

7 Things Every Family Lawyer Should Know About Criminal Law

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1) What exactly is the whole misdemeanor, gross misdemeanor and felony thing? (Bonus sentencing issues!)

In Minnesota there are three levels of crime and one “non-crime”.

Misdemeanor: A misdemeanor is the lowest level of crime and is defined as a punishment of up to 90 days in jail and/or a \$1,000 fine. Some common examples are careless driving, 5th degree assault, 1st time DWI, etc.

Gross Misdemeanor: This level of crime is punishable by up to 1 year in jail and/or a \$3,000 fine. As a practical matter there are no “extra” punishments that go along with a gross misdemeanor, just the fine and amount of jail. Some examples are a second domestic assault on the same victim, a second time DWI, and slapping a police officer.

Felony: This is the big one, the game changer, the one that has serious “collateral consequences” and can, but not always, send that person to prison. Minnesota does not have classes of felonies. You may have heard about such as “A, B or C” instead when we talk felonies, we often talk about a 3 year, 5 year, or 10 year being the maximum sentence. There are also serious collateral consequences for a felony conviction, see below.

Petty Misdemeanor: Is defined not as crime but as a violation of the law. No jail can result and the fine is capped at \$300. Some very common examples are speeding and a small amount of marijuana.

NOTE: prison is substantially different than jail. The words should not be interchanged! I often hear family lawyers use the two words interchangeably and they are not the same in Minnesota. When a person goes to Prison they usually are taken immediately on the day of sentencing and then go to St. Cloud. After about six months of intake and processing time the prisoner goes to one of the prisons in Minnesota: Stillwater, Rush City, Lino Lakes, Moose Lake, Oak Park Heights, Shakopee (Women’s) and Faribault. Jail refers to county jail. Nearly every county has a jail, some very small (Faribault County) some as big as a prison (Hennepin County). In jail the person can get out on “Huber” work release, meaning they can go to work then spend their nights at the local county jail. In Prison, it’s 24/7.

GOOD TIME: In Minnesota you get credit for “good time” meaning no serious disciplinary infractions. Most people get good time and I can only recall one time in 11 years a person did NOT get good time, and that was because he smuggled alcohol into the jail at night. Good time is equal to 1/3 of the sentence, for example a 90 day jail sentence equals 60 actual days in jail.

2) What is a person's record?

When one starts to discuss "record" in Minnesota it means a lot of things. Here are some of the common terms that a person's record can refer too:

- 1) **Driving record:** Sometimes called a 1045, is a person's driving record. Statute calls for all driving infractions to be automatically removed from a person's license 7 years after the incident, but as a practical matter, this is rarely done.
- 2) **MNCIS record:** This is the court's record, accessible online, has (but not all) charges or convictions. By far the easiest to access but only has Minnesota records.
- 3) **BCA/NCIC:** This is the executive branch's version of record keeping. The NCIC database is the FBI's National Crime Information Center and lists a more detailed and interstate version of MNCIS.

Often time's people will say they have received an expungement. This is where the judicial branch has the authority to seal records. However, recent case law has severely limited the judiciary by saying that the inherent authority to expunge criminal records only can be done for judicial branch records, not the executive (which the police & BCA fall into). While a person can get an expungement, it will not clean up the BCA record and that data should still be accessible. If you're looking into the opposing party's criminal record and you think it is important, contact the BCA and make the formal request; you may be surprised at what you turn up.

Sentencing note: It can be confusing reading the NCIC or MNCIS paperwork. You may see a crime such as 5th degree controlled substance crime, a crime you know to be a felony, but you see it's listed as a misdemeanor. That is because under Minnesota law a felony that is sentenced under a stay of imposition automatically is reduced to a misdemeanor upon the end of probation. More on this under the probation section.

3) DWI?

DWI is the most common crime in Minnesota and the U.S. Approximately 1 out of 9 drivers have at least 1 DWI in Minnesota.

What happens at most 1st time DWI sentencings in Minnesota? While each county is different, most are fairly standard and include a sentence as follows:

- a) \$250-\$700 fine
- b) Chemical Dependency evaluation
- c) Unsupervised probation for a year
- d) 30 days jail "suspended"
- e) Required to attend a MADD impact panel
- f) While not part of the criminal case per se, usually at least a 90 day license suspension goes along with a DWI criminal conviction. With a limited license or "work permit" after 15 days.

