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All phases of preventive and correctional activities in delinquency and crime come within the fields of interest of FEDERAL PROBATION. The Quarterly wishes to share with its readers all constructively worthwhile points of view and welcomes the contributions of those engaged in the study of juvenile and adult offenders. Federal, state, and local organizations, institutions, and agencies—both public and private—are invited to submit any significant experience and findings related to the prevention and control of delinquency and crime.

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This Issue in Brief

Disclosure of Presentence Reports in the United States District Courts.—This article is a summary by Philip L. Dubois of a report prepared by Stephen A. Fennoll and William N. Hall under contract with the Federal Judicial Center. The author states that, on the one hand, it does appear that a large proportion of Federal districts have achieved disclosure of presentence report in a large proportion of their criminal cases. On the other hand, he adds, although the high rate of disclosure is a positive step, many districts utilize practices that limit the effectiveness of such disclosure.

Prosecutive Trends and Their Impact on the Presentence Report.—With Federal prosecutors launching aggressive prosecutions against white-collar criminals, narcotics trafficers, corrupt public servants, and organized crime racketeers, probation officers find they need significant enhancement of their investigation and reporting skills, assert Harry Joe Jaffe and Calvin Cunningham, U.S. probation officers in Memphis, Tenn. For these offenders, a presentence writer can prepare a useful presentencing document by concentrating chiefly upon three significant areas: the official version section, the financial section, and the evaluative summary.

The Right To Vote as Applied to Ex-Felons.—While rights are intimately connected to duties, laws disenfranchising ex-felons show that correlations between the two are often drawn imprecisely, writes Professor John R. Vile. While voting is a fundamental right, the Supreme Court has refused to void felony disenfranchising legislation, he reports. The Court's action is normatively questionable, he maintains, especially when applied to those whose incarceration has ended.

Action Methods for the Criminal Justice System.—Dale Richard Buchanan, chief of the Psychodrama Section at Saint Elizabeths Hospital in Washington, D.C., tells us that while role training, role playing, and psychodrama have been extensively used in the criminal justice system, there has been a lack of coordination among these terms and in the ways in which they were used. Action methods will probably continue to gain greater use within the criminal justice field, he asserts, because of their direct applicability to the jobs that are needed to be performed by criminal justice personnel.

Administrators' Perception of the Impact of Probation and Parole Employee Unionization.—This article by Professor Charles L. Johnson and Barry D. Smith presents information from a recent survey on the incidence of parole/probation unionization

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and administrators' perceptions of the impact of unionization on the quality, cost, and difficulty of administering services. Some of the critical issues emanating from the increased parole/probation unionization are delineated and discussed as they are reflected in the literature and as a result of the survey.

Highlights, Problems, and Accomplishments of Corrections in the Asian and Pacific Region.—The Australian Institute of Criminology recently organized the First Conference of Correctional Administrators for Asia and the Pacific, which was well attended and prepared the ground for joint action. Already this has resulted in the collection of data on imprisonment, some of which are provided in this article by W. Clifford, director of the Institute. In this very broad survey, some of the problems of corrections in the region—and some of the approaches which are different from those in the West—are highlighted.

The Demise of Wisconsin's Contract Parole Program.— This article discusses the elimination of an innovative method of paroling criminal offenders in Wisconsin. The State abolished its creative Mutual Agreement Program because budget analysts deemed the program to be an ineffective method of paroling offenders when compared to the traditional method of parole decisionmaking. Although this program has been eliminated, Wisconsin Parole Board Member Oscar D. Shade says it is conceivable that contract parole is workable and could prove to be a most effective means of managing an offender's parolability.

Juvenile Detention Administration: Managing a Political Time Bomb.—Administering a juvenile detention center is one of the most difficult and frustrating jobs in the juvenile justice field, asserts Youth Services Consultant Robert C. Kihm. Although it is clearly stipulated in idealistic terms how children ought to be cared for while in state custody, the detention administrator must deal with the reality of providing care with very limited resources and little control over who is admitted and discharged from the facility, he states. This article examines how these contradictions proved the demise of four detention administrators' careers, and what lessons can be gained by current administrators facing similar problems.

