

NEW YORK COUNCIL OF DEFENSE LAWYERS

60 EAST 42ND STREET

SUITE 950

NEW YORK, NEW YORK 10165

(212) 682-7000

FAX (212) 972-4930

FREDERICK P. HAFETZ
PRESIDENT
ROBERT G. MORVILLO
VICE-PRESIDENT
SAMUEL DAWSON
SECRETARY-TREASURER

PAST PRESIDENTS:
RONALD P. FISCHETTI
GUSTAVE H. NEWMAN

BOARD OF DIRECTORS:

PAUL B. BERGMAN
BENJAMIN BRAFMAN
RONALD P. FISCHETTI
JAY GOLDBERG
JO ANN HARRIS
ROBERT KATZBERG
ANDREW M. LAWLER
SARA MOSS
JED S. RAKOFF
VICTOR ROCCO
MICHAEL ROSS
EDWARD M. SHAW

PETER LUSHING
EXECUTIVE DIRECTOR

Comments Regarding Proposed Amendments

to U.S.S.G. §§ 5K1.1 and 1B1.8

The New York Council of Defense Lawyers ("NYCDL") is an organization comprised of more than one hundred attorneys whose principal area of practice is the defense of criminal cases in federal court. Many of our members are former Assistant United States Attorneys, including ten previous Chiefs of the Criminal Divisions in the Southern and Eastern Districts of New York.

In the pages that follow, we address several proposed amendments that relate to a subject that our organization's Federal Rules Committee has been examining: the impact of the Sentencing Guidelines (and in particular, §§ 5K1.1 and 1B1.8) on defendants cooperating with the government. Due to time constraints in preparing this pre-hearing submission, the NYCDL has not been able to conduct a comprehensive analysis of the many other pending proposed amendments, so as to

include in this document our comments on those other proposals. However, we do plan to complete our review of the proposed amendments and to submit to the Commission, during the post-hearing comment period, the results of our further analysis.

Amendment 35: Substantial
Assistance to Authorities (§ 5K1.1)

The Commission has proposed two noteworthy changes to § 5K1.1: First, Application Note 1 would be expanded to reflect the position adopted by many courts, that except in "an extraordinary case where the government in bad faith breaches an agreement to file the requisite motion," the sentencing court is without authority to depart below the guideline range absent a government motion pursuant to § 5K1.1. Second, the principle currently expressed in Application Note 3 to § 5K1.1 -- i.e., that the sentencing court grant substantial weight to the government's evaluation of the defendant's cooperation -- would be elevated from Commentary to Guideline Policy Statement.

With respect to the first proposed amendment, the NYCDL agrees with the Commission that the Guidelines should expressly recognize that a government motion pursuant to § 5K1.1 is not in all cases an absolute prerequisite to a downward departure based on the defendant's substantial assistance to the authorities; we believe, however, that the exception embodied in the proposed amendment is far too

restrictive and, at a minimum, should be expanded to allow downward departures where the government unreasonably declines to file a § 5K1.1 motion.

Preliminarily, it is important to note that except in the case of a departure below a statutory minimum, Congress itself has not elected to deprive the sentencing court of the authority to grant a downward departure to a cooperating defendant absent a motion by the government. In 18 U.S.C. § 3553(e), which deals only with downward departures below a statutory minimum sentence, Congress expressly made a government motion a prerequisite to such a departure: "Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person" In contrast, in directing the Commission to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence [on cooperating defendants] than would otherwise be imposed," 28 U.S.C. § 994(n), Congress chose not to engraft as a precondition to such a downward departure any requirement that the government move the court for relief of this nature. Accordingly, except in cases involving departures below the statutory minimum sentence, the

government-motion requirement of § 5K1.1 is a creation of the Sentencing Commission¹ -- and one that we respectfully submit should be reconsidered by the Commission.

