

United States Sentencing Commission  
6 November 2001

If it is the intent of the Commission that the FSGO apply to Native American Tribal Governments, it might be wise to engage them in considering if there are not unique matters to consider as it sets forth its minimum requirements. As one who has had experience working with tribal governments and who sees the advantages of having effective ethics and compliance programs on a model that reflects the dynamics of today's tribes, I would welcome specific language addressing the tribes.

Another area of concern to those who care deeply about the public policy implications of effective ethics and compliance programs are the challenges to micro/small to medium enterprises in designing and implementing such programs. The experience and lessons learned to date have been largely confined to the larger or even largest organizations. However, a significant number of the enterprises that have problems before either the Federal Courts or Federal Agencies, such as the Department of Defense or Health and Human Services, are smaller enterprises.

In my view, an ad hoc advisory group to the Commission should have membership reflecting the two groups and their bodies of challenges and concerns. I would welcome the opportunity to serve as a member of the ad hoc advisory group as a voice for those two groups. I do not hold myself out as an expert on the challenges and concerns of the Native American Tribes. I think few would do so boldly, but as a tribal member (Cherokee) and one who has written on tribal governance as early as my law review days, I am intensely interested in them and would work to engage voices that are truly representative. I do feel that I can speak for the small to medium enterprise having been a small businessman and represented small businesses earlier in life. Moreover, as part of a program I am in the midst of developing, I will begin hosting within the month an international e-conference addressing these issues as the first step in developing an effective guide for the micro/small to medium enterprise to design and implement a truly effective ethics and compliance program to meet its needs within its organizational context and organizational culture.

I will be pleased to make more information available to you upon request, but I bring a wealth of experience to such a group. In addition to being a lawyer who had largely small business clients in the 1980s, I have consulted in the ethics and compliance industry since 1993, was a principal proponent of the Coalition for Ethics and Compliance Initiatives by calling and arranging for its formative meetings in 2000, and have been an Ethics Resource Center Senior Fellow since its inception in 1997.

In sum, I wholeheartedly support such a review and pledge to support the Commission in its endeavors. Moreover, I see special value in the Commission staff's fostering a dialogue with industry and government regulators regarding the design, implementation, enforcement, and assessment of an effective program in order to lay a solid foundation for the Commission's review. In this regard, I believe that I offer unique value in working with the Commission in soliciting other experiences and learning.

United States Sentencing Commission  
6 November 2001

Please do not hesitate to contact me if I can offer any other support for this important endeavor.

Sincerely,



KENNETH W. JOHNSON  
Director, EPIC



Owen Graduate School of Management  
VANDERBILT UNIVERSITY



NASHVILLE, TENNESSEE 37203

TELEPHONE (615) 322-2534  
FAX (615) 343-7177

November 5, 2001

The Honorable Diana E. Murphy  
Chair, U.S. Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, DC 20002

Dear Judge Murphy:

I am responding to your September 19, 2001 notice in the Federal Register requesting comments on the advisability of beginning a dialogue on revising the organizational guidelines. By way of background, as a former staff member, I served as a consultant to the Commission during the development of the organizational guidelines. My analysis of past sentencing practice served as a focal point for discussions and ultimately informed the development of the guidelines.<sup>1</sup> I have since studied and published empirical research on the implementation of the guidelines.<sup>2</sup> My research continues to focus on corporate crime and punishment and the effect of the guidelines on organizations.

In theory, I applaud the effort to revisit the organizational guidelines after 10 years. Moreover, there is potential merit to having a longer-term advisory board continually monitor the organizational guidelines and to develop some expertise and perspective that would assist the Commission in adapting to new issues that ultimately will arise. A well-balanced advisory group should consist of corporate managers, U.S. Attorneys, regulatory agencies, the defense bar, ethics officers, and scholars who study both corporate crime and punishment as well as organizational behavior and economics. Note that my vision of this advisory board differs substantially from what I read in the letters you have received to date. For example, the "Coalition for Ethics and Compliance The Initiatives" (CECI) appears to be a well-organized association of stakeholders interested in corporate ethics. For that matter, Win Swenson would be a natural candidate for membership in such an advisory group, and he would no doubt be a valuable contributor.

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<sup>1</sup> See Cohen, "Corporate Crime and Punishment: A Study of Social Harm and Sentencing Practice in the Federal Courts, 1984-1987," 26 American Criminal Law Review 605-660 (1989); Cohen, Ho, Jones, and Schleich, "Organizations as Defendants in Federal Court: A Preliminary Analysis of Prosecutions, Convictions and Sanctions, 1984-1987," 10 Whittier Law Review 103-124 (1988); and Cohen, "Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-1990," 71 Boston University Law Review 247-80 (1991).

<sup>2</sup> See Alexander, Arlen, and Cohen, "Regulating Corporate Criminal Sanctions: Evidence on the Effect of the U.S. Sentencing Guidelines," 42 Journal of Law and Economics 271-300 (1999) and "The Effect of Federal Sentencing Guidelines on Penalties for Public Corporations," 12 Federal Sentencing Reporter 20-6 (1999).

Honorable Diana E. Murphy  
November 5, 2001  
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Having said that, I am concerned that CECI is too narrow a group focusing on ethics and compliance - with a predetermined agenda - to be given the role of organizing and spearheading any such advisory group. The same could be said for some of the other organizations that have written you. These groups should be represented and be a large part of any advisory group - but they should not control it.

Some of the letters you have received suggest that answers are already known and that there is a demonstrated need to tighten the guidelines. I wish it were that simple. For example, one writer urges you to adopt specific recommendations including that compliance programs be of a certain type and "requiring that the ethics officers in such programs have at least three university-level, full-term courses in ethics." Other recommendations are equally detailed and go so far as to require that violations of corporate "ethical standards" be criminalized. Although I have an open mind to all such suggestions, as a researcher and a business school professor, I would caution the Commission not to entertain such notions without careful study by an unbiased, representative advisory group that includes significant representation from rigorous empirical researchers. One of the lessons that was learned early on when drafting the organizational guidelines was that the guidelines do not just affect "offenders" or corporations that are willfully violating the law. Instead, the organizational guidelines have the potential to affect all corporations - including those that otherwise have well functioning compliance programs and whose top managers are good citizens. The guidelines need to be written with this in mind, and with the fact that it is important not to turn the courts and probation officers into corporate managers - except in the most egregious cases. The type of recommendations I read in the letters you have on file appear to want to micro-manage the nature of compliance programs and ultimately tell corporations how to run their businesses. That is a very risky proposition that could ultimately lead to law-abiding corporations losing their competitiveness and, worse yet, unintended consequences that go beyond any potential crime control benefit.

In addition to calling for a broadly representative - and research focused - advisory group, I have a few suggestions in terms of the scope of work of any such advisory group you ultimately decide to convene. First, I would note that the penalty portion of the guidelines fail to cover a substantial number of crimes - including environmental, worker safety, and food and drug violations. Several years ago, I gave a presentation to a working group of the Commission that was tasked with drafting guidelines for environmental crimes.<sup>3</sup>

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<sup>3</sup> See for example, Cohen, "Environmental Crime and Punishment: Legal/Economic Theory and Empirical Evidence on Enforcement of Federal Environmental Statutes," 82 *Journal of Criminal Law and Criminology* 1054-1108 (1992) and Cohen "Environmental Sentencing Guidelines or Environmental Management Guidelines: You Can't Have Your Cake and Eat it Too!" 8 *Federal Sentencing Reporter*, 225-9 (February 1996).



Honorable Diana E. Murphy  
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Page 3

Although that working group did issue some draft proposals for discussion purposes, the issue has been on the back burner for quite a few years. It would be appropriate for any new advisory group to consider the crimes not currently covered by the organizational guidelines and to begin the process of filling in those holes if they deem it to be appropriate.

My second recommendation is that any advisory group considers what data the Commission should collect on organizations sanctioned under the guidelines, in order to instruct future proposals for changing them. As a researcher who originally coded and analyzed pre-guideline cases and who has spent considerable time with the Commission data, I have found that basic questions about the impact of the guidelines on corporate sanctions cannot be answered.<sup>4</sup> This might seem surprising and it is certainly not meant to be a criticism of the Commission or its staff. The primary reason for this deficiency appears to be the switch from a "research" mode in the pre-guideline era to more of a "monitoring" mode in the post-guideline period. Thus, the Commission has collected data on the guideline factors themselves so that it can evaluate how those factors are being applied, and not on a larger set of questions that would assist researchers and policy makers in identifying the strengths and weaknesses of applying the guidelines to actual cases.

I hope these suggestions are taken as constructive as that is their intent. As a researcher, I pride myself on not prejudging the outcome of any new research project I embark upon. As an important governmental institution, I believe the Commission should adopt the same principle and take care in appointing advisory groups that share that same vision.

Please do not hesitate to contact me if I can further elaborate on any of these points or otherwise be of assistance.

Sincerely,



Mark A. Cohen  
Associate Professor of Management and  
Director, Vanderbilt Center for Environmental Management Studies

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<sup>4</sup> See Alexander, Arlen, and Cohen, "Evaluating Trends in Corporate Sentencing: How Reliable are the U.S. Sentencing Commission's Data?" 13 Federal Sentencing Reporter 108 (September/October 2000).

Lockheed Martin Corporation  
6801 Rockledge Drive, MP 210 Bethesda, MD 20817  
Telephone 301-897-6631 Facsimile 301-897-6442  
E-mail: nancy.higgins@lmco.com



**Nancy McCreedy Higgins**  
Vice President, Ethics and Business Conduct

November 5, 2001

United States Sentencing Commission  
One Columbus Circle NE  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

Attention: Public Affairs

Re: Request for Comment on Possible Formation of an Ad Hoc Group on Organizational Sentencing Guidelines, 66 Fed. Reg. 48306 (September 11, 2001)

Dear Sir or Madam:

I am writing in response to the above-referenced Request for Comment to encourage the Sentencing Commission to form an ad hoc advisory group to review the organizational sentencing guidelines and to volunteer to serve as a member of such a group.

I have been involved in the development and implementation of corporate ethics and compliance programs for two companies: The Boeing Company and Lockheed Martin Corporation. Both companies were among the original signatories to the Defense Industry Initiative on Business Conduct and Ethics (DII), and thus already had strong self-governance programs at the time the guidelines were promulgated. Nonetheless, these companies and the other DII signatories had to reassess and fine-tune their programs in order to assure compliance with the standards set forth in the organizational sentencing guidelines.

As an attorney in the Boeing law department when the draft guidelines were first published, it was my responsibility to lead a team to assess the Boeing Ethics and Business Conduct program to determine what changes would be needed to meet the due diligence requirements in the guidelines. This assessment project was a wonderful opportunity for the company to re-examine and improve its compliance processes. One of the outcomes of that project was the reorganization of the program to create a single company-wide Office of Ethics and Business Conduct. I left the law department to lead that organization.



In early 2001, I joined Lockheed Martin Corporation as Vice President of Ethics and Business Conduct, with responsibility for the company's Ethics and Business Conduct Program and related compliance activities. I have seen how the organizational sentencing guidelines also had a positive impact at Lockheed Martin. The due diligence requirements for an effective program to detect and prevent violations of the law, as set forth in the guidelines, provide a strong foundation for Lockheed Martin's state-of-the-art ethics and compliance program.

American business has now had 10 years of experience with the organizational guidelines and with corporate compliance programs designed to implement their requirements. These guidelines have had a profound impact on the way these companies do business. Although the DII signatory companies were already committed to formal compliance programs, the sentencing guidelines were the driving force in bringing these programs to the rest of corporate America.

Those of us who have helped organizations to develop programs with these guidelines in mind have had an opportunity to evaluate their strengths and weaknesses. I believe it is time to take a close look at the guidelines to see how they can be improved to be even more effective in preventing criminal behavior and raising the standards of ethical business conduct in the United States. I highly recommend the formation of an ad hoc advisory group to review the guidelines and recommend such improvements. I would also like to convey my availability to serve as a member of such a group.

Very truly yours,

  
Nancy McCready Higgins

# ETHICS OFFICER ASSOCIATION

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Arkin, Kaplan & Cohen, LLP

Advisor, W. Michael Hoffman  
Center for Business Ethics  
Bentley College

November 6, 2001

United States Sentencing Commission  
One Columbus Circle NE  
Suite 2-500, South Lobby  
Washington, DC 20002-8002  
Attention: Michael Courlander, Public Affairs

To Whom It May Concern:

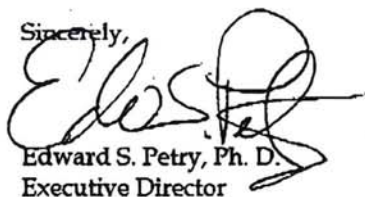
The following is in response to the request for comment on the possible formation of an ad hoc advisory group on the Organizational Sentencing Guidelines.

On this the tenth anniversary of the Organizational Guidelines, it is clear that they have had a major impact in promoting ethical and law-abiding conduct within corporations. One measure of this impact has been the growth of the Ethics Officer Association (EOA). The EOA was founded in 1992 - several months after the guidelines went into effect. It is the peer-to-peer, non-consulting association for managers of ethics and compliance programs. At its founding the EOA had only 12 members. Today, it has over 770 members, including more than one-half of the Fortune 100.

The impact of the Organizational Guidelines can also be seen in the attendance at a series of forums cosponsored by the U.S. Sentencing Commission and the EOA. The forums were designed to discuss the Guidelines, their impact, and suggestions to improve the implementation of corporate programs in response to the Guidelines. They have been held in Atlanta, Boston, Chicago, Columbus, New York, and San Francisco and have drawn over 500 attendees including ethics and compliance officers, senior executives, and representatives from the prosecutorial community.

The EOA has been, and can continue to be, a principal link between the Commission and those with the responsibility to develop and oversee ethics and compliance programs. It can also continue to serve as a forum for the exchange of information and best practices and provide opportunities for discussion among diverse parties. We welcome the opportunity to continue to serve in this capacity, to participate in the ad hoc advisory group on the Organizational Sentencing Guidelines and/or to assist the Commission in other appropriate ways.

Sincerely,



Edward S. Petry, Ph. D.  
Executive Director



Judge Diana E. Murphy, Chair  
United States Sentencing Commission  
One Columbus Circle, NE  
Suite 2-500  
Washington, DC 20002-8002

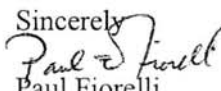
Dear Judge Murphy:

Thank you for the opportunity to comment on the proposed ad hoc advisory group regarding the Organizational Sentencing Guidelines. I think this is an excellent idea. I was the Supreme Court Judicial Fellow at the United States Sentencing Commission from August 1998 to August 1999, and I worked with Paula Desio, almost exclusively on Chapter 8 questions. I have written a number of law reviews, business articles and one book focusing on the Organizational Guidelines. I have maintained my relationship with the Commission as a guest speaker at your jointly sponsored regional workshops with the Ethics Officer Association, and yesterday I was named as the first director of Xavier University's Williams College of Business' newly established Ethics Center.

My research and work on Chapter 8 has confirmed the impact they have had on the business world. November 1, 1991 will be remembered as the day that corporate America could truly say "Good Ethics is Good Business". Prior to the Guidelines, there was tremendous pressure at all levels of business to do whatever it took (regardless of law or ethics) to maximize profits. Executives may have been sending this message explicitly or implicitly because the probability of detection was low, and the punishment, even if detected, seemed worth the risk. After the Guidelines were introduced, top executives saw the business value of "values". Of course they still need to maximize profits, but now the message is sent to only use legal and ethical means to accomplish this goal. This corporate commitment to compliance and ethics programs has been clearly demonstrated by the exponential growth in the Ethics Officer Association, a group that did not exist before the 1991, but now has over 750 members.

The ten year anniversary of the Guidelines seems to be an appropriate time to reflect back on the accomplishments, and review possible changes to make them even more useful in the future. An ad hoc advisory committee can help in this regards. Outside practitioners and academics can lend their talent to surface potential issues and suggest possible solutions. I for one, would be honored to help in any capacity that was appropriate.

Please let me know if there is anything I can do in this endeavor.

Sincerely,  
  
Paul E. Fiorelli  
Director,  
Xavier Center for Business Ethics and Social Responsibility



**DEFENSE  
INDUSTRY  
INITIATIVE**

ON BUSINESS ETHICS AND CONDUCT

Richard J. Bednar, DII Coordinator  
Crowell & Moring LLP  
1001 Pennsylvania Avenue, NW, Suite 1000  
Washington, DC 20004-2595  
202/624-2619; 202/628-5116 (Fax)  
*rbednar@crowell.com*

October 30, 2001

United States Sentencing Commission  
Attn: Public Affairs  
One Columbus Circle, NE  
Suite 2-5400, South Lobby  
Washington, DC 20002-8002

**Re: Request for Comment on Possible Formation of an  
Ad Hoc Group on Organizational Sentencing  
Guidelines, 66 Fed. Reg. 48306 (Sep 11, 2001)**

Dear Sir/Madam:

On behalf of the Defense Industry Initiative on Business Ethics and Conduct ("DII"), I am submitting comment on the above-referenced matter. The DII, founded in 1986 as a result of the President's Blue Ribbon Commission on Defense Management (the Packard Commission), is a private organization of about 50 defense contractors who have voluntarily joined together to embrace and practice a high level of business ethics and conduct. A listing of the current DII Signatories is enclosed for your information.

The public announcement of the prospective review of the organizational sentencing guidelines coincides with our own on-going review by our governing body - the Steering Committee - of the principles adopted and practiced over the past 15 years of the DII existence. This review is to assure that those original Principles remain vibrant and appropriate. Even if this review should result in no change, and conclude in the reaffirmation of these original Principles, the review process will have strengthened the commitment of the Signatory companies and will have given a fresh impetus to the faithful practice of those Principles.

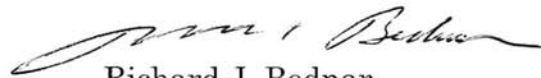
The DII has studied the organizational sentencing guidelines over the years, and has noted the harmony of those guidelines with our own Principles and practices. The DII Principles were considered by the Sentencing Commission in its work in developing the organizational sentencing guidelines. We believe the DII would bring an important



United States Sentencing Commission  
Attn: Public Affairs  
October 30, 2001  
Page 2

perspective to the ad hoc Group not available from any other institution. We therefor support the formation of the Group and would welcome the opportunity to serve as a member of it.

Sincerely yours,



Richard J. Bednar  
DII Coordinator

Enclosure

1854267

**DEFENSE INDUSTRY INITIATIVE  
JULY 2001 DII SIGNATORIES**

Advanced Technical Products, Inc. (Marion Composites Division)  
Allfast Fastening Systems Inc.  
Alliant Aerospace Company  
AT&T -- Government Markets  
Bath Iron Works/General Dynamics  
BF Goodrich Aerospace/BF Goodrich Aerostructures  
The Boeing Company  
The CNA Corporation  
The CFM International, Inc.  
Computer Sciences Corp.  
Day & Zimmerman, Inc.  
DRS Technologies, Inc.  
Dyncorp  
Frequency Electronics, Inc.  
GE Aircraft Engines  
General Dynamics Corp.  
Georgia Tech Research Institute  
Harris Corporation  
Honeywell International  
Howmet Castings  
IBM Corporation  
ITT Defense  
Lear Siegler Services, Inc.  
L-3 Communications Corporation  
Lockheed Martin Corporation  
Newport News Shipbuilding  
Northrop Grumman Corporation  
Parker Hannifin Corp.  
Raytheon Company  
Rockwell-Collins  
SAIC  
Sequa Corporation  
Southwest Research Institute  
Stewart & Stevenson  
Teledyne Technologies Incorporated  
Textron, Inc.  
Thales, Inc.  
Thiokol Propulsion  
TRW Systems  
UNISYS Corporation  
United Defense LP  
United Space Alliance



United Technologies Corporation  
University of Dayton Research Institute  
Veridian Corporation  
Vought Aircraft Industries, Inc.  
Williams International

Total: 47

1824004

**From:** K&G <TestingGK@netscape.net>  
**To:** <pubaffairs@ussc.gov>  
**Date:** Mon, Nov 5, 2001 4:39 AM  
**Subject:** comments due by nov. 6 on ad hoc adv. group for sent. guidelines (sept. 19 fed. register)

KINDLY PASS ON THESE COMMENTS TO THE COMMISSION AS GENERAL INPUT BUT ALSO AS COMMENTS FOR THE PROPOSED AD HOC ADVISORY COMMITTEE

MESSAGE: GO FOR HIGH IMPACT CHANGES, NOT MINOR TWEAKS. HERE ARE THREE:

1. REQUIRE COMPANIES TO HAVE A S E P A R A T E A N D I N D E P E N D E N T SENIOR LEVEL COMPLIANCE FUNCTION. MANY COMPANIES HAVE RESPONDED TO THE COMPLIANCE IMPERATIVE BY JUST RE-NAMING THE POSITION OF AN EXISTING LAWYER IN THE LEGAL DEPARTMENT. THIS IS COSMETIC. IT'S NOT MORE "LAWYERING" THAT BRINGS COMPLIANCE RESULTS, IT IS A RECOGNIZED LEADERSHIP AND OPERATIONAL FUNCTION THAT CAN THINK AND ACT INDEPENDENTLY, IMPACT MANAGEMENT, AND USE MANY TYPES OF TOOLS (NOT JUST LEGAL TOOLS) TO IMPLEMENT AND MEASURE.

