

PRESENTENCE INVESTIGATION REPORTS

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House Bill 6389 with committee amendment

House Bill 6390 as introduced

Sponsor: Rep. Ellen Cogen Lipton

Committee: Judiciary

First Analysis (9-14-10)

BRIEF SUMMARY: Together, the bills would require a presentence investigation (PSI) report be given to a prosecutor, defendant, or defendant's attorney at least two days prior to sentencing; allow those individuals to keep the copy of the PSI report; and prohibit certain information from being included in a PSI report.

FISCAL IMPACT: The bills could result in additional costs for MDOC, as discussed in greater detail later in the analysis.

THE APPARENT PROBLEM:

After a defendant is convicted of a crime and before the sentence is handed down, a presentence investigation (PSI) report must be prepared by a probation officer and provided to the court. Among other things, the PSI report describes the background and character of the defendant and is used by the court to determine an appropriate sentence. A PSI report is not a public record and so access is restricted. Under statute, the court must allow the prosecutor, defendant's attorney, and the defendant to review the PSI report before sentencing (MCL 771.14).

Earlier this year, the Michigan Supreme Court adopted several amendments to court rules pertaining to PSI reports. Under the changes, copies of the report must be provided at least two business days before the sentencing date to the prosecutor, defendant's attorney, and the defendant if not represented by an attorney. A party who did not receive the report within the new time period may file a motion to adjourn and reschedule the sentencing date so to have time to obtain and review the report. Certain information is also prohibited from being included in the PSI report, such as the home address or telephone number of a victim or witness. However, the amendments also changed the current practice of allowing the parties to retain copies of the PSI reports.

In response to concerns raised by the Prosecuting Attorneys Association of Michigan (PAAM) and the Criminal Defense Attorneys of Michigan (CDAM) over losing the ability to retain a copy of a PSI report, the Court once again proposed to amend the court rules to specifically permit a prosecutor, defense attorney, or defendant if not represented by an attorney to retain a copy of the report. However, noting that this amendment conflicts with an existing provision in law that restricts access to PSI reports to judges, probation officers, and law enforcement agencies (MCL 791.229), the Court delayed the effective date of the amendment until January 1, 2011, to give the Legislature, if it chose

to do so, time to resolve the conflict in statute. Without a legislative "fix" to clarify who has access to a PSI report, the scope of that access, and under what circumstances, the order of the Court allowing prosecutors and defense attorneys to retain copies of the PSI report will take effect in January of next year, even though seemingly still at odds with statute.

THE CONTENT OF THE BILLS:

The bills would amend provisions in different acts relating to the dissemination of presentence investigation reports. The bills are tie-barred to each other, meaning that neither bill could take effect unless both are enacted into law.

House Bill 6390 would amend the Corrections Code (MCL 791.229). Currently, the act specifies that all records and reports of investigations made by a probation officer, and all case histories of probationers, are privileged or confidential communications and not open to public inspections. Access is given to judges and probation officers, and the attorney general, auditor general, and law enforcement agencies must also be permitted to access these reports. Under the bill, the restricted access would apply except as otherwise permitted by law.

House Bill 6389 would amend the Code of Criminal Procedure (MCL 771.14). Currently, the court must permit the prosecutor, the defendant's attorney, and the defendant to review the presentence investigation report before sentencing. The bill would add that the court must also permit these individuals to receive a copy of the report as prescribed.

Under the bill, a copy of the PSI and, if amended or corrected by either party, any amended report, would have to be provided to the prosecutor, the defendant, and the defendant's attorney. The PSI would have to be provided at least two days before sentencing unless the two-day period was waived by the defendant. The prosecutor, the defendant, and the defendant's attorney would have the right to retain the copy of the report and amended report.

The bill would specify that a presentence investigation report could not include the address or phone number for the home, workplace, or place of worship of a victim or witness or a family member of a victim or witness, unless an address was used to identify the place of the crime. Upon request, any other address or telephone number that would reveal the location of a victim or witness would be exempted from disclosure unless an address was used to identify the place of the crime.

BACKGROUND INFORMATION:

Presentence investigation report

A presentence investigation (PSI) report includes information such as prior criminal history, a description of the offense for which the defendant is about to be sentenced, marital status, financial status, medical history, the impact statement(s) by victim(s) and whether harm was done to the victim(s), the defendant's statement, applicable sentencing guidelines, evaluation of the probable adjustment of the defendant in the community

based upon factual information, and sentencing recommendations that include whether multiple offenses are required or allowed to be served consecutively.

