

03-009

CRIMINAL PROCEDURE: SENTENCE; JUDGMENT; EXECUTION OF SENTENCE – GENERAL PROVISIONS

No authority for defense attorney to copy defendant's presentence report or to provide original or copy of report to defendant.

The Honorable Thomas B. Hoover
Judge, Ninth Judicial Circuit
March 31, 2003

Issue Presented

You ask whether it is a violation of § 19.2-299 for the defense attorney in those criminal cases where a presentence report is prepared to make a copy of the report and deliver it to the defendant.

Response

It is my opinion that it is a violation of § 19.2-299 for a defense attorney to copy a defendant's presentence report or to provide the original or a copy of such report to the defendant. Section 19.2-299 authorizes defense counsel to advise and review the contents of the report with the defendant.

Applicable Law and Discussion

Section 19.2-299(A) directs a probation officer who prepares a presentence report on a defendant as authorized therein to furnish a copy of the report "at least five days prior to sentencing to counsel for the accused and the attorney for the Commonwealth for their permanent use." Section 19.2-299(A) further provides:

The probation officer shall be available to testify from this report in open court in the presence of the accused, who shall have been *advised of its contents* and be given the right to cross-examine the investigating officer as to any matter contained therein and to present any additional facts bearing upon the matter. *The report of the investigating officer shall at all times be kept confidential by each recipient*, and shall be filed as a part of the record in the case. Any report so filed shall be sealed upon the entry of the sentencing order by the court and made available only by court order, except that such reports or copies thereof shall be available at any time to any criminal justice agency, as defined in § 9.1-101, of this or any other state or of the United States; to any agency where the accused is referred for treatment by the court or by probation and parole services; and to counsel for any person who has been indicted jointly for the same felony as the person subject to the report. [Emphasis added.]

The purpose of providing the defense with a copy of the presentence report five days before sentencing is to give counsel the opportunity to review it with the defendant and to prepare a response, if needed, to items contained in the report. Section 19.2-299(A) specifically imposes upon counsel the affirmative duty to *advise* the defendant of the contents of the report, but notably *does not* authorize counsel to copy or distribute the report. "When a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way."¹

Section 19.2-299 is replete with provisions intended to ensure that, while the defendant will be aware of the contents of the report, copies of the report will not be available in any way for unrestricted circulation. The purpose of these confidentiality provisions is not merely to protect the defendant's personal privacy interests. Presentence reports frequently contain the criminal history of codefendants, the criminal history or other sensitive personal information of the defendant's family members, and may contain highly personal information concerning the victims of the crime. Each of the individuals in the presentence report has privacy interests independent of those of the defendant. It is for these reasons that § 19.2-299 prohibits the defendant from having his own personal copy of the report. Thus, a defendant may not disseminate such information without regard to the welfare and privacy interests of the other people concerned.

Conclusion

Accordingly, it is my opinion that it is a violation of § 19.2-299 for a defense attorney to copy a defendant's presentence report or to provide the original or a copy of such report to the defendant. Section 19.2-299 authorizes defense counsel to advise and review the contents of the report with the defendant.

¹Grigg v. Commonwealth, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982) (explaining maxim, *expressio unius est exclusio alterius*), *quoted in* Commonwealth ex rel. Dep't of Corr. v. Brown, 259 Va. 697, 705, 529 S.E.2d 96, 100 (2000).