

Presentence Investigation

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Presentence Investigation

4-01 AUTHORITY AND RESPONSIBILITY

A. Felony Cases

Michigan state law requires that a presentence report be prepared for the sentencing judge in every case in which a person is charged with and convicted of a felony. [MCL 771.14; MSA 28.1144] The presentence report provides the sentencing court with timely, relevant and accurate data so that it may select the most appropriate sentencing.

B. Misdemeanor Cases

As directed by the sentencing judge or district court magistrate, a probation officer must conduct a presentence investigation and prepare a report on persons charged with and convicted of a misdemeanor. [MCL 771.14; MSA 28.1144] In deciding whether to order a report, the court may follow standards which suggest that a presentence report be prepared in misdemeanor cases involving a minor or first offender or when incarceration is a possible sentence. [See ABA Standards for Criminal Justice, Probation 2.1 and Criminal Justice Goals and Standards for the State of Michigan, Standard 64.20]

The defendant in a misdemeanor case may request the preparation of a presentence report. While the sentencing judge has a right to deny a defendant's request for a presentence report in a misdemeanor conviction, there should be a good reason for doing so. Sentencing is of such obvious importance to the criminal justice system that no trial judge, without a clear exposition of his discretionary thinking, should deny a defendant a presentence report and proceed to impose a maximum sentence. Such an act is tantamount to saying that nothing the court can learn from the presentence report can help the defendant. [People vs Schackelford, 146 Mich App 330; 379 NW2d 487 (1985)]

C. Responsibility of Probation Officer

1. Statutory Requirements

Under MCL 771.14; MSA 28.1144 the probation officer must inquire into the antecedents, character, and circumstances of the defendant and shall report in writing to the court. The presentence investigation report must include:

- a. an evaluation of and a prognosis for the person's adjustment in the community based on factual information contained in the report;
- b. if requested by a victim, any written impact statement submitted by the victim under the Crime Victim's Rights Act;
- c. A specific written recommendation for disposition based on the evaluation and other information as prescribed by the assistant director of the department of corrections in charge of probation (applied only to circuit court);

- d. a statement prepared by the prosecuting attorney as to whether any consecutive sentencing is required as authorized by law;
- e. if a person is to be sentenced for a felony or for a misdemeanor involving the illegal delivery, possession, or use of alcohol or a controlled substance, a statement that the person is licensed or registered under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838, if applicable; and
- f. Diagnostic opinions that are available and not exempted from disclosure under MCL 771.14(3).

2. Michigan Court Rule Requirements

Under MCR 6.425 (applies to felony cases only), prior to sentencing, the probation officer must investigate the defendant's background and character, verify material information, and report in writing the results of the investigation to the court. The report must be succinct and, depending on the circumstances, include:

- a. a description of the defendant's prior criminal convictions and juvenile adjudications;
- b. a complete description of the offense and the circumstances surrounding it;
- c. a brief description of the defendant's vocational background and work history, including military record and present employment status;
- d. a brief social history of the defendant, including marital status, financial status, length of residence in the community, educational background, and other pertinent data;
- e. the defendant's medical history, substance abuse history, if any, and if indicated, a current psychological or psychiatric report;
- f. information concerning the financial, social, psychological, or physical harm suffered by any victim of the offense, including the restitution needs of the victim;
- g. if provided and requested by the victim, a written victim's impact statement as provided by law;
- h. any statement the defendant wishes to make;
- i. a statement prepared by the prosecutor on the applicability of any consecutive sentencing provision;
- j. an evaluation of and prognosis for the defendant's adjustment in the community based on factual information in the report;

- k. a specific recommendation for disposition; and
- l. any other information that may aid the court in sentencing.

D. Referral to Probation Department

1. Procedure

After a defendant pleads guilty to a charge or is found guilty by court or jury trial, the judge may refer the defendant to the probation department for an investigation and report prior to sentencing. The sentence date may or may not be set prior to this referral. An appointment for the presentence interview is usually set at this time. All referrals from the court to the probation department should be made by written referral. All referrals are forwarded to the probation department and may contain a number of categories such as:

- a. Bond Investigation Report
- b. Court Appointed Attorney Investigation Report
- c. Full Investigation Report
- d. Abbreviated Presentence Investigation Report
- e. Oral Report
- f. Alcohol Evaluation

2. Basic Information Sheet

Upon initial contact with the probation department, the defendant will be requested to fill out a basic information sheet (BIS) (see sample forms in Section 4 Appendix). This form is the backbone of subsequent reports.

a. Primary Contents

The BIS should consist of the following:

- 1) identification data
- 2) family history
- 3) marital history
- 4) education history

- 5) employment history
- 6) economic data
- 7) military record
- 8) health history
- 9) substance abuse/use and any mental health history
- 10) arrest record, including any prior or pending cases (non-public record, see Chapter 8, page 8-02-01)
- 11) additional information deemed relevant by the probation officer or the defendant

b. Additional Information

The BIS should be kept up-to-date during the course of the investigation. Any changes in address, phone number, employment, etc., should be included.

The defendant's version of the offense should be included in either the BIS or in the record of an interview. Court information, such as court actions, dates, dispositions, victim's name, amounts of restitution, etc., should be recorded on a separate sheet filled out by the probation department after the initial contact with the client; this information should also be kept up-to-date.

c. Completing the BIS

The BIS should be completed whenever possible by the defendant prior to the interview. The probation officer may need to offer assistance. If, at the time of referral or during the interview, the defendant indicates that he or she is currently, or has recently been, in some type of treatment, the probation officer should have the defendant sign a release of information form. (See sample forms in Section 4 Appendix.) This release will give the probation officer authority to verify the defendant's attendance in treatment before the sentencing date.

E. Sex Offenders Registration

1. Authority

After a defendant pleads guilty or is found guilty or has been assigned to youthful trainee status (YTA) for any violation listed below, the defendant must register with the Department of State Police. [MCL 28.722 et seq.; MSA 4.475(2) et seq.]

2. Definition

Cases involving an individual arrested and charged with violating MCL 750.520b, 750.145a-c, 750.455, 750.520c-e, and 750.520g. Also included are sections 750.167 and 750.335a for a third or subsequent conviction of the statute or a corresponding local ordinance. Specific titles of the misdemeanor violations are:

750.145a	Accost, solicit, entice child for immoral purposes
750.167(1)(f)*	Indecent/obscene conduct in public
750.335a*	Indecent exposure
750.520e	Attempted criminal sexual conduct fourth degree

*Reportable on third or subsequent conviction of the statute or corresponding local ordinance.