Parent Orientation Program.—Juveniles paroled from a correctional institution are faced with readjustment problems. Community resources are limited and families poorly equipped to offer assistance. To increase the effectiveness of families as resource people, the author, Serge W. Gremmo, has developed the Parent Orientation Program (POP) which orients families toward potential problems in the parole adjustment of their children, acquaints them with the mechanics of parole, disseminates information to assist juveniles during reintegration, and lends support during a difficult period.

Crisis Intervention in a Community-Based Correctional Setting.—Despite their widespread use in other practice settings, crisis-intervention theory and techniques have been woefully underutilized in community-based correctional agencies. This article by New York City Probation Officer Margaret R. Savarese is an attempt to help remedy that situation by presenting an overview of crisis theory and techniques and then illustrating their application at a particular crisis point in the criminal justice system—the point of sentencing—via two actual case situations.

Disclosure of Presentence Reports in the United States District Courts*

BY PHILIP L. DUBOIS

Department of Political Science, University of California, Davis

THE AMERICAN system of criminal justice has long been dominated by the premise that criminal offenders can be rehabilitated. Although this premise has been recently challenged by those who emphasize the deterrent or retributive functions of punishmont, the rehabilitative objective of criminal sentencing has presumed that a sentencing judge, armed with detailed knowledge and clinical evaluations of the offender's character and background, can determine an appropriate "individualized" sentence and treatment program that is tailored to the offender's character, social history, and potential for recidivism, and that will address the underlying psychological or sociological abnormality or malfunction leading to the offender's criminal behavior.[1]

To prescribe an individualized sentence that will meet these rehabilitative goals, the judge must have complete information about every aspect of the offender's life. The major vehicle for collecting and conveying this information to the sentencing judge is the presentence investigation report.[2] Standardized into Federal practice in 1946 by the enactment of rule 32(c) of the Federal Rules of Criminal Procedure,[3] a presentence report must be prepared by a probation officer in every case unless the court directs otherwise. Generally, unless the court finds that the record alone contains sufficient information and explains this finding on the record, or the defendant waives this presentence investigation with the court's permission,[4] the probation office must make a presentence investigation and report to the court prior to imposition of a sentence. Although most Federal probation offices do not initiate presentence investigations until after the defendant is convicted or enters a guilty plea, some do begin the investigation earlier.[5] Regardless of when the investigation is initiated, however, the report cannot be submitted to the court or disclosed to anyone else until after the defendant's guilt is adjudged unless the defendant gives written consent allowing the judge to inspect the report at any time.[6]. . .

For many years both judges and probation officers strongly opposed proposals calling for mandatory disclosure to the defendant of the information contained in presentence reports, a reform that advocates claimed was necessary to guarantee accuracy and reliability of information being provided to sentencing courts. Opponents argued that disclosure would inhibit sources of information who required anonymity, allow numerous challenges to the report and thus significantly delay sentencing proceedings, and impair the rehabilitative process by jeopardizing the probationer's rolationship with his probation officer.[7]

Proponents of disclosure, however, continued to voice their concern for the reliability of presentence reports. Districts practicing full disclosure reported that their practice did not adversely affect quality and completeness of presentence reports, impair integrity of the sentencing process, or retard rehabilitative efforts.[8] A 1966 revision of the Rules of Criminal Procedure did serve to codify what was then the informal practice of allowing judges to exercise their discretion concerning disclosure of the presentence report to the defense,[9] but there was at the same time a growing dissatisfaction with the widely

*This article is a summary of a report prepared by Stephen A. Fennell and William N. Hall under a contract with the Federal Judicial Center.

Another article based on the same report is Fennel & Hall, "Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in the Federal Courts," *Harvard Law Review*, Vol. 93, No. 8, 1980, p. 1613. The present article is generally more abbreviated; it also omits material on the history of disclosure of presentence reports, legal and constitutional issues, and disclosure to third parties.

The selection and presentation of material to be included in the summary are the responsibility of the present author. The opinions and conclusions expressed are those of the original investigators and do not represent statements of policy of the Judicial Center or its Board.