2. RECOMMEND THAT COMPANIES CHANGE THEIR BOARD COMMITTEES FROM "AUDIT COMMITTEES" TO "AUDIT AND COMPLIANCE COMMITTEE". OR EVEN BETTER PRACTICE, TO HAVE A SEPARATE "COMPLIANCE COMMITTEE". THIS ALLOWS FOCUS ON FUTURE AND PREVENTION, NOT JUST LOOKING AT THE PAST, WHICH IS WHAT AUDITORS/AUDIT COMMITTEES BEST DO.

3. RECOMMEND THAT COMPLIANCE FUNCTIONS GO BEYOND JUST SIMPLY AIMING FOR TECHNICAL REGULATORY COMPLIANCE. IT SHOULD INCLUDE PROMOTING GOOD CONDUCT BEYOND THE LAW. HOWEVER, DO NOT RECOMMEND THAT IT BE CALLED "ETHICS" AS THIS TURNS OFF MANAGEMENT.

THANK YOU VERY MUCH.

GK Testng

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**United States Sentencing Commission**  
**One Columbus Circle, NE**  
**Suite 2-500, South Lobby**  
**Washington, DC 20002-8002**

**Sentencing Guidelines for United States Courts**  
**66 FR 128 (July 3, 2001)**

Included are comments and suggestions concerning the request for response; I am pleased to be able to provide these comments, but concerned that the possible lack of regard for the Indian Community and those who face Federal Sentencing, regulations will go unchanged and more of our people will be lost to this system.

For centuries Native Americans have been treated as second-class citizens, considered illegal aliens in their own country. This is especially so in the legal arena, more impacting to those who reside on Indian Reservations facing the most sever sentencing guidelines in the nation.

In New Mexico as in most Southwestern States, the location of the offence could mean probation to a lengthy prison sentence, for the same offence. This depends on "Which Side of the Fence" the offence occurs, State verses Federal, Tribal or Federal. Severe sentences are levied to those who are on Federally Impacted Lands, more so for those who reside on Indian Reservations, no variances are given to those who lack a criminal background. They are treated the same as those who have no regard for the law and are habitual offenders.

Native Americans in Indian Country do not appear to have the same rights as those in other parts of the country or those who are from other ethnic origin. This creates a rebellious atmosphere against authority. Included into this equation is the fact that when an incident occurs, no matter the severity of the situation, the individual will more than likely be tried in the Local Tribal System, if a sentence is levied, the term is served out in Tribal Jail, once the sentence is served, the Federal System has the option to charge the individual for the same charges that they had served in the Tribal System. This in the legal community is called "Double Jeopardy", and should not happen in any case, Federal, State or Tribal.

Individuals sentenced in the State's legal system are almost assured parole for their **FIRST OFFENCE**, in the Federal System they are **GAURANTEED THE MAXIMUM PENALTY BY LAW**. This system almost assure those who enter the "SYSTEM" will be released to further their criminal life, as been taught to them "IN THE SYSTEM". This does not provide those "FIRST TIME OFFENDERS" the chance to rehabilitate through probation and a **SECOND CHANCE**, as most States allow.

Economically, the Federal System places a lot of burden on the taxpayers of the Nation. In Indian Country unemployment on most reservations exceeds 70% of the local

population, many do not pay taxes, and receive some sort of assistance income. The question would be; Wouldn't we rather have them incarcerated or rehabilitated and placed into a productive environment? Many who return from Federal Prison return to the reservation, cannot find employment and in the end become a burden to the taxpayer.

On Indian Reservations there appears to be a lack of respect for local Law Enforcement this in most cases is brought on by the lack of the local Law Enforcements effective approach with the local drug trade. Here on the Zuni Reservation drug dealers go on untouched, but those who retaliate against them are punished in the Federal System, these drug dealers have in recent cases provoked altercations with individuals, and when confronted in retaliation the their aggression the drug dealers run to the Local Law to seek and gain support. Those who are defending themselves are sentenced in the Federal System, while those who cause the most harm to the people (The Drug Dealers) are left to continue their trade.

Granted, habitual and first offenders who commit murder should be sentenced to hard time, included in that company should be the drug dealers. Leniency to those who have committed their first offence protecting themselves. The current system does not allow for rehabilitation for First Offenders, only the knowledge of a lengthy prison term.

Have you heard of Young Indian Youth awaiting sentencing for a crime committed on an Indian Reservation, hanging themselves so they wouldn't have to go through the seemingly harsh process? This is all too common in Indian Country; the Federal System is just another example of the System, "STACKING THE DECK" for those who would find survival easier if the system was structured differently.

The Federal System needs to be overhauled and comparable to the States Sentencing Procedures, this will correct a disparity that singles out a race of people.

When the ad hoc advisory group is assembled, please include or promote certain involvement of those who have challenged the system trying to gain a lesser penalty fore those who have had no previous criminal activity. Formulate sentencing following the States Guidelines where the crime is committed.

Thank You,  
Ernest Mackel  
(505) 782-4569  
PO Box 338  
Ramah, New Mexico  
87321



**Washburn, Kevin**

---

**From:** Washburn, Kevin  
**Sent:** Wednesday, October 24, 2001 2:03 PM  
**To:** John P. Elwood (E-mail)  
**Subject:** Ad Hoc Advisory Group on Native American Issues under the USSG

John, as a member of the Chickasaw Nation of Oklahoma, I have a strong interest in issues related to justice and public safety in Indian communities. As a former federal prosecutor handling Indian country prosecutions in New Mexico, I have more than a passing familiarity with the sections of the sentencing guidelines that most often are involved in sentencing Native Americans. I would be delighted to have an opportunity to offer my own thoughts and suggestions to any committee considering proposed changes related to the sentencing of Native Americans under the guidelines.

I am attaching my resume for consideration. If there is anything else that I should be doing or if you prefer a hard copy of this resume, please let me know. Best wishes. Kevin Washburn, (202) 632-0040



KRW resume.doc

**KEVIN K. WASHBURN**

1276 North Wayne Street, Apt. 1200, Arlington, Virginia 22201 email: kevinwashburn@hotmail.com  
703.465.4731 (home) 202.632.0040 (office)

**EXPERIENCE****GENERAL COUNSEL, NATIONAL INDIAN GAMING COMMISSION, Jan. 2000 to present.**

Provide legal advice to Chairman and Associate Commissioners of the independent federal regulatory agency responsible for regulating Indian gaming, a \$10 billion industry existing in 28 states. Supervise seven lawyers and several support personnel. Develop enforcement policy, strategy and regulatory initiatives. Advise the Commission on enforcement actions, administrative and judicial litigation, Congressional testimony and administrative rulemaking. Coordinate with Department of Justice on civil litigation and with various law enforcement agencies on criminal investigations involving gaming.

**ASSISTANT UNITED STATES ATTORNEY, Albuquerque, N.M., Nov. 1997 - Jan. 2000.**

Prosecuted violent criminals, primarily for crimes arising under the Indian country jurisdictional statutes. Handled all aspects of prosecutions, including supervising investigations by the FBI, BIA, ATF and other law enforcement agencies, seeking indictments before federal grand juries, arraignments, preliminary hearings and detention hearings, and jury trials and appeals before the federal courts.

**TRIAL ATTORNEY, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C. 1994-1997.**

Appointed through the Attorney General's Honors Program to the Environment and Natural Resources Division - Indian Resources Section. Litigated affirmative cases on behalf of the United States in its role as trustee for Indian tribes. Defended programs of the Department of the Interior and the Environmental Protection Agency in actions by states and other non-Indian parties.

**LAW CLERK, JUDGE WILLIAM C. CANBY, JR., U.S. Court of Appeals for the Ninth Circuit, 1993-94.****EDUCATION****YALE LAW SCHOOL, J.D. 1993.**

Editor-in-Chief, *Yale Journal on Regulation*; Arnold & Porter Scholar.

**WASHINGTON UNIVERSITY (ST. LOUIS) SCHOOL OF LAW, 1990-1991.**

Gustavus A. Buder Scholar; American Jurisprudence Awards: Torts, Civil Procedure.

**UNIVERSITY OF NEW MEXICO, Summer 1990.**

Pre-Law Summer Institute for Indians, American Indian Law Center: Outstanding Student, Indian law.

**UNIVERSITY OF OKLAHOMA, B.A. (Economics) with Honors 1989.****AWARDS AND PERSONAL INFORMATION****Special Commendations for Outstanding Service:**

United States Department of Justice, April 8, 1997.

United States Department of Justice, May 7, 1998, for successfully litigating *Montana v. EPA*, 941 F. Supp. 945 (D. Mont. 1996) and 137 F.3d 1135 (9<sup>th</sup> Cir. 1998).

Award for Sustained Superior Performance, United States Attorneys Office, September 13, 1999.

Member, **CHICKASAW NATION OF OKLAHOMA**, a Federally Recognized Indian Tribe.





SCHOOL OF LAW FACULTY

Mail #TMMH 444 Telephone: 651-962-4920  
1000 LaSalle Avenue Facsimile: 651-962-4915  
Minneapolis, MN 55403-2005

November 5, 2001

Honorable Judge Diana E. Murphy  
United States Court of Appeals  
for the Eighth Circuit  
300 South 4<sup>th</sup> Street  
11E  
Minneapolis, MN 55415-2219

Via Facsimile: 202-502-4699  
Attention: Frances Cook

Dear Judge Murphy:

I am an Assistant Professor of Law at the University of St. Thomas School of Law. I teach in the lawyering skills program. Before coming to UST, I worked as a Federal Public Defender for 10 years. I understand that the sentencing commission may be establishing an ad hoc committee to study the impact of the federal sentencing guidelines on Indian country. Having practiced federal criminal defense for the last seven years in Arizona, I am very interested in this topic. I am writing to volunteer any assistance I can provide to such a committee. If there is anything I can do to assist with this study, please let me know.

Sincerely,

Celia Rumann

**VIKEN, VIKEN, PECHOTA, LEACH & DEWELL, LLP**

*Attorneys at Law*

1617 Sheridan Lake Road  
Rapid City, South Dakota 57702-3483

FAX: (605) 341-0716

*Legal Assistants*

*Sherril J. Holechek  
Nicki Schwall, CLA*

*Linda Lea M. Viken  
Jeffrey L. Viken  
Terry L. Pechota  
James D. Leach  
Kenneth R. Dewell  
Lisa F. Cook*

---

Tel: (605) 341-4400

October 23, 2001

Diana Murphy  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

Dear Judge Murphy:

I received your letter of October 16, 2001. I think that an ad hoc advisory group is an excellent idea. I hope that if such a group is formed, it will include Indian people who are familiar with not only traditional forms of justice but also with existing formal tribal court systems already in place. Tribal justice systems need to be a part of the federal law enforcement effort in Indian Country, not separate and largely to be ignored by the federal courts and federal prosecutors.

Sincerely,

VIKEN, VIKEN, PECHOTA, LEACH & DEWELL, LLP



Terry L. Pechota

TLP/mc



*Forest County Potawatomi Community*  
*P.O. Box 340, Crandon, Wisconsin 54520*

05 November 2001

United States Sentencing Commission  
**ATTN: PUBLIC AFFAIRS**  
One Columbus Circle, NE Suite 2-500  
South Lobby  
Washington, DC 20002-8002

**VIA United States Mail and  
FACSIMILE 202/502-4699**

RE: Native Americans in Indian Country

Dear Sir or Madam:

The Forest County Potawatomi Community has reviewed the Federal Register for Wednesday, September 19, 2001 regarding the Notice of the United States Sentencing Commission. The Forest County Potawatomi Community supports the formation of an ad hoc advisory group on issues related to the impact of the sentencing guidelines on Native Americans in Indian Country. While Wisconsin is a P.L. 280 state, the Forest County Potawatomi Community is well aware of the issues faced by Native Americans in sentencing before Federal authorities.

Our Native American brothers and sisters are incarcerated in Federal facilities at disproportionate rates to the Anglo population; this includes death row. Native Americans tend to face more harsh penalties when being sentenced in Indian Country. State courts have greater flexibility in fashioning appropriate sentences. In the Federal system, Native Americans serve longer sentences than non-minorities.

While the Tribe supports the formation of an ad hoc committee as an initial step, it is suggested that the Sentencing Commission take steps to establish a more permanent, formal group that has some authority and continuing review responsibility over any implemented changes. It is suggested that membership terms be at least three to four years. The membership could be comprised of tribal members that have an expertise in matters of sentencing and the impact of Federal sentencing guidelines on Tribal communities, scholars who have studied the rates of incarceration of Native Americans, and representatives from appropriate civil rights organizations as well as Department of Justice prosecutors and Federal Judges. The group must have a clear charge of their scope of authority—which should be broad. It must also be clear that the advisory group will actually play valid role in tempering the Federal justice system. There must be a commitment to change by the Sentencing Commission.

Sincerely,

Harold Gus Frank  
Chairman

COPY: Executive Council  
File



**FEDERAL PUBLIC DEFENDER  
DISTRICT OF NEW MEXICO**

Joseph W. Gandert  
Supervisory Assistant  
Albuquerque Office  
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Robert E. Kinney  
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Las Cruces Office  
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Fax (505) 527-6933

November 6, 2001

The Honorable Diana E. Murphy, Chair  
United States Sentencing Commission  
One Columbus Circle, NE, Suite 2-500  
Washington, D.C. 20002-8002

Re: Ad Hoc Advisory Group Concerning Native Americans in Indian Country

Dear Judge Murphy:

The United States Sentencing Commission has proposed forming an Ad Hoc Advisory Group on issues related to the impact of the Federal Sentencing Guidelines on Native Americans in Indian Country. The Federal Public and Community Defenders, joined by the Practitioners' Advisory Group, would support forming a broad based Ad Hoc Advisory Group that could give voice to the concerns of Native Americans and constructive guidance to the Sentencing Commission. Those of us who have worked with many Native American tribes have heard the universal concerns and frustrations that are reflected in the March 2000 report of the South Dakota Advisory Committee to the United States Commission on civil rights: *Native Americans in South Dakota: An Erosion of Competence in the Justice System.*<sup>1</sup>

Concerns over the appropriateness of the sentencing guidelines for Native American defendants in Indian Country cases are being raised by members of the federal judiciary. In a recent article, Judge Charles B. Kornmann, U.S. District Judge, District of South Dakota, recognizes a sentiment among federal judges that the sentencing guidelines are unfair to Native Americans. Kornmann, *Injustices: Applying the Sentencing Guidelines and Other Federal Mandates in Indian Country*, 13 Fed.Sent.R 71 (2001). "Too often [sentencing judges are] required to impose sentences based on injustice rather than justice, and this bothers us greatly." *Id.* We have heard similar concerns, although less bluntly spoken, from judges in the Southwest and Northwest, who have significant Native American case loads. In his article, Judge Kornmann sets forth several proposed departures that he believes would taken into account the realities of the reservation.

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<sup>1</sup>The Federal Public and Community Defenders and the Practitioner' Advisory Group strongly recommended to the Sentencing Commission to seek Native American input before passing amendments to the sex abuse guidelines, where historically Native Americans have represented approximately 70% of defendants sentenced under U.S.S.G. § 2A3.1, § 2A3.2 and § 2A3.4.

The Honorable Diana E. Murphy, Chair  
United States Sentencing Commission  
November 6, 2001  
Page 2

It is clear that the reservations are home to the highest crime rate of any community. While the last of 1990's saw an economic boom and the concomitant reduction of violent and other crimes throughout the country, the reservations were left out of both. According to 1999 statistics from the Census Bureau and the Bureau of Indian Affairs, out of the 1.4 million of Native Americans that live on or near reservations, 19% are homeless and 59% live in sub-standard housing. 20% of Native American households on the reservations do not have full access to plumbing. 38% of Native American children age 6-11 live in poverty, in comparison with 18% for U.S. children nationwide. Only 63% of Native Americans are high school graduates. The unfortunate permanency of poverty on the reservation has also led to consistency in the crime rate. In 1998, 110 Native Americans out of 1,000 were victims of a crime of violence in comparison with 43 per 1,000 blacks, 38 per 1,000 whites and 22 per 1,000 Asians.

Long periods of incarceration have little effect on Native American crime. The roots of Native American crime can be found in the destruction of their culture, extreme poverty and the lack of economic opportunity, and a very understandable high rate of depression. This has led to significant substance abuse problems, teenage pregnancies and an alarmingly high suicide rate among Native American populations. These factors make Native American cases unique in the federal justice system.

The Sentencing Commission should seek broad based input in forming its committee. The Federal Public and Community Defenders and C.J.A. Panel attorneys represent the majority of Native Americans who are charged with crimes in Indian Country. Thus, we believe the defense community can provide useful input to the committee and the Commission. We also respectfully suggest that the Commission should seek the involvement of the National Congress of American Indians, which is based in Washington, D.C. The National Congress of American Indians is the largest association of tribes and has members throughout the country. In addition, we believe the Commission should also extend invitations to the Honorable Robert Yazzie, Chief Judge of the Navajo Supreme Court, and Dr. Dewey J. Ertz, of South Dakota. Dr. Ertz, a Native American, has vast experience concerning reservation crime and effective treatment of offenders. These individuals can add unique perspectives on the causes of crime on the reservation.

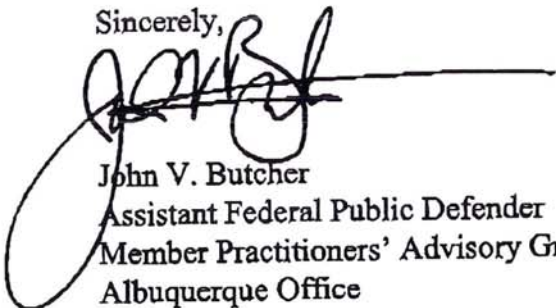
The scope of the Ad Hoc Committee should include possible amendments or downward departures concerning Indian Reservation cases. This would be consistent with concerns raised to the Commission prior to the promulgation of the sentencing guidelines. See, Tova Indritz, Testimony before U.S. Sentencing Commission, Denver, CO (Nov. 5, 1986); Letter from Fredric F. Kay, Federal Public Defender, Dist. of Arizona, to the Hon. William W. Wilkins, Chair, U.S.S.C. (Aug. 9, 1989); Jon M. Sands, Departure Reform and Indian Crimes: Reading the Commission's Staff Paper With "Reservations", 9 FED. SENT. R. 144, 145 (1996).



The Honorable Diana E. Murphy, Chair  
United States Sentencing Commission  
November 6, 2001  
Page 3

The Federal Public and Community Defenders and the Practitioners' Advisory Group are willing to work with the Commission in forming an Ad Hoc Advisory Group on issues related to the impact of the Federal Sentencing Guidelines on Native Americans in Indian Country. Please let us know if we can provide further assistance.

Sincerely,



John V. Butcher  
Assistant Federal Public Defender  
Member Practitioners' Advisory Group  
Albuquerque Office

JVB:srf

cc: Vice Chair John Steer  
Tim McGrath  
Jon Sands  
Barry Boss  
James Felman



UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
400 South Phillips Avenue  
Sioux Falls, South Dakota 57104-6851  
605-330-4505

LAWRENCE L. PIERSOL  
Chief Judge

November 5, 2001

The Honorable Diana E. Murphy  
Chair  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

Re: United States Sentencing Commission

Dear Judge Murphy:

This letter is in response to the notice published in the Federal Register on September 19, 2001.

I believe a Native American Advisory Group would be most desirable. The June, 2001 hearing held in Rapid City, South Dakota, showed the need for such an Advisory Group. The Advisory Group is needed not only for the Native Americans on South Dakota's nine reservations, but also for other Districts that have a significant Native American population. As you know, because of federal law, Native Americans are subject to federal prosecution and the sentencing guidelines to a far greater extent than any other portion of our population. Many Native Americans are prosecuted in Federal Court for offenses which would be the subject of State Court prosecution if they were not Native Americans.

The Advisory Group, if it is created, should be broad based, with representation from interested persons in a number of affected federal jurisdictions. The members should have the time and the interest to identify problems and suggest solutions within the framework of the Guidelines.

Some members might have government or private employers who could pay the expense of their employee attending advisory board meetings. Other members, based upon need, would need to have a mechanism to cover their expenses.

I do hope that an advisory board is created. In those few jurisdictions where there is a significant Native American population of juveniles and adults, trial courts have neither the jurisdiction, resources, nor training to handle any significant offense conduct. The application of federal criminal law on those reservations is intense with sentencing problems that do not generally or, in some instances, cvcr, arise in other federal

The Honorable Diana E. Murphy  
November 5, 2001  
Page 2

jurisdictions. An example of the degree of impact of federal criminal law on the South Dakota reservations is set forth on pages 4, 5 and 7 of *The Third Branch*, October 2001.