3. Reporting Requirements

Registration must be completed within 7 days of conviction unless the conviction occurred before October 1, 1995. In those cases, registration must be completed before sentencing.

4. How to Report

Courts with direct access to LEIN may enter the registration directly. Courts without LEIN access shall send the registration form to the local law enforcement agency or the local Michigan State Police post. A copy of the form shall be given to the defendant.

5. Change of Address

Once registered, the registrant must notify law enforcement of any in-state change of address within 10 days of the address change. This requirement applies for 25 years following conviction. While on probation, the probationer may be provided a change of address form by the probation officer, but the responsibility to notify the local law enforcement agency in which the new address is located is the registrant's. Courts with LEIN access will have the ability to enter the address change.

F. Protection Against Possible Exposure to HIV, HBV, and HCV

Since the probation officer will be meeting with defendants to gather presentence information, there is the possibility that the probation officer could contract an infection from the defendant. Under the same statutes that require the court to order HIV testing for defendants charged with certain crimes, there are provisions for certain professionals who may be exposed to an infection as a result of their work with an infected person.

If a county employee or court employee who, while performing his or her official duties or otherwise performing the duties of his or her employment, determines that he or she has sustained a percutaneous, mucous membrane, or open wound exposure to the blood or body fluids of an arrestee or probationer may request that the arrestee or probationer be tested for HIV infection, HBV infection, or HCV infection under MCL 333.5204 only if he or she has received training in the transmission of bloodborne diseases under the rules governing exposure to bloodborne diseases in the workplace promulgated by the occupational health standards commission or incorporated by reference under the Michigan occupational safety and health act, 1974 PA 154, MCL 408.1001 to 408.1094. For details on procedure, see Section 7-09.

4-02 TYPES AND CONTENTS OF PRESENTENCE INVESTIGATION REPORTS

A. Full Presentence Investigation Report

The full investigation report is a complete investigation of the defendant's background. All records such as police, medical, work, school, etc. will be included and verified in addition to releases of information. The probation officer will include his or her evaluation, plan, program, and sentence recommendation.

The four subsections included in a full investigation report are the: 1) defendant's interview; 2) investigation; 3) evaluation; and 4) sentence recommendation.

1. The Interview

The interview is a face-to-face contact between the defendant and the presentence investigator. At this time, the BIS should be reviewed, clarifying all information and obtaining fuller responses if necessary. Using the BIS as a guide, the investigator should develop a full history of the defendant's background, taking additional notes as necessary. The defendant's version of the incident should be included.

2. The Investigation

- a. The most important part of the investigation is to verify all statements made at the interview and all information on the BIS as fully as possible. The probation officer will decide whether to include or exclude any information necessary to determine the appropriate sentence. If appropriate, contact employers, schools, medical and treatment facilities using the signed releases of information.
- b. Police arrest records and driving records should be obtained.
- c. The record should indicate whether the defendant was represented by an attorney in prior cases. According to People vs Miller, 179 Mich App 466; 446 NW2d 294 (1989), "where it appeared that defendant had been represented by counsel on only one of his prior misdemeanors, the sentencing court erred by using the uncounselled offenses to enhance defendant's sentence. Defendant was entitled to resentencing with a corrected presentence report which omits the counselless convictions." [Defender Sentencing Book, Michigan State Appellate Defender's Office]
- d. After completing the investigation, a written report should be submitted to the sentencing court. The written report should include the police version of the offense, the defendant's version, the victim's version, and the complete detailed background history of the defendant and the investigation. Any information which cannot be verified should be noted as such.

3. Evaluation, Plan, and Program

This section of the full investigation report is the presentence investigator's own assessment of the defendant. The investigator: 1) evaluates the data obtained in the interview and investigation; 2) formulates a plan of action for rehabilitating the defendant; and 3) determines a program for implementing the rehabilitation plan. These plans follow the previous sections of the written report and justify the final section, which is the sentence recommendation.

4. Sentence Recommendation

The last section of the presentence report is a sentence recommendation. There are a variety of sentencing options available to the court, but all include at least financial penalties or probation or jail. If probation is to be part of the sentence recommendation, any special clauses and terms of probation should be included. Either directly before or after the actual specific recommendation, a short explanation justifying the recommendation should be inserted. Review Section 6.

B. Abbreviated Presentence Investigation Report

1. General Contents

The abbreviated presentence report, which is usually a shortened form of the full investigation report, consists of the: 1) basic information sheet; 2) defendant's interview; and 3) written recommendation to the judge.

Because of high caseloads and time restraints, many courts have designed abbreviated presentence investigation reports to capture the most basic and pertinent information needed by the judge. Some samples of this wide variety of specially designed reports are included in the Section 4 Appendix.

2. When Used

This report is generally used when time is limited, when a defendant has been on probation before and another more complete presentence investigation report is available for the probation officer's inspection, or when the judge is familiar with the defendant's background. It may also be used to determine if a defendant is to be assigned Holmes Youthful Trainee status, or if a sentence is to be deferred or delayed.

3. Limitations

The judge should be made fully aware of the limitations of this type of report. A thorough investigation probably has not been conducted and not all information has been verified. There may be some records or reports that have not been obtained.

C. Oral Report

1. General Contents

An oral report is usually an informal request for information which is obtained from a brief interview with the defendant, followed by a check on the defendant's employment status, traffic and criminal records, ability to pay fines and costs, etc. The basic information sheet should be filled out, the defendant interviewed about the incident involved, and some points verified by telephone. If available, the arresting officer should be consulted. The defendant should be informed that sentencing will occur that day and the information requested is essential. The probation officer will present a summary of the information and make a verbal recommendation for sentencing.

2. When Used

The oral report is generally used when the judge intends to sentence a defendant the same day that the oral report is requested.

3. Limitations

MCL 771.14; MSA 28.1144 requires that a presentence investigation report contain a written recommendation for disposition. Since the presentence investigation report is not optional in felony cases, an oral report will never be ordered in these instances. However, since the sentencing judge has the option of ordering a presentence investigation report for misdemeanor cases, an oral report is permissible as an alternative.

