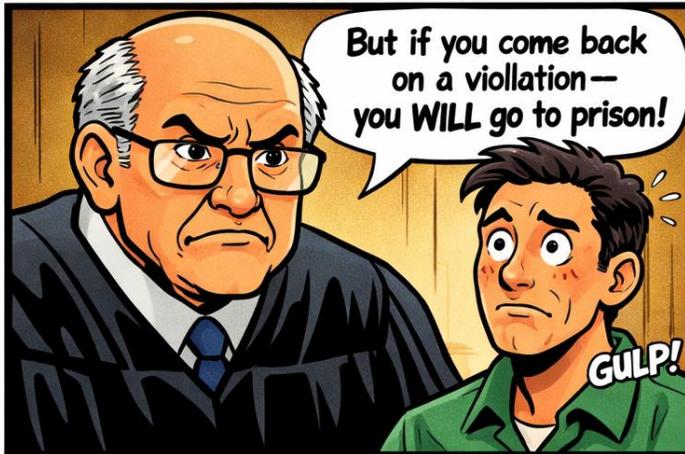
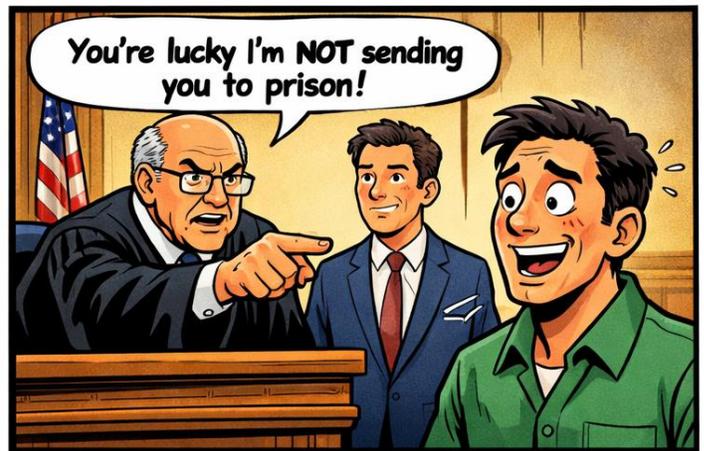
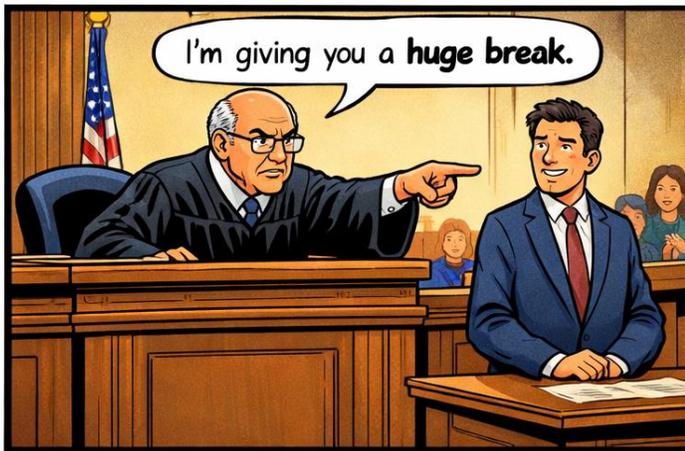




# JUDICIAL TRAINING & EDUCATION UPDATE



## FELONY SENTENCINGS & PROBATION VIOLATION HEARINGS The one thing a judge should never say or promise



**GENERAL RULE** During a felony sentencing or probation revocation hearing, although judges may warn defendants that a violation of probation can have serious ramifications, the court should NEVER PROMISE, MAKE ANNOUNCEMENTS OR OTHERWISE IMPLY that the court will send the defendant to prison if he/she violates conditions of their probation, or that the court has otherwise prejudged the proceedings. In other words, although a judge may warn a defendant about possible consequences (including the risk of prison), a judge cannot indicate that revocation is predetermined regardless of the *Austin* analysis.

**Supreme Court Warning:** If such a statement is made and a reasonable examiner [*i.e. an objective, unbiased, layperson with full knowledge of the facts and circumstances*] would question whether the judge could impartially conduct the proceedings, then at the defendant's request, the judge would likely be disqualified from the probation violation hearing. *State v. Finch, 865 N.W.2d 696 (Minn.2015)*.

**WHY THIS RULE EXISTS** Minnesota law requires a judge to make an independent and discretionary decision at the time of a probation violation. A court cannot predetermine that probation will automatically be revoked because revocation requires careful analysis under the *Austin* factors. *State v. Austin, 295 N.W.2d 246 (Minn. 1980)*.