An advisory group to identify problems and suggest solutions for sentencing problems peculiar to Native Americans is most desirable. The trust relationship the United States has recognized it has with Native American people likewise suggests that an advisory group is desirable.

Sincerely yours,



LAWRENCE L. PIERSOL  
Chief Judge

LLP:jh

cc: The Honorable Roger L. Wollman  
Chief Judge  
United States Court of Appeals for the Eighth Circuit  
400 South Phillips Avenue, Suite 315  
Sioux Falls, SD 57104



# THE THIRD BRANCH

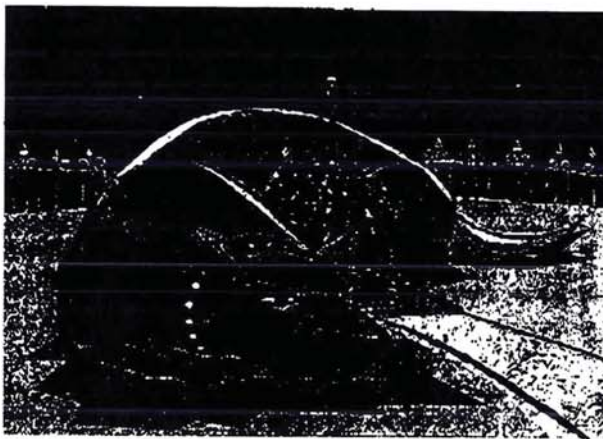
Newsletter  
of the  
Federal  
Courts



Vol. 33  
Number 10  
October 2001

## Judiciary Looks To Security Following Attacks

A week after the September 11 terrorist bombings in New York City and Washington, Administrative Office Director Leonidas Ralph Mecham presented the security needs of the federal Judiciary to House members. Sally Rider, Administrative Assistant to the Chief Justice, appeared for the Supreme Court. The special briefing was convened by Congressman Frank Wolf (R-VA), chair of the House Appropriations Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies, with José E. Serrano (D-NY), the subcommittee's ranking minority member.



Following the attacks, the U.S. Marshals Service (USMS), which provides protective services to judges and the courts, went on heightened alert. Court facilities throughout Manhattan were closed, but reopened for business by the end of the following week, although phone service and public access to the area continue to be disrupted. It was expected that the heightened security alert would continue throughout the Judiciary for the

long-term, especially as the war on terrorism evolves into trials and other court proceedings.

With this in mind, Mecham told the subcommittee, "We believe very strongly that the Department of Justice needs additional deputy U.S. Marshals for protection of the judicial process and to provide overall security coordination for the courts." The Judiciary fears that U.S. Marshals may be diverted to bolster security at airports, to work on investigations, and to fly on civilian aircraft, which would stretch their already limited numbers to cover the needs of the federal courts.

Even before the terrorist attacks, the Judiciary had been in the process

*See Security on page 2*

## Continuing Resolutions Keep Government Running

They nearly have become a sign of fall. As the leaves turn, the continuing resolutions emerge. Congress passed and the President signed the first continuing resolution at the end of September to keep government running as the fiscal year began October 1 without Presidential signatures on any of the 13 appropriations bills. The House and Senate passed H.J. Res. 65, and the President signed on September 28 the first CR making federal funds available through October 15, 2001. A second CR extended that deadline. Meanwhile, 35 percent of the projected fiscal year 2002 funding was dispersed to the courts to continue operations in the new fiscal year.

The House and Senate passed separate bills making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies for the fiscal year ending September 30, 2002. The Judiciary requested a \$4.8 billion appropriation for fiscal year 2002. However, the House approved \$4.6 billion for the Judiciary, and the Senate approved just \$4.4 billion. In response to the September 11 terrorist attack, the Senate version now contains funds "to

*See Resolution on page 2*

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Where Are the Needed Judgeships? .....	pg. 6



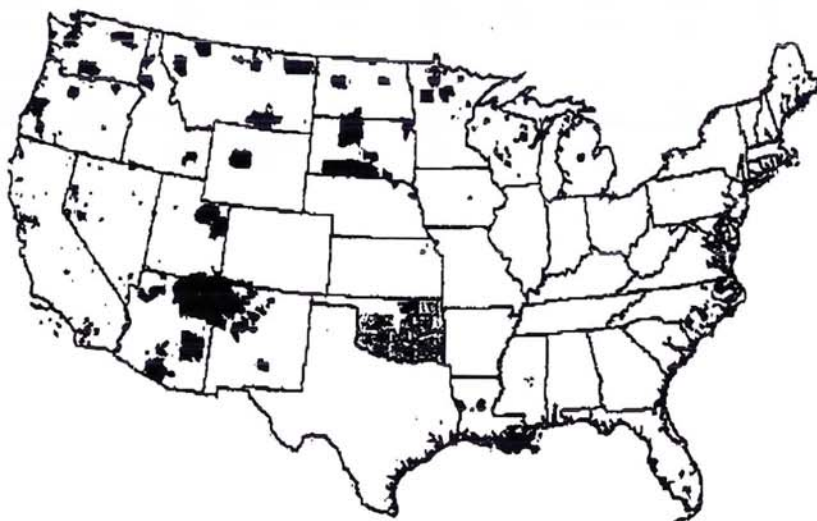
## Courts Try New And Tribal Ways In Indian Territory

Assault, sexual abuse, arson, burglary—these are typically of-fenses heard in state courts—except when the federal government has jurisdiction. That jurisdiction, and the authority of the federal courts, extends to national parks and other federal property, but it is in the 275 locations in the U.S. that are federally administered as Indian reservations where an expanding workload is accompanied by particularly unique challenges.

For more than 100 years the federal government has been vested with the responsibility to enforce major crimes on reservations, although this responsibility can be transferred to state governments. Today, 1.2 million American Indians live on or near these reservations, and according to the Department of Justice, American Indians are the victims of violent crimes at more than twice the rate of all U.S. residents. This crime rate has, since 1996, increased the number of American Indians under supervision in the federal probation system by 57 percent. The unique nature of the cases, the large number of juveniles involved, the low standard of living, and the geographic remoteness of much of these areas have prompted judges and probation officers who handle American Indian cases to take a different approach to their work.

Last year, the District of South Dakota had a total of 412 American Indians under supervision. Judge Karen E. Schreier (D. S.D.), who sits in Rapid City, hears cases from the nearby Pine Ridge Reservation. "The caseload from the

Map courtesy of Geographic Data Service Center



American Indian Reservations and Tribal Entities in The United States

reservation," said Schreier, "has significantly increased over 6 or 7 years. We're seeing a more severe level of violence, most of which is alcohol-related. We're also seeing a large number of juveniles. They're usually 16 or 17 years old, but the youngest was 13." Schreier adds that nearly 200 gangs have been identified on the Pine Ridge Reservation, where unemployment reaches nearly 80 percent. Said Schreier, "American Indians are entitled to live in a safe, crime-free environment. So I place a high priority on handling these cases."

Chief Judge Lawrence L. Piersol (D. S. D.) knows the defendants he sees in court are the product of high rates of unemployment and corresponding rates of alcoholism on the reservations. According to statistics compiled by the Bureau of Justice Statistics, American Indian victims reported a drinking offender in 46 percent of all violent victimizations, and about 70 percent of jailed American Indians convicted of violence reported that they had been drinking at the time of the offense. Piersol is especially concerned about the num-

ber of cases involving juveniles, which due to their nature take up a disproportionate amount of the court's time.

The number of sex offenses and juvenile crimes on reservations is a cause for concern throughout the districts. Indian juveniles represented 62 percent of all juveniles arrested in calendar year 1999. Nationwide, American Indians represent 30 percent of all offenders convicted for sex offenses.

"Most probation officers never see juveniles in their careers," said Magdeline E. Jensen, Chief U.S. Probation Officer for the District of Arizona, "but we have more than 80 juveniles, mainly American Indians, under supervision here. We have 22 juveniles serving terms of official detention, of whom 16 had underlying offenses involving crimes of violence ranging from 1<sup>st</sup> and 2<sup>nd</sup> degree murder to aggravated assault and kidnapping."

As crime involving violence or child physical or sexual abuse has grown, probation officers and the federal judiciary are looking for ways in which to reach not only of-



fenders, but also the communities in which they live.

The Administrative Office Federal Corrections and Supervision Division (FCSD) began developing Indian country initiatives in districts with significant Indian caseloads in 1993. In 1999, FCSD created a special Indian Country Project to improve supervision and treatment services in reservation communities. The FCSD has helped form partnership projects with the Department of Justice and the Bureau of Indian Affairs, and FCSD's Rene Green works closely with probation officers who are looking for solutions to problems. At an FCSD-hosted meeting of federal officials and tribal community members, all agreed that any successful effort to address law-enforcement and correctional treatment issues on Indian reservations must include an understanding of the Indian culture, the economy, and the geography, and that each court must work with the local tribes to establish partnerships.

One such effort is underway in the District of New Mexico, where Anita Chavez, as Supervising U.S. Probation Officer, supervises an office that covers most of the district's Indian country cases. Her district is third in the country for sex offender cases. "We're emphasizing supervision," said Chavez, "including polygraphs and treatment." She acknowledges that the geography makes supervision particularly challenging. On the 16 million acre Navajo reservation, a "surprise" visit to an offender in her territory may mean a four-hour trip from the base office. In response, the district has opened a part-time satellite office, with cooperation with the FBI, in a city closer to the more remote reservation areas. This office will be manned four days a month to give defendants access to probation officers on a regular basis. "We also are working on a half-way house where sex offenders will come as a condi-

tion of release to get the help they need," said Chavez.

Other districts have developed equally innovative solutions. In the District of Arizona, the probation office helped form a Tribal/Federal Sex Offender Management Task Force composed of tribal and federal representatives of probation, victim advocates, law-enforcement and prosecutors, therapists, judges, legislative representatives and a tribal counsel member. The Task Force has helped change tribal law to permit registration and notification of sex offenders, and it has helped increase awareness on the reservation of the incidence of sexual violence.

The District of South Dakota has developed its own sex offender program where therapy is mandatory for offenders. Community service also is mandatory if an offender is not employed or a student. A juvenile facility has been opened on the Pine Ridge Reservation, and now juveniles who were once sent away for placement are supervised on the reservation. The goal is to find continued funding for teachers and therapists, and continue access from tribal elders who can teach offenders about their culture.

Forty to 50 percent of the offenders under supervision in the District of North Dakota are American Indians. As a result, Chief Probation Officer Richard Crawford has aggressively recruited American Indians for his staff who have criminal justice degrees and law enforcement experience, and who are enrolled members of reservation tribes. Four new American Indian staff members came on board within the last year and have proved invaluable in working within their communities. The probation office has made its presence felt on the reservations in other ways. With the support of Chief Judge Rodney Webb, the district is now finalizing the opening

See Indians on page 7

### American Indians and Sentencing Guidelines Topic of Hearing

On June 19, 2001, the U.S. Sentencing Commission (USSC) held a public hearing in Rapid City, South Dakota, in response to a March 2000 Report of the South Dakota Advisory Committee to the United States Commission on Civil Rights. The Advisory Committee's Report recommended that an increase in the impact of the Sentencing Guidelines on American Indians in South Dakota be considered. The Commission also has received information from South Dakota that American Indians are being subjected to a racial prosecution in which they are charged with possession of a handgun and receive harsh sentences, including a life term, for a crime that would be considered a misdemeanor if the offender were not an American Indian. The Commission will be providing a report on these issues to the U.S. Sentencing Commission in the next few weeks. The Commission will also be providing a report on the impact of the Sentencing Guidelines on American Indians in South Dakota in the next few weeks.

The hearing was attended by the Honorable Judge Rodney Webb, Chief Judge of the District of South Dakota, and several other judges, including Judge Richard Crawford, Chief Probation Officer of the District of South Dakota. The hearing was also attended by several American Indian representatives, including Chief Judge Webb, who provided information on the impact of the Sentencing Guidelines on American Indians in South Dakota. The Commission will be providing a report on these issues to the U.S. Sentencing Commission in the next few weeks.

The Commission will be providing a report on these issues to the U.S. Sentencing Commission in the next few weeks. The Commission will also be providing a report on the impact of the Sentencing Guidelines on American Indians in South Dakota in the next few weeks.



*Indians continued from page 5*

of offices on three of the reservations in its jurisdiction that once entailed a 70- to 100-mile drive to conduct any business. The fourth reservation is within 12 miles of the central office.


Frank Fleming, Chief U.S. Probation Officer for the District of Montana, says 40 percent of his office's supervision caseload is on Montana's reservations. His probation officers place a high priority on working with the community, and when working with juveniles, interacting with their schools and teachers. Officers specializing in juveniles carry a smaller caseload to make that possible.

Officers also are encouraged to be proactive in helping offenders on probation make a successful tran-

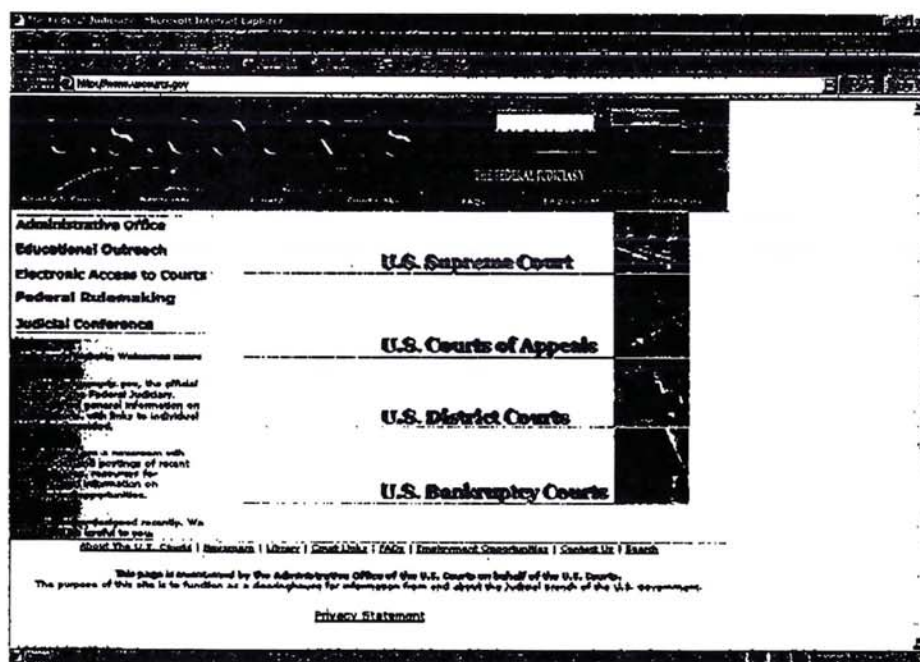
sition into the community. If there's a question of non-compliance with the terms of probation, officers try to work out matters on a local level before heading to court for a revocation hearing. Fleming says that with the support of Chief Judge Donald W. Molloy, he has worked with the Bureau of Prisons to acquire facilities for juvenile offenders from the reservation. "These offenders previously were sent out of state," said Fleming, "and that's not acceptable for a good support system. Now we have a non-secured facility in western Montana, and we're breaking ground for a 30-bed secured juvenile facility near Butte."

For the future, the Judicial Conference Criminal Law Committee may be considering asking Congress to

change the sentencing for juvenile offenders to allow for such options as a combination of incarceration and supervised release, which is not possible now.

Most judges and probation officers agree that the crime problems seen on Indian reservations have their roots in poverty. Fleming may speak for many when he observes that unemployment and alcoholism on reservations combine to present a future with little or no hope for the children. "That's why we emphasize working with the kids," says Fleming, "to show them other ways they can go. If we can't give people hope, especially the kids, if we lose them, we'll never get them back. We're invested in the communities, and it is well worth it." 

## Redesign Makes Navigating Judiciary's Website Easier



The official website of the federal Judiciary (<http://www.uscourts.gov/>) has a new look this month. And the redesign is more than just a facelift. Content has been reorganized with users' needs in mind. It's easier to find the most frequently accessed information; current news is posted up front; and, in many cases, pages that were two or more clicks of a mouse away are now accessible directly from the home page. All of which makes the site significantly easier to navigate.





# Spokane Tribe of Indians

P.O. Box 100 • Wellpinit, WA 99040 • (509) 258-4581 • Fax 258-9243

CENTURY OF SURVIVAL  
1881 - 1981

October 29, 2001


United States Sentencing Commission  
Attn: Public Affairs  
One Columbus Circle, NE.,  
Suite 2-500 South Lobby  
Washington, DC 30003-8002

Dear Ms. Murphy:

The Spokane Tribe of Indians agrees that the Sentencing Commission should form an *ad hoc* advisory group to study the impact of the federal sentencing guidelines on Native Americans. Because of our unique status and the general trust obligation of all agencies of the United States in relation to Native American people, the sentencing guidelines should be given careful scrutiny under the highest of standards.

The composition of this group should be comprised of the people directly affected: Indian people. Efforts should be made to solicit applications for members from organizations such as the National Council of American Indians (NCAI) along with its regional sub-organizations, and the Native American Rights Fund (NARF).

Sincerely,



Alfred Peone, Chairman

UNITED STATES SENTENCING COMMISSION  
ONE COLUMBUS CIRCLE, N.E.  
SUITE 2-500, SOUTH LOBBY  
WASHINGTON, D.C. 20002-8002  
(202) 502-4500  
FAX (202) 502-4699

---



November 2, 2001

**MEMORANDUM**

**TO:** Chair Murphy  
Commissioners  
Tim McGrath  
Frances Cook  
Ken Cohen  
J. Deon Haynes  
Pam Montgomery  
Lou Reedt  
Judy Sheon  
Charlie Tetzlaff  
Susan Winarsky  
Theresa Cooney  
Paula Desio  
Janeen Gaffney

**FROM:** Mike Courlander

**SUBJECT:** Public Comment

Attached for your reference is some recently received public comment.

Keith T. Darcy *Executive Vice President*  
IBJ WHITEHALL BANK & TRUST COMPANY



October 23, 2001

United States Sentencing Commission  
One Columbus Circle, NE, Suite 2-500, South Lobby  
Washington, DC 20002-8002  
Attention: Public Affairs

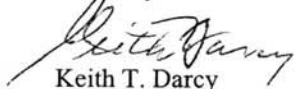
Dear Sir/Madam:

I am writing in response to the Federal Register Notice dated 9/19/01 (BAC2210-40/2211-01) regarding the possible formation of an ad hoc advisory group on organizational guidelines. Since its inception the Organizational Guidelines have generally stimulated an effective response from the business community. The formation and rapid development of the Ethics Officer Association, along with increased vigilance in all compliance areas, attest to the effectiveness of these guidelines.

Given that the Commission has received letters for proposed changes regarding Chapter Eight (Sentencing of Organizations), the creation of an ad hoc advisory group is a worthy recommendation. The formation of such a group would be consistent with the Commission's outreach to its various constituencies and its openness to new ideas. The membership of this group should consist of serious-minded legal, ethics and compliance professionals whose respect for the Organizational Guidelines is established. It should represent a cross-section of leaders from business, nonprofit and the academic communities.

I appreciate the opportunity to comment on this notice. For your information, I would welcome the opportunity to be of service to the Commission in this regard.

Sincerely,

  
Keith T. Darcy





October 19, 2001

ADVISORY BOARD

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Chairman of the Board  
Ethics Officer Association

WILLIAM E. DAVIS  
Chairman and CEO  
Niagara Mohawk Holdings, Inc.

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Boston Edison Company

DAWN-MARIE DRISCOLL  
Former VP of  
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Stone & Webster, Inc.

DUANE D. FITZGERALD  
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CEO, Global Services  
Cable and Wireless plc

ANTHONY J. RUCCI  
Exec. VP and Chief Admin Officer  
Cardinal Health Inc.

ALISON TAUNTON-RIGBY  
Former President & CEO  
Aquila Biopharmaceuticals

JEAN C. TEMPEL  
Managing Director  
First Light Capital

United States Sentencing Commission  
Attn: Public Affairs  
One Columbus Circle, NE  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

To Whom It May Concern:

I am writing to express my support for the formation of an Organizational Guidelines Advisory Group. I was not only made aware of this proposal group by reading the Federal Register, but also from talking to a number of people, including Paula Desio of the U.S. Sentencing Commission. I briefly served on an advisory group of the USSC as it related to the Sentencing Guidelines. My role then was to bring out the importance of ethics to compliance in the communication and enforcement of the Guidelines. This advisory group was rather short-lived, and I see this proposal as a rebirth of such a group almost a decade later.

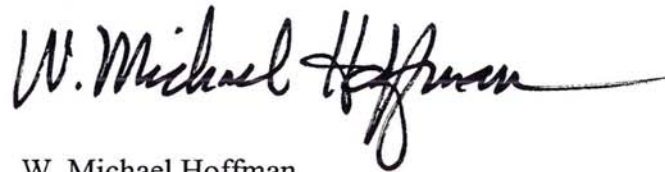
In reading the Prevention of Corporate Liability (Vol. 9, No. 9, October 15, 2001), I agree with the suggestions that have already been sent for improving the Guidelines, especially the effort to view compliance as an element of a broader integrity-based ethics program, and an effort to promote programs that reward ethical behavior. There is no doubt that the Sentencing Guidelines have played a major role in furthering the business ethics and compliance movement in corporate America and are playing a role in influencing similar efforts in other countries around the world. The USSC should be and is praised for these efforts, and the formation of a follow-up advisory group to strengthen the Guidelines should be seen as timely and important.

