

April 24, 2003

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

Dear Judge Murphy:

I write on behalf of the American Bar Association regarding the task facing the U.S. Sentencing Commission following passage of the "Feeney Amendment" to the Amber Alert legislation, S. 151. As you know, the ABA vigorously opposed the Feeney amendment in its original form. We hope that the decision of the House-Senate conference committee to modify some of the most objectionable features of the Feeney Amendment can in some small measure be attributed to Congress having heeded the voice of the organized Bar.

Regrettably, even the final, somewhat ameliorated, version of the Feeney Amendment contains deeply troubling provisions. The American Bar Association is particularly concerned that this legislation not become a vehicle for reducing the independence of the federal judiciary or for denigrating the important institutional role of the U.S. Sentencing Commission.

The ultimate effect of the Feeney Amendment will depend in large measure on the response of the Sentencing Commission to the directives contained in the legislation. The most important of these would appear to be the directive that the Commission study downward departures and develop, within 180 days, guideline amendments that will "ensure that the incidence of downward departures are [sic] substantially reduced." It is significant that this directive is not limited to any particular type of downward departure. Rather, the plain language of the bill instructs the Commission to study and devise means of reducing *all* departures, including those requested by the government to reward substantial assistance or for other purposes.

There will doubtless be voices urging you to restrict your attention during the next six months to judicially-initiated departures, if only for reasons of efficiency. However, such an approach would not only contravene the statutory language, it would render any resulting conclusions about downward departures fatally incomplete. For example, the centerpiece of the Justice Department's complaint about downward departures is the increase of non-substantial assistance departures since the *Koon* decision in 1996. It is undeniable that district judges responded to *Koon* with some incremental increase in non-substantial assistance departures. Yet

Commission statistics reveal that the bulk of the increase in departures after *Koon* occurred as a result of prosecution departure requests. The decision in *Koon* occurred shortly after the five Mexican border districts began developing "fast-track" programs in which downward departures are offered as inducements for early pleas. By 2001, more than half of all non-substantial assistance departures were granted in the border districts. And, as I noted in my April 1, 2003, letter to Senators Hatch and Leahy, fully 79% of all downward departures granted in 2001 were requested by the government.

Moreover, there is compelling preliminary evidence of significant interaction between different types of departures, and between departures and other mechanisms for reducing sentence length. For example, the very high rate of substantial assistance departures in some districts – sometimes approaching or exceeding 40% in districts as disparate as the Western District of Missouri, the Western District of North Carolina, the Eastern District of Pennsylvania, and the Northern District of New York – strongly suggests that prosecutors often use substantial assistance departures to facilitate early pleas or to mitigate the severity of Guideline sentences, rather than to obtain information necessary to the prosecution of other defendants. Likewise several studies have suggested that lawyers and judges within judicial districts employ departures and other mitigation devices to create local sentencing norms.

Finally, it is important to remember that departures from the Guidelines are not inherently wrong. Rather, departures were made an integral part of the federal sentencing system, both to achieve justice in individual cases and to provide a judicial feedback mechanism for the Commission. Departure patterns enable the Commission to identify types of cases in which judges determine that the guidelines produce sentences that are either unduly lenient or unduly severe, and to respond with amendments to those guidelines if appropriate. Thus severe restrictions on judicial departure authority would not only hobble judges' ability to do justice with respect to the unique defendants who appear before them, but would restrict an important avenue of judicial participation in the process of making national sentencing rules.

The American Bar Association hopes that the Sentencing Commission will view the directive in the Feeney Amendment as an opportunity to study the interplay of various sources of sentencing discretion in the Guidelines system. Such a study should embrace downward departures requested by the government as well as judicially-initiated departures. Moreover, if the Commission is able to identify classes of cases in which departures have been frequent, it may wish to consider adjusting the guideline sentences for such cases, thus taking serious account of the shared views of numerous judges.

The American Bar Association wishes the Commission well as it undertakes this challenging task, and stands ready to assist the Commission in any way possible.

Sincerely,

A handwritten signature in cursive script, appearing to read "Alfred P. Carlton, Jr.", written in dark ink.

Alfred P. Carlton, Jr.

cc: All Sentencing Commissioners