The condition precedent adopted by the Commission enables the government in most cases to foreclose entirely the court's consideration of the appropriateness of a downward departure on the basis of a factor generally agreed to be highly pertinent to the sentencing decision: the defendant's cooperation with the authorities. The pending proposal dispenses with the need for a government motion only "[i]n an extraordinary case where the government in bad faith breaches an agreement to file the requisite motion" The limited nature of the exception carved out in the pending proposal will have the untoward effect of shifting the focus of the court's inquiry away from the most pertinent issue (the nature and extent of the defendant's cooperation) to a more collateral consideration (the government's motives in refusing to make a motion under § 5K1.1). Moreover, the exception is unduly narrow, in that it precludes the sentencing court from considering the propriety of a downward departure where the government unreasonably declines to make the requisite motion, but where no claim is made that the

¹ The proposed amendment to Application Note 1 appears to recognize this distinction between 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n) ("The Commission has similarly determined that a government motion is a necessary prerequisite to a departure below the applicable guideline range based upon a defendant's substantial assistance") (emphasis supplied).

government acted in bad faith. The restrictive nature of the exception will undoubtedly increase the number of challenges to the bona fides of the government, but will leave without any redress those defendants who seek to litigate only the reasonableness of the government's position. In our view, the interests of justice are not served by so circumscribing the court's authority to grant downward departures under § 5K1.1.

The argument most often advanced in support of the government-motion requirement, and the one reflected in the proposed revision to Application Note 1, is the "assumption that the government is in the best position to supply the court with an accurate report of the extent and effectiveness of the defendant's assistance" United States v. White, 869 F.2d 822, 829 (5th Cir. 1989). However, quite apart from the government-motion requirement, § 5K1.1 expressly acknowledges the special role of the government in making assessments of this nature, and thus directs the courts to give "substantial weight . . . to the government's evaluation of the extent of the defendant's assistance" Accordingly, under § 5K1.1, the government's opinion as to the value of the defendant's cooperation is in any event afforded substantial deference. Thus, even if the Commission were to eliminate the government-motion prerequisite, consistent with the "substantial weight"

provision, a sentencing court would presumably decline to grant a downward departure over the government's objection, unless the government took a plainly unreasonable position.

Simply put, by requiring a government motion except in "extraordinary cases," the Commission goes beyond merely affording the government a reasonable degree of deference, and instead enables the government to preclude judicial consideration of a downward departure absent a showing of bad faith. The NYCDL recommends that either the government-motion requirement be dropped, or that the exception to that requirement be expanded to encompass cases in which the government unreasonably declines to make the requisite § 5K1.1 motion.²

The second proposed change to § 5K1.1 would elevate the "substantial weight" provision from Application Note 3 to the Guideline itself. Our principal problem with this amendment concerns ambiguities in the language of the provision. While it has been widely recognized that the government occupies a special position with respect to its ability to evaluate the defendant's cooperation, we submit that the sentencing court is better equipped, after taking into account the government's qualitative assessment, to quantify the extent of the downward departure.

² At a minimum, an objective reasonableness standard should be applicable unless the parties expressly agree that another standard (such as good faith) should alone apply.

Some United States Attorney's Offices have followed a practice or policy of recommending the extent of a downward departure under § 5K1.1; for example, the prosecutor will propose that the court grant the cooperating defendant a "discount" of a specified percentage or number of months. However, the government's familiarity with the nature and value of the defendant's cooperation does not, we submit, afford it any special "expertise" in quantifying the sentencing "credit" to be earned by the defendant.

We assume that the Commission did not intend to shift this quantification function from the court to the prosecution. Nevertheless, the proposed inclusion of the "substantial weight" provision in the Guideline itself may lead some courts to believe that the government's recommendation as to the precise extent of the departure must be given "substantial weight." To avoid any such confusion, we recommend that the Commission add a clarifying Application Note to the effect that the government's recommendation as to the extent of the downward departure, while entitled to some weight, need not be given substantial weight.

Proposed Amendment 37(c):
Use of Certain Information (§ 1B1.8)

In order to "clarif[y] the operation" of U.S.S.G. § 1B1.8, which relates to the use of incriminating information pursuant to an agreement with the government, the Commission has proposed the addition of two new Application

Notes: one restricts the protections of § 1B1.8 to defendants who provide information concerning the unlawful activities of others; the other Note clarifies that the Guideline limits the court's use of such information, whether presented by the prosecutor, the probation officer, or some other party.