D. Restitution

1. When Determined

If there was a victim in the case, restitution should be addressed during the time that the probation officer is preparing the presentence report and determined prior to sentencing. The victim should be interviewed either by phone or in person, if requested. This will help in determining the seriousness of the offense, and give another view of the defendant.

2. Determining Validity and Amount

Restitution should not be on the probation order unless the amount is specific and has been verified by proof from medical bills, work loss statements from employers, repair bills, etc. Restitution may be ordered for the deductible amount in insurance paid losses. An insurance company requesting restitution should submit proof of payment. Restitution may be ordered in cases involving welfare fraud, Michigan Employment Security Commission (MESC) fraud, and Crime Victim Compensation Board. Proof of fraud or victim compensation amounts are readily verifiable.

3. Ordering Restitution After Sentencing

If sentence has already been passed when restitution amounts are determined, the probation order must be amended. It may be necessary to hold a hearing, with adequate proof verifying the amount, before a payment of restitution can be added to a probation order.

E. Reimbursement for Emergency Response

Under MCL 769.1f, a person convicted of specified offenses shall reimburse a state or local unit of government expenses for emergency response. Reimbursement shall be a condition of probation or parole. These reimbursements are not restitution, and are not treated as restitution for purposes of priority of payment under MCL 775.22.

1. When Determined

Reimbursement for emergency response should be addressed during the time that the probation officer is preparing the presentence report and determined prior to sentencing.

2. Determining Validity and Amount

The expenses for which reimbursement may be ordered under this section include salaries or wages, including overtime pay, of law enforcement personnel, of fire department and emergency medical service personnel, including volunteer fire fighters or volunteer emergency medical service personnel, the cost of medical supplies lost or expended by fire department and emergency medical service personnel, the salaries, wages, or other compensation, including, but not limited to, overtime pay of prosecution personnel for time spent investigating and prosecuting the crime or crimes resulting in conviction, the cost of extraditing a person from another state to this state.

A local unit of government may elect to be reimbursed for expenses under this section or a local ordinance, or a combination of this section and a local ordinance. A local unit of government may not be fully reimbursed more than once for any expense incurred by that local unit of government.

If police, fire department, or emergency medical service personnel from more than 1 unit of government incurred expenses as described in MCL 769.1f(2), the court may order the person convicted to reimburse each unit of government for the expenses it incurred.

3. Reimbursement as Condition of Probation

If the person convicted is placed on probation or parole, any reimbursement ordered under this section shall be a condition of that probation or parole.

4. Enforcing Reimbursement

The court may revoke probation or parole if the person fails to comply with the order and if the person has not made a good faith effort to comply with the order. In determining whether to revoke probation or parole, the court shall consider the person's employment status, earning ability, number of dependents, and financial resources, the willfulness of the person's failure to pay, and any other special circumstances that may have a bearing on the person's ability to pay.

An order for reimbursement under this section may be enforced by the prosecuting attorney or the state or local unit of government named in the order to receive the reimbursement in the same manner as a judgment in a civil action.

A person shall not be imprisoned, jailed, or incarcerated for a violation of probation or parole, or otherwise, for failure to make a reimbursement as ordered under this section unless the court determines that the person has the resources to pay the ordered reimbursement and has not made a good faith effort to do so.

4-03 INVESTIGATION

A. Constitutional Limitations

The United States and Michigan Supreme courts have found it essential that a sentence, and therefore a presentence report, be based on accurate information. [Townsend vs Burke, 334 US 736 (1948); People vs Malkowski, 385 Mich 224; 188 NW2d 559 (1971); People vs Gunter, 76 Mich App 483; 257 NW2d 133 (1977)]

1. Polygraph Test

Polygraph test results may not be included in a presentence report without the defendant's consent. [People vs Allen, 49 Mich App 148; 211 NW2d 533 (1973); People vs Dockery, 65 Mich App 600; 237 NW2d 575 (1975)] These courts stated that a polygraph examination is not sufficiently accurate under due process to allow it to be imposed upon the defendant during sentencing in order to determine whether he or she is guilty of other criminal conduct.

In 1976 the Court of Appeals went even further and said that there may be no mention at all of the polygraph test in a presentence report. [People vs Towns 69 Mich App 475; 245 NW2d 97 (1976)] It is improper for a judge to "broach the subject of polygraph examinations or induce defendant to take the examination for sentencing purposes." [People vs Towns supra]

2. Past Convictions

a. Violation of Right to Counsel

A sentence may not be influenced by a defendant's past convictions obtained in violation of the right to counsel. The United State Supreme Court has found this to be "misinformation of constitutional magnitude." [United States vs Tucker, 404 US 443; 92 SCt 589; 30 LEd2d 592] When conducting a presentence investigation, a probation officer should ask a defendant if he or she had an attorney at the time of the plea(s) or trial(s) resulting in conviction and incarceration. The report should note any case in which the defendant apparently was unrepresented so the sentencing court may consider the constitutionality of the conviction(s) and decide whether they should be taken into account in the current sentencing proceeding.

b. Waiver of Right to Counsel

The Michigan Supreme Court has declared that a defendant who claims a denial of the right to counsel in a past conviction has a right to a hearing on that question. [People vs Moore, 391 Mich 426; 216 NW2d 770 (1974); People vs Henbry, 395 Mich 367; 236 NW2d 489 (1975)]

c. Convictions in Foreign Countries

Under People v Braithwaite, 67 Mich App 121; 240 NW2d 293 (1976) it states that a court may not consider in sentencing, a prior conviction of a defendant rendered in any foreign country. However, in People v Galvan, 226 Mich 137, the Court of Appeals upheld the trial court's statement that "it doesn't make any difference where the conviction entered as long as that it comported with due process." In People v Wallach, 110 Mich App 70; 312 NW2d 387 (1981) it was held that the blanket prohibition of Braithwaite, that evidence of a conviction under Canadian law can never be permissible consideration in determining a sentence, should not be followed. In Galvan, the court agreed with Wallach "that the holding in Braithwaite is overbroad and should not be followed. For practical purposes, a trial court should have all relevant information before it to fashion an appropriate sentence. Convictions in other jurisdictions are a relevant consideration at sentencing and should be considered as long as the courts are convinced that the defendant was afforded due process in that system."