1 *See* Frankel, *Lawlessness in Sentencing*, 41 U. Cin. L.Rev. 1, 51, 54 (1972).
2 *See* Administrative Office of the U.S. Courts, Pub. No. 105, *The Presentence Investigation Report* 1 (1976).
3 The legislative history and judicial development of rule 32(c) is extensively considered by Fennell and Hall in the *Harvard Law Review* article mentioned in the asterisk footnote.
4 Fed. R. Crim. P. 32(c)(1).
5 See the discussion of the timing of presentence report disclosures at pp. 21-23 of the Fennell and Hall report mentioned in the first sentence of the asterisk footnote.
6 Fed. R. Crim. P. 32(c)(1).
7 *See, e.g.*, Hincke, *In Opposition to Rule 34(c)(2): Proposed Federal Rule of Criminal Procedure*, 8 Fed. Probation, 3 (Oct.-Dec. 1944).
8 *See* Thomsen, *Confidentiality of the Presentence Report: A Middle Position*, 28 Fed. Probation 8, 9 (March, 1964).
9 Fed. R. Crim. P. 32(c) as amended in 1966.

disparate disclosure practices of the Federal courts.[10] By 1975, the concern expressed for the accuracy and reliability of presentence reports had gained recognition equal to the long-held concern for completeness. The result was a sophisticated compromise of these competing interests, embodied in the adoption of rule 32(c)(3). The rule furthers the interest in the reliability of presentence reports by requiring disclosure of the factual sections of the report to either the defendant or his attorney upon request. The defense is thus afforded the opportunity to bring to the judge's attention and to comment upon information it considers inaccurate, incomplete, or otherwise misleading. On the other hand, the interest in the completeness of presentence information is protected by certain exceptions to disclosure in rule 32(c)(3). These exceptions provide that the sentencing judge need not disclose those parts of the presentence report containing diagnostic information that could disrupt a rehabilitation program, identify sources of information obtained upon a promise of confidentiality, or information that, if disclosed, might result in physical or other harm to other persons. If the judge relies upon any of this undisclosed information in making a determination of sentence the rule requires providing a written or oral summary of that information to the defense. The probation officer's recommendation need neither be disclosed to nor summarized for the defense.

Despite the compromise in rule 32(c)(3), debate over the proper amount of disclosure of presentence reports did not end. The rule gives district court judges great flexibility and considerable discretion in determining the appropriate time and place of disclosure, the proper party to inspect the report, the applicability of disclosure exceptions and the corresponding requirement for summarization of nondisclosed information, and the correct procedure for receiving defense commentary. Because of this flexibility, Federal judges have often adopted disclosure practices to fit their individual sentencing procedures. Further, although disclosure is the controlling principle of rule 32(c)(3), discretion allowed by the rule enables some courts to withhold a significant amount of information from the defense by broadly construing the exceptions to disclosure.

To determine the extent of this problem and to assess the actual merits of the criticisms that have been leveled against disclosure, the Committee on the Administration of the Probation System of the Judicial Conference of the United States asked the Federal Judicial Center to study the implementation of rule 32(c)(3). The study relied upon information gathered through a national field study involving personal interviews with Federal judges and probation officials in 20 district courts[11] as well as an analysis of responses to three separate sets of questionnaires sent to randomly selected judges,[12] all chief probation officers,[13] and randomly selected line probation officers.[14] The field study and the questionnaire inquiries covered a broad range of procedural and substantive issues related to the disclosure, contents, and use of presentence reports in the sentencing and correctional processes. . . .

Presentence Disclosure Procedures

The 1975 amendments to rule 32(c)(3) rest on belief that the defendant's right to be sentenced upon accurate and reliable information is most effectively protected by availability of the presentence report to the defense for study and review. The data from this study reveal that the vast majority of districts surveyed (76 of 90, or 84.4 percent) have achieved disclosure of at least half of the presentence reports filed in their courts, three-fourths of the districts (67 of 90) secure disclosure in 75 percent of their cases, and an impressive two-thirds of the districts (62 of 90) disclose nearly all of their presentence reports.

