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AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association recommends that Rule 32 of the Federal Rules of Criminal Procedure be amended to require that:

(a) Any party submitting documentary information to the probation officer in connection with a pre-sentence investigation shall, unless excused by the Court for good cause shown, provide that documentary information to the opposing party at the same time it is submitted to the probation officer;

(b) a probation officer who receives oral information from a party other than through the interview of the defendant, unless excused by the Court for good cause shown, provide a written summary of the information to the parties.

(c) a probation officer who receives documentary information from a non-party in connection with a pre-sentence investigation, unless excused by the Court for good cause shown, promptly provide that documentary information to the parties; and

(d) a probation officer who receives oral information from a non-party, unless excused by the Court for a good cause shown, provide a written summary of the information to the parties.

REPORT

The American Bar Association Criminal Justice Section supports the recent recommendation of the Sentencing Initiative of the Constitution Project regarding improving procedural fairness in the federal sentencing process. *See Recommendations for Federal Criminal Sentencing in a Post-*Booker *World*, available at **http://www.constitutionproject.org/pdf/SentencingRecs-Final.pdf**.

Specifically, the ABACJS endorses the proposed amendments to Rule 32 of the Federal Rules of Criminal Procedure set forth in the Constitution Project Report. The proposed amendments to the Rule would ensure that both the government and the defense have an opportunity to review the information to be considered by the sentencing court in determining the appropriate punishment. *Cf. United States v. Hamad*, Case No. 05-4196 (6th Cir. July 19, 2007) (vacating sentence based on information not disclosed to defendant). As the Constitution Project Report noted:

> Prior to the Federal Sentencing Guidelines, district courts had discretion to sentence defendants anywhere between the statutory minimum (if any) and maximum sentences. Courts were not required to state any reasons for their sentences or make any particular factual findings to support their decisions. Under this discretionary regime, the courts utilized probation officers to conduct pre-sentence investigations regarding the defendant, but these reports were not used to make factual findings regarding disputed matters because no such factual findings were required in the sentencing process.
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> Under the Guidelines, in contrast, narrow sentencing ranges are determined through very specific factual findings regarding the factors enumerated in the Guidelines. Given the number and importance of the factual determinations to be made under the Guidelines, the rules of procedure should ensure that the process of litigating these factual issues is balanced and designed to produce the most reliable results possible.
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> The pre-existing practice of pre-sentence investigations conducted by probation officers is inconsistent with the principles underlying an adversarial system of justice and should be revised to account for the new importance of fact finding at sentencing. There are presently no rules governing the process by which such investigations are conducted. In practice, the parties and other interested persons submit factual information to the probation officer on an *ex parte* basis. The probation officers do not share the information submitted to them with the parties. Indeed, probation officers are authorized to promise confidentiality to sources of information and to present information without revealing its source. Even in the absence of a probation officer's grant of confidentiality to information sources, pre-sentence investigation reports do not typically cite or reference the sources of information upon which their proposed factual findings are based.

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Dueling *ex parte* submissions, followed by reports without citations, do not result in the level of reliability in the fact-finding process that would result though the ordinary adversarial process. There do not appear to be any countervailing considerations to suggest that an adversarial process would be unduly burdensome or unworkable in the litigation of sentencing facts, so long as provision is made for the protection of sensitive information upon good cause shown.

An adversarial process in litigating sentencing facts could be accomplished by amending Rule 32 of the Federal Rules of Criminal Procedure to require that any party wishing to provide information regarding sentencing to the probation officer writing the pre-sentence investigation report, must, absent good cause shown, provide that information to the other party.

Specifically, new subsections (c)(3) and (c)(4) should be added to Rule 32:

> **(3) Availability of Information Received from Parties**. Any party wishing to submit information to the probation officer in connection with a pre-sentence investigation shall, absent good cause, provide that information to the opposing party at the same time it is submitted to the probation officer.
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> **(4) Availability of Information Received From Non-Parties.** Where information provided by a non-party has been used in the preparation of the pre-sentence report or otherwise submitted by the probation officer to the court, the probation officer shall, on request of any party, make such information available to the parties for inspection, copying, or photographing, or, if the information was provided to the probation officer in oral form, the probation officer shall provide a written summary of the information to the parties.