Order of the Court

July 1, 2010, the Michigan Supreme Court issued a contingency order proposing an amendment allowing prosecutors, defense counsel, and defendants to retain a copy of the presentence investigation report. Understanding that this proposed amendment is at odds with MCL 791.229, which restricts access to the reports for reasons of confidentiality, and also with subsequent case law which has expanded who may review and receive the reports, the Court invited interested parties to approach the Legislature to resolve the conflict. However, if the Legislature does not enact legislation by the end of the year, the Court order will go into effect January 1, 2011.

According to a dissenting opinion by Justice Corrigan, the contingency aspect of the Court's order not only breaks with precedent, but amounts to an "improper ultimatum to the Legislature" and "demonstrates a troubling lack of regard for the separation of powers." For those and other reasons, Justice Corrigan objected to inclusion of the contingency aspect in the Court's order. She was joined in the dissent by Justices Young and Markman.

FISCAL INFORMATION:

The bills would require copies of all pre-sentence investigation reports and amended reports to be provided to the prosecutor, defendant, and defendant's attorney involved in a case at least two days before sentencing unless the two-day period is waived by the defendant. The bills could increase costs to the state and to local courts. The Michigan Department of Corrections (MDOC) indicates that pre-sentence investigation reports are already provided to the prosecutor and to the defendant's lawyer (or directly to the defendant if he or she does not have a lawyer) under current procedures in compliance with Michigan Court Rules. However, the bills appear to require that a separate copy of the report be provided to both the defendant and the defendant's attorney. This is not consistent with current practices. Thus, the bills could require the printing and distribution of an extra copy of each pre-sentence investigation report and each amended report. The Department of Corrections estimates this would involve around 60,000 copies each year. The printing and distribution costs are typically incurred by either the MDOC or by the relevant local court. A specific estimate for these added costs is not available.

ARGUMENTS:

For:

The legislation is needed to clarify who has lawful access to a PSI report, under which circumstances, and the scope of that access (such as retaining a copy). Currently, court rules are silent as to retention of the reports, but a proposed amendment allowing the parties to keep a copy of the PSI report will take effect at the beginning of next year. However, this amendment to the court rules directly contradicts a provision within the Corrections Code that (1) states that all reports of investigations made by probation officers are confidential, and (2) limits access to judges and probation officers, though

probation officials may permit the attorney general, auditor general, and law enforcement agencies access to the reports. Adding to the confusion is a provision in the Code of Criminal Procedure that requires a court to permit a prosecutor, defense attorney, and the defendant to review the PSI report, but does not address whether they can keep the copy of the report. Further, subsequent case law has expanded the circumstances under which a PSI report may be disseminated. If the bills under consideration are not enacted, the court rule will go into effect and the confusion will continue.

House Bill 6390 will address the problem by including in the Corrections Code a reference to other lawful circumstances under which other parties may access PSI reports. House Bill 6389 will specifically allow a prosecutor, defendant's attorney, and the defendant to review the PSI report before sentencing and to receive a copy of the report at least two days before sentencing, unless the defendant waives the right to a copy. The bill will also incorporate the same restrictions on the types of information that cannot be included in a PSI report that are currently in court rules. Thus, enactment of the bills will bring statutory provisions in line with each other and the court rules.

Against:

The new court rules require copies of the PSI report to be provided at least two business days before the sentencing date whereas House Bill 6389 says two days. The distinction is important, as an attorney receiving a PSI report at the close of business on Friday will have little time to review the report or recourse to correct erroneous information before a Monday morning sentencing date. In addition, the court rules only require a copy of the PSI report to be provided to a defendant who is representing himself or herself, or is otherwise without attorney representation. House Bill 6389, on the other hand, requires copies of the report to be given to all defendants. According to the Department of Corrections, whose responsibility it would be to make and distribute the copies, supplying all defendants with copies of the PSI report would put a strain on limited staff and financial resources. It has been suggested that the bill be further amended to reflect the recent changes to the court rules.

POSITIONS:

The Prosecuting Attorneys Association of Michigan supports the bills. (9-8-10)

The Criminal Defense Attorneys of Michigan support the bills. (9-7-10)

The Michigan Department of Corrections indicated a neutral position on the bills. (9-8-10)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.