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This Issue in Brief

Are Probation and Parole Officers Liable for Injuries Caused by Probationers and Parolees?—The number of offenders on probation and parole has risen; inevitably some offenders will commit other crimes during their terms of supervision. A growing concern for probation and parole officers is whether they can be held civilly liable for injuries caused by probationers and parolees under their supervision. While case law in this area is still developing, there are enough cases to indicate when an officer might be held liable. Authors Richard D. Sluder and Rolando V. del Carmen provide a categorization of decided cases and sketch a broad outline of when officer liability might ensue.

The Influence of Probation Recommendations on Sentencing Decisions and Their Predictive Accuracy.—Using data on all serious cases concluded in 1 year in an Iowa judicial district, authors Curtis Campbell, Candace McCoy, and Chimezie A.B. Osigweh, Yg. explore the disjuncture between sentencing recommendations made by the probation department and sentences actually imposed by judges. While probation personnel and the judiciary usually agreed on appropriate dispositions for first-time offenders, they strongly disagreed on recidivists' sentences. Probation officers recommended incarceration for recidivists almost twice as often as judges imposed it.

Home Confinement and the Use of Electronic Monitoring With Federal Parolees.—Authors James L. Beck, Jody Klein-Saffran, and Harold B. Wooten evaluate a recent Federal initiative examining the feasibility of electronically monitoring Federal parolees. Although technical problems were experienced with the equipment, the authors conclude that the project was an effective way of enforcing a curfew and supervising the offender in the community. The success of the project has served as a foundation for expansion of home confinement with electronic monitoring in 12 Federal districts.

Twelve Steps to Sobriety: Probation Officers "Working the Program."—Working with chemically dependent offenders is indisputably a challenge of the new decade. Addiction treatment is complex and, by its very nature, engenders phi-

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Looking at the Law

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Obtaining and Disclosing Financial Information

THE INCREASED use of financial penalties under the Criminal Fine Improvements Act (18 U.S.C. 3571 *et seq.*) and the Sentencing Guidelines (5E1.2) has made it vital to gather complete and accurate financial information. The fine provisions and the guidelines, as well as the Victim and Witness Protection Act (18 U.S.C. § 3663 *et seq.*), condition imposition of financial penalties on the ability of the defendant to pay and thus require detailed knowledge of the defendant's finances. Financial information can also be important in determining the scope of an offense, deciding whether a defendant is a career offender under the guidelines, conducting community supervision, and collecting fines and restitution. Although the guidelines, restitution, and fine provisions make increased use of financial information, these provisions provide probation officers and the court with few new tools for securing that information from defendants.

While financial information is clearly needed by the court, three statutes, the Right to Financial Privacy Act of 1978, the Fair Credit Reporting Act, and the Internal Revenue Code, limit access to financial records. Passed in response to the information explosion brought on by increased computerization, these statutes strive to strike a balance between the individual's right to privacy and the legitimate needs of law enforcement. Generally, they require that an individual provide written consent to disclosure, but they vary in their technical compliance requirements. This article will outline the requirements for attaining, using, and transferring information under these statutes.

Laws Restricting Access

The Right to Financial Privacy Act of 1978

The Right to Financial Privacy Act of 1978 (12 U.S.C. § 3401, *et seq.*) was enacted for the express purpose of preventing unlimited access to financial records by the Federal government. It not only restricts government access but also gives the customer of the financial institution notice of disclosure and standing to challenge access, and it requires the government to maintain documentation on records it has reviewed without consent. The Act applies to the records of individuals and small partnerships developed or maintained by financial institutions, such as banks, loan companies, credit unions, and credit card companies. *See* 12 U.S.C. § 3401(1), (4). It does not apply to the records of corporations.

The Act allows the government access to reasonably described financial records pursuant to an administrative subpoena, a search warrant, a judicial subpoena, a formal written request issued pursuant to applicable agency regulations, or consent of the customer. *See* section 3402. The exception to confidentiality most relevant to pretrial services and probation is the customer consent provision.

A customer consent to disclosure must be signed and dated, limited to 3 months, state that the customer may revoke the authorization at any time prior to disclosure, identify the records, specify the purpose for which the government will use the records, and state the customer's rights under the Act. *See* section 3204. Probation Form 11J is designed to meet these requirements. This form provides space for indicating whether the information will be utilized in preparation of the presentence report or in supervision. Along with the consent of the customer, the government must file a certificate with the financial institution stating that it has complied with the applicable provisions of the Act. *See* section 3403(b).

