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Sentencing Tips for New York Lawyers

Obtain a Copy of the Pre-sentence Report and Request Corrections

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Introduction

Defense attorneys now customarily review the pre-sentence report prepared by the Probation Department prior to sentencing. (Before 1975 the pre-sentence report was completely confidential and was not available for review by the defense or prosecution.) Surprisingly, it is still not common practice for defense counsel to obtain an actual copy of the pre-sentence report, and insist on their right to receive a copy, or to insist on receiving it in advance of sentencing day. More than 30 years ago the legislature codified a defendant's right to obtain a copy of the pre-sentence report in CPL § 390.50(2)(a), which provides in relevant part:

> *Not less than one court day prior to sentencing, unless such time requirement is waived by the parties, the pre-sentence report or memorandum shall be made available by the court for examination and for* ***copying by the defendant's attorney****, the defendant himself, if he has no attorney, and the prosecutor.* (Emphasis added.)

The original language of CPL § 390.50(2)(a) did not specify that the report could be copied. In the Assembly Memorandum in support of the 1984 amendment of the statute, the bill's sponsor explained the rationale for the legislative change:

> *In many instances, the parties are currently required to hand-copy the reports without photocopying them. This is an unnecessarily laborious practice which serves no legitimate function. By permitting copying we ensure that both sides can verify information in the report if such becomes necessary.*

The statute, as amended, is in accordance with the current American Bar Association (ABA) *Standards for Criminal Justice, Sentencing Standards* (3rd ed.), Standards 18-5.6(a)(i) and 18-5.7(a) which provide that pre-sentence reports should be available to the parties.

Although defense counsel in several jurisdictions have reported that there are judges who are still unaware of the requirements of the statute or are simply unwilling to provide counsel with a copy of the pre-sentence report, the statute is absolutely clear on its face and performs a very important function. The statutory requirement that a copy of the pre-sentence report be provided

to defense counsel has been addressed by both state and federal courts, finding the terms of CPL § 390.50(2)(a) to be mandatory, not discretionary. *Hili v. Sciarotta,* 140 F.3d 210 (2nd Cir. 1998 and *People v. Butler,* 54 A.D.2d 56 (4th Dept. 1976). Failure to follow the statutory safeguards to insure that the defense has a copy of the pre-sentence report may result in appellate review and necessitate subsequent resentencing.

Counsel's Duty to Challenge Incorrect or Misleading or Incorrect Information in Report

By obtaining a copy of the pre-sentence report, defense counsel is able to carefully review with the client the information provided to the Court by the Probation Department. Inaccuracies as to the client's criminal history, level of involvement in the crime, remorse, mitigating factor, mental health, conclusions drawn by the probation officer, and other matters may be detected. For much of this, you client is in the best position to identify errors. That is why it is imperative to obtain the pre-sentence report a day or days in advance of sentencing so that a careful review can be undertaken. A quick review of the pre-sentence report on the morning of sentencing does not allow for sufficient time to carefully analyze and respond. Identifying errors prior to sentencing day allows defense counsel time to either address the inaccuracies and misinformation in a defendant's pre-sentence memorandum (CPL § 390.40), request an adjournment of sentencing, or prepare a motion to request that the judge order the pre-sentence report be rewritten or the offending portions be redacted.

Both National and New York State standards for defense counsel mandate that attorneys review the pre-sentence report, ensure that clients have an opportunity to examine the pre-sentence report, and protect clients' interest concerning the content of the pre-sentence report. *See* National Legal Aid and Defender Association (NLADA), *Performance Guidelines for Criminal Defense Representation,* Guidelines 8.1, 8.3(4), 8.4 [defense counsel should "take appropriate steps to ensure that erroneous or misleading information which may harm the client is deleted from the report"] (Guideline 8.4[4]). *See* also ABA Standards for Criminal Justice, *Criminal Justice Standards for the Defense Function* (4th ed), 4-8.3(e) [defense counsel should seek to verify information in the pre-sentence report when it is made available and be prepared to supplement or challenge information if necessary.] To the same effect *see* New York State Bar Association (NYSBA) 2015 Revised Standards for Providing Mandated Representation, *Criminal Matters,* I-7(i) and New York State Defenders Association (NYSDA) Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State, *Criminal Defense Counsel* 8(d).