I would be pleased to serve on such a group if you think I could contribute. I have a lot of relationships in the business ethics academic community both here and abroad, and I have been working with corporations and other organizations in the area of business ethics for many years. Attached is my resume for your review.

Some of the largely academic associations, such as SBE, APPE, ISBEE, etc., could be very helpful and should be included as a source of ideas and support. I am also contacted by the media frequently, which could be helpful to the efforts of an advisory group, and I work with numerous laws firms in an expert witness/consulting capacity, which is another source of useful information with regard to what corporations are doing, or as is more often the case, not doing. I also serve as the Advisor to the Board of the Ethics Officer Association, an association which I helped to establish and served as the Executive Director of for its first five years.

I was encouraged to write to you with my offer to serve on this proposed advisory group by Paula Desio; however, whether I serve on the committee or not, I will be pleased to help the effort in whatever way I can.

Sincerely,

A handwritten signature in black ink that reads "W. Michael Hoffman". The signature is written in a cursive style with a long horizontal flourish extending to the right.

W. Michael Hoffman  
Executive Director



**PROFESSIONAL RESUME****BIOGRAPHICAL SUMMARY****W. Michael Hoffman, Ph.D.**

W. Michael Hoffman is the founding Executive Director of the Center for Business Ethics at Bentley College in Waltham, Massachusetts, a 25 year-old research and consulting institute and an educational forum for the exchange of ideas and information in business ethics.

Dr. Hoffman received his Ph.D. in Philosophy at the University of Massachusetts at Amherst in 1972. He is a Professor of Philosophy and was Chair of the Department of Philosophy for 17 years at Bentley. Dr. Hoffman has authored or edited 16 books, including Business Ethics: Readings and Cases in Corporate Morality (now in its 4<sup>th</sup> edition), The Ethical Edge: Tales of Organizations that Have Faced Moral Crises (1995), and Ethics Matters: How to Implement Values-Driven Management (2000). He also has published over 60 articles.

Dr. Hoffman has consulted on business ethics for universities, government agencies, and corporations, including The Ayco Company, Bath Iron Works, Cablevision Systems, CBS, Congress' Office of Technology Assessment, Coopers & Lybrand (now PricewaterhouseCoopers), Exelon Corporation, Fidelity Investments, GTE, General Electric, Glaxo (now Glaxo SmithKline), Hill and Knowlton, Junior Achievement, Johnson & Johnson, KPMG Peat Marwick, Long Island Lighting Company (now KeySpan Energy), Massachusetts Bay Transportation Authority, Niagara Mohawk Power Corporation, Northeast Utilities System, Northrop (now Northrop Grumman), NYNEX (now Verizon), Orange and Rockland Utilities, and TRW Systems. He has been a National Endowment for the Humanities Fellow and Consultant, a lecturer at universities and conferences around the world, and an expert witness on business ethics in numerous legal cases. He is on the board of editors of many business ethics journals, was a founding member and President of the Society for Business Ethics, and served on the advisory board of the U.S. Sentencing Commission. He was the founding Executive Director (1991-1995) and later a member of the Board of Directors (1995 - 1997) of the Ethics Officer Association; he is presently the Association's Advisor to the Board. He has been quoted extensively on business ethics in newspapers and magazines, including the Boston Globe, Business Week, Industry Standard, Los Angeles Times, New York Times, USA Today, U.S. News and World Report, Wall Street Journal, and Washington Post and is interviewed frequently for television and radio programs around the country.

Dr. Hoffman resides in West Newton, Massachusetts with his wife, Bliss Read Hoffman.



The College Of  
**WILLIAM & MARY**

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**School of Law**

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October 30, 2001

United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500  
South Lobby  
Washington, D.C. 200062-8002

Attention: Public Affairs

VIA FAX : (202) 502-4699

re: Federal Register notice  
September 19, 2001  
Request for Comment

Ladies and Gentlemen:

You have asked for comment on the desirability of creating an ad hoc advisory group on the subject of the Organizational Sentencing Guidelines.

It certainly makes sense to revisit the Organizational Guidelines in light of extensive experience with legal compliance programs – both successful and unsuccessful – since the Guidelines were adopted in 1991. It also makes sense to consider the academic, practitioner, and expert commentary that has emerged from this experience. Most of all, it makes sense for the academics, practitioners, and experts who have a strong interest in and experience with the Sentencing Guidelines to have regular and sustained – yet informal – contact with the Sentencing Commission staff. This kind of ongoing exchange has certainly proven to be useful at the Securities and Exchange Commission. Dialog of this sort makes all parties more aware of the problems involved in administering the Guidelines as written, can accelerate the transmission of useful information, and can dispense quickly with ideas that have no practical utility.



### Scope, Duration and Membership

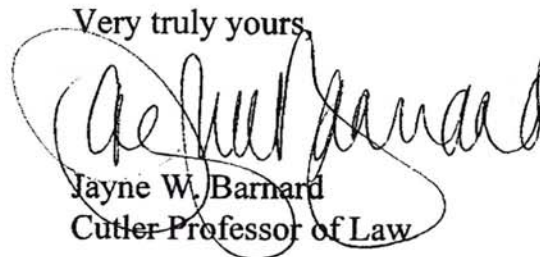
I would think that any advisory committee should be encouraged (subject to some agenda control) to provide comment on any aspect of the Organizational Sentencing Guidelines. The committee should function for a minimum of three years. Membership should be by invitation, with an opportunity to expand the group as expertise and interest manifest themselves. The advisory committee should be kept to a workable size (25 participants?), with the understanding that non-members with specific expertise should be invited to participate in the advisory committee's discussions. Certainly, the committee should include representatives of the Justice Department and the corporate defense bar, as well as those who make their living in the "compliance business."

### Specific Agenda Items

I have my doubts about extending the protections of the existing Guidelines to include programs aimed generally at "ethical" behavior. A lot of these programs are self-congratulatory without having any real impact or substance.

I think a serious discussion of a "safe harbor" provision is in order – the practices of various divisions of the Justice Department on this issue appear to be all over the place.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jayne W. Barnard", is written over a circular stamp or seal. The signature is fluid and cursive.

Jayne W. Barnard  
Cutler Professor of Law

Charles L. Howard  
Phone: (860) 251-5616  
Fax: (860) 251-5699  
choward@goodwin.com

October 25, 2001

United States Sentencing Commission  
One Columbus Circle N.E.  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

RE: Federal Register Notice of September 19, 2001

Dear Chair Murphy and Commissioners:

I am writing in response to the Commission's Federal Register Notice of September 19, 2001 requesting comment on issues relating to the Organizational Guidelines.

I think that the Commission should appoint an ad hoc advisory group to study possible revisions to the Organizational Guidelines and Commentary. I would suggest that such a group have no more than 15 members and include federal prosecutors and judges, business ethics officers, private practitioners (both criminal defense counsel and counsel experienced in business ethics and related matters), and academicians. Despite the broad scope of Chapter 8 of the Guidelines, I think that this ad hoc advisory group should be asked to concentrate on business ethics and compliance issues. If there are other areas in Chapter 8 of concern to the Commission, another ad hoc group could be appointed with a membership related to those issues. The ethics and compliance ad hoc group should be asked to report back to the Commission within 18 months of its appointment.

I would like to express my desire to serve on such an advisory group. I practice law with a large Connecticut firm and have a broad civil litigation practice that includes substantial experience in ERISA and intellectual property litigation matters and appeals in a variety of areas. I also have for many years represented public clients such as the City of Hartford and the State of Connecticut in various matters. In addition, for over ten years, I have been independent counsel for organizational ombuds programs, including several at national and international corporations. This experience has given me insight into the operation of corporate ethics programs and the dynamics of



employee reporting and dispute resolution at major organizations. I have been a co-author of booklets published by The Ombudsman Association (TOA) on both the ombudsman confidentiality privilege and on the impact of the Commission's Organizational Guidelines on corporations and how ombuds programs can be of assistance in creating an "effective program to prevent and detect violations of law." As a frequent presenter at annual conferences of The Ombudsmen Association and as an author of articles for the TOA newsletter, I have had many opportunities to become familiar with the role of ombuds programs in a variety of institutions. The TOA is the nation's leading trade association for corporate and organizational ombuds programs, and I believe that I would be able to draw upon the collective experience of its members as well as my own experience in serving on such an ad hoc advisory group.

My experience in representing corporate ombuds offices lead to my being asked to assist in an Ethics Resource Center (ERC) Fellows Program, where I was a contributor and a draftsman of a legislative model contained in the ERC's Resolution and Report: Employee Confidentiality and Non-Retaliating Reporting Systems, dated May 7, 1999. In the course of my representation of corporate ombuds offices and my participation in the ERC Fellows Program, I developed an idea for possible revisions of the Commentary to the Guidelines that I presented in the enclosed letter to Judge Murphy this past April.

While my principal experience is in civil litigation, I have long been familiar with criminal law issues. I began my career as an assistant attorney general in Missouri handling state court criminal appeals. In the course of my practice in Connecticut, I have handled corporate internal investigations in matters involving alleged federal procurement fraud and State Ethics Commission violations. In addition, I have served since 1995 as a Commissioner on the Connecticut Criminal Justice Commission, which is responsible for hiring all state prosecutors in Connecticut. A copy of my resume is attached. If any Commissioners have questions concerning my background or experience, I would be happy to furnish whatever additional information is necessary.

United States Sentencing Commission  
October 25, 2001  
Page Three

I hope that the Commission appoints an ad hoc advisory group on possible revisions to the business ethics and compliance issues. I would be honored to be appointed to such a group and would devote whatever time is necessary to its work.

Very truly yours,

A handwritten signature in black ink, appearing to read "Charles L. Howard". The signature is written in a cursive style with a large, stylized initial "C" and "H".

Charles L. Howard

CLH:trb  
Enclosures



**CHARLES L. HOWARD**

**Shipman & Goodwin LLP**  
**One American Row**  
**Hartford, Connecticut 06103-2819**  
**(860) 251-5616**  
**FAX (860) 251-5699**  
**E-mail: [choward@goodwin.com](mailto:choward@goodwin.com)**

**EDUCATION:** University of Virginia School of Law, J.D. (1975)  
Princeton University, A.B. (cum laude) (1972)  
(Woodrow Wilson School for Public and International Affairs)

**EMPLOYMENT:** Shipman & Goodwin, Partner (1984-present)  
Chair, Litigation Department (1985-2000)  
Member, Management Committee (1990-96), (1998-2000)  
Chair, Practice Committee (1994-95) and Practice Oversight  
Committee (1995-97); Member (1997-98, 1999-present)  
Practice areas: General civil litigation in state and federal courts,  
with significant experience in appeals; ERISA, municipal, and  
intellectual property litigation; and representation of corporate  
ombuds.

Associate, Robinson, Robinson & Cole (1977-81)

Assistant Attorney General of Missouri for Attorney General John C.  
Danforth (1975-76)

**ADMITTED TO BAR:** Connecticut, 1977; Missouri, 1975; United States District Courts for  
the Western District of Missouri, District of Connecticut, District  
of Vermont, and District of Arizona; United States Courts of  
Appeals for the Second, Eleventh, and Federal Circuits; United  
States Tax Court; United States Supreme Court.

**PROFESSIONAL  
ACTIVITIES:**

**Present:** Commissioner, Connecticut Criminal Justice Commission  
(1995 to present); Guest Lecturer on ERISA Litigation, University of  
Connecticut School of Law; Trustee appointed pursuant to Practice  
Book §2-64 by the Connecticut Superior Court as attorney to protect  
clients' interests in connection with disbarment of an attorney;  
Lawyers for Children America. **Prior:** Commissioner, Connecticut  
Judicial Selection Commission (1992-95); Commissioner,  
Connecticut Commission on the Compensation of Elected State  
Officials and Judges (1983-91); Chair, Hartford County Bar  
Association Ethics Committee; Board of Directors, Connecticut  
Association of Municipal Attorneys; Member, Civil Action Victims

Task Force (appointed by General Assembly pursuant to Special Act 87-52); Special Public Defender for pro bono criminal appeals; Connecticut Bar Association Executive Committees: Sections on Administrative Law, Civil Justice, Municipal Law, and Professional Ethics. Speaker: numerous bar association and professional seminars.

Member: American, Connecticut, and The Hartford County Bar Associations; National Health Lawyers' Association; and Defense Research Institute.

#### **COMMUNITY ACTIVITIES:**

**Present:** Board of Trustees of the Connecticut Policy and Economic Council; Local Government Committee, Hartford Downtown Council; Board of Directors, Terry's Plain Homeowners' Association. **Prior:** President, First Church of Christ, Simsbury; Board of Directors, Connecticut World Trade Association (1983-90); Board of Directors, Simsbury Historical Society; Regional Strategy Implementation/Retreat Committee, Greater Hartford Chamber of Commerce; Member, Connecticut District Export Council; Board of Directors, Bushnell Park Foundation; Treasurer, Jim Fleming for State Representative; Board of Directors, Simsbury Public Library (1981-85; elected); Treasurer, Chair of Personnel and Finance Committees, and Member of Stewardship Committee, First Church of Christ, Simsbury; Transportation Committee, Town of Simsbury (1981-87); Member of task forces of the Greater Hartford Chamber of Commerce for the establishment of Connecticut World Trade Association and for study of water resources for the Greater Hartford area; Board of Directors, Spring Grove Cemetery Association; Board of Trustees, Simsbury Land Conservation Trust; and Volunteer Tutor, Fred D. Wish School, Hartford.

#### **HONORS:**

Chosen as one of five men from Central Connecticut and Western Massachusetts in 1979 by the Rotary Foundation International to participate in a five-week cultural exchange program in Hokkaido, Japan.

Invited participant on Connecticut-Shandong Trade Mission to China with Governor William O'Neill in 1987.

Martindale-Hubbell rating - AV

#### **PERSONAL:**

Born in Alamogordo, New Mexico; April 15, 1950  
Married to Joan Wunderlich Howard; two children  
Resident of Simsbury, Connecticut, since 1977



Charles L. Howard  
Phone: (860) 251-5616  
Fax: (860) 251-5699  
choward@goodwin.com

April 3, 2001

The Honorable Diana E. Murphy  
Chair  
United States Sentencing Commission  
Suite 2-500 South Lobby  
One Columbus Circle Northeast  
Washington, D.C. 20002

Re: Suggestion for Additional Commentary to the Organizational Sentencing Guidelines

Dear Judge Murphy:

I am writing to urge the Commission to amplify the commentary to Section 8A-1.2 of the Organizational Sentencing Guidelines to articulate criteria that would constitute a presumptive "safe harbor" for a "reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution," as that phrase is currently used in Commentary §3(k)(5).

The premise of my proposal is that ethics officers, alone, cannot create an environment for reporting wrongdoing without fear of retribution. Since ethics officers must investigate and, if necessary, initiate appropriate action on matters brought to their attention, their position has inherent barriers to alleviating employee reluctance to report wrongdoing or fear of retribution. Consequently, organizations must often look for additional ways to reduce fear of retribution and encourage employee reporting of wrongdoing.

For over ten years, I have represented organizational ombuds offices, including several at national and international corporations. During this time, I have repeatedly seen how organizational ombuds offices work cooperatively with and yet separately from business practice or ethics officers for their organizations to facilitate reporting of wrongdoing by employees while reducing the fear of retribution. My clients have found that enabling an employee first to go to a neutral office with an assurance of confidentiality enables many people to feel comfortable enough to later come forward to

April 3, 2001

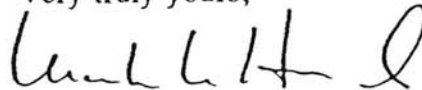
the compliance officer or other official company channels. In many other instances, the ombuds and the employee have found ways of reporting alleged violations while still preserving the confidentiality of the employee's identity. Because these offices attempt to preserve the confidentiality of their communications with reporting employees and are not official reporting channels for the organization (and thus do not "investigate" wrongdoing), they are able to reduce the fear of retribution while fostering reporting of wrongdoing. Indeed, the benefits of such a neutral office, whether called an ombuds office or by some other name, go to the very heart of creating a reporting system that allows wrongdoing to be reported without fear of retribution.

The Commission would provide strong support to organizations that want to comply with the Sentencing Guidelines if it were to identify in further commentary the essential characteristics of a program that presumptively would constitute a "reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution." Among these characteristics would be the creation of a neutral office within the organization, separate and distinct from the compliance or any formal function, that would encourage and facilitate employee reporting of concerns in the workplace, including violations of law. Such a neutral office must be designed and operated so that it is neutral, independent, and has the ability to assure employees or others within the organization that their communications with the office will remain confidential. Likewise, it would be important both for such an office to have direct access to senior management and compliance officers and for the office to be adequately funded in order to publicize its presence as an alternative channel of communication within the organization.

The initial Commentary in Section 3(k) helped create and standardize the role of organizational ethics officers in a wide variety of organizations. Now that their role is well established, I believe the Commission has the opportunity to address ways that organizations can break down the barriers to reporting. By distilling and articulating the essential characteristics of such a neutral office in a nonexclusive way, the Commission would both promote greater corporate and organizational responsibility for compliance with the law as well as help create more uniform standards.

Thank you for your consideration.

Very truly yours,



Charles L. Howard

CLH:ems

cc: Timothy B. McGrath, Staff Director

Paula J. Desio, Esq., Deputy General Counsel





**Shell Oil Company**  
Jerome Adams  
One Shell Plaza  
P. O. Box 2463  
Houston, TX 77252-2463  
Phone (713) 241-3678  
Fax (713) 241-0520

October 31, 2001

United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, DC 20002-8002  
Attn.: Public Affairs

Re: Improvements to Organizational Guidelines

Shell Oil Company's Ethics and Compliance Office understands that you are considering appointing an advisory committee to develop proposals on the federal sentencing organizational guidelines for your consideration. We recommend that you form such an advisory committee, which would include, among others, representatives from corporate ethics and compliance offices.

If an advisory committee is formed, then we would also recommend that you instruct the committee to use a rigorous process, such as an "after action review" to structure its work. As you probably know, the after action review process is used widely by the United States military and is gaining support among corporations. The after action review process can be summarized in six steps:

1. What was the original intent of the action being reviewed?
2. What exactly happened and why?
3. What have we learned?
4. What do we know now and what actions should we take? The actions would include short-term, mid-term and long-term actions.
5. Take actions identified in 4.
6. Tell others who need to know what was learned.

We think following such a process will allow for better focus for the advisory group and will result in improved guidelines for corporations to use when developing their compliance programs.

Shell would be willing to send a corporate representative to participate in this important work.

Best regards,

  
Jerome Adams  
Corporate Ethics and Compliance Officer



WHITTIER LAW SCHOOL

3333 Harbor Boulevard  
Costa Mesa, CA 92626-1501

Tel. 714.444.4141

November 1, 2001

Michael Courlander  
Public Affairs Officer  
United States Sentencing Commission  
One Columbus Circle, NE,  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

Dear Mr. Courlander,

I am writing in response to the Sentencing Commission's request for public comments on the advisability of forming an ad hoc advisory group concerning the organizational sentencing guidelines. I believe that such an advisory group could perform several valuable functions at this time and I am happy to support its formation.

The initial section of this letter details my thoughts on recent developments in the fields of organizational sentencing and law compliance that make this a particularly favorable time for the formation of the advisory group. This section reviews the changes in these fields which give rise to needs for studies by the advisory group. It also offers a few suggestions about the types of studies that the advisory group might wish to pursue. The last portion of this letter contains comments regarding the possible composition of the advisory group and the ways that its work might be structured.

### **Developments Supporting the Need for an Advisory Group**

#### Accumulated History of Sentencing Evaluations

The accumulated history of sentencing evaluations under the organizational guidelines to date makes possible several types of studies of organizational crime and sentencing. An initial round of studies might address the types of organizational offenses that are most frequently sentenced and the types of organizational defendants convicted of those crimes. A variety of further studies might examine the most commonly applied bases for sentencing enhancements and the grounds for criminal history adjustments. These studies might also explore cases where grounds for sentencing adjustments are asserted, but rejected by probation officers and sentencing courts to determine if these rejections seem sound and if the sentencing guidelines need



to provide more guidance in similar cases.

These types of studies will be valuable in that they will provide a picture of recent patterns in organizational convictions and sentencing that may not have been taken into account when the original organizational sentencing guidelines were issued. At the time the organizational sentencing guidelines were adopted, the Sentencing Commission had a very limited history of organizational prosecutions to look to for guidance as to the types of offenses and offender characteristics that would fall within the guidelines. The emergence of the guidelines has changed this, resulting in a much more substantial number of organizational prosecutions and sentences. This new body of experience deserves further analysis as a basis for informed debate about organizational crime and sentencing.

