Almost every historic change in the law has come through the vision provided by someone who has been supported by many. Seminal decisions in race and sex discrimination have come from Supreme Courts composed exclusively of white males. The people who argued the cases before the Supreme Court that have changed the legal landscape, however, were mostly people of color and women, aided by people of many races and of both sexes.

Recall that Justice Thurgood Marshall argued Brown v. Board of Education, but Justice Marshall had a cadre of brilliant Afro-American lawyers like later Judges Robert Carter and Constance Baker Motley and non Afro-American lawyers like Jack Greenberg and many others providing him and the cause with support and assistance. Similarly, Justice Ginsburg, with other women and men attorneys, was instrumental in advocating and convincing courts that equality of work requires equality in the terms and conditions of employment.

I hope that it does not take a grand historical event like the Presidential election of a person of color to remind us that the differences we project onto others and which so often alienate us from each other are superficial and not terribly meaningful. The other day at an event I reminded people that we have different faces, but the same physical heart beats in all of us. On November 4, we saw past our ethnic, religious and gender differences.

What is our challenge today: Our challenge as lawyers and court related professionals and staff, as citizens of the world is to keep the spirit of the common joy we shared on November 4 alive in our everyday existence. We have to continue to work together for our common goal of bringing the promise of America's greatness and fairness to all members of our society.

We must remember to stand united and face our problems and find solutions to our problems as one community. Our challenge is to give unselfishly and openly to the needy in our society, regardless of their gender or ethnic background. You cannot pick up the newspapers today without reading about the hardship our economic times are inflicting on all people. Our ethnic groups, who live on the margin always, will endure even greater hardship, but pain and hardship does not stop for color, race or gender.

Those of us fortunate enough to be well-educated and earn a decent living have an obligation to make change by working at it. It is the message of service that President Obama is trying to trumpet and it is a clarion call we are obligated to heed. We must devote ourselves to bettering the lives of all the needy of our society and we must do it together.

That means that each of us - no matter what kind of work we do to make a living - must do more than just that. We must identify those causes important to us and support those causes actively. It means giving money, when we have it, to organizations that provide services we value. It means giving time to public service activities. I am fond of reminding young lawyers - but I think more experienced lawyers need the reminder as well - that the needs of our community are extraordinarily varied, so your giving can take many different forms.

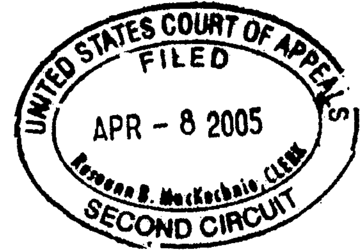
It can mean helping a person in need to write a resume or draft a will. It can mean, when you have the legal resources, helping asylum or withholding of removal immigrants or indigents seeking social security benefits. It can mean serving on your local school community boards and making sure our kids get the quality public education they need to survive in this competitive world. It means being active in voter registrations. The bottom line is that giving can take many forms - but give we must because our needs are many and human resources are a priceless commodity.

For the many of you who have seen me in Court, I hope you have seen how much I enjoy my work and how passionate I am about the good the law can and often does in our society. Our legal institutions are integral parts of how we interact with each other, but the most important part of change is not the law - it is the people who drive change and the vision they carry and execute. There are many needs in our society but I remain hopeful, today, looking at all of you here, members of the Black, Latino, Pan Asian Association, that many more historic and ordinary changes will continue to happen so long as we continue to remember that standing united and working together for change gets us very far.

I understand there are some newly admitted law students in the audience. I hope for you the happiness I have found in our profession. I assume that you will understand from my message tonight that I believe that happiness in the profession is found by giving of yourself to others. I do caution you, however: law school is hard and do not overextend yourself in giving until you have done enough to master your skills as a lawyer. You make the greatest contributions when you have developed your craft well. Thank you all for inviting me to be with you tonight and I hope that the many of you whom I have not met before will come up and say hello to me.

EXHIBIT 8

ORIGINAL



THE JUDICIAL COUNCIL OF THE SECOND CIRCUIT

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In re CHARGES OF JUDICIAL MISCONDUCT.	No. 04-8529 No. 04-8530 No. 04-8541 No. 04-8547 No. 04-8553 Memorandum and Order

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B e f o r e:

The Judicial Council of the Second Circuit.

In June, July, August and September 2004, five complaints of judicial misconduct were filed against a circuit judge of this Circuit ("the Judge") pursuant to 28 U.S.C. § 351 and the Rules of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officers ("the Local Rules").

Pursuant to 28 U.S.C. § 353(a) and Local Rule 9, Acting Chief Judge Dennis Jacobs (designated following the recusal of Chief Judge John M. Walker, Jr.) appointed a special committee to investigate the allegations in the above-referenced complaints. The special committee ("the Committee") consisted of the Acting Chief Judge, Circuit Judge Joseph M. McLaughlin, and District Judge Carol B. Amon of the Eastern District of New York. Michael Zachary, a supervisory staff attorney for the Court of Appeals, was appointed counsel to the Committee pursuant to Local Rule 10(c). The Committee submitted a report to the Judicial Council of the Second Circuit, pursuant to 28 U.S.C. § 353(c) and Rule 10(e) of the Local Rules. The report was based on a

Council of the Second Circuit, pursuant to 28 U.S.C. § 353(c) and Rule 10(e) of the Local Rules. The report was based on a thorough review of the complaints, the evidence submitted by the complainants and by the Judge, the relevant canons and authorities, and responses from the Judge written at the invitation of the Acting Chief Judge.

All five complaints present one or more misconduct claims concerning the substance of the Judge's June 19, 2004 remarks at an American Constitutional Society convention event ("the ACS remarks"); one complaint further alleges that speaking at that convention, without regard to the substance of the remarks, constituted prohibited political activity; and one complaint further alleges misconduct inferred from certain statements alleged to have been made by the Judge's wife at a May 23, 2004 political demonstration at Yale University.

I

The ACS remarks at issue were made after a panel discussion entitled "The Election: What's at Stake for American Law and Policy." The Judge spoke from the floor as a non-panelist. The remarks and context are as follows:

> Okay, I'm a judge and so I'm not allowed to talk politics and so I'm not going to talk about some of the issues which were mentioned or what some have said is the extraordinary record of incompetence of this administration at any number of levels, nor am I going to talk about what is really a difficult issue which is the education issue, which is an incredibly complicated one, which I'm glad you talked about. I'm going to talk about a deeper structural issue that is at stake in this election, and that has to do with the fact that in a way that occurred before but is rare in the United States, that somebody came to power as a result of the illegitimate acts of a legitimate institution that had the right to put somebody in power. That is what the Supreme Court did in Bush versus Gore. It put somebody in power. Now, he might have won anyway, he might not have, but what happened was that an illegitimate act by an institution that had the legitimate right to put somebody in power. The reason I emphasize that is because that is exactly what happened when Mussolini was put in by the King of Italy, that is, the King of Italy had the right to put Mussolini in though he had not won an election and make him Prime Minister. That

> is what happened when Hindenburg put Hitler in. I'm not suggesting for a moment that Bush is Hitler. I want to be clear on that, but it is a situation which is extremely unusual. When somebody has come in in that way they sometimes have tried not to exercise much power. In this case, like Mussolini, he has exercised extraordinary power. He has exercised power, claimed power for himself that has not occurred since Franklin Roosevelt, who after all was elected big and who did some of the same things with respect to assertions of power in time of crisis that this President is doing. It seems to me that one of the things that is at stake is the assertion by the democracy that when that has happened it is important to put that person out, regardless of policies, regardless of anything else, as a statement that the democracy reasserts its power over somebody who has come in and then has used the office to take... build himself up. That is what happened after 1876 when Hayes could not even run again. That is not what happened in Italy because, in fact, the person who was put in there was able to say "I have done all sorts of things and therefore deserve to win the next election." That's got nothing to do with the politics of it. It's got to do with the structural reassertion of democracy. Thank you.