On the other hand, the survey results have identified some deficiencies existing in the procedures by which the defense is allowed access to the report. Two of the most important factors affecting the defense's ability to make use of disclosure are the timing of the disclosure and whether the defendant is allowed and encouraged to review the presentence report with his counsel. Of the 76 districts achieving "full" or "substantial" disclosure,[15] only 28 (or 37 percent) regularly disclose the report prior to the date of sentencing. And in only 23 (or 30.3 percent) of these districts does the defendant regularly have the opportunity

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10 Several individual and institutional commentators continued to recommend the adoption of a mandatory rule or a court finding of a constitutional right to disclosure of presentence reports. *See, e.g., ABA Standards Sentencing Alternatives and Procedures* §4.4 (Approved Draft, 1968); Cohen, *Sentencing, Probation and the Rehabilitative Ideal*, 47 Tex. L. Rev. 11 22 (1968).

11 The field research was concentrated in the eastern and southeastern areas of the United States, but included visits to representative districts in the midwestern, southwestern and western regions of the country.

12 Of the 193 Federal judges receiving questionnaires, responses were received from 174. After elimination of 20 judges who had handled fewer than 12 criminal cases in the past year, the study was left with a useable sample of 154 judges; 53 of the original sample of 193 judges were not selected randomly but specifically in order to assure a response from at least one judge in each district court. In this way it was possible to describe judicial practices with respect to the disclosure of presentence reports on a district-by-district basis.

13 Of the 94 chief probation officers in the Federal district courts, responses to the questionnaire inquiry were received from all but 2; all 92 responses were useable.

14 A total of 248 line probation officers were sent questionnaires. Of the 220 responses received, 6 were eliminated as incomplete and 52 were eliminated from those probation officers who had written fewer than 12 presentence reports in the past year. In all, 162 useable questionnaires were left for analysis.

15 "Full" disclosure means that disclosure is automatic or requests are received in over 90 percent of the cases. "Substantial" disclosure means that disclosure requests are required and received in from 60 percent to 89.9 percent of the cases.

to review the contents of the report about him. Only 13 districts (17.1 percent) achieve "full" or "substantial" disclosure to both defendant and counsel prior to the day of sentencing.

Other procedures used in the Federal districts also combine to impede the effective review by the defense of the presentence reports. Insistence that counsel merely take notes from a report rather than obtain a full copy increases the chances that erroneous items of information about the defendant, his background, or the circumstances of the offense, will go unnoticed and unchallenged.

Optimal disclosure of presentence reports would utilize an automatic disclosure procedure, provide formal notice of their availability at least one day prior to the sentencing date, and allow their reproduction and distribution by mail or inspection in the probation office. Unfortunately, these optimal conditions are met in only 14 districts.[16]

Confidentiality Exceptions to Full Disclosure

One of the concerns accompanying the adoption of the 1975 amendments to rule 32(c)(3) was that the disclosure requirements would deter the communication of important information from individuals fearing retribution or reprisal should their identity become known to the defendant or others who might do them harm. To ensure that the courts will obtain the widest possible range of information relevant to the task of sentencing, rule 32(c)(3)(A) allows several exceptions to full disclosure. Under these exceptions, only partial disclosure of the presentence report is required when it contains factual information that could cause harm to the defendant or others, or when it contains diagnostic opinion that may, if disclosed, seriously disrupt rehabilitative programs. Rule 32(c)(3)(B) requires the judge to provide either an oral or written summary of any excepted material that is relied upon in sentencing a defendant.

During the development of these exceptions to full disclosure, many commentators expressed concern over the amount of discretion vested in probation officers and sentencing judges with respect to determining the applicability of the exceptions to each case.[17] Some objected to allowing probation officers to promise confidentiality with no administrative review of its necessity. Others feared judges might virtually circumvent disclosure through a broad use of the exceptions and perhaps even avoid the requirement of a written summary by disclaiming their reliance upon the excepted information in reaching sentencing decisions. In sum, the existence of exceptions to the principle of full presentence disclosure prompts a number of inquiries concerning the frequency of their use, the types of information typically excepted for confidentiality, the existence and effectiveness of external checks upon probation officers' disclosure decisions, the appropriateness of various methods by which confidential information is conveyed to the judge, and the response by judges to the requirement of summaries.

