

# Presentence Work in a COVID-19 Environment

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**THE COVID-19 PANDEMIC** has forced changes upon nearly every aspect of our personal and professional lives; presentence work was not spared. In response to these challenges, presentence units across the country have adapted, problem-solved, struggled, and ultimately endured to continue serving the court and the community.

Despite national policy and shared data systems, the 94 districts across the country are diverse, representing different sizes and court philosophies and facing different geographical challenges, defendant populations, logistical barriers, budget constraints, and a variety of other circumstances and difficulties. Specific practices are consequently equally varied.

Precisely describing the reality of each individual district's experience of the pandemic could consume entire volumes of journal articles, but this one aims to capture *generally* what presentence practice looked like pre-pandemic and how the discipline responded when confronted by this novel challenge.

## **Presentence Work Before the Pandemic**

A presentence report provides a comprehensive, concise, and accurate picture of a defendant to assist the court in making a fair sentencing decision. Under Rule 32 of the Federal Rules of Criminal Procedure, the presentence report must reliably depict the

defendant's criminal history and personal history and properly calculate the sentencing guidelines.<sup>1</sup> The presentence report also includes a sentencing recommendation and justification, requiring a "careful assessment of all of the facts relating to the defendant and the case, followed by a determination, based on the applicable statutes and guidelines, as to what the officer believes to be an appropriate sentence."<sup>2</sup>

To provide the court with a comprehensive presentence report and a thoughtful

<sup>1</sup> Fed. R. Crim. P. 32.

<sup>2</sup> Guide to Judiciary Policy Guide, Volume 8, Part D, Chapter 5, §510(a).

and valuable sentencing recommendation, probation officers assigned to complete presentence reports must perform a thorough investigation into each case. The primary investigative tasks include, but are not limited to, (1) interviewing the defendant, (2) obtaining documentation and verification, (3) completing a home investigation, (4) speaking with collateral contacts, (5) communicating with defense counsel and the assistant United States attorney or the assigned case agent, (6) gathering victim impact statements when appropriate, and (7) when applicable, discussing the defendant with the assigned pretrial services officer.

After the investigation, the officer drafts the presentence report and recommendation, addresses any objections by counsel in an addendum, and attends the sentencing hearing.

Of the presentence responsibilities, the *Guide* describes the defendant interview as “the pivotal component of the presentence investigation.”<sup>3</sup> Before the pandemic, best practices dictated that presentence interviews be conducted in person whenever possible. For defendants in custody, presentence interviews were completed at the federal or local facility that housed the defendant. For out-of-custody defendants, presentence interviews generally occurred at the probation office.

The environment created by an in-person interview was considered important because presentence officers must discuss intimate and often difficult topics with the people they interview. In most cases they must do so without the benefit of prior interactions or an established relationship with that person. Quickly building rapport and trust with a defendant is crucial and can be streamlined with appropriate eye contact and body language and a thoughtful demeanor. Furthermore, the in-person interview holds investigative value; the officer observes and evaluates visual cues into the defendant’s behavior, demeanor, willingness to change, veracity, and sincerity and makes other insights crucial to assessing the statutory factors of sentencing.

Additionally, third-party documentation is often needed to verify the information gathered during the interview. This requires an authorization form signed by the defendant agreeing to the release of the information. The process of obtaining these signatures was simple when interviews took place in person: The officer printed the forms and brought them to

the interview, and the defendant signed them.

Following the interview, the officer takes several more steps to better understand the defendant; two of the most crucial are the home investigation and the collateral contacts. Prior to the pandemic, the officer visited the defendant’s home to assess, among other things, the standard of living and community ties and the nature and circumstances of the residence and surrounding neighborhood.

This home visit was especially crucial in districts that have bifurcated pretrial services and probation offices. The home visit was the first opportunity for officers to interact with the defendant’s family and support system. In many cases this is the first time the family has interacted with a law enforcement officer for a purpose other than to facilitate an arrest or bring new charges. The home visit provided the officer with the opportunity to reinforce one of the primary missions of this work: to help defendants maintain long-term positive changes in their lives. It was a time to set a positive tone with the family, aiding in creating a strong and trusting foundation for future interactions and eventual supervised release.

