

Staff Issue Paper

Changing the Rules for Changing the Guidelines

May 2, 2023

The following points briefly recap the Commission’s past action on changing the rules governing how the Commission changes the Sentencing Guidelines:

- In 1985, the Commission promulgated Chapter 3000 of the Minnesota Administrative Rules—rules the Commission must follow when changing the Sentencing Guidelines. Those rules are available [here](#), and are included in this month’s meeting materials.
- In December 2022, the Commission discussed the possibility of changing those rules to streamline its meeting calendar. The December staff paper is available [here](#).
- In April 2023, the Commission discussed some options for what a streamlined calendar might look like; one option is discussed [here](#).

This paper addresses three items: [First](#), this paper briefly discusses the process by which administrative rules are amended. [Second](#), this paper outlines Chapter 3000 for purposes of an in-meeting walkthrough. [Third](#), this paper identifies staff-perceived problems with Chapter 3000 in its current form. The paper [concludes](#) by discussing the Commission’s possible next steps.

The Administrative Rulemaking Process

Rather than provide a detailed explanation of Minnesota’s administrative rulemaking process, staff has included a rulemaking checklist in this month’s meeting materials—published and updated by the experts on the Interagency Rules Committee, Minnesota’s rulemaking community. While the checklist may seem daunting, the Commission should keep in mind that the checklist represents a simplified rulemaking process for adoption of rules without a hearing. The simplified process is presented because, not foreseeing controversy, staff assumes it unlikely that more than 24 persons will request a hearing on these rule changes.

Although the checklist does not specify exactly when in the process the rule language should be developed, the checklist appears to imply that rule drafting be given early attention, as a rule draft will bring clarity to, or is necessary for, many of the later steps on the checklist.

This document was prepared by the staff of the Minnesota Sentencing Guidelines Commission for the Commission’s review. This document has not been adopted by the Commission and does not necessarily represent its views.

Outline of Chapter 3000

- 3000.0100 – “Purpose and Scope” – Copies authorizing language from Minn. Stat. § 244.09, subd. 5.
- 3000.0200 – “Notice of Hearing” – Requires notifying interested people on MSGC’s U.S. Mail list about upcoming hearings, 30-day advance publication in State Register.
- 3000.0300 – “Conduct of Hearings” – Explains how to conduct a public hearing.
- 3000.0400 – “Receipt of Written Materials” – Defines the end of the written comment period.
- 3000.0500 – “Hearing Record” – Defines the public hearing record.
- 3000.0600 – “Amendment Adoption” – Says how amendments are made, when they take effect, and whom to notify about it.

Potential Problems with Chapter 3000

From staff’s perspective, the root problem with the existing administrative rules—and the impetus for change—is the rules’ seven-week public hearing process—detailed in the [December staff paper](#)—which even the most straightforward Sentencing Guidelines change requires.

Staff perceives three other categories of potential problems with Chapter 3000.

First, the rules are not explicit on several points. There may be a benefit in being explicit; on the other hand, there may be a benefit to leaving room for interpretation. These points fall into two categories: Things that the Commission or its staff have, in recent years, assumed to be true, but about which Chapter 3000 is silent; and questions that may come up in the future that Chapter 3000 does not answer.

Table 1. Staff-Identified Items About Which Chapter 3000 Is Not Explicit.