Under *Austin*, a court must make three findings before revoking probation:

1. **Identify the specific probation condition violated**
2. **Find that the violation was intentional or inexcusable**
3. **Determine that the need for confinement outweighs the policies favoring probation**

These findings must be made at the time of the probation violation hearing, not predetermined earlier in the case. In addition, the judge **MUST** make **specific, individualized findings** when applying the *Austin* factors. *State v. Modtland, 695 N.W.2d 602 (Minn. 2005)*; *State v. Osborne, 732 N.W.2d 249 (Minn. 2007)*; *State v. Johnson, 941 N.W.2d 911 (Minn. App. 2020)*.

**Note:** The state's burden at a probation revocation hearing is by "clear and convincing evidence." *Minn. R. Crim. P. 27.04, subd. 3(2)(b)*.

**HOW THIS ISSUE TYPICALLY COMES UP** During a felony sentencing or probation revocation hearing, there are many instances where the presiding judge could justifiably sentence the defendant to prison, but instead, in the exercise of judicial discretion, decides to place or keep the defendant on probation.

In the judge's desire to impart upon defendants the seriousness of probation and the potential consequence should they violate probation, some of us may, on occasion, resort to slight exaggeration or hyperbole to make our point. This is especially true in cases involving downward dispositional departures or revocation hearings where the court, once again, decides to give a repeat violator one more chance on probation. For example:

1. In a **Downward Dispositional Case**, (defendant gets probation instead of prison) and the judge says: *“If you come back on a probation violation, you are going to prison.” (or something similar)*; or
2. In a **Probation Revocation Hearing**, (defendant stays on probation instead of prison) and the judge says: *“If you violate probation one more time, I am going to send you to prison.” (or something similar).*

#### **FOUR KEY QUOTES FROM STATE V. FINCH, 865 N.W.2D 696 (Minn. 2015)**

1. A defendant may seek to disqualify a judge for cause at any point in the proceeding. *Minn. R. Crim. P. 26.03, subd 14(3)*. A judge is disqualified “due to an appearance of partiality” if a “reasonable examiner, with full knowledge of the facts and circumstances, would question the judge’s impartiality.” *Finch*, 865 N.W.2d at 703.
2. In considering whether to revoke probation, district court judges “must take care that the decision to revoke is based on sound judgement and not just their will. Judges must remain impartial by not prejudging; they must maintain an open mind.” Judges “should be sensitive to the ‘appearance of impropriety’ and should take measures to assure that litigants have no cause to think their case is not being fairly judged.” *Id. at 705*.
3. A disqualification motion is not evaluated from “the perspective of a chief judge,” but rather from the perspective of a “reasonable examiner.” A “reasonable examiner” is an objective, unbiased layperson with full knowledge of the facts and circumstances.” *Id. at 703*.
4. “Because the district court judge unequivocally told Finch that the court would revoke his probation for any violation [of probation]....a reasonable examiner would question whether the judge could impartially conduct the proceedings under the “*Austin*” factors thus, we hold that the judge was disqualified from the probation revocation proceeding. *Id. at 705*.