The home visit also provided the officer with an opportunity to conduct an interview with someone close to the defendant. This is a vital part of the presentence investigation; the officer can corroborate aspects of the defendant’s statements about biographical details, learn about aspects of the defendant that may not have been discussed during the presentence interview, gain a deeper understanding of the defendant’s relationships and community ties, and receive a third-party perspective of the defendant. Additionally, the probation officer portrays how the officer can be a valuable resource for the family in understanding the sentencing process.

While in-person interactions were a central part of presentence work before the pandemic, virtual interactions also took place. For example, it was not always possible to interview a defendant’s family or significant other during a home inspection. In those instances, the probation officer generally spoke to the collateral contact on the telephone. Other investigative tasks were done in person when convenient, but often took place over the phone. For example, to learn more about the crime, officers often spoke with the assistant United States attorneys or case agents over the phone. Discussions with the defendant’s pretrial services officers occurred over the phone, through email, or in person. Conversations with others in the presentence unit regarding

the defendant generally took place over the phone or in person.

Prior to the pandemic, the sentencing hearing took place in a courtroom with all parties present. According to the Federal Rules of Criminal Procedure, “the defendant must be present at . . . the sentencing.”<sup>4</sup> Pre-pandemic, at least four circuits interpreted this to prohibit virtual appearances by defendants at sentencings.<sup>5</sup> In some districts, probation officers occasionally appeared virtually, but this appears to have been rare.

The in-person nature of the interview, the home investigation, and the sentencing hearing was a critical part of a thorough investigation, providing the framework for a useful presentence report and a thoughtful sentencing recommendation. When the pandemic unexpectedly forced the work to be entirely virtual, districts across the country were required to adapt, solve novel problems, and acclimate to a new way of performing a presentence investigation in a short period of time.

## Presentence Work in a COVID-19 Environment

As terms like “social distancing,” “Zoom,” and “quarantine” were added to the country’s lexicon, the judiciary raced to keep our courts running, our rights preserved, and our communities safe.

Pursuant to the Coronavirus Aid, Relief, and Economic Security, or CARES, Act, enacted on March 27, 2020, the Judicial Conference found, on March 29, 2020, that “emergency conditions due to the pandemic have and will materially affect the functioning of federal courts...,” allowing chief district

<sup>4</sup> Fed. R. Crim. P. 43(a)(3).

<sup>5</sup> See *U.S. v. Torres-Palma*, 290 F.3d 1244, 1246–48 (10th Cir. 2002) (“[V]ideo conferencing for sentencing is not within the scope of a district court’s discretion.”); *U.S. v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001) (same); *U.S. v. Navarro*, 169 F.3d 228, 239 (5th Cir. 1999) (same); *U.S. v. Williams*, 641 F.3d 758, 764–64 (6th Cir. 2011) (citation omitted) (“The text of [then] Rule 43 [did] not allow video conferencing. The structure of the Rule [did] not support it. As our sister circuits have recognized, and anyone who has used video conferencing software is aware, ‘virtual reality is rarely a substitute for actual presence.’...While an individual may determine that the benefits of not having to travel outweigh the costs of having a meeting by video conference, we do not, and cannot, perform such a balancing with a criminal defendant’s rights. Until such time as the drafters of the Rule instruct us otherwise, district courts may not conduct sentencing hearings by video conference.”).

<sup>3</sup> Guide to Judiciary Policy Guide, Volume 8, Part D, Chapter 2, §220.

judges to temporarily authorize the use of video teleconferencing for certain criminal proceedings with the consent of the defendant.<sup>6</sup> Additionally, federal courts across the country suspended the timing requirements established by the Speedy Trial Act, which allows for continuances of criminal proceedings to be excluded under the Act when “the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.”<sup>7</sup>

The temporary suspension of the Speedy Trial Act requirements and the authorization to use videoconferencing in response to the material effect of the pandemic on federal courts has now been extended in most districts for over a year. In retrospect, it is striking how reserved the initial CARES Act finding was; the pandemic has caused a profound shift in the way our systems operate—both inside and outside the judiciary. The somewhat conservative approach during the initial months of the pandemic provided courts, probation offices, and federal defenders with flexibility to begin exploring options for what

many might have expected to be a short-term national crisis. More than one year later, as the country continues to struggle with the effects of the pandemic, the courts will likely consider whether procedures adopted during the pandemic should be continued post-pandemic.

