Commencing a Criminal Case

Only the state may bring a criminal case. Generally a prosecutor starts a criminal case by filing a complaint. The court is directly involved in a criminal case from the beginning to protect the rights of the defendant. Parties have a right to discovery in a criminal case, but discovery is not as extensive in a criminal case as in a civil case because the state must have completed most of its investigation before bringing criminal charges.

The criminal complaint

Most criminal cases are started when a prosecutor, either a district attorney (who represents a county) or the attorney general (who represents the state), files a complaint with the court. The complaint states the crime charged, names the defendant, and gives the date, approximate time, and location of the crime. In a

A very simple complaint charging Munir Hamdan with carrying a concealed weapon. Hamdan was convicted in circuit court, but the Wisconsin Supreme Court ultimately overturned the conviction upon finding that a 1998 amendment to the Wisconsin Constitution afforded Mr. Hamdan the right to carry a concealed weapon in his store for security purposes. (See a description of Hamdan's case in the *Summary of Significant Decisions* section of this book.)

STATE OF WISCONSIN — CIRCUIT COURT CRIMINAL DIVISION — MILWAUKEE COUNTY

STATE OF WISCONSIN, Plaintiff

v.

Hamdan, Munir

[illegible]

Milwaukee, WI [illegible]

[illegible] D.O.B.

Defendant.

CRIMINAL COMPLAINT

CRIME
Carrying Concealed Weapon

STATUTE(S) VIOLATED
941.23

COMPLAINING WITNESS
PO John [illegible]

CASE NUMBER
[illegible]

The above named complaining witness, being duly sworn, on information and belief states that the above named defendant, in the County of Milwaukee, State of Wisconsin, on 11-26-98 at 2497 [illegible], City of Milwaukee, not being a peace officer, did go armed with a concealed and dangerous weapon, contrary to Wisconsin Statutes Section 941.23.

Upon conviction of this offense, a Class A Misdemeanor, the maximum possible penalty is a fine of not more than $10,000 or imprisonment for not more than 9 months, or both.

I am a City of Milwaukee police officer and base this complaint upon the statement of [illegible] that on the above date, at the above place, s/he personally observed the above-named defendant in possession of a loaded .38 caliber pistol, which was located [illegible]

END OF COMPLAINT

Subscribed and sworn to before me and approved for filing this 2nd day of December, 1998.

Assistant/Deputy District Attorney

PO [illegible]
Complaining Witness

complaint, the district attorney also presents sufficient facts to show why the defendant is being charged, identifies the source of the information contained in the complaint, and provides reasons why the source should be believed.

Prosecution of most crimes must be commenced within a certain time period that is established by a statute of limitation. The state generally has six years to commence prosecution of a felony (a crime for which a person may be sentenced to one year or more in prison) and three years for a misdemeanor (a crime for which the maximum penalty is a year in jail). However, there is no time limit for the prosecution of homicide. The main purpose of time limits is to ensure that criminal cases are tried while the evidence is still available and witnesses' memories are fresh. A case is commenced when a warrant, summons, or indictment is issued or an information is filed.

Pretrial court appearances

The defendant's first court date is called the initial appearance. The court informs the defendant of the charges filed against him or her and gives the defendant a copy of the complaint. The court also informs the defendant of his or her right to have an attorney and that if the defendant is indigent and requests counsel, the court will appoint an attorney. If the defendant is in custody, the court determines whether to release the defendant on bail, and if the defendant is released, imposes conditions for bail. In a misdemeanor case, the court may set the trial date at the initial appearance. The next court action in a misdemeanor case is the arraignment. Further steps are required in a felony case. At the initial appearance, the court informs a felony defendant that he or she is entitled to a preliminary examination before the criminal case may go forward.

The purpose of a preliminary examination is to determine in a felony case whether the district attorney can show probable cause to believe that the defendant committed a felony. If not, the court must dismiss the felony complaint. At the preliminary examination the district attorney and defendant may call witnesses and present evidence. If the court determines that the district attorney has shown probable cause or if the defendant waives his or her right to a preliminary examination, the case goes forward. The prosecutor files a pleading called an "information," which informs the court of the crime with which the defendant is charged and states the date and place of the crime.

An arraignment is held in both misdemeanor and felony cases. At the arraignment, the complaint or information is read out loud unless the defendant waives reading, and in a felony case the district attorney gives the defendant a copy of the information. The court then asks the defendant to submit a plea. The defendant may plead "guilty", "no contest", "not guilty", or "not guilty by reason of mental disease or defect". A plea of no contest has the same effect in a criminal case as a guilty plea, except it cannot be used as an admission of criminal action in a civil case. The defendant may not enter a plea of no contest without approval from the court. If the defendant pleads guilty or no contest, the court sentences the defendant or places the defendant on probation. If the defendant pleads not guilty or not guilty by reason of mental disease or defect, the case proceeds to trial.