This Rule would substantially increase the reliability and fairness of the fact-finding process in sentencing proceedings by permitting all parties to review and comment intelligently upon information submitted to the sentencing court through its probation officer. A "good cause" exception is made where information, if revealed to other parties, may compromise an ongoing investigation or result in physical or other harm to a confidential source, the defendant, or others. Existing rules limiting *ex parte* communications should suffice to limit submissions of information directly to the Court without serving opposing parties.

It may also be necessary to repeal or amend subsection (d)(3)(B), which directs probation officers to exclude from the pre-sentence investigation report "any sources of information obtained upon a promise of confidentiality." Probation officers should not be empowered to promise confidentiality to sources of information to be used to sentence

defendants in the absence of good cause.

As the Criminal Justice Section Council studied this issue, one matter of interest was whether any of the various federal district courts had enacted local rules addressing these issues. Accordingly, we reviewed the local rules for each of the ninety-four districts to determine how many districts address sentencing procedures by local rule and the manner in which they do so. The results of this survey were quite interesting. Seventy-five of the ninety-four districts have promulgated local rules regarding presentence investigation reports (PSRs) and sentencing procedures. The local rules vary widely from one district to another. A number of districts have local rules which are very similar to the proposed Recommendation.

1. The Northern District of California

The Northern District of California has enacted Criminal Local Rule 32-3, which provides in pertinent part:

> **Initiation of the Presentence Investigation.**
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> **(b) Sentencing Information in Government's Possession.** Within 7 days after receiving a written request from the Probation Officer for information (e.g., indictment, plea agreement, investigative report, etc.), the attorney for the government shall respond to the request and may supply other relevant information. The attorney for the government shall serve a copy of the material on defense counsel, except material already in the possession of defense counsel.
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> **(c) Deadline for Submission of Material Regarding Sentence.** Any material a party wishes the Probation Officer to consider for purposes of the proposed presentence report shall be submitted to the Probation Officer at least 45 days before the date set for sentencing. The party shall serve a copy of the material on opposing counsel, except for material already in the possession of opposing counsel.

This Rule, like the proposed Recommendation, thus requires the parties to serve one another with the information submitted to the court through its probation officer for use in the preparation of the PSR.

2. The District of Connecticut

The District of Connecticut has enacted Local Rule of Criminal Procedure 32, which provides in pertinent part:

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(**l) The Role of Defense Counsel**

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2. Defense counsel may submit a "Defendant's Version of the Offense" to the Probation Officer and, in that event, shall serve a copy on the attorney for the government. Subject to the restrictions of Fed. R. Crim. P. 32 and D. Conn. L. Cr. R. 32(g), the attorney for the defendant shall promptly make available to the attorney for the government all documents provided to the Probation Officer that were not provided to the government in discovery, unless otherwise excused by the Court for good cause shown.

(m) The Role of the United States Attorney

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3. The attorney for the government may submit a "Government's Version of the Offense" to the Probation Officer and, in that event, shall serve a copy on counsel for the defendant. Subject to the restrictions of Fed. R. Crim. P. 32 and D. Conn. L. Cr. R. 32(g), the attorney for the government shall promptly make available to the attorney for the defendant all documents provided to the Probation Officer that were not provided to the defense in discovery, unless otherwise excused by the Court for good cause shown.

This Rule, like the proposed Recommendation, thus requires the parties to serve one another with the information submitted to the court through its probation officer for use in the preparation of the PSR.

3. The District of Nebraska

The District of Nebraska has enacted Criminal Local Rule 32.1, which provides in pertinent part:

(a) Initiation of the Presentence Investigation.

(1) Government's Information. Within five (5) business days after receiving a written request from the probation officer for information (*e.g.*, indictment, plea agreement, investigative report), the government shall respond to the request and may supply other relevant information. The government shall serve defense counsel with a copy of any material provided to the probation officer that is not already in the possession of defense counsel.

