Federal Probation

New Sentencing Proposals and Laws in the 1970's . . . . . *Sol Rubin*

The Story of New-Gate . . . . . *Charles W. Dean*

The Probation Officer as Therapist: Examination of Three Major Problem Areas . . . . . *Shelle G. Dietrich*

Criminal Sentencing: Misunderstandings and Misapplications . . . . . *Jay L. Schaefer*

The Lawyer and the Accuracy of the Presentence Report . . . . . *Walter Dickey*

Crime and the Use of Prisons . . . . . *David Biles*

Is It Grievable? . . . . . *Alexandreena Dixon*

Group Counseling . . . . . *Paul Hotfelder*
A. Dwain Sachs

l Probation: A Skills Course

iewing Techniques in Probation and Parole:
Art of Listening . . . . . *Henry L. Hartman, M.D.*

JUNE 1979

61974

good behavior in the institution and participation in certain activities in influencing the court to grant the motion. While upon occasion judges may in fact follow up on their stated intention of "keeping an eye on the defendant," in many more cases such indications hamper the efforts of prison or parole authorities to work with the defendant and may foster a misplaced belief in the defendant that the judge is the primary supervisor and determiner of the release date.

* EDITOR'S NOTE: An amendment to the Federal Rules of Criminal Procedure, Rule 35(b) has been approved by the Supreme Court on April 30, 1979, to become effective on August 1, 1979. This change would allow a sentence of imprisonment to be reduced to probation within the time limitations of Rule 35. The text of the amendment and its effect are discussed in topic #2.

The Lawyer and the Accuracy of the Presentence Report

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THERE is currently difference of opinion as to the major objective to be served in sentencing a convicted offender. The former emphasis on treatment or rehabilitation is being replaced by an emphasis on justice or fair and certain punishment. The indeterminate sentence designed to achieve treatment objectives is being replaced by a determinate sentence designed to achieve equality of treatment and certainty of punishment.[1]

Raymond Parnas and Michael Salerno, drafters of the Uniform Determinate Sentencing Act of 1976 which was substantially adopted in California,[1.1] had this to say about the trend toward determinate sentencing:

> Whether determinate sentencing will be any more successful than indeterminate sentencing in changing criminal offenders into law abiding citizens is doubtful. In that sense, the new process is just as experimental as the former. However, a crucial difference between the two is that rehabilitation is not a dominant goal of the new law. In fact, widespread recognition of the failure and abuses of the rehabilitative ideal was the primary factor in the dismantling of a system grounded in a diagnostic, sickness, causality-capability and curative, predictive change. Nonetheless, there is speculation that a collateral benefit of a visible, fair and equitable sentencing process of relatively certain and early prison terms may be rehabilitation. It is hypothesized that the apparent factual fairness of such a system will be more effective than a system geared toward rehabilitation but incapable of making the decisions required to accomplish that end.[1.2]

There is some variety among determinate systems. Some, like California's, give the judge the discretion to vary a statutory fixed term if certain criteria exist. Others, like the system being experimented with in Wisconsin and now in use in Minnesota and in the Federal system, give the judge wide discretion as to the term to be imposed and fix the parole date through a scoring system based on facts already in existence. Such facts typically include the offense severity and the offender's prior record, employment, history and record under prior parole and probation supervision.

These systems are in contrast to the more prevalent indeterminate systems which give wide discretion to the court to set the maximum term an offender may serve and similar discretion to a parole authority to set the date of release. The indeterminate system is based on a medical model in which an attempt is made to diagnose the offender's problem and release him when a prediction of satisfactory adjustment to the community can be made. During confinement, attempts are made to deal with the offender's problems in a way that enhances the chances for successful reassimilation into the community.

Whatever the system used, an effective sentencing decision requires knowledge of facts, whether those facts relate to characteristics of the defendant which might make him responsive

1. *See, e.g.*, McGEE, CALIFORNIA'S NEW DETERMINATE SENTENCING ACT, 42 FED. PROB. 3 (1978); ALSCHULER, SENTENCING REFORM AND PROSECUTORIAL POWER: A CRITIQUE OF RECENT PROPOSALS FOR "FIXED" AND "PRESUMPTIVE" SENTENCING, 126 Y. Pa. L. R. 550. (1978); REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING: FAIR AND CERTAIN PUNISHMENT (1976).

1.1. 1975 Cal. Stats. Ch. 1139.

1.2. Parnas and Salerno, *The Influence Behind, Substance and Impact of the New Determinate Sentencing Law in California*, 1978 Univ. of Cal., Davis L. R. 29, 29.

to treatment or to the facts of the offense upon which a judgment as to fair punishment should be based.

Commonly, especially in guilty plea cases in which little information about the defendant is revealed through the plea procedure, the presentence report is the main source of factual information for the judge and for others who may be called on to make a decision with respect to sentence. This being the case, it seems obviously important that:

(1) Efforts should be made, particularly by defense counsel, to ensure the accuracy and adequacy of the facts set forth in the presentence report.[2]

(2) There will be changing emphasis on certain kinds of facts as sentencing criteria change from treatment considerations to considerations of fair and certain punishment.

In recent years, it has been thought that accuracy of the report and fairness to the defendant can be achieved by disclosure of the presentence report.[3] For example, the American Bar Association urges that all derogatory information about the offender used at sentencing should be disclosed to him and that "This principle should be implemented by requiring that the sentencing court permit the defendant's attorney, or the defendant himself if he has no attorney to inspect the report."[3.1] Wisconsin has adopted a similar procedure.

