

Staff Issue Paper

Decision on Public Hearing

May 28, 2020

This staff paper poses the following three questions to the Commission:

- Is a public hearing required when there are no intended amendments to the Sentencing Guidelines themselves—only to commentary and appendices?
- May a public hearing be conducted remotely in a time of a health pandemic?
- Should the Commission receive public input on proposed amendments to commentary and appendices remotely? If so, how?

Is a Public Hearing Required?

According to its administrative rules, “[T]he commission shall, at least 30 days before the date set for the hearing, give notice of its intention to amend the sentencing guidelines by United States mail to all persons on its list, and by publication in the State Register.”¹

Changes Being Contemplated

At its meeting in April, the Commission preliminarily approved draft amendments to the commentary to Guidelines § 3.A, subject to public hearing and final adoption.²

As a result of the Minnesota Legislature’s enactments during its 2020 Regular Session, staff is recommending only one change, to Appendix 1, correcting a technical error brought to our attention by a similar error being corrected in statute by the Revisor’s Bill.

These changes, to § 3.A commentary and to Appendix 1, are the only 2020 changes anticipated by staff that have not already been the subject of a public hearing.

Public Hearing Logistical Issues

The current state of peacetime emergency due to a continuing health pandemic poses some unique challenges to planning a public hearing. Although the rules require published notice 30 days in advance of the public hearing, staff has no way of predicting that far in advance whether public gatherings will even be allowed, or where, on the planned public hearing date of July 16, 2020. It is likely that the notice would

¹ Minn. R. [3000.0200](#).

² [MSGC meeting minutes of April 9, 2020](#).

have to refer the reader to the MSGC web site for details on how the public hearing will actually be conducted.

Need for Public Hearing

If the only amendments are to the commentary and to an appendix, there may not be a need for a public hearing. As stated above, a public hearing is needed for amendments to the “sentencing guidelines,” which may not include the commentary and appendices.

- The original Sentencing Guidelines were contained in a 1980 report to the Legislature. Although the report began with a lengthy explanation of the Commission’s rationale, the Guidelines themselves, which began midway through the report, contained neither commentary nor appendices.³ Comments were added the following year, to explain the Commission’s rationale at appropriate points within the Guidelines.⁴
- Since 1981, the Commission’s policy document has been entitled, “Minnesota Sentencing Guidelines and Commentary,” implying that “Guidelines” and “Commentary” are different things.
- Appendices have been added to the Guidelines as reference tools for practitioners. They were originally created by staff, not the Commission.
- Guidelines § 3.G distinguishes between “[m]odifications to sections 1 through 8 of the Minnesota Sentencing Guidelines” and “associated commentary and appendices.” This section puts “commentary and appendices” in a class together, separate from “Guidelines policy.”
- Courts construe comments not as binding, but as merely advisory.⁵
- On at least one occasion in recent memory, the Commission made modifications to the commentary without holding a public hearing in advance.⁶

Is a Remote Public Hearing Possible?

Even if a public hearing is required, it may be possible to conduct one remotely. When the Commission’s administrative rules governing the conduct of its public hearings⁷ were adopted in 1985, they likely contemplated an in-person hearing only. Yet, those rules do not explicitly say that the hearing may not be conducted remotely, and all the actions required within those rules—such as requiring witnesses to sign in before testifying—can be effectively accomplished electronically. In light of the Open Meeting Law’s

³ [MSGC 1980 Report to the Legislature.](#)

⁴ [Minn. Sentencing Guidelines & Commentary \(1981\).](#)

⁵ See *State v. Rouland*, 685 N.W.2d 706 (Minn. Ct. App. 2004) holding that the comments to the guidelines are not binding but advisory. See *Asfaha v. State*, 665 N.W.2d 523, 526 (Minn. 2003) (stating the comments to the sentencing guidelines are “only advisory and not binding on the courts”); *State v. Notch*, 446 N.W.2d 383, 385-86 (Minn. 1989) (determining that although the comments to a guideline provision specifically state that credit for time served shall not apply to time spent in a residential treatment facility, the district court was not bound by the comment).

⁶ [MSGC meeting minutes of Nov. 17, 2016.](#)

⁷ [Minn. R. ch. 3000.](#)

permission to conduct public meetings remotely in such times,⁸ the Commission may consider a remote public hearing to be permissible within the rules.

Are There Other Options for Gathering Public Input?

Even if it does not consider a remote public hearing to be within the spirit of its administrative rules, the Commission may, if it does not consider a public hearing to be required, decide to hold the functional equivalent of a public hearing, remotely, to gather input on the proposed changes before taking final action. Alternatively, the Commission could adopt a more relaxed means of gathering public input, such as posting a notice on the MSGC web site soliciting email input. Staff could then compile the public comments for the Commission's consideration when deciding the question of final adoption or rejection of the changes on July 23, 2020.

⁸ Minn. Stat. § [13D.021](#).

CHAPTER 3000
SENTENCING GUIDELINES COMMISSION
SENTENCING GUIDELINES

- 3000.0100 PURPOSE AND SCOPE.
- 3000.0200 NOTICE OF HEARING.
- 3000.0300 CONDUCT OF HEARINGS.
- 3000.0400 RECEIPT OF WRITTEN MATERIALS.
- 3000.0500 HEARING RECORD.
- 3000.0600 AMENDMENT ADOPTION.

