Sentencing Tips for New York Lawyers: Obtain a Copy of the Pre-sentence Report and Request Corrections

By Alan Rosenthal

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. More than twenty 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:

"... 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..." (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.), Standard 18-5.6(a)(i), which provides that pre-sentence reports should be available to the parties.

Although defense counsel in several jurisdictions have reported that a few judges 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); *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 subsequent resentencing.

Counsel and Client Should Use Copy to Correct Errors

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 factors, and other matters may be detected. Any inaccuracies and misinformation can then be addressed in a defense pre-sentence memorandum and/or at the time of sentencing.

National 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' interests

concerning the content of the pre-sentence report. See National Legal Aid and Defender Association (NLADA), *Performance Guidelines for Criminal Defense Representation*, Guidelines 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, *Prosecution and Defense Function* (3rd ed.), Standard 4-8.1(b) [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.]

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 all errors. *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 & Feurstein, Handling a Criminal in New York, §21.174 [2004]). 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 390.50; *Sciaraffo v. New York City Dept. of Probation*, 248 A.D.2d 277 (2nd Dept. 1998); *Matter of Gayle v. Lewis*, 212 A.D.2d 919, 622 N.Y.S.2d 626 (3d Dept.1995); *People v. Blanches-Rivera*, 168 Misc. 2d 72, 643 N.Y.S.2d 330 (Monroe Co. Ct. 1996). It is critically important to request that corrections be made because 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 division for youth facility to which the defendant is committed whenever a person is sentenced to a term of imprisonment and will be used in decision-making regarding the client by the Department of Correctional Services (DOCS), Division for Youth, or Office of Mental Health. *See* CPL 390.60(1).

A request that the pre-sentence report be rewritten is clearly the preferred practice. 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 Correctional Services indicate that "it is sporadic as to whether or not sentencing minutes will be in a particular inmate's file." Consequently the pre-sentence report may 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. The Department of Correctional Services 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 continuing legal education seminar, "Everything You Ever Wanted to Know about the New York State Department of Correctional Services," Anthony J. Annucci, Deputy Commissioner and Counsel for the New York State Department of Correctional Services, 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 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.)

CPL 400.10 specifically provides for both a pre-sentence conference and a hearing to help resolve any discrepancies and assist the court in its consideration of any matters relevant to the sentence. Upon request of counsel the court then 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. *People v. Rampersaud*, 144 Misc.2d 126 (Sup. Ct. Bronx Co. 1989); *People v. Boice*, NYLJ, Dec. 9, 2004 at 21 col 3 (Co. Ct. Chemung County, Buckley, J.). 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, and unsubstantiated information from contaminating the sentencing or correctional process. The Court of Appeals in *People v. Hicks*, 98 N.Y.2d 185 (2002) recognized the critical and dual 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 subjected to the safeguard of judicial scrutiny and correction.

PSI Important for Parole, DOCS

For a client who receives a state prison sentence, the pre-sentence report may also be critical at the time of parole consideration. The Parole Board is required to consider the pre-sentence report as a factor in making the parole release decision. (Executive Law 259-i(2)(c)(A)). If your client has not reviewed a copy of the report, it will be very difficult for him or her to address issues in the report that may be raised by the Parole Board.

Long before prisoners are ready to see the Board, inaccuracies or misinformation in a pre-sentence report may affect many aspects of their lives while in custody. For example, DOCS may use pre-sentence report information to determine a prisoner's classification/designation, boot camp eligibility, temporary release programming, and transfers. Defense counsel should be aware at the time of sentencing of these potential uses for the pre-sentence report, and strive to ensure that no erroneous information is contained in the copy of the report that is sent to DOCS.

Difficult to Get a Copy of Report After Sentencing and Appeal

By the time people in prison are assessed by DOCS, or apply for parole, they may not be able to get copies of their pre-sentence reports. The statute makes it clear that a defendant is entitled to a copy of the pre-sentence report prior to sentencing and also for the purposes of appeal. However, the Appellate Division is split on what the authority is for obtaining the pre-sentence report and what the factual predicate is that must be alleged in the affidavit in support of disclosure. Therefore, access to the pre-sentence report may depend on where they were sentenced. (According to Peter Preiser's Commentary to 390.50[2][a], "The cases are fairly well in accord that the only court with authority to order disclosure is the sentencing court--as distinguished from the court where the collateral proceeding is pending (*see e.g., Holmes v. State*, 140 A.D.2d 854, 528 N.Y.S.2d 686 [3d Dept.1988]."