Prior to sentencing, lawyers should not hesitate to ask the court to make corrections on the face of the probation report and/or to have the report sent back to the Probation Department for correction of errors and to have the report re-written. *See* e.g. Cohen and Neely, eds. Supreme Court of the State of New York Appellate Division, First Department, *Criminal Trial Advocacy,* (7th ed. 1992) p. 724 ["if successful in efforts to correct report, ask court for direction to Probation to retype report and for revised version only to be sent to Corrections."] (*See also* Muldoon, Handling a Criminal Case in New York, § 22:218 [2016-2017]). As a general rule, errors in the pre-sentence report should be challenged at the time of sentencing and cannot be corrected after sentencing. CPL § 400.10. All four Departments of the Appellate Division are in agreement that the challenge to the accuracy of the pre-sentence report should be made at or

prior to sentencing and it cannot be corrected after sentencing. *Hughes v. Probation,* 281 A.D.2d 229 (1st Dept. 2001); *Antonucci v. Nelson,* 298 A.D.2d 388 (2nd Dept. 2002); *Salahuddin v. Mitchell,* 232 A.D.2d 903 (3rd Dept. 1996); *Champion v. Belmont,* 12 A.D.3d 1152 (4th Dept. 2004).

In order to preserve a challenge to errors or inaccuracies in a pre-sentence report for appellate review, objection must be made at the time of sentencing. Without such an objection there can be no review. *Salahuddin v. Mitchell,* 232 A.D.2d 903 (3rd Dept. 1996); *Wisniewski v. Michalski,* 114 A.D.3d 1188 (4th Dept. 2014). *See People v. Freeman,* 67 A.D.3d 1202 (3rd Dept. 2009) for an excellent example of proper preservation of a challenge to erroneous information in a pre-sentence report so that the Appellate Division could take corrective action and order redaction.

It is critically important to request that corrections be made, even if the Judge does not rely on the misinformation and imposes the agreed upon sentence. The report's function does not end with the court's use of it at the time of sentencing. A copy of the report is required to be delivered to the person in charge of the correctional or Office of Children and Family Services to which the defendant is committed whenever a person is sentenced to a term of imprisonment and will be used in decision-making for programming, parole release (Executive Law § 259-i(2)(c)(A)(vii), security determinations and in the case of a person convicted of a sex offense, for civil commitment (Mental Hygiene Law §§ 10.05(c)(4),10.05(d), and 10.05(e). *See* CPL 390.60(1); *People v. Freeman,* 67 A.D.3d 1202 (3rd Dept. 2009); *People Boice,* 6 Misc.3d 1014(A) (Co. Ct. Chemung Co. 2004). The pre-sentence report is a critical document at five stages of decision-making on the criminal justice continuum: sentencing, corrections programming, parole release, civil commitment and community supervision.

A request that the pre-sentence report be rewritten is clearly the preferred practice and is consistent with NLADA *Performance Guidelines for Criminal Defense Representation,* Guideline 8.4. When a judge offers to make the corrections on the record so that they become part of the sentencing minutes, respectfully decline and insist that the report be rewritten. Sources within the Department of Corrections and Community Supervision (DOCCS) indicate that "it is sporadic as to whether or not sentencing minutes will be in a particular inmate's file." Consequently, the uncorrected pre-sentence report may still be relied upon and the sentencing minutes may be ignored if the correction is only made in the sentencing minutes. Likewise, it may be inadequate for a judge to write on the pre-sentence report that certain information is stricken by judicial order. Obviously the stricken information is still available to be seen by the reader. DOCCS not only anticipates that errors will be stricken from the pre-sentence report, they advise defense counsel to make such requests at sentencing. In a presentation to the New York State Association of Criminal Defense Lawyers, at a CLE program, "Everything You Ever Wanted to Know About the New York State Department of Correctional Services," Anthony J. Annucci, then Deputy Commissioner and Counsel, and currently the Acting Commissioner of DOCCS, in his prepared written materials instructed as follows:

> *The single most important document is the pre-sentence report. It is of enormous importance not only in making security and classification decisions, but also in terms of making program assignments. This report follows the inmate throughout his incarceration.*

> *A computer generated summary of the pre-sentence report is also entered into the Department's computer for each inmate. Hence, if a pre-sentence report contains inaccurate information, it behooves the affected party to* ***make the appropriate motion to correct the report before the defendant enters the prison system.*** (Emphasis added.)