*Workload*

One of the biggest impacts that the COVID-19 pandemic had on presentence work was not the shift to working from home or the decline of in-person communication; instead, it was the dramatic fluctuation of workload and the reduction of sentencing hearings being held.

For the first time, guilty pleas and sentencing—the hearings most often associated with presentence work—could be conducted remotely. But despite the legal authority and technological capacity for these hearings to occur virtually, data received from the Administrative Office of the United States Courts suggests that parties were hesitant to do so.<sup>8</sup>

<sup>8</sup> The data used for this analysis were obtained from Administrative Office of the U.S. Courts’ case management system and were authorized for use in this article. The data encompassed all presentence reports assigned and submitted on a monthly basis during the time frame between fiscal years 2018 and 2020.

As seen in Figure 1, before the pandemic began, from October 2017 until February 2020, an average of 5,735 presentence investigation reports were assigned monthly across all districts. In March 2020, that number dropped to 4,480, and then to 1,820 by April 2020.

The number of submitted presentence reports also declined, although the decrease was less extreme, and the decline was more gradual. From October 2017 until February 2020, an average of 5,582 presentence investigation reports were submitted monthly across all districts. This number decreased steadily from March 2020 until July 2020, the lowest month, with only 2,988 presentence reports submitted.

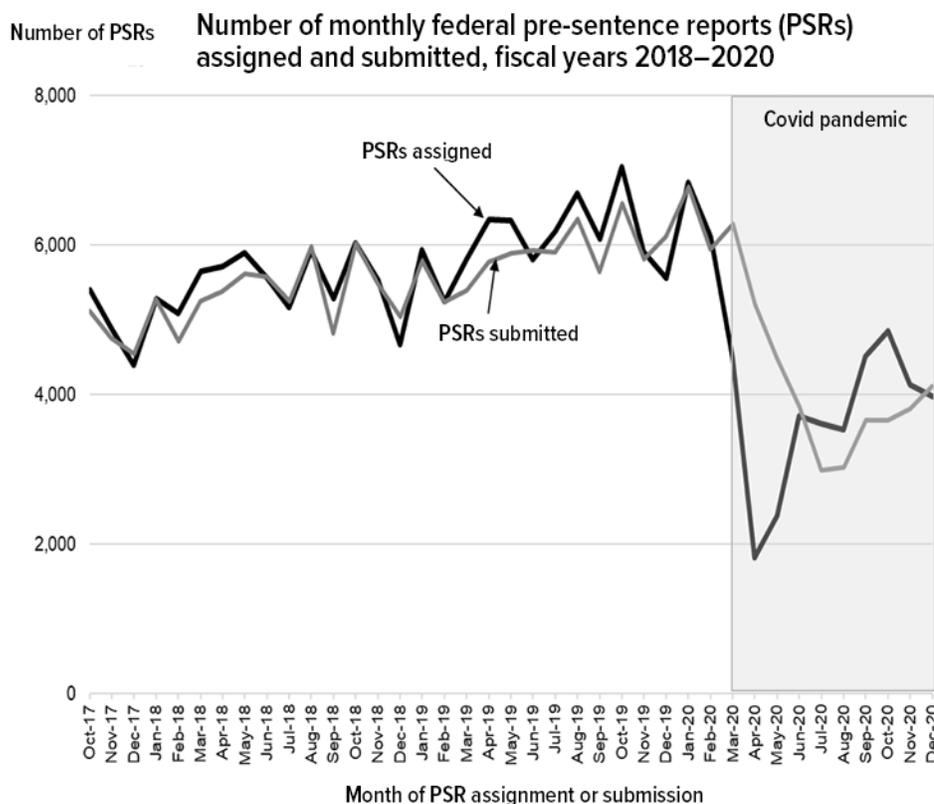
After the sharp drop in presentence investigation report assignments from February 2020 to April 2020, the numbers slowly crept up, averaging 4,320 monthly assignments during the last quarter of 2020. Presentence investigation report submissions didn’t begin increasing until August 2020, and during the final quarter of 2020, the average for monthly submissions was 3,860.

The decline in the number of monthly presentence reports assigned followed a similar pattern in nearly all major crime types. Immigration cases had the steepest drop, declining by 41.8 percent, while sexual offenses were impacted the least, declining by 23.9 percent during the COVID pandemic. After the significant drop in April 2020, presentence reports assigned for all crime types have been increasing. However, immigration cases seem to be rebounding at a slower rate than the other crime types, as illustrated in Figure 2 (next page).