B. Importance of Relevancy and Reliability

1. When Preparing the Report for Sentencing

The presentence report must contain reliable information relevant to the defendant's character, attitude, and activities since it provides support for the judge's sentencing decision. The presentence investigator must seek reliable sources, verify information, and evaluate on the basis of experience, common sense, accuracy, and validity. According to case law, it is improper for a probation officer to inject personal opinion that the defendant is guilty of a charge where he or she has not been found guilty. [People vs Westerfield, 71 Mich App 618; 248 NW2d 641 (1976), People vs Winhoven 65 Mich App 522, 237 NW2d 575 (1975)]

2. When Using the Report at Sentencing

- a. The sentence imposed by a judge must be based only upon knowledge or evaluation of the defendant. Therefore, a sentencing judge may not consider a personal impression that the defendant is protecting a co-defendant or assume a defendant is guilty of other crimes based on hearsay or unsubstantiated reports. [People v Anderson, 391 Mich 419; 216 NW2d 780 (1974); People v Davis, 41 Mich App 683; 200 NW2d 779 (1972); People v Grimmit, 388 Mich 590; 202 NW2d 278 (1972)]
- b. A sentencing judge may not increase the defendant's sentence on the assumption that he has not fully confessed to the criminal behavior. If the defendant denies the offense, the sentencing judge has a duty to ascertain that the sentencing decision is not based upon false information. These limitations clearly control a presentence investigation as well.

C. Fundamental Elements to Consider During Investigation

1. Criminal History and Records

In order to obtain an accurate, comprehensive evaluation of a defendant for sentencing purposes, the probation officer should include in the presentence investigation report the defendant's criminal record (if one), the defendant's traffic history, the police report, the offender's version of the current offense, a summary statement from the victim, and any other pending charges or allegations of criminal conduct. Access to Criminal history records and dissemination of information contained within the records is controlled by Michigan Law Enforcement Information Network (LEIN) Administrative Rules and federal regulations. [Title 28 of the United States Code]. There are some guidelines and limitations to the inclusion of this information in the presentence report as follows:

- a. Any admissions a defendant makes to a probation officer regarding criminal conduct should be included in a presentence report. However, if these statements are later denied in court, a judge should not consider them as true in imposing sentence. [People v Hildabidle, 45 Mich App 93; 206 NW2d 216 (1973)] Pending charges and other allegations of criminal conduct may be included in the presentence report. However, if the defendant denies any allegations, the court may only consider them if it is presented with further information establishing their validity.
- b. The Michigan Supreme Court in People v McFarlin, 41 Mich App 116; 199 NW2d 684 (1972) made clear that a judge may consider a defendant's juvenile record in sentencing and that such records are often important in determining sentences. Probate courts (now family division of the circuit court pursuant to MCL 600.1021) and the Michigan Family Independence Agency have a duty to provide information to the Department of Corrections about a defendant's prior record as a juvenile. [MCL 791.228] However, information in a juvenile record may be unreliable.
- c. The defendant may object to consideration of prior felony, misdemeanor, or juvenile convictions obtained without counsel or a valid waiver. The defendant must present prima facia evidence that the prior conviction challenged is constitutionally invalid. This can be demonstrated by showing the judges register of actions entry or transcript that acknowledges an absence of counsel in the presentence report itself. This burden then shifts to the prosecution to show the constitutionality of the conviction. [People v Moore, 391 Mich 426; 216 NW2d 770 (1974)] See also People v Carpentier, 446 Mich 19, 29-30; 521 NW2d 195 (1994) and People v Zinn, 217 Mich App 342; 551 NW2d 704 (1996).
- d. If a defendant has previously been sentenced under Holmes Youthful Trainee Act [MCL 762.11 et seq.] this information also should be included in the report, if available. Even though records showing assignment to youthful trainee status are closed to the public, section 762.14 of the act provides that "all proceedings relative to the disposition of the criminal charge and the individual's assignment as youthful trainee shall

be closed to public inspection, but shall be open to the courts of this state, the Department of Corrections, the Department of Social Services (FIA) and law enforcement personnel for use only in the performance of their duties." [People v McFarlin, 389 Mich 557; 208 NW2d 504 (1973)] This information also applies to Spouse Abuse Act [MCL 769.4a] and the Controlled Substance Act [MCL 333.7411]

- e. Pending but unadjudicated charges against a defendant may be included in the presentence report and considered in fixing sentence, so long as the fact of reliance upon them is placed on the record. [People v Lee, 391 Mich 618; 218 NW2d 655 (1974), People v Pulley, 66 Mich App 321; 239 NW2d 366 (1976), People v Henry, 395 Mich 367; 236 NW2d 489 (1975)] Pending charges, even those dropped pursuant to a plea bargain, may be considered by the sentencing court and provide an accurate and adequate basis for imposing sentence. [People v Moors, 70 Mich App 210; 245 NW2d 569 (1976)]
- f. When a person has been convicted of domestic violence, or when a prior conviction of domestic violence is included in a criminal history record, federal law prohibits the person from possessing, carrying, or purchasing a firearm or ammunition. [US Code, Title 18, Section 922(g)(9)]

The definition of domestic violence in the federal code includes all misdemeanor convictions that involve the use or attempted use of physical force or threat of use of a deadly weapon, by a current or former spouse, parent, or guardian of the victim; by a person with whom the victim shares a child in common; by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian; or by a person similarly situated to a spouse, parent, or guardian of the victim. A person must have been represented by counsel or knowingly and intelligently waived the right to counsel, and same for jury. The presence of a conviction meeting these requirements would result in a condition of probation prohibiting the defendant from possessing, carrying, or purchasing a firearm or ammunition.

2. Psychiatric Reports

The Michigan Supreme Court held that a psychiatric report from the Center for Forensic Psychiatry evaluating the defendant's present mental health is required, before a guilty but mentally ill defendant may be sentenced. [People v McLeod, 407 Mich 632; 288 NW2d 909 (1980)] See also MCR 6.425(A)(5).

3. Privileged and Confidential Information Obtained from Professionals

The probation officer needs to be aware of the rules of confidentiality when gathering privileged information for the presentence investigation report and how these rules pertain to the disclosure of that information once it is compiled in the report. The conversations between the probation officer and the defendant, while confidential, are not considered privileged and the conversations may be subject to disclosure (see Section 4-05 and Section 9 for more details on disclosure of confidential information).