The provisions of § 1B1.8 first became effective on June 15, 1988, more than a year and a half following the effective date of the Guidelines. Essentially, § 1B1.8 seeks to preserve the ability of government attorneys and defense counsel to enter into agreements whereby a defendant who volunteers information to the government is appropriately assured that his truthful disclosures will not be detrimentally used against him, either to further prosecute him or to increase his sentence, provided that he has otherwise complied with the terms of his agreement with the government.

Although § 1B1.8(a) protects against the use of such information "in determining the applicable guideline range," Application Note 1, as currently in effect, advocates much broader protection, and sets forth the policy of the Commission that a cooperating defendant "should not be subject to an increased sentence by virtue of that cooperation where the government agreed that the information revealed would not be used for such purpose." Thus, the

Commission has apparently concluded that as a general matter, information volunteered by the defendant to the government should not be used to set a higher sentence within the applicable guideline range.³ The last sentence of proposed Application Note 5 reaffirms this policy, by eschewing an interpretation of § 1B1.8 that would "unfairly penalize the defendant for truthfulness."

We agree with the Commission's policy in this regard and would favor a further refinement of the Commentary to prevent sentencing courts from taking into account information volunteered by a defendant, except to the extent permitted pursuant to § 1B1.8(b).

Proposed Application Note 5 is designed to prevent an end-run around the restrictions embodied in § 1B1.8, by clarifying that the Guideline acts as a limitation on the use of specified information, whether presented to the court by the prosecutor, the probation officer, or some other party. The NYCDL supports this proposal, which we believe is consistent with the policy underlying § 1B1.8.

³ At the higher offense levels, the difference between a sentence at the low end of a particular guideline range and one at the high end can be substantial -- indeed, as much as 81 months. See U.S.S.G. Sentencing Table, at 5.2. Thus, the use of information proffered by a defendant to increase his or her sentence within the guideline range may well constitute a not insignificant penalty in return for providing truthful information to the government.

Our only disagreement with proposed Application Note 5 is language contained in the initial sentence, which restricts the protections embodied in § 1B1.8 to agreements to provide information "concerning the unlawful activities of other persons"; this limitation is further discussed in proposed Application Note 6, which we oppose.

To be sure, the government rarely enters into cooperation agreements except with defendants believed to possess information concerning the unlawful activities of third parties. However, there are occasions on which the government may elect to enter into an agreement with a defendant to provide information about his own criminal activities -- either to enable the government to close out its investigative files or as part of an agreement by which the defendant will voluntarily make restitution to the victims of his various misdeeds. Where the parties thus agree that the information provided by the defendant should not be used against him in imposing sentence, we perceive no policy reason to exclude such agreements from the ambit of § 1B1.8. The government and the defense should be permitted to enter into such agreements with the knowledge that the Guidelines and the court will effectuate the parties' intent. Thus, we recommend that proposed Application Note 6 not be

adopted and that the first sentence of proposed Application Note 5 be amended to eliminate the final clause ("concerning the unlawful activities of others").

On a final note, we wish to alert the Commission that at least one prosecutor's office has refused across-the-board to afford any cooperating defendant the protection embodied in § 1B1.8. Consequently, even though prosecutors in that district have filed motions for downward departures pursuant to § 5K1.1, defendants who cooperate with that office may well begin with a much higher guideline range than similarly situated cooperators in other districts. This apparently aberrational policy thus fosters a form of sentencing disparity that the Guidelines were intended to eliminate.

If the Commission is not prepared to address this problem at the present time, we recommend that it be considered in connection with the next amendment cycle.⁴

⁴ We further urge the Commission to amend Application Note 3 to § 1B1.8, to express the view that the Guideline applies to so-called "proffer agreements," by which many defendants provide self-incriminating information prior to entering into more formal cooperation agreements with the government. Absent the protection of § 1B1.8, proffering defendants -- like cooperating defendants prior to the enactment of § 1B1.8 -- may find themselves unfairly penalized for having provided truthful information to the government.