Over the course of several years, the adequacy and accuracy of the presentence report, as well as the lawyer's role in insuring them, has been observed and evaluated in Wisconsin. Over the course of several months, further study was made to determine the extent to which efforts are, in fact, being made to ensure the accuracy of presentence information, particularly by defense counsel; to see the extent to which there is change in kinds of facts which are being given emphasis, again particularly by defense counsel. During the study, major attention was given to the question of accuracy. Although there is some trend in Wisconsin toward greater objectivity in sentencing,[4] the system remains largely an indeterminate system, at least in theory. Nonetheless, the question of whether there is change in the kinds of facts given emphasis with change in sentencing objectives is an important one to raise even though, at present, there is insufficient data to deal with the question in detail.

This article reports on the results of the observations and the study. After brief attention to the preparation of the presentence report and the legal authority to disclose it, emphasis is given to a description and analysis of the practice of defense attorneys not to disclose the report to clients; to the types of errors and their effects on correctional and parole decisions; and to the perceptions of inmates of the effects of errors. Finally, several responses to the problems identified are offered.

I. Data Base

The data[5] in this article were obtained in the University of Wisconsin Law School Legal Assistance to Institutionalized Persons Program. This program assists inmates in the resolution of their legal problems. The first step is a "diagnostic" interview with each inmate and patient upon his or her admission to a Wisconsin correctional or mental health institution. The purpose of the interview is to identify all legal problems the person may have and assist in their resolution. Since 1975, all adult inmates and patients admitted to Wisconsin correctional and mental health institutions have been interviewed during the first month of confinement. The inmates interviewed include those just sentenced and those whose probation and parole was revoked recently.

Not surprisingly, given the fact of confinement, many inmates express concern about the length of their sentences at this interview. Given the opportunity to discuss the matter in detail, a great

2. *See, generally,* CRIMINAL JUSTICE ADMINISTRATION, *supra* note 3; L. ORLAND, JUSTICE, PUNISHMENT, TREATMENT (1973) ALI MODEL PENAL CODE § 7.07 (May, 1972 draft); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).

Some judges also fail to realize the report's continuing significance: "I cannot see any need to you (counsel), or benefit to the defendant, for such release (of the report) . . . I cannot see how much (sic) report could possibly be part of any post-conviction remedies or procedures since its and entire purpose is merely to aid the judge, if at all, in the sentencing procedure and decision." Letter to Attorney Ben Kempinen from County Judge Peter J. Seidl (April 13, 1978).

3. There has been a great deal written on the presentence report. *See, e.g.,* F. MILLER, R. DAWSON, G. DIX & R. PARNAS, SENTENCING AND THE CORRECTIONAL PROCESS (1976); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES (approved draft with commentary, 1968); Coffee, *The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice,* 73 MICH. L. REV. 1361 (1975), [hereinafter cited as Coffee]; Lehrich, *The Use and Disclosure of Presentence Reports in the United States,* 47 F.R.D., 225 (1969).

3.1. American Bar Association Project On Standards for Criminal Justice, Standards Relating To Sentencing Alternatives and Procedures, s. 4.4, p. 213-214.

4. DECISION-MAKING GUIDELINES FOR WISCONSIN'S PAROLE BOARD, July 7, 1978, on file with author.

5. The Legal Assistance to Institutionalized Persons Program is also discussed in: Dickey, *The Lawyer and the Quality of Service Provided to the Poor and Disadvantaged: Legal Services to the Institutionalized,* 27 DEPAUL L. REV. 407 (1978), [hereinafter cited as Dickey]; Dickey & Remington, *Legal Assistance to Institutionalized Persons—An Overlooked Need,* 1976 SO. ILL. L.R. 175 (1976); Remington, *Wisconsin Correctional Internship Program,* in PROCEEDINGS OF THE ASHEVILLE CONFERENCE OF LAW SCHOOL DEANS ON EDUCATION FOR PROFESSIONAL RESPONSIBILITY 56 (1965); Kimball, *Introduction: Inmate Problems and Correctional Administration,* 1969 WIS. L. REV. 574 (1969); Note, *Legal Services for Prison Inmates,* 1967 WIS. L. REV. 514 (1967).

many indicate dissatisfaction with their attorneys and express specific concern with the presentence report.

The students typically follow up on such issues by reading the transcript of the case, including the sentencing phase, the presentence report, the psychological and social worker's observation about the client, and all other relevant facts of the Division of Corrections' file on the case. When appropriate, the student will communicate with the district attorney and defense attorney concerning the case.

This experience is the basis for the description and analysis which follows. Because concern about the accuracy of the presentence report is commonly expressed by inmates and because of its importance, we gathered some additional data which verified many of our conclusions. An additional set of questions were addressed to all inmates who arrived at Wisconsin correctional institutions in June of 1977. The study was done in June because that was the most convenient time to interview the inmates at length. The purposes of these interviews were to find out how many inmates had a chance to read and discuss the presentence report with their attorneys; whether the attorney, by virtue of discussing the report with the client had the opportunity to raise objections to it; and whether inmates believed their sentences were adversely affected by errors they believed existed in the reports.