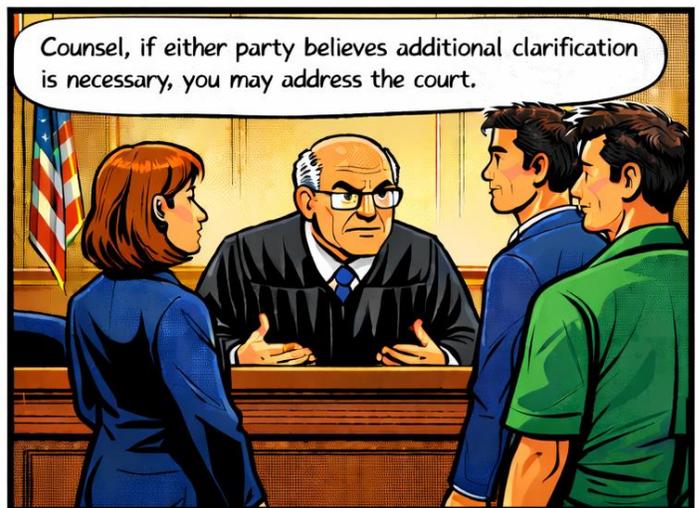
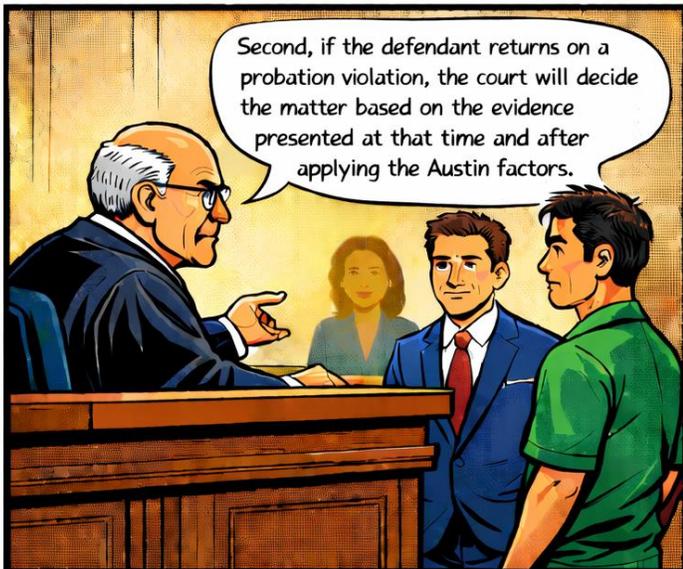
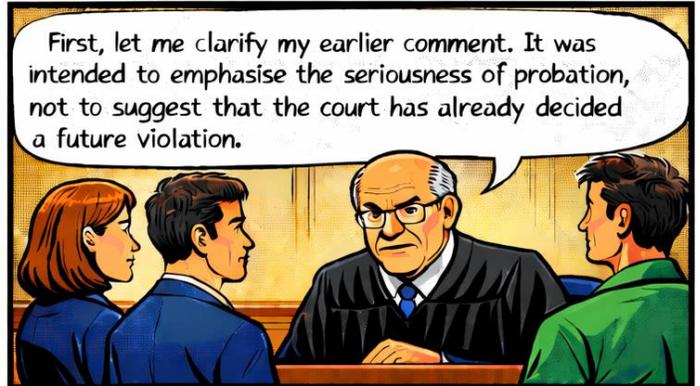
**PROCEDURE FOR REMOVAL OF A JUDGE FOR CAUSE – 4 KEY FACTS**

1. **Rule 26.03:** A request to disqualify a judge for cause may be raised whenever grounds for disqualification become known during the proceeding. The request is governed by *Minn. R. Crim. P. 26.03, subd. 14(3)*, which provides:
  - “A judge must not preside at a trial or other proceeding if disqualified under the Code of Judicial Conduct. A request to disqualify a judge for cause must be heard and determined by the chief judge of the district or by the assistant chief judge if the chief judge is the subject of the request.”
  - The relevant ethics rule is *Minnesota Code of Judicial Conduct Rule 2.11(A)*.
2. **Request for Voluntary Disqualification:** Despite the clear language of *Rule 26.03, subd. 14(3)*, a defendant may first request that the presiding judge voluntarily disqualify him or herself. Making such a request does not waive the defendant’s right to have a motion for disqualification for cause heard and determined by the chief judge of the district if the presiding judge declines to recuse. *Finch, 865 N.W.2d at 708*.
3. **No Authority to Deny the Alternative Request:** While the district court judge has authority to hear and decide the defendant’s request that the judge voluntarily disqualify him or herself, if that request is denied, the judge has no authority to deny a defendant’s alternative request to refer the removal motion to the chief judge under *Minn. R. Crim. P. 26.03, subd. 14(3)*. *State v. Finch, 865 N.W.2d at 709–10*.
4. **Appellate Review of a Denial of a Motion to Disqualify for Cause:** If the chief judge denies a motion to disqualify a judge for cause, the defendant may seek appellate review of that decision. The Court held in *State v. Finch* that a defendant is not required to file a petition for a writ of prohibition to obtain review of such a ruling. Instead, the issue may be raised on direct appeal after final judgment.

However, a defendant may still choose to file a petition for a writ of prohibition to seek immediate appellate review if the defendant believes the judge’s continued participation in the case would cause irreparable harm. *State v. Finch, 865 N.W.2d at 701–02; Minn. R. Crim. P. 26.03, subd. 14*.

**Correcting an Improper Statement Suggesting Automatic Probation Revocation**

In many cases, the problem can be mitigated if the court promptly clarifies that no decision about a future probation violation has been made and that any future revocation decision would require application of the *Austin* factors. *State v. Finch, supra*.



**Judicial Takeaway:** Judges may warn defendants about consequences—but must avoid language suggesting that revocation is automatic or predetermined.

This Training Update is also available on the [Minnesota Judicial Training and Education website](https://www.mnjudicialtraining.com/). If you find this update helpful, please consider forwarding it to colleagues who would benefit from timely insights on Criminal and Family Law, Rules of Evidence, and Courtroom Procedure.

**Special thanks** to Martine Law clerks Kayla Multer (certified student attorney) and Makayla Stromgren (certified student attorney) for generously contributing their insight and expertise to this update.

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