

# **Chapter 8: The Bench**

## **Appendices and Training Memos**

## APPENDIX: Memorandum on Legal Considerations in Probation Violations Based on a New Offense<sup>1</sup>

When a probation violation is based upon an allegation of a new crime, Minn.R.Crim.P. 27.04, Subd. 2(4) allows, but does not require, the hearing on the violation to be postponed until after resolution of the new criminal case. This is true even when the probationer is held in custody on the violation. Despite the permissive language of Rule 27.04, double jeopardy, collateral estoppel and the prohibition against compelled self-incrimination have all been advanced as reasons that the violation hearing must be postponed until after the resolution of the criminal case. With the possible exception of collateral estoppel<sup>i</sup>, none of these theories supports a postponement of the probation revocation hearing.

### Double Jeopardy.

Double jeopardy does not apply because “revocation of probation or parole is regarded as reinstatement of the original sentence rather than punishment for the more recent misconduct.”<sup>2</sup> Thus, even if the probation violation is decided prior to a new criminal charge, the resolution of the probation violation will not bar prosecution of the new offense.

### Compelled Self-Incrimination.

The Fifth Amendment prohibits statements made under compulsion from being used against the declarant. In this regard, compulsion includes loss of a right or privilege. Holding a revocation hearing prior to the criminal trial based on the same event forces the defendant to choose between remaining silent at the revocation hearing or taking the stand and making statements that may be used against him during the criminal case. There is universal agreement that this dilemma does not create a constitutional requirement that the probation revocation hearing be postponed until after the resolution of the new charge as long as the defendant’s silence is not used against him.<sup>3</sup> Nor, is there any constitutional requirement that the court provide use immunity<sup>ii</sup> for any statements made during a revocation hearing held prior to the related criminal trial.<sup>4</sup>

The same rule applies based on the exercise of supervisory powers. There is no requirement that courts, in the exercise of their supervisory powers, postpone probation violation proceedings until after the resolution of the criminal case unless limited use immunity is provided. The Minnesota Court of Appeals has stated that the district court is not obligated “to unilaterally offer a defendant limited-use immunity at the revocation hearing.”<sup>5</sup>

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<sup>1</sup> States other than Minnesota have statutes similar to those cited here.

<sup>2</sup> *State v. McKenzje*, 542 N.W.2d 616, 620 (Minn. 1996).

<sup>3</sup> *State v. Phabsomphou*, 530 N.W. 2d 876 (Minn. Ct.App. 1995). *Accord: United States v. Jones*, 299 F. 3d 103 (1<sup>st</sup> Cir. 2002); *United States v. Bazzano*, 712 F. 2d 826 (3<sup>rd</sup> Cir. 1983) (en banc).

<sup>4</sup> *Phabsomphou*, 530 N.W. 2d 876. *Accord: Jones*, 299 F. 3d 103; *Bazzano*, 712 F. 2d 826; *Ryan v. State of Montana*, 580 F.2d 988 (9<sup>th</sup> Cir. 1978), *cert. denied*, 440 U.S. 977 (1979); *United States v. Brugger*, 549 F. 2d 2 (7<sup>th</sup> Cir.), *cert. denied*, 431 U.S. 919 (1977); *United States v. Markovich*, 348 F.2d 238 (2<sup>nd</sup> Cir. 1965).

<sup>5</sup> *State v. Hamilton*, 646 N.W.2d 915, 919 (Minn. Ct.App. 2002). *See also: Phabsomphou*, 530 N.W. 2d 876.

The decision to proceed with the probation violation hearing prior to resolution of the new charge is reviewed under an abuse of discretion standard. Regardless of whether use immunity was granted or offered, the Minnesota appellate courts have upheld the decision to proceed with the revocation hearing prior to trial in all reported cases.<sup>6</sup>

The choice to forego the perceived advantage of testifying at a hearing on a related matter for fear of adversely affecting the outcome of a criminal case is not unique to probation revocation hearings. Regulatory proceedings, employment disciplinary proceedings, professional licensing proceedings and civil suits are just a few of examples of the multitude of parallel civil and criminal proceedings in which the choice can arise. Continuing criminal conduct such as drug sales or check forgeries that give rise to multiple prosecutions are examples of some of the situations in which the choice arises wholly within the criminal law.

The defendant in a probation revocation proceeding is not faced with a qualitatively different choice than any one else facing parallel proceedings related to the same set of facts. No defendant could successfully argue that he must be given use immunity as to his testimony at the first of a series of criminal trials. Nor could he successfully argue that the court, in the exercise of its supervisory powers, should dictate the order of trial in a way that minimizes his exposure to criminal consequences.

#### Collateral Estoppel.

“Collateral estoppel may be applied when: (1) the issue was identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and, (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.”<sup>7</sup> In this regard, there is a final judgment on the merits when the decision on the claim is “not tentative, provisional or contingent and represents the completion of all the steps in the adjudication of the claim by the court”.<sup>8</sup>

The issue of whether the State will be estopped from relitigating at a criminal trial an issue decided adversely to it at a probation revocation proceeding has not been decided by the Minnesota courts. In cases where different prosecutor’s offices are responsible for presenting the State’s case at the probation revocation hearing and criminal trial the *Lemmer* court’s reasoning would preclude the application of collateral estoppel. However, in many domestic violence cases the same prosecutor’s office will be responsible for both the probation revocation hearing and the criminal trial. In those

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<sup>6</sup> Use immunity granted or offered: *Phabsomphou*, 530 N.W. 2d 876; *Moore*, 207 WL 2917461. No use immunity offered or granted: *Hamilton*, 646 N.W.2d 915 (the defendant did not request limited-use immunity and the court had no duty to unilaterally offer limited use immunity, particularly where the probation violation could rest on proof of probable cause alone); *State v. Hazelton*, 2003 WL 21007892 (Minn.Ct.App. 2003), unpublished opinion (proceeding on the revocation hearing was not an abuse of discretion where the defendant did not ask for immunity and did not testify about the new charge); *In Re the Welfare of M.G.B.* 2006 WL 340876 (Minn.Ct.App. 2006) (no grant of use immunity but the defendant was allowed to assert his Fifth Amendment right to remain silent when questioned about the incident which led to his arrest).

<sup>7</sup> *State v. Lemmer*, 736 N.W. 2d 650, 659 (Minn. 2007).

<sup>8</sup> *Lemmer*, 736 N.W. 2d at 659.

cases, the reasoning of the Lemmer court points to the conclusion that the technical requirements of collateral estoppels are met.

Even if the technical requirements for collateral estoppel have been met, it will not be applied if its application would be unfair.<sup>9</sup> The majority of jurisdictions do not apply collateral estoppel to bar the State from relitigating at trial an issue decided against it at a probation revocation hearing.<sup>10</sup> Policy considerations against the application of collateral estoppel appear to underlie the cases following the majority rule, even when the case also finds a technical requirement of collateral estoppel has not been met. The following policy considerations have been cited in support of the majority rule:

1. The State does not have the same incentive to present its best evidence at the revocation hearing with its lower standard of proof and more limited purpose.<sup>11</sup>
2. The State frequently will not have had time to complete its investigation before the revocation hearing.<sup>12</sup>
3. It is not in society's best interests to require the state to complete its entire investigation before seeking to revoke probation.<sup>13</sup>
4. There are two separate interests represented by two separate entities being addressed at the two proceedings -- the probation department's interest in the swift enforcement of probation conditions and the prosecutor's interest in presenting the strongest possible case in its effort to enforce the criminal law.<sup>14</sup>
5. Subjecting the defendant to both a probation revocation and criminal trial is not the kind of vexatious litigation the rule was designed to prevent.<sup>15</sup>
6. The procedural and substantive differences between the two proceedings make application of collateral estoppel unfair.<sup>16</sup>
7. There is an overriding societal interest in seeing that the criminal matters are resolved correctly in a criminal trial.<sup>17</sup>

Given the strength of these policy considerations, it is likely that Minnesota will follow the majority of other jurisdictions in declining to apply collateral estoppel to prevent the State from relitigating an issue decided adversely to it at a prior probation revocation hearing. This is particularly true in domestic violence cases where the need for swift and sure consequences to protect the public safety argues in favor of proceeding expeditiously with the probation revocation hearing.

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<sup>9</sup> *Lemmer*, 736 N.W.2d at 650,659.

<sup>10</sup> *State v. Brunet*, 806 A.2d 1007, 1010 (Vt. 2002). *See also*: Annotation, *Determination that the State Failed to Prove Charges Relied Upon for Revocation of Probation as Barring Subsequent Criminal Action Based on Same Underlying Charges*, 2 A.L.R.5<sup>th</sup> 262 (1992).

<sup>11</sup> *Brunet*, 806 A.2d at 1012.

<sup>12</sup> *Brunet*, 806 A.2d at 1011-12.

<sup>13</sup> *Brunet*, 806 A.2d at 1013

<sup>14</sup> *Krotcha v. Commonwealth*, 711 N.E.2d at 148 (Mass. 1999).

<sup>15</sup> *Lucido v. Superior Court*, 795 P.2d 1223, 1232 (Cal. 1990).

<sup>16</sup> *State v. Brunet*, 806 A.2d at 1011; *People v. Hilton*, 166 A.D.2d 233, 235 (N.Y. App.Div. 1999)

<sup>17</sup> *Hilton*, 166 A.D.2d at 235; *Lucido*, 795 P.2d at 1229.

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i “Collateral estoppel” is a legal principle preventing a party from relitigating an issue that has already been decided against that party in another legal proceeding.

ii “Use Immunity” prevents the State from using information provided by the Defendant in one proceeding against the Defendant in a subsequent proceeding.

## Appendix: Court Administration in Domestic Violence-Related Cases

Court administration has a key role in managing a timely response to domestic violence–related cases that come before the criminal court. It schedules hearings and appearances as expeditiously as possible within statutory and policy-based time frames and notifies the involved parties and intervening agencies. It accurately enters and distributes court orders. It acts to ensure that confidential information is not disclosed to unauthorized parties.

The particulars of court administration’s performance of its duties in domestic violence cases are largely a matter of local practice and resources. For this reason, the following is offered as a guide to the types of issues that might be addressed in writing policy for court administration in domestic violence–related cases. It is not intended as a set of model policies.

This appendix includes material from the Second Judicial District Coordinating Council’s *Guidelines and Procedures for Domestic Abuse-Related Criminal Cases* (the Manual), which is referenced by page (e.g., Manual at 5).

### Policy: Court Administration

In addition to adhering to general policy, court administration personnel will take the following actions in domestic violence–related cases, using the protocol referenced and included as part of this policy.

1. Ensure that domestic violence–related cases are handled with the timeliness required by statute and local policy.
2. Ensure that all defendants appearing on domestic violence–related matters have been booked.
3. Correctly enter and distribute court orders to all required and specified parties. Such orders include:
  - a. Conditional release orders
  - b. Pretrial no-contact orders
  - c. Modifications and cancellations of pretrial no-contact orders
  - d. Probation no-contact orders
4. As necessary, notify Project Remand of all cases in which the defendant is conditionally released.
5. Notify necessary parties of any hearing regarding modification of a probation no-contact order.
6. Notify appropriate parties of any cancellation of a probation no-contact order.

7. On all warrants of commitment, correctly identify those cases in which a no-contact order remains in effect.
8. At all times ensure that confidential information is not disclosed to unauthorized parties.

## Protocol: Court Procedures in Domestic Violence Cases

1. Correctly calendar all court appearances in domestic violence–related cases.

### Appearance

- Release pending first appearance
- Conditional release violations hearings in *misdemeanor* or *gross misdemeanor* cases
- Conditional release violations hearings in *felonies*
- Omnibus, pretrial and trial calendaring: *misdemeanors*
- Omnibus, pretrial and trial calendaring: *gross misdemeanors*
- Omnibus, pretrial and trial calendaring: *felonies*
- Sentencing

### Calendar

- The following Thursday
- Defendant awaiting sentencing: according to calendar of sentencing judge
- All other cases: next available arraignment judge
- Defendant awaiting sentencing or pretrial already held: calendar of assigned trial or sentencing judge
- All other cases: next available arraignment judge [Manual at 37]
- Defendant in custody: 10 day trial date
- Out of custody: domestic abuse pretrial; trial date 1<sup>st</sup> or 3<sup>rd</sup> week of block
- Applies to defendants in custody and out of custody
- Domestic abuse omnibus hearing and Trial date 1<sup>st</sup> or 3<sup>rd</sup> week of block
- Applies to defendants in custody and out of custody
- Felony omnibus 2 weeks after first appearance
- Pretrial and trial date set at omnibus
- Full presentence investigation no less than 6 weeks after plea or verdict
- Other cases may be scheduled earlier [Manual at 23-24]

2. Adopt procedures to ensure that a judge is available to review requests for probation violation warrants when the sentencing judge is unavailable to handle them in a timely manner.
3. In circumstances where judicial resources allow, consider the use of domestic violence calendars or courts.
4. Take the necessary steps to ensure that all orders and modifications or cancellations of orders in domestic violence–related cases are entered into criminal history and other applicable databases, including MNCIS and BCA hotfiles.
5. Prior to first appearance, the clerk will check whether booking has been completed. If not, the clerk will process a booking summons. The Clerk will recheck prior to first appearance to ensure that booking occurred. If it did not, the clerk will advise the court and the court will issue a booking order. [Manual at 12, updated to reflect current practice]
6. Immediately distribute either an electronic or paper copy of the conditional release order to the agency having custody of the arrested person and provide the agency with any available information on the location of the victim in a manner that protects the victim's safety (pursuant to Minn.Stat. §629.72, subd. 2(c)).
7. Keep a supply of blank domestic abuse no-contact order (DANCO) forms available. [Manual at 31]
8. Retain the original signed pretrial DANCO order in the court file. [Manual at 32] In the Second Judicial District the image of the order is also available through the WebExtender.
9. Distribute either an electronic or paper copies of the pretrial DANCO to the following:
  - a. Defendant/defendant's attorney
  - b. Prosecutor (City Attorney will distribute copies to the victim and the police)
  - c. Project Remand for those cases it is supervising
  - d. Agency having custody of the defendant (pursuant to Minn.Stat. §629.72, subd. 2(c)) [Manual at 33]
10. If a pretrial DANCO is modified it shall be served on the parties and forwarded to the appropriate law enforcement agency in the same manner as the original no-contact order. [Manual at 33]
11. Distribute either electronic or paper copies of the cancellation of a pretrial DANCO to the following:
  - a. Defendant/defendant's attorney
  - b. Prosecutor (City Attorney will distribute copies to the victim and the police)
  - c. Project Remand for those cases it is supervising
  - d. Ramsey County Emergency Communications Center data channel

12. When Remand is not present at the hearing when the release is ordered, notify Project Remand of any case in which the defendant is conditionally released and Remand is to supervise the conditional release.
13. Retain the original of the signed probation no-contact order in the court file. [Manual at 34]
14. Distribute either electronic or paper copies of the probation no-contact order to the following:
  - a. Defendant/defendant's attorney
  - b. Prosecutor (City Attorney will distribute copies to the victim)
  - c. Probation
  - d. Project Remand for those cases it is supervising [Manual at 34]
15. Upon notification from the judge's clerk that the hearing has been scheduled on a request to modify a probation no-contact order, court administration will send notices to all parties:
  - a. Defendant/defendant's attorney
  - b. Probation officer
  - c. Victim
  - d. Prosecutor
16. If a probation no-contact order is canceled the judge's clerk will distribute either electronic or paper copies of the cancellation order to:
  - a. Defendant/defendant's attorney
  - b. Probation officer
  - c. Prosecutor
17. If a probation no-contact order is canceled, the clerk of district court will fax all cancellations to the Ramsey County Sheriff and the Emergency Communications Center data channel.
18. On all warrants of commitment, check the appropriate box regarding whether the no-contact order was lifted or remains in effect.
19. When the court file contains confidential material, take one of the following actions as appropriate:
  - a. Remove all confidential material from the file before allowing *pro se* defendants to have access to the file.
  - b. Obtain prior authorization from the court to allow the *pro se* defendant access to the court file when confidential materials remain in the file.