Rate of Confidentiality.—To estimate the frequency with which Federal district courts treat presentence information as confidential, a nationwide random sample of 162 line probation officers and all the probation officers in seven of the field study districts were asked to estimate both the number of their reports during 1977 containing confidential information and the number of times in their four most recent reports that confidential information was submitted to the court.[18] Additionally, during the field visits to 14 districts, all presentence reports filed over a 2-month period were inspected to determine the frequency of disclosure exceptions under rule 32(c)(3). These estimation techniques consistently showed that from 14 percent to 18 percent of the presentence reports contain confidential information. Perhaps more importantly, however, data from the probation officer's questionnaire suggests that the officers do not call upon the exceptions of rule 32(c)(3) with equal frequency. In fact, 40 percent of the probation officers surveyed did not submit confidential information at all, while only 27.9 percent of the officers accounted for 84 percent of the reports in which confidentiality occurred.

This great disparity in the use of confidential information is confirmed by the response of chief probation officers and a random sample of judges to questionnaire inquiries on the extent of confidentiality in their courts. Both surveys consistently indicated that 79 percent of the judges receive confidential information in less than 10

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16 The tabulation in the text is an approximation based upon the responses of chief probation officers to four questions included in the questionnaire they completed for this study. These questions inquired of the CPOs whether *all* of the judges of their particular courts: (a) initiate disclosure of the presentence report automatically or require a defense request to initiate disclosure; (b) provide the defense with formal written or oral notice of the report's availability; (c) disclose the report in the probation office or transmit it by mail (as opposed to disclosure in the courtroom or the judge's chambers); and (d) make the report available to the defense at least one day before sentencing. Thus, only in 14 districts do *all* of the judges employ *all 4* of these procedures designed to maximize the opportunities for the defense to engage in a meaningful review of presentence reports.

17 See, Coffee, *The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice*, 73 Mich. L.Rev. 1361, 1424-25 (1975); Note, *Disclosure of Presentence Reports in Federal Court: Due Process and Judicial Discretion*, 28 Hastings L.J. 1527, 1548-1550 (1976).

18 Confidential information was defined as "any psychiatric diagnosis, factual information or allegation conveyed or the existence of which is made known to the judge but which is subject to more limited disclosure than information contained in the body of the presentence report."

percent of their cases while 3 percent of the judges receive confidential information in more than 90 percent of their cases. In short, a relatively small minority of district courts and probation officers account for most of the cases in which confidential information is involved.

Nature and Sources of Confidential Information.—Rule 32(c)(3)(A) is fairly explicit as to the type of information to be withheld from the defendant under the exceptions for confidentiality. The rule contemplates that material that would identify persons who would be the victims of retaliation should their identities become known is properly excluded. Additionally, material that might jeopardize chances of success in a rehabilitative program are proper objects for exclusion. In all likelihood this would include information concerning the defendant's family or work, or perhaps his psychiatric profile and history. And typically such information could be expected to originate with members of the defendant's immediate family or perhaps an employee of a social service agency providing the defendant with personal support services of one kind or another.

Surprisingly, data based upon probation officers' analysis of their four most recent presentence reports showed that probation officers most frequently hold as confidential the contents of their investigatory contacts with law enforcement officials (33.5 percent of all confidential information). An additional 13.7 percent of all the confidential information withheld by probation officers concerns the defendant's cooperation with law enforcement authorities. The defendant's family life and psychiatric history account for sizeable, but smaller proportions of information excluded from disclosure (18.5 percent and 22.5 percent, respectively). . . .