This Rule is similar to the proposed Recommendation in that it would require the government to serve the defense with information submitted to the court through its probation officer. The Nebraska Rule differs from the proposed Recommendation in that it is one-sided and does not require the defense to serve the government with materials it provides to the probation officer. On the other hand, the Nebraska local rule further provides that after the PSR has been finalized, any party wishing to offer documentary evidence in support of or in opposition to an objection to the PSR must submit such evidence to the court and opposing parties in advance of the sentencing hearing. Neb. Cr. R. 32.1(b)(6)(C). Thus, under the Nebraska Rule the parties will at least obtain copies of opposing parties' evidence prior to the sentencing hearing itself.

4. The District of Hawaii

The District of Hawaii has enacted Criminal Local Rule 32.1, which provides in pertinent part:

> (g) Not less than eleven (11) calender days prior to the sentencing date, the completed presentence report shall be submitted to the court and to all parties. This report shall be accompanied by an addendum setting forth any objections raised by counsel that are unresolved, and any written materials provided by counsel in support of their respective positions. Any earlier proposed presentence reports furnished to counsel shall be returned to the probation officer.

Under this Rule, the parties submit their evidence to the probation officer on an *ex parte* basis, but the probation officer then discloses all evidence relating to disputed issues to both parties prior to the sentencing hearing.

5. The Northern and Southern Districts of Illinois and the District of Colorado

These three districts have adopted local rules requiring the government to submit a written "version of the offense" to the probation officer within a short period of time after a determination of guilt and to serve the defense with the document. The two Illinois districts require the defense to submit its own "version of the offense" and to serve the government with it. The Colorado Rule applies only to the government. *See* N.D. Il. LCrR32.1(e), S.D. Il Cr32.1(d), and D. Colo. General Order 2002-3. Under these rules, the parties will have access to at least the overall positions submitted to the probation officer, although perhaps not the documentary evidence later submitted to support these positions.

6. The Northern and Southern Districts of Iowa and the Northern District of Ohio

These three districts have adopted local rules requiring the parties to submit to the court and serve on opposing counsel five to seven days in advance of the sentencing hearing all information

and exhibits the parties intend to rely on at the hearing. *See* N.D. Ohio LCrR 32.2(c), Iowa LCrR32a4. Under these rules, the parties will not see each other's evidence until after the PSR has been completed, but they will at least obtain opposing parties' evidence in advance of the sentencing hearing.

7. The District of Rhode Island, the Eastern District of Tennessee, and the District of The Virgin Islands

These three districts have adopted local rules that highlight the disadvantages to the defense of probation officers preparing PSRs based on *ex parte* submissions by the government. In the District of Rhode Island, submissions to the probation officer are made ex parte, but the defense – and *only the defense* – must notify the court and the government at least seven days prior to the sentencing hearing regarding any witnesses the defense intends to call at the hearing. R.I. LR Cr 32(b). In the Eastern District of Tennessee there is no requirement that evidence submitted for use in the drafting of the PSR be either sworn or served on opposing parties, but any party wishing to object to a factual assertion made in the PSR must support the objection with a sworn affidavit. E. Tenn. LR83.9(c). The local rule enacted by the District of the Virgin Islands is similar in effect to the Eastern District of Tennessee. Under the Virgin Islands local rule, the parties need not serve each other with information submitted to the probation officer for use in the drafting of the PSR, but any party wishing to object to a factual assertion made in a PSR must file a memorandum in advance of the sentencing hearing stating "what evidence, including written submissions or witnesses, the aggrieved party wishes to present at the sentencing hearing." V.I. LRCrP 32.01d. There is no requirement under the Virgin Islands rule for the party defending the factual assertion in the PSR to reveal any information prior to the sentencing hearing.

The variety of local rules and the existence of a number which are very similar to the proposed recommendation supports the sense of the Criminal Justice Section that a uniform Rule is needed. Moreover, after considerable study and debate, the Section supports the rule changes outlined by the Sentencing Initiative of the Constitution Project, and believes these changes would provide a needed and valuable improvement in the procedural fairness of the federal sentencing process.

Respectfully Submitted,

Stephen A. Saltzburg
Chair, Criminal Justice Section
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