



# GuideLines

News from the U.S. Sentencing Commission

January 2004

## Panel on the Sentencing Guidelines for Organizations Issues Final Report

The Ad Hoc Advisory Group on the Organizational Sentencing Guidelines on October 8 delivered its final report to the Sentencing Commission. The report is the culmination of an 18-month process to review the effectiveness of the organizational guidelines and solicit suggestions for their improvement. While the report concludes that the organizational guidelines have induced many organizations to focus on compliance and to create programs to prevent and detect violations of the law, it also recommends amending the existing organizational guidelines in order to reflect contemporary legislative, regulatory, and corporate governance requirements. The advisory group's proposed amendments –

- promote an organizational culture that encourages a commitment to compliance;
- require compliance training at all levels of the organization;
- define high-level personnel's responsibilities for compliance programs;
- require programs to provide anonymous reporting mechanisms for potential violations of law; and
- require ongoing risk assessments as an essential component of the design, implementation, and modification of an effective program.

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## Sentencing Commission Responds to PROTECT Act

The PROTECT Act (Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21) directed the Commission to promulgate, within 180 days, guideline amendments that would reduce the frequency with which courts depart below the sentencing guidelines. In response, the Commission implemented an amendment affecting several guideline departure provisions. The amendment became effective October 27, 2003, and was accompanied by a comprehensive report to Congress entitled *Downward Departures from the Sentencing Guidelines*.

The amendment prohibits several grounds for departure, including (1) the defendant's acceptance of responsibility, (2) the defendant's mitigating role in the offense, (3) the defendant's decision to plead guilty to the offense or to enter into a plea agreement, (4) the defendant's fulfillment of legally required restitution, and (5) the defendant's addiction to gambling. The amendment also prohibits armed career criminals and repeat and dangerous sex offenders from being considered for criminal history departures. In addition, the amendment imposes increased restrictions on the availability of departures based on aberrant behavior, family ties and responsibilities, victim's conduct, coercion and duress, and diminished capacity.

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(Left to right) Tracy Toulou, Celia Rumann, Chief Judge Lawrence Piersol, Diane Humetewa, and Tom Peckham, of the Ad Hoc Native American Advisory Group, presented the group's final report to the Commission in November. See story on page 4.

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# Message from the Chair

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*Diana E. Murphy*

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This fall has been an eventful one for the Commission. We worked hard to meet the October 27 deadline Congress set in the PROTECT Act regarding downward departures. In the process we undertook a thorough study of downward departures and the reasons given for them before modifying the guidelines in response to congressional concerns. Our report is available on the Commission's website, [www.ussc.gov](http://www.ussc.gov), and this issue of the newsletter has an article describing the Commission's amendment and the findings in our report.

The General Accounting Office (GAO) also released its report on downward departures in late October. The report is available on the GAO website, [www.gao.gov](http://www.gao.gov). It suggests several improvements for collecting sentencing data, and the Commission is working with the Criminal Law Committee of the United States Judicial Conference to revise the statement of reasons form used in sentencing to make it easier for judges to give their specific reasons for their decisions. Education programs for judges and court personnel dealing with the form are also planned.

This fall also marked the end of the 18 month terms of our two ad hoc advisory groups – one which examined the effectiveness of the organizational guidelines and the other the application of the guidelines to Native Americans under the Major Crimes Act. Each group testified before the Commission at public hearings on their work and recommendations. Both groups were given challenging missions, and they managed to reach consensus on a set of well developed and practical recommendations. Articles in this issue discuss the content of each group's report and recommendations. The reports are also available on the Commission's website. The Commission is deeply grateful for the contributions made by the members of these groups.

## Guidelines

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We expect that the work of both groups will influence public debate on a range of issues for some time to come. For example, Greg Wallace, a member of the ad hoc advisory group on the organizational guidelines and a partner at Kaye Scholer in New York, testified before the House Energy and Commerce Subcommittee on Oversight and Investigations at its November 5 hearing on the collapse of HealthSouth. His testimony focused exclusively on the group's work. Our full agenda for the regular amendment cycle also includes proposed amendment language developed by the organizational guidelines group and several issues that affect Native Americans sentenced under the Major Crimes Act, including sex offenses and homicide.

On December 11, 2003, the Federal Judiciary Television Network (FJTN) broadcast a live presentation on the guideline amendments that took effect November 1, as well as the amendment passed in response to the PROTECT Act. This program will assist all those with access to the FJTN in becoming more familiar with the recent changes and will be rebroadcast periodically over the next few months.

Finally, a warm welcome to our new Supreme Court judicial fellow, Scott Carlson. The Supreme Court Fellows Program brings talented individuals from a variety of disciplines to spend one year with the Sentencing Commission, the Supreme Court, the Administrative Office and the Federal Judicial Center. We take care to integrate our fellow into the ongoing work at the Commission where we must always maximize our limited resources. ■



COMMISSION WELCOMES NEW JUDICIAL FELLOW SCOTT CARLSON

The Sentencing Commission is pleased to welcome Scott Carlson who, as the Supreme Court judicial fellow, will spend the coming year at the Commission with its Office of General Counsel. Scott brings to the Commission a wealth of experience in international, comparative, and tax law.

In 1994, Scott became an adviser on the rule of law with the American Bar Association's Central European and Eurasian Law Initiative in Albania, and later became its director for Central and Eastern Europe and judicial reform. Scott's experiences include assisting the government of Albania with the drafting of a new constitution and providing technical assistance for the national referendum approving it. Scott was also a founder of the ABA war crimes documentation project which presented evidence in the trial of former President Slobodan Milosevic.