The decrease in assignments corresponds directly to a decrease in guilty pleas or verdicts. Whether the decrease in adjudications was a direct result of reduced prosecution efforts (stemming from a shift in investigation and charging practices by the executive branch and other federal agencies) or limitations on in-person court proceedings related to the pandemic is unclear.

There has also been a significant decrease in the number of monthly sentences through the first quarter of 2021. Information was also obtained regarding the most serious conviction offenses for these presentence reports and the number of federal sentences imposed on a monthly basis for the same time period. Examining sentencing patterns for a period encompassing over three fiscal years demonstrates the extent to which the pandemic significantly impacted federal sentencing trends and practices.

**FIGURE 1**  
**Monthly presentence reports assigned and submitted**



imposed. Before the pandemic began, from October 2017 until February 2020, an average of 5,330 sentences were imposed monthly across all districts. In March 2020 that number dropped to 4,509, and by April 2020 only 3,060 sentences were imposed. The following months had an increase in sentences imposed, but as shown in Figure 3 (next page), sentencing hearings are not yet occurring at a pre-pandemic rate.

For presentence officers, this means that cases are not being resolved, even if the presentence report has been submitted, and instead are remaining on their caseload.

*The Impact of a Reduced Caseload and the Constraints Posed by the Pandemic*

The impact of the trends discussed above varied from district to district, but for many, a decrease in presentence report assignments did not mean a decrease in work. Unsurprisingly, officers used the temporary decrease in caseload to complete projects and trainings, to take on additional duties, and to assist other units.

For example, in the District of Minnesota, the Western District of Washington, the Southern District of Florida, and possibly other districts, when presentence assignments decreased, officers assisted with compassionate release investigations and backed up Pretrial Services. In the District of Connecticut, a presentence officer took on a location-monitoring hybrid caseload due to the increased number of defendants released on bond with location monitoring conditions. In the Southern District of Florida, officers conducted compassionate release investigations, supported Pretrial Services, assisted with the low-risk caseloads, responded to collateral record requests from other districts and agencies, and completed prerelease investigations. In the Eastern District of Michigan, the presentence unit took on all collateral requests and helped Pretrial Services complete criminal histories. Additionally, four officers from the Eastern District of Michigan served on a remote temporary duty assignment writing presentence reports for the District of Alaska, because, interestingly, its workload drastically increased during the pandemic.

This is a small sample of the extra functions presentence officers took on while their presentence caseloads were reduced; presentence officers across the country likely provided similar support to their districts. And while there was a significant drop in case assignments, presentence work never stopped.

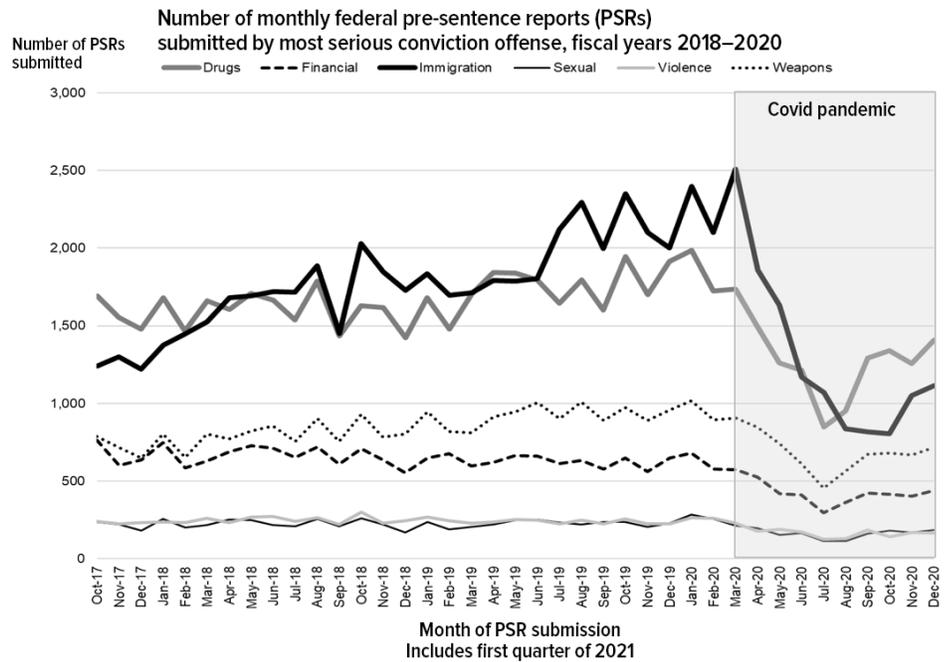
Presentence officers continued to have assignments, and the pandemic posed significant complications in the way presentence officers carried out their duties.