One of the biggest mistakes I see in family court is that the family attorney gets very worked up about a DWI that the opposing party had years ago. I think this is a mistake. Judges in Minnesota sentence DWI violators every day; many judges sentence multiple DWI violations every day. As long as there are no aggravating factors (the child was in the car, .20+ blood alcohol, etc.) many family judges will give a pass on a one time DWI that is many years old.

You may hear the term “wet careless” or your client may say they didn’t get a DWI they got a careless driving. It’s not uncommon for a person with a low BAC of say .08-.10 to get the DWI reduced to a careless driving. It’s important to note that every county/city has their own informal rules on what they will and will not reduce to a careless driving. The benefit is to keep the DWI off the criminal record, but because of the license revocation (having a BAC in excess of .08) for all practical purposes it is the same as a DWI conviction.

4) Collateral Consequences

One of the most important, yet least known areas of criminal cases are the “collateral consequences” that go along with a criminal conviction. I have listed some of the big ones below:

Felony Conviction General: Loss of voting rights, prohibited from possessing firearms, ineligible to serve on jury duty, prohibition from military enlistment, prohibited from Americorps, removal from law enforcement employment (both state and federal), or prohibited from selling insurance.

Drug Convictions: generally, aside from misdemeanor level offenses, prohibition from Americorps, prohibited from working in Hospice care facility, may not work as a mortgage loan originator for at least 7 years, loss of Hope Scholarship, May lose Federal Pell grants, and various other federal loans, may be deported.

Sexual Assault Convictions: if a person pleads guilty (even with a stay of adjudication) to a 1st-4th degree criminal sexual conduct charge, there is a requirement to register as a sex offender for 10 years.

Domestic Assault: Generally, there is a lifetime ban on possessing firearms for a domestic assault conviction. 18 USC 921. Assaults on the same victim within 10 years will result in a more serious charge.

Theft/Fraud: Many licensing branches will not issue a license to a person with even a misdemeanor theft conviction. Some examples are CNA, RN, LPN, a ten year ban on working in a FDIC insured facility (i.e. a bank), 1 year suspension on SEC license.

DWI: Prohibition from entering Canada until the Ministry of Justice grants a conditional rehabilitation (for the low, low fee of \$400). Loss of CDL for 1 year, second offense is a lifetime ban on CDL.

5) What goes along with OFP's?

Probably the most common intersection of criminal and family law is the Order for Protection. In order to obtain an order for protection there must be domestic abuse included: Domestic abuse is defined in Minnesota under Minn. Stat. 518b.01 and covers these areas:

- a) Physical harm, bodily injury or assault
- b) Fear of *imminent* physical harm, bodily injury or assault (emphasis added)
- c) Terroristic threats (see 609.713, "threatening to commit crime of violence with the purpose to terrorize); inference with a 911 call.
- d) Up to two years, may be extended.
- e) Must be a family/household member.

Can be issued without a hearing, but if the other party requests it, it shall be heard within 14 days of the request.

Please note there is no mention of emotional abuse, name calling, control issues, etc. With our first amendment, your crazy client is absolutely free to call his wife any name he chooses. It is not advisable and it is not smart, but name calling does not equal an order for protection.

A twist on the OFP is the HRO or Harassment restraining order under Minn. Stat. 609.748, with the highlights below:

- a) Any physical/sexual assault.
- b) *Repeated* incidents of intrusive or unwanted acts that have a substantial adverse effect or are intended to on safety, security, or privacy.
- c) A pattern of attending public events.
- d) Up to 50 years.

6) Probation

Another area where I see confusion is when someone is on probation. Probation generally is either supervised to the county probation department or unsupervised to the court. Most low level cases are unsupervised and even though the sentence may say 2 year of probation, often times once all of the requirements are met the probation department may release the individual early. It is important to note that probation is not parole. That is what many people think probation is, sitting every week in a hallway full of "cons" waiting to check in, not usually. Parole, or supervised release, is available in Minnesota; however there are no parole boards. Instead, good time is used in all cases (see above).

What probation can do to help your family law case is release information, chemical dependency evaluations, domestic abuse inventories, and the PSI or pre-sentencing

interview. All of that information will normally require either a signed release of information or a court order. Understand, you can't just call the probation officer and explain the situation and ask they send the file; it will not happen. A number of hoops must be jumped through, but good information can be gleaned.

Questions? Call me at 507-625-5000

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