Challenging the Pre-sentence Report

In order to challenge errors in a pre-sentence report it must first be carefully reviewed. Reviewing the pre-sentence report shortly before sentencing does not provide sufficient time for careful review. CPL § 390.50(2) anticipates a meaningful review by providing that in the absence of a waiver, defense counsel must be provided with the pre-sentence report at least one day prior to sentencing. *People v. Stella*, 188 A.D.2d 318 (1st Dept. 1998). Even receiving the report a day prior to sentencing as contemplated by CPL § 390.50(2)(a) may not provide sufficient time for review. Defense counsel should be aware that there is case law that supports a request for an adjournment to provide time to challenge an inaccurate portion of the pre-sentence report either by submitting a Defendant's Pre-sentence Memorandum (CPL § 390.40 or by conference or hearing. *See People v. Martinez,* 185 A.D.2d 191 (1st Dept. 1992) and *People v. Ranieri*, 43 A.D.2d 1012 (4th Dept. 1974). There is also statutory authority for adjourning the sentencing date to provide time to conduct pre-sentence proceedings to resolve discrepancies in the pre-sentence report. CPL § 380.30(4) and CPL § 400.10(4). Although there is no requirement that a written motion be made to challenge the pre-sentence report, such written request would help preserve the issue for appeal, and also signal to the judge that this challenge is not a mere afterthought.

The Seldom Used Sentencing Hearing

The procedural vehicles that can be used to challenge errors in a pre-sentence report are found in CPL § 380.30(4) CPL § 400.10 which provide for the pre-sentence proceeding of either a pre-sentence conference and/or a hearing. As the court recognized in *People v. James*, 114 A.D.3d 1312 (4th Dept. 2014):

> *If the investigation report contains incorrect information, [defendant] should object at sentencing to the inclusion of the erroneous information and move to strike it…The court may conduct a conference or a summary hearing to resolve discrepancies in sentencing information.*

It is important to note that these two statutory provisions provide the basis for a court to conduct a conference or hearing not only for the purpose of resolving discrepancies in the Pre-sentence report, but also for the purpose of "consideration of any matter relevant to the sentence to be pronounced." CPL § 400.10(1) and (3).

For an example of a case in which the court conducted such a "summary hearing" to resolve discrepancies in the pre-sentence report that lasted almost a full day, *See People v. Irwin,* 19 Misc.23d 1118(A) (Onondaga Co. Ct. 2008).

Once the Court has been convinced that there is an error that should be corrected or redacted in the pre-sentence report, what is to be done? Surprising courts have struggled with this simple and quite obvious question. In *People v. James,* 114 A.D.3d 1312 (4th Dept. 2014) when defendant objected to the contents of the presentence report and sought redaction, county court stated that it did not know what procedure by which to correct the information. Fortunately, the Fourth Department did know what to do, and remitted the case for resentencing, concluding that "the defendant was not properly afforded an opportunity to challenge the contents of the presentence report."

Court's Authority to Correct the Pre-sentence Report

Upon request of defense counsel that the pre-sentence report be redacted and/or rewritten the court has the authority to direct the Probation Department to correct the pre-sentence report to avoid irrelevant, erroneous or unsubstantiated information from being used for sentencing or correctional decisions. It would seem beyond argument that the sentencing court must have the authority to correct the pre-sentence report in order to avoid inappropriate, misleading, incorrect, and unsubstantiated information from contaminating the decision-making at any one of the five point at which it is used on the criminal justice continuum from sentencing to community supervision. The Court of Appeals in *People v. Hicks*, 98 N.Y.2d 185 (2002) recognized the importance of the pre-sentence report. "The pre-sentence report may well be the single most important document at both the sentencing and correctional level of the criminal process." A document that so greatly affects people's lives must be subject to the safeguard of judicial scrutiny and correction. Some courts have simply acknowledged the proposition that they must have the authority to correct errors in the pre-sentence report and have done so without a written decision. Still other courts have seemed baffled by the simple task of ordering a probation report rewritten or redacted. *People v. James,* 114 A.D.3d 1312 (4th Dept. 2014).

