

The
Ombudsman
A S S O C I A T I O N

To: Advisory Group of U.S. Sentencing Commission

From: The Ombudsman Association (TOA)

Date: October 2, 2002

Re: Response to Request for Public Comment to Advisory Group on Organizational Guidelines to the U.S. Sentencing Commission, §8A1.2, comment 3(k)(5)

The Ad Hoc Advisory Group on Organizational Sentencing Guidelines (Group) announced in August 2002 that it was soliciting additional public comment regarding specific questions identified by the Group. The Ombudsman Association (TOA) is providing comment on Question 1 (f) that references ombudsman offices.

The existing §8A1.2, comment 3(k)(5) specifies that "The organization must take reasonable steps to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retaliation."

The Group has asked if §8A1.2, comment 3 (k)(5) could be more specific to encourage: (i) Whistle blowing protections; (ii) A privilege or policy for good faith self-assessment and corrective action (e.g. 15 U.S.C. § 1691(c)(1)(1998)); (iii) The creation of a neutral or ombudsman office for confidential reporting; or (iv) Some other means of encouraging reporting without fear of retaliation.

Based on the collective, extensive experience of our Corporate, Governmental and Academic ombudsmen, TOA Board of Directors recommend that the creation of an ombudsman office be specifically included in the revised §8A1.2, comment 3(k)(5). As part of an organization's corporate governance plan, the Organizational Ombudsman offers an early warning capability, a resolution capability, an option for employees who want to raise concerns without fear of retaliation, and a mitigating factor in risk and in the sentencing process.

The goal of the Sentencing Guidelines is to penalize and prevent criminal conduct. Following recent events involving a number of publicly held corporations, there is a sense of urgency to uncover and punish illegal conduct and to remedy any environment that has permitted such conduct to occur.

Our Organizational Ombudsman experience tells us that employees are reluctant to report potentially illegal and wrongful conduct either by co-workers, supervisors or managers. Barriers to coming forward include; fear of retaliation, fear of loss of relationships at work, fear of job loss, uncertainty about the facts, and lack of faith in the system. The Organizational Ombudsman provides the unique enclave to overcome these barriers.

An Organizational Ombudsman practicing to the ABA standards for ombudsmen, is a neutral, confidential conduit for information, and is the only resource that can assure the anonymity of the individual while being able to surface the issue. The absolute confidentiality of the Organizational Ombudsman fosters an increase in reporting of any illegal conduct.

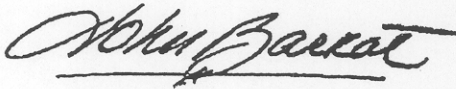
In summary, an Organizational Ombudsman:

- ~ Provides a confidential outlet and an avenue for early detection of illegal and criminal activity while reducing fear of retribution, and protecting anonymity of complainants where requested.
- ~ As a senior leader in the organization, uses business judgment, institutional knowledge and management maturity to probe and identify serious issues, such as illegal acts, so that these issues may be surfaced to and handled by the appropriate party in the corporation
- ~ Does not take the place of, but complements, ethics, compliance officers or 1-800 Hotlines.
- ~ Helps to drive the systemic change to correct patterns and practices of wrongdoing.

Therefore, we strongly support the reference to an Organizational Ombudsman in the United States Sentencing Guidelines and further recommend that §8A1.2, comment 3(k)(5) be worded in relevant part: “. . . the creation of an Organizational Ombudsman office for confidential reporting. . .”

I want to thank you for this opportunity to provide comments regarding §8A1.2 of the United States Sentencing Guidelines. Please feel free to contact me if there are any questions concerning these comments or if TOA can be of any further assistance.

Sincerely,



John S. Barkat, Ph. D.
President, The Ombudsman Association

Enclosure (Mary Rowe's Workplace Justice, Zero Tolerance, and Zero Barriers)

Cc: TOA Board of Directors

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We attach the Abstract of an article by Mary Rowe, for thirty years an ombudsperson and also professor of negotiation and conflict management. The article discusses the importance of providing a zero barrier office in an organization which wishes to hear, on a timely basis, about concerns of illegal and criminal behavior. Dr. Rowe discusses why it is so difficult for an organization to succeed with zero tolerance policies if it relies solely on "compliance offices." Organizations which have many compliance offices -- but no zero barrier office -- discover that many people not only fear retaliation from coming forward but also are unwilling to risk their relationships at work.

Workplace Justice, Zero Tolerance, and Zero Barriers

(Abstract)

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If an organization wants an effective zero tolerance policy, it needs a zero barrier office within an integrated conflict management system (ICMS). This article presents reasons why an employer may decide to take a systems approach—with an organizational ombudsman—for dealing with illegal behavior like harassment, unsafe working conditions, and fraud.

No one internal dispute resolution option suits all whistleblowers, let alone all those who wish to convey a serious concern. Some individuals think mainly about their legal rights. Others think almost entirely about their interests, and especially about maintaining their relationships. ***They worry about damaging relationships with family and friends and co-workers—and with the offender.***

In addition, to concerns about their relationships, people fear loss of privacy, and potential retaliation. They wonder whether they have enough evidence. They worry that they will not be believed. They think they do not know enough about how to bring a complaint. They think bringing a complaint will take too much time and cost too much in terms of time and money and “soul.” They fear losing control over the matter. Most people hate formal investigations. Many think it is pointless to complain—they suspect nothing will be done. Often people do not want to come forward if the offender will be punished. Others would only come forward if they were sure the offender would be seriously punished.

People who perceive wrongdoing are all different—they need **options** if they are to come forward. They also need their own **choice** of options.

Zero tolerance policies therefore do not work well for most people most of the time because a zero tolerance policy usually implies no options for the person with a concern. Zero tolerance policies—if accompanied by mandatory reporting, investigation and punishment—do not work well for other reasons as well. The best hope for an organization that wants to have an effective zero tolerance policy is to have at least one **zero barrier office** (an ombudsman that is not part of the compliance system, or 800 number) as part of an integrated conflict management system.