By letter to Chief Judge Walker dated June 24, 2004, the Judge apologized for the ACS remarks:

> I write you as Chief Judge to express my profound regret for my comments at last weekend's American Constitution Society Conference. My remarks were extemporaneous and, in hindsight, reasonably could be - and indeed have been - understood to do something which I did not intend, that is, take a partisan position.
>
> As you know, I strongly deplore the politicization of the judiciary and firmly believe that judges should not publicly support candidates or take political stands. Although what I was trying to do was make a rather complicated academic argument about the nature of reelections after highly contested original elections, that is not the way my words, understandably, have been taken. I can also see why this occurred, despite my statements at the time that what I was saying should not be construed in a partisan way. For that I am deeply sorry.

> I will not take the time here to outline the non-partisan theoretical framework I was trying to develop. In retrospect, I fear that is properly the stuff only of an academic seminar. For, whatever I had in mind, what I actually said was too easily taken as partisan. That is something which judges should do their best to avoid, and there, I clearly failed.
>
> Again, I am truly sorry and apologize profusely for the episode and most particularly for any embarrassment my remarks may have caused you, my colleagues, and the court.
>
> You should feel free to share this letter with our colleagues.

Chief Judge Walker forwarded the Judge's June 24 letter to the other members of the Second Circuit Court of Appeals, with a memorandum of his own, which stated the following:

> Although [the] remarks were presented as an academic point with various historical analogies, the principal issue his remarks presents has nothing to do with the merits of what he said nor with his intent in saying them. The issue is whether his remarks could reasonably be understood as a partisan political comment. Partisan political comments, of course, are violations of the Code of Judicial Conduct. As [the Judge] has acknowledged, his remarks reasonably could be--and indeed have been--so understood, whatever his intent. He has sent me the enclosed letter, which he has urged me to share with the members of the Court.
>
> I am pleased that [the Judge] has promptly recognized that his remarks could too easily be taken as partisan and hence were inappropriate, and I urge all members of the Court to exercise care at all times, but especially in an election year, to refrain from any conduct or statements that could reasonably be understood as "political activity" or "publicly endors[ing] or oppos[ing] a candidate for public office."

The next day, the Judge's June 24 letter and Chief Judge Walker's June 24 memorandum were released to the press, with the express approval of the Judge.

II

We first consider the claim that the Judge's presence and participation at an event of the ACS is in itself a breach of ethics. Next, we consider the several claims premised on the substance of the Judge's remarks. Last, we consider the claim based on statements attributed to the Judge's wife at the Yale Protest.

A. Speaking at the ACS Conference

The complaint docketed under 04-8547 claims that, regardless of the content of the Judge's remarks, the fact that he spoke at all at the ACS convention violated the Canon 7 prohibition against political activity and making speeches for a political organization. See Canon 7(A(2)("A judge should not ... make speeches for a political organization..."). It is alleged in the complaint that the ACS is, "by definition[,] left-leaning and [has] always had a partisan mission and agenda."

The ACS describes itself on its web site, found at www.acslaw.org, as a "progressive legal organization" which seeks to counter "a narrow, conservative approach to the law" that (it asserts) "has come to dominate American law and public law." According to the web site, contributions to the ACS are tax-deductible; it "is a non-partisan, non-profit 501(c)(3) educational organization"; and it does "not, as an organization, lobby, litigate, or take positions on specific issues, cases, legislation, or nominations." A review of the various events listed on the web site supports the allegation that the ACS mission is "left-leaning," but it also reveals that speakers at the listed events appear to be from across the political spectrum.

The claim that speaking at an ACS event constitutes political activity does not withstand analysis under Canon 7. The phrase "political organization" in Canon 7(A)(2) likely refers to groups organized *primarily* for political purposes, such as political parties, rather than to groups organized primarily for other purposes, such as legal education or debate, even if there is sympathy between a particular group or its mission and partisan entities. This distinction is suggested by Canon 7(C), which states: "A judge should not engage in any other political activity [referring to activities specified in 7(A) and (B)]; provided, however, this should not prevent a judge from engaging in the activities described in Canon 4." Canon 4 in turn provides: "[a] judge may engage in extra-judicial activities to

improve the law, the legal system, and the administration of justice." Among other things permitted by Canon 4, "[a] judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice." Canon 4(A). The Commentary to Canon 4 states:

> [a]s a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that the judge's time permits, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

Canon 4 Commentary. "[T]o qualify as a Canon 4 activity, the activity must be directed toward the objective of improving the law, qua law, or improving the legal system or administration of justice, and not merely utilizing the law or the legal system as a means to achieve an underlying social, political, or civic objective." Judicial Conference of the United States, Committee on Codes of Conduct, Advisory Opinion 93, Extrajudicial Activities Under Canons 4 and 5, ¶ 3 (1977, last revised Oct. 1998). Because "judicial participation in Canon 4 activities is actively encouraged[,] ... a judge will be given greater latitude when participating in extrajudicial activities expressly covered by Canon 4," id. at ¶ 2, but, when an activity is "politically oriented," Canon 4 activities are construed "narrowly, restricting them to activities that are most directly related to the law and legal process," id. at ¶ 13.

A judge may attend or speak at an event even if it is sponsored by a group that has an identifiable political or legal orientation or bias. It does not follow therefrom that the judge is an adherent of the group's political or legal mission, or a fellow traveler. See Judicial Conference of the United States, Committee on Codes of Conduct, Compendium of Selected Opinions, § 4.5(k) (2001)("A judge who is a member of the American Bar Association is not regarded as personally supporting positions taken by the Association without the judge's involvement."); Judicial Conference of the United States, Committee on Codes of Conduct, Advisory Opinion 93, Extrajudicial Activities Under Canons 4 and 5, ¶ 12 (1977, last revised Oct. 1998)("a judge may remain a member of a bar association which takes controversial positions on policy issues so long as the judge abstains from

participating in the debate or vote on such matters in a manner in which the public may effectively become aware of the judge's abstention"). The ACS web site makes clear that various Supreme Court justices have attended and spoken at ACS events, and various panel members at the 2004 ACS convention and other ACS events stated or suggested that their political beliefs were opposed to the viewpoint attributed to the ACS by the complainants.[1] Legal organizations often invite speakers of divergent views as a means of fostering robust debate and attracting an audience. Balance in the roster of speakers or topics may be relevant to whether an event may be attended under Canon 4, but such balance is not required:

> [t]he education of judges in various academic and law-related disciplines serves the public interest. That a lecture or seminar may emphasize a particular viewpoint or school of thought does not necessarily preclude a judge from attending. Judges are continually exposed to competing views and arguments and are trained to consider and analyze them. Yet, notwithstanding the general principle that judges may attend independent seminars ..., there are instances in which attendance at such seminars would be inconsistent with the Code of Conduct. It is consequently essential for judges to assess each invitation on a case-by-case basis.

Judicial Conference of the United States, Committee on Codes of Conduct, Advisory Opinion 67, Attendance at Educational Seminars, ¶ 2 (1980, last revised Aug. 2004).

The Judge's presence at the ACS event, by itself, does not bespeak sympathy or support for the mission of the ACS, or for any of the speakers or groups represented at the event, because, among other reasons, the Judge's educational activities are by no means limited to groups generally aligned to the left, as a review of web sites confirms. See United States v. Pitera, 5 F.3d 624, 626-27 (2d Cir. 1993) (judge's impartiality not

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[1] The political views of many of the speakers listed for the various events described on the web site are not apparent. However, in addition to various speakers who are well known for being politically left-of-center, there are various speakers described as present or former officials in the current presidential administration, the Republican National Committee, and organizations such as the American Enterprise Institute and the National Right to Life Committee.

reasonably questioned, for purposes of a recusal motion in criminal case, where she previously gave lecture to police/prosecutor drug enforcement task force "about steps they might take to increase the prospects for conviction in narcotics cases," in light of fact that lecture also included "several emphatic criticisms of prosecutors" and judge also participated in programs for defense lawyers and "commendably lectures to a variety of trial practice seminars").