## Appendix: Domestic Violence-Related Standard Conditions of Probation

Type of Condition	Probation Conditions
<b>Key</b>	<i>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</i>
<b>1. Drugs/Alcohol</b>	
1	a. You may not use or possess any controlled substances except in the manner and amount prescribed for you by a doctor.
3	b. You may not use or possess alcoholic beverages.
3	c. You must attend Alcoholics Anonymous or an equivalent program weekly as directed by your probation officer.
3	d. You must cooperate with a chemical dependency evaluation and follow any recommendations of the evaluation, including aftercare, as directed by your probation officer.
1	e. You must submit to random testing for the presence of controlled substances or alcoholic beverages as directed by your probation officer.
<b>2. Employment/School</b>	
3	a. You must obtain and maintain employment as directed by probation officer.
3	b. You must report any changes in employment to your probation officer within 72 hours of the change. The obligation to report includes any involuntary changes such as being fired or laid off.
3	c. You must attend and cooperate with any job-seeking programming as directed by your probation officer.
3	d. You must attend and cooperate with any life skills programming as directed by your probation officer.
3	e. You must attend and cooperate with any high school equivalency program as directed by your probation officer.
3	f. You may not change employment without the prior permission of your probation officer if, as a result, you would be working for the same employer as _____ (victim).
<b>3. Fines/Community service:</b>	
1	a. You must pay a fine of \$ _____. You must make the payment as directed by the probation department.
<b>4. Law abiding:</b>	
1	a. You must refrain from any action which is prohibited by any state, federal or local law. An action, or inaction, prohibited by state, federal or local law violates probation even if it is not charged as a crime or does not result in a criminal conviction.
2	b. You must obey all court orders, including any orders for protection or no contact orders. An action, or inaction, prohibited by court order violates probation even if it is not charged as a crime or does not result in a criminal conviction.
2	c. You must not use threats, intimidation or coercion against any person
2	d. You must not use illegal violence against any person.
2	e. You must obey all court orders including protection orders, child support and

Type of Condition	Probation Conditions
<b>Key</b>	<i>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</i>
	custody orders, and orders regarding return of children from parenting time.
<b>4A. Other provisions to consider when needed in particular cases</b>	
4	a. You must obey all court orders including orders regarding child support.
<b>5. Miscellaneous:</b>	
1	a. You must be truthful with your probation officer in all matters, and reply promptly to any communication from your probation officer
1	b. You must waive extradition to the State of Minnesota from any jurisdiction in or outside the United States where you may be found. You must agree not to contest any further effort by any jurisdiction to return you to the State of Minnesota. NOTE: Reviewers raised the issue of whether these waivers are enforceable. The concept, though not the language, is from Ramsey County’s standard conditions.
1	c. You may not leave the State of Minnesota without first obtaining written permission from your probation officer.
2	d. If requested by your probation officer, you must sign releases of information related to: <ol style="list-style-type: none"> <li>i. Victim of this offense: A release sufficient to allow your probation officer to discuss and review with the victim statements made by you to the probation officer writing the presentence investigation.</li> <li>ii. Medical/Mental Health programs or professionals. These releases must be sufficient to allow your probation officer to verify if you are attending and complying with your treatment and medication programs.</li> <li>iii. Chemical Dependency programs. These releases must be sufficient to allow your probation officer to verify that you are attending and complying with the chemical dependency program and to allow any person working with the program to be informed if you use alcohol or drugs.</li> <li>iv. Domestic Violence Programs. These releases must be sufficient to allow your probation officer to:                             <ul style="list-style-type: none"> <li>• Verify that you are attending and complying with the domestic violence program.</li> <li>• Release to the domestic violence program the non-confidential portion of the PSI.</li> <li>• Discuss with the program any concerns about your compliance with, or adjustment to, probation.</li> </ul> </li> <li>v. Other Third Parties. Releases as necessary to monitor your compliance with the conditions of your probation.</li> </ol>
2	e. You must provide to your probation officer all court documents relating to the victim in this case:

Type of Condition	Probation Conditions
<b>Key</b>	<i>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</i>
	<ul style="list-style-type: none"> <li>i. Protection orders</li> <li>ii. Harassment restraining orders</li> <li>iii. No-contact orders</li> <li>iv. Custody and visitation orders or agreements</li> <li>v. Civil court judgments</li> </ul>
<b>5A. Other provisions to consider when needed in particular cases</b>	
4	1. You must make full disclosure of the status of any child custody investigations, paternity actions, adoption proceedings and other family or civil matters.
4	2. You must cooperate with child or adult protection services and make full disclosure of criminal history and status
4	3. You must obey any curfew imposed by your probation officer.
<b>6. No-contact orders:</b>	
3	<p>a. You must have no contact, directly or indirectly, with the people listed below. Prohibited contact includes, but is not limited to, physical, verbal, visual, letters, phone calls, computer transmissions, videos, visits, photographs or text messaging. Prohibited contact also includes any form of contact through a third party. Contact for the purpose of arranging parenting time with joint children is also prohibited except as provided for by the court order granting parenting time.</p>
	i. the victim of this offense, _____;
	ii. the victim’s children;
	iii. others residing in victim’s home;
	iv. the victim’s employer; or
	v. the following other individuals: _____.
3	b. You must stay away from the area within _____ feet/blocks of:
	i. the victim’s current and all future residences;
	ii. the victim’s school;
	iii. the victim’s current and any future employment;
	iv. the school attended by the victim’s children. You may not be within this area even if the victim’s children are also your children. If there is a school program or other special event at the school that you wish to attend, you may be in the school area only if with prior written approval from your probation officer. You may be in the area only in the manner and at the time specified by that written approval. If you have an existing court order for parenting time which requires you to pick up or drop off the children at school, you may be within the school area for that purpose only with prior written approval of your probation officer and only in the manner and at the time specified in that written approval.
	v. the childcare facility attended by the victim’s children. You may not be within this area even if the victim’s children are also your children. If there is a program or other special event at the childcare facility that you wish to attend, you may attend only with prior written approval from your probation officer You may be in the area only in the manner and at

Type of Condition	Probation Conditions
<b>Key</b>	<i>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</i>
	the time specified by your probation officer. In the event that you have an existing court order for parenting time which requires you to pick up or drop off the children at daycare, you may be within the school area for that purpose only with the prior written approval of your probation officer and only in the manner and at the time specified in that written approval.;
	vi. the following additional locations: _____.
3	c. You may not have unsupervised contact with the following children_____.
<b>6A. Other provisions to consider when needed in particular cases:</b>	
4	a. You must have no contact with persons specified by your probation officer.
4	b. You must stay away from places specified by your probation officer.
<b>7. Programming:</b>	
<b>a. Domestic Violence:</b>	
2	i. You must attend, cooperate with and complete domestic violence treatment as directed by your probation officer.
3	ii. You must attend and cooperate with any other designated domestic violence group if, and for long as, required by your probation officer.
3	iii. You must attend the Victim Impact panel as directed by your probation officer.
3	iv. You must attend a domestic violence parenting program as directed by your probation officer
3	v. You must attend a domestic violence sexual education program as directed by your probation officer.
<b>b. Chemical Dependency:</b>	
3	i. You must cooperate with a chemical dependency evaluation and follow any recommendations of the evaluation, including aftercare, as directed by your probation officer.
3	ii. You must attend Alcoholics Anonymous or an equivalent program weekly, as directed by your probation officer.
<b>c. Mental Health:</b>	
3	i. You must cooperate with a psychological evaluation, and follow any recommendations of the evaluations, as directed by your probation officer.
3	ii. You must cooperate with your current mental health treatment program, including: <ul style="list-style-type: none"> <li>• Taking all prescribed medications as directed; and,</li> <li>• Attending and cooperating with appointments with your psychiatrist and/or therapist and counseling group(s).</li> </ul>
3	iii. You must cooperate with case manager/AMHRS worker/other mental health professional or civil commitment requirements as directed by your probation officer.

Type of Condition	Probation Conditions
<i>Key</i>	<i>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</i>
<b>8. Reporting:</b>	
1	d. You must meet with or contact your probation officer as directed by your probation officer.
1	e. You must at all times ensure that your probation officer has the current telephone number at which you can be reached. If there is no number at which you can be reached, you must ensure that probation officer has a number at which a message can be left.
1	f. You must report all police contacts to your probation officer within 48 hours of the contact.
1	g. You must report any new arrests, charges, orders for protection or no contact orders to your probation officer within 72 hours of the arrest, charge or issuance of the order.
1	h. You must report all changes of employment to your probation officer within 7 days of the change.
1	i. You must report all changes of residence to your probation officer within 7 days of the change.
<b>9. Residence:</b>	
4	a. You must make no change in residence without prior written approval of your probation officer.
<b>10. Restitution:</b>	
3	a. You must pay restitution in the amount of \$_____. You must pay the restitution as directed by the probation department.
<b>11. Weapons other than firearms:</b>	
3	a. You must not use or possess any weapon. For the purposes of this provision a weapon is any device designed as a weapon or any device which is used, or intended to be used, as a weapon.
<b>12. Firearms:</b>	
2	a. You may not use or possess any firearm. This prohibition is in addition to any prohibition imposed as a special condition of probation in your case. For the purposes of this provision a firearm is any weapon which discharges a projectile by means of an explosive, a gas or compressed air.
2	b. In addition to these conditions of probation, state and federal law prohibit use and possession of guns, silencers, destructive devices, tear gas and other devices. Some of those prohibitions are summarized in the Notice of Probation Obligations and Responsibilities which your probation officer will review with you. This is a partial list only. You should not assume that you may possess because a device just because it is not on that list. If you have any questions about whether you are prohibited from possessing any device you are responsible for consulting with your attorney before possessing it.
<b>12A. Other provisions to consider when needed in particular cases:</b>	
3	a. You may not use or possess a pistol for 3 years. The length of this prohibition may be extended by a new conviction within those 3 years.

Type of Condition	Probation Conditions
<b>Key</b>	<i>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</i>
3	b. You may not use or possess any firearms for 3 years. The length of this prohibition may be extended by a new conviction within those 3 years.
3	c. You may not use or possess any firearms for _____ years.
3	d. You may not use or possess any firearms for the duration of your life.

## Appendix: Domestic Violence Risk Assessment Bench Guide<sup>1</sup>

A research-based bench guide for use by judges  
at all stages of family, order for protection, civil or criminal cases involving domestic violence  
(*Second Judicial District Domestic Abuse Guidelines and Procedures Manual*)

Research has identified additional risk factors beyond those included in Ramsey County's current risk assessment tool. These include stalking behaviors (not convictions), the victim's attempts to make a permanent break in the relationship, serious injury to the victim, or a perpetrator's almost daily impairment by alcohol or other drugs. Violence with a pattern of coercion is a serious marker of risk and danger. Coercion may be displayed as control of children, finances, or activities; demanding sex and sexual aggression; intimidation; hurting pets; or isolating the victim from support systems. See the Blueprint appendix *Practitioners' Guide to Risk and Danger in Domestic Violence Cases*.

Risk assessment in domestic violence-related cases includes review of offense characteristics (as documented in the complaint and police reports), criminal history (Project Remand bail evaluation) and Confidential Victim Information form.

Note: The presence of following factors can indicate elevated risk of serious injury or lethality. The absence of these factors is not, however, evidence of the absence of risk of lethality.

1. Does perpetrator have access to a firearm, or is there a firearm in the home?
2. Has the perpetrator ever used or threatened to use a weapon against the victim?
3. Has perpetrator ever attempted to strangle or choke the victim?
4. Has perpetrator ever threatened to or tried to kill the victim?
5. Has the physical violence increased in frequency or severity over the past year?
6. Has perpetrator forced the victim to have sex?
7. Does perpetrator try to control most or all of victim's daily activities?
8. Is perpetrator constantly or violently jealous?
9. Has perpetrator ever threatened or tried to commit suicide?
10. Does the victim believe that the perpetrator will re-assault or attempt to kill the victim?  
*A "no" answer does not indicate a low level of risk, but a "yes" answer is very significant*
11. Are there any pending or prior orders for protection, criminal, or civil cases involving this practitioner?

*These risk assessment factors are validated by a number of studies. See Campbell, Jacquelyn, et al., "Intimate Partner Violence Risk Assessment Validation Study: The RAVE Study Practitioner Summary and Recommendations: Validation of Tools for Assessing Risk from Violent Intimate Partners", National Institute of Justice (December, 2005); Heckert and Gondolf, "Battered Women's Perceptions of Risk Versus Risk Factors and Instruments in Predicting Repeat Reassault", Journal of Interpersonal Violence, Vol. 19, No 7 (July 2004).*

<sup>1</sup> States other than Minnesota have statutes similar to those cited here.

## How to Use the Domestic Violence Risk Assessment Bench Guide

- **Obtain information regarding these factors through all appropriate and available sources**
  - Potential sources include police, victim witness staff, prosecutors, defense attorneys, court administrators, bail evaluators, pre-sentence investigators, probation, custody evaluators, the parties and the attorneys
- **Communicate to practitioners that you expect that complete and timely information on these factors will be provided to the court**
  - This ensures that risk information is both sought for and provided to the court at each stage of the process and that risk assessment processes are institutionalized
  - Review report forms and practices of others in the legal system to ensure that the risk assessment is as comprehensive as possible
- **Expect consistent and coordinated responses to domestic violence**
  - Communities whose practitioners enforce court orders, work in concert to hold perpetrators accountable and provide support to victims are the most successful in preventing serious injuries and domestic homicides
- **Do not elicit safety or risk information from victims in open court**
  - Safety concerns can affect the victim's ability to provide accurate information in open court
  - Soliciting information from victims in a private setting (by someone other than the judge) improves the accuracy of information and also serves as an opportunity to provide information and resources to the victim
- **Provide victims information on risk assessment factors and the option of consulting with confidential advocates**
  - Information and access to advocates improves victim safety and the quality of victims' risk assessments and, as a result, the court's own risk assessments
- **Note that this list of risk factors is not exclusive**
  - The listed factors are the ones most commonly present when the risk of serious harm or death exists
  - Additional factors exist which assist in prediction of re-assault
  - Victims may face and fear other risks such as homelessness, poverty, criminal charges, loss of children or family supports
- **Remember that the level and type of risk can change over time**
  - The most dangerous time period is the days to months after the perpetrator discovers that the victim
    - might attempt to separate from the perpetrator or to terminate the relationship
    - has disclosed or is attempting to disclose the abuse to others, especially in the legal system

## The Value of Domestic Violence Risk Assessment Tools

Identifying and assessing risk in the wide array of domestic violence cases that come before the civil and criminal courts constitute a critical aspect of judicial intervention in domestic violence cases. A baseline recognition and understanding of risk and lethality markers in domestic violence cases greatly enhance a judge's ability to effectively adjudicate these cases. While judges do try to assess risk in these cases, most have no validated tool with which to do so. By using a tool such as the Risk Assessment Bench Guide, judges will be better equipped to make informed and accurate decisions in cases in which domestic violence is involved. In addition, uniform application of this tool in each court throughout the State of Minnesota will ensure that best practices are in place in every jurisdiction.

Copious literature exists regarding the use and accuracy of various risk and lethality assessment instruments. The most commonly identified risk and lethality factors are listed in this Bench Guide. Of course, risk and lethality factors are not one-hundred-percent determinative. Most notably, while assessment tools often correctly predict the most dangerous offenders/individuals, such tools are sometimes under-inclusive and can fail to identify some dangerous individuals. Therefore, judges should utilize this tool to improve risk assessment accuracy but be vigilant of the risk inherent in *all* domestic violence cases.

Of course, the quality of decisions which are informed by the Risk Assessment Bench Guide can be greatly improved where the court has evidence of the existence of such factors in particular cases. For this, the court must rely on other court and legal system practitioners. Judges need the information necessary for these assessments and should take leadership locally to encourage attorneys, litigants, police, probation and others to consistently provide it. A strong coordinated community response to domestic violence will facilitate information-gathering and timely provision of information to the bench so that judges can take appropriate measures regarding the safety of victims and their children.

Risk assessment instruments have a proven ability to identify some of the highest-risk abusers. With this kind of tool, judges can easier decide whether to institute stronger controls that might have a deterrent impact on abusers' future violence or provide heightened safety measures for victims. For example, a judge can order more intensive supervision of a more dangerous offender or can institute more protective parenting time provisions when a party presents heightened risk.

The use of this formal assessment tool can save lives, but is not intended to, nor should it be used to, prejudge any case on the merits.

## Appendix: Firearm Prohibitions<sup>1</sup>

**State Law.** Whenever a defendant is convicted of domestic assault or of assault in the fifth degree against a family or household member, the court shall inform the defendant that the defendant is prohibited from possessing a pistol for 3 years from the date of conviction and that it is a gross misdemeanor to violate this prohibition. Minn. Stat. § 609.2242, subd. 3(d). In addition, when a person is convicted of assault (any degree) and the court makes written findings on the record that: (1) the assault was committed against a family or household member, (2) the defendant owns or possesses a firearm and (3) the firearm was used in any way during the commission of the assault, the court shall order the firearm forfeited and may order that the defendant is prohibited from possessing any firearm for any period longer than 3 years or for life. Minn. Stat. § 609.2242, subd. 3(a), (b) and (c).

**Federal Law.** In addition, under federal law, it is a crime to possess a firearm after conviction of a qualifying state misdemeanor crime of domestic violence. A "qualifying misdemeanor" is one which has as an element the use or attempted use of physical force or threatened use of a deadly weapon committed against a spouse, former spouse or intimate partner. 18 U.S.C. § Sec. 2261(a)(1); 18 U.S.C. § 922(g)(9). It is also a crime to possess a firearm while subject to a qualifying protective order. A "qualifying protective order" is one issued after a hearing of which the defendant had actual notice and an opportunity to participate and which contains an explicit provision restraining the person from harassing, stalking or threatening the intimate partner or child of the intimate partner or placing the partner or child in fear of bodily injury and which also contains an explicit finding that the person represents a credible threat to the physical safety of the intimate partner or child or explicitly prohibits domestic abuse (as defined in Minnesota law) against the intimate partner or child. 18 U.S.C. § 922(g)(8). (*Second Judicial District Domestic Abuse Guidelines and Procedures Manual*)

See the following attachments to the Probation Appendix (Blueprint Supplement – Chapter 7), *Probation Presentence Investigation: Framework for Sentencing, Conditions of Probation, and Revocation of Probation*.

- Attachment 2: Chart of State Firearms Prohibitions
- Attachment 4: Use of Firearms/Pistol Special Conditions

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<sup>1</sup> States other than Minnesota have statutes similar to those cited here.

