

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

6, Page 17 -- §2B1.1

We object to the Amendment inserting a new Application Note 3 that eliminates even the present-minimal standard for the court ascertaining the loss. The proposed new standard, is "only make a reasonable estimate of the range of the loss".

The "Reason for Amendment" says that this "clarifies Application Note 3." We beg to differ -- it completely eviscerates it. Present Note 3 speaks of "reasonably reliable information" -- something tangible and meaningful. The proposed "reasonable estimate" sets no standard of reliability for the information.

We believe that the Guidelines should clearly state that the parties have a right to a hearing on the issue of loss when that factor is in dispute.

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

6. With specific reference to proposed Application Note 3, this appears to further dilute the standard of evidence applicable to the resolution of factual disputes. Again, NACDL urges adoption of the clear and convincing evidence standard. Notwithstanding this position, the Commission's use of the term "reasonable estimate" does not even appear to satisfy the preponderance standard through critical indicia of reliability.