*Virtual Interviews*

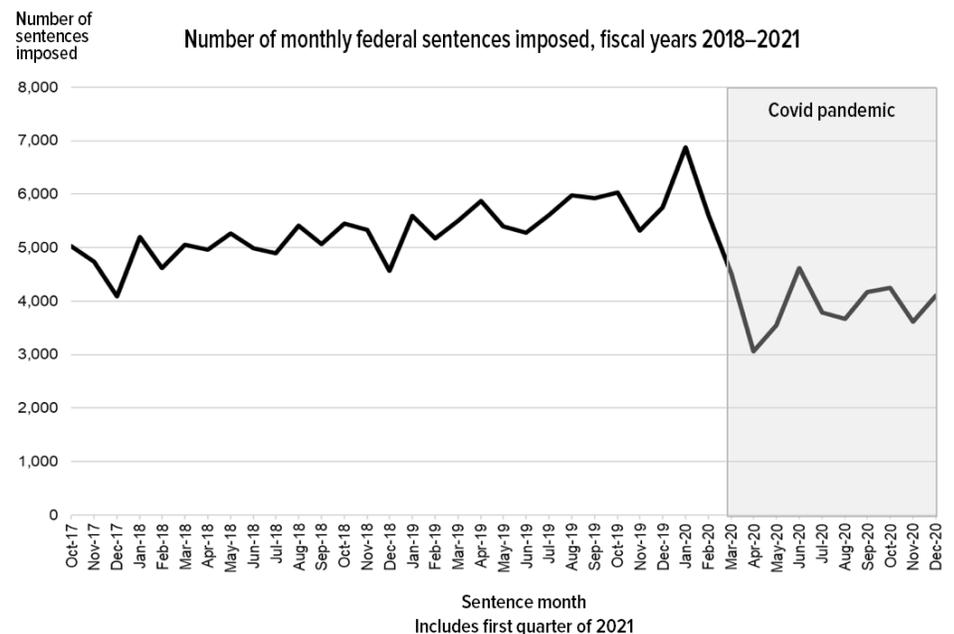
The presentence interview is now completed by videoconferencing or over the telephone. Neither of these options is ideal; quickly

building rapport with a defendant is much more difficult in a virtual environment. However, videoconferencing does offer some parallels to being in person. Being able to see one another allows both parties to give and receive non-verbal feedback such as nodding or leaning in, it assists in distinguishing between whether the speaker is taking a thoughtful pause or has finished speaking,

**FIGURE 2**  
Monthly presentence reports assigned by most serious conviction



**FIGURE 3**  
Monthly federal sentences imposed



and it makes clear to the defendant that the probation officer is focused on and present in the interview. Though videoconferencing is significantly different from spending time with someone in person, a probation officer can create a trusting and comfortable environment for the defendant over video.

Unfortunately, doing so becomes even more difficult when interviews are conducted over the phone. There is no longer any body language or non-verbal feedback; accidental interruptions become more frequent; and a sense of connection is even more difficult to foster. However, probation officers are trained to interview and to speak with defendants, and luckily many of the skills are transferrable to the telephone.

Districts across the country have had to adapt and do so quickly. Conducting an interview over video is relatively simple when the defendant is out of custody. However, for in-custody defendants, conducting a video interview requires more logistical problem solving.

According to a poll conducted during a training put on by the Federal Judicial Center titled “Presentence Practice During a Pandemic,” nearly a year after the pandemic began, approximately 40 percent of the participants were conducting interviews over the phone. Just over 50 percent were conducting interviews using video conference, and a few officers had resumed in-person interviews.<sup>9</sup>

Some districts, however, were very successful in working with the United States Marshals Service to secure video interviews with detained defendants. For example, the Eastern District of Michigan worked closely with the United States Marshals Service to incorporate video interviews within their holding facilities, and the District of Minnesota was able to provide iPads for use by defendants during video interviews. This creativity and cooperation illustrate the resourcefulness of the 94 districts and the importance of positive relationships between agencies.