For the foregoing reasons, the claim is dismissed.[2]

B. The ACS Remarks

The following claims based on the ACS remarks are presented in one or more of the five complaints:

> 1. Advocacy that the President Not be Reelected. This claim is explicitly made in one complaint and is implicit in most of the others, as most of their allegations of political bias or political advocacy rely in part on the reelection-oriented portion of the remarks.
>
> 2. Comparing the President to Hitler and Mussolini. This claim is explicitly made in one complaint.
>
> 3. Political Bias or Engagement in Political Advocacy. Aside from the reelection-related claim, four of the complaints make the more general claim that the ACS remarks, or portions of them, demonstrate the Judge's "bigotry," political bias, or political advocacy.
>
> 4. Disagreement with *Bush v. Gore.* One complaint claims that this demonstrates incompetence.

We review these claims one by one. The general political advocacy allegations will be discussed in tandem with the reelection claim, as there is significant overlap between the two claims and, in any event, the same principles apply to both. The political bias claim will be discussed separately since it

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[2] To the extent that the complainants rely on the portion of Canon 7 which proscribes a judge from "mak[ing] speeches for a political organization," Canon 7(A)(2), that portion of the Canon does not apply since the Judge was not making his remarks "for" the ACS, i.e., he was not purporting to represent the organization or actively soliciting support for it.

appears to be based on the independent, although questionable, principle that judges should not hold strong political beliefs.

1. Advocacy that the President not be Reelected.

Canon 7 states that judges "should refrain from political activity," and, specifically, that judges "should not ... publicly endorse or oppose a candidate for public office." Canon 7(A)(2). The Judge stated in his August 12, 2004 letter to Acting Chief Judge Jacobs that his remarks were reasonably understood as opposing a candidate in violation of Canon 7(A)(2). He also apologized for making the remarks, stated that he had not intended to make a partisan statement, and asserted that he has "every intention of seeing to it that such an episode does not happen again."

Under 28 U.S.C. § 354(a) and (b), when a Judicial Council finds that an Article III judge has engaged in judicial misconduct, the actions it may take include:

> Ordering that, on a temporary basis, no further cases be assigned to the judge;
>
> Censuring or reprimanding the judge by means of private communication;
>
> Censuring or reprimanding the judge by means of public announcement;
>
> Certifying disability of the judge pursuant to § 372(b);
>
> Requesting that the judge voluntarily retire;
>
> Referring the complaint, together with the record of any associated proceedings and recommendations for appropriate action, to the Judicial Conference of the United States; or
>
> If the Judicial Council determines that the judge engaged in conduct which might constitute grounds for impeachment or which, in the interest of justice, is not amenable to resolution by the Judicial Council, certify that determination to the Judicial Conference of the United States.

See 28 U.S.C. § 354(a)-(b); Local Rules 14(a)-(g) and 15. Under Local Rule 14, the Judicial Council also may dismiss claims that do not state a misconduct claim under the applicable statutes,

"conclude the proceeding" on the grounds that corrective action has been taken or intervening events have made action unnecessary, or order corrective action. See Local Rule 14(a)-(g). There is no definition of "censure" or "reprimand" or any other possible sanction in the misconduct statutes or Local Rules, or the case law and scholarly writing interpreting them. However, the use of those and related terms in the ethics rules of the United States Senate and House of Representatives provides some guidance.[3]

For the reasons that follow, the Judicial Council (a) finds that the Judge violated Canon 7 when he made the statement concerning the President's reelection, (b) concurs in Chief Judge Walker's July 24, 2004 admonition, and (c) concludes that the dissemination of Chief Judge Walker's admonition--together with the Judge's apology--and the Judicial Council's concurrence with the admonition, constitute both a sufficient sanction and corrective action.

The Commentary to Canon 1 of the Code of Conduct for United States Judges states that the question of "[w]hether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable application of the text [of the Code] and should depend on such factors as the seriousness of the violation, the intent of the judge, whether there is a pattern of improper activity, and the effect of the

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[3] Based on the ordinary meaning of those terms, and their use in the Senate and House ethics rules, "censure" and "reprimand" are deemed to be more serious sanctions than "admonishment." See Rules of Procedure of the Senate Select Committee on Ethics, 149 Cong. Rec. S2677-01 at *S2677, *S2683 (Feb. 25, 2003) (§ 2(a)((2)(B), found under "Part I: Organic Authority," and Rule 4(g), found under "Part II: Supplementary Procedural Rules")(listing as most serious sanctions for Senators: expulsion, censure, payment of restitution, and change in seniority or responsibilities; listing as less serious sanctions: reprimand or payment of restitution; listing a public or private letter of admonition as least serious sanction); Rules of the House Committee on Standards of Official Conduct, 108th Congress, 149 Cong. Rec. H2375-01 at *H2381 (Mar. 26, 2003)(Rule 24)(describing reprimand as "appropriate for serious violations," censure as "appropriate for more serious violations," and expulsion as "appropriate for the most serious violations"; a "letter of reproval" is apparently the least severe sanction). A public letter of admonition is quite obviously a more severe sanction than a letter that is private.

improper activity on others or on the judicial system." See also Leonard E. Gross, Judicial Speech: Discipline and the First Amendment, 36 Syracuse L. Rev. 1181, 1256-61 (1986) (discussing factors to be weighed when state or federal tribunals are choosing between possible disciplinary sanctions).

In the present instance, certain factors militate in favor of imposing some type of sanction: the violation of Canon 7 was clear and serious; and the remarks were made before a large public audience, and they were widely reported by the news media. On the other hand, there are significant mitigating factors: the Judge conceded that his remarks could reasonably be understood as violating Canon 7; he stated that the remarks were not planned and that he had not intended to veer into remarks that could be construed as partisan advocacy; he apologized and gave assurances that there will be no recurrence; Chief Judge Walker's admonition and the Judge's apology were released to the public; and there was wide media coverage of that admonition and apology.

There is little in the way of published case law or other guidance concerning when censure, reprimand, or other sanction is warranted. However, in cases where censure, reprimand, or suspension was ordered, the behavior at issue was, in general, appreciably more egregious than anything alleged in the current five complaints. See Report of the National Commission on Judicial Discipline and Removal, reprinted as appendix to Illustrative Rules Governing Complaints of Judicial Misconduct and Disability (Admin. Office of U.S. Courts 2000); Jeffrey N. Barr and Thomas E. Willging, Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980, 142 U. Pa. L. Rev. 25 (1993). Cases involving allegations of improper partisan activity were "generally" resolved through corrective action. See Barr and Willging, supra, at 176. It appears that the corrective action usually took the form of the subject judge acknowledging the error or improper conduct and/or apologizing. Id. at 98, 100-01, 151-52.

We conclude that all of the purposes of the judicial misconduct provisions are fully served by: the Judge's apology; Chief Judge Walker's June 24, 2004 Memorandum; the release of that apology and Memorandum to the public; and the Judicial Council's concurrence with the admonition in the Memorandum. See id. at 106 ("the collective acts of the entire council are likely to have more credibility with complainants, the judge, and the public than the individual acts of a chief judge"). These actions constitute a sufficient sanction and appropriate corrective action.

Finally, in his June 24, 2004 letter of apology to Chief Judge Walker, the Judge suggested that his remarks were only contextually inappropriate, and that they were "properly the stuff only of an academic seminar." However, in response to the Committee's report, the Judge has acknowledged that the remarks also would have been inappropriate in an academic setting. Based on the Judge's acknowledgment, the Judicial Council concludes that no further action need be taken on that issue.

2. Comparing the President to Hitler and Mussolini.

The remarks concerning Hitler and Mussolini were cast in terms of the supposed similarity in how the President, Hitler and Mussolini gained power. However, the Judge went on to make a direct comparison between the President and Mussolini: "[i]n this case, like Mussolini, he [President Bush] has exercised extraordinary power." Under the circumstances, however, there is no need to parse these remarks. The Judge's August 12, 2004 letter to Acting Chief Judge Jacobs characterized the use of the Hitler and Mussolini examples as a mistake:

> With respect to the examples of other situations where persons came into power as a result of the illegitimate act of a legitimate body, I unquestionably would have been much wiser to limit my examples to those from American history.... My use of the appointment of Mussolini and Hitler as examples - however much it may have been a natural, off-the-cuff example for someone with my childhood, and however much I meant it as a comparison of the Supreme Court's use of its power to that of Victor Emmanuel III and Hindenburg, and not at all a comparison of President Bush to the dictators - was obviously not so reported or read. That was reason enough for me to apologize, as I have said, "profusely" and "deeply." I stand by my apology completely.