Scott has also served at the IRS Office of Chief Counsel, working in both regulatory and litigation positions, and he has spent time with a European law firm providing legal counsel to the European Union and the World Bank. At the Commission, Scott's work will focus on proposed revisions to the compliance criteria within the organizational sentencing guidelines. He will also assist in the work of the Commission's ad hoc advisory group on Native American issues.■

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The Commission also responded to a directive regarding early disposition programs by creating a new policy statement, section 5K3.1 (Early Disposition Programs). The new policy statement provides that, upon motion of the government, the court may depart downward not more than four offense levels pursuant to an early disposition program authorized by the Attorney General and the United States Attorney.

Among the findings of the Sentencing Commission's report were that –

- The downward departure rate increased from 5.8 percent in 1991 to 18.1 percent in 2001, but the government is estimated to have initiated approximately 40 percent of these departures. If government initiated downward departures are excluded, the remaining downward departure rate is 10.9 percent. Early disposition (fast track) programs are believed to account for a substantial portion of government initiated downward departures;
- Southwest border districts, which combined have a departure rate of 38.2 percent, account for a disproportionate number of departures in large part due to burgeoning immigration related caseloads. If southwest border districts are excluded from the departure analysis, the national departure rate was 10.4 percent in 2001;
- Statutory requirements enacted by the PROTECT Act are expected to have a significant impact on departure practices. The statutory changes include a requirement for the court to include specific *written* reasons for departures in the judgment and commitment order and a requirement that the court submit to the Commission within 30 days of judgment specified sentencing documents. The Commission added similar specific documentation requirements to three departure policy statements: section 5K2.0 (Grounds for Departure), section 4A1.3 (Departures based on Inadequacy of Criminal History Category), and section 6B1.2 (Standards for Acceptance of Plea Agreements). Moreover, in a joint letter from the Criminal Law Committee and the Commission, Judge Diana Murphy and Judge Sim Lake outlined the criteria in the PROTECT Act on document submission requests.

Both the amendment and the Commission's report are available on the Commission's web site at [www.ussc.gov](http://www.ussc.gov).■

Organizations *Continued from page 1*

The advisory group devoted considerable time and effort on the criteria for an effective program to ensure an organization's compliance with the law. Ultimately, the group concluded that this set of issues should be given greater emphasis, proposing that the "Sentencing Commission promulgate a stand-alone guideline...that defines an 'effective program to prevent and detect violations of the law.'"

The group also recommended adding commentary regarding the role of waivers of privilege to the organizational guideline sections on cooperation and substantial assistance to authorities (§8C2.5(g) and §8C4.1).

On November 5, the Commission voted to publish for public comment the advisory group's proposed amendments. The report and proposed amendments are available on the U.S. Sentencing Commission web site at [www.ussc.gov](http://www.ussc.gov).■

# Native American Advisory Group Issues Final Report to Commission

Analysis Focuses on Aggravated Assault, Sexual Abuse and Manslaughter

On Tuesday, November 4, 2003, the Native American Advisory Group presented its final report to the United States Sentencing Commission. The advisory group had been formed in response to concerns that Native Americans are being sentenced unfairly by the operation of the federal sentencing guidelines under the Major Crimes Act.

“The Native American Advisory Group’s report addresses important concerns unique to Native Americans. This report represents 18 months of study and deliberation by the group and its conclusions and recommendations will be invaluable to this Commission as it considers these important issues,” said Commission chair, Judge Diana E. Murphy, in thanking the advisory group and its chair, Judge Lawrence L. Piersol.

The final report examines federal and state sentences imposed on defendants in three jurisdictions that have significant Native American populations. The analysis focuses on aggravated assault, sexual abuse and manslaughter since these represent the federal offenses most often prosecuted under the Major Crimes Act. The advisory group’s final report concludes that the impact on Native Americans resulting from federal criminal jurisdiction and the application of the federal sentencing guidelines varies both from offense to offense and between jurisdictions.

To address these differing effects, the advisory group recommended the following:

## Commissioners and Senior Staff Testify Before Kennedy Commission

Following Justice Anthony M. Kennedy’s speech to the ABA in August 2003, the ABA Justice Kennedy Commission was formed and current and former sentencing commissioners and senior staff were called to testify on November 12 and 13. Those testifying included Vice Chair John R. Steer; Commissioner Michael E. Horowitz; former commissioner, Chief Judge Deanell R. Tacha; former commissioner, Judge Sterling Johnson, Jr.; and Paul Hofer, Commission senior research associate. ■

- increase the penalties for reckless involuntary manslaughter and add additional penalties if the offense involved driving while intoxicated or under the influence of alcohol or drugs; multiple homicides; and use of a weapon;
- maintain the current penalties for criminally negligent involuntary manslaughter;
- adopt the U.S. Sentencing Commission’s recommendation to Congress that the statutory maximum for voluntary manslaughter be increased from ten to 20 years; impose additional penalties of between 70 to 87 months on defendants who use a weapon and 87 to 108 months on defendants who use a firearm during the commission of voluntary manslaughter offenses;
- create a new guideline to penalize specifically sexual offenses where the defendant travels to meet or transport a minor for prohibited sexual activity;
- reduce penalties for aggravated assault offenses;
- establish a sex offender treatment program that would provide the opportunity for sentence reductions of up to 12 months for its successful completion; and
- consult on an ongoing basis with national Indian organizations and the affected Indian communities when considering changes to the federal sentencing guidelines for crimes covered by the Major Crimes Act. A copy of this report can be found online at [www.usc.gov](http://www.usc.gov). ■