BRIEF SUMMARY OF THE COMMENTS OF THE SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE AND THE SECTION ON CRIMINAL LAW AND INDIVIDUAL RIGHTS ON PROPOSED AMENDMENTS TO THE LOCAL RULES OF THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

The District of Columbia Bar Section on Courts, Lawyers and the Administration of Justice, its Committee on Court Rules and Legislation, and the Section on Criminal Law and Individual Rights intend to submit comments concerning the proposed amendment to Rule 311(h) of the Local Rules of the U.S. District Court for the District of Columbia.

The Sections oppose the proposed addition to Local Rule 311(h), which would prohibit disclosure of a probation officer's sentencing recommendation. We believe that a defendant has a legitimate need to review the recommendation, which may form at least part of the basis for a sentencing decision. We further believe that withholding the probation officer's recommendation raises serious concerns about fairness and the appearance of justice, as well as constitutional due process protections.

SECTION ON COURTS, LAWYERS
AND THE ADMINISTRATION OF JUSTICE
AND THE SECTION ON CRIMINAL LAW AND INDIVIDUAL RIGHTS
OF THE DISTRICT OF COLUMBIA BAR

COMMENTS OF THE SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE AND THE SECTION ON CRIMINAL LAW AND INDIVIDUAL RIGHTS OF THE DISTRICT OF COLUMBIA BAR ON PROPOSED AMENDMENTS TO THE LOCAL RULES OF THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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July 26, 1996

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The views expressed herein represent only those of the Section on Courts, Lawyers and the Administration of Justice and the Section on Criminal Law and Individual Rights of the District of Columbia Bar and not those of the Bar or its Board of Governors.

COMMENTS OF THE SECTION ON COURTS, LAWYERS
AND THE ADMINISTRATION OF JUSTICE
AND THE SECTION ON CRIMINAL LAW AND INDIVIDUAL RIGHTS
OF THE DISTRICT OF COLUMBIA BAR
ON PROPOSED AMENDMENTS TO THE LOCAL RULES OF THE U.S.
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

The Section on Courts, Lawyers and the Administration of Justice, its Court Rules and Legislation Committee, and the Section on Criminal Law and Individual Rights,[1] urge the United States District Court for the District of Columbia not to approve the proposed addition to Local Rule 311(h), which would forbid disclosure of the probation officer's recommendation as to sentence. Although Federal Rule of Criminal Procedure 32(b)(6)(A) authorizes districts to "opt out" of the Rule's policy favoring disclosure of the probation officer's presentence report, including the final recommendation as to sentence, we believe that disclosure is the better course. Moreover, as drafted, Local Rule 311(h) would forbid individual district judges from authorizing disclosure when the judge deems it appropriate. Since the primary justification for non-disclosure of presentence reports has been the probation officer's role as an adjunct of the district judge, we suggest that district judges should have the option of authorizing disclosure of sentencing recommendations, either as a general

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[1] The District of Columbia Bar is the integrated bar for the District of Columbia. Among the Bar's sections is the Section on Courts, Lawyers and the Administration of Justice. The Section has a standing Committee on Court Rules and Legislation, whose responsibilities include serving as a clearinghouse for comments on proposed changes to court rules. The Section on Criminal Law and Individual Rights is another Bar Section with a particular focus on criminal law issues. Comments submitted by these Sections represent only their views, and not those of the D.C. Bar or of its Board of Governors.

practice, or in individual cases, even if a majority of district judges prefer not to disclose them.

Disagreements over the disclosure of presentence materials compiled by probation officers employed by the courts are a longstanding feature of the Advisory Committee Notes to Rule 32. See Notes of the Advisory Committee concerning the 1974 Amendments to Fed. R. Crim. P. 32 (discussing history of recommendations for disclosure in 1944, 1962, 1964 and 1966), and citing C. Wright, Federal Practice and Procedure § 524 (1969) and 8A Moore's Federal Practice ¶ 32.03[4] (2d ed. Cipes 1969). As the Advisory Committee noted in 1974, the American Bar Association, the American Law Institute, and the National Council on Crime and Delinquency recommended disclosure, despite the opposition of most federal judges. The Advisory Committee concluded that disclosure would enhance the accuracy of presentence reports, by affording the parties an opportunity to respond to information that was incomplete, inaccurate, or misleading. At the same time the Advisory Committee initially proposed disclosure of presentence reports, it also proposed two reservations: (1) the judge retained the authority to bar disclosure of information that "would seriously interfere with rehabilitation, compromise confidentiality, or create risk of harm to the defendant or others;" and (2) "[a]ny recommendation as to sentence should not be disclosed as it may impair the effectiveness of the probation officer if the defendant is under supervision on probation or parole."

