

**COMMENTS REGARDING PROPOSED AMENDMENTS
TO SENTENCING GUIDELINES**

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.

Our members thus have gained familiarity with the Sentencing Guidelines both as prosecutors and as defense attorneys. In the pages that follow, we address a number of proposed amendments of interest to our organization.

At the outset, we would like to thank the Sentencing Commission for the opportunity to present our views on the proposed amendments. We would also like to acknowledge our familiarity with and high regard for the work performed by the Judicial Conference, which recommended a number of the proposed amendments endorsed by our organization.

**Proposed Amendment 29: § 5C1.1 -
Imprisonment and Alternatives to Imprisonment**

We support this amendment, which consists of six options that, individually and in combination, redefine the "split sentence" and enlarge the number of defendants eligible for an increased number of alternatives to imprisonment.

In formulating its position on these options, the NYCDL sought the views of judges sitting in the Southern and Eastern Districts of New York. Twenty-one judges responded to questionnaires posing fifteen questions, which addressed the components of the six options regarding alternative sentencing. A great majority of the judges were in favor of the Commission (1) increasing the flexibility available to sentencing judges at the lower guideline ranges, particularly with regard to non-imprisonment options for less serious first offenders; (2) expanding the menu of options available to judges at sentencing to include additional alternatives to imprisonment; and (3) enlarging the pool of offenders eligible for alternatives.

As we stated during our appearance at the Commission's meeting on December 12, 1991, we strongly endorse Option 1 of the proposed amendment, which redefines the "split sentence" to require service of at least one month of incarceration rather than the current requirement of at least one-half of the minimum term. This option would implement Judicial Conference Recommendation 1 and is supported by the Staff Working Group. Such a change would enable sentencing judges to fashion sentences that more closely approximate the often used pre-Guideline "split sentence" alternative.

We likewise support Option 4, which amends the Guideline ranges to permit straight probation at three additional levels (currently 1-7 months in Criminal History Categories I-III). We see no reason why judges should not have this increased flexibility in sentencing first offenders.

We also support Option 5, which expands the availability of split sentences to Guideline ranges with a minimum of twelve months or less rather than the current range of ten months or less. This amendment would expand Zone C Guideline ranges to provide one additional level (six cells at 12-18 months) at which a split sentence is available. Judges should have this option available to them.

Accordingly, the NYCDL recommends that the Commission adopt Option 6, which incorporates Options 1, 4, and 5. We feel that this combination of options, which represents the consensus recommendation of the Staff Working Group, would not compromise the structure or purpose of the Guidelines and would give sentencing judges flexibility without inviting undue disparity in the sentences imposed.

The NYCDL also supports the adoption of additional programs that might be utilized by sentencing judges as alternative sentences to incarceration. In our survey, a majority of judges responded favorably to specific questions regarding the availability at sentencing of additional alternative programs such as "residential incarceration" (24

hour restriction to the residence), day reporting centers (reporting to a day facility with restriction to the residence at night), public service, or boot camp (shock incarceration). Programs such as these would expand the range of reasonable and appropriate alternatives to incarceration now available to sentencing judges.

Moreover, we believe that the alternatives to imprisonment should apply to all defendants at the offense levels specified. We urge the Commission to eschew an offense-by-offense approach that might, for example, exclude white collar offenders. Such an approach would hardly serve to provide certainty and fairness by avoiding unwarranted disparity -- goals that the Guidelines are purportedly designed to realize.

**Proposed Amendment 23: Chapter Three,
Part E - Acceptance of Responsibility**

Proposed Amendment 23 contains four alternative modifications of § 3E1.1, the Guideline that governs the "credit" (i.e., reduction in offense level) to be afforded a defendant who accepts responsibility. The NYCDL strongly endorses the two similar approaches embodied in Options 3 and 4, which contemplate varying degrees of reduction, depending upon the presence of different factors that demonstrate acceptance of responsibility. Option 2, which provides for a greater (i.e., three- rather than two-level) reduction if the offense level is 30 or above, is, in our view, not as

attractive as Options 3 and 4 but is preferable to the current version of § 3E1.1, which allows only a two-level reduction. Finally, we strongly oppose Option 1, which would deny any sentencing reduction under § 3E1.1 unless the defendant accepts responsibility for relevant conduct as well as for the offense of conviction.

As the Commission noted in the Background comments to § 3E1.1, "[t]he reduction of offense level provided by this section recognizes legitimate societal interests." Courts have long acknowledged that the first step along the road to rehabilitation involves a recognition and affirmative acceptance of personal responsibility, and that therefore a defendant who takes such a step may appropriately be rewarded with a lower sentence than one who has not accepted responsibility. Also underlying § 3E1.1 are important practical considerations: society has a legitimate interest in creating incentives to guilty pleas, without which our already overburdened criminal justice system could not function. Accordingly, our analysis of the proposed amendments to § 3E1.1 is premised on the notion that the Guideline should be drafted in such a way as to maximize these important societal interests.

Option 1, which denies any credit at all unless the defendant also accepts responsibility for relevant conduct, would undermine society's interest in encouraging guilty pleas. A defendant wishing to obtain a reduction may be

willing to admit to all the elements of the crime charged -- all that is required to constitute a legally sufficient guilty plea. However, the same defendant may be understandably reluctant to admit to all the relevant conduct alleged by the government; as noted by the Committee on Criminal Law and Probation Administration of the Judicial Conference of the United States, in order to accept responsibility for related conduct, a defendant might have to acknowledge wrongful conduct that would automatically raise his offense level and more than offset the two-level reduction under § 3E1.1. Report and Recommendations of the Judicial Conference of the United States for Amendments to the Sentencing Guidelines (1991) (hereinafter "Judicial Conf. Rep."), Appendix p. 10. In these not unusual circumstances, the defendant would have little or no incentive to plead guilty. Thus, Option 1 would exacerbate the currently existing problem identified by the Judicial Conference: "The two-level reduction [in § 3E1.1] is seen by many judges as insufficient to encourage plea agreements particularly at higher offense levels." Judicial Conf. Rep., at App. 10.