In this study, 80 inmates were interviewed intensively about the presentence report. Of these, 44 had presentence reports done prior to sentencing on the conviction for which they were confined. Thirty did not have a presentence investigation; 5 did not know whether one had been done. And for one, there had been a presentence report done, but it was done on another person whose name the inmate gave when he was arrested. The man had pled guilty and been sentenced under the assumed name. That he was not the person the authorities thought he was had not become known by the time of the interview, during the fourth week of confinement. No effort was made to find out what criteria courts used for determining whether to order a presentence investigation.

While the remainder of the information gathered in this survey is set out in the text, it is worth emphasizing that the description and analysis of the Wisconsin practice is based on our overall experience with people who have recently been sentenced to correctional institutions, not just the survey.

II. The Preparation of the Presentence Report and Its Importance

In Wisconsin, the sentencing court has the discretion to direct that a presentence report be prepared.[6] Typically, the report is prepared by an agent of the Bureau of Probation and Parole who is assigned supervision of the offender on probation or, later, on parole.

To gather information for the report, the agent uses a number of sources. He will review the court file in the case, interview the victim, witnesses, offender and the offender's family and review the records of other public agencies including the police department. The report is then written on a standard form, with sections on Court History, Family Background, Personal History, and Agent's Impressions. The report concludes with the recommendation of the agent as to disposition of the case.[7]

The report influences the sentence imposed as well as later correctional and parole treatment in various ways. Courts rely on the basic information in the report at sentencing. The agent's recommendation as to disposition is relied on by sentencing courts to varying degrees. The recommendation includes a judgment as to whether confinement is appropriate, and, if so, for how long. If probation is recommended or considered, suggested conditions of probation are usually included.

The prosecutor often is influenced by the recommendation in the report and the information underlying it. Some prosecutors frequently adopt the report's recommendation as their own recommendation to the court or use it as a benchmark in deciding on their recommendation. Sometimes, a plea agreement will include the condition that the prosecutor will adopt the report's recommendation as his own. Courts often rely on the prosecutor's recommendation.

The report is also important in decisionmaking after sentencing. It becomes part of the offender's correctional file. If the offender is placed on probation, the report influences supervision. It may, as already pointed out, suggest conditions of probation thereby influencing the offender's authority

6. Wis. Stat. § 972.15(1) (1975); *State v. Schilz*, 50 Wis. 2d 395, 184 NW 2d 134 ( ).

7. A full correctional file is reproduced in F. REMINGTON, D. NEWMAN, E. KIMBALL, M. MELLI & H. GOLDSTEIN, CRIMINAL JUSTICE ADMINISTRATION, 1331-1487 (1969).

to drink, travel, drive and associate with family and friends. If the offender is pictured as very irresponsible or suspected of being involved in other criminal activities, it will influence the decision to keep an offender under surveillance. School and job placements, which require the agent's approval, will also be influenced by the report's discussion of the offender's intelligence, interests and habits.

The presentence report also influences correctional decisions if the offender is sentenced to confinement. It affects the security classification of an inmate, which, to a great extent, dictates the institution to which he is assigned. There is a great difference among institutions in Wisconsin, so classification affects the general quality of life, the degree of freedom a person has, and the programs a person may join. These factors affect parole decisionmaking, because most inmates must demonstrate the ability to successfully adjust to the relative freedom of medium and minimum security institutions before they can be paroled. The sooner they are afforded this opportunity, the faster they are released, in general.

The report also directly influences parole decisionmaking. The parole board relies on the report for its description of the crime and the offender.[8] The report along with summaries of the inmate's conduct and progress in the institution and the parole plan—detailing where the inmate will live and work upon release—are used to decide when to release an offender. The factors used to make the parole decision include the offense, facts that existed before the offense, facts that have developed during confinement and plans for the future.

In July 1978, the Wisconsin Parole Board began experimenting with parole decisionmaking guidelines for a limited category of cases.[9] These guidelines, modeled on similar guidelines used in Minnesota and the Federal system, attempt to objectify the parole process by weighting several factors and assigning parole release dates according to the score received by each parole applicant. While it is too early to predict the results of this experiment, it is clear that the presentence report will be used to determine scores. In contrast to the present system, the factors relevant to scoring are all historical, i.e., they occurred before the inmate's sentencing. They include prior felony offenses, previous adult incarceration, previous convictions for offenses against the person, probation or parole revocations, a crime free period before the current offense, employment or school involvement during the 6 months prior to commission of the current offense, and aggravating or mitigating factors related to the offense such as disruptive alcohol abuse, juvenile record, cooperation with the authorities.

Clearly, it is critical that accurate information be used in scoring in such a system, since points are assigned or taken away depending on the presence or absence of the various factors. The final score greatly influences the parole date.

It is apparent from this brief description of the report, present parole practice and the experimental parole guidelines, that there is a shift in emphasis in parole criteria in the experimental system. How this will affect release decisions awaits experience with the guidelines.

III. The Legal Authority to Disclose Presentence Reports

A. Wisconsin and the Model Penal Code.—The relevant statutes in Wisconsin that are concerned with the presentence report are ambiguous. It is not clear whether the statutes authorize disclosure to the client and his attorney or whether the statutes should be read as authorizing the attorney but not client to see the report. Wis. Stat. § 972.15 (1975) provides:

> Presentence investigation. (1) After conviction the court may order a presentence investigation.
>
> (2) When a presentence investigation report has been received the judge shall disclose the contents of the report to the defendant's attorney and the district attorney prior to sentencing. When the defendant is not represented by an attorney, the contents shall be disclosed to the defendant.
>
> (3) The judge may conceal the identity of any person who provided information in the presentence investigation report.
>
> (4) After sentencing, unless otherwise ordered by the court, the presentence investigation report shall be confidential and shall not be made available to any person except upon specific authorization of the court.