In *Matter of the Legal Aid Bureau of Buffalo v. Armer*, 74 A.D.2d 737 (4th Dept. 1980) the Appellate Division, Fourth Department, citing to CPL 390.50(2), held that "Petitioner has a clear right to review the presentence reports for the purpose of preparing briefs and for use before the Parole Board." Eight

years later the Fourth Department, still relying upon the authority of CPL 390.50(2), added the requirement of a "factual showing sufficient to warrant overriding the cloak of confidentiality..." *Salamone v. Monroe County Dept. of Probation*, 136 A.D.2d 967 (4th Dept. 1988). The Court in *Salamone* rejected the argument that CPL 390.50(1) was authority for disclosure of pre-sentence reports in a collateral proceeding.

The First Department has taken a different approach. In *People v. Wright*, 206 A.D.2d 337 (1st Dept. 1994) the Court rejected the notion of the Fourth Department that subdivision (2) of CPL 390.50 was authority for obtaining the pre-sentence report for collateral purposes such as parole. Nevertheless, citing the Fourth Department's decision in *Matter of Legal Aid*, the First Department concluded that there was a clear right to review the pre-sentence reports for use before the Parole Board. Significantly, they held that "a showing of relevance is not required..." The 3rd Department has taken yet another approach. In *Blanche v. People*, 193 A.D.2d 991 (3rd Dept. 1993) the court rejected the Fourth Department's premise that the request for a copy of a pre-sentence report for a collateral matter was governed by CPL 390.50(2). Instead, the Court found the request governed by CPL 390.50(1). In addition, the Third Department has grafted onto that statute a requirement that there be a "factual showing sufficient to warrant the disclosure of the report." *See Shader v. People*, 233 A.D.2d 717 (3rd Dept. 1996). It is unclear what constitutes a "sufficient" showing. In *Allen v. People*, 243 A.D.2d 1039 (3rd Dept. 1997) the supporting affidavit was apparently found to be inadequate because there was no indication that the Board considered the pre-sentence report in rendering its decision. Yet in *Shader* the Court reversed the lower Court's denial of disclosure coming to the conclusion that "petitioner made such a showing inasmuch as a presentence report is one of the factors required to be considered by the Board of Parole upon application for release." In *Kilgore v. People*, 710 N.Y.S.2d 690 (3rd Dept. 2000) the Court indicated that at the very least petitioner must demonstrate that "notice of an impending hearing before the Board of Parole" has been given. The Second Department has followed the Third Department in requiring a specific showing of need in order to obtain disclosure of a pre-sentence report. *Matter of Thomas v. Scully*, 131 A.D.2d 488 (2nd Dept. 1987). In an attempt to reconcile the disparity of decisions on this subject, the court in *People v. Delatorre*, 767 N.Y.S. 766 (Westchester Co. Ct. 2003) reviewed many of the cases concluding that "any attempt to reconcile the disparity among the respective departments is not feasible under the state of the law." Judge Adler went on to require a specific show of need for disclosure of the pre-sentence report. **In *People v. Tata***, 2001 WL 1607869 (N.Y.Sup. Queens Co. Crim. Ct. 2001), 2001 N.Y. Slip Op. 40407(U), 10/21/01 NYLJ, Judge Rotker ordered the Department of Probation to provide a copy of the pre-sentence report to the petitioner upon a showing that he was scheduled for reappearance before the parole board. Recently he came to the same conclusion in *People v. Peetz*, 2004 WL 1381057 (N.Y. Sup. Queens Co. Crim. Ct. 2004), 2004 N.Y. Slip Op. 24216. Regardless of the standard, your client should never be in a position of having to seek judicial approval to obtain a copy of the pre-sentence report. At least not if you obtained a copy.

You should review your copy of the pre-sentence report with your client prior to the time of sentencing. Explain why the document is important and how it will be used by DOCS and Parole. Clients should be prepared to point out any inaccuracies or misinformation. If you wait until your client is in prison before you review it with him or her, not only is it too late to correct any errors or misinformation, the opportunity to address certain issues with DOCS or Parole personnel may have also passed. You should keep a copy of the pre-sentence report for your file. The copy should be maintained with the file until

your client has completed service of the sentence. It is not until the sentence has expired that this document loses its relevance.

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 rewritten. 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 stuck not knowing what was said in the pre-sentence report when it comes time for DOCS classification and planning or time to appear for parole.

Alan Rosenthal is a criminal and civil rights attorney with over 29 years experience.