Generally, information obtained pursuant to a customer consent cannot be transferred to another government agency unless the transferring agency certifies that there is a legitimate law enforcement inquiry within the jurisdiction of the receiving agency. *See* section 3412(a). Section 3413(d) provides an exception to this prohibition on transfer or redisclosure of information and allows disclosure pursuant to any Federal statute or rule. Federal Rule of Criminal Procedure 32 requires disclosure of the presentence investigation report (PSI) to the parties and the court, and thus any financial information contained in the PSI can be

disclosed pursuant to Rule 32. Nevertheless, it would be good practice to advise a defendant that information obtained from a financial institution may be used in the presentence report and that the PSI is disclosed to the United States attorney, particularly since the United States attorney may use this information in the collection of fines and restitution. It would also be a good idea to indicate on form 11J that the information obtained may be used in supervision by both the pretrial services officer and the probation officer as well as in preparation of the PSI.

The Fair Credit Reporting Act

The Fair Credit Reporting Act is directed more at insuring the accuracy of consumer records than protecting personal privacy. Still, it functions to limit government access to credit bureau records. The purpose of the Act is stated at 15 U.S.C. § 1681(b) as follows:

> . . .to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information. . .

Under the Act, a credit bureau may prepare a credit report in the following circumstances: 1) in response to a court order or grand jury subpoena; 2) in accordance with the written instructions of the consumer; and 3) in connection with a credit transaction, employment, insurance, license, or other business transaction. *See* 15 U.S.C. § 1681b. Credit reporting agencies are prohibited from reporting obsolete information (section 1681c), must establish and maintain procedures to insure the accuracy of information (section 1681e), must disclose to the consumer in a timely and accessible manner information compiled concerning the consumer, the source of that information, and the names of the recipients of a credit report (sections 1681g and 1681h), and must give the consumer the opportunity to dispute the accuracy of the information compiled (section 1681i).

Perhaps because the Fair Credit Reporting Act is aimed at business regulation, in contrast to the Right to Financial Privacy Act, which is directed at controlling government information-gathering, it requires only that the consumer provide written consent to disclosure and does not place any statutory time limitation on that consent or require disclosure of consumer rights under the statute. Nevertheless, it is better practice to inform defendants of the purpose for gathering credit information and that, if such information is used in the presentence report, the PSI will be disclosed to the United States attorney's office and may be used in collection of financial penalties. While the Fair Credit Reporting Act does not explicitly provide that consent can be revoked, as a general matter any timely revocation of consent should be honored. Probation Form 11J can be used as a consent form for credit information.

Like the Right to Financial Privacy Act, the Fair Credit Reporting Act requires the requester of information to certify the purpose for which the information is sought; it also requires that the requester certify that the information will be used for no other purpose. *See* section 1681e(a). Although the Act has no explicit prohibition on a recipient of a credit report transferring the report, the certification provision functions to limit the sharing or transferring of credit information unless the further uses of the information are stated in the certification. A recipient's failure to comply with the provisions of the Act can result in civil liability. *See* sections 1681n and 1681o. Obtaining credit information under false pretenses is a criminal offense. *See* section 1681q.

Notwithstanding the consent provisions of section 1681b, the Fair Credit Reporting Act allows consumer reporting agencies to provide government agencies with a consumer's name, address, and place of employment. *See* section 1681f. This "locator" information may be very valuable in the supervision process.

Internal Revenue Code

In the important effort to maintain a high level of voluntary Federal income tax compliance, the Internal Revenue Code provides at 26 U.S.C. § 6103(a) that as a general rule tax returns and return information shall be kept confidential. A taxpayer may give consent to the disclosure of a return by IRS (*see* section 6103(c)), and a form for this is included in the Federal Judicial Center's Financial Investigation Workbook. In the case of a joint return, either of the individuals filing may request a copy of the return. *See* 6103 (e)(1)(B). Tax returns, whether received directly from the taxpayer or the IRS, should not be redisclosed. Because of the extremely confidential nature of tax returns, copies of returns should be returned to the taxpayer unless there is a reason for retaining a copy. If the return is retained, it should be stamped confidential on each page to avoid unwarranted redisclosure.