The Hitler and Mussolini analogy is contextually subsumed in the reelection remarks, which are discussed above. See, e.g., Complaint docketed under 04-8541 (describing comparison as part of "a pattern of thinly disguised political advocacy"). No incremental action is required or justified. Moreover, even if the comparison remarks are treated as independent of the reelection remarks, no incremental action would be needed for the following reasons.

Although the comparison remarks were inflammatory to a reasonable person of ordinary sensibilities, it is not clear that they constituted judicial misconduct. In the complaint docketed under 04-8547, the complainants reasonably argue that the comparisons violated the Canon 1 requirement that judges maintain, enforce, and personally observe "high standards of conduct ... so that the integrity and independence of the judiciary may be maintained." However, there is no guidance in the Canons (which are advisory in any event)--and little elsewhere--on when out-of-court remarks that may be intemperate or disrespectful transcend the merely distasteful or the inadvisable and amount to misconduct. The available cases (mostly applying state canons to state court judges) reflect that sanctions have been imposed primarily for inappropriate remarks made in the courtroom, or for inappropriate out-of-court remarks more offensive than the comparison remarks, or for repeated instances. The cases involving federal judges who made questionable remarks outside the courtroom generally were resolved through corrective actions taken either before or after the filing of misconduct complaints; however, the available descriptions of those cases do not indicate whether a finding or acknowledgment of misconduct was made in conjunction with the corrective action. See Barr and Willging, supra, 142 U. Pa. L. Rev. at 66, 76, 98, 102, 176 (discussing federal misconduct proceedings); American Law Reports Annotation, Disciplinary Action Against Judge on Ground of Abusive or Intemperate Language or Conduct Toward Attorneys, Court Personnel, or Parties to or Witnesses in Actions, and the Like, 89 A.L.R.4th 278 (1991, 2004) (discussing state and federal cases); cf. Talbot D'Alemberte, Searching for the Limits of Judicial Free Speech, 61 Tul. L. Rev. 611, 612 (1987)(describing newspaper article which had reported that a Federal Bar Association ethics expert had opined that federal judge's public statement that President Reagan was a racist "probably didn't violate judicial ethical canons prohibiting federal judges from engaging in politics").

As part of the media coverage of the ACS remarks, at least one article reported on the opinions of several law professors concerning the ethical implications of those remarks. See Josh Gerstein, Judge's 'Mussolini' Comments Violated Ethics, Critics Say, NEW YORK SUN, June 23, 2004. Professor Volokh of the University of California at Los Angeles School of Law, the only professor who distinguished between the reelection and comparison remarks, was reported as opining that the reelection remarks violated the Canon 7 prohibition against political advocacy, but that the "analogy to Hitler and Mussolini was factually inaccurate and unfair, but not a breach of ethics." Id. at last paragraph.

The Judicial Council concludes that no additional action is necessary based on the comparison language because the Judge acknowledged that the comparison was a mistake and has apologized for the ACS remarks, and because there is no precedent or authority clearly defining the comparison remarks as misconduct under the misconduct statutes or the Canons: "[m]any of the proscriptions in the Code are necessarily cast in general terms, and it is not suggested that disciplinary action is appropriate where reasonable judges might be uncertain as to whether or not the conduct is proscribed." Canon 1 Commentary at ¶ 3.

3. General Political Bias.

The general allegations of political bias, when considered separately from the political advocacy allegations, do not state a claim under Canon 7 or the misconduct statutes. Under Canon 7, a judge is free to have a preference or bias as between political candidates, and vote accordingly, as long as he or she does not publicly advocate for or against a candidate. To the extent that any of the complaints are based on the belief that a judge must be politically neutral or hold no strong political beliefs, they are without merit. To the extent that any of the complaints are based on the belief that the Judge's alleged bias renders him unable to sit as a judge in a case involving the President or any particular issue, they are (at least) premature as any such claim would await an actual instance. The general "political bias" claims are dismissed.

4. Disagreement with *Bush v. Gore*.

Canon 3 requires federal judges to "maintain professional competence in the law." Canon 3(A)(1). Although "incompetence" may not fit comfortably within the definition of "misconduct," it is arguably "conduct prejudicial to the effective and expeditious administration of the business of the court" or (less arguably) a "mental or physical disability" within the meaning of § 351(a). In any event, even assuming that demonstrated incompetence would constitute misconduct or a disability, we dismiss this claim as meritless. As shown by the closely divided vote in the Bush v. Gore decision itself, and the numerous analyses of that decision, reasonable people disagree over the soundness of the opinions in that case. See Bush v. Gore, 531 U.S. 98 (2000). Nothing in the Judge's comments about that decision raises an issue of competence.

C. The Yale Protest.

The complaint docketed under 04-8541 cites a report by the Associated Press that, on May 23, 2004, the Judge's wife attended a protest against the President and the war in Iraq, that she said that "she was protesting on behalf of herself and her husband" (identifying him by title, court and name), and that she expressed anger about the President's veracity and conduct of the war. The complainant argues that, by failing to "publicly correct[] his wife's comments that she was protesting on his behalf," the Judge "has allowed the impression to fester that he does take partisan political stands." As with the ACS remarks claims, this claim is construed as alleging a violation of Canon 7.

Both the Judge and his wife submitted letters in response. She had "no recollection of saying that [she] was protesting on behalf of [her] husband"; "[m]ore important, [the Judge] never authorized any such statement"; and she did not "believe that [she] would have said such a thing, as [she is] well aware of [the Judge's] obligation to avoid publicly opposing or endorsing candidates for public office, and [she is] vigilant against attribution of [her] own political views to [her] husband." Finally, she stated, as did the Judge in his response, that she was unaware of the allegation until it appeared in a June 25, 2004 newspaper story, over four weeks after the protest.

The Judge observes that his wife "is well aware of [his] obligation to avoid publicly opposing or endorsing candidates for public office, ... [he has] always counseled her that she must make every effort to avoid conveying the impression that she might be speaking on [his] behalf when expressing her political views," and "[o]ver the years she has been very faithful to that admonition." In any event, the Judge emphasizes that he "did not instruct or authorize her to make any statements on [his] behalf." Finally, the Judge states that he would have attempted to correct the article had he known of it at the time it was published (though he concedes no obligation to do so), but that he first became aware of the allegation approximately a month after the protest, by which time he felt that "it was too late to make a meaningful correction."

The dispositive question is whether the Judge authorized his wife to make the alleged comments. The only direct evidence bearing on that question indicates that he did not do so. Moreover, the Judge and his wife acknowledge that the Judge must avoid publicly endorsing or opposing political candidates, either directly or through his wife, and affirm their intention to abide

by that rule.

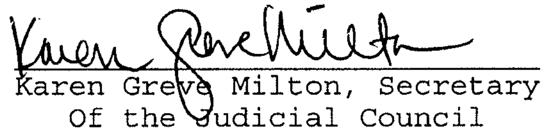
As to whether the Judge should have corrected the Associated Press story once he became aware of it, we conclude that he had no ethical duty to do so. He became aware of the story approximately a month after it was published, and it would have been reasonable at that point to decide against reviving the story by correspondence to the editor.

The claim is dismissed for lack of evidence of misconduct.

IV. Conclusion

For the foregoing reasons, the Judicial Council finds that the Judge's remarks concerning the President's reelection violated Canon 7, concurs in Chief Judge Walker's July 24, 2004 admonition, concludes that the dissemination of Chief Judge Walker's admonition--together with the Judge's apology--and the Judicial Council's concurrence with the admonition, constitute both a sufficient sanction and corrective action, and dismisses the five complaints in all other respects.

So ordered.