A defendant interviewed during a presentence investigation must be informed that the law protects certain kinds of records kept by doctors, schools, accountants, etc., whatever is pertinent. In order to compile a complete report to aid a judge in sentencing, access to this privileged information is important or even indispensable.

For more details on the confidential relationship between the probation officer and the defendant, see Section 1-03 and Section 4-03, page 4-03-06.

a. Seeking Privileged Information from Confidential Relationships

When privileged information is sought from someone who has a confidential relationship with the defendant, the probation officer needs permission to obtain the information. A defendant should be asked to sign a waiver giving confidential sources permission to release or disclose privileged information to the probation officer. A form for this should be developed in each probation department. The release form must specifically indicate that the individual understands that he or she has the right to deny access to privileged information and that they are knowingly relinquishing that right.

If privileged information is included in a report without a waiver, a defense attorney may be able to prevent a judge from considering the privileged information in sentencing based on that statute which grants the privilege barring its use.

Confidential relationships recognized by Michigan statute are numerous; therefore, only the most frequent are listed below.

- Accountants [MCL 338.2120]
- Attorneys [MCL 767.5a]
- Confessions to Clergy [MCL 600.2156]
- Guardian and Ward [MCL 704.2]
- Husband and Wife [MCL 600.2161]
- Marriage Counselors [MCL 338.1043]
- Physicians [MCL 600.2157]
- Polygraphs [MCL 338.1728]
- Psychiatrists [Morrisser v Brewer, 408 US 471; 92 S Ct 2593; 33 L Ed 2d 484]
- Psychologists [MCL 338.1018]

Whenever information is required from any of the above sources, it is best first to check the statute to determine if a privilege is involved and, if so, whether a means for obtaining it is provided, either through waiver or court order.

b. Exceptions to Release of Privileged Information

Sometimes privileged information cannot be released to the probation officer even with the consent of the individual concerned. This is because **privileges** exist without there being a confidential relationship as defined above. Generally these privileges protect government

records pertaining to children, for example, adoptions, illegitimate births and training school records. Because the government believes it would be harmful to both children as a class and the public if such information were available. The law usually does not allow disclosure even if the person described in the records consents.

c. Access to Public Assistance Records

In order to determine a defendant's ability to pay fines, costs, and restitution, the probation officer will need to verify that a defendant receives public assistance and the amount received. This information is open to inspection by officials in connection with their official acts according to MCL 400.64.

d. Freedom of Information Act

The Freedom of Information Act greatly facilitates the gathering of information from government agencies only (this does not apply to court records). This information is open to the general public. The statute provides that failure of a government agency employee to promptly furnish the information subjects that employee to immediate dismissal and is also a misdemeanor. [MCL 15.231]

4. Confidential Information Obtained from the Defendant

There is a difference between privileged information and confidential information. The conversations between a probation officer and a defendant are considered confidential, but the defendant does not have the legal right to insist that information revealed in these conversations is privileged. The Supreme Court confirmed that "privileged information" in a conversation between a probation officer and an offender is not protected, like a conversation between a lawyer and his/her client. [*Fare v Michael*, 442 US 707; 99 S Ct 2560; 61 L Ed 2d 797 (1979)]

Although the information revealed to the probation officer is not privileged, the relationship between the defendant and the probation officer should be based on mutual trust so that the offender can feel comfortable talking with the probation officer about personal problems. Assurances of confidentiality are one way to foster and gain trust in this relationship. While conversations between the probation officer and the defendant may be considered confidential in many situations, the probation officer must forego confidentiality if public safety is endangered.

If a probation officer makes a promise of confidentiality (implied or expressed), then any information acquired through further questioning may not be used in a violation or subsequent criminal proceeding. Otherwise, the information gathered can be used.

For more information on the release of confidential information, see Section 1-03, Section 4-05, and Section 8.

5. Blood Testing for HIV and Other Diseases

Human Immunodeficiency Virus (HIV) and other communicable diseases have had a significant impact on the criminal justice system. Probation officers may come in contact with persons who have communicable diseases. It is important to have knowledge of the following laws and their impact on the criminal justice system.

MCL 333.5131 and MCL 333.5133 states that all reports, records and data pertaining to testing, care, treatment, reporting and research associated with a communicable disease or infection are confidential. Any person who releases test results in compliance with the law is immune from civil or criminal liabilities or administrative penalties for the release of that information. The test results for the presence of a communicable disease or infection, and the fact that a test was ordered, is subject only to physician - patient privilege laws. (See Section 6-01, page 6-01-05 for more information on the responsibilities of the court.)

6. Fingerprinting

At the time of arraignment of a person on a complaint for a felony or a misdemeanor (punishable by imprisonment for more than 92 days) a district court magistrate or judge must order that fingerprints be taken (see SCAO Approved Form MC 233 in the Section 4 Appendix). The order will either: 1) order the person to submit himself or herself to the police agency that arrested the subject or obtained the warrant for the arrest of the person so that the person's fingerprints can be taken; or 2) order the person committed to the custody of the sheriff for the taking of the fingerprints. [MCL 764.29]

Note: MCL 28.243 was amended effective 12/29/99 and provides that fingerprints are not required at arrest for violations of MCL 257.904(a) and (2); 1st offense DWLS, 1st offense No Operators License - Never Applied, and 1st offense Allow Person to Operate Suspended, Revoked, Denied. Pending amendments of MCL 764.29 and 764.16a regarding the ordering of fingerprints and reporting of dispositions, courts and local law enforcement should determine how these various statutes will be implemented.

7. Assessments

Under MCL 257.625b(5) before imposing sentence for a violation of subsections MCL 257.625(1), (3), (4), (5) (6), or (7) or a local ordinance substantially corresponding to subsections (1), (3), or (6), the court shall order the defendant to undergo screening and assessment by a person or agency designated by the Office of Substance Abuse Services to determine whether he or she is likely to benefit from rehabilitative services, including alcohol or drug education and alcohol or drug treatment programs. Except as otherwise provided in MCL 257.625b(5), the court may order the defendant to participate in and successfully complete one or more appropriate rehabilitative programs. If the person has 1 or more prior convictions, the court shall order the person to participate in and successfully complete 1 or more appropriate rehabilitative programs as part of the sentence. The defendant shall pay for the costs of the screening and rehabilitative services as part of the sentence. This assessment can be included as a portion of the presentence report. There are several screening and assessment tools that can be used for

evaluation (see Section 5 for more information). There are assessment tools that can be used for crimes other than drunk driving, such as the Driver Risk Inventory (DRI), Shoplifters Anonymous, a psychological evaluation, etc.