## Appendix: General Standard Conditions of Probation

Type of Condition	Probation Conditions
<b>Key</b>	<b>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</b>
<b>1. Drugs/Alcohol</b>	
1	a. You may not use or possess any controlled substances except in the manner and amount prescribed for you by a doctor.
3	b. You may not use or possess alcoholic beverages.
3	c. You must attend Alcoholics Anonymous or an equivalent program weekly as directed by your probation officer.
3	d. You must cooperate with a chemical dependency evaluation and follow any recommendations of the evaluation, including aftercare, as directed by your probation officer.
1	e. You must submit to random testing for the presence of controlled substances or alcoholic beverages as directed by your probation officer.
<b>2. Employment/School</b>	
3	a. You must obtain and maintain employment as directed by probation officer.
3	b. You must report any changes in employment to your probation officer within 72 hours of the change. The obligation to report includes any involuntary changes such as being fired or laid off.
3	c. You must attend and cooperate with any job-seeking programming as directed by your probation officer.
3	d. You must attend and cooperate with any life skills programming as directed by your probation officer.
3	e. You must attend and cooperate with any high school equivalency program as directed by your probation officer.
3	f. You may not change employment without the prior permission of your probation officer if, as a result, you would be working for the same employer as _____ (victim).
<b>3. Fines/Community service:</b>	
1	a. You must pay a fine of \$_____. You must make the payment as directed by the probation department.
<b>4. Law abiding:</b>	
1	a. You must refrain from any action which is prohibited by any state, federal or local law. An action, or inaction, prohibited by state, federal or local law violates probation even if it is not charged as a crime or does not result in a criminal conviction.
2	b. You must obey all court orders, including any orders for protection or no contact orders. An action, or inaction, prohibited by court order violates probation even if it is not charged as a crime or does not result in a criminal conviction.
2	c. You must not use threats, intimidation or coercion against any person
2	d. You must not use illegal violence against any person.

Type of Condition	Probation Conditions
<b>Key</b>	<b>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</b>
2	e. You must obey all court orders including protection orders, child support and custody orders, and orders regarding return of children from parenting time.
<b>4A. Other provisions to consider when needed in particular cases:</b>	
4	a. You must obey all court orders including orders regarding child support.
<b>5. Miscellaneous:</b>	
1	a. You must be truthful with your probation officer in all matters, and reply promptly to any communication from your probation officer
1	b. You must waive extradition to the State of Minnesota from any jurisdiction in or outside the United States where you may be found. You must agree not to contest any further effort by any jurisdiction to return you to the State of Minnesota. c. NOTE: Reviewers raised the issue of whether these waivers are enforceable. The concept, though not the language, is from Ramsey’s standard conditions.
1	d. You may not leave the State of Minnesota without first obtaining written permission from your probation officer.
2	e. If requested by your probation officer, you must sign releases of information related to: <ol style="list-style-type: none"> <li>i. Victim of this offense: A release sufficient to allow your probation officer to discuss and review with the victim statements made by you to the probation officer writing the presentence investigation.</li> <li>ii. Medical/Mental Health programs or professionals. These releases must be sufficient to allow your probation officer to verify if you are attending and complying with your treatment and medication programs.</li> <li>iii. Chemical Dependency programs. These releases must be sufficient to allow your probation officer to verify that you are attending and complying with the chemical dependency program and to allow any person working with the program to be informed if you use alcohol or drugs.</li> <li>iv. Domestic Violence Programs. These releases must be sufficient to allow your probation officer to:                             <ul style="list-style-type: none"> <li>• Verify that you are attending and complying with the domestic violence program.</li> <li>• Release to the domestic violence program the non-confidential portion of the PSI.</li> <li>• Discuss with the program any concerns about your compliance with, or adjustment to, probation.</li> </ul> </li> <li>v. Other Third Parties. Releases as necessary to monitor your compliance with the conditions of your probation.</li> </ol>
2	f. You must provide to your probation officer all court documents relating to the victim in this case:

Type of Condition	Probation Conditions
<b>Key</b>	<b>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</b>
	<ul style="list-style-type: none"> <li>i. Protection orders</li> <li>ii. Harassment restraining orders</li> <li>iii. No-contact orders</li> <li>iv. Custody and visitation orders or agreements</li> <li>v. Civil court judgments</li> </ul>
<b>5A. Other provisions to consider when needed in particular cases:</b>	
4	1. You must make full disclosure of the status of any child custody investigations, paternity actions, adoption proceedings and other family or civil matters.
4	2. You must cooperate with child or adult protection services and make full disclosure of criminal history and status
4	3. You must obey any curfew imposed by your probation officer.
<b>6. No-contact orders:</b>	
3	<p>a. You must have no contact, directly or indirectly, with the people listed below. Prohibited contact includes, but is not limited to, physical, verbal, visual, letters, phone calls, computer transmissions, videos, visits, photographs or text messaging. Prohibited contact also includes any form of contact through a third party. Contact for the purpose of arranging parenting time with joint children is also prohibited except as provided for by the court order granting parenting time.</p> <ul style="list-style-type: none"> <li>i. the victim of this offense, _____;</li> <li>ii. the victim’s children;</li> <li>iii. others residing in victim’s home;</li> <li>iv. the victim’s employer; or</li> <li>v. the following other individuals: _____.</li> </ul>
3	<p>b. You must stay away from the area within _____ feet/blocks of:</p> <ul style="list-style-type: none"> <li>i. the victim’s current and all future residences;</li> <li>ii. the victim’s school;</li> <li>iii. the victim’s current and any future employment;</li> <li>iv. the school attended by the victim’s children. You may not be within this area even if the victim’s children are also your children. If there is a school program or other special event at the school that you wish to attend, you may be in the school area only if with prior written approval from your probation officer. You may be in the area only in the manner and at the time specified by that written approval. If you have an existing court order for parenting time which requires you to pick up or drop off the children at school, you may be within the school area for that purpose only with prior written approval of your probation officer and only in the manner and at the time specified in that written approval.</li> <li>v. the childcare facility attended by the victim’s children. You may not be within this area even if the victim’s children are also your children. If there is a program or other special event at the childcare facility that you wish to attend, you may attend only with prior written approval from</li> </ul>

Type of Condition	Probation Conditions
<b>Key</b>	<b>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</b>
	your probation officer You may be in the area only in the manner and at the time specified by your probation officer. In the event that you have an existing court order for parenting time which requires you to pick up or drop off the children at daycare, you may be within the school area for that purpose only with the prior written approval of your probation officer and only in the manner and at the time specified in that written approval.;
	vi. the following additional locations: _____.
3	c. You may not have unsupervised contact with the following children _____.
<b>6A. Other provisions to consider when needed in particular cases:</b>	
4	a. You must have no contact with persons specified by your probation officer.
4	b. You must stay away from places specified by your probation officer.
<b>7. Programming:</b>	
<b>a. Domestic Violence:</b>	
2	i. You must attend, cooperate with and complete domestic violence treatment as directed by your probation officer.
3	ii. You must attend and cooperate with any other designated domestic violence group if, and for long as, required by your probation officer.
3	iii. You must attend the Victim Impact panel as directed by your probation officer.
3	iv. You must attend a domestic violence parenting program as directed by your probation officer
3	v. You must attend a domestic violence sexual education program as directed by your probation officer.
<b>b. Chemical Dependency:</b>	
3	i. You must cooperate with a chemical dependency evaluation and follow any recommendations of the evaluation, including aftercare, as directed by your probation officer.
3	ii. You must attend Alcoholics Anonymous or an equivalent program weekly, as directed by your probation officer.
<b>c. Mental Health:</b>	
3	i. You must cooperate with a psychological evaluation, and follow any recommendations of the evaluations, as directed by your probation officer.
3	ii. You must cooperate with your current mental health treatment program, including: <ul style="list-style-type: none"> <li>• Taking all prescribed medications as directed; and,</li> <li>• Attending and cooperating with appointments with your psychiatrist and/or therapist and counseling group(s).</li> </ul>
3	iii. You must cooperate with case manager/AMHRS worker/other mental

Type of Condition	Probation Conditions
<b>Key</b>	<b>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</b>
	health professional or civil commitment requirements as directed by your probation officer.
<b>8. Reporting:</b>	
1	d. You must meet with or contact your probation officer as directed by your probation officer.
1	e. You must at all times ensure that your probation officer has the current telephone number at which you can be reached. If there is no number at which you can be reached, you must ensure that probation officer has a number at which a message can be left.
1	f. You must report all police contacts to your probation officer within 48 hours of the contact.
1	g. You must report any new arrests, charges, orders for protection or no contact orders to your probation officer within 72 hours of the arrest, charge or issuance of the order.
1	h. You must report all changes of employment to your probation officer within 7 days of the change.
1	i. You must report all changes of residence to your probation officer within 7 days of the change.
<b>9. Residence:</b>	
4	a. You must make no change in residence without prior written approval of your probation officer.
<b>10. Restitution:</b>	
3	a. You must pay restitution in the amount of \$_____. You must pay the restitution as directed by the probation department.
<b>11. Weapons other than firearms:</b>	
3	a. You must not use or possess any weapon. For the purposes of this provision a weapon is any device designed as a weapon or any device which is used, or intended to be used, as a weapon.
<b>12. Firearms:</b>	
2	a. You may not use or possess any firearm. This prohibition is in addition to any prohibition imposed as a special condition of probation in your case. For the purposes of this provision a firearm is any weapon which discharges a projectile by means of an explosive, a gas or compressed air.
2	b. In addition to these conditions of probation, state and federal law prohibit use and possession of guns, silencers, destructive devices, tear gas and other devices. Some of those prohibitions are summarized in the Notice of Probation Obligations and Responsibilities which your probation officer will review with you. This is a partial list only. You should not assume that you may possess because a device just because it is not on that list. If you have any questions about whether you are prohibited from possessing any device you are responsible for consulting with your attorney before possessing it.
<b>12A. Other provisions to consider when needed in particular cases:</b>	

Type of Condition	Probation Conditions
<b>Key</b>	<b>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</b>
3	a. You may not use or possess a pistol for 3 years. The length of this prohibition may be extended by a new conviction within those 3 years.
3	b. You may not use or possess any firearms for 3 years. The length of this prohibition may be extended by a new conviction within those 3 years.
3	c. You may not use or possess any firearms for _____ years.
3	d. You may not use or possess any firearms for the duration of your life.

## Appendix: Law Related to Pretrial Release<sup>1</sup>

### Minn. Stat. § 629.72: Harassment and Domestic Abuse-Related Crimes Subject to Heightened Bail and Conditional Release Requirements

(From Second Judicial District Domestic Abuse Guidelines and Procedures Manual) (Minn. Stat. § 629.72, subd. 1)

- **"Domestic abuse"** defined in Minn. Stat. § 518B.01, subd. 2 to mean any of the following committed against a family or household member:
  - Assault (includes first through fifth degree, domestic assault by strangulation or domestic assault)
  - Criminal Sexual Conduct (first through fifth degree)
  - Terroristic Threats
  - Interference with an Emergency Call.
- Violation of an Order for Protection (Minn. Stat. § 518B.01, subd. 14)
- Violation of a Domestic Abuse No Contact Order (Minn. Stat. § 518B.01, subd. 22)
- Harassment/Stalking

### Conditions of Release Which May Be Imposed by the Court for Harassment and Domestic Abuse-Related Crimes

(Minn. Stat. § 629.72, subd. 2(b))

- Enjoining the person from threatening to commit or committing acts of domestic abuse or harassment against the alleged victim or other family or household members, or from violating an order for protection or a domestic abuse no contact order
- Prohibiting the person from harassing, annoying, telephoning, contacting or otherwise communicating with the alleged victim, either directly or indirectly
- Directing the person to vacate or stay away from the home of the alleged victim, and to stay away from any other location where the alleged victim is likely to be
- Prohibiting the person from possessing a firearm or other weapon specified by the court
- Prohibiting the person from possessing or consuming alcohol or controlled substances

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<sup>1</sup> States other than Minnesota have statutes similar to those cited here.

- Specifying any other matter required to protect the safety of the alleged victim and to ensure the appearance of the person at subsequent proceedings

## Appendix: Memorandum on Consecutive Sentencing in Domestic Abuse Cases<sup>1</sup>

--By Jeanne Schleh, Assistant Ramsey County Attorney  
[Section 16 of Appendix from the *Second Judicial District Domestic Abuse Guidelines  
and Procedures*, Updated July 2009]

**Identified Problem:** Domestic abusers often reoffend between the time of the plea and the time of sentencing and during the period of probation. If the sentence for any subsequent offense is not specifically stated to be consecutive, the law presumes it to be concurrent (Minn. Stat. § 609.15, subd. 1(a)). If a person is arrested and ultimately convicted of a new offense between plea and sentence on another charge or during probation (or supervised release), Minnesota law requires the same jail credit to be applied both to the old and new offenses unless the subsequent sentence is expressly stated to be consecutive to the first. The result can be, particularly for multiple misdemeanor and gross misdemeanor offenses, that a repeat offender may get two, three, four or more sentences for the price of one unless sentences are consecutive. In domestic abuse cases, this sends the counter-productive message to the abuser that there is no additional consequence for repeat offenses against a domestic partner. Consecutive sentencing, on the other hand, sends a clear message of accountability.

### LEGAL ANALYSIS

#### A. The principle of accountability.

In order to make both conditions of release and conditions of probation effective in domestic abuse cases, it should be made clear to a defendant at the time conditions of pretrial release or probation are ordered and whenever a defendant is returned to court for violation, that court orders must be obeyed and that, if they are not, a defendant will be held accountable. This is particularly imperative if the order violated relates to victim safety.

#### B. Statutory and case law basis for consecutive sentencing.

A consecutive sentence is one which commences at the termination of another term of imprisonment; i.e., the prisoner with consecutive sentences can serve only one sentence at a time. *State v. Morrissey*, 135 N.W.Second 57 (Minn. 1965).

Minnesota statutes clearly contemplate that misdemeanor and gross misdemeanor sentences may be consecutive. Minn. Stat. § 609.15, subd. 2 provides the outer limit for such sentences: 1 year of jail if all are misdemeanors; 4 years if all are gross misdemeanors; if sentences are for a gross misdemeanor and one or more misdemeanors, the total of the sentences shall not exceed two years. This statute applies only to multiple sentences of incarceration and not to the period of probation (the period for which all or a portion of the permissible jail time is stayed). *State v. Aleshire*, 451 N.W.Second 66 (Minn. Ct. App. 1990).

The period of probation for multiple offenses can also be ordered to be run consecutively. As with consecutive jail time, the court must expressly state its intention to order consecutive service

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<sup>1</sup> States other than Minnesota have statutes similar to those cited here.

or the periods of probation are presumptively concurrent. See, *Aleshire, supra* (4-year probationary period on two consecutive gross misdemeanor sentences upheld.) A defendant, however, has the right to demand execution of consecutive probationary sentences, especially when conditions of probation are more onerous than an executed sentence. *State v. Rasinksi*, 472 N.W.Second 645 (Minn. 1991). A probationary sentence may also be ordered consecutive to time being served on an earlier offense; i.e., probation for a second offense may be ordered to commence after release from confinement for an earlier offense. *State v. Hague*, 229 N.W.Second 168 (Minn. 1975). Minn. Stat. § 609.135, subd. 2, sets forth the maximum probationary period for felonies, gross misdemeanors and misdemeanors.

Consecutive sentencing has great value in impressing upon a defendant the consequences of repeated unlawful acts. Concurrent sentences for multiple offenses--especially those in flagrant violation of court order, such as an OFP or other no contact order or the general order to remain law-abiding--undermine the authority of the court. Many serious domestic abuse offenses (assault, violation of an OFP or a domestic abuse no contact order) are only misdemeanors with a 90-day maximum sentence. When a defendant commits multiple such misdemeanor violations, it should never be with the expectation that all will be subsumed under the same 90-day maximum.

The provisions of Minn. Stat. § 609.15 make no limitation on the application of consecutive sentencing by type of misdemeanor or gross misdemeanor crime. Case law affirms the imposition of consecutive gross misdemeanor sentences even in property crimes. *Aleshire, supra*.

At the felony level, the Minnesota Sentencing Guidelines control the application of consecutive sentences. Felony crimes against persons are singled out for special consideration in consecutive sentencing. Felony consecutive sentences are permissive and not a departure from the guidelines when the defendant is being sentenced for a crime against a person and has an unexpired sentence for a crime against a person. Consecutive sentencing is also permissive without any departure from the guidelines when a defendant is being sentenced for multiple crimes against the person. Minn. Sent. Guidelines II.F. 1 and 2. This principle now applies even when the multiple crimes are against the same victim and even when they involve a single course of conduct. Minn. Sent. Guidelines II.F.04 (2000)(this is a change from earlier guidelines under which multiple crimes against the same person could be sentenced consecutively only with a departure from the guidelines).

Misdemeanor and gross misdemeanor domestic abuse crimes are inherently crimes against the person. By analogy to felony sentencing principles, the case for the application of the consecutive sentencing provisions of Minn. Stat. § 609.15 to domestic abuse misdemeanors and gross misdemeanors is even more compelling than for other crimes. In addition, violations of express orders of the court aimed at protecting a victim (such as an OFP or no contact order) are offenses against the court as well as the victim. Repeat violations of this nature, whether they occur before or after sentencing, are compelling reasons for consecutive sentencing.

### **C. Jail credit.**

The seminal case on jail credit, *State v. Goar*, 453 N.W.Second 28 (Minn. 1990), is routinely cited for the proposition that jail credit applies to all offenses for which a defendant is in custody or could have been in custody at the same time. It stands for the general proposition that the proper amount of credit a defendant receives against a prison or probationary jail term should not be dependent on matters subject to manipulation by the prosecution or a defendant's exercise of his right to trial. Therefore, in all concurrent sentences, a defendant being sentenced for multiple offenses is entitled to credit for any time served in custody since commission of each of the offenses

even if there was a delay in charging or final disposition of the particular offense being sentenced. *Id.*; *State v. Morales*, 532 N.W.Second 268 (Minn. Ct. App. 1995).