### *Verifications and Home Inspections*

Other aspects of presentence work have presented difficult logistical questions in the face of a pandemic. Obtaining signatures for

releases of information pre-pandemic was simple; now it requires coordination with contacts at the local or federal facilities for in-custody defendants, assistance from attorneys for out-of-custody defendants, and a significant loss of control over the process for the officers. Whether a form will be returned with a signature is largely contingent on the effective and efficient help of others.

Home inspections are now done virtually, making it difficult for the officer to get a true sense of the home and the community. The home inspection is largely dictated by the defendant, who holds the phone or computer as the inspection is conducted. Although a virtual home inspection is certainly more beneficial than not conducting one at all, it can be challenging to assess the defendant's living conditions based on the view the defendant provides or chooses not to provide. Additionally, assessing the entire property and surrounding areas is challenging in a virtual environment.

### *Officer Training and Education*

The pandemic forced the judiciary's training agencies to adapt in order to reach presentence officers at a distance. The most notable effect was the cancellation of in-person programs and the expansion of virtual programs. Training modalities—like eLearning courses, live webinars, and podcasts—that had previously been supplements to in-person education programs became the primary ways for officers to participate in judiciary education. Training agencies enhanced their websites to highlight educational resources for presentence officers to use in self-guided study. The primary agencies responsible for training officers on the presentence investigation process are the Administrative Office, the Federal Judicial Center, and the United States Sentencing Commission. These agencies have independent statutory missions, but all play important roles in educating presentence officers.<sup>10</sup> These agencies increased collaboration

<sup>10</sup> The Administrative Office was established in 1939 “to support the constitutional and statutory mission of the federal judiciary to provide equal justice under the law as an independent and equal branch of government.” See Ricardo S. Martinez, *Federal Sentencing Policy: Role of the Judicial Conference of the United States and the Administrative Office of the U.S. Courts*, 81 Federal Probation 3 (2017).

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967, on the recommendation of the Judicial Conference of the United States. 28 U.S.C. §§ 620–629.

during the pandemic and adapted to ensure that newly hired and experienced officers received training opportunities.

The Administrative Office's Federal Probation and Pretrial Services Academy (FPPA), which provides a 6-week initial officer training and orientation, was not immune to the effects of the pandemic. On March 13, 2020, Initial Probation and Pretrial Training (IPPT) classes 2004 and 2005 were sent home from Charleston, South Carolina, and in-person training was suspended indefinitely. The FPPA adapted their operations and provided the first virtual class, Contact Safety, on June 10, 2020. Since that time, the FPPA has developed virtual versions of the IPPT, Post-Conviction Risk Assessment (PCRA), and Firearms Instructor Recertification (FIR) programs, along with more than seven stand-alone classes. As of June 2, 2021, 408 students have completed the virtual IPPT program, 128 students have completed the virtual FIR program, and over 6,000 students have participated in stand-alone virtual classes. The course evaluations for all these programs have been overwhelmingly positive, and the FPPA is considering keeping some level of virtual training post-reconstitution.

In-district training of presentence officers looked different during the pandemic as well. For example, before the pandemic, the District of New Mexico broke presentence training into two primary phases. The first phase lasted approximately two and a half days and covered the basic topics such as interviewing, home contacts, sentencing guidelines, criminal history, statutory requirements for presentence reports, and others. When the first phase of training was complete, officers were assigned several straightforward cases. After gaining some familiarity with the work, the officer participated in Phase II training, which included more complex topics, such as career offender cases, armed career criminal cases, and how to work with victims. Additionally, each officer was assigned a mentor and had access to the district's six sentencing guideline specialists to answer any questions that arose.

In June 2020, the District of New Mexico held an all-virtual Phase I training. The group being trained consisted of 2 newly promoted

The United States Sentencing Commission was created by Congress as part of the Sentencing Reform Act of 1984 and was charged with formulating national sentencing guidelines to define the parameters for federal judges to apply in their sentencing decisions. P.L. No. 98-473, 98 Stat. 1987.

<sup>9</sup> The poll was conducted on March 9, 2021. The question asked was “How are you conducting interviews right now?” Of the 269 answers received, 15 officers answered “in person” (5.58%), 110 officers answered “using telephone conference” (40.89%), and 144 officers answered “using video conference” (53.53%).