8. Crime Victim's Rights

Victims have certain rights established by Article I, Section 24 of the Michigan Constitution and the Crime Victim's Rights Act that became effective October 9, 1985. There are certain actions that a presentence interviewer/probation officer should consider during investigation. [Const 1963, Art 1, §24, MCL 780.824]

A parent, guardian, or custodian of a minor victim or a victim who is mentally or emotionally unable to participate in the legal process may exercise the rights of the victim, unless the parent, guardian, or custodian is the defendant or is incarcerated.

a. Victim Impact Statement

Under MCL 780.823 and 780.824, the victim has the right to submit or make a written or oral impact statement to the probation officer for use by that officer in preparing a presentence investigation report concerning the defendant. The victim's written statement shall, upon the victim's request, be included in the presentence investigation report. A victim impact statement letter should be sent to and filled out by the victim(s) prior to a probation officer's interview. (See also MCL 771.14(2)(b)] Under MCR 6.425(A)(7) if provided and requested by the victim, a written victim's impact statement as provided by law shall be included for sentencing regarding information concerning the financial, social, psychological or physical harm suffered by any victim of the offenses, including the restitution needs for the victim. (See attached sample form in the Section 4 Appendix.)

b. Effect on Sentencing Recommendation

In determining a sentencing recommendation, the probation officer should assess the relationship of the victim and defendant. If the victim wishes not to have contact with the defendant, the probation officer may include this as a recommended condition of probation.

c. Determining Restitution

During an investigation, it is essential to contact the victim and determine injuries or losses for which the victim may receive compensation. In determining restitution, refer to MCL 780.826.

For crimes resulting in physical or psychological injury: The following costs, whether incurred or reasonably expected to be incurred, may be included in the calculation of restitution:

- medical services;
- physical therapy and rehabilitation;
- medical and psychological treatment for victims' family members;

- homemaking and child care expenses; and
- federal, state, and local tax deductions or credits which are lost due to the death of a victim if the deceased victim could have been claimed as a dependent.

If homemaking or child care services are provided without charge, restitution may include the amount which would be charged for those services in the area. (MCL 780.766(4), 780.794(4), 780.826(4))

Calculation of amounts not yet incurred but reasonably expected to be incurred will present challenges to probation officers. Simple scenarios, such as monthly counseling sessions which will last for a predetermined duration, will be relatively straightforward. But future expenses which may go on for an unknown period of time, or which may vary in amount over time, will be more complicated. Especially complex will be the value of tax benefits not realized, since the value of future deductions is dependent upon the future income of the parents or guardians.

In cases where costs will continue to accrue, courts should enter an order with a specific (even if estimated) amount of restitution; “open” orders should not be entered. As costs continue to accrue, the restitution order should be amended, periodically if necessary, and always state a specific amount. Orders with estimated costs should be automatically calendared for future review.

In all cases, the court is obliged to order amounts which are “reasonably determined” or “reasonably expected to be incurred” despite the difficulty of calculating those amounts.

Crimes resulting in death or serious impairment of a body function: The court may order three times the amount otherwise allowed as restitution. MCL 780.766(5)

d. Notice to Prosecuting Official

Depending on local practice, after the defendant's arraignment the probation officer may be responsible for notifying the prosecuting official of the names and addresses of victims under MCL 780.816. (See SCAO Approved Form DC 255 in the Section 4 Appendix.)

e. Confidentiality of Impact Statement

If a victim has requested his or her Victim's Impact Statement be included in the presentence investigation report, it will be made available to the defendant unless exempted from disclosure by the court as specified under MCL 771.14(3) and MCR 6.425(B) and (C). (See also Section 4-05.)

[MCL 780.823(1)(e), MCL 780.824]

9. Defendant's Statement

It is important that the probation officer get a statement from the defendant as part of the presentence report; the statement may be either written or oral depending on local practice. There are disadvantages and advantages to both. Any discrepancies between the defendant's version and police report need to be expressed to the judge in the presentence investigation report.

D. Waiver of Updated Presentence Report at Resentencing

A defendant or prosecutor has the right to waive the right to an updated presentence report at resentencing when each believes the previously prepared report is accurate. [People v Hemphill, 439 Mich 576; 487 NW2d 152 (1992)] A defendant may waive preparation of an updated report at resentencing even though a previously prepared presentence report may contain inaccurate information and basing a sentence on such information could jeopardize the sentencing unless updated.

4-04 PRESENTENCE REPORT

A. Purpose

After a defendant pleads guilty to a charge or is found guilty by the court or jury trial, the judge may refer the defendant to the probation department for an investigation and report prior to the sentencing. The presentence report provides the sentencing judge with a recommended sentence supported by documentation which aids the judge in fashioning a just sentence.

B. Contents

MCL 771.14(2) specifies those components which must be included in all felony presentence reports and any misdemeanor presentence reports which have been requested by the court (two of the components apply only to felony cases). If the court has not requested the probation officer to prepare a written report, these components, while not required, are highly recommended. Other recommended components are outlined in case law.

1. Required or Recommended Components of the Report

- a. Components under MCL 771.14(2); MSA 28.1144(2)
 - 1) an evaluation of and a prognosis for the person's adjustment in the community based on factual information contained in the report.
 - 2) if requested by a victim, any written impact statement submitted by the victim under MCL 780.823; MSA 28.1287(823), MCL 780.824; MSA 28.1287(824);
 - 3) A specific written recommendation for disposition based on the evaluation and other information as prescribed by the assistant director of the department of corrections in charge of probation;
 - 4) a statement prepared by the prosecuting attorney as to whether any consecutive sentencing is required as authorized by law;
 - 5) if a person is to be sentenced for a felony or for a misdemeanor involving the illegal delivery, possession, or use of alcohol or a controlled substance, a statement that the person is licensed or registered under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838, if applicable; and
 - 6) Diagnostic opinions that are available and not exempted from disclosure under MCL 771.14(3).
- b. Components recognized in People v Anderson, 107 Mich App 62; 308 NW2d 662 (1982)
 - 1) an objective description of the offense;

- 2) the defendant's version of the offense;
- 3) a full description of the defendant's prior criminal record;
- 4) the status of all criminal charges pending against the defendant; and
- 5) a personal profile of the defendant.