Accordingly, we urge the Commission to reject Option 1. That is not to say that a defendant's willingness to accept responsibility for relevant conduct should be disregarded; rather, we believe that a defendant who not only pleads guilty, but also admits to his involvement in relevant

conduct, has demonstrated a degree of acceptance of responsibility that may warrant a reduction greater than two points.

This is the approach embodied in Options 3 and 4, which we urge the Commission to adopt in one form or another. Though structurally different, both options would afford an automatic two-level reduction to a defendant who enters a plea of guilty (or nolo contendere) prior to the opening of the government's case at trial. The certainty of this two-level reduction would enhance whatever incentive to plead guilty currently exists.

Equally important, Options 3 and 4 follow the suggestion of the Judicial Conference that the Guidelines "utiliz[e] a range of several offense levels for acceptance of responsibility to provide for more individual consideration of varying degrees and demonstrations of acceptance." Id. at App. 11. Specifically, Options 3 and 4 grant an additional one-level reduction for other forms of acceptance (such as voluntary restitution, surrender, or assistance to the authorities), and thereby enable a defendant to obtain a reduction of up to three levels. These proposals therefore "recognize and encourage affirmative actions demonstrating acceptance of responsibility other than entry of a plea of guilty." Id. We believe that § 3E1.1 ought to perform this function, and we therefore embrace the approach taken in

Options 3 and 4.¹ Notably, nearly every judge in the Southern and Eastern Districts of New York who responded to a questionnaire distributed by the NYCDL favored a sliding-scale approach to acceptance of responsibility.

With respect to Option 2, the only effective change would be to increase the § 3E1.1 reduction from two to three levels where the offense level is 30 or above. The Judicial Conference recommended that "greater adjustments be available for higher offense levels to encourage entries of pleas in cases where defendants, who in anticipation of long periods of incarceration may, without adequate incentive, go to trial." Judicial Conf. Rep. at App. 10-11. While we agree with the foregoing rationale, we prefer an amendment that provides a sliding scale based on the presence of different factors demonstrating acceptance of responsibility -- i.e., Options 3 and 4. Defendants with high offense levels, like all defendants, would be able to qualify for a three-level reduction in certain circumstances. If a greater incentive to plead guilty is needed at the higher levels, the Option 2 approach could be incorporated into Option 3 or 4 by

¹ Ideally, we would like to see a combination of the two options, which have slightly different features. Option 8 would provide for a one-level reduction where the defendant pleads guilty after the opening of the government's case at trial; without this provision, a defendant would have no incentive to change his plea once the government's case has opened. On the other hand, Option 6 provides a one-level reduction for a defendant who goes to trial and affirmatively demonstrates his acceptance of responsibility after verdict. We believe that each of these features provides useful incentives that should be incorporated into an amended § 3E1.1.

affording defendants at the higher levels an additional one-level reduction beyond the reduction they would otherwise receive.

**Amendment 34: § 5K1.1 -
Substantial Assistance to Authorities**

We wholeheartedly support this proposed amendment to § 5K1.1, which would eliminate the requirement of a government motion as a condition precedent to a downward departure based on the defendant's substantial assistance to the authorities. While we agree that the government's evaluation of the extent and value of the defendant's assistance is entitled to deference by the court, we do not believe that judicial consideration of the appropriateness of a downward departure for cooperation should be foreclosed unless the government consents -- the situation that in effect exists under the current version of § 5K1.1. For this reason, in connection with the 1991 amendment cycle, we supported a proposed amendment to the provision and urged the Commission, in a letter dated August 28, 1991, to revisit the issue in 1992.

As we have stated in our previous testimony and submissions, the requirement now embodied in § 5K1.1 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. Although some judicial decisions have dispensed with the need for a government motion in the rare case in which the government is found to have acted in bad faith, this limited exception is, in our view, 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 government acted in bad faith. Thus, as presently written and interpreted, § 5K1.1 invites defense challenges to the bona fides of the government, but leaves 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 proposed amendment would rectify this situation by eliminating the requirement of a government motion and replacing it with a requirement of a judicial finding that the defendant has provided substantial assistance. The proposed amendment also anticipates, and takes into account, the argument most often advanced in support of the government-motion requirement -- i.e., 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). The proposed amendment expressly

acknowledges the special role of the government in making assessments of this nature: it elevates into the § 5K1.1 Policy Statement the admonition presently contained in the Commentary, directing the court to give "substantial weight . . . to the government's evaluation of the extent and value of the defendant's assistance" Moreover, proposed new Commentary specifically provides that a downward departure "generally" will be based on a government motion. Accordingly, even under the proposed amendment to § 5K1.1, the government's opinion as to the value of the defendant's cooperation would continue to be afforded substantial deference, and a sentencing court would presumably decline to grant a downward departure over the government's objection, unless the government took a plainly unreasonable position.

In short, as presently drafted, § 5K1.1 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 strongly embraces Proposed Amendment 34, which would drop the government motion requirement, except for departures below statutorily mandated minimum sentences.