This statute provides for the preparation, disclosure and later use of the presentence report. It indicates that the court has the discretion to order a report. The report must be disclosed to the *defendant's attorney* and to the *district attorney,* and to the *defendant if he is without counsel.* The comment of the draftsmen of the statute does not make totally clear whether disclosure to the *represented defendant* is contemplated:

8. Ralph Collins, vice-chairman of the Wisconsin Parole Board stated that the Board, in making parole decisions, relies on the accuracy of the report "because the statute requires lawyers to see it." Speech of Ralph Collins, June 12, 1978, University of Wisconsin Law School.

9. *See* Note 4, *supra.*

> Sub. (2) provides for a disclosure of the contents of the presentence report to the district attorney and the defense. This provision is subject to a great deal of debate nationally. After weighing all factors, the Council believes that the Model Penal Code, s. 7.07(5) provisions are appropriate whereby the contents are disclosed. The judge may, however, conceal the identity of persons who provided information for the report.[10]

The comment is ambiguous because it states that disclosure is to be to "the defense," without specifying whether this includes both counsel and defendant. The Model Penal Code provision,[11] relied on as the model for the Wisconsin Statute, provides for disclosure, not of the report itself, but of its factual contents to "the defendant or his counsel."

The Model Penal Code section and commentary both specifically provide that the defendant may contest the facts disclosed. This is also true in Wisconsin.[12] Since the defendant cannot do so without access to the information, an inference may be drawn that the attorney will share the information with the defendant if he receives the information. The use of the disjunctive, then, in this section of the Model Penal Code is probably for convenience. Neither the Code or the Wisconsin Statutes suggest that disclosure to the defendant is improper.

An additional reason for inferring that disclosure is to be to the defendant through counsel is that, typically, the terms "defense counsel" and "defendant" are used interchangeably in statutes and administrative rules. This is so because the defendant is viewed as acting through counsel. Counsel's authority to act comes from the client and the attorney is required to disclose information to the client to permit the client to make informed decisions. Indeed, it may be a violation of the Code of Professional Responsibility for the lawyer[13] to withhold information like the presentence report from the client, in the absence of a specific, unambiguous statute to that effect.

Upon inquiry, the draftsman of the Wisconsin Statute indicated,[14] however, that his recollection of the drafting committee's intent was that the state provide access to the report to the attorney alone, and not the defendant. He indicated that the assumption was that, in appropriate cases, counsel could get the permission of the court to show the report to the defendant.

The only other relevant statute in Wisconsin, Wis. Stat. § 972.14, provides:

> Statements before sentencing. Before pronouncing sentence, the court shall inquire of the defendant why sentence shall not be pronounced upon him and accord the district attorney, defense counsel and defendant an opportunity to make a statement with respect to any matter relevant to sentence.

This statute permits the defendant to comment "with respect to any matter relevant to sentence." Given the relevance of the presentence report, it can be inferred that comment upon it by the defendant is permitted. If so, it would follow that access to the report is contemplated to give substance to the right of allocution.

Another important point is when access may occur. While Wis. Stat. § 972.15(2) provides for disclosure "prior to sentencing," it does not establish how long before sentencing the report is to be made available. This is crucial, because the report must be available well in advance of the sentencing hearing if it is to be studied carefully by the defense, and if the accuracy of the information is to be checked.

B. The Legal Authority Elsewhere.—The uncertainty about whether the presentence report must be shown to the defendant which characterizes the practice in Wisconsin is common in other jurisdictions. Many jurisdictions have not addressed the issue of disclosure to the defendant at all.[15] Other jurisdictions have addressed the issue through rule-making or legislation, but the rules or statutes do not clearly state whether disclosure to the defendant is permitted.[16] The trend, however, is for statutes to require some form of disclosure of the report.[17]

One approach reflecting this trend which was recommended by the American Bar Association and adopted in the Federal system is to disclose the report to the defendant and his attorney but to permit the court, in its discretion, to withhold certain information. For example, the Federal rule permits withholding information which "might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which

10. WIS. STAT. ANN. § 972.15 (1971).
11. ALI MODEL PENAL CODE § 7.07 (May 1972 draft).
12. WIS. STAT. § 972.14 (1975).
13. ABA SPECIAL COMMITTEE ON EVALUATION OF ETHICAL STANDARDS, CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT, ETHICAL CONSIDERATION 7-7, 7-8, P 32 C (1975).
14. Interview with Francis Croak (April 11, 1978).
15. *See, e.g.,* ARK. STAT. ANN. § 43-2301 (Cum. Supp. 1975).
16. *See:* CAL. PENAL CODE § 1203 (West 1978); COLO. R. CRIM. P. 32(a) (1973) (requiring disclosure only to defense counsel). *See also:* ARIZ. R. CRIM. P. 26.6 (1973); CONN. GEN. STAT. § 54-109 (1975); OKLA. STAT. ANN. W. 22 § 982 (West Supp. 1977-78) (requiring disclosure to the defendant or his attorney). *BW cf.:* ALASKA STAT. § 12.55.075 (Supp. 1977), F.L.A. R. CRIM. PRO. § 3.710 (1973), NEV. REV. STAT. § 176.135, 176.145, 176.156 (1974), (specifically requiring disclosure to the defendant). There is considerable variety in the federal practice, too. *Compare: U.S. v. Woody,* _____ _____ _____ (5th Circuit) and *U.S. v. Fatice,* _____ F. Supp. _____.
17. *Id.*

if disclosed might result in harm, physical or otherwise, to the defendant or other persons."[18]