Summarization Requirement.—Rule 32(c)(3)(B) requires the sentencing judge to provide an oral or written summary of any information excepted from disclosure in the presentence report that he will rely upon in sentencing. The principle supporting the summarization requirement is, of course, protection of the defendant's right to be sentenced on the basis of accurate information. This demands that the defense be sufficiently apprised of any allegation, whether or not the source is identified, so that an informed commentary or challenge can be made. On the other hand, some commentators (including many judges) have argued that in some cases it is not possible to summarize the confidential information in such a way as to avoid revealing to the defendant either its source or actual contents.[19] The summarization requirement is thus often viewed as jeopardizing the purposes of the disclosure exceptions—to protect information sources and to preserve the effectiveness of rehabilitative programs.

Court decisions applying the requirement of rule 32(c)(3)(B) have reflected this tension between goals and have proposed alternative approaches to satisfy the summarization requirement.[20] Similarly, the data collected in the field study and the questionnaire survey indicate that individual judges follow a wide variety of summarization practices. When faced with confidential information, judges have opted to not disclose the information at all, to inform the defense of receipt of confidential information but to not disclose or summarize, to disclose the information to the defense attorney only, or to provide a written or oral summary.

Most of the judges surveyed[21] (58.1 percent) indicated that they follow a standard practice with respect to all kinds of confidential information. A sizeable minority (41.9 percent), however, follow a varied approach to the treatment they accord confidential information depending upon whether it concerns a defendant's family life, psychiatric background, or criminal status.

Among the judges following a single standard approach to the treatment of *all* kinds of confidential information, 36.2 percent neither disclose the existence nor summarize the essence of confidential information they have before them. A quarter of these judges are willing to indicate the receipt of confidential information (13.8 percent) or disclose the information to the defense attorney only (12.1 percent). But only a small proportion of these judges (10.3 percent) follow the practice of providing the defense with an oral or written summary of the confidential information.

Among those judges who treat the various kinds of confidential family, psychiatric, and criminal justice information differently, these proportions vary significantly. With respect to family information, there is a tendency toward nondisclosure (36.4 percent of the judges), or mere acknowledgment of the existence of confidential information (6.8 percent). Written or oral summaries of family information are provided by only 9.1 percent of the judges surveyed, with a much larger proportion

[19] Junior Bar Section of the Bar Association of the District of Columbia, *Discovery in Federal Criminal Cases: A Symposium at the Judicial Conference of the District of Columbia Circuit*, 33 F.R.D. 47, 125 (1963).

[20] *See United States* v. *Long*, 411 F. Supp. 1203 (E.D. Mich. 1976) and *United States* v. *Woody*, 567 F.2d 1353 (5th Cir. 1978). *See also* Fennell and Hall, *supra* note 3 at pp. 1664-1666.

[21] Judges were instructed in answering this question to assume that the confidential information they receive is relied upon in the determination of sentence. This may not always be the case, of course.

(34.1 percent) willing to disclose the information to the defense attorney alone.

In contrast, psychiatric information is kept undisclosed by a very small proportion of those judges (8.9 percent). But neither are written and oral summaries frequently used to convey this information (11.2 percent). Rather, 62.2 percent of the judges surveyed convey confidential psychiatric information to the defense only through the defendant's counsel.

Written and oral summaries are most commonly employed for the treatment of law enforcement information (21.4 percent). But just as many judges choose to disclose this kind of information only to defense counsel (21.4 percent) and the rate of nondisclosure (26.2 percent) remains just as high. . . .

Disclosure of the Evaluative Summary and the Sentencing Recommendation

Almost all courts require an evaluative summary that contains the probation officer's subjective evaluation of the presentence report's contents and of the offender's character.[22] Likewise, because of the officer's knowledge of various sentencing alternatives and accumulated experience in selecting and supervising probationers, most judges require the probation officer to include a sentencing recommendation in the presentence report.

Although rule 32(c)(3)(A) requires disclosure of factual information contained in the presentence report, the recommendation of the probation officer concerning the sentence and treatment of the defendant is specifically excluded from disclosure. The rule is silent, however, on whether the probation officer's subjective evaluation and opinion of the defendant expressed in the evaluative summary need be disclosed as well.[23] Thus, the application of rule 32(c)(3)(A) to the evaluative summary section of the presentence report varies from district to district.

