

Report on Public Policy Position

Name of section:

Appellate Practice Section

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Proposed Court Rule or Administrative Order Number:

[2008-10 Proposed Amendments of Rule 6.425 and Rule 7.210 of the Michigan Court Rules](#)

This proposal would require a sentencing judge to prepare and include with the case record a form in which the judge outlines the reason or reasons for departure from the sentencing guidelines. The duty to do so would be in addition to the obligation to state such reasons on the record. The proposal is designed to provide litigants and appellate courts a clear and unambiguous recitation of the reasons for departure by the sentencing court.

Date position was adopted:

March 3, 2011

Process used to take the ideological position:

Position adopted after an electronic discussion and vote

Number of members in the decision-making body:

23

Number who voted in favor and opposed to the position:

15 Voted for position

0 Voted against position

4 Abstained from vote

4 Did not vote

Position:

Oppose and Amend

Explanation of the position, including any recommended amendments:

Upon reviewing the proposed amendments of MCR 6.425 and 7.10 set forth ADM File No. 2008-10, the Appellate Practice Section has identified some areas of concern which have the potential to cause some serious problems.

Currently, MCR 2.425(e)(1) provides that "At sentencing, the court, must, on the record: (e) if the sentence imposed is not within the guidelines range, articulate the substantial and compelling reasons justifying that specific departure." This is in accord with statute, MCL 769.34(3):

A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.

The proposed amendment to MCR 6.425(D) requires that a trial court, in addition to the requirement in MCR 6.425(E)(1)(e) to articulate substantial and compelling reasons justifying a specific departure on the record, also explain those reasons on a form which will be made part of the record; the amendment to MCR 7.210 provides that the form will be part of the record which is transmitted to the Court of Appeals. The Staff Comment states that this will be a form “in which the judge outlines the reason or reasons for departure” in order “to provide litigants and appellate courts a clear and unambiguous recitation of the reasons for departure by the sentencing court”.

The issues which immediately spring to mind are as follows. First, just what is the decision which the appellate court is being asked to review, the substantial and compelling reasons justifying a specific departure which the trial court has placed on the record in accordance with statute and the court rule embodying that statutory requirement, or what the trial court later placed into the supplemental form outlining those reasons? Second, what takes precedence when what is placed into the form differs from what is articulated on the record?

Since what is placed in the form is not a verbatim transcription of what the trial court has placed on the record at sentencing, it must, by definition, be different, and either more comprehensive or less comprehensive. Can what is placed on the form supplement a deficient articulation at sentencing, one which statute requires be placed “on the record”, or take back a reason previously articulated? Just what is intended?

What makes this even more problematic is that there is no requirement that the completed form be served on defendant and all counsel, nor is there any time requirement stating just when this form must be completed other than it must obviously be completed before the record is sent to the Court of Appeals; under MCR 7.210 (G), the record is not transmitted to the Court of Appeals until after the appellate briefs have been filed. If the form is intended to be substantive, to provide controlling or supplemental substantial and compelling reasons which can justify a specific departure from the sentencing guidelines, this could create a very serious problem, preventing meaningful briefing and appellate review. If defendant and all appellate counsel are not served with a copy of the form, then appellate counsel may not be aware of the content of the form at the time the briefs are filed. Indeed, the form might not even be filed by the trial court until after the appellate briefs are filed, thus making it impossible to adequately brief the issues and leaving the appellate court without guidance from the briefs of the parties.

We believe that these are issues which need to be addressed. If the appellate court is to review the decision of the trial court setting forth the substantial and compelling reasons justifying a specific departure which the trial court has placed on the record as required by statute and MCR 2.425(e)(1), without regard to what is placed on the form, then the rule should clearly say so. If the appellate court is also to base its review on what is placed on the form, then, again, the rule should clearly say so, should clearly spell out which controls when there is a conflict between what is placed on the record and the form, provide a specific time period within which the trial court must file the form, and provide for service of the form upon defendant and all counsel.

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.

<http://courts.michigan.gov/supremecourt/Resources/Administrative/2008-10-11-23-10.pdf>