Uncooperative Clients

Securing Information

Since disclosure of banking, credit, and tax information requires the defendant's consent,

what steps can an office take when a defendant refuses consent? In spite of the obvious need for financial information in sentencing, Congress has provided few tools to secure this type of data without client cooperation. The best approach may be a persuasive explanation that full and accurate financial information may be to the defendant's benefit by revealing his financial limitations and inability to pay financial penalties. The advantages to the defendant of disclosure should not be overstated, however, because disclosure of financial information can also work to the defendant's detriment. For example, the information may reveal a criminal livelihood (*see* Sentencing Guidelines at 4B1.3) or large unexplained or untaxed resources. When consent is not forthcoming, the officer should attempt to get financial information from other sources that do not require consent such as family members, employers, and title and motor vehicle records.

In the sentencing context, there is no explicit authority for the court to coerce disclosure or to issue a subpoena for the records. Federal Rule of Criminal Procedure 41 generally applies to contraband or evidence of the commission of a crime, and it is doubtful whether the United States attorney could subpoena records under this rule in aid of sentencing.

A more fruitful source of authority for the issuance of a subpoena to assist a court, perhaps, may be found in the All Writs Act (28 U.S.C. § 1651). That Act provides, in relevant part, as follows:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

In *United States* v. *New York Telephone Company*, 434 U.S. 159 (1977), the Supreme Court held that a district court has power under the All Writs Act to issue orders to effectuate a prior order of the court and allowed a district court to compel a telephone company to attach a pen register to provide information concerning a person for whom there was an outstanding arrest warrant. Under Federal Rule of Criminal Procedure 32, the district court has authority to order the preparation of a presentence report that shall contain, among other things, the defendant's financial condition (*see* F.R.Crim.P. 32(c)(2)(A)). Section 3664(b) provides that a court may order a probation officer to obtain information pertaining to restitution. Arguably, to effectuate these orders, the court could employ the All Writs Act to require disclosure of financial information either from the defendant or a financial institution. While this may be an attractive idea, I could find no cases in which a district court had utilized the approach in sentencing or supervision.

While there are limited mechanisms for requiring the disclosure of information, the failure to provide information or providing false or misleading information can be factored into the sentencing determination. Pursuant to 18 U.S.C. §§ 3572(a) and 3664(a), the court, in imposing either a fine or restitution, is required to consider the defendant's financial resources and earning ability as well as the financial needs of the defendant's family.[1] The restitution provisions at section 3664(d) squarely place the burden of showing inability to pay restitution on the defendant:

> Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. *The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant.* (Emphasis added.)

The statutory provisions on fines do not delineate the burden of production. However, the Sentencing Guidelines at 5E1.2(a) place the burden on the defendant to establish that he or she is unable to pay a fine. The Guidelines on fines further provide at application note 6 that the discovery of assets that the defendant failed to disclose, such as unexplained expenditures or possessions, may justify a larger fine than may otherwise be warranted. Given these provisions, defendants who refuse to provide financial information or refuse to give consent to disclosure by financial institutions so that information can be verified may be notified that the failure to demonstrate their inability to pay a financial penalty may result in imposition of the maximum guidelines fine and restitution.[2]

When the defendant flatly refuses to cooperate in the financial investigation, the imposition of the maximum financial penalty may be an illusory sanction when the defendant in fact does not have the ability to pay. Uncollectible fines and restitution make supervision difficult, promote disrespect for the courts and law, and should be avoided. Financial penalties should always be based on concrete evidence of assets or earning ability.

I have found one case, *United States* v. *Cross*, 900 F.2d 66 (6th Cir. 1990), that, in part, based a denial of the two-level Sentencing Guidelines adjustment for acceptance of responsibility (*see* Sentencing Guidelines at 3E1.1) on the defendant's refusal to provide financial information. *See also United States* v. *Scott*, ____F. 2d ____, 1990 WL 141941, No. 90-1224 (1st Cir. Oct. 2, 1990) (denial of acceptance of responsibility reduc-

tion based in part on false information given to court concerning financial status, but mainly on obstruction of justice.) The acceptance of responsibility guideline was amended on November 1, 1990, to place more emphasis in the granting of the adjustment on whether the defendant has put the government to its proof at trial. While refusal to cooperate with the preparation of the presentence report generally, and with the financial investigation portion of that report specifically, may be factored into the acceptance of responsibility decision, this is not the central focus of the adjustment and should not be the sole reason for the denial of the two-level reduction.

