PRESENTENCE REPORTS IN THE JAIL

At a recent sentencing hearing, an issue was raised about the wisdom of giving copies of Presentence Reports to clients who are detained. This is a question for which there are no black or white answers.

The concern is that people who have no business knowing the contents of a Presentence Report may gain access to the report. Obviously, the reports contain information that, if shared, could be embarrassing to clients, such as very specific mental health history and medical history. Often the reports also contain information about cooperation and could result in danger to a client or his family. These are concerns and dangers which are recognized by the Bureau of Prison's policy that inmate may not have a copy of their Presentence Report.

On the other hand, there are statutory provisions which indicate that a defendant is entitled to have his or her own copy of the Presentence Report. In 18 U.S.C. §3552(d) and in Rule 32(e)(2) of the Federal Rules of Criminal Procedure, the Probation Officer is directed to disclose the report to the defendant. It appears to be the intention of the statute that the defendant receive the report in addition to the defendant's attorney, because the defendant's attorney is listed separately as a recipient of the report.

However, Local Rule 83.9(b) directs the Probation Office in the Eastern District to disclose the report only to the defendant's attorney. The rule says that disclosure to counsel constitutes disclosure to the defendant. That rule places a burden on defense counsel to disclose the report to the defendant and seems to shift the obligations of FRCP 32(e)(2) and 18 U.S.C. §3552(d) to the defense attorney.

With these competing interests, a defense lawyer is in the middle. It is the best practice to talk to one's client before the Presentence Report is disclosed and point out the dangers and disadvantages of keeping a copy of the report in the detention facility. When a client has an extensive criminal history, one solution might be to copy only the pages that have the criminal history. Or, one could copy only the pages that do not have embarrassing information for the client to review at his leisure. If a defendant decides not to keep all or any part of the report, defense counsel must show those pages which are not turned over to the client so that the client can read them and ask questions about them.

It is, of course, of utmost importance that the entire report be thoroughly explained and reviewed with the client. Do not forget that at the sentencing hearing the judge will be asking if the attorney and the defendant have read the report. FRCP 32(i)(1)(A).

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