The Federal rule also states that, with respect to information which should not be disclosed, "the court in lieu of making the report portion thereof available shall state orally or in writing a summary of the factual information contained therein . . . ."[19] This rule has been held to permit a wide range of practice by Federal courts. For example, courts have taken the extreme position of refusing disclosure altogether under the authority granted by this rule.[20] In such situations, it has been suggested that the court may have the responsibility for insuring that the information is accurate.[21] An intermediate position between full and no disclosure is to permit disclosure to counsel only, under order that the information not be disclosed to the defendant.[22]

IV. Description and Analysis of the Practice in Wisconsin

A. Disclosure of Reports to Clients.—A significant number of defendants neither see nor discuss the presentence report with their attorneys before sentencing in Wisconsin. Many inmates who have some access to the report indicate that their access was superficial because it is so limited. Our survey, described at page 5, *infra,* verified what we concluded from extensive interviews with inmates on a range of topics, including access to the report. Of the 44 inmates for whom a report was done, 21 inmates saw, received a copy, or discussed with their attorney the presentence report before sentencing. Twenty-three neither saw, received a copy nor discussed it before sentencing.

Of the 21 inmates who had some access to the report, only 9 had read the report. The remaining 12 had merely discussed it with their attorneys. Often, the discussion is limited to the report's recommendation as to sentencing. It does not include the underlying reasons or other facts in the report. These inmates also typically had not seen the report; their access was limited to what their attorneys told them about it and this was often limited to the sentence recommendation.

Many inmates who read the report explain that their access was superficial because there was insufficient time to review it thoroughly. Most inmates see the report on the day of sentencing. This discussion usually occurs minutes before sentencing. The defendant sees it when he is brought to court from the county jail for sentencing or comes for the sentencing hearing, if he was released on bail. Usually, the copy filed with the court is the only one available to the defense. Typical of the comments of the nine men who had read the report was that of the man who remarked that his "attorney showed me a copy in the bullpen right before my case was on."[23]

The practice of not providing clients with access to the presentence report would not be so troubling if lawyers independently verified the facts in the reports, prepared their own presentence report or assisted in the preparation of the official report. The transcripts of sentencing hearings and discussions with inmates reveal that lawyers typically do none of these things. Indeed, lawyers themselves often read the report on the day of the sentencing hearing. This "reading" itself often consists of reading only the recommendation of the person who prepared the report. In many cases, the report is not available to the defense lawyer, the court and the prosecutor until shortly before sentencing because it is not completed sooner.

B. Types of Misleading Information in Reports.—There is misleading information in presentence reports with sufficient frequency to cause concern about the general adequacy of the reports. The term "misleading information" is used guardedly and includes: (1) rumors and suspicions that are reported without any factual explanation; (2) incomplete explanations of events that leave a misleading impression; (3) factual errors relating, usually, to the criminal record of the offender.

Rumors and suspicions are often reported in presentence reports and identified as such. The report that the rumor exists may be accurate. What is objectionable is the fact that the subject of the rumor may cause the reader to give more weight to the rumor than it deserves, if any. If the rumor is without foundation, reference to it is particularly troubling.

It is difficult to assess the impact of rumors, though they sometimes seem to directly affect correctional decisions. For example, one sex offender's presentence report contained the statement that the offender "was rumored to have killed his mother." This was referred to in several parole decisions before it was investigated. Upon

18. FED. R. CRIM. P. 32(c)(3).
19. *Id.*
20. *United States v. Long,* 411 F. Supp. 1203, 1206 (1976).
21. *Id.* at 1207.
22. *Id.*
23. The bullpen is a large cage-like structure in which defendants are held immediately before they appear in court.

inquiry, it was determined to the satisfaction of the parole board that the offender had been confined in another state at the time of his mother's death and had no connection to it.[24]

Some reports do not contain complete information and are therefore misleading. One inmate's report contained the statement that he "had been arrested for attempted first degree murder after a barfight. The charges were later dropped." Investigation showed that the reason the charges were dropped was that the inmate was actually the victim of an attack and not the aggressor. The other person involved was later charged with a crime for the attack.

The statement in the report suggests that the offender is aggressive and assaultive. The facts which suggest this are misleading and do not support this conclusion in the light of the further information developed.

The most frequently recurring factual problem with the reports is related to past offenses. The so-called "FBI Rap Sheet" or "Yellow Sheet" is part of the report. It contains a confounding listing of past offenses that is frequently repetitious, i.e., it reports the same offense more than once. The repetitions are not so identified.* Past charges do not always contain their disposition, so the reader is never sure how many offenses there actually were, which were dropped and why, what the facts underlying the charges and offenses are, and what the outcome was.

It is difficult to evaluate the past record of the offender based on the "Rap Sheet." A reader is often impressed by the length of it, which may in fact mean nothing. It is troubling to realize that past criminal record will be a weighted factor in determining the parole date under the Wisconsin guidelines, given the misleading nature of the "Rap Sheet." Presumably, a more reliable method for assessing the criminal record of the offender will be devised. Under the guidelines, felony offenses will be weighed with only little attention to their severity. This itself may be misleading, given the fact that "felony" may refer to conduct of varying seriousness.