*Goar* charges the trial court with ensuring that the withholding of jail credit does not result in *de facto* consecutive sentencing when there is no express intention to sentence consecutively.

However, *Goar* has no application to expressly ordered consecutive sentences. In applying jail credit to consecutive sentences, credit should be applied only to the first sentence since to do otherwise in these circumstances would result in unjust "double credit" and would defeat the purposes of consecutive sentencing. *State v. Allen*, 482 N.W.Second 228 (Minn. Ct. App. 1992), rev. denied (Minn. Apr. 13, 1992); *State v. Elting*, 480 N.W.Second 152 (Minn. Ct. App. 1992), rev. denied (Minn. Mar. 26, 1992); *State v. Anderson*, 520 N.W.Second 184 (Minn. Ct. App. 1994); *State v. Cameron*, 603 N.W.Second 847 (Minn. Ct. App. 1999).<sup>2</sup>

When the trial court specifically orders consecutive sentences in a domestic abuse case because of repeat crimes against person or repeat violations of court order, there is therefore no violation of *Goar*.

#### **D. Consecutive sentencing in light of *Blakely*.**

In *Blakely v. Washington*, 542 U.S. 296 (2004), the United States Supreme Court held that before a criminal defendant may be sentenced to any sentence beyond the presumptive sentence, he is entitled to a jury trial on any departure factors. This decision has no application to misdemeanors and gross misdemeanors but does impact aggravated upward durational and dispositional departures for felonies under the Minnesota Sentencing Guidelines. Numerous questions concerning the application of *Blakely* in Minnesota continue to be addressed by our appellate courts on a case-by-case basis. However, the question of whether *Blakely* applies to consecutive sentences has been resolved: It does not. *State v. Senske*, 692 N.W.Second 743 (Minn. Ct. App. 2005), pet. for review denied.

As of 8/1/06 (and in response to *Blakely*), the Minnesota Sentencing Guidelines now contains a list of offenses eligible for permissive consecutive sentences; i.e., what were previously simply referred to as crimes against persons. This list includes not only the assaults and terroristic threats offenses commonly seen in domestic abuse case but also offenses with no assault or threat, such as burglary 1 and 2 and violations of an OFP. Minn. Sent. Guidelines VI. The Minnesota Sentencing Guidelines, of course, are only applicable to felonies, but these principles support arguments by analogy for consecutive misdemeanor or gross misdemeanor sentences for violation of and OFP or DANCO.

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<sup>2</sup> The post-*Goar* court of appeals decision in *State v. Fritzke*, 521 N.W.Second 859 (Minn. Ct. App. 1994) is sometimes erroneously cited for the proposition that a defendant is entitled to jail credit even on consecutive sentences for all time spent in custody, including time spent in custody on other charges, beginning on the date the prosecution acquires probable cause to charge the defendant with a crime. Such an assertion misapprehends *Fritzke*. *Fritzke* involves a prior and a current charge for theft with concurrent sentencing. It has no application to consecutive sentences. The *Fritzke* court, moreover, cites and relies upon *Goar*.

## Appendix: Memorandum on History of Relationship in Domestic Abuse Cases Before and After *Mc Coy*<sup>1</sup>

(Rev. Sept. 27, 2006)

[Section 17 of Appendix from the Second Judicial District Domestic Abuse  
Guidelines and Procedures, Updated July 2009]

**Before *McCoy*: History of relationship, Minn. Stat. § 634.20 and Spreigl.** The general and well-established rule in Minnesota is that “evidence pertaining to the relationship between a defendant and a homicide victim is ordinarily admissible in criminal prosecutions, regardless of its reference to another crime.” *State v. Blanchard*, 315 N.W.2d 427, 431 (Minn. 1982). It is also admissible in non-homicide cases to show history of the relationship to the victim and the context for the crime charged. Domestic abuse (including child abuse) cases are the most frequent kinds of cases in which Minnesota's appellate courts have endorsed the admission of history of relationship evidence because it is in these cases, where the relationship of the victim to the defendant is intimate and long-standing, that this evidence is most obviously relevant to an understanding of how the crime occurred and to an assessment of the credibility of both the victim and the defendant. (See attached case law compendium for homicide and non-homicide domestics.)

Although history of relationship evidence has some commonalities with Spreigl evidence, the two are not identical. For history of relationship evidence, the state need not follow Spreigl notice requirements. *State v. Boyce*, 284 Minn. 242, 170 N.W.2d 104 (Minn. 1969); *State v. Black*, 291 N.W.2d 208 (Minn. 1980); *State v. Enger*, 539 N.W.2d 259 (Minn. Ct. App. 1995). The rationale for this policy is one of common sense: a defendant with an ongoing relationship to a victim knows the nature of that relationship will be a trial issue and cannot claim he was unprepared, for lack of Spreigl notice, to refute such evidence. *State v. Doughman*, 384 N.W.2d 450 (Minn. 1986), *Enger, supra*.

Separate and apart from any Spreigl theory of admissibility (such as proof of identity, common scheme or plan, motive, premeditation, intent or absence of mistake or accident), history of relationship evidence is admitted to illuminate the relationship between the parties and to place the crime charged in context. See *State v. Bauer*, 598 N.W.2d 352 (Minn. 1999) (evidence of prior abuse, threats, existence of OFP, financial troubles, defendant's status as beneficiary of his wife's life insurance policy all properly admitted in trial for wife's murder), *State v. King*, 367 N.W.2d 599 (Minn. Ct. App. 1985) (evidence of a stormy four-year prior relationship including heavy drinking and defendant's holding knife and scratching victim's throat properly admitted); *State v. Williams*, 361 N.W.2d 473 (Minn. Ct. App. 1985) (evidence of defendant's prior telephone threats to victim, pouring coffee and hitting her on the head were highly relevant in establishing strained relationship and intent of defendant when he attempted to murder victim); *State v. Langley*, 354 N.W.2d 389 (Minn. 1984) (prior assault on victim when defense was accident); *State v. Rediker*, 8 N.W.2d 527 (Minn. 1963) (course of conduct showed defendant's mental attitude and malice toward wife). Note that relationship evidence is broader than just "bad acts" within the meaning of Spreigl.

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<sup>1</sup> States other than Minnesota have statutes similar to those cited here.

Relationship evidence has also been held to encompass evidence of a defendant's assaultive conduct toward a third party related to or a close friend of the victim. See *State v. Diamond*, 241 N.W.2d 95 (Minn. 1976) (series of prior threats with weapons made by the defendant on the victim over past three years, and assault by defendant on friend of victim, admissible to prove intent and refute claim victim was aggressor); *State v. Swain*, 269 N.W.2d 707 (Minn. 1978) (ten month old threat to kill victim related while angry to a third person admissible because it bore on intent); *State v. Blanchard*, 315 N.W.2d 427 (Minn. 1982) (evidence of prior abuse of murder victim's child admissible); *State v. Currie*, 400 N.W.2d 361 (Minn. Ct. App. 1987) (prior abuse of mother and children admitted to show relationship of victim and other family members to defendant and to place charged incident in proper perspective); *State v. Ostlund*, 416 N.W.2d 755 (Minn. Ct. App. 1987) (other bad acts against victim and other children admitted to illuminate relationship); *State v. Williams*, 593 N.W.2d 227 (Minn. 1999) (evidence of prior abuse of girlfriend in trial for attempted murder of girlfriend and murder of her grandmother); *Bauer, supra* (prior abuse of the child of the parties admissible in trial of husband for murder of wife). But see, *State v. Copeland*, 656 N.W.2d 599 (Minn. Ct. App. 2003) (strained relationship between defendant and his girlfriend inadmissible in trial for defendant's assault of a third party who intervened in their argument *except* as impeachment to show girlfriend's bias).

In addition to history of relationship case law, the Minnesota Legislature has enacted a statute supporting the admission this kind of evidence in domestic abuse criminal cases. In domestic abuse prosecutions, Minn. Stat. § 634.20 expressly allows evidence of similar conduct involving the same victim *or* other family or household members.<sup>2</sup> "Similar conduct" is defined to include, but is not limited to, evidence of domestic abuse, violation of an order for protection or harassment order, harassment/stalking or harassing phone calls. Although the statute is similar to history of relationship case law, it is narrower in the sense that it applies only to domestic abuse-related bad acts; and it is broader in the sense that similar conduct with another family or household member could include persons with whom the defendant previously had this relationship regardless of whether the past victim and the current victim are in the same family or household. See *State v. Manley*, 664 N.W.2d 275 (Minn. 2003).

From approximately 1997 until 2004 the distinction between history of relationship/634.20 evidence and Spreigl evidence was blurred by a series of cases which blended discussion of them. In *State v. Mills*, 562 N.W.2d 276 (Minn. 1997) followed by *State v. Buggs*, 581 N.W.2d 329 (Minn. 1998) and *Bauer, supra*, the Minnesota Supreme Court commented generally as dictum, without expressly addressing the distinction between these two theories, that before admitting such evidence, the trial court must determine that evidence of the prior bad act is clear and convincing (the requirement for Spreigl evidence) and that its probative value outweighs its prejudice. In each of these cases, this evidence was (as is typically the case with history of relationship evidence) offered as part of the case-in-chief, not (as with Spreigl evidence) after the state had concluded its case-in-chief. In none of these cases was there a formal Spreigl evidentiary hearing. Since prosecutors routinely sought admission of this evidence under alternate theories and since the distinction between the two was not expressly raised on appeal, it is not surprising that appellate court decisions would blend them.

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<sup>2</sup> "Domestic abuse" and "family or household member" have the meanings given in Minn. Stat. § 518B.01, subd. 2 (a) and (b).

**After *McCoy*.** In *State v. McCoy*, 682 N.W.2d 153 (Minn. 2004), the Minnesota Supreme Court finally did squarely address these alternate theories and expressly found them to be conceptually distinct. Specifically, the court held that history of relationship evidence does not involve evidence of collateral bad acts against another person but is instead evidence of other conduct between the accused and the victim offered to illuminate their relationship. *Id.* at 159. The court also expressly held that, unlike Spreigl evidence, evidence admitted pursuant to Minn. Stat. § 634.20 need not first be proved by clear and convincing evidence. *Id.*

In reaching this conclusion, the court cited its history-of-relationship cases and noted in a footnote that to the extent recent cases (*Bauer, Buggs* and *Mills, supra*) have suggested that the clear and convincing standard applied, that was dicta which was expressly overruled. *Id.* at 159-60, FN 6. Finally, the *McCoy* court reiterated its recognition of the special circumstances of domestic abuse cases that support different treatment. *Id.* at 161 (citing *State v. Cross*, 577 N.W.2d 721, 727 (Minn. 1998)). The court has subsequently been asked to reconsider this ruling in light of *State v. Ness*, 707 N.W.2d 676 (Minn. 2006) (a case clarifying its Spreigl analysis) and expressly declined to do so. *State v. Bell*, 719 N.W.2d 635 (Minn. 2006) (in deciding to admit evidence pursuant to Minn. Stat. § 634.20, the trial court is not required to place its analysis of probative value versus prejudice on the record). *Bell* also notes the evidence in that case could likewise have been admitted under relationship evidence case law. *Id.* at 640-1.

As a result of *McCoy*, as reiterated in *Bell*, it is now clear that in a domestic abuse prosecution, evidence of other similar conduct under Minn. Stat. § 634.20, is presumptively admissible unless the trial court finds that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Evidence admissible pursuant to this statute--or the broader class of evidence encompassed by history of relationship case law--is not subject to the formalities of Spreigl requirements even if the evidence includes what might otherwise be described as Spreigl "bad acts." Otherwise admissible evidence of other similar conduct is admissible even if the conduct occurred after the charged offense. *State v. Lindsey*, 755 N.W.2d 752 (Mn.Ct.App. 2008).

The result in *McCoy* also makes sense in terms of practical trial practice. History of relationship/634.20 testimony usually comes from the victim or other witnesses who are already testifying at trial. Unlike Spreigl evidence, it is evidence directly relevant to proof of the crime charged as part of the case-in-chief precisely because it illuminates the relationship of the victim and the defendant and puts the crime charged in context. It is (as noted in *Cross, supra*) the evidence which helps a jury understand and assess characteristics common to domestic abuse cases such as reluctance to report, underreporting and recantation. In short, it gives the necessary "big picture" in determining where the truth lies about the crime charged because the truth lies in deciphering the relationship of the principals; not just at the moment of the crime but also, before and after.

It would be artificial, inefficient and nonsensical to require the victim in a domestic abuse case to testify in the case-in-chief, to complete the case-in-chief and then, after a hearing at which the judge would determine which of the defendant's other bad acts against the victim were clear and convincing, recall the victim at the conclusion of the state's case to testify again. The same principle applies to the testimony of friends, family members and other witnesses routinely called in the case-in-chief to give evidence relating to the context of the crime if not the crime itself. If, however, the

other similar conduct evidence involves a family or household other than that of the victim in the charged case, it makes sense to offer it at the conclusion of the state's case.

To avoid confusion, any time the defendant's bad acts other than the crime charged are part of the evidence presented, it is always a good idea to include a cautionary instruction (such as CRIMJIG 3.16) in final instructions to the jury.

**Past pattern of abuse domestic abuse/child abuse homicide.** The legislature has elevated murder under circumstances manifesting an extreme indifference to human life and occurring after a past pattern of domestic abuse against the same victim or another family or household member to first-degree murder. Minn. Stat. § 609.185 (a) (6). Murder under the same circumstances against a child when the defendant has committed a past pattern of child abuse against the same or a different child is also first-degree murder. Minn. Stat. § 609.185 (a) (5). A “past pattern of abuse” is automatically admissible in these cases because it is an element of the offense. *State v. Robinson*, 539 N.W.2d 231 (Minn. 1995); *State v. Kelbel*, 648 N.W.2d 690 (Minn. 2002); *State v. Manley*, 664 N.W.2d 275 (Minn. 2003). Only the past pattern needs to be proved beyond a reasonable doubt, not the individual acts of abuse making up the pattern. *Id.* No cautionary instruction is required because the past pattern is an element of the crime charged. *Id.*

## DOMESTIC HOMICIDE HISTORY OF RELATIONSHIP CASES

*State v. Rediker*, 8 N.W.2d 527 (Minn. 1963)

*State v. Martin*, 197 N.W.2d 219 (Minn. 1972)

*State v. Diamond*, 241 N.W.2d 95 (Minn. 1976)

*State v. Swain*, 269 N.W.2d 707 (Minn. 1978)

*State v. Blanchard*, 315 N.W.2d 427 (Minn. 1982)

*State v. Langley*, 354 N.W.2d 389 (Minn. 1984)

*State v. King*, 367 N.W.2d 599 (Minn. Ct. App. 1985)

*State v. Ostlund*, 416 N.W.2d 755 (Minn. Ct. App. 1987)

*State v. Thieman*, 439 N.W.2d 1 (Minn. 1989)

*State v. Robinson*, 539 N.W.2d 231 (Minn. 1995)

*State v. Folkers*, 562 N.W.2d 5 (Minn. 1997)

*State v. Mills*, 562 N.W.2d 276 (Minn. 1997)

*State v. Harris*, 560 N.W.2d 672 (Minn. 1997)

*State v. Miller*, 573 N.W.2d 661 (Minn. 1998)

*State v. Buggs*, 581 N.W.2d 329 (Minn. 1998)

*State v. Williams*, 593 N.W.2d 227 (Minn. 1999)

*State v. Bauer*, 598 N.W.2d 352 (Minn. 1999)

*State v. Oates*, 611 N.W.2d 580 (Minn. Ct. App. 2000)

*State v. Rhodes*, 627 N.W.2d 74 (Minn. 2001)

*State v. Lee*, 645 N.W.2d 459 (Minn. 2002)

*State v. Quick*, 659 N.W.2d 701 (Minn. 2003)

*State v. Asfeld*, 662 N.W.2d 534 (Minn. 2003)

## **NON-HOMICIDE DOMESTIC HISTORY OF RELATIONSHIP CASES**

*State v. Schweppe*, 237 N.W.2d 609 (Minn. 1975) (domestic terroristic threats)

*State v. Williams*, 361 N.W.2d 473 (Minn. 1985) (domestic attempted murder, kidnapping, assault)

*State v. Kannianen*, 367 N.W.2d 104 (Minn. Ct. App. 1985) (domestic/CSC)

*State v. Waukazo*, 374 N.W.2d 563 (Minn. Ct. App. 1985) (domestic/CSC)

*State v. Currie*, 400 N.W.2d 361 (Minn. Ct. App. 1987) (family/child abuse)

*State v. Thompson*, 520 N.W.2d 468 (Minn. Ct. App. 1994) (CSC/domestic abuse)

*State v. Enger*, 539 N.W.2d 259 (Minn. Ct. App. 1995) (domestic CSC/theft)

*State v. Nelson*, 562 N.W.2d 324 (Minn. Ct. App. 1997) (child abuse)

*State v. Williams*, 593 N.W.2d 227 (Minn. 1999) (domestic attempted murder of girlfriend and murder of her grandmother)

*State v. Reckinger*, 603 N.W.2d 331 (Minn. Ct. App. 1999) (domestic child sexual abuse, state's appeal: no abuse of discretion for trial court not to admit prior CSC with victim found not to be clear and convincing)

*State v. Waino*, 611 N.W.2d 575 (Minn. 2000) (domestic assault)

*State v. Vick*, 632 N.W.2d 676 (Minn. 2001) (reversing court of appeals and affirming conviction (child sexual abuse))

*State v. Copeland*, 656 N.W.2d 599 (Minn. Ct. App. 2003) (assault of third party intervening in argument between defendant and his girlfriend: evidence of defendant's prior abuse of girlfriend improperly as history of relationship but harmless because properly admitted to show her bias after recantation)

*State v. McCoy*, 682 N.W.2d 153 (Minn. 2004) (reversing court of appeals and reinstating domestic abuse conviction in which trial court allowed impeachment of recanting victim's through prior domestic abuse report; Spreigl and history of relationship held conceptually distinct)

*State v. Bell*, 719 N.W.2d 635 (Minn. 2006) (evidence that defendant violated two prior OFPs properly admitted in burglary/violation of domestic abuse no-contact order case involving same victim)

### **PAST PATTERN OF ABUSE MURDER ONE CASES**

*State v. Robinson*, 539 N.W.2d 231 (Minn. 1995) (domestic abuse)

*State v. Cross*, 577 N.W.2d 721 (Minn. 1998) (domestic abuse)

*State v. Crowsbreast*, 629 N.W.2d 433 (Minn. 2001) (domestic abuse)

*State v. Kelbel*, 648 N.W.2d 690 (Minn. 2002) (child abuse)

*State v. Asfeld*, 662 N.W.2d 534 (Minn. 2003) (prior abuse of child victim and other members of defendant's family)

*State v. Manley*, 664 N.W.2d 275 (Minn. 2003) (domestic abuse; prior abuse of victim and of prior girlfriend properly admitted)

*State v. Gutierrez*, 667 N.W.2d 426 (Minn. 2003) (child abuse; sex crime murder: evidence of defendant's physical abuse of victim's sister properly admitted)

## Appendix: Minimum Sentences in Domestic Violence Cases<sup>1</sup>

1. **Domestic Assault.** (Minn. Stat. § 609.2243) A person convicted of gross misdemeanor domestic assault under Minn. Stat. § 609.2242, subd. 2, shall be sentenced to a minimum of 20 days imprisonment, at least 96 hours of which must be served consecutively (i.e., without interruption). Execution of this minimum sentence may be stayed on condition that the person sentenced complete anger therapy or counseling and fulfill any other condition ordered by the court. For a person convicted of a felony under Minn. Stat. § 609.2242, subd. 4, the presumptive minimum sentence is 45 days of which at least 15 days must be served consecutively.