Karen Greve Milton, Secretary
Of the Judicial Council

Dated: April 8, 2005
New York, New York

EXHIBIT 9

Suffolk University Law Review
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*35 RETURNING MAJESTY TO THE LAW AND POLITICS: A MODERN APPROACH [FNa]

Hon. Sonia Sotomayor [FNd]

Nicole A. Gordon [FNdd]

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LED -- Law School & Continuing Legal Education

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. [FN1]

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. [FN2] A con ***36** fused public, finding itself at odds with the results of particular judicial decisions, experiences increased cynicism about the law. [FN3]

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. [FN4] 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 by denigrating the professionals in certain practice areas, like personal injury law. Further, many neglect to focus 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 discuss how we can satisfy societal expectations about "The Law" and help create a better atmosphere in which 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 that lawyers practice and judges declare 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:

> 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, 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 towards their function there is cynical disdain of the lawyers themselves. . . . The layman, despite the fact that ***37** he constantly calls upon lawyers for advice on innumerous questions, public and domestic, regards lawyers as equivocators, artists in double-dealing, masters of chicane. [FN5]

Frank, a noted judge of the Court of Appeals for the Second Circuit and a founder of the school of "Legal Realism," postulated that the public's distrust of lawyers arises because the law is "uncertain, indefinite, (and) subject to incalculable changes," while the public instead needs and wants certainty and clarity from the law. [FN6] Because a lawyer's work entails changing factual patterns presented within a continually evolving legal structure, 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. [FN7]

Frank believed that in the complex, fast-paced modern era, lawyers do themselves a disservice by acceding to the public myth that law can be certain and stable. He advocated that lawyers themselves accept the premise that the law is not fixed and that change in the law is inevitable and to be welcomed: "Without abating our insistence that the lawyers do the best they can, we can then manfully (sic) endure inevitable short-comings, errors and inconsistencies in the administration of justice because we can realize that perfection is not possible." [FN8]

Frank's thesis, set forth in 1930, should continue to attract examination today. It supports a pride that lawyers can take in what they do and how they do it. The law can change its direction entirely, as when Brown v. Board of Education [FN9] overturned Plessy v. Ferguson, [FN10] or as the common law has gradually done by altering the standards of products liability law directly contrary to the originally restricted view that instructed "caveat ***38** emptor." [FN11] As these cases show, change--sometimes radical change--can and does occur 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.

Lawyers must also continually explain the various reasons for the law's unpredictability. First, as Frank describes, laws are written generally and then applied to different factual situations. [FN12] The facts of any given case may not be within the contemplation of the original law. [FN13] 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). [FN14] Third, a given judge (or judges) may develop a novel approach to a specific set of facts or legal framework that pushes the law in a new direction. [FN15] Fourth, the function of the law at a trial is not simply to provide a framework within which to search for the truth, as understood by the public, but it is to do so in a way that protects constitutional rights. [FN16] Against these and other constraints, including, as Frank observed, an unknown factor--i.e., which version of the facts a judge or jury will credit-- competent lawyers are often unable to predict reliably what the outcome of a particular case will be for their clients. [FN17]

***39** 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. . . .

Hence is the Bar with fees supplied;--

Hence eloquence takes either side. . . .

And now we're well secured by law,

Till the next brother find a flaw. [FN18]

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 juries would reach different results in the same case because of a lawyer's presentation. [FN19] Whether the concern is that only the wealthy 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. To the extent judges and juries reach different results, much, as Frank observed, may be attributable to the fact that judges and juries react differently to facts because their life experiences are different. [FN20] Working from the same facts and within the confines of the same law, however, it seems that gross disparities in result do not frequently occur. [FN21] But the law does evolve, and to assist its evolution and at the same ***40** time maintain their own credibility, lawyers must dispel the view that they are dishonest, dissembling, hypocritical, or that Ben Franklin's description is correctly derisive. [FN22]

Frank's point that the public fails to appreciate the importance of indefiniteness in the law must be addressed through better education of the public by lawyers and others, including government officials. [FN23] In addition, the public has other needs relating to the law: the need, for example, for lawyers to act honorably, beyond what any law, regulation, or professional rule may require. 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 lawyers and in our public officials has varied. A history of ethical codes that have apparently not provided sufficient guidance to practitioners has recently led to tighter restrictions. In the public sphere, we have for some time been engaged in passing laws and regulations intended to curb unworthy behavior. This may not always be adequate for public officials or for lawyers. 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 nineteenth century 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 means flattering to the national standard of honesty and honour. 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 *41 and paltry suspicions. [FN24]

There is indeed a national plethora of legislation at every level of government restricting activities of government officials. [FN25] This legislation, among other things, controls the receipt of gifts; limits outside employment and the amounts of fees and honoraria; 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 to address financial and other conflicts. These rules are extremely important, even vital, notwithstanding Dickens' eloquent statement to the contrary. They protect the public from many kinds of inappropriate influences on government officials, and they perform another crucial service in providing guidance to and protecting those they regulate. Public servants have sometimes walked a fine line or walked over the line between gifts and bribes. [FN26] If specific rules have their place, however, that does not mean that we should limit the standard we apply to public officials to the technical question whether those rules have been broken, rather than aspiring to the highest in moral behavior. As a "Nation," we have not sufficiently emphasized the importance of professional morality in public service, whether among our government officials or our lawyers. Instead, we overemphasize social morality, concentrating on personal scandals that we cannot regulate, and then pass detailed rules, hoping to elevate professional behavior in that way. If we limit our expectations to what is specifically regulated (and sometimes over-regulated), we may in effect degrade the offices and the people who hold them.

In other countries, professional morality is approached differently. In Europe, for example, public officials 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 in their work. [FN27]

***42** The tolerance in this country for questionable behavior by public officials is illustrated by the persistence of extremely troubling--but legal-- practices in the public arena. In one of the murkiest and least well-controlled areas, we find ourselves debating what the quid pro quo's are for campaign contributions. Here we have abandoned standards we would surely apply in any other context. We would never condone private gifts to judges about to decide a case implicating the gift-givers' interests. [FN28] Yet our system of election financing permits extensive private, including corporate, financing of candidates' campaigns, raising again and again the question what the difference is between contributions and bribes and how legislators or other officials can operate objectively on behalf of the electorate. [FN29] Can elected officials say with credibility that they are carrying out the mandate of a "democratic" society, representing only the general public good, when private money plays such a large role in their campaigns? If they cannot, the public must demand a change in the role of private money or find other ways, such as through strict, well-enforced regulation, to ensure that politicians are not inappropriately influenced in their legislative or executive decision-making by the interests that give them contributions. [FN30] As Congress revamps many questionable practices, including the receipt of gifts from lobbyists, it must monitor to the public's satisfaction both whether inappropriate activity is being left unregulated and whether laws and regulations that are put in place are actually enforced. The continued failure to do this has greatly damaged public trust in officials and exacerbated the public's sense that no higher morality is in place by which public officials measure their conduct.

Similarly, the public wonders whether lawyers have enforceable rules of self-government or any kind of defined professional morality. Professional codes tend to speak in terms of ethical presumptions, without prescribing what lawyers should do in specific, troubling situations. 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. [FN31] But no rule guides a lawyer who is ***43** 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. [FN32]

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. [FN33] 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. . . . 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. [FN34]

Our public officials and lawyers should also be prepared to adopt a culture that depends upon subjective accountability as well as on well-defined, consistent 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 standards 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 the law in common moral standards. [FN35]

III. The Bar's Responsibility

What is the responsibility of a practicing lawyer, and how can 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 and misrepresentation that occurs in court.