2. Optional

The presentence report may include:

- a. the defendant's juvenile record if the record has not been expunged [People vs McFarlin, 389 Mich 557; 208 NW2d 504 (1973)];
- b. the conclusions or opinions of the probation agent [People vs Books, 95 Mich App 500; 291 NW2d 94 (1980)]; and
- c. pending charges and prior arrests without convictions. [People vs Lee, 391 Mich 618; 218 NW2d 655 (1974)] With pending charges, the judge may not assume that the defendant is guilty of charges of which the defendant is presumed to be innocent, if denied by the defendant. (non-public record, see Chapter 8, page 8-02-01) [People vs Grimmett, 388 Mich 590; 202 NW2d 278 (1972)].

3. Updating Reports

A presentence report must be current and updated [People vs Triplett, 407 Mich 510; 287 NW2d 165 (1980)]. A report is deficient if it is so old that it does not reflect changed circumstances. [People vs Crook, 123 Mich App 500; 333 NW2d 317 (1983)]. The defendant is entitled to be sentenced on the basis of a presentence report prepared specifically for the offense for which the defendant is being sentenced. [People vs Anderson, 107 Mich App 62; 308 NW2d 662 (1981), People vs McKeever, 123 Mich App 533; 332 NW2d 596 (1983)] If a complete report has been prepared within the past 3 years, that report may be submitted along with a supplementary report. [Michigan Administrative Code, Rule 791.9910(3) (1977)]. Supplemental reports should reflect new information and relevant changes.

If a prepared presentence investigation report is amended or altered before sentencing by the supervisor of the probation officer who prepared the report or by any other person who has the authority to amend or alter a presentence investigation report, the probation officer may request that the court strike his or her name from the report and the court shall comply with that request. [MCL 771.14(4); MSA 28.1144(4)]

C. Sentence Recommendation

The presentence report must contain a specific sentence recommendation [People vs Green, 123 Mich App 563; 332 NW2d 610 (1983), MCL 771.14(2); MSA 28.1144(2)] A simple recommendation of incarceration or that the defendant not be placed on probation is sufficient. [People vs Joseph, 114 Mich App 70; 318 NW2d 609 (1982)]

1. Sentencing Guidelines

Michigan trial court judges have used sentencing guidelines when sentencing offenders since March, 1984. These guidelines were mandated by Administrative Order of the Michigan Supreme Court. Pursuant to 1997 PA 317, legislatively mandated sentencing guidelines became effective for all felony offenses and all two year misdemeanors. Offenders committing offenses prior to January 1, 1999 are to be sentenced using the sentencing guidelines mandated by the Supreme Court. Offenders committing offenses on or after January 1, 1999 will be sentenced using the legislatively mandated sentencing guidelines. These guidelines do not apply to misdemeanor offenses handled by the district court. [MCL 769.21; MSA 28.1097(3)(2)]

2. Plea Agreement

The judge may not initiate or participate in discussions aimed at reaching a plea or sentence agreement. [People vs Briggs and Killebrew, 416 Mich 189; 330 NW2d 834 (1982)] The judge also is not bound by defense-prosecution sentence bargains until he or she accepts them at sentencing. [People vs Ott, 144 Mich App 76; 373 NW2d 694 (1985)] Sentence bargaining may result in a sentence agreement between the defendant and prosecutor that the defendant will plead guilty in exchange for: 1) a specific sentence disposition; or 2) a sentence recommendation by the prosecutor.

3. Factors in Determining Sentence

In determining what sentence to impose, the following should be considered:

- a. the possibility of reforming the defendant;
- b. the protection of society;
- c. the disciplining of the offender; and
- d. the likelihood of deterring others from committing like offenses.

Although the sentence must be individualized, the judge should consider what similarly situated defendants who have committed similar crimes have generally been sentenced so as to avoid a "significantly disproportionate" sentence. [People vs Coles, 417 Mich 523; 339 NW2d 440 (1983)] (See Section 6-01 for more details on determining sentence.)

D. Release of Privileged Information

See Section 1-03, Rules of Confidentiality, Section 4-05, and Section 8.

4-05 DISCLOSING PRESENTENCE INVESTIGATION REPORT AND RELATED RECORDS

A. Authority

The presentence report must be disclosed prior to sentencing.
[MCL 771.14(4); MSA 28.1144(4), MCR 6.425(B)]

B. Right to Access

The defendant, the defense attorney, and the prosecutor have the right to read the presentence report. [MCL 771.14(4); MSA 28.1144(4), MCR 6.425(B)] At the time of sentencing, either party may challenge, on the record, the accuracy or relevancy of any information contained in the presentence investigation report.

C. Records, Reports, and Case Histories

1. Exemptions from Disclosure

The sentencing judge may exempt parts of the presentence report from disclosure to the defendant which might seriously disrupt a program of rehabilitation and sources of information that have been obtained on a promise of confidentiality. When a part of the report is not disclosed, the court must advise the defendant and the defendant's attorney that information has not been disclosed and state on the record the reason for nondisclosure. [MCLA 771.14(3); MSA 28.1144(3); MCR 6.425(B)]

2. Disclosure of Presentence Investigation Report

a. Before Sentencing

1) Review by Parties

The sentencing court must permit the prosecutor, the defendant's lawyer and the defendant to review the presentence report at a reasonable time before the day of sentencing. The court may exempt from disclosure: 1) any information or diagnostic opinion that might seriously disrupt a program of rehabilitation; and 2) any sources of information that have been obtained on a promise of confidentiality. The defendant can object to consideration of prior felony or misdemeanor convictions. (See page 4-03-03.)

2) **Nondisclosure**

When part of a presentence investigation report is not disclosed, the court must inform the parties that information has not been disclosed and state on the record the reasons for nondisclosure. To the extent it can do so without defeating the purpose of nondisclosure, the court also must provide the parties with a written or oral summary of the nondisclosure information and give them an opportunity to comment on it. The court's decision to exempt part of the report from disclosure is subject to appellate review. [MCR 6.425(B)]

b. After Sentencing

After sentencing, the court, on written request, must provide copies of the presentence report and any attachments to the prosecutor and the defendant's lawyer. [MCR 6.425(C)]

3. **Responsibility of Probation Officer**

Probation officers have a dual responsibility of protecting the public and promoting the rehabilitation of offenders. While the information which a probation officer has obtained and maintained in the probation file is confidential material, some materials may be released in certain instances. (See Section 4-03, page 4-03-06.)