Many judges and probation officers fear that disclosure of the evaluative summary will have any number of adverse effects—from inhibiting the probation officers in providing frank assessment of offenders to interfering with the supervisory relationship on probation. Others, however, view disclosure as having a positive influence upon the probation officer by forcing him to be more cautious, objective, and analytical in the evaluative summary.

A majority (57) of the districts surveyed (62 percent) have opted for disclosure of the evaluative summary. The remaining 35 (38 percent) withhold the probation officer's subjective evaluation, either by not disclosing the evaluative summary or by transferring the evaluation to the undisclosed recommendation section of the report. . . .

The field study of disclosure practices revealed that the evaluative summary often provides probation officers with a convenient and tempting means by which to convey information that does not fall within one of the exceptions to disclosure but that the probation officer nevertheless does not want the defense to see. As a result, two presentence reports are, in essence, created: one a bland rendition of facts for the defendant's review and the other an enlightening mixture of facts, inference, innuendo, and character analysis for the judge's viewing.

At the same time, field study in those districts disclosing the evaluative summary revealed that most of the adverse consequences said to accompany disclosure have not resulted. Greater objectivity from probation officers has increased the respect they enjoy among defense lawyers and thus minimized defense attempts to subject officers' opinions to rigorous examinations and extensive attacks. Moreover, probation officers practicing disclosure of the evaluative summary reported better cooperation from probationers who appreciated an honest evaluation and appraisal from the officer and the court.

Many of the objections made to disclosure of the evaluative summary apply with equal force to disclosure of the probation officer's recommendation for sentence and treatment. As noted earlier rule 32(c)(3)(A) specifically excludes the recommendation from its disclosure requirements. Judges and probation officers apparently fear that frank exchanges between them will be inhibited and the supervisory role of the probation officer over the offender damaged should the recommendation become known to the defense. The offender's knowledge of an adverse recommendation by the officer may create a distrustful and hostile relationship, one that at best impedes the rehabilitative process and at worst results in threats of or actual physical harm to the officer.

Advocates of disclosure point to the defendant's strong interest in examining a recommendation that will have such a substantial influence on the sentencing decision. Further, research findings that probation officers' recommendations in

[22] Because Federal probation officers usually have training in the social sciences and several years of experience at the state or local levels in probation or correctional services, their perspectives are often valued by judges as a complement to the judges' legal and judicial backgrounds.

[23] In *United States* v. *Long*, 411 F. Supp. 1202 (E.D. Mich. 1976), the court construed rule 32(c)(3) to protect the probation officer's opinion from disclosure. As noted in the text, 35 of the districts surveyed follow this interpretation, but 57 do not.

similar cases exhibit substantial disparity support the argument that they should be disclosed and scrutinized for objectivity.[24] Finally, disclosure of the recommendation would ensure that the probation officer did not use that section of the report to convey unverified confidential information to the judge.

Unlike district practices with respect to the disclosure of evaluative summaries, the balance concerning sentence recommendations has been struck heavily on the side of the nondisclosure provided in rule 32(c)(3)(A); 70.3 percent of the judges never disclose the sentence recommendation while an additional 20.9 percent make disclosure only rarely. Only a small fraction of judges reveal the sentence recommendation "sometimes" (1.4 percent), "routinely" (4.1 percent), or "almost always" (3.4 percent). . . .[25]

Assessing the Impact of Mandatory Disclosure

By requiring the releases of the presentence report but permitting only partial disclosure therein of certain kinds of information, rule 3(c)(3) attempts to balance a number of potentially conflicting interests in the Federal criminal sentencing process: the defendant's right to be sentenced upon the basis of accurate information, the probation officer's desire to provide the judge with as much information as possible relevant to the sentencing decision, and the judge's desire to have collected within a reasonably brief period as much accurate information as possible about each defendant upon which to base an individualized sentence.

Despite the careful attempt represented in rule 32(c)(3) to balance these competing interests, the original critics of disclosure nevertheless feared that the rule would reduce the quantity and quality of information available to the court, diminish the utility of the presentence report as a decisionmaking tool for sentencing, and unnecessarily lengthen the sentencing process.