2. **Violation of an Order for Protection.** (Minn. Stat. § 518B.01, subd. 14 (b), (c) and (d)). Upon a misdemeanor conviction under this paragraph, the defendant must be sentenced to a minimum of 3 days and appropriate counseling. Upon a gross misdemeanor conviction under this paragraph, the defendant must be sentenced to a minimum of 10 days and participate in appropriate counseling. Upon a felony OFP conviction, the defendant must be sentenced to a minimum of 30 days and appropriate counseling.

3. **DANCO Violations.** (Minn. Stat. § 518B.01, subd. 22 (c) and (d)). Upon a gross misdemeanor conviction for a DANCO violation, the defendant must be sentenced to a minimum of 10 days and appropriate counseling; for a felony conviction, the defendant must be sentenced to a minimum of 30 days and appropriate counseling. (Adapted from *Second Judicial District Domestic Abuse Guidelines and Procedures Manual*)

See the following attachment to the Probation Appendix (Blueprint Supplement – Chapter 7), Presentence Investigation: Sentencing Recommendations and Conditions of Probation:

Attachment 1: Statutory Mandates in Domestic Violence Cases

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<sup>1</sup> States other than Minnesota have statutes similar to those cited here.

## Appendix: Non-Criminal Issues in Criminal Court

This appendix is in development.

## Appendix: Probation Conditions

The following memos and attachments are related to conditions of probation in domestic violence cases and is located in the supplement to Chapter 7, County Probation and Bail Evaluation. This material addresses (1) general standard conditions of probation; (2) standard conditions in domestic violence cases; (3) domestic violence–related special conditions of probation; and (4) atypical conditions.

- ❑ *Probation Appendix – PSI: Framework for Sentencing, Conditions of Probation, and Revocation of Probation*
  - Attachment 1: Statutory Mandates in Domestic Violence Cases
  - Attachment 2: Firearms/Pistols Prohibition Chart
  - Attachment 3: Probation Conditions
  - Attachment 4: Use of Firearms/Pistol Special Conditions
  - Attachment 5: Use of Domestic Violence Special Conditions
  
- ❑ *Probation Training Memo: PSI – Conditions of Probation*

## Appendix: Rehabilitation Program Considerations in Domestic Violence Cases

This appendix is in development.

## Appendix: Sentencing Framework for Misdemeanor and Felony Domestic Assault Cases

This training memo is in development.

## Appendix: Special Evidentiary Issues in Domestic Abuse Trials<sup>1</sup>

[Section 7 of Appendix from the Second Judicial District Domestic Abuse Guidelines and Procedures, Updated July 2009]

Although not necessarily unique to domestic abuse cases, the following issues commonly occur in these cases.

1. **Spreigl evidence.** The test for admission of Spreigl evidence was clarified in *State v. Ness*, 707 N.W.2d 676 (Minn. 2006). The 5-part test was adopted in Minn. R. Evid. 404 (b) eff. 9/1/06. See also the *Judges' Criminal Benchbook*, Ch. [14], for an excellent discussion of this evidence.)
2. **Minn. Stat. § 634.20.** This statute specifically addresses the issue of similar conduct in domestic abuse cases. Evidence of similar conduct by the accused against the victim of domestic abuse, or against other family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion, undue delay or needless presentation of cumulative evidence. "Similar conduct" includes, but is not limited to, any offense enumerated in Minn. Stat. § 518B.01, subd. 2 (a) (assault, terroristic threats, criminal sexual conduct or interference with an emergency call) as well as violation of an OFP or HRO, harassment or harassing phone calls. This is *not* Spreigl evidence and need not be proved by clear and convincing evidence. *State v. McCoy*, 682 N.W.2d 153 (Minn. 2004).
3. **History of relationship.** A long body of Minnesota case law supports the admissibility of relevant evidence of the history of the relationship of the parties, particularly in domestic abuse cases. (Appendix 17)
4. **Hearsay (Minn. R. Evid. 8).** Commonly raised hearsay exceptions in domestic abuse cases include: 803(2) [excited utterance]; 803(3) [then existing mental, emotional or physical condition]; 803(4) [statements for purposes of medical diagnosis or treatment] and 807 [catch-all exception].

Prior consistent statements of a witness testifying at trial are not hearsay and are admissible to assist the trier of fact in determining the credibility of the witness. 801(d)(1)(B).

Prior statements of a recanting victim may be admissible at trial under 801(d)(1)(D) [present sense impression], the hearsay exceptions listed above or for impeachment (Minn. R. Evid. 607 and 613).

Pursuant to the United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), admission of any out-of-court statement at trial violates a defendant's Sixth Amendment right to confrontation *if* (1) the declarant does not testify and (2) the statement is testimonial. As long as the victim in a domestic abuse trial testifies at trial (even if she recants), there is no *Crawford* problem. The *Crawford* court did not define "testimonial," leaving this to subsequent decisions and to the states. At a minimum, formal police interrogations (such as Scales interviews) are testimonial. In its subsequent decisions in *Davis v. Washington* and *Hammon v. Indiana*, 126 S. Ct. 2266 (2006), it refined

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<sup>1</sup> States other than Minnesota have statutes similar to those cited here.

*Crawford* slightly by holding that when a police interrogation is made "under circumstances objectively indicating the primary purpose...is to enable police assistance to meet an ongoing emergency," the statement is nontestimonial. See also *State v. Wright*, 726 N.W.2d 464 (Minn. 2007) (statements by victims to 911 operator not testimonial, statements made to officers in the field after emergency had ended were testimonial); *State v. Warsame*, 735 N.W.2d 684 (Minn. 2007) (domestic abuse victim's initial volunteered statement to police about assault, while in obvious distress and while defendant was still at large, and her responses to police interrogation about her medical condition were nontestimonial responses to ongoing emergency); *State v. Kraskey*, 736 N.W.2d 636 (Minn. 2007), cert.denied,128 S.Ct. 1223 (2008) (statements made by child abuse victim to MCRC nurse, after a joint police and child protection referral, were not testimonial because primary purpose was to assess and protect child's health and welfare). Forfeiture by wrongdoing is a specific exception to *Crawford*.

If the victim testifies but recants and out-of-court statements are admitted substantively under any exception to the hearsay rule, the jury may choose to credit an out-of-court statement over the sworn trial testimony. See *McCoy*, *supra*.

**5. Enhanced offenses; defense offer to stipulate.** Many domestic-related misdemeanor and gross misdemeanor offenses are enhanceable. (See Appendix 11) Specifically, a QDVRO ("qualified domestic violence-related offense") misdemeanor or gross misdemeanor may be chargeable as a gross misdemeanor or felony if the defendant has had the requisite QDVRO past conviction(s) - whether misdemeanor, gross misdemeanor or felony - within 10 years of commission of the new offense. The enhanceable domestic-related offenses are: assault in the fifth degree, domestic assault, malicious punishment, harassment and violation of an OFP, HRO or DANCO. Interference with privacy is also an enhanceable offense, regardless of whether domestic-related. The following crimes qualify as QDVRO predicate convictions: murder 1 or 2; violation of an OFP, HRO or DANCO; assault 1-5; domestic assault; domestic assault by strangulation; CSC 1-4; malicious punishment; terroristic threats; harassment/stalking; interference with an emergency call; attempts to commit any of these offenses and violations of similar laws of other states or federal law. See Minn. Stat. § 609.02, subd. 16.

When charged with an enhanced offense, the defense at trial may offer to stipulate to the prior conviction so it is not included as an element of the offense charged. This is the tactic now generally accepted in enhanced DWIs and in felon in possession of a firearm cases. See *State v. Clark*, 375 N.W.2d 59 (Minn. Ct. App. 1985) (DWI conviction reversed for court's refusal to accept defense offer to stipulate to prior DWI); *State v. Allen*, 375 N.W.2d 82 (Minn. Ct. App. 1985) (reversing court's refusal to accept defendant's stipulation to his felony status as element of offense). Unless the prior conviction is admissible for other reasons (such as Spreigl or impeachment evidence), these cases held the defense offer to stipulate must be accepted because of the great potential for improper use (prejudice) as against its probative value. *State v. Davidson*, 351 N.W.2d 8 (Minn. 1984).

The general rule of law stated in these and underlying cases is that a defendant's offer to stipulate does not take away the state's right to offer evidence, especially when the evidence has relevance beyond the stipulation. That is, a defendant should not be able to unilaterally control the admission of relevant evidence. *Davidson, supra*; *State v. Stillday*, 646 N.W.2d 557 (Minn. Ct. App. 2002). But

relevant evidence must, in turn, be assessed in terms of the balancing test of Minn. R. Evid. 403. *State v. Berkelman*, 355 N.W.2d 394 (Minn. 1984); *Clark*, supra.

No published appellate case has yet expressly ruled that the trial court must accept a domestic abuse defendant's offer to stipulate to prior QDVRO convictions used to enhance the current charge. However, the competing principles stated above are equally applicable to this situation.

If the prior QDVRO conviction involved the same domestic abuse victim, or another family member, or even a victim of domestic abuse in another relationship, both the offense and the facts underlying it may have relevance beyond the stipulation. A defense offer to stipulate to the prior conviction to remove it as an element of the offense does not eliminate the potential admissibility of the offense under different grounds such as Spreigl, Minn. Stat. § 634.20, history of the relationship or, if the defendant testifies, impeachment by prior conviction. If the evidence is admitted for any of these other purposes, it is unlikely denial of a defense offer to stipulate to the fact of the prior conviction to remove it as an element would be an abuse of discretion. See *Davidson and Stillman*, supra.

On the other hand, if the predicate conviction did not arise in a domestic abuse situation and the facts are not otherwise relevant, it would likely be an abuse of discretion to refuse a defense request to stipulate to the prior conviction in order to remove it as an element. *Clark* and *Allen*, supra.

Note: The defendant personally (not his attorney) must stipulate on the record, either orally or in writing, to the waiver of an element. *State v. Wright*, 679 N.W.2d 186 (Minn. Ct. App. 2004); *State v. Barker*, 705 N.W.2d 768 (Minn. 2005).

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Excellent additional resources on these issues are found in the *Judges' Criminal Benchbook* and *Minnesota Misdemeanor and Moving Traffic Violations*.

## Appendix: Special/Atypical Conditions of Probation to Consider in Domestic Violence-Related Cases

Type of Condition	Probation Conditions
<b>Key</b>	<b>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</b>
<b>1. Drugs/Alcohol</b>	
1	a. You may not use or possess any controlled substances except in the manner and amount prescribed for you by a doctor.
3	b. You may not use or possess alcoholic beverages.
3	c. You must attend Alcoholics Anonymous or an equivalent program weekly as directed by your probation officer.
3	d. You must cooperate with a chemical dependency evaluation and follow any recommendations of the evaluation, including aftercare, as directed by your probation officer.
1	e. You must submit to random testing for the presence of controlled substances or alcoholic beverages as directed by your probation officer.
<b>2. Employment/School</b>	
3	a. You must obtain and maintain employment as directed by probation officer.
3	b. You must report any changes in employment to your probation officer within 72 hours of the change. The obligation to report includes any involuntary changes such as being fired or laid off.
3	c. You must attend and cooperate with any job-seeking programming as directed by your probation officer.
3	d. You must attend and cooperate with any life skills programming as directed by your probation officer.
3	e. You must attend and cooperate with any high school equivalency program as directed by your probation officer.
3	f. You may not change employment without the prior permission of your probation officer if, as a result, you would be working for the same employer as _____ (victim).
<b>3. Fines/Community service:</b>	
1	a. You must pay a fine of \$_____. You must make the payment as directed by the probation department.
<b>4. Law abiding:</b>	
1	a. You must refrain from any action which is prohibited by any state, federal or local law. An action, or inaction, prohibited by state, federal or local law violates probation even if it is not charged as a crime or does not result in a criminal conviction.
2	b. You must obey all court orders, including any orders for protection or no contact orders. An action, or inaction, prohibited by court order violates probation even if it is not charged as a crime or does not result in a criminal conviction.
2	c. You must not use threats, intimidation or coercion against any person

Type of Condition	Probation Conditions
<b>Key</b>	<b>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</b>
2	d. You must not use illegal violence against any person.
2	e. You must obey all court orders including protection orders, child support and custody orders, and orders regarding return of children from parenting time.
<b>4A. Other provisions to consider when needed in particular cases:</b>	
4	a. You must obey all court orders including orders regarding child support.
<b>5. Miscellaneous:</b>	
1	a. You must be truthful with your probation officer in all matters, and reply promptly to any communication from your probation officer
1	b. You must waive extradition to the State of Minnesota from any jurisdiction in or outside the United States where you may be found. You must agree not to contest any further effort by any jurisdiction to return you to the State of Minnesota. c. NOTE: Reviewers raised the issue of whether these waivers are enforceable. The concept, though not the language, is from Ramsey’s standard conditions.
1	d. You may not leave the State of Minnesota without first obtaining written permission from your probation officer.
2	e. If requested by your probation officer, you must sign releases of information related to: <ol style="list-style-type: none"> <li>i. Victim of this offense: A release sufficient to allow your probation officer to discuss and review with the victim statements made by you to the probation officer writing the presentence investigation.</li> <li>ii. Medical/Mental Health programs or professionals. These releases must be sufficient to allow your probation officer to verify if you are attending and complying with your treatment and medication programs.</li> <li>iii. Chemical Dependency programs. These releases must be sufficient to allow your probation officer to verify that you are attending and complying with the chemical dependency program and to allow any person working with the program to be informed if you use alcohol or drugs.</li> <li>iv. Domestic Violence Programs. These releases must be sufficient to allow your probation officer to:                             <ul style="list-style-type: none"> <li>• Verify that you are attending and complying with the domestic violence program.</li> <li>• Release to the domestic violence program the non-confidential portion of the PSI.</li> <li>• Discuss with the program any concerns about your compliance with, or adjustment to, probation.</li> </ul> </li> <li>v. Other Third Parties. Releases as necessary to monitor your compliance with the conditions of your probation.</li> </ol>
2	f. You must provide to your probation officer all court documents relating to the

Type of Condition	Probation Conditions
<b>Key</b>	<b>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</b>
	victim in this case: <ol style="list-style-type: none"> <li>i. Protection orders</li> <li>ii. Harassment restraining orders</li> <li>iii. No-contact orders</li> <li>iv. Custody and visitation orders or agreements</li> <li>v. Civil court judgments</li> </ol>
<b>5A. Other provisions to consider when needed in particular cases:</b>	
4	1. You must make full disclosure of the status of any child custody investigations, paternity actions, adoption proceedings and other family or civil matters.
4	2. You must cooperate with child or adult protection services and make full disclosure of criminal history and status
4	3. You must obey any curfew imposed by your probation officer.
<b>6. No-contact orders:</b>	
3	a. You must have no contact, directly or indirectly, with the people listed below. Prohibited contact includes, but is not limited to, physical, verbal, visual, letters, phone calls, computer transmissions, videos, visits, photographs or text messaging. Prohibited contact also includes any form of contact through a third party. Contact for the purpose of arranging parenting time with joint children is also prohibited except as provided for by the court order granting parenting time. <ol style="list-style-type: none"> <li>i. the victim of this offense, _____;</li> <li>ii. the victim’s children;</li> <li>iii. others residing in victim’s home;</li> <li>iv. the victim’s employer; or</li> <li>v. the following other individuals: _____.</li> </ol>
3	b. You must stay away from the area within _____ feet/blocks of: <ol style="list-style-type: none"> <li>i. the victim’s current and all future residences;</li> <li>ii. the victim’s school;</li> <li>iii. the victim’s current and any future employment;</li> <li>iv. the school attended by the victim’s children. You may not be within this area even if the victim’s children are also your children. If there is a school program or other special event at the school that you wish to attend, you may be in the school area only if with prior written approval from your probation officer. You may be in the area only in the manner and at the time specified by that written approval. If you have an existing court order for parenting time which requires you to pick up or drop off the children at school, you may be within the school area for that purpose only with prior written approval of your probation officer and only in the manner and at the time specified in that written approval.</li> <li>v. the childcare facility attended by the victim’s children. You may not be within this area even if the victim’s children are also your children. If there is a program or other special event at the childcare facility that you</li> </ol>