Assessing the frequency and effect of misleading and inaccurate information such as in the illustrations is difficult. Errors are not frequently brought to the attention of sentencing courts, correctional and parole authorities by lawyers. None of these groups give detailed reasons for their decisions, so it is difficult to determine the extent to which inaccurate information is relied on. Acquiring this information would require a careful examination of the report, investigation of its accuracy, and interviews with sentencing, correctional and parole authorities.

While our experience in investigating the accuracy of the reports and the extent to which inaccurate and misleading information is relied on in individual cases reveals a troubling pattern of error and reliance, no effort has been made to determine how frequently such errors and reliance occur. The seriousness of the problem may depend upon one's point of view. While a so-called objective observer might decide that there is a level at which erroneous decisionmaking is acceptable, the individual offender whose sentence is increased because of such an error is unlikely to be so tolerant. Viewed from the perspective of the offender, every error is intolerable because it is thought to have adverse consequences. So, there is great value in assessing the significance of errors not only from the so-called objective point of view, but also from the point of view of those affected by the error.

To be sure, there are errors in reports that are unrelated to correctional and parole decisionmaking. Many such errors bother inmates and for this reason, perhaps, should be of concern. The most prevalent such error is a mistake about the inmate's family history. For example, there are sometmes errors about the number of siblings an offender has or the exact relationship to them. A half-brother is called a full brother in the report and the inmate may be upset at this if he does not get along with the sibling. Such mistakes have no apparent effect on correctional decisions.

C. Inmate's Attitudes to Misleading Information.—The overall impression of inmates regarding the accuracy of the presentence report and the effect of misleading information on sentence can be characterized as "confused." Whether they had access to the report or not, many inmates believe there were errors in the report which have adverse effects on sentence.

These impressions are formed in a variety of ways. Typically, inmates reach the conclusion because of something said by the judge, prosecutor or defense attorney at sentencing. From such statements they infer an error in the report whether the report is the basis for the statement

24. The Wisconsin Supreme Court has stated, in dicta, that the failure to object to the consideration of information which the sentencing court ought not consider constitutes a waiver of the right to have such information excluded. *Hammill v. State*, 52 Wis. 2d 118, 187 NW 2d 792 (1971).

*Ed. note: In the Federal system any such repetitions are to be collapsed, & there is to be only 1 entry for each arrest.

or not. Sometimes, inmates form their impression from discussions with other inmates about the unreliability of reports in general. Or the inmate may later discuss his background with a social worker and learn that the inmate's version of the facts are inconsistent with the report.

Because facts inmates believe to be inaccurate in the report are discussed at sentencing, they often infer that the alleged errors affected their sentences. Sometimes, after inmates have had experience in the institution and with the parole board, they conclude the errors affect their institutional treatment and parole decisions.

Few inmates feel that errors in the report are corrected. This conclusion is usually based on their institutional experience or their impression of the sentencing hearing.

Of the 21 inmates who saw, received a copy or discussed the report with their attorney, 8 believed there was an error in it; 6 thought there were no errors; and 7 did not know if there were errors, even though they had either received or seen a copy or discussed the report with their attorney.

Several inmates made tongue-in-cheek remarks to the effect that, at sentencing, they thought the judge was talking about someone else. By this they meant that the court's impression of them was at great variance with their self-image.

Several inmates also remarked that the court's impression of their family life was at variance with their own impression. Further discussion indicated that in some of these cases the court viewed the inmate's family life stable and close and the inmate thought the opposite; others state that their family was close but that the court thought otherwise.

Of those inmates who had no opportunity to see the report or discuss it with their attorney, 6 thought there were errors in the report which had an adverse effect on sentence; one inmate thought there was an error which did not affect his sentence and 12 inmates did not know if there were errors.

Many inmates remarked bitterly that their attorneys did nothing to correct such misimpressions.

D. Correction of the Report.—All of the inmates who believed there were errors in the report which adversely affected sentence also believed that those errors went uncorrected at the sentencing hearing. This belief is often based on the fact that the alleged error went unchallenged or, if challenged, no clear finding as to its truth was made. If the alleged error was challenged and found to be true, the adverse finding is not always accepted by the inmate and the error is viewed as uncorrected.

Even when an alleged error is challenged at sentencing and a contrary finding made, it does not necessarily follow that the report will be corrected. When a judge makes a finding of fact that is inconsistent with the presentence report, he usually states the finding in the record of the sentencing hearing. Without more, this leaves the report itself uncorrected. The sentencing transcript is not made a part of the report; it is not attached to it. The oral finding does not signal anyone to amend the report or any of the copies of it. Subsequent users of the report, correctional and parole authorities, rely on the uncorrected report. Rarely is the report amended to reflect additional information or findings of fact inconsistent with it at sentencing.

For example, one young inmate stated that the sentencing court had stated, at sentencing, that there was an error in the report. Further inquiry revealed that the judge had said that the presentence report's characterization of the man's family life as unstable and an unsuitable place for the man to return to upon release was incorrect. The judge said he personally had known the family for years; that it was a stable, secure family; and that, contrary to the report, the young offender's father was not an alcoholic.

The young man said that his social worker at the prison, based on the report, had counseled him to seek a parole plan that would call for him to live away from home. Upon inquiry, the social worker indicated he was unaware of the judge's contrary view of the man's home life. The sentencing transcript had not been made part of the inmate's correctional file, nor the report amended to include the court's view.