Providing False or Misleading Financial Information

Providing false information to a probation officer may result in prosecution for a new offense, revocation of community supervision, or an adjustment under the Sentencing Guidelines for obstruction of justice. Section 1001 of title 18, United States Code, provides for a fine or imprisonment of up to 5 years or both for willfully making a false, fictitious, or fraudulent statement or representation or using a false writing or document. In *United States* v. *Gonzalez-Mares*, 752 F.2d 1485 (9th Cir.), *cert. denied*, 473 U.S. 913 (1985), the court upheld a conviction under section 1001 when the defendant lied to a probation officer in a pre-plea interview about her prior criminal record and use of aliases. Similarly, in *United States* v. *Barber*, 881 F.2d 345 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1956 (1990), the court upheld a section 1001 prosection and probation revocation when a probationer sent fraudulent documents concerning a former coconspirator to a United States attorney and a district judge.

These cases might suggest that prosecution under section 1001 may be relatively simple when false information is provided to a probation officer. *United States* v. *Gahagan*, 881 F.2d 1380 (6th Cir. 1989), illustrates some of the difficulties in securing a conviction under section 1001. In *Gahagan*, the defendant was charged with making false statements to the probation officer when he omitted ownership of a 1974 Jaguar from a financial report completed as part of a presentence investigation in a drug case. The defendant was sentenced to prison on the drug charge, but no fine was imposed after a finding by the court that the defendant lacked substantial assets. The defendant argued that he did not include the car on his financial statement because he had sold it to his girlfriend in exchange for the cancellation of a debt just prior to filling out the financial report. The prosecutor argued that the sale and transfer of title was a sham intended to conceal the defendant's continued ownership of the car. In a split decision, the court held that under the law of the state in which the car was registered, the sale was valid and that the defendant was not the owner of the car at the time he completed the financial report. The court held:

> Section 1001 requires that a false statement be made with knowledge of the falsity and that the concealment be made knowingly and willfully. To demonstrate that the alleged misrepresentation and concealment were knowingly made, it was necessary for the government to show that Gahagan knew he owned the Jaguar despite the transfer of title to Tongish.

Id. at 1384. Thus, a clever defendant may avoid prosecution for making a false statement by complying with state law in the shifting of assets before providing information to the court.

Other problems exist in prosecutions under section 1001, including the requirement in most circuits that a defendant make an affirmative false representation in order to be prosecuted. This is called the "exculpatory no" doctrine and allows a defendant to answer in the negative to avoid prosecution under section 1001 when he has not initiated the encounter. Finally, generally false statements made before courts in their judicial capacity should be prosecuted as perjury; only false statements made to a court in its administrative capacity can be prosecuted under section 1001. Because of these technical problems, as well as standard prosecutorial discretion, prosecution for false or misleading statements is far from a sure thing.

More certain is the availability of a two-level increase in the sentencing guidelines for obstruction of justice when a defendant makes material false statements to a probation officer in the preparation of a presentence report. *See* Sentencing Guidelines at 3C1.1 and accompanying application notes. There have been a stream of court of appeals cases upholding the two-level increase when a defendant is found to have lied to a probation officer. *United States* v. *Saenz*, *supra* (defendant lied to probation officer about source of cocaine and his receipt of bait money); *United States* v. *Jordan*, 890 F.2d 968 (7th Cir. 1989) (defendant tested positive for cocaine but denied use to probation officer); *United States* v. *O'Meara*, 895 F.2d 1216 (8th Cir.), *cert. denied*, ____ U.S. ____, 1990 WL 104855, No. 90-5215 (Oct. 29, 1990) (defendant lied to probation officer about limits of codefendant's knowledge of offense and codefendant admitted greater knowledge); *United States* v. *Lofton*, 905 F.2d 1315 (9th Cir.), *cert. denied*, ____ U.S. ____, 1990 WL 138340, No. 90-

5750 (Oct. 29, 1990) (defendant who committed new acts of mail fraud while in custody pending sentencing lied to probation officer concerning acceptance of responsibility); *United States* v. *Christman*, 894 F.2d 339 (9th Cir. 1990) (defendant lied to probation officer about prior record); *United States* v. *Baker*, 894 F.2d 1083 (9th Cir. 1990) (defendant lied to probation officer about prior record). *See also United States* v. *Scott, supra. But see United States* v. *Sergio*, 734 F. Supp. 842 (N.D. Ind. 1990) (defendant's post-conviction statements to probation officer that he was not guilty did not amount to obstruction of justice under the guidelines, as defendant's statements were unlikely to impede the judicial process.)