Type of Condition	Probation Conditions
<b>Key</b>	<b>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</b>
	wish to attend, you may attend only with prior written approval from your probation officer You may be in the area only in the manner and at the time specified by your probation officer. In the event that you have an existing court order for parenting time which requires you to pick up or drop off the children at daycare, you may be within the school area for that purpose only with the prior written approval of your probation officer and only in the manner and at the time specified in that written approval.;
	vi. the following additional locations: _____.
3	c. You may not have unsupervised contact with the following children_____.
<b>6A. Other provisions to consider when needed in particular cases:</b>	
4	a. You must have no contact with persons specified by your probation officer.
4	b. You must stay away from places specified by your probation officer.
<b>7. Programming:</b>	
	<b>a. Domestic Violence:</b>
2	i. You must attend, cooperate with and complete domestic violence treatment as directed by your probation officer.
3	ii. You must attend and cooperate with any other designated domestic violence group if, and for long as, required by your probation officer.
3	iii. You must attend the Victim Impact panel as directed by your probation officer.
3	iv. You must attend a domestic violence parenting program as directed by your probation officer
3	v. You must attend a domestic violence sexual education program as directed by your probation officer.
	<b>b. Chemical Dependency:</b>
3	i. You must cooperate with a chemical dependency evaluation and follow any recommendations of the evaluation, including aftercare, as directed by your probation officer.
3	ii. You must attend Alcoholics Anonymous or an equivalent program weekly, as directed by your probation officer.
	<b>c. Mental Health:</b>
3	i. You must cooperate with a psychological evaluation, and follow any recommendations of the evaluations, as directed by your probation officer.
3	ii. You must cooperate with your current mental health treatment program, including: <ul style="list-style-type: none"> <li>• Taking all prescribed medications as directed; and,</li> <li>• Attending and cooperating with appointments with your psychiatrist and/or therapist and counseling group(s).</li> </ul>

Type of Condition	Probation Conditions
<b>Key</b>	<b>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</b>
3	iii. You must cooperate with case manager/AMHRS worker/other mental health professional or civil commitment requirements as directed by your probation officer.
<b>8. Reporting:</b>	
1	d. You must meet with or contact your probation officer as directed by your probation officer.
1	e. You must at all times ensure that your probation officer has the current telephone number at which you can be reached. If there is no number at which you can be reached, you must ensure that probation officer has a number at which a message can be left.
1	f. You must report all police contacts to your probation officer within 48 hours of the contact.
1	g. You must report any new arrests, charges, orders for protection or no contact orders to your probation officer within 72 hours of the arrest, charge or issuance of the order.
1	h. You must report all changes of employment to your probation officer within 7 days of the change.
1	i. You must report all changes of residence to your probation officer within 7 days of the change.
<b>9. Residence:</b>	
4	a. You must make no change in residence without prior written approval of your probation officer.
<b>10. Restitution:</b>	
3	a. You must pay restitution in the amount of \$_____. You must pay the restitution as directed by the probation department.
<b>11. Weapons other than firearms:</b>	
3	a. You must not use or possess any weapon. For the purposes of this provision, a weapon is any device designed as a weapon or any device which is used, or intended to be used, as a weapon.
<b>12. Firearms:</b>	
2	a. You may not use or possess any firearm. This prohibition is in addition to any prohibition imposed as a special condition of probation in your case. For the purposes of this provision a firearm is any weapon which discharges a projectile by means of an explosive, a gas or compressed air.
2	b. In addition to these conditions of probation, state and federal law prohibit use and possession of guns, silencers, destructive devices, tear gas and other devices. Some of those prohibitions are summarized in the Notice of Probation Obligations and Responsibilities which your probation officer will review with you. This is a partial list only. You should not assume that you may possess because a device just because it is not on that list. If you have any questions about whether you are prohibited from possessing any device you are responsible for consulting with your attorney before possessing it.

Type of Condition	Probation Conditions
<b>Key</b>	<i>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</i>
<b>12A. Other provisions to consider when needed in particular cases:</b>	
3	a. You may not use or possess a pistol for 3 years. The length of this prohibition may be extended by a new conviction within those 3 years.
3	b. You may not use or possess any firearms for 3 years. The length of this prohibition may be extended by a new conviction within those 3 years.
3	c. You may not use or possess any firearms for _____ years.
3	d. You may not use or possess any firearms for the duration of your life.

## Appendix: The Framework for Sentencing, Conditions of Probation, and Revocation of Probation

**Note:** See the presentence investigation policy and Protocol 1 (*Domestic Violence Presentence Investigation*) included in the Blueprint and the companion training memo to this appendix, *Probation PSI – Conditions of Probation*, included in the Blueprint supplement.

1. Recommend that all felony defendants be sentenced in accordance with state sentencing guidelines unless there are grounds for departure under the guidelines.
2. In felony cases where there is no durational departure, consider risk and lethality factors as well as the following in recommending what sentence should be imposed within the guideline range:

a. **Aggravating factors:**

1. Re-offense while on probation, particularly re-offense involving assaultive, threatening, coercive, harassing or stalking conduct
2. Multiple violations of no-contact orders, domestic assault no-contact orders, harassment restraining orders, or orders for protection involving this or any other victim
3. Multiple domestic violence treatment failures
4. Multiple probation or conditional release failures
5. Significant injury to the victim which is not an element of the offense
6. Injury to the victim that is more severe than is typical for the conviction offense
7. Victim vulnerability stemming from factors including:
  - a. Physical or developmental disabilities,
  - b. Age
  - c. Defendant's prior pattern of coercion, violence or intimidation
  - d. Pregnancy
  - e. The need to shield or protect children
  - f. Cultural or religious influences that make it difficult for the victim to leave the relationship
8. Subjecting the victim to sexual aggression or coercion, including:
  - a. Assaults targeting the intimate parts of the victim
  - b. Assaults including the removal of victim's clothing
  - c. Assaults which involve covering the victim with the defendant's body
  - d. Assaults related to demanding sex or punishing victim for being sexual with someone other than the defendant.
9. As the result of the past pattern of violence by this defendant, the defendant's actions during the offense caused the victim to fear death, great or substantial bodily harm or sexual assault
10. The offense was committed with reckless disregard for causing physical harm to the victim or others.

11. The offense drew the children into the abuse.
  - b. **Mitigating factors:**
    1. The defendant is the victim of ongoing domestic violence by the victim in the current case.
    2. The defendant in the current case shows no indication of engaging in a pattern of control or intimidation of the victim
3. Consider recommending the maximum time within the guideline range when any of the following circumstances apply:
  - a. Increased risk of lethality, recidivism, or severe abuse, as described above
  - b. Severe abuse in the past
  - c. High risk to children
4. Consider recommending a stay of imposition, the minimum time within the guideline range or a downward durational departure when the following circumstances apply:
  - a. The defendant in the current case has been the victim of ongoing domestic abuse from the victim in the current case, and
  - b. The violence appeared to be an attempt to control or cope with that domestic abuse, and
  - c. The violence did not result in substantial bodily harm.
5. Consider recommending a stay of imposition, the minimum time within the guideline range or a downward durational departure when the following circumstances apply:
  - a. The defendant in the current case shows no indication of engaging in a pattern of control or intimidation of the victim, and
  - b. The violence used was not severe or potentially lethal and did not result in substantial bodily harm.
6. In general, recommend that the suspended sentence be set at the maximum allowed for gross misdemeanor and misdemeanor cases.
7. In general, recommend probation for the maximum period allowed by law for all offense levels involving probation.
8. Where authorized by statute, recommend that the second year of probation in misdemeanor cases shall be supervised probation when any of the following aggravating circumstances applies:
  - a. A pattern of actions associated with lethality, recidivism, or severe abuse are present. (See *Practitioners' Guide for Risk and Danger in Domestic Violence Cases* and the related training memo included in the Blueprint Supplement. )

- b. The defendant will be unlikely to be able to complete the conditions of probation in one year.
9. In recommending an amount of time to serve as a condition of probation, consider the following factors as they apply to the circumstances of the case:
  - a. Any mandatory minimum sentence (see Attachment 1: Statutory Mandates in Domestic Violence Cases)
  - b. Aggravating and mitigating factors addressed previously in this protocol
  - c. That victims and defendants may interpret the length of the sentence to serve as a statement regarding the seriousness of the offense
  - d. That where the risk to the victim is low or moderate and the defendant is a good candidate for probation supervision, suspended time of sufficient length may be sufficient to motivate change and to respond to violations
  - e. Offender accountability, without regard to the considerations of motivating change or responding to violations, as the primary goal where the risk to the victim is high or the defendant is not considered a good candidate for probation supervision
10. In recommending conditions of probation:
  - a. Whenever possible utilize the conditions of probation set forth in Attachment 3: List of Probation Conditions to Consider in Domestic Violence Related Cases.
  - b. Except in extraordinary circumstances, recommend all of the general and domestic violence standard conditions of probation set forth in Attachment 3.
  - c. Recommend special conditions of probation in accordance with the following guidance and considerations:
    1. Attachment 2: Firearms Prohibitions Chart
    2. Attachment 4: Use of Firearms Special Conditions
    3. Attachment 5: Use of Domestic Violence Special Conditions
    4. Defendant's history of violence
    5. Victim safety
    6. Advisability of limiting the number of special conditions in light of the length of probation and the length of the stayed sentence
    7. Appropriateness of some special conditions for only the highest risk offenders
11. Identify for the court which of the following notices appears to be required at sentencing:
  - a. In violation of orders for protection, assault, and stalking/harassment cases where the victim was a family or household member and a firearm was used in any way: "You are prohibited from possessing a firearm for a period of \_\_\_\_\_ years. Violation of this prohibition is a gross misdemeanor."
  - b. In convictions of crimes of violence as defined by Minn. Stat. §624.712, subd. 5: "You are prohibited from possessing firearms for the remainder of your life. Violation of this prohibition is a felony."

- c. In all cases: “Failure to abide by any condition of probation is a probation violation. If you violate probation, you may be required to comply with additional probation conditions and/or be required to serve all or part of your remaining sentence.”

The following attachments are included as part of this appendix and the related presentence investigation policy and protocol:

- 1: Statutory Mandates in Domestic Violence Cases
- 2: Firearms/Pistols Prohibition Chart
- 3: Probation Conditions
- 4: Use of Firearms/Pistols Special Conditions
- 5: Domestic Violence Special Conditions

### Attachment 1: Statutory Mandates in Domestic Violence Cases

SENTENCING MINIMUMS				
Offense	Other Conditions	Minimum Duration	Stay of Execution/Imposition Allowed	Statute
<b>Misdemeanor:</b>				
Violation of Order for Protection		3 days	Yes Stay of Imp. also allowed: 3 days applies if revoked	518B.01, subd 14(b)
<b>Gross Misdemeanor:</b>				
Domestic Assault		20 days, at least 96 hours of which must be served consecutively	Yes, if anger therapy or other counseling ordered	609.2243, subd.1
Domestic Abuse No Contact Order Violation		10 days		518B.01, subds. 14(c) and 22(c)
Violation of Order for Protection		10 days	No	518B.01, subds. 14(c) and 22(c)
<b>Felony:</b>				
Domestic Abuse	Stayed sentence	“Presume” at least 45 days incarceration as condition of probation with at least 15 days being served consecutively		
Domestic Abuse No Contact Order		30 days	No	518B.01, subds. 14(d) and 22(d)
Violation of Order for Protection		30 days	No	518B.01, subds. 14(d) and 22(d)

SEE ALSO:

- 609.1095: execute sentence of at least presumptive guideline if two or more prior violent crimes
- 609.1095: increased sentence for dangerous offenders who commit a third violent crime

<b>MANDATED PROGRAMMING</b>			
<b>Offense</b>	<b>Other Conditions</b>	<b>Required Programming</b>	<b>Statute</b>
<b>Any Level:</b>			
Domestic Assault	Stay of imposition or stay of execution	Domestic abuse counseling or educational program	518B.02, Subd. 1
Assault on spouse or other person with whom offender resides	Stay of imposition or stay of execution	Counseling or other appropriate program chosen by Court	609.125., Subd. 5
Violation of Order for Protection		Counseling or other appropriate program chosen by Court	518B.2, Subd. 14(b)(c)(d)
<b>Gross Misdemeanor or Felony:</b>			
Domestic Abuse No Contact Order Violation		Counseling or other appropriate program chosen by Court	518B.2, Subd. 22(c)(d)

<b>MANDATED FIREARM FORFEITURE</b>			
<b>Offense</b>	<b>Offense Level</b>	<b>Other Requirements</b>	<b>Statute</b>
Violation of Order for Protection	Misdemeanor or Gross Misdemeanor	1. Owns and possesses firearm AND 2. used it in any way	518B.01, subd. 14(m)
Assault 1, 2, 3 or 5		1. Against a family or household member AND 2. Owns and possesses firearm AND 3. used it in any way	609.2242, subd.3
Stalking/Harassment		1. Owns and possesses firearm AND 2. used it in any way	609.749 Subd. 8(d)
Domestic Assault by Strangulation		1. Against a family or household member AND 2. Owns and possesses firearm AND 3. used it in any way	609.2242, subd.3

### Attachment 2: Chart of State Firearm Prohibitions<sup>1</sup>

Conviction Offense	Statute (Conviction)	Offense Level	Other Conditions	Firearm/ Pistol	Duration	Statute (Prohibition)
Domestic Assault	609.2242	Misdemeanor/ Gross Misdemeanor	Victim was a family or household member	Pistol	3 years as long as no subsequent conviction of 609.2241 or 609.224	609.2242, Subd 3
Domestic Assault	609.2242	Misdemeanor/ Gross Misdemeanor	Victim was a family or household member AND  Firearm used in any way during the commission of assault	Firearm	3 years to life, as determined by court	609.2242, Subd.3
Assault 5	609.224	Misdemeanor	Victim was a family or household member	Pistol	3 years as long as no subsequent conviction of 609.2241 or 609.224	609.2242, Subd 3

<sup>1</sup> Offenses listed are those which are likely to be seen in a domestic violence related offense. See Minn.Stat. §624.713, Subd. 1(11) for other gross misdemeanors to which the 3 year prohibition applies.

Conviction Offense	Statute (Conviction)	Offense Level	Other Conditions	Firearm/ Pistol	Duration	Statute (Prohibition)
Assault 5	609.2242	Misdemeanor	Victim was a family or household member AND  Firearm used in any way during the commission of assault	Firearm	3 years to life, as determined by court	609.2242, Subd.3
Assault 5	609.224	Misdemeanor/Gross Misdemeanor	Committed within 3 years of previous conviction for assault 1, 2, 3, 4 or 5	Pistol	3 years as long as no subsequent conviction or 609.224	609.224, Subd. 3
False Imprisonment	609.255	Gross Misdemeanor	Only applies to Gross Misd. level offenses	Firearm	3 years as long as no subsequent conviction for listed offenses	624.713, Subd. (11)
Neglect/ Endangerment of Child	609.378	Gross Misdemeanor	Only applies to Gross Misd. level offenses	Firearm	3 years as long as no subsequent conviction for listed offenses	624.713, Subd. (11)
Burglary 4	609.582, Subd. 4	Gross Misdemeanor	Only applies to Gross Misd. level offenses	Firearm	3 years as long as no subsequent conviction for listed offenses	624.713, Subd. (11)

Conviction Offense	Statute (Conviction)	Offense Level	Other Conditions	Firearm/ Pistol	Duration	Statute (Prohibition)
Harassment/ Stalking	609.749	Gross Misdemeanor	Only applies to Gross Misd. level offenses	Firearm	3 years as long as no subsequent conviction for listed offenses	624.713, Subd. (11)
Harassment/ Stalking	609.749	Gross Misdemeanor	Firearm used in any way during the commission of assault	Firearm	3 years to life, as determined by court	609.2242, Subd.3
Violation of Order for Protection	518B.01	Misdemeanor/ Gross Misdemeanor	Firearm used in any way during commission of violation	Firearm	3 years to life, as determined by court  Court shall order firearm to be summarily forfeited	518B.01 Subd.14 (j)  518B.01 Subd.14(m)  609. 5316, Subd3.
Violation of Order for Presentation	518B.01	Misdemeanor / Gross Misdemeanor	Any Violation of Order of Protection	Pistol	3 years from date of conviction	518B.01 Subd. 14 (k)

Conviction Offense	Statute (Conviction)	Offense Level	Other Conditions	Firearm/ Pistol	Duration	Statute (Prohibition)
			conviction, misdemeanor or Gross Misdemeanor			
Any Felony	---	Felony		Firearm	Duration of sentence	624.713, Subd. 1(10)(1) and 624.712, subd.10
“Crime of Violence”	Long list, see 624.712, Subd 5	Felony*		Firearm	Life	624.713, Subd. 1(2)

\*By definition, only felonies can be crimes of violence.

