



U.S. Department of Justice

Office of Legal Policy

*F.C. - Litigation  
Strategy why not*

Washington, D.C. 20530

MEMORANDUM

July 21, 1986

TO: Samuel A. Alito  
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FROM: Donald B. Ayer  
Deputy Solicitor General

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Attorney-Advisor

SUBJECT: Litigation Strategy Working Group

The Litigation Strategy Working Group will meet on Thursday, July 31, 1986 at 11:00 in the Lands Division's conference room, Rm. 2603. At that time, we will discuss the draft "Alternative Sentences" guidelines distributed by the LSWG on February 3, 1986. A copy of those guidelines is attached for your review.

As time provides, we also may want to discuss other subjects. The following is a list of topics that the LSWG has considered in the past:

1. Encouraging the use of presidential signing statements in statutory interpretation.
2. Compiling original intent materials and including a discussion of such materials in Department briefs.
3. Devising standards for amicus participation.

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4. Monitoring United States Attorneys and Department of Justice policies.
5. Analyzing Federal Rule of Civil Procedure 68 with respect to attorney's fees and costs.

cc: Assistant Attorneys General (Litigating Divisions)

DRAFT 2/3/86

MEMORANDUM

TO: All Assistant Attorneys General  
All United States Attorneys

FROM: Edwin Meese III  
Attorney General

SUBJECT: Department Policy Regarding Conditions  
of Probation, "Alternative Sentences,"  
and Other Non-Traditional Responses to  
Civil and Criminal Violations

The following guidelines are adopted as the policy of the Department of Justice with respect to conditions of probation and "alternative sentences" imposed in criminal cases and to credit programs or other non-traditional responses to civil violations. The guidelines limit the range of sanctions and conditions of probation that the Department considers appropriate and will approve. The guidelines apply in all cases over which the Attorney General has authority.

I. General Policy with Respect to Conditions of Probation,  
"Alternative Sentences," and Non-Traditional Responses to  
Civil and Criminal Violations

A. Criminal Violations

Federal courts possess no inherent judicial authority to impose sanctions or place defendants on probation. The Courts derive their authority from, and are limited by, legislative enactments establishing the law and prescribing the penalties for its violation. Congress, through the Probation Act, 18 U.S.C. § 3651, has empowered the courts, "when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby," to suspend the execution of the sentence in a criminal case and impose one of three monetary conditions of probation "as the court deems best." Under the statute, the courts may suspend sentence and require the defendant to (1) pay a fine, (2) make restitution, or (3) provide for the support of persons for whose support the defendant is legally responsible. <sup>1/</sup> In a number of cases the Department has successfully argued that courts are not empowered to go beyond

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<sup>1/</sup> The Probation Act, together with the rest of the currently applicable sentencing statutes, will be repealed when the Sentencing Reform Act of 1984 goes into effect (not before November of 1986). The new Act provides that, in its discretion and to the extent the conditions are related to the "nature and circumstances of the offense and the history and characteristics of the defendants" (18 U.S.C. § 3553  
(Footnote Continued)

the three conditions set forth in the Probation Act and, in effect, to substitute the courts' own remedies for the statutory penalties or remedies.

Increasingly, however, it has become fashionable for the courts to suspend sentence and impose conditions of probation that are not fines paid to the U.S. Treasury, restitution, or support for persons for whom the defendants are legally responsible. Moreover, the terms of probation frequently bear little or no relationship to the illegal activity, and hence serve no perceptible purpose for which sentencing is designed. As an example, in one case the court imposed a substantial fine and then suspended nearly three-fourths on the condition that the defendant use the money to establish a chair in ethics at the local university. In a second case, a court imposed a fine and then allowed the defendant to reduce the fine to the extent that the defendant hired local probationers and parolees. Other examples of creative sanctions or conditions of probation include cases where courts have mitigated the statutory penalties by

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(Footnote Continued)

(a) (1)), the court may impose any of the twenty specified conditions. The final condition would require a defendant to "satisfy such other conditions as the court may impose." 18 U.S.C. § 3563(b) (20). The imposition of any such conditions will be subject to guidelines issued by the Sentencing Commission and accepted by Congress. Nevertheless, the instant guidelines constitute Department policy on the kinds of conditions that courts ought to impose and that the Department will recommend, and these guidelines are to apply with equal force both to the current and the future probation statutes.

substituting contributions to charity, corporate community service projects, and unrelated environmental clean-up efforts.

Of course, it is appropriate for courts as part of sentencing or as a condition of probation, to require the defendant to comply with the law in the future. Other conditions of probation, such as restitution, in fact make little sense if the defendant is not required to be in compliance with the law and to maintain that compliance. Sentences that require compliance or maintenance of compliance are often called "rehabilitative." The term "rehabilitation," however, frequently has been misapplied and expansively distorted to justify the sort of so-called "alternative sentences" described in the preceding paragraph. Nothing in these guidelines should be construed to prevent truly rehabilitative sentences that directly relate to assuring compliance with the law. However, to the degree that conditions of probation or so-called "alternative sentences" do not ensure compliance or provide restitution to actual victims, such departures from the authority granted by statute are predicated on little more than an assumed roving commission to do good at large. Court abuse of the power to impose sentence and set conditions of probation expands judicial power at the expense of the legislature.