Some number of witnesses in court lie, including some for the prosecution and some for the defense, and their lawyers suspect as much. Lawyers are not, however, routinely confronted with the clear-cut dilemma ***44** 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 points 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. [FN36]

To maintain credibility in the system, however, we must study how well we do in fact get at the "truth." [FN37] Lying is risky in the courtroom, but not generally because of the threat of a perjury indictment. It is risky because each side has the opportunity, through discovery, independent investigation, and cross-examination, to expose falsehood. [FN38] 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. [FN39] Many factors 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. 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 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 of the ***45** United States, in Daubert v. Merrell Dow Pharmaceuticals, Inc., [FN40] has reacted to this debate by expanding the judge's function to require that scientific testimony be evaluated more stringently before it can be presented to a jury. [FN41] Certainly, the battle of the experts undermines public confidence not only in the certainty of the law, but in another desired bedrock, 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 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 area 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. [FN42] Dickens' remark that honorable lawyers admonish their clients to "(s)uffer any wrong that can be done you, rather than come here (to the courts)," is still timely for many litigants. [FN43] The adversary system has its limitations under the best of circumstances, including the limitations it places on the judges' role, and so we must explain why the benefits of the system outweigh those limitations. [FN44] If, as has been said of the democratic form of government, the adversary system is "the worst . . . except (for) all those other forms," then that is the way in which the public should understand it: not as a system expected to accomplish more than any system can. [FN45]

***46** As we ponder how effective our legal system is, we must help create greater credibility in existing, useful mechanisms. A number of years ago, Judge Harold Rothwax of the Supreme Court of the State of New York noted his concern that illegal activities occur in the judicial system sometimes for years and that lawyers do not report them. [FN46] In a heartening exception to this generalization, insurance kick-backs were recently exposed by a lawyer who was offered one in New York. [FN47] Similarly, we recently have heard much about the police practice of tailoring testimony to avoid the suppression of evidence, an apparently common practice that must be known to, or at least suspected by, some prosecuting attorneys. [FN48] Often, however, lawyers, instead of engaging in genuinely useful projects to ferret out fraud, tend to denigrate either the law itself or the role and quality of work performed by lawyers in the fields, for example, of personal injury or criminal defense. Lawyers have also unfortunately joined the public outcry over excessive verdicts and seemingly ridiculous results reached in some cases. [FN49]

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 at the same time as we challenge overreactions that undermine the principles of our judicial system. [FN50] For example, legislators have introduced bills that place arbitrary limits on jury verdicts in personal injury cases. [FN51] But to do this is inconsistent with the premise of the jury system. The focus must be shifted back to monitoring frivolous claims, uncovering pervasive misrepresentation in court, and educating the public that no system of justice is perfect. 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), that allow for the discipline of lawyers, and ***47** that can result in punishment of perjurers. [FN52]

Criminal law is the most challenging arena in which to satisfy the public that our system adequately addresses problems of apparently wrong verdicts. This is largely because the public either does not understand or does not accept the necessity for safeguards against sometimes overzealous prosecution and the protection of certain civil liberties. The role of criminal defense lawyers in particular is not well understood or sufficiently appreciated by many lawyers, much less the public. Prosecutors and government officials should be especially sensitive to and publicly supportive of the fundamental place constitutional safeguards and the defense bar have in our system. We must take an aggressive role in cleaning our own house by educating ourselves and publicly supporting our colleagues who perform essential functions in asserting and protecting constitutional rights. [FN53]

If we can persuade the public that the system we have in place and the roles played by lawyers within that system are the best available, there remain ancillary issues of an ethical nature that do not necessarily involve what happens in the courtroom. We have an obligation, for example, to address professional conduct perceived by the public to be wrong even if it is not necessarily illegal. 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. [FN54] Similarly, Cali-

fornia found that sexual exploitation of clients *48 was a pervasive enough problem in divorce and other areas of legal practice that the California Supreme Court passed a very hotly debated professional rule setting forth a lawyer's professional obligations in these situations. [FN55]

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 inappropriate sexual relations with a client? How aggressively will they be investigated? And will they be held accountable if they continue to represent a client with whom they are having an impermissible sexual relationship?

Failure to enforce such a rule will again feed the public's mistrust, which arises in part from the sense that lawyers (and public officials), whose conduct is generally self-policed, protect themselves from proper regulation. In New York, 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 these proceedings be made public, the House of Delegates of the New York State Bar Association has opposed the measure. [FN56] 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. [FN57] Alternatively, we must find other ways to assure the public that closed proceedings are effective in disciplining lawyers, and we must do more to monitor them. One way or another, there must be convincing public justification for the manner in which discipline and performance are regulated.

In the political sphere, the sense that elected officials fail to police themselves is equally prevalent. Partisanship is the accepted "adversarial" mechanism that is supposed to maintain checks and balances and protect the public in various contexts, including in the fields of elections and campaign finance. [FN58] Bipartisan commissions, such as boards of elections *49 or most campaign finance agencies, often reflect a close relationship between commissioners and party politics. The result is often votes on individual matters along party lines rather than on the merits, and policies and procedures that favor the established parties over independent or alternative groups. By contrast, the experience of 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 legislatures--including the federal Congress--are prepared to have their campaign finances monitored by a genuinely non-partisan, objective body. As a result, regulation of activity which is vital to the health of our democracy--including campaign finance activity--is largely administered by bipartisan agencies with weak claim to the public's trust. [FN59] The legislators' failure to submit themselves to meaningful scrutiny heightens cynicism about our elected officials, many of whom, as we all know, are lawyers.

In short, we must find ways to re-evaluate and, if necessary, alter our methods of concluding legal and political conflicts. Next, we must find effective, confidence-building mechanisms for policing ourselves. Further, we must be prepared to entrust judgments on our own professional fitness not only to our colleagues, but to the public.

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. We 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 personally raise standards by living up to a code of conduct beyond what is "enforceable." This responsibility is not confined to attorneys in private practice. The others who operate in or around the legal framework--judges, prosecutors, juries, witnesses, public officials, and the press--must also educate themselves, and others, and apply higher standards of conduct to their own behavior.

Much distrust arises from a lack of understanding, whether about the *50 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 that many influences, including the press and the lay public, play in contributing to our intricate legal system.

V. Conclusion

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; and the importance of respecting every kind of legal practice and the role it plays in helping our society to achieve its goals.

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 we cannot achieve perfection.

Third, we must instill among ourselves and our public 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 and serve the public 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 and government officials properly carry out responsibilities that are ill understood by the public.

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, journalists, and all our fellow citizens, because we are all 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 and political conduct. We are faced with ongoing instances of erosion in public confidence. The O.J. Simpson trial and the constantly recurring investigations of public officials continue to subject our profession and government officials to public scorn and ridicule. The response, if we do not act, *51 will be an increasing amount of legislation criminalizing and otherwise regulating 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 governed by few meaningful rules of conduct and subject to heightened and unrelenting personal scrutiny by the press. Among our own ranks, senior practitioners complain bitterly of the loss even of professional courtesy among lawyers and office holders.

In 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, it is clear we ourselves feel and regret the loss of professional courtesy and respect. [FN60] We must first give respect to each other and to the profession--in word and in deed--before we can expect the public to do so.

If we act in these areas, the public discourse, the behavior of our lawyers and public officials as well as their reputations, and, ultimately, confidence in our legal and political systems will be greatly enhanced.

[FNa]. This Article is based upon a speech that Judge Sotomayor delivered in February 1996 as part of the Donahue Lecture Series. The Donahue Lecture Series is a program instituted by the Suffolk University Law Review to commemorate the Honorable Frank J. Donahue, former faculty member, trustee, and treasurer of Suffolk University. The Lecture Series serves as a tribute to Judge Donahue's accomplishments in encouraging academic excellence at Suffolk University Law School. Each lecture in the series is designed to address contemporary legal issues and expose the Suffolk University community to outstanding authorities in various fields of law.

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[FNdd]. Executive Director, New York City Campaign Finance Board; A.B. 1974, Barnard College; J.D. 1977, Columbia University School of Law. 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 (COGEL), the umbrella organization for ethics, lobbying, campaign finance, and freedom of information agencies in the United States and Canada. The views expressed in this article are not necessarily those of the New York City Campaign Finance Board or COGEL.

[FN1]. See, e.g., Katharine Q. Seelye, Dole, Citing 'Crisis' in the Courts, Attacks Appointments by Clinton, N.Y. Times, Apr. 20, 1996, at A1 (describing Senator Dole's criticism of liberal ideology of Clinton judicial appointments and American Bar Association); John Stossel, Protect Us From Legal Vultures, Wall St. J., Jan. 2, 1996, at 8 (asserting damage manufacturers have done to society is "trivial" compared with harm lawyers do); Don Van Natta Jr., Group Urges More Scrutiny For Lawyers, N.Y. Times, Nov. 10, 1995, at B1 (discussing recommendations for improving legal system and combatting public criticism by Committee on the Profession and the Courts assembled by New York State's highest court).