### Attachment 3: Probation Conditions

Type of Condition	Probation Conditions
<i>Key</i>	<i>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</i>
<b>1. Drugs/Alcohol</b>	
1	a. You may not use or possess any controlled substances except in the manner and amount prescribed for you by a doctor.
3	b. You may not use or possess alcoholic beverages.
3	c. You must attend Alcoholics Anonymous or an equivalent program weekly as directed by your probation officer.
3	d. You must cooperate with a chemical dependency evaluation and follow any recommendations of the evaluation, including aftercare, as directed by your probation officer.
1	e. You must submit to random testing for the presence of controlled substances or alcoholic beverages as directed by your probation officer.
<b>2. Employment/School</b>	
3	a. You must obtain and maintain employment as directed by probation officer.
3	b. You must report any changes in employment to your probation officer within 72 hours of the change. The obligation to report includes any involuntary changes such as being fired or laid off.
3	c. You must attend and cooperate with any job-seeking programming as directed by your probation officer.
3	d. You must attend and cooperate with any life skills programming as directed by your probation officer.
3	e. You must attend and cooperate with any high school equivalency program as directed by your probation officer.
3	f. You may not change employment without the prior permission of your probation officer if, as a result, you would be working for the same employer as _____ (victim).
<b>3. Fines/Community Service:</b>	
1	a. You must pay a fine of \$ _____. You must make the payment as directed by the probation department.
<b>4. Law Abiding:</b>	
1	a. You must refrain from any action which is prohibited by any state, federal or local law. An action, or inaction, prohibited by state, federal or local law violates probation even if it is not charged as a crime or does not result in a criminal conviction.
2	b. You must obey all court orders, including any orders for protection or no contact orders. An action, or inaction, prohibited by court order violates probation even if it is not charged as a crime or does not result in a criminal conviction.

Type of Condition	Probation Conditions
<b>Key</b>	<b><i>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</i></b>
2	c. You must not use threats, intimidation or coercion against any person
2	d. You must not use illegal violence against any person.
2	e. You must obey all court orders including protection orders, child support and custody orders, and orders regarding return of children from parenting time.
<b>4A. Other provisions to consider when needed in particular cases:</b>	
4	a. You must obey all court orders including orders regarding child support.
<b>5. Miscellaneous:</b>	
1	a. You must be truthful with your probation officer in all matters, and reply promptly to any communication from your probation officer
1	b. You must waive extradition to the State of Minnesota from any jurisdiction in or outside the United States where you may be found. You must agree not to contest any further effort by any jurisdiction to return you to the State of Minnesota. c. NOTE: Reviewers raised the issue of whether these waivers are enforceable. The concept, though not the language, is from Ramsey’s standard conditions.
1	d. You may not leave the State of Minnesota without first obtaining written permission from your probation officer.
2	e. If requested by your probation officer, you must sign releases of information related to: <ul style="list-style-type: none"> <li>i. Victim of this offense: A release sufficient to allow your probation officer to discuss and review with the victim statements made by you to the probation officer writing the presentence investigation.</li> <li>ii. Medical/Mental Health programs or professionals. These releases must be sufficient to allow your probation officer to verify if you are attending and complying with your treatment and medication programs.</li> <li>iii. Chemical Dependency programs. These releases must be sufficient to allow your probation officer to verify that you are attending and complying with the chemical dependency program and to allow any person working with the program to be informed if you use alcohol or drugs.</li> <li>iv. Domestic Violence Programs. These releases must be sufficient to allow your probation officer to:                             <ul style="list-style-type: none"> <li>• Verify that you are attending and complying with the domestic violence program.</li> <li>• Release to the domestic violence program the non-confidential portion of the PSI.</li> <li>• Discuss with the program any concerns about your compliance with, or adjustment to, probation.</li> </ul> </li> <li>v. Other Third Parties. Releases as necessary to monitor your compliance with the conditions of your probation.</li> </ul>

Type of Condition	Probation Conditions
<b>Key</b>	<b>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</b>
2	f. You must provide to your probation officer all court documents relating to the victim in this case: <ul style="list-style-type: none"> <li>i. Protection orders</li> <li>ii. Harassment restraining orders</li> <li>iii. No-contact orders</li> <li>iv. Custody and visitation orders or agreements</li> <li>v. Civil court judgments</li> </ul>
<b>5A. Other provisions to consider when needed in particular cases:</b>	
4	1. You must make full disclosure of the status of any child custody investigations, paternity actions, adoption proceedings and other family or civil matters.
4	2. You must cooperate with child or adult protection services and make full disclosure of criminal history and status
4	3. You must obey any curfew imposed by your probation officer.
<b>6. No Contact Orders:</b>	
3	a. You must have no contact, directly or indirectly, with the people listed below. Prohibited contact includes, but is not limited to, physical, verbal, visual, letters, phone calls, computer transmissions, videos, visits, photographs or text messaging. Prohibited contact also includes any form of contact through a third party. Contact for the purpose of arranging parenting time with joint children is also prohibited except as provided for by the court order granting parenting time.
	i. the victim of this offense, _____;
	ii. the victim’s children;
	iii. others residing in victim’s home;
	iv. the victim’s employer; or
	v. the following other individuals: _____.
3	b. You must stay away from the area within _____ feet/blocks of:
	i. the victim’s current and all future residences;
	ii. the victim’s school;
	iii. the victim’s current and any future employment;
	iv. the school attended by the victim’s children. You may not be within this area even if the victim’s children are also your children. If there is a school program or other special event at the school that you wish to attend, you may be in the school area only if with prior written approval from your probation officer. You may be in the area only in the manner and at the time specified by that

Type of Condition	Probation Conditions
<b>Key</b>	<b>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</b>
	written approval. If you have an existing court order for parenting time which requires you to pick up or drop off the children at school, you may be within the school area for that purpose only with prior written approval of your probation officer and only in the manner and at the time specified in that written approval.
	v. the childcare facility attended by the victim’s children. You may not be within this area even if the victim’s children are also your children. If there is a program or other special event at the childcare facility that you wish to attend, you may attend only with prior written approval from your probation officer. You may be in the area only in the manner and at the time specified by your probation officer. In the event that you have an existing court order for parenting time which requires you to pick up or drop off the children at daycare, you may be within the school area for that purpose only with the prior written approval of your probation officer and only in the manner and at the time specified in that written approval.;
	vi. the following additional locations: _____.
3	c. You may not have unsupervised contact with the following children _____.
<b>6A. Other provisions to consider when needed in particular cases:</b>	
4	a. You must have no contact with persons specified by your probation officer.
4	b. You must stay away from places specified by your probation officer.
<b>7. Programming:</b>	
	<b>a. Domestic Violence:</b>
2	i. You must attend, cooperate with and complete domestic violence treatment as directed by your probation officer.
3	ii. You must attend and cooperate with any other designated domestic violence group if, and for long as, required by your probation officer.
3	iii. You must attend the Victim Impact panel as directed by your probation officer.
3	iv. You must attend a domestic violence parenting program as directed by your probation officer
3	v. You must attend a domestic violence sexual education program as directed by your probation officer.
	<b>b. Chemical Dependency:</b>
3	i. You must cooperate with a chemical dependency evaluation and follow any recommendations of the evaluation, including aftercare, as directed by your probation officer.

Type of Condition	Probation Conditions
<b>Key</b>	<b>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</b>
3	ii. You must attend Alcoholics Anonymous or an equivalent program weekly, as directed by your probation officer.
	<b>c. Mental Health:</b>
3	i. You must cooperate with a psychological evaluation, and follow any recommendations of the evaluations, as directed by your probation officer.
3	ii. You must cooperate with your current mental health treatment program, including: <ul style="list-style-type: none"> <li>• Taking all prescribed medications as directed; and,</li> <li>• Attending and cooperating with appointments with your psychiatrist and/or therapist and counseling group(s).</li> </ul>
3	iii. You must cooperate with case manager/AMHRS worker/other mental health professional or civil commitment requirements as directed by your probation officer.
<b>8. Reporting:</b>	
1	a. You must meet with or contact your probation officer as directed by your probation officer.
1	b. You must at all times ensure that your probation officer has the current telephone number at which you can be reached. If there is no number at which you can be reached, you must ensure that probation officer has a number at which a message can be left.
1	c. You must report all police contacts to your probation officer within 48 hours of the contact.
1	d. You must report any new arrests, charges, orders for protection or no contact orders to your probation officer within 72 hours of the arrest, charge or issuance of the order.
1	e. You must report all changes of employment to your probation officer within 7 days of the change.
1	f. You must report all changes of residence to your probation officer within 7 days of the change.
<b>9. Residence:</b>	
4	a. You must make no change in residence without prior written approval of your probation officer.
<b>10. Restitution:</b>	
3	a. You must pay restitution in the amount of \$_____. You must pay the restitution as directed by the probation department.
<b>11. Weapons other than Firearms:</b>	
3	a. You must not use or possess any weapon. For the purposes of this provision a weapon is any device designed as a weapon or any device which is used, or intended to be used, as a weapon.
<b>12. Firearms:</b>	
2	a. You may not use or possess any firearm. This prohibition is in addition to any prohibition imposed as a special condition of probation in your case. For the

Type of Condition	Probation Conditions
<b>Key</b>	<b><i>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</i></b>
	purposes of this provision a firearm is any weapon which discharges a projectile by means of an explosive, a gas or compressed air.
2	b. In addition to these conditions of probation, state and federal law prohibit use and possession of guns, silencers, destructive devices, tear gas and other devices. Some of those prohibitions are summarized in the Notice of Probation Obligations and Responsibilities which your probation officer will review with you. This is a partial list only. You should not assume that you may possess because a device just because it is not on that list. If you have any questions about whether you are prohibited from possessing any device you are responsible for consulting with your attorney before possessing it.
<b>12A. Other provisions to consider when needed in particular cases:</b>	
3	a. You may not use or possess a pistol for 3 years. The length of this prohibition may be extended by a new conviction within those 3 years.
3	b. You may not use or possess any firearms for 3 years. The length of this prohibition may be extended by a new conviction within those 3 years.
3	c. You may not use or possess any firearms for _____ years.
3	d. You may not use or possess any firearms for the duration of your life.

### Attachment 4: Use of Firearms/Pistols Special Conditions

Condition	When to Use	Reason
<p>Banned from possessing a pistol for 3 years, or longer if there is a qualifying subsequent conviction (12.b.)</p>	<p>1. Misdemeanor or Gross Misdemeanor convictions under:</p> <ul style="list-style-type: none"> <li>• 609.2242 or 609.224 or 609.729</li> </ul> <p>AND</p> <ul style="list-style-type: none"> <li>• Victim was family or household member</li> </ul> <p>AND</p> <ul style="list-style-type: none"> <li>• did not involve the “use of a firearm in anyway”.</li> </ul>	<p>This condition should be used in addition to the standard firearms prohibition to ensure that there is a ban on pistol possession which extends beyond the termination of probation.</p>
	<p>2. Misdemeanor or Gross Misdemeanor convictions under:</p> <ul style="list-style-type: none"> <li>• 518B.01, subd. 14(k)</li> </ul> <p>AND</p> <ul style="list-style-type: none"> <li>• did not involve the “use of a firearm in anyway”.</li> </ul>	<p>This condition should be used in addition to the standard firearms prohibition to ensure that there is a ban on pistol possession which extends beyond the termination of probation.</p>
	<p>3. Misdemeanor or Gross Misdemeanor conviction under:</p> <ul style="list-style-type: none"> <li>• 609.224</li> </ul> <p>AND</p> <ul style="list-style-type: none"> <li>• committed within three years of prior conviction under 609.221 to 609.224</li> </ul>	<p>This condition should be used in addition to the standard firearms prohibition to ensure that there is a ban on pistol possession which extends beyond the termination of probation.</p>



Condition	When to Use	Reason
<p>Banned from possessing firearms for 3 years, or longer if there is a qualifying subsequent conviction (12.c.)</p>	<p>1. Gross Misdemeanor convictions under:</p> <ul style="list-style-type: none"> <li>• 609.255 false imprisonment OR</li> <li>• 609.378 neglect or endangerment of a child OR</li> <li>• 609.582, subd 4 Burglary 4 OR</li> <li>• 609.749 Harassment/Stalking</li> </ul>	<p>This condition should be used in lieu of the standard firearms prohibition to ensure that the firearms ban extends beyond the termination of probation.</p>
<p>Banned for _____ years. (12.d.)</p>	<p>1. Misdemeanor or Gross Misdemeanor convictions under:</p> <ul style="list-style-type: none"> <li>• 609.2242 or 609.224 AND</li> <li>• Victim was family or household member AND</li> <li>• used of a firearm in anyway</li> </ul>	<p>Minimum of 3 years, maximum of life, to be determined by the court</p> <p>This condition should be used in lieu of the standard firearms prohibition to ensure that the firearms ban extends beyond the termination of probation.</p>
	<p>2. Misdemeanor or Gross Misdemeanor convictions under:</p> <ul style="list-style-type: none"> <li>• 518B.01, subd. 14 (j) AND</li> </ul>	<p>minimum of 3 years, maximum of life, to be determined by the court</p> <p>This condition should be used in lieu of the standard firearms</p>

Condition	When to Use	Reason
	used of a firearm in anyway	prohibition to ensure that the firearms ban extends beyond the termination of probation.
	3.Gross Misdemeanor conviction under 609.749 AND <ul style="list-style-type: none"> <li>• used of a firearm in anyway</li> </ul>	minimum of 3 years, maximum of life, to be determined by the court  This condition should be used in lieu of the standard firearms prohibition to ensure that the firearms ban extends beyond the termination of probation.
Banned for life.(12.e.)	Crime of violence	This condition should be used in lieu of the standard firearms prohibition to ensure that the firearms ban extends beyond the termination of probation.

**Attachment 5: Domestic Violence Special Conditions**

Type of Condition	Probation Conditions
<b>Key</b>	<b><i>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</i></b>
<b>1. Drugs/Alcohol</b>	
3	b. You may not use or possess alcoholic beverages.
3	c. You must attend Alcoholics Anonymous or an equivalent program weekly as directed by your probation officer.
3	d. You must cooperate with a chemical dependency evaluation and follow any recommendations of the evaluation, including aftercare, as directed by your probation officer.
<b>2. Employment/School</b>	
3	g. You must obtain and maintain employment as directed by probation officer.
3	h. You must report any changes in employment to your probation officer within 72 hours of the change. The obligation to report includes any involuntary changes such as being fired or laid off.
3	i. You must attend and cooperate with any job-seeking programming as directed by your probation officer.
3	j. You must attend and cooperate with any life skills programming as directed by your probation officer.
3	k. You must attend and cooperate with any high school equivalency program as directed by your probation officer.
3	l. You may not change employment without the prior permission of your probation officer if, as a result, you would be working for the same employer as _____ (victim).
<b>3. Fines/Community Service:</b>	
<b>6. Law Abiding:</b>	
3	f. You must not use threats, intimidation or coercion against any person.
<b>4A. Other provisions to consider when needed in particular cases:</b>	
4	b. You must obey all court orders including orders regarding child support.
<b>7. Miscellaneous:</b>	
<b>5A. Other provisions to consider when needed in particular cases:</b>	
4	4. You must make full disclosure of the status of any child custody investigations, paternity actions, adoption proceedings and other family or civil matters.
4	5. You must cooperate with child or adult protection services and make full disclosure of criminal history and status.
4	6. You must obey any curfew imposed by your probation officer.

Type of Condition	Probation Conditions
<b>Key</b>	<b>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</b>
<b>6. No-Contact Orders:</b>	
3	a. You must have no-contact, directly or indirectly, with the people listed below. Prohibited contact includes, but is not limited to, physical, verbal, visual, letters, phone calls, computer transmissions, videos, visits, photographs or text messaging. Prohibited contact also includes any form of contact through a third party. Contact for the purpose of arranging parenting time with joint children is also prohibited except as provided for by the court order granting parenting time.
	i. the victim of this offense, _____;
	ii. the victim’s children;
	iii. others residing in victim’s home;
	iv. the victim’s employer; or
	v. the following other individuals: _____.
3	b. You must stay away from the area within _____ feet/blocks of:
	i. the victim’s current and all future residences;
	ii. the victim’s school;
	iii. the victim’s current and any future employment;
	iv. the school attended by the victim’s children. You may not be within this area even if the victim’s children are also your children. Any exceptions require the prior written approval of the judge and probation officer.
	v. the childcare facility attended by the victim’s children. You may not be within this area even if the victim’s children are also your children. Any exceptions require the prior written approval of the judge and probation officer.
	vi. the following additional locations: _____.
3	c. You may not have unsupervised contact with the following children _____.
<b>6A. Other provisions to consider when needed in particular cases:</b>	
4	c. You must have no contact with persons specified by your probation officer.
4	d. You must stay away from places specified by your probation officer.
<b>7. Programming:</b>	

Type of Condition	Probation Conditions
<b>Key</b>	<b>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</b>
	<b>a. Domestic Violence:</b>
3	i. You must attend and cooperate with any other designated domestic violence group if, and for long as, required by your probation officer.
3	ii. You must attend the Impact of Domestic Violence on Children Panel as directed by your probation officer.
3	iii. You must attend a domestic violence parenting program as directed by your probation officer.
3	iv. You must attend a domestic violence sexual coercion program as directed by your probation officer.
	<b>b. Chemical Dependency:</b>
3	i. You must cooperate with a chemical dependency evaluation and follow any recommendations of the evaluation, including aftercare, as directed by your probation officer.
3	ii. You must attend Alcoholics Anonymous or an equivalent program weekly, as directed by your probation officer.
	<b>c. Mental Health:</b>
3	i. You must cooperate with a psychological evaluation, and follow any recommendations of the evaluations, as directed by your probation officer.
3	ii. You must cooperate with your current mental health treatment program, including: <ul style="list-style-type: none"> <li>• Taking all prescribed medications as directed; and,</li> <li>• Attending and cooperating with appointments with your psychiatrist and/or therapist and counseling group(s).</li> </ul>
3	iii. You must cooperate with case manager/AMHRS worker/other mental health professional or civil commitment requirements as directed by your probation officer.
<b>8. Reporting:</b>	
<b>9. Residence:</b>	
4	b. You must make no change in residence without prior approval of your probation officer.
<b>10. Restitution:</b>	
3	a. You must pay restitution in the amount of \$_____. You must pay the restitution as directed by the probation department.
<b>11. Weapons other than Firearms:</b>	
3	a. You must not use or possess any weapon. For the purposes of this provision a weapon is any device designed as a weapon or any device which is used, or intended to be used, as a weapon.
<b>12. Firearms:</b>	
<b>12A. Other provisions to consider when needed in particular cases:</b>	

Type of Condition	Probation Conditions
<b>Key</b>	<b><i>1= general standard 2=DV standard 3=DV special condition, 4=atypical condition</i></b>
3	e. You may not use or possess a pistol for 3 years. The length of this prohibition may be extended by a new conviction within those 3 years.
3	f. You may not use or possess any firearms for 3 years. The length of this prohibition may be extended by a new conviction within those 3 years.
3	g. You may not use or possess any firearms for _____ years.
3	h. You may not use or possess any firearms for the duration of your life.