The presentence investigation report contains numerous bits of information about an offender's background such as his or her education, social and medical history, and work experience. A probation file may also consist of other reports written by counselors, psychologists, and case workers. Therefore, a large amount of personal and confidential information is maintained by the probation officer which should not be disclosed arbitrarily.

a. Releasing Conviction Information on Defendant

When conviction information is a matter of **public record**, probation officers may disclose this information to non-criminal justice agencies or other persons as long as agency regulations are observed. **Information obtained via LIEN may not be disclosed to non-criminal justice agencies or persons.** Dissemination of criminal history record information (CHRI) obtained via the Law Enforcement Information System (LEIN) is controlled by MCL 28.214; MSA 4.448(54), Criminal Justice Information Systems (CJIS) Policy Council rules, and Chapter 1 of Title 28 of the Code of Federal Regulations. Title 28 was developed to insure the constitutional rights and privacy of individuals with CHRI, and to control the collection and dissemination of such information. LEIN Field Services is required by Title 28 to insure that its requirements are satisfied by security standards. Misdemeanor and felony violations were created by 1998 Public Act 82 for disclosure of information from LEIN in a manner not authorized by law or rule.

Title 28 limits the dissemination of nonconviction data directly or through an intermediary to criminal justice agencies for criminal justice purposes or employment, or other individuals and agencies as authorized by statute, executive order, or court rule. LEIN administrative rule 28.6210 states that a user agency shall not disseminate criminal history record information received through the LEIN to a private person. A private person may receive verbal information from a law enforcement agency as to whether or not a warrant ordering his or her arrest has been issued by a court and entered into either LEIN or national crime information center (NCIC) files if they provide proper identification.

b. Releasing Background Information on Defendant

Probation officers may also disclose an offender's background to criminal justice agencies on a need-to-know basis, provided the inquiry is related to an on-going investigation. Courts generally base their decision to disclose information about an offender's background on the nature of the offender's crime and on the probation officer's opinion for potential harm.

c. Releasing Privileged Information

Privileged information gathered from confidential relationships as defined on page 4-03-04 is not open to public inspection. (See Section 1-03 for more details.)

d. Releasing Confidential Information

Confidential information gathered from the defendant as defined on page 4-03-06 is privileged only when given to the probation officer within the scope of the probation officer's statutory responsibility. [People v Burton, 74 Mich App 215; 253 NW2d 710 (1977)]

D. Probationer's Statements

Any statements a defendant makes to a probation officer about criminal conduct should be included in the report, however if these statements are later denied in court, a judge should not consider them true in imposing sentence.

[People vs Hildabridle, 45 Mich App 93; 206 NW2d 216 (1973)]

(See Section 4-03, page 4-03-08 for more information on the probationer's statements.)

E. Crime Victim Rights

If a victim has requested this his or her Victim's Impact Statement be included in the presentence investigation report, it will be made available to the defendant unless exempted from disclosure by the court as specified under MCL 771.14(3); MSA 28.1144(3) and MCR 6.425(B) and (C). (See Section 4-03, page 4-03-08.)

[MCL 780.823(1)(e); MSA 28.1287(823)(1)(e), MCL 780.824; MSA 28.1287(824)]

(See also Sections 1-03 and 8.)

4-06 CHALLENGES TO INVESTIGATION AND REPORT

A. Authority

Any information contained in the presentence report may be challenged as inaccurate and irrelevant. [People vs Wilkins, 121 Mich App 813; 329 NW2d 500 (1982), MCL 771.14(5); MSA 28.1144(5)]

B. What Can Be Challenged

Prior felony and misdemeanor convictions may be objected to as unconstitutionally obtained in violation of the right to counsel [People vs Moore, 391 Mich 426; 216 NW2d 770 (1974), People vs Schneider, 132 Mich App 214; 347 NW2d 21 (1984)], and if the defendant was not advised of the right to a jury trial, right to confront his or her accusers and the right to remain silent [People vs Crawford, 417 Mich 607; 339 NW2d 630 (1983)]. See also, page 4-03-03.

(See also Section 6-12, page 6-12-02.)

4-07 IN-CHAMBERS CONFERENCES

The judge may conduct in-chamber conferences. [People vs Pulley, 411 Mich 523; 309 NW2d 170 (1981)] The judge may not confer ex parte with the prosecutor in the absence of defense counsel. [People vs Von Everett, 110 Mich App 393; 313 NW2d 130 (1981)] The judge may confer with defense counsel in the absence of the defendant unless the defendant is prejudiced. [People vs Pulley, supra]

Two judges may confer regarding a defendant whom both judges are going to sentence. [People vs Sexton, 113 Mich App 145; 317 NW2d 323 (1982)]. And the judge may meet with the victim although the practice is "unwise." [People vs Rodriquez, 124 Mich App 773; 335 NW2d 690 (1983)]

The judge may meet with the probation agent outside the presence of defense counsel, however, counsel must have access to any information which was disclosed at that conference. [People vs Thompson, 423 Mich 427; 378 NW2d 384 (1985), People vs Beal, 104 Mich App 159; 304 NW2d 513 (1980), People vs Mills, 145 Mich App 126; 377 NW2d 361 (1985)].

4-08 SUGGESTED INTERNAL PROCEDURES

The presentence interview should include relevant questions, moving from general to more specific areas of inquiry. Asking open-ended questions helps gain more insight into the defendant's character and behavior. The interview should also be conducted in a nonjudgmental manner with persistence and directness on the part of the probation officer. The basic procedure in the investigation prior to meeting with the defendant is to:

- create a file on the defendant
- obtain a police report
- review the basic information sheet (BIS)
- read the register of actions
- check the local criminal record/index (automated or manual alphabetical)
- check the juvenile records
- review the traffic and criminal histories
- compile all information to begin basis for presentence investigation report
- obtain a Victim Impact Statement if applicable

APPENDIX 4

Referral to Probation

Basic Information Sheet (BIS)

Release of Information Forms

Abbreviated Presentence Investigation Report

Order for Fingerprints (MC 233)

Victim Impact Statement

Notice to Prosecuting Official (DC 255)

Motion and Affidavit Regarding Alleged
Probation Violation and Order (MC 246)

Financial Statement (MC 287)