The only situations in which the correct information is brought to subsequent user's attention are fortuitous. In Wisconsin, an inmate's correctional file usually contains a transcript of the reasons given by the court for the sentence that is imposed. Occasionally, this transcript page is the one which also reproduces the judge's remarks regarding the accuracy of the presentence report. If so, the judge's correction of the report is in the correctional file. This is fortuitous because the board typically does not examine the whole sentencing transcript, but only the

page on which the judge pronounced sentence. More often than not, any corrections are on a transcript page not part of the file and are, therefore, not known to the board.

Occasionally, an inmate will tell a prison social worker that the report was corrected by the sentencing court. This usually is prompted by an assertion made by the social worker or parole agent based on the report which the inmate knows is untrue and which was "corrected" by the sentencing court. Or, if the social worker or parole agent reveals the report to the inmate, the inmate may point out that there are errors in it. When this happens, the social worker or agent usually will include the inmate's version of the facts in his case summary. The report itself is not altered, but the inmate's version does become part of the file.

E. Sense of Unfairness.—Many correctional inmates feel a sense of injustice about the way they were treated in the criminal justice process. Correctional inmates commonly direct their bitterness and frustration toward the sentencing process in general and toward the presentence report and their attorney in particular.[25]

The common perception that the presentence report is inaccurate and that the inaccuracies affected the sentence imposed is a primary source of frustration. A related concern, voiced frequently after the inmate has been confined for awhile, is that the inaccuracies affect correctional treatment and parole release decisions.

To be sure, the presentence report is relied on by correctional officials in making security classifications and program decisions. It is relied on by the parole board for its "picture" of the offender and is of crucial importance in parole release decisions. Many inmates feel that these decisions are made on the basis of inaccurate reports and that they are thereby affected adversely.

Another source of the sense of injustice is the belief that lawyers do not provide the court with positive information about the offender to supplement the presentence report which, it is frequently asserted, is incomplete. Sophisticated defendants realize that even the most forceful statements, if they are general, are of little value to their case. They recognize the importance of presenting the court with alternatives to confinement (i.e., job or school plan, place to live) if probation is sought or a specific statement of plans after release if a short period of confinement is the goal. These defendants are usually dissatisfied because they feel the court is forced to rely on an incomplete report because their lawyer did not provide the additional information.

Inmates who do not have access to the report do not complain that their lawyer did not show them the report, at least during the early days of confinement. This is explained by the fact that they believe they are not permitted to read the report. Many inmates wish to see the report, but do not consider disclosure to be their attorney's responsibility. Later, when inmates learn from others that the report was available to some and that their attorneys' conduct was at variance with that of others, they feel they were treated unfairly.

A goal of the criminal justice process should not only be fairness, but the perception by defendants that they were treated justly. The failure of lawyers to share the report with the client fosters the belief of inmates that the report is inaccurate and contributes to the feeling of injustice, so common among correctional inmates. Such feelings reinforce what many believe and want to believe about the system and, in the minds of some, justifies resistance to the correctional process.

V. Responses to the Problem

A. Legislative.—One reason why lawyers do not disclose the presentence report to their clients is the unfortunate ambiguity in the Wisconsin statute on disclosure. Legislative attention to the ambiguity is required.

Given present practice, it is unlikely that disclosure can be an effective check on errors in the report unless the subject of the report can examine it. The subject is in a far better position to identify errors and to elaborate on facts in the report than anyone else, since the report is about him. Furthermore, it is unlikely that the process will be a fair one or that subjects of the report will believe it to be fair unless they can read the report.

To urge disclosure to the defendant is not to argue that accuracy of the report is the only relevant value at stake. Other important considerations have been more than adequately discussed elsewhere.[26] However, if fairness through disclosure is the goal, it is important that dis-

25. I have dealt with the responsibility of the lawyer at sentencing more comprehensively in Dickey and Schultz, *The Role of the Lawyer at Sentencing*, unpublished draft manuscript, January 28, 1978. *See also*, Note 5A, *infra*.

26. *See* Note 3, *infra*.

closure be adequate to insure that fairness is indeed achieved.

Another matter that deserves legislative attention is the time of disclosure.[27] If defense attorneys and prosecutors are going to have adequate time to prepare for sentencing, they need to see the report well in advance of sentencing. While lawyers can seek continuances if they have not had time to examine the report, this is an unsatisfactory method for dealing with the issue of the report's availability.

Finally, the legislature should require a specific procedure whereby all copies of the presentence report are amended to reflect both contrary and additional findings of fact by the court. It is essential that correctional and parole authorities have accurate facts upon which to base their decision.

B. Lawyers' Responsibility.—Lawyers have failed to give the presentence report the attention it deserves. In part, this practice of lawyers results from an unfortunate ambiguity in Wisconsin law which seems to forbid disclosure to the client. In part, the Wisconsin practice also reflects an unawareness by the lawyer of the importance of the report to his client who is placed under probation supervision or who is sentenced to confinement.

The Wisconsin practice also reflects a continuing ambivalence on the part of lawyers as to precisely what function they are supposed to serve at the sentencing stage. Despite the fact that the plea of guilty resolves the issue of guilt or innocence in most criminal cases and that sentencing remains of great concern, many lawyers do not view sentencing as important as the adjudication of guilt or innocence. They view sentencing as a social work decision, rather than a process at which the client is greatly affected and at which he can be helped by careful preparation and advocacy.