Evaluations of past sentencing may be capable of identifying patterns of misconduct in corporate offenses that have previously been overlooked. These studies may also identify features of past offenses that have been improperly emphasized in recommended corporate sentences or sentencing guidelines criteria that have been applied incorrectly or unevenly.

The results of these studies could be very valuable, not only to the Commission, but also to members of the business community and others who are interested in preventing organizational crimes. The Commission will be able to use these studies to determine how the present organizational guidelines are working, whether more or less attention is needed to the various sentencing criteria presently reflected in the guidelines, and whether new criteria should be addressed in the guidelines. Organizational managers who are concerned with efficiently and effectively applying resources to crime prevention will gain from a better understanding of the types of organizational offenses that are particularly prevalent and the features of those offenses that typically lead to particularly severe penalties. Scholars in business schools who are concerned with law compliance management techniques can use greater insights into present organizational crime patterns to offer better analyses of the sources of organizational offenses and the types of management measures that can prevent the same sources from resulting in further offenses. Legal academics can use the same studies to analyze and suggest improvements for standards encouraging corporations and other organizations to take preventive measures towards criminal misconduct.

#### Lessons from New Types of Sentences

Another type of valuable study that the advisory group might perform concerns the experience of sentencing courts in applying several of the innovative forms of organizational sentences that were authorized in the organizational guidelines. Organizational probation, in particular, is deserving of special attention in this regard in that it has been seen by several courts as a highly useful tool in ensuring that sources of misconduct are fully understood by offenders and that corresponding organizational changes are implemented and maintained.

For example, the corporate probation sentence imposed on the Consolidated Edison Company of New York (Con Edison) in 1995 following a serious environmental offense would be a valuable target for a detailed study. This sentence entailed the appointment of a probation monitor who was given extensive powers to oversee Con Edison's environmental law compliance practices during the company's three-year probation period. The monitor conducted a number of reviews of those practices, revealing and helping the company to reform a variety of compliance problems far removed from the asbestos handling and discharge reporting practices that were the source of its offense. For further information about the Con Edison probation sentence and its impact on the company, see Gruner, *How Compliance Programs Fail: Lessons from the Con Edison Probation Sentence*, in **Advanced Corporate Compliance Workshop Program Materials** 171 (PLI 2000).

Because they promise to be valuable tools for reforming convicted organizations that may otherwise tend to return to "business as usual" following offenses, organizational probation sentences like that in the Con Edison case may warrant greater attention by federal courts. The circumstances justifying the imposition of sentences like that imposed on Con Edison and the proper scope of probation monitoring and oversight under these sentences would be valuable topics for study by the advisory group.

#### Development of Increasingly Sophisticated Standards in Other Legal Areas

A further reason that studies of organizational sentencing standards by the advisory group are timely is that other governmental bodies have recently developed a series of sophisticated standards for evaluating compliance programs that may serve as valuable models for changes or extensions of the compliance program standards presently included in the organizational sentencing guidelines.

At least four independently developed sets of standards will provide guidance to the advisory group in this regard:

- 1) Tests for identifying responsible compliance programs in corporate prosecution guidelines developed by the Department of Justice, *see* U.S. Department of Justice, *Guidance on Prosecutions of Corporations* (June 16, 1999) (memorandum from Eric H. Holder, Jr., Deputy Attorney General, to Heads of Department Components and All United States Attorneys);
- 2) Standards for compliance programs in the health care industry developed by the Office of Inspector General, Department of Health and Human Services, Department of Health and Human Services, *see, e.g.*, 65 Fed. Reg. 14289 (March 16, 2000)(compliance program guidelines for nursing



facilities); 63 Fed. Reg. 45076 (August 24, 1998)(compliance program guidelines for clinical laboratories); 63 Fed. Reg. 8987 (February 23, 1998)(compliance program guidelines for hospitals).

- 3) Definitions of a "compliance management system" and an "environmental audit" articulated by the Environmental Protection Agency, *see* Environmental Protection Agency, Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention, 65 Fed. Reg. 19618-01 (April 11, 2000); and
- 4) Criteria for assessing an organization's good faith efforts to comply with equal opportunity laws as articulated in a series of recent federal court decisions dealing with sexual harassment liability, *see, e.g.,* Romano v. U-Haul International, 233 F.3d 655 (1st Cir. 2000); Passantino v. Johnson & Johnson, 212 F.3d 493 (9th Cir. 2000); Lowery v. Circuit City Stores, Inc., 206 F.3d 431 (4th Cir. 2000); Jaudon v. Elder Health, Inc., 2000 WL 1918691 (D. Maryland 2000).

Each of these standards addresses the features of effective organizational programs for monitoring, detecting, disclosing and preventing offenses or other misconduct. By carefully studying the strengths of these standards issued since the emergence of the organizational sentencing guidelines, the advisory committee can capitalize on the efforts and expertise of the originators of these various standards.

Based on studies of these other governmental standards, the advisory group may produce an enhanced set of guideline commentaries describing new standards for identifying an effective compliance program. These new commentaries may be improvements over the present standards in several respects.

First, by capturing more of the relevant features of compliance programs that distinguish effective programs from less successful ones, these improved standards may be more thorough in scaling the size of corporate penalties to the quality of law compliance efforts.

Second, by adding more detailed grounds for evaluating the quality of compliance programs, the new standards may produce more consistent evaluations of this quality by courts, probation officers, prosecutors, attorneys and corporate managers.

Finally, new standards modeled after these other governmental standards will help to ensure that compliance program evaluations under the guidelines are conducted consistently with evaluations of the same compliance programs under other governmental criteria.

## Successes Of Related Government Policies

In addition to the above standards for evaluating compliance programs, a number of other recently developed governmental standards and policies may provide useful guidance for the advisory group. In particular, the exceptionally important success of the corporate amnesty standards now observed by the Antitrust Division of the Department of Justice suggest possible two lines of study for the advisory group.

First, the success of these standards in generating revelations of corporate misconduct and making possible prosecutions of non-cooperating parties suggests that similar standards calling for the complete avoidance of penalties by certain self-reporting companies may be valuable additions to the organizational sentencing guidelines.

Second, the specific criteria used in the Antitrust Division's amnesty standards for identifying corporate self-reporting meriting amnesty may serve as a useful model for expanded standards in the organizational sentencing guidelines identifying post-offense self-reporting and cooperation that merits sentence reductions.

For a complete description of the Antitrust Division's amnesty program, profiles of the highly important corporate convictions it has generated, and some suggestions concerning how it may be used as a model for broader amnesty arrangements, see Gruner, *Avoiding Fines Through Offense Monitoring, Detection, and Disclosure: The Race for Amnesty*, in **Advanced Corporate Compliance Workshop Program Materials 77** (PLI 2001).

## Increased Sophistication in the Business Community Regarding Compliance Techniques

Increased understanding and sophistication among business executives about how to evaluate and operate compliance programs has created a wealth of expertise that can be tapped by the advisory group to produce new standards for evaluating effective compliance programs.

Spurred by the potential rewards for compliance programs articulated in the original organizational sentencing guidelines and other governmental standards, various businesses have given extensive attention to compliance programs in the last decade. Their expertise about both the strengths and weaknesses of various compliance program techniques and features have been shared at numerous business conferences and in numerous published articles. In addition, consultants assisting companies in establishing and maintaining effective compliance programs have developed additional insights into compliance program techniques. Finally, academics in both law and business schools have evaluated a variety of present compliance program techniques and needed changes.



The work of the advisory group can rely upon this significant body of new understanding regarding compliance programs that was not available to the Sentencing Commission when the original organizational sentencing guidelines were promulgated. Put simply, better, more complete guidelines, are possible because, with the benefit of experience, we know more about effective organizational management techniques to prevent and stop offenses. Expanded expertise in the business community and elsewhere about how to construct effective compliance programs and how to identify post-offense conduct meriting sentence reductions, This new expertise can be gathered by the advisory group and applied to the drafting of "second generation" compliance program standards that build on the standards that went before, but which also reflect today's state of the art knowledge about compliance techniques.

### **Composition and Work of the Advisory Group**

In the remainder of this memorandum, I would like to offer a few thoughts on the composition and work of the advisory group. In order to gather and apply the full range of new knowledge that exists about organizational law compliance and related sentencing issues, it would be desirable for the following constituencies to be represented among the members of the advisory group:

- 1) Agency Specialists: Federal agency officials (e.g., EPA or HHS officials) experienced in evaluating compliance programs in civil or criminal enforcement contexts;
- 2) Prosecutors of Organizational Defendants: Prosecutors having developed complex corporate or organizational cases;
- 3) Probation Officers With Organizational Experience: Probation officers who have experience with the special demands of evaluating organizational offenders for sentencing;
- 4) Corporate Compliance Managers: Compliance officers or other corporate managers who are experienced in establishing and maintaining law compliance programs;
- 5) Corporate In-House Counsel: In-house counsel who are experienced in evaluating corporate compliance practices under governing legal standards;
- 6) Corporate Defense Counsel: Corporate defense attorneys experienced in defending compliance efforts;
- 7) Legal Academics: Legal academics with expertise in organizational crime and compliance program standards;

- 8) Business School Academics: Business school analysts concerned with means for operating effective compliance programs; and
- 9) Specialized Consultants: Industry consultants specializing in evaluating and developing business methods for ensuring law compliance.


The work of the advisory group might best be conducted through a combination of public hearings and commissioned studies.

Testimony presented at public hearings could be a quick means to gather a wide range of information for consideration by the advisory group and the Commission itself. In addition, if captured in printed volumes similar to the symposium text on organizational sentencing issued by the Sentencing Commission in 1995, testimony about compliance program "best practices" and failure modes could serve as a valuable resource for the business community regardless of whether guideline changes later emerge from the Commission.

Commissioned studies of focused issues (such as a detailed study of possible patterns in the accumulated history of organizational sentencing by federal courts) might also provide important information for consideration by the advisory group and the Commission. These studies might be completed either within the government or by independent analysts such as law or business school faculty members. The expertise of the advisory group members regarding the nature of outstanding organizational sentencing issues and sources of related information will allow the group to effectively target and assign needed studies to ensure that critical pieces of the organizational sentencing picture are developed.

It has been my pleasure to offer these comments on the potential work and composition of an advisory group to study the organizational sentencing guidelines. If I can provide any further assistance, please do not hesitate to contact me by phone (714-444-4141 ex. 228) or email (rgruner@law.whittier.edu).

Sincerely,

  
Richard Gruner  
Professor of Law



# Alliance for Health Care Integrity

A Health Care Industry Initiative to  
Integrate Compliance, Ethics, and Corporate Responsibility

November 1, 2001

U.S. Sentencing Commission  
One Columbus Circle, NE, Suite 2-500, South Lobby  
Washington DC 20002-8002  
ATTN: Public Affairs

SUBJECT: Federal Register Notice 9/19/01: BAC2210-40/2211-01

We're delighted that the Sentencing Commission is taking this 10<sup>th</sup> anniversary of the publication of the *Guidelines Manual* to address their impact on industry and consider possible improvements to them. As we suggested in our February 21, 2001 letter to the Sentencing Commission (please see enclosed letter), although their impact has been significant, there is still room to improve them—and enhance their impact—by broadening compliance-based systems to include integrity-driven ones.

It seems us that the ad hoc advisory group alluded to in the notice is the perfect vehicle to open a dialogue on these important issues. We would recommend the following organizational guidelines for this group:

- *Scope.* The advisory group should be charged with addressing industry-wide issues, such as the efficiency and effectiveness of existing compliance-based and/or ethics-based systems in preventing violations of statute and regulation; best practices in organizing, implementing, and evaluating such systems within individual corporations and across the industry; background and training of staff; and policies related to investigation and enforcement of legal *and* ethical violations.
- *Duration.* Because the scope of work for the advisory group is large (and will undoubtedly meet with some resistance and ownership struggles), the duration should be proportionate to the challenges it will face. We recommend at least one year though two or three years would probably be more realistic. Full meetings should occur quarterly with committee meetings and conference calls once or twice a quarter. Furthermore, the expectations of the Sentencing Commission for the advisory group, as well as the deadline for it to complete its work, should be clear from the start, perhaps negotiated by a steering committee comprised of Sentencing Commission staff and initial advisory group appointees.
- *Focus:* The focus of the ad hoc advisory group should be the consideration of strategies to enhance the efficiency and effectiveness of the current, largely compliance-based organizational guidelines.

#### Board of Directors (to date)

Mark Aulisio, PhD  
*Center for Biomedical Ethics*  
*Case Western Reserve University*

Louis Feuerstein  
*Ernst & Young LLP*

Andy Thurman, JD  
*West Penn Allegheny Health System*

Patricia Werhane, PhD  
*The Darden School of Business*  
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*Midwest Bioethics Center*

Tim C. Mazur, MBA  
*Ethical Advisory Services*

Brian Schrag, PhD  
*Association for Practical*  
*and Professional Ethics*

Paul Schyve, MD  
*Joint Commission on*  
*Accreditation of Healthcare Organizations*

David C. Smith, PhD  
*Council for Ethics in Economics*

Matthew Wynia, MD, MPH  
*Institute for Ethics*  
*American Medical Association*

*Affiliations listed for identification purposes*

#### Executive Director

Robert Olson, PhD, MPH

- *Membership:* The membership of the ad hoc advisory group should include, we believe, the following stakeholders:
- Industry representatives (a good mix of corporate officers [CEOs, ethics officers, compliance officers], management and supervisors, and line staff)
  - Scholars (not only in general and industry-specific business/organizational compliance and ethics but also in organizational/management theory and behavioral research)
  - Experts in compliance and business ethics, both general and industry-specific, particularly in strategies for integrating and institutionalizing related programs, as well as in development of standards and metrics for evaluating their impact.
  - Representative from governmental and quasi-governmental bodies (Offices of Inspector General and Department of Justice, as well as particular departments, commissions, or boards charged with developing and/or enforcing regulations, such as HHS, FTC, SEC, FASB, and so on)
  - Other groups as appropriate, such as professional and trade associations, consumer groups, and so on.

Because the Alliance for Health Care Integrity is dedicated to integrating compliance, ethics, and corporate responsibility (please see the enclosed prospectus), we would welcome an opportunity to participate on the ad hoc advisory group. While our mission is industry-specific, we believe the principles that drive our enterprise and the broad-based network that we have assembled are industry-wide in their application.

We wish you all the best in this bold initiative. If you would like to contact us, please call me at (714) 307-6400.

Sincerely,



Robert Olson, PhD, MPH  
Executive Director



# Alliance for Health Care Integrity

A Health Care Industry Initiative (HCII)  
on Organizational Ethics and Business Integrity

February 21, 2001

## Board of Directors (to date)

Mark Aulisio, PhD  
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## Staff

Robert Olson, PhD, MPH  
Executive Director

Judge Diana E. Murphy, Chair  
United States Sentencing Commission  
One Columbus Circle, NE  
Washington, DC 20002-8002

Dear Commissioner Murphy,

On this 10<sup>th</sup> anniversary of the publication of the *Guidelines Manual*, we'd like to congratulate you for the impact they have had, in particular, on the health care industry.

More than any other public or private initiative, the Guidelines have motivated stakeholders in the health care industry to take seriously the importance of compliance with federal statutes and regulations, especially those related to the prevention of fraud, waste, and abuse. In particular, the seven steps outlined in Chapter Eight to meet due diligence requirements have resulted in the creation of compliance programs—and related trade and professional associations, as well as a burgeoning consultancy sector—in the majority of health care organizations.

Yet it has been difficult to document the success of these compliance programs—even those meeting all the steps required for due diligence—in preventing fraud, waste, and abuse in the industry. The Big 5 professional services firms and regulatory agencies that have studied compliance programs have learned that very few health care organizations (HCOs) attempt to measure whether their compliance programs really reduce fraud, waste, and abuse. As one recent report stated: "Is compliance having an effect impact on organizations? The answer is: It's too early to tell."<sup>1</sup> According to scholarly research, however, it's not too early to tell if the health care industry is like other industries in the corporate world: compliance programs, costly both to oversee and to implement, have little or no measurable impact in preventing fraud, waste, and abuse.

Indeed, according to scholarly research, only compliance programs that have been integrated into integrity-based programs begin to show demonstrably positive results. The classic

<sup>1</sup> Deloitte&Touche, "Compliance Hard to Measure—Study, *Modern Healthcare* December 18, 2000.

theoretical work in this area was done by Lynn Paine at Harvard Business School. In her contrast of compliance-based and integrity-based programs, she concludes that integrity-based programs—that is, programs focused on organizational ethics—in corporations will succeed, while compliance-based programs, because of their narrow focus and emphasis on external standards, will contribute little to preventing violations of federal and state regulations, as well as the public good (and may, in fact, be counter-productive).<sup>2</sup>

Recent research, based on Paine's theoretical frame, has provided empirical support to her conclusions. For example, Treviño et al conclude that a "values-based cultural approach to ethics/compliance management works best."<sup>3</sup> That is, their data indicates that compliance programs situated in the broader context of organizational integrity are significantly more effective than either stand-alone compliance programs or ethics programs. Our own market research confirms this conclusion: many of the compliance officers we spoke to, as well as staff in regulatory agencies, indicated that compliance simply does not go far enough. They asserted that, in the end, it is the *ethos* of the organization—the way it does business—that determines whether compliance initiatives are effective or not.

It turns out, then, that both compliance and integrity are necessary, *as long as* the focus of compliance-based programs is set within the broader, more systemic and long-term perspective of an integrity-based program. Integrity-based programs that emphasize organizational ethics and business integrity leverage the impact of compliance-based programs, resulting in significant reductions in fraud, waste, and abuse. Therefore, it is the shared values and purpose of the organization—the organization's ethic—that drive compliance.<sup>4</sup>

Our organization, an alliance of major stakeholders in the health care industry, drawing upon both the Defense Industry Initiative and public health models, with a vision of "responsible self-regulation," urges you to consider revising the influential guidelines you published ten years ago in light of the research related to compliance-based and integrity-based programs. In particular, we urge you to:

- Require that compliance be a component of a broader, integrity-based ethics program that emphasizes organizational ethics and business integrity.
- Require that the ethics officers in such programs have at least three university-level, full-term courses in ethics.
- Require that employee training uses whole system change technologies, involving cross-level and cross-function grouping of all employees, including executive management and board members.

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<sup>2</sup> Lynn Sharp Paine, "Managing for Organizational Integrity," *Harvard Business Review* (March-April 1994) 106-117.

<sup>3</sup> Linda Klebe Treviño, Gary Weaver, David Gibson, Barbara Ley Toffler, "Managing Ethics and Legal Compliance: What Works and What Hurts," *California Management Review* 41:2 (Winter 1999) 149.

<sup>4</sup> As Porras and Collins point out in *Built to Last* (New York: HarperBusiness, 1994), they also drive the profitability and sustainability of the organization—good reason enough to pay attention to organizational ethics.



- Require that the standards for organizational ethics and business integrity have an industry-wide basis.
- Require that corporations evaluate both the impact (changes in knowledge, attitude/values, and behavior) and outcomes (reduction of fraud, waste, and abuse) of their integrated compliance-ethics programs annually—and compare their results to industry-specific benchmarks.
- Require that violations of ethical standards carry penalties similar to the violation of regulatory standards.

We applaud the guidelines the Commission developed ten years ago. They have revolutionized the corporate world. Now we ask the Commission to take the next step: move this world from “obeying the law because I have to” to “doing what is right because I want to.” It’s the difference—a profound one—between compliance and integrity.

If you should decide to enhance the 1991 guidelines, and there is anything we can do to assist you in this undertaking, please contact me at (714) 307-6400.

Sincerely,

A handwritten signature in black ink that reads "Robert Olson". The signature is written in a cursive, flowing style.

Robert Olson, PhD, MPH  
Executive Director

# Alliance for Health Care Integrity

A Health Care Industry Initiative to  
Integrate Compliance, Ethics, and Corporate Responsibility

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American Medical Association

*Affiliations listed for identification purposes*

## Executive Director

Robert Olson, PhD, MPH

## Mission

To assure the health care industry's commitment to integrity through an alliance of all major stakeholders that *designs, delivers, verifies, and certifies* its own model standards and metrics for compliance, ethics, and corporate responsibility.

## Goals

- To prevent fraud and abuse by managing their root causes
- To reduce regulatory pressure by a demonstrated commitment to core values *and* by the targeting of inspection and enforcement activities
- To decrease business costs by integrating—and leveraging—compliance, ethics, and corporate responsibility initiatives into a unified program that is both more effective and more efficient
- To enhance business performance by building trust and reciprocity between the industry and its stakeholders through redesigning the process of *responsible self-assessment and regulation*.

## Plan of Action

- Convene a summit of *independent, nonpartisan, and impartial alliance* of public and private stakeholders—professional, trade, consumer, regulatory, advocacy, payer, employer, accrediting, provider, union, shareholder, governmental, employer, academic, and ethics organizations—from across the industry.
- Develop model
  - √ *standards for integrity and ethical principles* that integrate compliance, ethics (research, clinical, and organizational), and corporate responsibility by aligning the core values that drive best-of-class integrity programs
  - √ *performance metrics by industry sector and function* that translate standards into specific and measurable process, impact and outcome objectives
  - √ *institutionalization strategies* that employ breakthrough, whole system change technologies to promote consensus and ownership of standards
  - √ *audit and assurance tools* that measure the breadth and depth of organizational commitment to standards through surveys, interviews, focus groups, document review, and observational techniques.
  - √ *certification program* for the health care industry
- Enroll signatories
- Retain an independent auditing firm to verify commitment to standards on an annual basis.