Assumed Truths, Unstated by Chapter 3000	Questions Chapter 3000 Does Not Answer
<ul style="list-style-type: none"> • The event that compels a public hearing is a majority vote in favor of a specific proposal to change the Guidelines. • The public hearing notice must say when and where the public hearing will be, and the public hearing must be convened at that time and place. • The public hearing notice must explain how the public may participate. • Email notice is an adequate substitute for U.S. mail notice. • The written comment period begins when the public hearing notice is sent out. • The public hearing does not require a quorum of the Commission. 	<ul style="list-style-type: none"> • If the Chair is absent from a public hearing, can anyone else convene it? <i>(Staff suggests the answer should be “yes.”)</i> • How many “copies” of the proposed changes need to be available at the public hearing? <i>(Staff suggests requiring one copy, per the Open Meeting Law.)</i> • At what time of day does the five-day written comment period close? <i>(Staff suggests 4 p.m.)</i> • After the Commission adopts a proposed Guidelines change, the rules require staff to notify those on a roster of interested persons. Should these people also be notified if the Commission rejects a proposed Guidelines change? <i>(Staff suggests the answer should be “yes.”)</i>

Assumed Truths, Unstated by Chapter 3000	Questions Chapter 3000 Does Not Answer
<ul style="list-style-type: none"> • At the public hearing, the Chair may regulate the duration and manner of speech, and may require participants to confine their remarks to the subject of the hearing. • Although speakers are said to “testify” at the public hearing, no oaths are administered. • An “audio” recording includes an audiovisual recording. • For purposes of the public hearing record, an internet link to the audio recording is sufficient. • To take action, the Commission must be meeting under the Open Meeting Law. • For purposes of a calculating a quorum, a “majority of the members of the commission” does not count vacant seats. • The Commission need not follow Chapter 3000 when making changes to the commentary alone. 	<ul style="list-style-type: none"> • A Guidelines change “relating to a crime created or amended by the legislature in the preceding session” need not be submitted to the Legislature before it may take effect. When, exactly, is the “preceding session”? For example: If, after the regular session ends, the Legislature holds a short special session in late May, is the regular session still the “preceding session” with respect to Commission action in June and July, or does the late-May special session become the “preceding session” instead? What about multiple special sessions in rapid succession, as was the case during the pandemic? <i>(Staff suggests giving the Commission the whole year to take action.)</i> • If the Legislature directs the Commission to review and consider modifying how the Sentencing Guidelines address a particular issue—as has happened twice recently—is the change resulting from such a long-term review “a modification mandated or authorized by the legislature” that need not be submitted to the Legislature in advance? <i>(Staff suggests the answer should be “no.”)</i> • If the Commission fails to specify an effective date for such a Guidelines change, when is it effective? <i>(Staff suggests establishing August 1—or, if the change is related to a crime amendment, the date of the amendment’s effective date—as the default effective date.)</i> • If the Commission lacks a quorum at its January meeting to finalize its annual Report to the Legislature, may staff nevertheless report previously approved Sentencing Guidelines changes to the Legislature on the Commission’s behalf? <i>(Staff suggests requiring such reporting in the rules, implicitly authorizing staff to make the report if the Commission can’t meet in January.)</i>

Second, Chapter 3000 contains some obsolete or cumbersome requirements. In staff's opinion—

- Email notice should officially replace the requirement of U.S. mail notice.
- It is unnecessary to obtain the address *and* telephone number of every person who wishes to speak at a public hearing. One or the other, or email instead, would be sufficient contact information.
- It is unnecessary to create a separate roster of people who want to be notified of the final action of a particular public hearing. The general email notification roster should be sufficient.

In the same vein, the Commission may want to consider eliminating the State Register publication requirement altogether.

Third, there are several instances in which Chapter 3000 could better conform to the state standard of “plain language” in rulemaking.

Next Steps

If the Commission wishes to change Chapter 3000, it now faces two decisions:

First, should the Commission wait to begin the rulemaking process until the rule changes are drafted, or should it direct staff to begin the rulemaking process immediately? Staff suggests waiting on the rulemaking process until the Commission has agreed on a first draft of rule changes.

Second, how should the Commission go about drafting rule changes? Three options come to mind:

- The Chair appoints a rulemaking subcommittee to work on drafting changes between Commission meetings;
- The whole Commission works on drafting changes during successive Commission meetings; or
- The Commission directs staff to work on drafting changes and refines the drafts at successive Commission meetings.