The failure of the lawyer to share important information in the presentence report with the client raises an important question about the responsibility of lawyer to client. Can a lawyer properly fail to provide information to the client that so directly bears on what happens to the client?

Two ethical considerations in the Code of Professional Responsibility are relevant. Ethical Consideration 7-7[28] provides in part:

> In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. *But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer.* (Emphasis added)

Ethical Consideration 7-8[29] provides in part:

> A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. *A lawyer ought to initiate this decisionmaking process if the client does not do so.* (Emphasis added)

Given the importance of the presentence report to the client, the failure to reveal it to the client and discuss it with him would be contrary to these ethical considerations. For the lawyer to withhold the report would be to usurp the authority of the client to know facts which bear substantially upon decisions about sentence that are for the client to make. For example, an informed decision whether to seek alternative dispositions to confinement cannot be made without access to the report. The client is also entitled to make decisions about the accuracy of the report and how the report should be responded to at sentencing.

Ethical Consideration 7-8 gives the lawyer the affirmative responsibility to inform the client of the report and to initiate the decisionmaking process. The presentence report is clearly relevant to sentencing and correctional decisions that affect the client. The fact that the client does not assert his desire to be involved in decisionmaking regarding sentence does not excuse the lawyer from initiating the process.

It is apparent that the current practice of many lawyers at sentencing in Wisconsin is not in accord with the standard set forth in the Code of Professional Responsibility and does not give adequate emphasis to meeting the needs of the clients who are so affected by the presentence report.

C. Questions Which Remain.—Before there can be comprehensive legislation and professional responses to the issue of disclosure of presentence reports, several questions require attention. Many people sentenced to confinement are sentenced without a presentence report having been prepared. In our survey, 30 of the 80 inmates inter-

27. *See, e.g.,*: CAL. PENAL CODE § 1203 (West 1978) (requiring disclosure nine days prior to sentencing hearing), ARIZ. R. CRIM. P. 26.6 (1973) (requiring disclosure two days prior to sentencing).

28. ABA SPECIAL COMMITTEE ON EVALUATION OF ETHICAL STANDARDS, CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT 32c (1975).

29. *Id.*

viewed revealed that no presentence report was prepared in the case for which they were confined. It would be helpful to know why this is so; whether a presentence report should be required in every case; and, if not, in what specific cases a report ought to be required. Is the absence of a report due to the fact that a presentence report was recently prepared on the same defendant? Because the offender is well known to the court? Is it because the nature of the offense made confinement or probation inevitable? How, if at all, does the lack of report affect the sentence imposed?

It would also be useful to know the effect on correctional and release decisions of not having a presentence report. If the information in it is necessary for correctional and parole decisions, how is this information obtained when there is no report? If the information is gathered at the institution, is its accuracy affected? Is a prison social worker, perhaps without contacts and reliable sources in the community, likely to obtain comprehensive and accurate information about the client? Are parole and treatment decisions affected by the lack of a report?

The answers to these questions would help resolve the issue of whether a report should be required in every case. They would also enable the legislature to identify the circumstances in which a report is not required.

It would be useful to explore other methods of insuring accuracy. While disclosure surely serves the value of fairness, there may need to be additional safeguards to insure accuracy, since the inmate may not necessarily know or reveal a discrepancy between the report and the truth. Perhaps most importantly, more should be known about possible errors in the presentence reports. At present the practice of lawyers is not sufficiently developed to discover errors, though inmates believe they are common. The discovery of how extensive errors may be and judgments about the quality and comprehensiveness of the reports awaits disclosure to the clients in a way that insures a check on the accuracy of reports or some other check on the accuracy of the reports.

Conclusion

There is increasing awareness of the importance of sentencing in the criminal justice process. Yet insufficient attention is given to insuring that the presentence report, central to sentencing and correctional decisionmaking, is adequate and accurate. A significant number of Wisconsin lawyers neither read the report nor share it with their clients, who are affected by it. The practice of many lawyers, then, does not insure that the report is accurate. Many clients believe the reports inaccurate and that they adversely affect sentence and correctional treatment. Even when findings are made by courts that are inconsistent with the information in the presentence report, the report is not always corrected to prevent future reliance on erroneous information. Not surprisingly, many defendants are dismayed and frustrated by this process.

Attention needs to be given by the Wisconsin legislature and the appropriate rulemaking and law making bodies of other jurisdictions to disclosure of the presentence report to the subjects of the reports. The lack of disclosure in Wisconsin is in part explained by an unfortunate ambiguity in the relevant statute. This ambiguity is characteristic of many jurisdictions and there is reason to believe that the practice of lawyers with regard to disclosure in Wisconsin is duplicated in other states. Another reason for the lack of disclosure is confusion among lawyers about their responsibility at sentencing. This confusion reflects unawareness of the importance of the report to the client and raises an important question about the responsibility of the lawyer to the client, particularly whether the lawyer can properly fail to disclose the report to the client. The Code of Professional Responsibility and good practice suggests that disclosure is necessary.

Finally, several important questions still remain. It would be helpful to know whether presentence reports should be required in all cases and whether complete disclosure is desirable. When there is more experience with disclosure to clients, it will be possible to assess the effects on the preparation of the reports, their accuracy and the benefits and costs of disclosure.

THE presentence investigation has always been the basic working document of the probationary process, dealing with lives and liberties of human beings and presenting the courts with information that ultimately determines the destiny of offenders.—ARTHUR SPICA

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