

**RESPONSE OF
THE NEW YORK COUNCIL OF DEFENSE LAWYERS
TO THE JULY 1, 2003 REQUESTS FOR COMMENTS
REGARDING DOWNWARD DEPARTURES**

Respectfully submitted,

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DEFENSE LAWYERS**

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As the Commission knows, the New York Council of Defense Lawyers ("NYCDL") has participated actively in the Commission's periodic reviews of whether the Guidelines should be modified to address perceived inadequacies in the Guidelines. Regardless of whether we opposed or endorsed a Commission proposal, we have always believed that the Requests for Comment promulgated by the Commission have presented issues on which our organization's perspective could be constructive. However, the pending Issues for Comment concerning the appropriate Commission response to the Congressional directive on downward departures pose a challenge for our organization unlike any other proposal promulgated by the Commission; we do not see how we can constructively participate in a process that results from such a misguided and misinformed premise. As the Commission's own statistics demonstrate, and as our extensive experience teaches, there is not an excessive incidence of downward departures. On the contrary, the Federal Courts have, in fact, been utilizing the safety valve of downward departure in a relatively small number of cases in an effort to balance the competing values of sentencing uniformity and individualized considerations.

Thus, although we understand that the Commission has a Congressional mandate to review downward departures, we do not believe that any of the proposed language changes to the text or commentary of Chapter 5 will contribute to a fairer and better functioning sentencing process. Even, if such changes would reduce the incidence of downward departures, which we doubt because we believe that downward departures result primarily from a perceived unfairness in the application of the Guidelines to a

particular case, then such a reduction will only contribute to an increased unfairness in the sentencing process, which we cannot endorse. Our experience in the Federal Courts in New York, where most of our cases are litigated, is that downward departures in white collar cases are sparingly applied to that small portion of cases where the Guidelines are so demonstrably out of line with the facts of a particular case as to compel departure or where the defendant's individual circumstances make the strict application of the Guidelines inappropriate. In fact, those few cases in which the ability to make a downward departure motion survives plea negotiations are generally those where even the prosecution perceives that a mitigating factor of the sort contemplated by 18 U.S.C. § 3553 (b) is present.

Thus, we cannot support any language changes to the existing provisions of Chapter 5. To the extent that the Commission will consider easing excessively harsh Guidelines provisions which are triggering downward departures, such as those circumstances where a history of minor criminal offense results in a criminal history calculation that overstates the seriousness of a defendant's actual criminal history, we certainly endorse such modifications. In fact, we believe that the ever-increasing harshness of the fraud tables and the proliferation of sentencing enhancements are contributing factors to the limited downward departure activity as currently exists. Thus, to the extent that the Commission takes any action that would reduce the incidence of downward departures, we urge the Commission to reconsider its recent revisions of the fraud guidelines to insure that fair sentencing is still possible

Congress has set an impossible task for the Commission—to make changes in the Guidelines to reduce downward departures when the existing language already

discourages departures. It is our hope that the Commission, as it attempts to comply with the statute, does not tinker with language in ways that could cause unnecessarily harsh sentences and have unintended consequences for years to come.¹

¹ The New York Council of Defense Lawyers is an organization comprised of more than 150 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 previous chiefs of the Criminal Division in the Southern and Eastern Districts of New York. Our membership also includes attorneys from the Federal Defender Services offices in the Eastern and Southern Districts of New York.