[FN2]. See generally 5 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment (3d ed. 1996) (explaining that exclusionary rule protects constitutional right to be secure against unreasonable searches and seizures).

[FN3]. See Judge Baer's Mess, N.Y. Times, Apr. 3, 1996, at A14 (criticizing federal judge's reversal of initial exclusion of drugs and confession as unconstitutional seizure). According to one editorial, "(o)ne of the major troubles with most lawyers is that they actually believe their profession is making the United States a better place to live." Time For Real Legal Reform Is Now, Before Lawyers Bring Nation Down, Series: The Trouble with Lawyers, Ft. Lauderdale Sun-Sentinel, Jan. 4, 1996, at 14A.

[FN4]. See Max Boot, Stop Appeasing the Class Action Monster, Wall St. J., May 8, 1996, at A15 (detailing how corporate mass-tort defense lawyers criticize class actions yet offer few alternatives or solutions).

[FN5]. Jerome Frank, Law and the Modern Mind 3 (Anchor Books 1963) (1930).

[FN6]. Id. at 5. In the preface to the sixth printing of Law and the Modern Mind, Frank took issue with the notion that his theories and their advocates constituted a school. Id. at viii-xii. 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.

[FN7]. Id. at 6-7 (footnotes omitted).

[FN8]. Id. at 277.

[FN9]. 347 U.S. 483 (1954).

[FN10]. 163 U.S. 537 (1896).

[FN11]. See W. Page Keeton et al., Prosser and Keeton on the Law of Torts SS 95-96, at 677-83 (5th ed. 1984) (outlining movement from notion of caveat emptor to liability for losses caused by defective products); Restatement (Second) of Torts S 402A cmt. b (1965) (detailing common law evolution of liability for defective products).

[FN12]. See Frank, supra note 5, at xii (describing how courts apply legal rules to unique cases).

[FN13]. See id. at 127-28 (criticizing mechanistic approach to law that would treat people like mathematical entities to achieve predictability).

[FN14]. See id. at 121 (discussing statistical evidence concerning differences among judges).

[FN15]. Cf. Jeremy Paul, First Principles, 25 Conn. L. Rev. 923, 936 (1993) (discussing how cases of first impression force judges to create law and affect law's unpredictability).

[FN16]. See United States v. Filani, 74 F.3d 378, 383-84 (2d Cir. 1996) (discussing varied goals of the trial in American jurisprudence). In Filani, the United States Court of Appeals for the Second Circuit considered a drug conviction based on the judge's improper questioning of the defendant. Id. at 382-83. In discussing the history and role of trial judges in England and the United States, the court stated:
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 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.Id. at 384.
[FN17]. Frank, supra note 5, at xiv-xv. Of course, there are many instances in which lawyers can predict reliably what the outcome of a particular case will be. See Rodney J. Uphoff, The Criminal Defense Lawyer as Effective Negotiator: A Systematic Approach, 2 Clinical L. Rev. 73, 83-86 (1995) (analyzing systemic pressures to plea bargain in criminal cases). Cases that reach the trial stage do not reflect the multitude of cases that are resolved early--even before the complaint stage--precisely because the parties have quite a clear expectation of how their cases would be decided. See id. at 83
(noting some defendants readily admit guilt and acknowledge responsibility for wrongs committed).
[FN18]. Benjamin Franklin, Poor Richard's Opinion, in Law: A Treasury of Art and Literature 151, 151 (Sara Robbins ed., 1990).

[FN19]. Compare BMW v. Gore, 116 S. Ct. 1589, 1592-94 (1996) (considering constitutionality of $2 million punitive damages award for undisclosed automobile paint repairs), with Yates v. BMW, 642 So. 2d 937, 938 (Ala. Civ. App. 1993) (noting jury in virtually identical Alabama fraudulent car repainting lawsuit awarded no punitive damages), cert. quashed as improvidently granted by 642 So. 2d 937 (Ala. 1993).

[FN20]. See Frank, supra note 5, at xii-xiii (recognizing judge and juries bring personal prejudices to trials). In extreme cases, of course, a lawyer (or a judge or jury) can be entirely incompetent or otherwise entirely fail to do a proper job.

[FN21]. 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, case law principles require that appellate courts give jury verdicts a great deal of deference. See Honda Motor Co. v. Oberg, 114 S. Ct. 2331, 2336-38 (1994) (stating civil jury verdicts are historically afforded deference on judicial review unless damages too large); United States v. Powell, 469 U.S. 57, 67 (1984) (commenting
that deference to jury's collective judgment brings element of finality to criminal process); Binder v. Long Island Lighting Co., 57 F.3d 193, 201-02 (2d Cir. 1995) (finding appellate court grants "strong presumption of correctness" when reviewing whether jury verdict is "seriously erroneous").
[FN22]. Franklin, supra note 18, at 151.

[FN23]. See Roberta Cooper Ramo, Law Day More Important than Ever for Keeping Strong, Chi. Daily L. Bull., Apr. 27, 1996, at 8 (emphasizing importance of legal profession keeping citizenry well informed about Constitution and legal system).

[FN24]. Charles Dickens, American Notes and Pictures from Italy 123 (Oxford Univ. Press 1957) (1842). It is interesting that in England there is now a heightened sense that laws or rules are in fact needed to regulate the behavior of public officials. See Committee on Standards in Public Life, First Report, 1995, Cmnd 2850-I, at 3 (urging remedial legislative action to counter public discontent with ethical standards of public officials).

[FN25]. See generally Council on Governmental Ethics Laws, The Council of State Gov'ts, COGEL Blue Book (9th ed. 1993) (compiling information on laws governing campaign finance, ethics, lobbying and judicial conduct nationwide).

[FN26]. See Jane Fritsch, The Envelope, Please: A Bribe's Not a Bribe When It's a Donation, N.Y. Times, Jan. 28, 1996, at D1 (describing subtle distinction between illegal bribes and legal campaign contributions to politicians); Stephen Kurkjian, Ferber's Conviction Spurs Widening of Probe, Boston Globe, Aug. 15, 1996, at B5 (reporting planned investigation of Massachusetts politicians after corruption conviction of former financial advisor to state agencies).

[FN27]. See generally Mark Davies, The Public Administrative Law Context of Ethics Requirements
for West German and American Public Officials: A Comparative Analysis, 18 Ga. J. Int'l & Comp. L. 319 (1988) (detailing differences between ethics regulations for American and German public officials).
[FN28]. Cf. Scott D. Wiener, Note, Popular Justice: State Judicial Elections and Procedural Due Process, 31 Harv. C.R.-C.L. L. Rev. 187, 194 (1996) (discussing Texas attorney Joe Jemail's $10,000 campaign contribution to judge in Texaco-Pennzoil case).

[FN29]. See Fritsch, supra note 26, at D1 (reporting influence of special interest money as serious political issue).

[FN30]. See Jamin Raskin & John Bonifaz, The Constitutional Imperative and Practical Superiority of Democratically Financed Elections, 94 Colum. L. Rev. 1160, 1160 (1994) (proposing replacement of federal election finance system with total public financing of congressional campaigns).

[FN31]. See Model Rules of Professional Conduct Rule 3.3 (1995) (noting candor toward tribunal prevents lawyer from offering false evidence); Model Code of Professional Responsibility EC 7-1, 7-6 (1983) (declaring lawyer's duties to client and legal system).

[FN32]. Lord Moulton, Law and Manners, Atlantic Monthly, July 1924, at 1, 1. Lord Moulton, a judge and member of the British Parliament, served as Minister of Munitions for Great Britain at the outbreak of World War I. Id.

[FN33]. Id.

[FN34]. Id. at 4.

[FN35]. Piero Calamandrei, Eulogy of Judges 45 (John Clarke Adams & C. Abbott Phillips, Jr. trans., 1942).