B. Civil Violations

Sanctions imposed in civil cases may pose a similar problem. In the case of purely civil violations of regulatory laws, such as the environmental laws, there has also developed a tendency to stray beyond traditional categories of fines paid to the Treasury and specific relief ordered to remedy the particular effects of a violation or to ensure future compliance. For instance, in some cases the courts have recognized, and accepted in lieu of the statutory penalty or remedy, the voluntary efforts of defendants to mitigate the effects of their unlawful behavior. While mitigation is frequently restitutionary in nature and therefore appropriate, judicial power to mitigate penalties is misused when courts treat the specific power to mitigate as though it were a general power to suspend sanctions and impose conditions on the defendant that the court has no authority to require. Thus a court abuses its discretion when, in exchange for a promise from the court to impose a reduced statutory fine or penalty, it coerces a monetary remedy from the defendant not specifically provided for by the statute. In general, a court should not condition mitigation on a defendant's future conduct if the court would not have the power to order the remedy directly.

Moreover, with respect to both criminal and civil violations, the courts exercise peculiarly legislative powers when they divert money intended for the U.S. government, a victim, or a party to an individual or entity not specifically authorized by

Congress. They interfere with the regulatory scheme by avoiding statutory penalties, thus altering the legislatively-established incentives to comply with the law. The courts are legally and politically ill-equipped to choose among many worthy community charities when ordering money to be paid to a charity in lieu of statutory penalties. The Department should strongly discourage open-ended use of this judicial authority and should encourage the courts to adhere strictly to the statutory scheme.

II. Policy Guidelines on Conditions of Probation, "Alternative Sentences," and Non-Traditional Responses to Civil and Criminal Violations

The following guidelines are stated in general terms and must be adapted to the circumstances of each case. In cases in which a court has imposed or intends to impose a sentence, a civil penalty or obligation, or a condition of probation that is not in accord with these guidelines, Department attorneys shall object, file motions in opposition, and appeal such actions. The promulgation of these guidelines, while limiting the range of possible sanctions, does not infringe upon the broad discretion of the Attorney General to settle cases on terms that are in the best interests of the government, in accordance with regulations and policy guidelines governing settlements (see "Department Policy Regarding Consent Decrees and Settlement Agreements"). Exceptions to these policy guidelines will be made only in



extraordinary circumstances and with the approval of the appropriate Assistant Attorney General.

The following guidelines are hereby adopted:

1. Any fine or other monetary assessment should be paid either to the U.S. Treasury or to actual victims of the unlawful act. Serious questions of constitutional and statutory authority are raised when courts suspend statutory fines and order money paid to charitable or other entities, instead of to the U.S. Treasury or to actual victims of the particular violations. Such actions circumvent congressional intent, arrogate to the courts and to the executive (where administratively imposed) the power of the purse, and threaten to disrupt the economic incentives and deterrent effects inherent in the statutory scheme. Moreover, fines paid to the U.S. Treasury or to actual victims represent a clear penalty for violating federal law and convey a forceful deterrent message.

2. Penalties, non-monetary punishment, or conditions of probation should punish the defendant for past violations and be directly related to one or more of the following objectives: (1) rehabilitation in the sense of ensuring compliance with the law, (2) restitution, (3) providing for the support of persons for whose support the defendant is legally responsible. It is improper for a court to use its power to determine penalties -- including the power to mitigate fines and penalties -- to coerce conduct the court deems desirable but that cannot reasonably be

considered to be required by the statute. Legitimate uses of mitigation authority exercised in response to actions voluntarily taken by the defendant must be distinguished from impermissible attempts to condition mitigation on conduct the court could not order directly. In addition, penalties should be structured so as to deter the specific defendant and the regulated community in general from future violations. Voluntary activity of the defendant should be credited toward the mitigation of penalties only if the activity is initiated in addition to all regulatory compliance obligations; the activity directly addresses the harms produced by the violation; the cost to the defendant is commensurate with the degree of mitigation; and, the mitigation of penalties does not detract from the general deterrent effect of the court-imposed sanctions. Furthermore, in the civil penalties context, a defendant should not receive mitigation credit for fulfilling statutory compliance requirements.

3. "Rehabilitative" measures outside the context of compliance or restitution are inappropriate as conditions of probation or for mitigation of penalties. "Rehabilitative" measures that are not restitutionary or designed to ensure compliance are particularly inappropriate when applied to an organization as an abstract entity. Fines levied on an organization do, however, provide an incentive to officials and even shareholders to see that the organization in the future complies with the law. Moreover, organizational changes, monitoring programs, and other structural measures imposed as conditions of probation may serve to ensure future compliance, and to this

extent are acceptable as analogous to rehabilitative programs for individual offenders.

4. The Department should not approve any civil consent decree or settlement agreement that includes terms or remedies that do not accord with these guidelines, nor should the Department approve any consent decree that contains terms or remedies which would have been beyond the power of the court to order. The Department promulgated on [date], "Department Policy Regarding Consent Decrees and Settlement Agreements," which makes clear that the Department will not approve a consent decree which contains provisions that the court could not have ordered had the case been litigated to conclusion.

5. If special circumstances require any departure from these guidelines, such proposed departure must be submitted for the approval of the appropriate Assistant Attorney General. In notifying the appropriate Assistant Attorney General of the exception sought, the U.S. Attorney shall demonstrate that the circumstances warrant deviation from these guidelines.