



## JUDICIAL TRAINING & EDUCATION UPDATE

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

**GENERAL RULE:** During a felony sentencing or probation violation hearing (PVH), 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.

**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 request of the defendant, the judge would likely be disqualified from the probation violation hearing. *State v. Finch*, 865 N.W.2d 696 (Minn.2015).

**HOW THIS TYPICALLY COMES UP:** During a felony sentencing or (PVH), 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 PVH's 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) NEVER PROMISE...  
*"If you come back on a probation violation, you are going to prison."* (or something similar); or
2. In a Probation Violation Hearing, (defendant stays on probation instead of prison): NEVER PROMISE...  
*"If you violate probation one more time, I am going to send you to prison."* (or something similar).

#### RATIONALE – 4 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." Id. at 11.
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 14.
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 11.

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 (see Update 11-08 on Austin Findings) thus, we hold that the judge was disqualified from the probation revocation proceeding. Id at 14.

### **PROCEDURE FOR REMOVAL OF A JUDGE FOR CAUSE –4 KEY FACTS TO KNOW:**

1. **RULE 26.03:** A request to disqualify a judge for cause can be raised at any point in the proceeding. Id at 6. The request must be heard and determined by the chief judge of the district. A request to remove a judge for cause is governed by Minn R. Crim. P. 26.03, subd 14(3) which states:  
*“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.”*
2. **REQUEST FOR VOLUNTARY DISQUALIFICATION:** Despite the clear and unambiguous language of the above rule, a defendant may request that the presiding judge voluntarily disqualify him or herself as an alternative to the chief judge hearing the request per Rule 26.03. By making such an alternative request, a defendant DOES NOT waive the right to have the request heard by the chief judge if the presiding judge denies defendant’s request for voluntary disqualification. Id at 8.
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. Id at 9-10.
4. **APPELLATE REVIEW – IS A WRIT OF PROHIBITION REQUIRED?** If the motion to disqualify a judge for cause is denied by the chief judge a defendant has the right to seek appellate review of the denial. The Supreme Court in Finch clearly held that “a petition for a writ of prohibition is NOT required to obtain appellate review of a denial of a request to disqualify a judge for cause.” However, the court’s ruling did not change the long-standing rule that “denial of a peremptory removal [per rule 26.03, subd 14] must be challenged via a petition for a writ of prohibition.” Id at 5.

### **UNDER THESE CIRCUMSTANCES A DEFENSE ATTORNEY HAS FOUR OPTIONS:**

1. If you decide it’s in your client’s best interest to keep the judge (despite the statement) -- do nothing;  
**Note:** Even if a motion to remove for cause is never raised at the district court level, the issue of disqualification under Rule 26.03, subd 14(3) may still be raised and considered on appeal. However, the standard of review is “plain error.” (i.e. plain error analysis involves a 4-pronged test). Id at 7, fn 3.
2. If you decide to pursue disqualification, first ask the presiding judge to voluntarily recuse him or herself;
3. If your request is denied, ask that the motion be heard by the chief judge per Rule 26.03, subd 14(3);
4. If your request is denied by the chief judge you have the right to seek appellate review of that decision.

### **PROSECUTORS HAVE TWO OPTIONS: Pro-Active Approach or Passive Approach:**

1. **Pro-Active Approach:** Once you recognize the potential problem, you approach the judge and respectfully raise the issue giving the judge an opportunity to clarify the court’s statement and intent;
2. **Passive Approach:** Even though you recognize the potential for future disqualification, you do nothing ☹️