***Potential Benefits of Participation***

- ❑ Reduced legal *and* ethical exposure
- ❑ Demonstrated “good faith” commitment to compliance *and* ethics
- ❑ Increased morale and sharpened performance
- ❑ Strengthened assurance of a level playing field with competitors
- ❑ Enhanced commitment and ownership that results from *self-assessment and self-regulation*
- ❑ *Increased effectiveness and efficiency of compliance programs* achieved by integrating seamlessly with ethics program
- ❑ Technical assistance from *experts in health care and business ethics*
- ❑ Improved *competitive advantage*
- ❑ More *rigorous tools for evaluating program impact and outcome*
- ❑ Greater *patient trust* and heightened *public reputation*
- ❑ Lowered transaction costs
- ❑ Leveraged *bargaining power* of industry-wide group with multi-stakeholder support
- ❑ Bolstered evidence of attempt to meet *JCAHO standards on organizational ethics*
- ❑ *Decreased federal and state regulatory pressure.*

***For More Information***

***To Be Listed as a Supporter***

***To Become a Member***

***To Provide Corporate Sponsorship***

***For this Ground-Breaking Alliance***

**Contact Bob Olson at (714) 307-6400**

November 1, 2001

United States Sentencing Commission  
Attention: Public Affairs  
One Columbus Circle, NE  
Suite 2-500, South Lobby  
Washington, D.C. 2002-8002

Commissioners of the United States Sentencing Commission:

Since the Organizational Sentencing Guidelines were promulgated in 1991, they have had an immense cross-industry impact on corporations. The organizational guidelines have refocused corporate management and Boards on the obligation to prevent violations, while concurrently implementing meaningful incentives and defining actions that corporations should take in managing compliance. The organizational guidelines and decisions such as the *Caremark* case have helped corporate America converge on a commonly understood and accepted standard for compliance management. As a result, many corporations have established high-level compliance and ethics programs to prevent violations and have voluntarily come together in organizations such as the Ethics Officer Association to facilitate the exchange of ideas and information.

Although the organizational guidelines have achieved a great deal in promoting effective compliance management in corporations, I strongly support the proposal that the Commission has put forth to establish an ad hoc advisory group to consider viable methods to improve the operation of the organizational guidelines. If such an advisory group is established, the scope of issues addressed should extend beyond the sentencing of organizations to include discussion on the operation and impact of the Guidelines in the corporate environment. Issues identified by corporate ethics officers could provide insight on how the Commission could move to enhance the effectiveness of the organizational guidelines 1) to promote a more consistent approach to compliance and ethics management between and across industries, and 2) to improve compliance and ethics management in corporations that have established programs.



Commissioners of the United States Sentencing Commission  
Page 2  
November 1, 2001



If an ad hoc advisory group is established and the scope of work for that group includes the operation and impact of the organizational guidelines in the corporate environment, I recommend that membership of the advisory group include ethics officers and a representative from the Ethics Officer Association or the Coalition for Ethics and Compliance Initiatives. Membership should not be exclusively a legal constituency. Ethics officers have first hand experience in applying the organizational guidelines, especially in terms of criminal conduct, which is the primary aspect of the Commission's emphasis on deterrence in Chapter Eight.

If the Commission decides to form an ad hoc advisory group that includes ethics officers, I would be honored to serve as a member of that advisory group. Attached is information on my qualifications to serve in this capacity.

Thank you for the opportunity to comment on the establishment of an ad hoc advisory group on the Organization Sentencing Guidelines.

Sincerely,

A handwritten signature in black ink, appearing to read 'Eric Pressler', written in a cursive style.

Eric Pressler  
Director, Legal Compliance and Business Ethics  
PG&E Corporation  
Phone: (415) 973-6607  
eric.pressler@pge-corp.com

EP:mb

Enclosure

## **Eric Pressler - Qualifications for USSC Advisory Group**

**Ethics Officer Experience:** I have served as the Director of Legal Compliance and Business Ethics at PG&E Corporation for more than 5 years. PG&E Corporation is one of the largest utility and energy services companies in the United States, with over 23,000 employees and over \$20 Billion in annual revenues. The PG&E Corporation compliance and ethics program was designed in accordance with the requirements of the Organizational Sentencing Guidelines. I have worked for the Corporation for 22 years.

**Ethics Officer Association (EOA):** I have been the EOA Sponsoring Partner Representative for PG&E Corporation since 1996. In 2000, I was elected to serve a three-year term as a member of the EOA Board of Directors. I have made numerous presentations at EOA conferences on compliance and ethics topics and will be teaching the session on compliance risk assessment in the EOA course, Managing Ethics in Organizations.

**Bay Area Compliance Association (BACA):** BACA is a regional organization in the San Francisco Bay Area focused on enhancing compliance management activities for BACA member companies. BACA currently has 20 corporate members and meets bi-monthly. I co-founded this organization in May 2000 with another local EOA member and was elected by the BACA membership as the BACA Chairperson for 2000 and 2001.

**USSC Regional Forum:** PG&E Corporation co-sponsored and helped organize the USSC Regional Forum in San Francisco in September 1999.

**Education:** I hold a B.S. in Business and a MBA in Management from the University of California, Berkeley.



Winthrop M. Swenson  
Partner,  
Compliance Systems Legal Group

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Chair Diana E. Murphy and  
Members of The United States Sentencing Commission  
Thurgood Marshall Judiciary Building  
1 Columbus Circle NE  
Washington DC 20002

November 2, 2001

Dear Chair Murphy and Commissioners:

I am writing in response to the September 19, 2001 Federal Register request for comment ("RFC") on the appointment of an organizational guidelines advisory group. The RFC states that comment is welcomed in three areas: 1) the scope, duration and composition of the group; 2) the merit of suggestions in letters submitted to date; and 3) any other issues related to the improvement of Chapter Eight. I will address my comments to these three areas.

*1) The Scope, Duration and Composition of the Advisory Group*

Chapter Eight contains much important detail, but I believe the portions of Chapter Eight that have had the greatest impact, generate the most public concern and therefore should be the advisory group's primary focus – at least initially – are the portions relating to the credit for corporate compliance programs. This includes the definition of "an effective program to prevent and detect violations of law" found at USSG §8A1.2, comment. (n.3(k)).

The implications of the guidelines' credit for compliance programs is difficult to overstate. Most major corporations operating in the U.S. today have been spurred by the guidelines' credit for compliance programs into establishing such programs, and virtually all of these companies have been guided by the guidelines' definition of "an effective program" in designing their programs. In addition, major cases and enforcement policies that have an impact on corporate behavior have drawn heavily on the guidelines' approach. Finally, newly proposed ISO standards for compliance programs that are working their way through the international approval process are based on the guidelines' definition of an effective program.

I therefore believe it is important that the Commission recognize, in weighing the scope of an advisory group (as well as the group's duration and purpose), that while the number of "cases" applying Chapter Eight or its credit for compliance programs is relatively low, the impact of the guidelines' pro-compliance policy – especially on our business organizations and, as a result, on the everyday lives of literally millions of employees – is extensive. I have worked with scores of companies over the last five years and have seen this impact first-hand. I would add finally, that the cost of failing to meet the guidelines' compliance standards is also very significant, with criminal fines now reaching into the hundreds of millions of dollars. In short, the guidelines' compliance standards and credit are exceedingly important and should therefore be, in my view, the starting point for the advisory group's work.

With respect to the question of what issues the advisory group should focus on, I would respectfully urge that the group address issues that go beyond potential amendments to the definition of an effective program. As partially summarized in the attached article, J. Murphy & W. Swenson, *A Call to Action – Creating a Voice (and Ears) for the Compliance and Ethics Field*, Prevention of Corporate Liability (July 2001) (see "The Need" section beginning on the first page of the article), the current legal and enforcement environment in which the guidelines must operate is, in many ways, inimical to the goals of Chapter Eight's policy of promoting effective compliance programs.

In other words, aspects of the legal and enforcement environment make it much more difficult for organizations to operate the kind of compliance programs the guidelines intend to encourage. As the article discusses, issues have arisen as a consequence of decisions by the National Relations Board, the Federal Trade Commission and certain court decisions. In addition, existing penalty schemes such as the treble damage provisions of the False Claims Act can be – and I believe are – applied in ways that undercut the guidelines' credit for compliance programs.

Accordingly, I would urge that the advisory group inventory these issues and present proposals to the Commission on how these issues might be addressed – either through 1) dialogue with other agencies or 2) legislation, aimed at coordinating and bringing greater rationality to the current inconsistencies. In my view, and I believe the view of most experts in the field, this is where the larger, more significant issues reside – not so much, in other words, in the guidelines themselves.

The suggestion that the advisory group examine the broader legal and enforcement environment in which the guidelines' compliance provisions operate is directly supported by the Commission's enabling statute. As the Commission recognizes, its enabling statute contemplates that the Commission will evaluate the effectiveness of sentencing policies on an ongoing basis and improve them where possible. See, e.g., 28 U.S.C. §§991(b)(1)(A) and (C), (b)(2), 994(o).

However, the Commission's authority goes beyond merely amending the guidelines themselves to improve their effectiveness. Congress was aware that the guidelines would not be able to function in a policy "stovepipe" – it knew that other agencies and laws



could affect the guidelines' effectiveness. Not wishing the Commission to ignore such effects, Congress empowered the Commission to:

- “[A]ssist and serv[e] in a consulting capacity to Federal courts, departments, and agencies in the development, maintenance and coordination of sound sentencing practices;” and
- “[M]ake recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal and correctional matters that the Commission finds necessary and advisable to carry out an effective ... and rational sentencing policy.”

28 U.S.C. §995(12)(B) and (20), respectively. These powers precisely coincide with the twin needs in this area – to advise and consult with other agencies and to weigh possible statutory changes as a way of strengthening the Chapter Eight’s core policies.

The need for the Commission to use its §995(12)(B) and (20) powers for the purposes described was forcefully recommended six years ago at the Commission’s 1995 symposium, “Corporate Crime in America – Strengthening the ‘Good Citizen’ Corporation”. There, Senator Edward M. Kennedy, an original sponsor of the Sentencing Reform Act of 1984, stated:

Government officials also have a duty to reduce red tape and coordinate multiple overlapping enforcement tools .... While the notion of coordinating these sanctions is not new, the guidelines make coordination all the more imperative. In effect, the guidelines make a basic promise to companies: “Act as good citizens and your penalty exposure will be reduced.” But the promise is false if companies face non-guideline penalties that take no account of these “good citizenship” efforts. I am pleased that tomorrow’s proceedings will consider these important coordination issues.

Symposium Proceedings at 120.

As Senator Kennedy noted, a panel the next day did discuss coordination issues at length. See *Carrots and Sticks Amid Overlapping Enforcement Schemes and Policies: Finding Government’s Message*, Symposium Proceedings at 265. A principal presenter on this panel was William B. Lytton (*The Case for Greater Governmental Coordination: Civil Sanctions and Third Party Actions, Symposium Proceedings*), who was recently elected Chair of the American Corporate Counsel Association.

An entirely separate second panel dealt with another critically important coordination issue – the fact that compliance activities can be used against an organization in non-sentencing contexts. See *Privilege Update: When Should Compliance Practices be Protected from Disclosure?*, Symposium Proceedings at 349.

Although 1) Congress has specifically empowered the Commission to discuss coordination issues with other agencies and identify areas where statutory changes could be constructive, and 2) important voices have for some time urged the Commission to use these powers, I certainly think expectations for the Commission's role in this area must be tempered and realistic. In my view, it is not the Commission's responsibility to actually effect any needed changes in the broader legal and enforcement environment. Rather, I believe the Commission's §995(12)(B) and (20) authorities imply a responsibility to see that relevant issues are identified and, to the extent possible, fairly considered by other policymakers.

With respect to the advisory group's membership, I think that it is essential that the group consist of a broadly representative cross-section of recognized experts in the field. This is not an area where academic study is particularly called for. There is a substantial reservoir of practical experience to draw from and there are known experts who have had a prominent role in representing the compliance/ethics field and can tap into this experience.

If the advisory group is comprised of recognized experts in the ethics/compliance field, the advisory group will be able to assist the Commission on both the "issue identification" and "dialogue with other agencies/Congress" fronts. Experts who are recognized in, and connected to, the ethics/compliance field will be able to identify true needs by "vetting" issues within the broad spectrum of compliance/ethics practitioners. In my view, this vetting process is critically important, as discussed in the next section of this letter, if the Commission's examination of Chapter Eight is to prove successful.

With respect to promoting a dialogue with other interested policymakers, the advisory group can again be helpful if it has the necessary experiential stature. Many prominent organizations have mature compliance/ethics programs. Those who have substantial experience either working with these companies in an advisory capacity or running such programs directly can cogently inform discussions with policymakers in forums that the Commission could facilitate or create. This would allow a full consideration of relevant issues by policymakers but not, as would be appropriate, a guarantee of any particular results.

One particular way to ensure that the advisory group has a substantial linkage to the compliance/ethics field would be to select one or members from those affiliated with the newly formed Coalition for Ethics and Compliance Initiatives (CECI). I played an early role in helping this group become organized (a role that has now ended in a formal sense) and I understand that Jay Cohen, the current Chair of the CECI Oversight Committee is submitting comment directly on CECI's behalf.

With respect to the advisory group's duration, I would recommend a timeframe of not less than two years. The issues are complex, the issues need to be vetted among practitioners who are busy professionals, and the Commission has many other important matters on its agenda that, presumably, would limit the time it could devote to the advisory groups' activities.



## *2) The Merit of Suggestions in Letters Submitted to Date*

With one exception, I do not have comments on any of the proposals made to date. Indeed, consistent with the view that proposals such as the ones already submitted need to be fully vetted, I think it is premature to comment on them. At the Ethics Officer Association meeting in Nashville last month, I led a session in which I asked attendees to react to the proposals submitted so far. The attendees' response illustrates my concern over the need for vetting. Almost all the suggestions were viewed as well meaning, but several were viewed as ill-informed.

The one suggestion that I think data and experience do generally support at this point is the need to heighten the importance of auditing and other evaluative techniques in the definition of "an effective" compliance program. The Commission's policy interests here are, in my view, to ensure that only "real" and "effective" programs are credited under USSG §8C2.5(f). Organizations that fail to evaluate the effectiveness of their programs may not have effective programs – providing that only companies that do evaluate their programs can receive culpability score credit helps ensure that credit will only be given where it is due.

Having said this, however, this point immediately raises the coordination issues discussed above. In today's litigation and enforcement environment, information gathered to assess and strengthen a compliance program can be used against a company in non-sentencing contexts. The Commission's possible policy interest here, in other words, conflicts with other laws and practices.

## *3) Other Issues*

The only additional issue I feel compelled to raise relates to the need for the advisory group to be what might be called "technically grounded" in the Commission's practices and statutory framework. It seems to me that the Commission has had varying success with advisory groups and one of the groups that was the least successful was a group convened to help the Commission further consider environmental guidelines for organizational offenses in the early 1990s. This group's members were able and expert, but because they lacked an understanding of the guidelines' structure, the guidelines' amendment process and the parameters of the Commission's enabling statute, I believe their expectations for what the Commission could consider doing were unrealistic. As a consequence, their recommendations were not nearly as useful as they might otherwise have been.

This kind of issue does not arise with the Practitioners Advisory Group because its members are accustomed to the guideline amendment process and used to working with the guidelines themselves. This will not be the case for most experts on compliance/ethics – the kinds of people who, in my view, should comprise the advisory group.

There appear to be two options for dealing with this issue – either having a dedicated staff member assigned to the group, which raises resource questions, or appointing a chief technical advisor among the group’s members. I think a staff and/or Commissioner liaison to the advisory group is a good idea in any case, but to ensure that the technical perspective is seen by the group as part of its own process and not an outside perspective, I favor the latter approach.

Let me conclude by saying that I would be pleased to serve in such a capacity drawing on my six years with the Commission, which included both legislative and organizational guidelines responsibilities, or in any other capacity the Commission would find helpful.

I strongly commend the Commission for undertaking the important inquiry raised by the RFC, am grateful for the opportunity to share these views and stand ready to assist however I can.

Sincerely,

A handwritten signature in black ink, appearing to read 'Win Swenson', with a long horizontal flourish extending to the right.

Win Swenson





**BNA, INC.**

# Prevention of Corporate Liability

## A Call to Action: Creating a Voice (And Ears) for the Compliance and Ethics Field

BY JOE MURPHY AND WIN SWENSON

Ten years ago, the Federal Sentencing Guidelines for Organizational Defendants became law, setting off a chain reaction that has helped make compliance and ethics programs a fixture on the American business landscape. The Guidelines created incentives for companies to establish such programs as a way of avoiding harsh penalties in the event of a criminal conviction for employee misconduct.

But they did much more than this—they catalyzed a transformation in the way that government and courts look at corporate responsibility for employee misdeeds. Under a range of pronouncements—from the Department of Justice's policy for charging corporations, to agency guidance and case law sorting out liability in the area of equal employment opportunity, to the standards of director and officer liability implied by the *Caremark* decision—a consensus has formed: The existence and strength of a company's compliance or ethics program should count when a company's responsibility for employee misconduct is being assessed.

This new perspective is welcome. It puts greater control of a company's potential liability in its own hands. And companies have responded. Today, more companies than ever have meaningful compliance/ethics programs. The Ethics Officer Association (EOA)—which did not even exist in 1991 when the Guidelines were promulgated—now has over 700 energetic members who regularly

gather to share and advance best practices.

But as the Guidelines' tenth anniversary nears, the compliance/ethics world is far from idyllic. The fact is, companies today must operate their compliance/ethics programs in a legal environment that is often hostile to the very practices that make these programs work best. Compounding the problem, policymakers regularly weigh proposals that can unnecessarily undermine the jobs of compliance and ethics officers—not because policymakers want to make these professionals' jobs harder, but because they often have little idea what compliance and ethics officers do.

And no wonder. While most professional groups have an association that can speak to a broad range of policymakers (legislatures, cross-industry regulatory groups, even courts) on their behalf, compliance/ethics officers have no such organizational voice. Perversely, as the government's policies have increasingly emphasized the need for corporate compliance and ethics, compliance and ethics officers have often had to swim hard against a legal current that is indifferent or even hostile to these same policies.

Organizations such as EOA and the industry-specific Health Care Compliance Association perform immensely valuable functions. But their missions do not include a mandate to systematically interact with the full range of policymakers to resolve issues on behalf of the compliance/ethics profession—let alone across industries. Up to now, no one has been

doing this for the ethics/compliance field.

Now, however, with seed money from leading compliance-oriented companies and not-for-profits (such as EOA, the Ethics Resource Center, the Center for Business Ethics, and the Ethics Resource Center's Fellows Program), an effort is underway to explore how and whether a permanent organization along these lines might be built—to be a voice (and ears) for compliance and ethics professionals, to help ensure that the legal environment supports effective programs.

This unprecedented new effort is flying under the banner of the "Coalition for Ethics and Compliance Initiatives" (CECI).

### CECI's Mission

The mission of CECI is straightforward—to foster the implementation of more effective ethics and compliance programs by:

- educating and communicating with policymakers, legislators, government agencies, and others who influence public policy,
- providing timely information and analysis to ethics and compliance practitioners and their organizations,
- serving as a voice and resource to ensure that the ethics and compliance communities are heard in the formulation of public policy, and
- identifying and advocating for relevant public and organizational policy issues of interest to CECI's members.

### The Need

The need for CECI is powerfully illustrated by examples depicting the troublingly uncertain legal environment in which compliance and ethics programs must operate.

(continued on page 78)

Joe Murphy ([jemurphy@cslg.com](mailto:jemurphy@cslg.com)) and Win Swenson ([wswenson@cslg.com](mailto:wswenson@cslg.com)) are Transition Coordinators for the Coalition for Ethics and Compliance Initiatives. Murphy is executive vice president of Compliance Systems Legal Group and Swenson is a partner with the firm.



(continued from page 80)

1. *The case of the unlucky stores:* A retail chain, concerned about preventing discrimination, hires an expert to conduct employee training sessions. To make sure employees truly understand the kind of conduct the training seeks to prevent, the instructor has employees describe biased comments they have heard in the stores. In a later discrimination lawsuit brought by employees, a federal judge provides the plaintiffs' lawyers with all the notes of the training course, whereupon the lawyers announce they have found "the smoking gun." In her opinion, the judge cites these very notes as a basis for allowing punitive damages claims. Shortly thereafter, the company settles the case for \$100 million—and the company's lawyers shut down the training.

*Message:* Addressing a compliance problem by openly recognizing that problem is legally risky.