## Appendix: Use of No-Contact Orders in Domestic Violence Criminal Cases

This appendix is in development.

## Appendix: Weekend Post-Arrest Procedures<sup>1</sup>

### Procedures for Domestic Abuse, Violation of an Order for Protection, Violation of Domestic Abuse No-Contact Order and Harassment Cases

(Source: Second Judicial District *Domestic Abuse Guidelines and Procedures Manual*, Revised September 3, 2003)

Per Ramsey County bench policy (see Appendix 1), the designated weekend duty judge shall be responsible for reviewing the status of all persons being held for domestic abuse, violation of an order for protection, violation of a domestic abuse no contact order or harassment at the 4:00 p.m. Saturday meeting with the Duty Officer (Station Commander). (The misdemeanor domestic abuse-related cases will therefore be excluded from the telephone conference held with the Remand Screener on Saturday morning.)

1. Prior to the 4:00 p.m. meeting, the following should occur:
  - a. Any agency wishing to continue detention of a person arrested for a domestic abuse (or any other felony and gross misdemeanor case) beyond 48 hours shall have available at the Duty Officer Unit a completed "*Judicial Determination of Probable Cause to Detain*" form (Appendix 7). The facts supporting probable cause shall be written in the space provided at the top of the form. Relevant police reports should be attached.
  - b. The Remand Screener on duty shall, prior to the meeting, forward to the Duty Officer (Station Commander) a copy of the *Pretrial Bail Evaluation* form (Appendix 10) regarding the arrestee and a copy of the *Project Remand Confidential Victim Information* form (Appendix 9).
2. Based upon the above information, the judge shall then determine whether the defendant should be held for court or released; and if released, under what conditions. Bail, a no contact order and other conditions of release may be set (see Appendix 6).
  - a. If the arrestee is to be held for court after the weekend, *the Judicial Determination of Probable Cause to Detain* form needs to be completed and signed by the judge.
  - b. If the judge determines that the arrestee may be released, a copy of the attached *Judicial Release Order* (Appendix 8) authorizing the release shall be completed and signed. This is in addition to the *Judicial Determination of Probable Cause to Detain* form.

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<sup>1</sup> States other than Minnesota have statutes similar to those cited here.

- c. If the judge determines that the arrestee may be conditionally released; the judge shall sign a *Conditional Release Order* (Appendix 12).
- d. The weekend judge shall also consider whether a no contact order is appropriate and if so, complete and sign the pretrial no contact order checking the "yes" or "no" box determining whether the order is or is not a Domestic Abuse No Contact Order. If the arrest is for assault, criminal sexual conduct, terroristic threats or interference with an emergency call committed against a family or household member, check "yes." The Remand Screener will serve the order upon the arrestee.

The procedure outlined above is intended to parallel that presently being followed for felony and gross misdemeanor cases and the distribution of the paperwork shall be made accordingly. Failure to have the proper documentation available at the review in the Duty Officer Unit (Station Commander's) office will result in the arrestee being released because of the expiration of the *McLaughlin* 48 hour time limit.

### COMPARISON BETWEEN THE 36-HOUR AND 48-HOUR RULES

#### 36-HOUR RULE (Rule 4.02)

1. Only applies to warrantless arrests where defendant is NOT released immediately.
2. Requires that defendant be brought before a judge within 36 hours of arrest.
3. Only an appearance before a judge will satisfy the rule.
4. In computing time elapsed, date of arrest, Sundays and legal holidays are NOT counted interruption.  
(time begins to toll at midnight and therefore always expires at noon).
5. Unless satisfied, defendant must be released.

#### 48-HOUR RULE (Rule 4.02)

1. Only applies to warrantless arrests where defendant is NOT released immediately.
2. Requires that a probable cause determination be made by a judge within 48 hours of arrest.
3. Can be satisfied by: (a) complaint signed by a judge; or (b) judge signing a "judicial determination of probable cause to detain" form filled out by police (usually a homicide detective).
4. Time starts to toll upon arrest without
5. Unless satisfied, defendant must be released.

**GENERAL COMMENTS:**

1. Which rule expires first depends on the day and time of the arrest. Therefore, each rule must be evaluated independent of the other.
2. In Ramsey County, all cases involving persons whose 48 hours will expire before Monday court are reviewed by a judge in the St. Paul Police watch Commander's office on Saturday at approximately 4 p.m. Therefore, a probable cause summary written by the arresting officer must be in the Watch Commander's office by then.
3. The Ramsey County District Court has a bench policy (see Appendix 1) which specifically requires judicial review of **weekend domestic abuse-related offenses and harassment** to be reviewed. Police reports for all weekend warrantless domestic abuse, violation of an OFP, violation of a domestic abuse NCO and harassment arrests must also be in the Watch Commander's office by 4 p.m. on Saturdays.
4. When Monday is a legal holiday, another judicial review also takes place on Sunday at 4 p.m.
5. If the original arrest was made on a felony or GM and the charge is subsequently reduced, there is **no** change in computing the time. Both are still figured from the time of arrest.

**CHART OUTLINING THE EXPIRATION OF 36 AND 48 HOUR RULE  
(Assumes NO legal holidays)**

<b>ARREST TIME</b>	<b>48-HOUR RULE EXPIRES AT:</b>	<b>36-HOUR RULE EXPIRES AT:</b>
Monday 1:00 a.m.	Wednesday 1:00 a.m.	Wednesday Noon
Monday Noon	Wednesday Noon	Wednesday Noon
Monday 4:00 p.m.	Wednesday 4:00 p.m.	Wednesday Noon
Monday 11:00 p.m.	Wednesday 11:00 p.m.	Wednesday Noon
Tuesday 1:00 a.m.	Thursday 1 00 a.m.	Thursday Noon
Tuesday Noon	Thursday Noon	Thursday Noon
Tuesday 4:00 p.m.	Thursday 4:00 p.m.	Thursday Noon
Tuesday 11:00 p.m.	Thursday 11:00 p.m.	Thursday Noon
Wednesday 1:00 a.m.	Friday 1:00 a.m.	Friday Noon
Wednesday Noon	Friday Noon	Friday Noon
Wednesday 4:00 p.m.	Friday 4:00 p.m.	Friday Noon
Wednesday 11:00 p.m.	Friday 11:00 p.m.	Friday Noon
Thursday 1:00 a.m.	Saturday 1:00 a.m.	Saturday Noon
Thursday Noon	Saturday Noon	Saturday Noon
Thursday 4:00 p.m.	Saturday 4:00 p.m.	Saturday Noon
Thursday 11:00 p.m.	Saturday 11:00 p.m.	Saturday Noon
Friday 1:00 a.m.	Sunday 1:00 a.m.	Monday Noon
Friday Noon	Sunday Noon	Monday Noon
Friday 4:00 p.m.	Sunday 4:00 p.m.	Monday Noon
Friday 11:00 p.m.	Sunday 11:00 p.m.	Monday Noon
Saturday 1:00 a.m.	Monday 1:00 a.m.	Tuesday Noon
Saturday Noon	Monday Noon	Tuesday Noon
Saturday 4:00 p.m.	Monday 4:00 p.m.	Tuesday Noon
Saturday 11:00 p.m.	Monday 11:00 p.m.	Tuesday Noon
Sunday 1:00 a.m.	Tuesday 1:00 a.m.	Tuesday Noon
Sunday Noon	Tuesday Noon	Tuesday Noon
Sunday 4:00 p.m.	Tuesday 4:00 p.m.	Tuesday Noon
Sunday 11:00 p.m.	Tuesday 11:00 p.m.	Tuesday Noon

## Sample Policy Language for Prosecuting Authorities

### When to Compel a Victim to Testify: Using a Witness Warrant When a Victim Fails to Appear as a Subpoenaed Witness

The Blueprint authors are constructing a number of policies using samples from other jurisdictions and applying them to the integrated Blueprint package. Whether and when to compel a victim's testimony is one such policy. This sample is based on one prepared by Aequitas: The Prosecutors' Resource on Violence Against Women, a new technical assistance and training provider created to address the needs of prosecutors and allied professionals, particularly OVW grantees, who work on issues related to the prosecution of violence against women.<sup>1</sup>

#### SUGGESTED POLICY

“It is the policy of this office that no prosecutor may request a warrant for the arrest of a domestic violence victim for non-appearance or for not cooperating in a domestic violence prosecution unless said prosecutor has obtained the approval of the supervising prosecutor. As prosecutors are considering whether to petition the office for a warrant for a domestic violence victim, the following training memo serves to provide a background for this policy and practice recommendations for its application.”

#### POLICY FOUNDATIONS

In domestic violence prosecutions, compelling the testimony of an uncooperative domestic abuse victim through a warrant<sup>2</sup> or other means is ineffective and may be dangerous. Model prosecution and law enforcement programs demonstrate nationally that its widespread use is counterproductive, increasing risk to victims and decreasing offender accountability overall. Accordingly, federal Violence Against Women legislation and policies have strongly discouraged its use as a direct safety risk to victims. Jurisdictions that inappropriately compel testimony risk losing federal funding directly and risk the funding of partner agencies by inappropriately coercing victim testimony. However, in very rare circumstances, its application to cases with unusually high victim safety risks may be appropriate.

Victims of domestic abuse must be treated differently than other crime victims because they are not similarly situated to other crime victims and witnesses. The prospective testimony of victims of domestic abuse often places them in imminent danger of future harm by their abusive intimate partner.<sup>3</sup> Furthermore, victims of abuse commonly experience the justice system at the same time that their abusers are re-victimizing them by attempting to prevent them from testifying through intimidation, solicitation to commit perjury, bribes, and even threats. Offenders appreciate that they have a constitutional right to confront their accuser and that a victim's failure to cooperate or appear at trial will likely result in a dismissal of their criminal case. This re-victimization is compounded

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<sup>1</sup> Aequitas is a partnership between OVW, the Pennsylvania Coalition Against Rape (PCAR), and the Battered Women's Justice Project (BWJP).

<sup>2</sup> MINN. STAT. § 588.20 (2009).

<sup>3</sup> VERA INSTITUTE OF JUSTICE, PROSECUTING WITNESS TAMPERING, BAIL JUMPING, AND BATTERING FROM BEHIND BARS (2006).

when abusers exploit victims' financial hardships, family or childcare needs, fear, societal norms, and isolation. Moreover, victims who are compelled by law enforcement to testify in spite of these risks may ultimately have their safety compromised in the immediate future and in the long-term be unwilling to disclose future abuse.

In very rare circumstances, however, it may become necessary for prosecutors to use these extreme measures to ensure the immediate safety of the victim or third parties. In these rare circumstances, prosecutors must give substantial consideration to potential sanctions, system roles, and best practices to improve offender accountability and reduce overall impact on victims and third parties.

## FEDERAL PROHIBITIONS & POTENTIAL SANCTIONS

Arresting victims for failing to cooperate in a prosecution not only creates significant safety risks for victims, but also may endanger federal funding. VAWA-funded offices<sup>4</sup> are “*strongly discouraged from proposing projects that include any actives that may compromise victim safety such as the following: ...Requiring victims to report sexual assault, stalking, or domestic violence crimes to law enforcement or forcing victims to participate in criminal proceedings...; and procedures that would force victims of domestic violence to testify against their abusers or impose other sanctions on them. Rather, procedures that provide victims the opportunity to make an informed choice about whether to testify are encouraged.*”<sup>5</sup> Moreover, these actions can also endanger VAWA funding of partner agencies, regardless of whether they were involved in arresting the victim. When a group of agencies works collaboratively on a VAWA grant, the entire grant could be jeopardized, even though only one of the partner agencies engaged in the problematic behavior, underscoring the seriousness of these decisions and the immediate impact on victims and justice partners.<sup>6</sup>

## COMPELLING VICTIMS DISTRACTS FROM OFFENDER ACCOUNTABILITY

Independent of federal funding sanctions, compelling victim testimony in abuse cases in lieu of other law enforcement initiatives is counterproductive. Victims often become uncooperative with the criminal prosecution as the direct result of the defendant attempting to intimidate, harass, bribe, and even threaten them. Law enforcement, however, often perceives that a victim's failure to cooperate is simply a “choice” because police and prosecutors are unaware of the victim's reasons and are not monitoring for this level of intimidation. When prosecutors simultaneously re-victimize victims of abuse through perceived sanctions for their lack of cooperation, such as arrest warrants and other punitive measures, it becomes more difficult for law enforcement to monitor, detect, and hold offenders accountable for their behavior. Conversely, when prosecutors and police officers promote victim education, increase monitoring of offender behavior, and target offenders for contributing to a victim's lack of cooperation, they significantly increase evidence that in many circumstances will enable them to proceed to trial without the victim. This in turn re-focuses the courts on the offender's accountability rather than the victim's.<sup>7</sup>

### *Recommendations for practice*

#### **GUIDANCE: When a warrant may be necessary**

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<sup>4</sup> Violence Against Women Act of 1994 (VAWA) P.L. No. 103-322, 108 Stat. 1796 (1994), codified at 42 U.S.C. § 13981 (1994).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See *supra* note 2.

*The following factors should be considered when a prosecutor believes that a warrant or other measure to compel a victim's testimony may be necessary:*

- o The prosecution must first determine that there is no alternative theory (hearsay exception/independent witness) to proceed to trial without the victim's in-court testimony.
- o The decision to request a warrant to arrest a victim to compel testimony should be considered only well in advance of trial/testimony and should never be decided on the day of trial.
- o Warrants should be considered only when the conclusion is reached that the victim, the community and/or a third party is at high risk of serious or lethal harm. and that compelling the victim's testimony is necessary.
- o Warrants should be considered only when the strength of the state's case is such that in the prosecutor's judgment a guilty verdict is highly probable with the victim's in-court-compelled testimony.
- o Warrants should be considered only when there is sufficient consequence (potential sentence length) to ensure that the defendant will be subsequently sentenced in a manner that guarantees to a reasonable degree that the victim will be safe from direct harm from the abuser.
- o The decision to issue a warrant should be approved by a supervising prosecutor.
- o The supervising prosecutor who approves the warrant should draft a brief internal memo to the file and to the chief prosecutor documenting the reasons for compelling the witness' testimony, the steps taken to minimize the impact of the decision on the victim and third parties, and an explanation of why the decision is justified as an exception to the office policy of strongly discouraging this practice.

### **REQUIREMENTS: What must be done before a warrant is issued**

*Once a decision has been made to compel a victim's testimony through a warrant, the prosecution should follow through with the following steps prior to petitioning the court for a warrant:*

- o The prosecution must first fully investigate to determine whether the defendant attempted to dissuade the victim from attending court and whether forfeiture by wrongdoing can be proven by a preponderance of the evidence.
  - √ Check jail phone calls to the victim and third parties.
  - √ Check all jail US mail correspondence logs.
  - √ Check all jail visitation logs.
  - √ Exhaust all investigation leads concerning any attempt by the defendant to dissuade the victim from testifying, either directly or through a third party.

### **PREPARATION: Minimizing the impact**

*Prior to obtaining a warrant, the prosecution should follow through with the following level of preparation to ensure that the impact of the warrant on the victim and third parties is minimized.*

- o Ensure that all efforts have been exhausted to notify the victim that the prosecutor will be requesting a warrant to encourage and enable them appear voluntarily. (This includes assisting in and offering all voluntary means of appearance including a detective picking up victims and bringing them to court.)

- o Ensure that the warrant is entered into the system with a requirement that the law enforcement agency that arrests the victim contact the prosecutor and advocate immediately upon arrest.
- o Ensure that upon reviewing the warrant, the court also agrees to hear the warrant return as a priority over all other cases to ensure the victim remains in custody for the shortest period of time as is necessary for the court to address conditions of release and cooperation with a future court date.
- o Ensure that proper childcare services (through family or victim-approved third parties) and victim advocacy services are contacted and that any other victim and/or third-party needs are met upon execution of the warrant and its duration.
- o Ensure that the court prioritizes the case for the earliest possible date for testimony, taking priority over other cases due to the impact that compelling the testimony will have on the victim and third parties.
- o **WARNING:** In instances where the victim cannot be located after the warrant is entered, the prosecutor must have the warrant quashed the moment it is no longer necessary (upon dismissal of the case, etc.)