What is clear is that New York courts have been correcting pre-sentence reports for more than twenty years. One of the earliest reported cases in which the court concluded that it had the authority to order the probation department to physically delete a portion of the pre-sentence report (in this case an entire paragraph) was *People v. Rampersaud*, 144 Misc.2d 126 (Sup. Ct. Bronx Co. 1989). That decision was grounded in the due process principle that sentencing decisions must be based on reliable fact finding, and that "[t]he period of custody and the conditions of custody and probation have such a severe impact on the individual that they must be determined on reliable information and the reliable inferences drawn therefrom." *Id*. at 128. In *People v. Boice,* 6 Misc.3d 1014(A) (Chemung Co. Ct. 2004) the court found that pre-sentence report's reference to the defendant as a "sociopath" was improper in that the probation officer was not qualified to make such a determination nor was that conclusion based upon the report of a qualified individual. The judge proceeded to order the probation officer to delete the offending words and retype the report and required the probation officer "to advise the Court in writing that the report has been retyped and the material ordered has been physically redacted, providing the Court with a copy of the retyped version." In both *People v. Freeman,* 67 A.D.3d 1202 (3rd Dept. 2009) and in *People v. James,* 114 A.D.3d 1321 (4th Dept. 2014) the Court concluded that redaction was the appropriate remedy for the court to take when the pre-sentence report contains incorrect information. In *Freeman* the court reasoned that "[f]ailing to redact erroneous information from the PSI created an unjustifiable risk of future adverse effects to defendant in other contexts, including appearances before the Board of Parole or other agencies."

Merely making note of the corrections on the records so that the errors appeared in the sentencing minutes was found to be insufficient.

In *People v. Irwin,* 19 Misc.3d 1118(A), after the court held an extensive pre-sentence hearing pursuant to CPL § 400.10 to determine whether certain discrepancies in the pre-sentence required redaction, the court concluded that certain portions of the report were required to be removed and ordered them deleted because the probation officer did not have the qualification to draw clinical conclusions and such conclusions could cause harm to the defendant as the report "could be a factor in his ultimate release or civil commitment" as it travels with the commitment to prison.

Obtaining a Copy of the Pre-sentence Report After Sentencing

There was a time when a person in prison would have difficulty obtaining his or her pre-sentence report in order to address errors or misinformation when the report was relied upon for corrections decision-making. It has long been the rule that it was available for appeal purposes. (CPL § 390.50(2). However, in 2010 the statute was amended to establish a procedure for a defendant to obtain a copy of the pre-sentence report for the purpose of a parole board appearance or an appeal of a parole board determination. There are still other purposes for which a defendant may need the report and for which access may be problematic. For that reason, best practice dictates that defense counsel obtain a copy of the pre-sentence report prior to sentencing and keep a copy in his or her file for future use should the defendant deem it necessary. One of the shortcoming of obtaining the report after sentencing is that it is then too late to correct errors.

Conclusion – Get a Copy Prior to Sentencing

The lesson from all of this is simple – follow the statute. Obtain a copy of the pre-sentence report before sentencing. Review it with your client. Request that erroneous or unsubstantiated information be stricken and the report be rewritten. If need be, request a pre-sentence hearing pursuant to CPL § 400.10 to assist the court in resolving discrepancies. Make a record to preserve the issue of redaction for appeal. You will be better prepared at the time of sentencing. Misinformation can be kept out of the sentencing and correctional process, and your client will not be kept in the dark not knowing what was said in the pre-sentence report when it comes time for DOCCS classification and programming, parole release or supervision, or civil commitment.

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