2. *The case of the unfair labor practice:* A utility company wants its compliance and ethics message to reach all employees. Its program will not be just a paper program with unread materials locked away in a dusty storage room. The company will have every employee, even those doing the most mundane tasks, receive its new code of conduct. An act of a good corporate citizenship? No, an illegal unfair labor practice, according to the National Labor Relations Board. In the Board's view, law abidance and morality were not essential parts of the job at this company; the company had a duty to negotiate the "imposition" of the code with the employees' union.

*Message:* Think twice about including nonexempt employees in your ethics program.

3. *The case of the self-reporting polluter:* Government environmental agencies told brewers not to worry—their brewing processes did not release harmful pollutants. One brewery, acting as a good corporate citizen, conducted its own tests, however, and determined that pollutants, in fact, were being produced. It reported its findings to state environmental enforcement authorities. The result? State authorities announced they had caught this wrongdoing company and were imposing a \$1 million punitive fine.

*Message:* Think twice about initiating a proactive compliance review and disclosing issues; your acts of

good corporate citizenship could cost you dearly.

4. *The case of the wronged harasser:* A company receives a confidential hotline call reporting that a manager is flagrantly harassing female employees; the caller is one of these employees and fears for her well-being if her boss finds out. To ensure a full and independent investigation, the company hires an outside law firm to look into the matter. The firm's report, relying in part on confidential information from victims, demonstrates that the manager engaged in harassment and intimidation. The company terminates the manager but the manager sues, successfully recovering lost pay and damages because the company failed to follow the Fair Credit Reporting Act: It did not ask his permission to retain the outside law firm, and it did not disclose to him the report's full content, including the identity of every employee who complained about him.

*Message:* Diligent investigations, aimed at protecting victims, can come with a price.

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**Every day compliance and ethics practitioners confront impossible choices. Practices that may promote effective compliance and ethics are simultaneously discouraged by the law.**

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What makes these stories troubling is that they are not make-believe. The first is the *Lucky Stores* case from a federal district court in California. The second is the *AEP* case, a decision by the NLRB that was affirmed on appeal. The third story is what happened to Coors brewery in Colorado. The fourth case is based on a legal interpretation of the Fair Credit Reporting Act by the Federal Trade Commission.

### Chilling Effective Practices

The crux of the problem goes beyond clearly unfair but sporadic cases, however. Every day compliance and ethics practitioners confront impossible choices. Practices that may promote effective compli-

ance and ethics are simultaneously discouraged by the law. Two examples, among many, illustrate:

■ Studies regularly show that some employees in virtually all organizations are unwilling to report sensitive compliance or ethics issues out of fear—fear that coworkers may disapprove, that a manager may try to retaliate, and so on. Companies can reduce fear by instituting nonretaliation policies, but in the end a promise of confidentiality to reporting employees may be required to get some to overcome their fears and actually report an issue. The problem is, companies that make a promise of confidentiality may be forced to break that promise if litigation arises and third-party discovery is allowed. There is no clearly established legal doctrine that protects against disclosure of an internal whistleblower's identity—no matter how important confidentiality may be to the whistleblower's decision to report—if a private litigant or the government seeks the material in discovery.

■ Practitioners have developed excellent ways to evaluate the effectiveness of compliance and ethics programs, and using these techniques is an important step in developing the best programs. But when companies diligently seek to identify program weaknesses in order to correct them, they create information that a third party may use against them. The *Lucky Stores* case shows only too well that focusing on faults with the goal of self-improvement is risky. It may be possible to protect this type of information under privilege by running it through counsel, but betting on the attorney-client privilege is a risky business. Moreover, keeping a close hold on self-evaluative information, which reliance on the attorney-client privilege requires, diminishes its usefulness. To promote program effectiveness, distribution of this kind of information should be as wide and open as possible, and certainly should go beyond the lawyers.

### Positive Impact

It would be wrong, however, to suggest that legal and regulatory decisions always undercut effective compliance and ethics. The truth is, some excellent governmental initiatives have promoted voluntary compliance and ethics initiatives in the United States and even around the world.



The development of the Organizational Sentencing Guidelines took a positive, pro-compliance turn (away from an initial, exclusively punitive focus) when practitioners talked with the U.S. Sentencing Commission about the value of effective programs. Had companies familiar with compliance not undertaken such an active dialogue with the Commission, it is doubtful the result would have been so positive. CECI can create the same kind of dialogue with others in the legal and regulatory arenas.

## What Would CECI Do?

CECI's mission statement sets the stage for its activities.

### 1. Educating and communicating with policymakers, legislators, government agencies and others who influence public policy.

We have witnessed too many instances where it appeared that those in government were simply unaware of the existence and role of company compliance and ethics efforts. Whether it is an agency issuing interpretations or congressional committees considering new legislative proposals, the potential impact on voluntary compliance and ethics programs too often is not fully understood.

CECI will bring together the compliance and ethics community first to monitor issues and then to bring them to the attention of government actors. We will be there to explain that voluntary compliance and ethics efforts are valuable, and how government and the litigation system affect these initiatives. We will aim our educational efforts at Congress, enforcement and regulatory agencies, the executive branch, and the states.

We will also communicate this message in any other appropriate forum that will help mold public policy. This includes academia, the press, the bar, and other organizations and associations.

### 2. Providing timely information and analysis to ethics and compliance practitioners and their organizations.

Many in the compliance and ethics field are unaware of the surprisingly long list of risks to their programs (and to themselves) created by the legal system. See Murphy, *Examining the Legal and Business Risks of Compliance Programs*, 13 ETHIKOS 1 (Jan/Feb 2000). Moreover, busy practitioners find it hard to keep up with new developments that could add even more risk to their current compliance

and ethics efforts, especially in areas outside their expertise.

There is also a need to act quickly in the governmental and litigation environments. If an agency is conducting rulemaking, a congressional committee is marking up legislation, or a court has a key case on appeal, there is little time to organize positions on an ad hoc basis. In the compliance and ethics context, there is often not even an awareness that these things are happening.

CECI will provide this information-gathering and dissemination function—what we refer to as a “Paul Revere function.” Whether it is a court considering the application of *Caremark*, an agency's enforcement document requiring that companies waive any privileges relating to internal investigations, or a legislative proposal to penalize companies for “invading” employees' privacy (when another agency expects them to be monitoring employee communications for harassing conduct), CECI can spread the word.

## Compliance and ethics

**professionals have a powerful story to tell, one that should resonate with policymakers.**

### 3. Serving as a voice and resource to ensure that the ethics and compliance communities are heard in the formulation of public policy.

When agency and congressional staffs are considering new initiatives, where do they turn for input and fact-finding? If they know of a readily accessible source, it is easy for them to make that contact. We need to make sure they know there is a resource on compliance and ethics issues.

CECI will seek to play a constructive, consultative role with the Sentencing Commission if, as expected, the Commission begins its review of the Organizational Sentencing Guidelines. We expect to play a similar role with other agencies too. Among its other initiatives, CECI can hold roundtable, interactive sessions with policymakers so that they can see and hear what voluntary compliance is about.

### 4. Identifying and advocating for relevant public and organizational policy issues of interest to our members.

Compliance and ethics practitioners need to do more than be a passive resource, however. CECI can also monitor agencies, legislatures, and courts for proceedings that would affect compliance and ethics efforts. At the direction of our membership, we will act as advocates in each of these forums, to work to prevent creation of new risks for compliance and ethics, and to support and propose initiatives that promote compliance and ethics programs. In advancing the perspectives of compliance/ethics professionals, we will reach out to the many functions in organizations that play a role and have an interest in these issues, including legal departments, HR functions, and internal audit.

CECI will accomplish these goals by, for example:

- filing amicus briefs in litigation;
- conducting workshops for agency staff members;
- proposing legislation to address specific impediments to effective compliance;
- proposing agency solutions, such as rules or agency policies;
- serving as a resource for company counsel in dealing with an agency;
- helping develop executive branch policies to guide all agencies; and
- writing in influential journals in the field.

## Getting Off the Sidelines

The truth is, compliance and ethics professionals have a powerful story to tell, one that should resonate with policymakers. Theirs is not a narrow, “me first” goal—it is everyone's goal: promoting ethics and law-abidance in our country's institutions.

The effort has begun. Prominent organizations have launched the first, exploratory phase of CECI. But for CECI to fully achieve its enormous potential, you who practice in the compliance and ethics field need to resist the otherwise admirable tendency to be modest. We all need to get off the sidelines and let our stories be told. CECI will be as powerful as its members.

*Organizations and individuals interested in learning more about supporting CECI's mission should contact the authors at the e-mail addresses in the biographical material above.*



[BETTER COPY REQUESTED]

To: U.S. Sentencing Commission  
Fax Number: (202) 502-4699  
Attn: Public Affairs.

From: Linda K. Treviño  
Professor of Organizational Behavior  
Chair, Department of Management and Organization  
Cook Fellow in Business Ethics  
The Pennsylvania State University  
University Park, PA 16802

Re: Issues Related to Formation of an Advisory Group on the Organizational Sentencing Guidelines

Date: October 30, 2001

I have been asked to provide input regarding the "scope, potential membership, and possible formation of an ad hoc advisory group on the organizational sentencing guidelines to consider any viable methods to improve the operation of these guidelines."

Based upon my work in this area for fifteen years, my interaction with ethics and compliance officers in corporations, and my own research, I would encourage the Commission to establish such an advisory group. Many knowledgeable people now have a decade of experience with the guidelines and their effects. Their input would be extremely valuable as the Commission considers any changes. Potential members could include seasoned corporate ethics/compliance officers, legal counsel, consultants, governmental regulatory agency representatives, and academics who have studied ethics/compliance program effectiveness. In addition, representatives from smaller organizations should be included because they tend to address these issues in a different and less formal manner.

My research has found that awareness of the guidelines' existence has clearly influenced the development of formal ethics/compliance programs in organizations. However, the extent to which those programs are values-based and integrated into the organization's daily operations is influenced more by senior executive commitment to ethics than by awareness of the guidelines. Further, ethics/compliance program effectiveness depends less on the formal characteristics of these programs (as guided by the Sentencing Commission Guidelines) and more on informal organizational culture characteristics such as executive and supervisory commitment to ethics, perceived fair treatment by employees, and management follow through when ethics problems are brought to its attention. Therefore, more attention to these informal organizational characteristics should be considered as the Commission considers changes.

Below, I have included a list of my publications that are relevant to ethics/compliance program management and effectiveness.



## Articles

- Treviño, L.K. & Weaver, G.R. Organizational justice and ethics program follow through: Influences on employees' helpful and harmful behavior, Business Ethics Quarterly, 11 (4): 651-671, 2001.
- Weaver, G.R. & Treviño, L.K. The role of human resources in ethics/compliance management: a fairness perspective. Human Resource Management Review, 11: 1-22, 2001.
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- Butterfield, K., Treviño, L.K., & Weaver, G.R. Moral awareness in business organizations: Influences of issue-related and social context factors. Human Relations, 53(7): 981-1018, 2000.
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- Weaver, G.R., Treviño, L.K., & Cochran, P. 1999. Corporate ethics programs as control systems: Influences of executive commitment and environmental factors, Academy of Management Journal, 42(1): 41-57, 1999.
- Treviño, L.K., Weaver, G., Gibson, D., & Toffler, B. Managing ethics and legal compliance: What works and what hurts. California Management Review, 41 (2): 131-151, 1999, reprinted in L.P. Hartman. Perspectives in business ethics. 2<sup>nd</sup> Ed. NY: McGraw-Hill.

Treviño, L.K., Butterfield, K. & McCabe, D. The ethical context in organizations: Influences on employee attitudes and behaviors, Business Ethics Quarterly, 8 (3): 447-476, 1998, reprinted with permission in J.A. Worthley. Organizational Ethics in the Compliance Context. Chicago, Illinois: Health Administration Press, 1999; reprinted with permission in J. Dienhart. The Next Phase of Business Ethics, Elsevier, 2001, pgs. 301-337.

McCabe, D., Treviño, L.K. & Butterfield, K. The influence of collegiate and corporate codes of conduct on ethics-related behavior in the workplace, Business Ethics Quarterly, 6: 441-460, 1996.

#### Books

Treviño, L.K. & Nelson, K. Managing business ethics: straight talk about how to do it right. 2<sup>nd</sup> ed. NY: John Wiley & Sons, Inc. 1999.



**JOE J. MCKAY • ATTORNEY AT LAW**

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November 1, 2001

U.S. SENTENCING COMMISSION  
One Columbus Circle, NE  
Suite 20500, South Lobby  
Washington, D.C. 20002-8002

RE: Comments on Proposed Ad Hoc  
Advisory Group on the Impact of  
Federal Sentencing Guidelines on  
Native Americans in Indian Country

TO THE UNITED STATES SENTENCING COMMISSION:

Pursuant to the notice published in the Federal Register on Wednesday, September 19, 2001, please consider the following comments on the question of the formation of an Ad Hoc Advisory Group to study the impacts of the Federal Sentencing Guidelines on Native Americans in Indian Country.

The Sentencing Commission has asked for comment on the merits of forming an ad hoc advisory group and for comments on the scope, duration and membership of such a group.

Before turning to my specific comments, by way of background; I am an enrolled member of the Blackfeet Indian Tribe of Montana, and except for time in the military service and to attend university, I am a life-long reservation resident.

I am also a licensed attorney and member of the Montana State Bar Association. I have practiced law since 1983 in the Tribal courts of Montana, the Montana State courts and the Federal District Court of Montana. As a part of my practice, I have handled criminal cases in all three court systems. And, unfortunately, I have a son who made some wrong decisions and as a consequence of those decisions, had proceedings in both the State District Courts of Montana and the Federal District Court of Montana.

I have served as a member of the Blackfeet Tribal Business Council (the governing body of the Blackfeet Nation) and I am currently a contract attorney for the Blackfeet Tribe.

My comments are as follows:

First, as to the merits of forming an ad hoc advisory group on the effects of the Federal Sentencing Guidelines on Native Americans in Indian Country, my response is that the recommendation has great merit and should be undertaken at once.

As the Commission fully understands, the effect of the Federal Sentencing Guidelines on the Court itself is to greatly restrict, indeed almost eliminate, the discretion of the sentencing judge in the Federal system.

At the same time, the sentencing discretion of the judges of most state courts remains relatively intact. The end result in the context of Indian people is that an Indian can commit a crime on the Reservation for which the sentencing guidelines mandates incarceration, while another Indian committing that same crime off the reservation may serve no jail time whatsoever.

Areas where this is particularly true is in drug related crimes. In most instances state court judges have unfettered discretion to fashion a sentence for the particular defendant and crime. In many instances, in drug cases, the state sentence may be centered more around treatment and rehabilitation rather than incarceration. As the Commission considers this decision, many Montana Indians are serving time in the Federal penal system for drug related crimes, while those committing the same crimes in the State generally, are going to treatment and serving probation.

It has been my experience, that many reservation crimes are rooted in poverty and despair. The effect of the Federal Sentencing Guidelines is to further victimize Indian people by mandating jail time, where a state court judge may well take the entire circumstances into consideration and opt for a more rehabilitative sentence.

In a recent particular case, a client of mine is now serving 11 months in Federal prison for being a felon in possession of a firearm. His prior felony was 20 years ago, and in that time he had no violations of his supervised release. I have no doubt that he would not have gone to prison under a state court judge's sentence.

This disparity in sentencing derives solely from the fact that the Indian person is on a federal Indian Reservation. There is no legal basis otherwise for treating Indian people different in sentencing than their white or non-Indian neighbors receive outside the Reservation for similar, and what in some cases, are more serious crimes.

Therefore I believe that the scope of an ad hoc advisory groups' review should be limited only by the nature of the problem. Thus not only should the advisory group look at the impact of the Federal Sentencing guidelines on Indians in Indian Country, it should also look at the consistency of sentencing within the Federal system as between Indians and non-Indians who commit similar crimes. Examining this latter issues will give some insight not only on whether Indians are being treated consistently within the federal system as compared to other ethnicities, it will also give some guidance on whether Indians are being impacted more or less disparately than white people or others in the context of state



court versus federal court sentences.

The Commission should be commended for even considering the formation of an ad hoc advisory group on this issue. Having taken the first step, the Commission should realize that the problem is complex, widespread and has as many mutations as there are states with Indian Country lands and Indian tribes.

With this in mind, I would suggest that the ad hoc advisory group be formed and that it be given 12 to 18 months within which to study the problem, assess the variables and make recommendations to the Sentencing Commission by way of a formal "white paper" report.

With respect to membership on such an ad hoc advisory group, I would recommend that membership be solicited from the following groups:

1. Tribal governments;
2. Indian Attorneys with criminal practice experience in State and Federal Court;
3. Non-Indian Attorneys with criminal practice experience in State and Federal Court;
4. State Court prosecutors in counties or districts which encompass or are adjacent to Indian Country lands;
5. State Court judges with districts which encompass or border Indian Country lands;
6. Federal Court judges with districts encompassing Indian Country lands;
7. State court probation officers who handle counties or districts which encompass or are adjacent to Indian country lands; and,
8. Federal probation officers whose case loads involve significant numbers of Reservation Indians who were convicted of crimes arising out of Reservation based conduct.

In closing, I welcome the opportunity to comment on this very important issue. While it is probably not possible to effect an overhaul of the Federal Sentencing Guidelines, the Commission now has the opportunity to at least study and perhaps correct what I believe to be an injustice to Indian people which is founded in the harsh treatment in the Federal Sentencing Guidelines.

While I do not personally support the Federal Sentencing Guidelines, it is my impression that the discretion was taken from Federal judges to ensure that career

criminals and those with demonstrated, consistent criminal intent could be appropriately punished. Most crimes committed by Reservation Indians and most Indian perpetrators do not fall in those categories. As I indicated, my own experience is that most Reservation crime arises out of the feelings of despair and depression that are born in abject poverty.

There must be a more appropriate way of dealing with this class of perpetrators than is currently allowed by the Federal Sentencing Guidelines. While putting all reservation Indians in federal prisons may be a short term solution to Reservation crime (and indeed, may be preferable to many non-Indians), it has no long term benefits for anyone. Additionally, the costs to the American Society as a whole (including tax payer dollars for incarceration) could be, in my opinion, greatly reduced if a different, more discretionary approach were followed.

Finally, if such an ad hoc advisory group is formed, please consider this as my expression of interest in serving on such a group.

Thank you for taking the time to review my comments and to even consider the issue discussed herein.

Respectfully,

Joe J. McKay

cc: file

Blackfeet Tribal Business Council



**ROSEBUD SIOUX TRIBE****October 31, 2001****United States Sentencing Commission  
One Columbus Circle NE Suite 2-500  
South Lobby  
Washington, DC 20002-8002****Attention: Public Affairs Commission**

**To improve the operations of the Federal guidelines and to consider al viable methods in the areas that have a significant Native American Indian population. My foremost immediate concerns lie in the following:**

**CULTURE ISSUE**

On cultural issue regarding federal court and sentencing, we cite the *Exparte Crow Dog* U.S. Supreme Court Case (109 U.S. 566, 1883) and we maintain that position therein today. We cite an excerpt from that case to make a point. "To impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others and not for them, which takes no account of the conditions which should except them from its extractions, and make no allowance for their inability to understand it. It tries them, not by their peers, nor the law of their land, by superiors of a different race according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; on which measures the red man's revenge by the maxims of the white man's morality."


The Major Crimes Act of March 3, 1885 did override the *Exparte Crow Dog* case, and diminished extensively the culture part of the Native American Indian's capability to maintain control over crimes within their own circles according to Sioux customs.

We maintain our position on the merits of *Exparte Crow Dog*'s decision especially in the light of the current federal sentencing guidelines imposed on the Native American Indians, and more recently the new laws imposed on them to address federal court impositions and dilemma regarding Indian Reservations.

We believe the culture part of any group of people maintain's control over their own circle in any given circumstances especially where civil conduct may be the issue.

It is difficult to maintain control over a group of people when others impose their standards of rule and laws on such as the Native American Indian reservations here in the state of South Dakota.

Sincerely,



**William Kindle, President  
Rosebud Sioux Tribe**

**11 Legion Avenue  
Phone: 605-747-2381**

**P.O. Box 430  
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**Rosebud, SD 57570-0430  
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**ROSEBUD SIOUX TRIBE****October 31, 2001****United States Sentencing Commission  
One Columbus Circle NE Suite 2-500  
South Lobby  
Washington, DC 20002-8002****Attention: Public Affairs Commission**

**To improve the operations of the Federal guidelines and to consider all viable methods in the areas that have a significant Native American Indian population. My foremost immediate concerns lie in the following:**

**COURT APPOINTED ATTORNEYS**

It is our opinion that the court appointed attorneys do not always serve in the best of their clients. Most of the Native American defendants always end up serving time through plea-bargaining, guilty pleas by their court-appointed attorneys. The inexperienced attorneys or the lackadaisical attitude on the part of the attorneys, often mean a long-term incarceration for the clients, usually the Native American Indians in this instance. We feel reservations are targeted for more laws unnecessarily as a federal judge observed, and said (quote) "And if your drinking and driving on the reservation and someone is injured, you get a year on top of what anybody else in the state would receive for a similar crime," (unquote) Rapid City Journal, April 22, 1999, and again said (quote) "For every Saturday night brawl, they prosecute somebody in Federal Court" (unquote) Rapid City Journal, April 22, 1999, (meaning on the reservation). The Federal Judge Kormann comments came from the fact most of his federal cases came from the Indian Reservation here in South Dakota.