[FN36]. See Sissela Bok, Lying: Moral Choice in Public and Private Life 158-59 (1978) (analyzing how adversary system sometimes encourages attorneys to argue credibility of clients who have made knowingly perjurious statements).

[FN37]. See Marvin E. Frankel, The Search for Truth--An Umpireal View, 30 Rec. Ass'n B. City N.Y. 14, 15 (1975) (arguing that the "adversary system rates truth too low among the values that institutions of justice are meant to serve.")

[FN38]. See Fed. R. Civ. P. 26-37 (setting forth rules governing depositions and discovery in federal civil cases); Fed. R. Crim. P. 16 (establishing rules of evidentiary disclosure by both government and defendant in criminal cases); Fed. R. Evid. 607 (allowing impeachment of witness' credibility).

[FN39]. See generally Jeffrey T. Frederick, The Psychology of the American Jury (1987) (presenting social scientific research on jury behavior and persuasion); Saul M. Kassin & Lawrence S. Wrightsman, The American Jury on Trial: Psychological Perspectives (1988) (analyzing jury reliability and phases of jury trial); Christopher M. Walters, Note, Admission of Expert Testimony on Eyewitness Identification, 73 Cal. L. Rev. 1402 (1985) (discussing expert witness reliability in eyewitness identification cases).

[FN40]. 509 U.S. 579 (1993).

[FN41]. See id. at 597 (acknowledging Federal Rules of Evidence require judge to ensure scientifically valid principles support expert testimony).

[FN42]. See Abraham Lincoln, Notes for a Law Lecture, in The Oxford Dictionary of American Legal Quotations 302 (Fred R. Shapiro ed., 1993) ("As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."); Joshua A. Darrell, For Many, Litigation Retains Important Practical Benefits, Nat'l L. J., Apr. 11, 1994, at C11 (discussing benefits of alternative dispute resolution).

[FN43]. Charles Dickens, Bleak House 51 (Norman Page ed., Penguin Books 1971) (1853) (quotation marks omitted).

[FN44]. Judges sometimes receive criticism if they ask, or let juries ask, too many questions of witnesses. See United States v. Filani, 74 F.3d 378, 384 (2d Cir. 1996) (commenting on popular notion that limited questioning by trial judge guards against bias); United States v. Ajmal, 67 F.3d 12, 14-15 (2d Cir. 1995) (discussing dangers of prejudice and compromise of juror neutrality in juror questioning of witnesses); see also Bill Alden, Juror Inquiries Require Retrial for Defendant, N.Y. L.J., Sept. 22, 1995, at 1 (reporting how improper juror questioning in Ajmal case led to reversal and new trial). 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 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.

[FN45]. Winston Churchill, Speech (Nov. 11, 1947), in The Oxford Dictionary of Quotations 202 (Angela Parting-

ton ed., 4th ed. 1992).

[FN46]. See Symposium: Ethics in Government, City Almanac, Winter 1987, at 20, 20 (noting corruption in legal system succeeds when a few good people do nothing).

[FN47]. See Matthew Goldstein, 23 Lawyers Arrested in Insurance Scheme: Inflating of Settlements in Tort Cases Charged, N.Y. L.J., Sept. 22, 1995, at 1 (reporting praise of whistleblowing attorney who stated he "did what any honest citizen would do"); George James, 47 Accused in an Insurance Claim Scheme, N.Y. Times, Sept. 22, 1995, at B3 (describing district attorney's praise of lawyer as "credit to the legal profession and the general public").

[FN48]. See And What About Justice?, Wall. St. J., Sept. 1, 1995, at A6 (discussing perjury by law enforcement officers in O.J. Simpson trial and on Philadelphia police force); see also Harold J. Rothwax, Guilty: The Collapse of Criminal Justice 63-65 (1996) (discussing problems exclusionary rule creates for law enforcement officers).

[FN49]. See Was Justice Served?, Wall St. J., Oct. 4, 1995, at A14 (publishing attorney's criticism of criminal trials as "indistinguishable from Roman circuses").

[FN50]. Cf. supra note 47 and accompanying text (describing efforts of New York attorney exposing fraudulent practices by plaintiffs' personal injury attorneys).

[FN51]. See Common Sense Product Liability Legal Reform Act of 1996, H.R. 481, 104th Cong. (limiting punitive damages in certain cases).

[FN52]. See Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 2214 (1996) (applying New York check on excessive damages to federal court); Bender v. City of New York, 78 F.3d 787, 794-95 (2d Cir. 1996) (finding verdict of $300,700 excessive in civil rights action); Scala v. Moore McCormack Lines, Inc., 985 F.2d 680, 684 (2d Cir. 1993) (finding $1.5 million verdict for pain and suffering excessive); see also 18 U.S.C. SS 401-02 (1994) (granting courts power to punish contempt of courts' authority, including obstruction of justice); 18 U.S.C. S 1623 (1994) (criminalizing false declarations before any federal court or grand jury); Fed. R. Civ. P. 11(c) (providing for sanctions of lawyers who pursue frivolous claims and needless litigation); Dunn v. United States, 442 U.S. 100, 107 (1979) (noting Congress enacted S 1623 to "facilitate perjury prosecutions and thereby enhance the reliability of testimony"). Perjury cases are not often pursued, and perhaps should be given greater consideration by prosecuting attorneys as a means of enhancing the credibility of the trial system generally.

[FN53]. See Miranda v. Arizona, 384 U.S. 436, 480 (1966) (noting attorney carries out sworn duty by advising client to remain silent during police questioning). The Miranda Court emphasized that an attorney's advice of silence in the face of criminal investigation is an exercise of "good professional judgment," not a reason "for considering the attorney a menace to law enforcement." Id.; see also United States v. Filani, 74 F.3d 378, 384 (2d Cir. 1996) (noting that "fulfilling professional responsibilities 'of necessity may become an obstacle to truthfinding.'") (quoting Miranda, 384 U.S. at 514 (Harlan, J., dissenting)).

[FN54]. See Committee to Examine Lawyer Conduct in Matrimonial Actions, Administrative Bd. of the Courts of N.Y., Report 1-5 (1993) (identifying criticism of divorce law system and proposing reforms and improvements for lawyers and courts); see also Carpe Diem, N.Y. L.J., Mar. 12, 1993, at 2 (citing report critical of divorce lawyers by New York City Department of Consumer Affairs commissioner).

[FN55]. See California Rules of Professional Conduct Rule 3-120 (1995) (prohibiting lawyer from engaging in sexual relations with a client in specific circumstances).

[FN56]. See Gary Spencer, State Bar Opposes Any Public Discipline Procedures, N.Y. L.J., June 27, 1995, at 1 (re-

porting bar association refused to endorse "even the smallest step toward opening" disciplinary process to public). The Association of the Bar of the City of New York has endorsed opening up these proceedings. See Committee on Professional Discipline, The Confidentiality of Disciplinary Proceedings, 47 Rec. Ass'n B. City N.Y. 48, 60 (1992) (advocating opening process to public after determination that proceedings should begin).

[FN57]. Arguably, lawyers do not exhibit the same heightened sensitivity to the plight their clients suffer when unfair or embarrassing information becomes public through legal proceedings.

[FN58]. The Federal Election Commission is, for example, bipartisan by law. See 2 U.S.C. S
437c(a)(1) (1994) (providing that only three of six members appointed to Commission "may be affiliated with the same political party").

[FN59]. See Charisse Jones, Old-Style Board Faulted After Botched Voting, N.Y. Times, Oct. 12, 1996, at 25 (reporting criticism of local bipartisan board of elections as "mismanaged" and "crippled" by political appointments).

[FN60]. See Louis P. DiLorenzo, Civility and Professionalism, N.Y. St. B.J., Jan. 1996, at 8, 8-10, 25 (exploring scope of decline in professionalism among attorneys, uncovering its cause, and suggesting possible solutions); see generally New York State Bar Ass'n, Civility in Litigation: A Voluntary Commitment (1995) (explaining suggested guidelines for behavior of all participants in litigation process).

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