3000.0100 PURPOSE AND SCOPE.

The procedures contained in parts 3000.0100 to 3000.0600 govern the promulgation of the sentencing guidelines, including any modifications of severity levels and criminal history scores.

Statutory Authority: *MS s 244.09*

History: *10 SR 1267*

Published Electronically: *May 9, 1997*

3000.0200 NOTICE OF HEARING.

The Sentencing Guidelines Commission shall maintain a list of all persons who have registered with the commission for the purpose of receiving notice on proposed amendments to the sentencing guidelines. The commission may inquire as to whether those persons on the list wish to maintain their names on the list and may remove names for which there is a negative reply or no reply within 60 days. The commission shall, at least 30 days before the date set for the hearing, give notice of its intention to amend the sentencing guidelines by United States mail to all persons on its list, and by publication in the State Register. The mailed notice and the notice in the State Register must include a copy of the proposed amendments or a brief description of the nature and effect of the proposed changes.

Statutory Authority: *MS s 244.09*

History: *10 SR 1267*

Published Electronically: *May 9, 1997*

3000.0300 CONDUCT OF HEARINGS.

Subpart 1. **Proposed amendment proceedings.** A hearing on proposed amendments to the sentencing guidelines, including any modifications of severity levels and criminal history scores, must proceed substantially in the manner specified in this part.

Subp. 2. **Registration of participants.** A person intending to testify regarding proposed amendments to the sentencing guidelines shall register with the commission before testifying by writing his or her name, address, telephone number, and the names of any individuals or associations that the person represents in connection with the hearing on a register to be provided by the commission. Persons may indicate to the commission in writing their desire to be informed of the date on which the proposed amendments will be considered for adoption at a public hearing under part 3000.0600.

Subp. 3. **Notice of procedures at hearing.** The chair of the Sentencing Guidelines Commission shall convene the hearing at the proper time and shall explain to all persons present the purpose of the hearing and the procedure to be followed at the hearing. The chair of the commission shall notify all persons present that the record will remain open for five calendar days following the hearing for receipt of written comments concerning the proposed amendments. The commission shall give due consideration to all comments received within the five-day comment period.

Subp. 4. **Proposed amendments.** The commission shall make copies of the proposed amendments available at the hearing.

Subp. 5. **Opportunity for questions.** Interested persons must be given an opportunity to address questions to the commission, its staff, or witnesses. The commission or its staff may question interested persons making oral statements. The questioning may extend to an explanation of the purpose of intended operation of a proposed amendment to the sentencing guidelines, or may be conducted for other purposes if material to evaluation or formulation of the proposed amendments.

Subp. 6. **Opportunity for presenting statements.** Interested persons must be given an opportunity to present oral and written statements regarding the proposed amendments to the sentencing guidelines.

Subp. 7. **Record of hearing.** The commission shall make an audio recording of the hearing.

Statutory Authority: *MS s 244.09*

History: *10 SR 1267; 17 SR 1279*

Published Electronically: *May 9, 1997*

3000.0400 RECEIPT OF WRITTEN MATERIALS.

The Sentencing Guidelines Commission shall allow written materials to be submitted and recorded in the hearing record for a period of five calendar days after the public hearing under part 3000.0500 ends, or for a longer period if the commission so orders.

Statutory Authority: *MS s 244.09*

History: *10 SR 1267*

Published Electronically: *May 9, 1997*

3000.0500 HEARING RECORD.

The record must be closed upon the last date for receipt of written materials under part 3000.0400. The record includes:

- A. the notice of hearing as mailed;
- B. a copy of the State Register containing the notice of hearing;
- C. the names of persons who testify with respect to the proposed amendments to the sentencing guidelines;
- D. copies of all publications in the State Register pertaining to the proposed amendments to the sentencing guidelines;
- E. all written statements, comments, and materials received by the commission relating to the proposed amendments to the sentencing guidelines;

F. the audio recording of the hearing under part 3000.0300; and

G. a copy of the proposed amendments to the sentencing guidelines as heard at the hearing under part 3000.0300.

Statutory Authority: *MS s 244.09*

History: *10 SR 1267*

Published Electronically: *May 9, 1997*

3000.0600 AMENDMENT ADOPTION.

Subpart 1. **Adoption.** After holding the hearing required under part 3000.0300 and expiration of the written comment period under part 3000.0400, the Sentencing Guidelines Commission may, by a majority vote of a quorum of the commission present, adopt proposed amendments to the sentencing guidelines. A quorum means a majority of the members of the commission.

Subp. 2. **Notice.** The commission shall provide all persons listed with the commission under part 3000.0200 and all persons requesting notification under part 3000.0300, subpart 2, with notice of the adoption hearing by United States mail.

Subp. 3. **Effective date.** All proposed amendments to the sentencing guidelines that do not have to be submitted to the legislature are effective on the date ordered by the commission.

Statutory Authority: *MS s 244.09*

History: *10 SR 1267*

Published Electronically: *May 9, 1997*