For these reasons above the current Court Appointed Attorneys through the federal courts must be willing to strive forward at their best in the interest of their clients who are already facing harsh prison sentence(s) by and through the current sentencing guidelines in place in federal courts.

Sincerely,



**William Kindle, President  
Rosebud Sioux Tribe**

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**ROSEBUD SIOUX TRIBE****October 31, 2001****United States Sentencing Commission  
One Columbus Circle NE Suite 2-500  
South Lobby  
Washington, DC 20002-8002****Attention: Public Affairs Commission**

**To improve the operations of the federal guidelines and to consider all viable methods in the areas that have a significant Native American Indian population. My foremost immediate concerns lie in the following:**

**INTERPRETERS**

The federal courts must allow an interpreter to be available at all times. The majority of the court appearances in federal court here in the state of South Dakota are Native American Indians by a population ratio figure. The majority of our Native Americans do not have education and sometimes do not understand federal charges that are being read to them let alone know the procedures available for them.

A non-Indian in federal court has a difficult time when such charges are read to him and he speaks that same language every day in life, from the time of his birth yet, he has a hard time understanding.

Our Native American people always speak their Sioux language at home, social gatherings and elsewhere, so to try to comprehend thoroughly the federal charges initiated against him is usually a devastating experience for that person charged.

An interpreter may help the defendant understand the charges clearly so a proper defense can be initiated for the trial should there be one. An interpreter's presence will show the federal court's initiation of fair play extended even to those who may seem semi-illiterate. The availability of an interpreter would be essential and a vital part of the federal court operations.

Sincerely,



**William Kindle, President  
Rosebud Sioux Tribe**

11 Legion Avenue  
Phone: 605-747-2381

P.O. Box 430  
Fax: 605-747-2905

Rosebud, SD 57570-0430  
E-mail: [rslakota@gwtc.net](mailto:rslakota@gwtc.net)

**ROSEBUD SIOUX TRIBE**

October 31, 2001

United States Sentencing Commission  
One Columbus Circle NE Suite 2-500  
South Lobby  
Washington, DC 20002-8022

Attention: Public Affairs Commission

To improve the operations of the federal guidelines and to consider all viable methods in the areas that have a significant Native American population. My foremost concerns lie in the following:

**FEDERAL JUDGE/DISCRETIONARY SENTENCING**

The strict sentencing guidelines calls for a federal judge to remain within these guidelines, thus, the discretionary source of a federal judge is no longer viable in sentencing when mitigating circumstances do surface when sentencing a defendant.

We assumed the strict sentencing guidelines arose because of the organized crime activities and other related troublesome groups here in the United States and not so much for individual offense(s), such as that of the Native American Indians here in U.S. we may be wrong.

Sincerely,



William Kindle, President  
Rosebud Sioux Tribe

11 Legion Avenue  
Phone: 605-747-2381

P.O. Box 430  
Fax: 605-747-2905

Rosebud, SD 57570-0430  
E-mail: [rsiakota@gwtc.net](mailto:rsiakota@gwtc.net)



UNITED STATES SENTENCING COMMISSION  
ONE COLUMBUS CIRCLE, N.E.  
SUITE 2-500, SOUTH LOBBY  
WASHINGTON, D.C. 20002-8002  
(202) 502-4500  
FAX (202) 502-4699

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January 4, 2002

**MEMORANDUM**

**TO:** Chair Murphy  
Commissioners  
Tim McGrath  
Frances Cook  
Ken Cohen  
Pam Montgomery  
Judy Sheon  
Charlie Tetzlaff

**FROM:** Mike Courlander

**SUBJECT:** Public Comment

Attached for your reference are two additional pieces of public comment.

**UNITED STATES PROBATION & PRETRIAL SERVICES OFFICE**  
*DISTRICT OF NORTH DAKOTA*

**Richard W. Crawford**

Chief U.S. Probation Officer  
Suite 154

220  
East Rosser Avenue

P.O. Box 793  
Bismarck, ND 58502  
Tel. 701-530-2400  
Fax 701-530-2412

January 2, 2002

Attn: Public Affairs  
Diana E. Murphy, Chair  
U.S. Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

Re: Advisory Group on Issues Related to the Impact of Federal Sentencing  
Guidelines on Native Americans in Indian Country.

Dear Chairwomen Murphy:

I'm sorry about the lateness of this letter, but I did not receive notice of your intent to look at Indian country issues until after the deadline noted in the *Federal Register*. I hope that you will still take my comments into consideration even though they are late.

In the District of North Dakota approximately 40% or more of our defendants and offenders on supervision are Native Americans sentenced for crimes that occurred in Indian country. It is my belief that there is disparity in the sentences imposed in the federal system compared to those imposed by the State courts. To support this claim, I asked the state penitentiary for some data regarding Native Americans and the crime they were sentenced for and the length of their sentence. Defendants convicted of aggravated assault with a dangerous weapon were sentenced to an average term of imprisonment of one year. A similar offense under the guidelines would have resulted in an offense level of 19 -2 points for acceptance with a sentencing range of 24-30 months. This is just one example of the disparity.

I am also concerned about other forms of disparity in sentencing. For example, there are insufficient resources on many of the Indian Reservations therefore; sentences that are normally available to other federal offenders are not always available to Native Americans. Sentencing options to keep an offender in the community are rarely available for the court to impose. In North Dakota, there are no halfway house (community treatment centers) on any of the five Indian Reservations. Most Native American defendants live with extended family and the homes do not have a telephone nor do they have the financial wherewithal to afford a telephone for electronic monitoring. Our issues are the same with treatment. The majority of the reservations do not have treatment programs for offenders and their variety of needs. Native Americans with court ordered treatment conditions often fail to complete treatment programs because they lack funding to obtain transportation to and from the major communities that have the programs they require.



Indian country issues are different than inner city issues and therefore they require special consideration by the court and the U.S. Sentencing Commission. If the Commission decides to put together a committee to look at Indian Country issues, I will gladly volunteer to participate on behalf of the U.S. Probation and Pretrial Services Office for the District of North Dakota. Should you have any questions or concerns regarding this letter, please contact me at 701-530-2404, or by one of the following methods: mail - P.O. Box 793, Bismarck, ND 58502-0793; E-mail at [marcus\\_roehrich@ndp.uscourts.gov](mailto:marcus_roehrich@ndp.uscourts.gov) <[mailto:marcus\\_roehrich@ndp.uscourts.gov](mailto:marcus_roehrich@ndp.uscourts.gov)>. Thank you.

Sincerely,

Marcus Roehrich  
QCS/Deputy Chief  
U.S. Probation & Pretrial Services Office

# THE FEDERAL DEFENDERS OF MONTANA

MISSOULA OFFICE  
218 EAST FRONT STREET, SUITE 208  
P.O. BOX 9380  
MISSOULA, MONTANA 59807  
(406) 721-6749  
FAX (406) 721-7751  
MONTANA ONLY (888) 721-7388

ANTHONY R. GALLAGHER  
FEDERAL DEFENDER

ASSISTANT FEDERAL DEFENDERS:  
MARK WERNER - Billings  
TIMOTHY CAVAN - Billings  
MICHAEL DONAHOE - Helena  
DAVID NESS - Great Falls  
JOHN RHODES - Missoula

December 7, 2001

United States Sentencing Commission  
One Columbus Circle, NE  
Suite 2-500  
South Lobby  
Washington D.C. 20002-80002

Attn: Public Affairs

I write regarding the possible formation of an ad hoc advisory group to consider the impact of the Guidelines on Native Americans in Indian Country.

First, I apologize for providing this comment after the November 6 deadline. I have been informed by Maria Jankowski, however, that Theresa Cooney welcomes my input.

Second, per the attached letter, I will be joining the Commission in May or June 2002 as the Federal Defender intern with the Commission. I look forward to working with you.

As an Assistant Defender in Montana, I have worked on many reservation cases. I applaud the Commission for recognizing that an advisory group could assist the Commission in improving the application of the Guidelines to reservation defendants. At the same time, I recognize that many of the persistent problems endemic in the interplay of Indian Country and the Federal criminal justice system cannot be addressed by the authority of the Commission. Nonetheless, those underlying problems influence the impact of the Guidelines on reservation defendants. For instance, alcohol abuse is nearly always a driving force in the reservation cases that I have defended (I can think of one exception). On the positive side, the more exposure I have to the Plains Indian culture, the more impressed I am by the tribal sense of family and community and the resulting restorative justice: repeatedly, I have witnessed victims who have strongly voiced their belief that the punishment required by the Guidelines is too severe and fails to incorporate adequate rehabilitation programs. These and many other issues may be beyond the authority of the Commission to address but are relevant considerations in improving the Guidelines.

I strongly encourage the formation of the proposed advisory group and am personally willing to serve in any capacity requested by the Commission. I suggest that the group examine the specific (e.g. Offenses Against The Person) Guidelines that regularly govern reservation cases. For instance, the assault base offense level is, in my opinion, too high and that section should include a victim's conduct reduction; should the Guideline base offense level be lowered, perhaps an aggravating enhancement can be devised for application in cases warranting more severe punishment. I also suggest that the group examine departure issues that are particularly relevant to reservation cases. For instance, perhaps Section 5K can include a discussion of a departure based upon comparing the Guidelines range with state sentences for the same offense. Another idea is to for the group to



examine whether life on the reservation is a socio-economic or a political or otherwise permitted departure factor. See, e.g., United States v. Big Crow, 898 F.2d 1326 (8<sup>th</sup> Cir. 1990). These are merely a few specific ideas for consideration by an advisory group. More generally, I believe that consideration of the Guidelines regularly applied in reservation cases and departures relevant to such cases should be included in the scope of an advisory group because those are the factors that determine sentences, and in reality, to the Indian families and communities, that's what counts.

The membership of an advisory group should include people who go to the reservations. Thus, I strongly believe that United States probation officers and federal defenders from reservation districts should be part of the group. I also recommend including federal prosecutors and district court judges from Indian Country districts; victim advocates would also contribute to the group. In my personal experience, it is important to work with the reservation communities rather than trying to assist by external fiat. Accordingly, I suggest including tribal members, perhaps judges or law enforcement officers, family of Native American offenders and victims, and most importantly, elders.

As for the duration of such a group, I confess that I am unfamiliar with the time necessary for an advisory group to effectively assist Commission, so I leave input on that issue to more learned individuals.

I again commend the Commission for its sensitivity to this issue and to the more general issue of the relationship between the United States and Native Americans, a relationship that is at the core of the American Experience. I look forward to working with you and am willing to assist in the proposed advisory group in any manner requested. Thank you for considering my opinion.

Sincerely,

A handwritten signature in black ink, appearing to read "John Rhodes". The signature is fluid and cursive, with a long horizontal line extending from the end.

JOHN RHODES  
Assistant Federal Defender  
Federal Defenders of Montana

Enclosure

FEDERAL PUBLIC DEFENDER  
Western District of Washington

*Thomas W. Hillier, II*  
*Federal Public Defender*

FEDERAL DEFENDERS OF MONTANA

October 22, 2001

OCT 22 2001

RECEIVED

Mr. Timothy B. McGrath  
Staff Director  
United States Sentencing Commission  
1 Columbus Circle N.E., Suite 2-500,  
South Lobby  
Washington, D.C. 20002-8002

Dear Tim:

I am writing to confirm the commitment of John Rhodes as the Federal Defender representative to the Sentencing Commission upon completion of Maria Jankowski's term. Ms. Jankowski is to begin her term in November 2001 and she will work with the Commission for six months. Thus, I expect John Rhodes to begin sometime in late May 2002, or early June 2002.

Mr. Rhodes works as an Assistant Federal Public Defender in Montana. He is an outstanding lawyer who has substantial experience working with the Federal Sentencing Guidelines. He brings a West Coast perspective to the Commission and should prove especially helpful to the Commission when it works on issues related to Native Americans. I expect John will provide outstanding assistance to the Commission and its staff.

John will be in contact with the Commission during the early Spring of 2002 in order to obtain information necessary for his transition. Meanwhile, he will be in contact with defenders who have preceded him at the Commission to discuss details of the work. If you have any questions, please do not hesitate to give me a call.



Once again, thank you very much for your assistance in continuing this important and valuable program.

Very truly yours,



Thomas W. Hillier, II  
Federal Public Defender

TWH/kac

cc: John Rhodes ✓  
Jon Sands  
Carmen Hernandez  
Richard Wolff

**FEDERAL PROSECUTORS**

**SUGGESTED BY:**

**Leslie Caldwell**  
Criminal Chief  
US Attorney's Office  
Northern District of CA

Horowitz

**Michael Horowitz**  
Criminal Division  
U.S. Department of Justice

Horowitz

**Rob Khuzami**  
Chief of Securities Fraud Unit  
US Attorney's Office  
Southern District of NY

Horowitz

**Miriam Krinsky**  
Chief of Appeals  
US Attorney's Office  
Central District of CA

Horowitz

**Sally Yates**  
Chief of Fraud Section  
US Attorney's Office  
Northern District of GA

Horowitz

**CRIMINAL DEFENSE ATTORNEYS**

**SUGGESTED BY:**

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Dorsey & Whitney  
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**Kimberly Dunne**  
Sidley & Austin  
ex-LA AUSA  
former chief of LA major fraud section and  
prosecuted corporate crime

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ex-Principal Deputy to DAG Holder  
ex-AUSA MDGA and SDNY

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**Thomas E. Holliday, Esq.**  
Gibson, Dunn & Crutcher LLP

Steer/Desio



**Eric Holder**  
Covington & Burling  
ex-Deputy AG  
issued Principles of Corporate Prosecution  
while Deputy AG

Horowitz

**Todd Jones**  
~~Greene Espel~~  
~~ex-Minn. USA~~  
~~former chair AGAC~~

Horowitz

*Wayne*  
*Pull him out*

**Joe Savage**  
Testa, Hurwitz & Thibault  
ex-Boston AUSA and chief of corruption section

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**Mary Spearing**  
Baker Botts  
ex-AUSA EDPA  
ex-chief Criminal Division's Fraud Section)

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Partner, Gibson, Dunn & Crutcher LLP

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ex-AUSA EDNY  
ex-chief Criminal Division's Fraud Section

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Member, Kaye Scholer, LLP

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ex chief of SDNY major fraud section  
prosecuted corporate crime, including Con Edison

Horowitz

**CORPORATE COUNSEL/INDUSTRY SPECIFIC**

**SUGGESTED BY:**

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Defense Industry Initiative of  
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PriceWaterhouse  
ex-chief, DOJ CRM Computer Crime Section

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Executive Vice President  
Director of Professional Services  
IBJ Whitehall Bank & Trust Company

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**Paul Gardephe**  
Deputy General Counsel, Time Inc.  
ex-AUSA and chief of appeals, SDNY

Horowitz

**Jane Nangle**  
Corporate Compliance Officer  
St. Joseph's/Candler Health System

Murphy

*Pull her out  
away from  
Snell*

**Roy Snell, CHC**  
Executive Director  
Health Care Compliance Association

Steer/Desio

**Steve Zipperstein**  
Deputy General Counsel, Verizon  
ex-First Ass't USA, CDCA  
ex-aide to AG Barr

Horowitz

**COMPLIANCE PROFESSIONALS**

**SUGGESTED BY:**

**Ron James**  
President & CEO  
Center for Ethical Business Cultures

Murphy

**Lisa Kuca**  
Director of Corporate Compliance  
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Horowitz

**Neil Getnick**  
Getnick & Getnick  
former ADA  
court-appointed monitor in many cases

Horowitz

**Joseph E. Murphy, Esq.**  
Partner, Compliance Systems Legal Group  
Co-Coordinator

Steer/Desio



Coalition for Ethics and Compliance Initiatives

**Dr. Edward S. Petry**  
Executive Director  
Ethics Officer Association

Steer/Desio

**The Honorable Stephen D. Potts, Esq.**  
Interim President  
Ethics Resource Center Fellows Program

Steer/Desio

**Winthrop M. Swenson, Esq.**  
Partner, Compliance Systems Legal Group  
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Coalition for Ethics and Compliance Initiatives

Steer/Desio

**ACADEMICS**

**SUGGESTED BY:**

**Jennifer Arlen**  
Professor Law and Business  
University of Southern California

Murphy/Allenbaugh

**Jayne Barnard**  
Professor of Law  
William and Mary School of Law

Murphy/Allenbaugh

**Pamela Bucy**  
Professor of Law  
University of Alabama School of Law

Murphy/Allenbaugh

**Mark Cohen**  
Professor of Management  
Vanderbilt University

Murphy/Allenbaugh

**Thomas Donaldson**  
Professor of Legal Studies  
University of Pennsylvania

Murphy/Allenbaugh

**Paul Fiorelli, Esq.**  
Professor of Business Law and Ethics  
Xavier University

Murphy/Allenbaugh  
Steer/Desio

**Ron Goldstock**  
Lecturer, Columbia Law School  
former chair, ABA criminal justice section  
former head of NY Organized Crime Task Force

Horowitz

Ⓢ hit review academics

**Richard Gruner**  
Professor of Law  
Whittier Law School

Murphy/Allenbaugh

**William S. Laufer**  
Associate Professor of Legal Studies  
University of Pennsylvania

Murphy/Allenbaugh

**Julie O'Sullivan**  
Georgetown Law Professor  
ex-AUSA SDNY  
gave presentation at 1995 USSC symposium  
on corporate crime

Horowitz

**Lynn Sharpe Paine**  
Professor of Business Administration  
Harvard Graduate School of Business

Murphy/Allenbaugh

**Joseph Petrick**  
Professor of Management  
Wright State University

Murphy/Allenbaugh

**Robert C. Solomon**  
Professor of Philosophy  
University of Texas at Austin

Murphy/Allenbaugh

**Linda Klebe Trevino**  
Professor of Organizational Behavior and  
Chair of the Department of Management and Organization  
Pennsylvania State University

Murphy/Allenbaugh

**Ian Weinstein**  
Fordham Law School  
ex-Ass't Public Defender, SDNY

Horowitz

**Patricia Werhane**  
Professor of Business Ethics  
University of Virginia

Murphy/Allenbaugh

**Cindy R. Alexander**  
Economic Analysis Group, Antitrust Division  
U.S. Department of Justice

Murphy/Allenbaugh



① Substantive

RESPONSES TO REQUEST FOR PUBLIC COMMENT

Barry Boss & Jim Felman	Practitioners' Advisory Group
Jay Cohen	Coalition for Ethics and Compliance Issues
Cindy R. Alexander, Ph.D.	U.S. Department of Justice, Antitrust Division
Kenneth W. Johnson	Ethics and Policy Integration Center
Edward S. Petry, Ph.D.	Ethics Officer Association
Robert Olson, PhD, MPH	Alliance for Health Care Integrity
Richard J. Bednar	Defense Industry Initiative
Nancy McCready Higgins	Lockheed Martin Corporation
Winthrop M. Swenson	Compliance Systems Legal Group Coalition for Ethics and Compliance Issues
Jane Adams Nangle	St. Joseph's/Candler Health Systems
Keith T. Darcy	IBJ Whitehall Financial Group
Jerome Adams	Shell Oil Company
Eric Pressler	PG&E Corporation
Charles L. Howard	Shipman & Goodwin
Lisa A. Kuca & David F. Axelrod	Holland & Knight LLP Vorys, Sater, Seymour, and Pease LLP
David T. Buente	Sidley Austin Brown & Wood American Chemistry Council General Electric Company
E. Scott Gilbert	General Electric Company
Jennifer Arlen	Yale Law School
Paul Fiorelli	Xavier University, Professor of Legal Studies, Director of Xavier Center for Business Ethics and Social Responsibility

Mark A. Cohen

Vanderbilt University, Owen Graduate School of  
Management

Richard Gruner

Whittier Law School

W. Michael Hoffman

Bentley College, Center for Business Ethics

Jayne W. Barnard

William & Mary School of Law

② Responses endorsing the idea of  
formation of a committee

③ List of Substantive Ideas



LIST OF QUESTIONS

How many members should the ad hoc group have? (15)

What constituencies need to be represented?

Industry

- Securities
- Health Care
- Large corporations
- Small corporations
- Criminal defense attorneys
- Compliance professionals
- Prosecutors/DOJ
- Academics

Defense Industry  
Tax Exempt

- business ethics
- law

Elwood 12-15  
Stein 9-12

Judiciary (carefully names)  
- AO/FJC

- staff liaison (resource drain)

What qualities should the individuals have?

- Different kinds of experience with the guidelines
- Concrete ideas re: what group should accomplish

- work well w/ others
- Ability to work on the project
- No affiliation as "lobbyist"

What should the duration of the group be?

18 months

What should the scope of the group's work be?

Refer to list of recommendations of what the group should do (sorted by commenter)

List of options

Charlie

- Focusing on the guidelines
- Use statement in publication
- Duration

- suggests only
- wide open
- we list priorities (but a problem)