SUSPOs, 3 brand-new officers, 1 promotion, and 1 lateral transfer from postconviction to presentence. Instead of all-day trainings, the specialists in charge of training broke it up into half-day trainings to avoid videoconferencing fatigue. According to Victoria Loya, a sentencing guidelines specialist who has been with the District of New Mexico for over 10 years, the most challenging parts of the virtual training were the technological hurdles, building rapport with the new officers, and the difficulty of teaching some topics using just a computer screen.

However, by the Phase II training, conducted in July 2020, the trainers were more familiar with the technology and more comfortable with virtual teaching. Specialists from both the north and the south office in New Mexico were able to be part of each training, spreading the work of training the officers out among more specialists. During the trainings, the specialists began to use surveys, polls, and timed competitions and overall made the virtual trainings more interactive. Ultimately, Ms. Loya felt that the virtual training was effective; though there are some things that will always be better trained in person, training virtually does have its advantages and, moving forward, should be considered a viable option.

Similarly, the District of Minnesota trained two new presentence officers during the pandemic. Leah Heino, a sentencing guideline specialist who has been with the District of Minnesota for 15 years, commented that virtual training seemed “so daunting,” but that she was pleasantly surprised by how well it went. In fact, she noted that some tasks were simplified by the virtual environment; for example, Ms. Heino was able to easily sit in on the new officers’ presentence interviews

and could send chat messages to the officer if something was missed.

Many districts also noted that the United States Sentencing Commission and the Federal Judicial Center did an excellent job of increasing their self-paced online and virtual training opportunities as well as providing small-group, district-specific training.<sup>11</sup>

### *Positive Impacts of the Pandemic*

The increased use of video software has prompted several positive changes to presentence work. Prior to the pandemic, many districts had two primary modes of communicating with parties involved in the process: in-person or over the phone. Now, officers have a comfort level with videoconferencing that didn’t previously exist. It is an option for much of the communication that previously occurred over the phone. Probation officers can speak with defendants’ families over videoconferencing, defendants residing in other states can now be interviewed on video instead of over the phone, and assistant United States attorneys can present case information to probation officers on video and with screensharing capabilities. Furthermore, districts with multiple office locations can use videoconferencing to hold meetings and unit-wide staffings, allowing cohesion among officers in a wider geographical area than pre-pandemic.

Though there is loss in those areas where districts shifted from in-person to video, there is also gain in those areas where districts shifted from telephone to video.

Prior to the pandemic, some districts may have faced challenges conducting virtual interviews in cases where geographical and budgetary concerns existed. The pandemic

demonstrated that although it may not be ideal, virtual interviewing may be useful in certain situations post-pandemic.

Additionally, it is important to note that the staff supporting presentence officers, and all officers, are critical to completing presentence work. Historically, support staff generally did not telework. The pandemic has demonstrated that support staff can provide their critical assistance in an environment other than an office setting. This will benefit the system as a whole should an emergency event occur in the future.

### **Conclusion**

The COVID-19 pandemic has certainly been disruptive to presentence work, but presentence has proven to be a flexible discipline, made up of resilient workers that have adapted well to a virtual environment. This time has provided clarity for officers of every function in that these new ways of working have forced presentence units to distill the work to its essential purposes and devise creative ways to meet those purposes.

As the judiciary slowly begins reconstitution efforts for a post-pandemic world, each district will assess local needs and resources with direction from their local courts and support from the AO, Federal Judicial Center, and other partner agencies to determine how presentence work will proceed. Some practices adopted during the pandemic likely will remain in place, while others will not. Hopefully, when the pandemic no longer dictates operations, presentence units will be thoughtful about incorporating the important lessons learned during this time to continue to serve the court, the defendants, and the community.

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<sup>11</sup> Among other resources, the United States Sentencing Commission provides self-paced “Core eLearning Curriculum” for officers to learn about the Sentencing Guidelines, basic criminal history, basic relevant conduct, and grouping rules, which can be found at <https://www.ussc.gov/education>.

The Federal Judicial Center has a presentence officer resource page that includes trainings for officers on such topics as recommending conditions of post-conviction supervision, writing skills, and developments in federal sentencing. This can be found at <https://fjc.dcn/content/355357/resources-new-presentence-officers>.