The adoption of the 1984 Sentencing Reform Act, authorizing promulgation of sentencing guidelines, dramatically transformed the role of both the presentence investigation report and the probation officer. Instead of making individualized clinical or diagnostic judgments, the probation officer became responsible for providing the court with information pertinent to the calculation of guideline ranges. Information about the defendant's family and living situation, employment history and status, which were once important factors in federal sentencing, was deemed irrelevant by statute. The dominant factors became the offense Level, based on factual findings about the defendant's role and other characteristics of the offense, and the Criminal History Score, computed on the basis of the defendant's prior history of conviction and incarceration. These changes radically transformed the physical appearance of the presentence report, and fundamentally changed the probation officer from a diagnostician making clinical judgments, to a fact-finder responsible for gathering information pertinent to the guidelines and applying the legal standards of the guidelines to this information.

As a result of the dominant role of the guidelines in federal sentencing, Congress amended Rule 32 to require disclosure of presentence reports. Today, counsel must certify that they have reviewed the presentence report and discussed the report with the defendant before sentencing. The Advisory Committee notes to the 1989 amendments, which moved further in the direction of full disclosure by eliminating the requirement that the defendant return the report after sentencing,

cautioned against withholding information from the defendant, because "[s]ubstantial due process problems may arise if a court attempts to summarize information in a presentence report, the defendant challenges the information, and the court attempts to make a finding as to the accuracy of the information without disclosing to the defendant the source of the information or the details placed before the court." See Burns v. United States, 501 U.S. 129, 138 (1991) (due process standards applicable to sentencing under the guidelines).

The 1994 amendments to Rule 32(b)(A)(6), which adopted a general policy in favor of disclosure of the entire report—excluding confidential information or information that could harm the defendant or others, but including the probation officer's recommendation—was one of several changes made in recognition of "the key role the presentence report is playing under guideline sentencing." Advisory Committee Notes to the 1994 Amendments. In our view, withholding the probation officer's recommendation as to sentence raises serious concerns about fairness and the appearance of justice that justify disclosure, whether or not withholding the recommendation would satisfy constitutional requirements.

The probation officer's final recommendation as to sentence generally plays some role in the judge's final decision. If not, given the very limited role for informal diagnostic judgment under the guidelines, there is no reason for the probation officer to make a final recommendation at all, having provided the court with the facts necessary to calculate the guideline range and to evaluate proposed adjustments and

departures. If the recommendation is something the judge may take into account, then it is something to which the parties should have the right to respond, just as they would to a recommendation by a magistrate judge or a special master. Moreover, the probation officer's "bottom line" recommendation may cast additional light on the significance of factual information in the report. A defendant may not recognize the importance of the manner in which information is expressed in the report without knowing how the information may have influenced the probation officer's final recommendation as to sentence. Non-disclosure cannot be justified on the basis that the probation officer is an agent of the court because that fact does not reduce the defendant's legitimate need to respond to information on which the judge may rely. A probation officer's formal recommendation carries different weight than, for example, informal discussions with court employees such as law clerks.

The concern that led the Advisory Committee in 1974 to recommend against disclosure of final recommendations no longer carries weight for several reasons. First, the probation officer assigned to prepare the presentence investigation need not be assigned to supervise the defendant on probation or supervised release. While there may once have been small districts where it was impossible or impractical to assign probationers to other probation officers for supervision, this surely is not the case today in the United States District Court for the District of Columbia. Second, because the probation officer's recommendation is based on facts and legal determinations under the guidelines, there is much less risk that an unfavorable

recommendation would interfere with later supervision. Third, the formal process for submission of a draft report to the parties for comments and corrections allows the parties a much greater opportunity to confer with the probation officer than was true in 1974, diminishing the likelihood that the probation officer's recommendation would produce an acrimonious response.

Disclosure of the probation officer's final recommendation as to sentence would enhance the openness and fairness of the sentencing process, without any significant detriment to the court. We therefore urge the Court not to approve the proposed change in Rule 311(h).