The results of the field study and the questionnaire surveys, however, show that these fears have not materialized. With respect to the predicted loss of information, for example, 74.2 percent (66 of 89) of the chief probation officers answering the questionnaire inquiry indicated that their districts had suffered no significant reduction in information due to disclosure. Additionally, several chief probation officers interviewed during the field study indicated that some of the information loss that has occurred has been a positive force for improving the quality of the reports inasmuch as disclosure has worked to prevent the more unreliable and unverified pieces of information from finding their way into the reports. Moreover, chief probation officers were twice as likely to attribute any loss of information to increasingly strict Federal and state privacy laws as they were to assign that blame to the mandatory disclosure rule. . . .

The survey data indicate that the requirement of mandatory disclosure has not lengthened the sentencing process. Nearly three of every four judges responding to the questionnaire inquiry (70 of 94, or 74.5 percent) indicated that the mandatory disclosure rule has not significantly affected the length of the sentencing process. Less than a fifth (18.1 percent) of the responding judges thought that the sentencing stage now takes longer, with less than a tenth (7.4 percent) of the opinion that disclosure has actually shortened the sentencing phase.[26]

In sum, at least to the extent indicated by questionnaire inquiries directed to the principal actors in the presentence process, these data indicate that most Federal district courts have implemented the disclosure requirements of rule 32(c)(3) without suffering the repercussions predicted by the rule's original critics. The character of the sentencing process has apparently not been substantially altered, the sources of information have not evaporated, and the utility of judges of the presentence report has not decreased.

Conclusion

With respect to the implementation of rule 32(c)(3), this report provides mixed results. On the one hand, it does appear that a large proportion of Federal districts have achieved disclosure of presentence report in a large proportion of their criminal cases. On the other hand, although the high rate of disclosure is a positive step, many districts utilize practices that limit the effectiveness of such disclosure. These limits to meaningful disclosure have occurred primarily in the areas of the procedures governing the disclosure of the reports to the defense, the confidentiality exceptions to the full disclosure of presentence information, and the impact of the nondisclosed sentencing recommendations on the sentencing and correctional processes.

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[24] Carter and Wilkins, *Some Factors in Sentencing Policy*, 58 J. Crim. L.C. & P.S. 503, 511 (1967).

[25] Three of the 154 judges surveyed did not respond to this questionnaire item; 3 additional judges indicated that they do not receive recommendations for sentence from the probation officer. These 6 judges were not, therefore, included in the calculation of the reported percentages.

[26] Twenty judges gave no answer to this inquiry and 3 gave answers other than "more time," "less time," or "no significant change."

With respect to procedures relating to the disclosure of presentence report to the defense, for example, some districts may provide no formal notice of the report's availability, disclose the report only on the day of sentencing, release it in places or impose duplication constraints that hinder full review, and refuse to disclose the report to the defendant, who is in the best position to check its factual accuracy. When all these limitations are considered together, the picture often emerges of courts intent on fulfilling the threshold requirements of disclosure but not upon designing and utilizing all of the procedures that will guarantee its full and meaningful exercise.

Similarly, this study has revealed some misuse of the confidentiality exceptions to disclosure provided in rule 32(c)(3). The disclosure exceptions are often used to shelter law enforcement information, which is crucial to sentencing but often unreliable and inaccurate. Moreover, the frequent inclusion of confidential information in either the evaluative summary or recommendation sections of the report make its confidential nature often unknown *even to the court itself*. When confidential information is openly conveyed to the judge via a confidential memorandum or cover letter, many judges ignore the summarization requirement of the rule.

Finally, by not disclosing to the defense either the probation officer's summary or his recommended sentence (and the objective criteria used in reaching the recommendation), many districts deny defendants the opportunity to review and comment upon information that is crucial in the judge's choice of the type and length of punishment to be imposed and in later decisions by correctional institutions.

Because the correctional goal of our criminal justice system can be achieved only if the convicted offender's sentence is based on accurate and reliable information, rule 32(c)(3) must be implemented in a way such that the defendant has the means to determine and challenge the accuracy of any information in the presentence report.

END