Although the courts of appeals have been fairly ready to accept lower courts' findings on obstruction of justice under the guidelines, effective November 1, 1990, the Sentencing Commission has revised the application notes to obstruction, adding finer shadings to this adjustment. New application note 1 provides that "refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty" does not amount to obstruction. Also added to the notes are examples of other conduct to which the adjustment is not intended to apply. The notes now read that providing materially false information to a probation officer in an investigation for the court is an example of conduct that would constitute obstruction, but providing incomplete or misleading information, not amounting to a material falsehood, is an example of conduct that does not constitute obstruction. "Material" is defined at note 5 as evidence or information that, if believed, would "tend to influence or affect the issue under determination." From the notes, it is clear that the mere failure to provide financial information or consent to disclosure should not result in the obstruction adjustment and providing false information should result in the increase only when it would influence the determination. For example, where the defendant has no assets and fails to provide information on a large debt in his financial statement, there may be no obstruction of justice because the omission has no bearing on the determination whether he has the ability to pay a financial penalty. In other situations, an attempt to conceal a large debt may be material.

If a defendant is found to have obstructed justice, the application notes to the guidelines advise that this "ordinarily indicates that the defendant has not accepted responsibility." *See* 3E1.1, application note 4. Therefore, a finding of obstruction will generally have a four-level impact on the defendant, and in several of the obstruction cases cited above the courts upheld denial of acceptance of responsibility as a result of the obstruction. *See e.g., United States* v. *Scott, supra*; *United States* v. *O'Meara, supra*, at 1220. Given the impact of a finding of obstruction, the caution the Commission added on November 1, 1990, that "the defendant's testimony and statements should be evaluated in a light most favorable to the defendant" (*see* 3C1.1 application note 1) should be taken very seriously.

This article has focused primarily on obtaining information prior to sentencing. In the supervision process, the court has more control and can impose a special condition of probation or supervised release requiring that the defendant provide access to financial information when the court finds that such a special condition is needed for collection of a financial penalty. *See generally* 18 U.S.C. § 3563 and Sentencing Guidelines at 5B1.4(b)(18).

Conclusion

The policy goals of the financial privacy laws addressed in the first part of this article seem out of step with the need for accurate verified financial information in sentencing. The mechanisms for sanctioning a defendant's failure to cooperate outlined in the second part are imprecise and clumsy. As a result of the financial privacy laws and the limits of the courts' authority to compel the release of information, probation officers must sometimes use indirect methods to secure this information. In spite of the difficulties, probation officers should strive to get as much financial data as possible, both to assist in the imposition of nondisparate financial penalties and to avoid the imposition of noncollectible sanctions.

NOTES

[1]"Looking at the Law," 53 *Federal Probation* 85 (March 1989), discusses the court's responsibility to consider (and in some circuits make specific findings regarding) a defendant's ability to pay before imposing financial penalties.

[2]Defendants may argue that, in refusing to cooperate with a financial investigation, they are asserting their right under the fifth amendment to the Constitution against compelled self-incrimination. The fifth amendment provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." The Supreme Court in *Minnesota* v. *Murphy*, 465 U.S. 420 (1984), held that while a convicted person does not lose his privilege against self-incrimination, the privilege applies only against subsequent criminal prosecution. A routine request for pertinent financial information to assist in preparation of a PSI that is not sought in order to investigate new crimes is not a new criminal prosecution and does not invoke the protection of the fifth amendment.

As another approach to the fifth amendment argument, defendants may claim that they should have been given a

Miranda warning as part of the presentence interview if information they provided results in an increased penalty. There is a growing body of case law holding that the probation interview, whether it be in the course of preparing the presentence report or in the supervision process, is *not* the type of inherently coercive custodial setting which requires prophylactic *Miranda* warnings. *See Minnesota* v. *Murphy, id.*; *United States* v. *Rogers*, 899 F.2d 917 (10th Cir.), *cert. denied*, 111 S.Ct. 113 (1990); *United States* v. *Jackson*, 886 F.2d 838, 841-2 n.4 (7th Cir. 1989); *Baumann* v. *United States*, 692 F.2d 565, 575-77 (9th Cir. 1982); *see also United States* v. *Belgard*, 694 F. Supp. 1488, 1497 (D. Or. 1989), *aff'd*, 894 F.2d 1092 (9th Cir.), *cert. denied*, 111 S.Ct. 164 (1990); *but see United States* v. *Saenz*, 915 F.2d 1046 (6th Cir. 1990).