Grand jury and John Doe proceedings

Although the vast majority of criminal cases in Wisconsin are begun by a district attorney filing a criminal complaint, some cases are commenced as the result of a grand jury or John Doe investigation. Grand jury and John Doe investigations are secret proceedings for which witnesses may be subpoenaed. Grand jury and John Doe proceedings are generally used when investigators need to take testimony under oath or compel a witness to testify in order to gather sufficient evidence to issue a criminal complaint.

A judge, usually upon the request of a district attorney, may assemble a grand jury to investigate suspected criminal activity. A grand jury consists of 17 people selected for jury service. The grand jury may request that the prosecutor subpoena and examine witnesses. Upon completing an investigation, a grand jury may by the vote of at least 14 members return an indictment, which is a written accusation that a person committed a crime. If the grand jury returns an indictment, the court issues a summons or warrant for the defendant.

A judge initiates a John Doe proceeding upon receiving a complaint about criminal activity from any person, including the district attorney. The judge must question the person who makes the complaint under oath and may subpoena and examine other witnesses (usually with the assistance of the district attorney). If the judge finds probable cause to believe that a person has committed a crime, a written complaint is filed and the judge issues a warrant for the arrest of the defendant named in the complaint.

Discovery

Discovery in a criminal case is generally less extensive than in a civil case. Discovery allows the parties to obtain certain information known by the opposing party. Upon request, the prosecution and defense must provide a list of witnesses it intends to call at trial, as well as statements of the witnesses, reports of expert witnesses, and any known criminal record of a witness. The parties must also disclose any physical evidence they intend to introduce at trial. A party may obtain a court order allowing scientific testing of evidence held by the opposing party. The prosecution must disclose statements made by the defendant that pertain to the crime or that the prosecution intends to introduce at trial. The prosecution is obligated to disclose exculpatory evidence (evidence that might weigh in the defendant's favor) to the defendant even if the defendant does not specifically request the information or material.

Pretrial motions and plea bargains

Parties in a criminal case often file pretrial motions. Common motions include motions to exclude physical evidence, a defendant's confession, or an eyewitness identification of the defendant. The court may require the attorneys to submit briefs on the motions, but briefing is less common on pretrial motions in criminal cases than civil cases.

Most criminal cases do not go to trial. Instead the prosecution and defense negotiate a settlement. The parties may agree upon the crimes to which a defendant will plead guilty and a sentence recommendation, or may only agree on the plea. The judge must review the agreement on the plea before accepting it to ensure that there is sufficient reason to believe that the defendant is guilty of the crime. If the parties agree on a sentence recommendation, the judge must review it to determine if it is appropriate. The judge is not bound by the sentence agreement.

Trial of a Civil or Criminal Case

The proceedings in a trial of a civil or criminal case are similar. Both may be to a jury or judge. Both start with opening statements, proceed to presentation of evidence followed by closing statements, and culminate with a decision. Depending on the result of the trial, a civil case may end with the awarding of damages and a criminal trial may end with sentencing. During the trial, the role of the judge is similar – determining the admissibility of evidence, guiding the jury, if there is one, and refereeing the actions of the attorneys.

Judge Sue E. Bischel is shown presiding over a jury trial in a products liability case. She is the second woman (retired Judge Vivi Dilweg was the first) to serve as a judge for the Brown County Circuit Court in Green Bay, and is one of a group of judges in the state who handle administrative duties such as budgeting and personnel issues in addition to their caseloads. She is deputy chief judge of the Eighth Judicial District, which encompasses Brown, Door, Kewaunee, Marinette, Oconto, Outagamie, and Waupaca counties. (Kathleen Sitter, LRB)

Jury or bench trial

A trial may be either to a jury and judge together, or to a judge alone (called a bench trial). In a civil case either party may request a jury, which usually consists of six jurors. In a criminal case, the defendant has a right to a jury. The defendant may waive the right to a jury, but the state does not have to accept the defendant's waiver, so the state may require that the case be tried to a jury. In a felony case the jury usually consists of 12 jurors and in a misdemeanor case, six jurors.

In a jury trial, after the jury is selected, the judge advises the jury of its role and the ground rules for the jury's participation in the trial. Once preliminary jury matters are settled, or at the beginning of a trial in a bench trial, each attorney has an opportunity to make an opening statement describing the case and what the attorney intends to prove.

Presentation of evidence

The heart of a trial is the presentation of evidence. Each side has an opportunity to present evidence; the plaintiff or prosecution goes first and must present sufficient evidence to prove his or her claims. Presentation of evidence is governed by the

A clerk swears in a witness in one of the state's circuit courts.

(Kathleen Sitter, LRB)

rules of evidence. A party may only present evidence that is relevant to the case. Certain types of evidence are not admissible even if relevant. Evidence obtained in the course of a privileged communication, such as between a doctor and patient, lawyer and client, or between spouses, is generally not admissible. Further, hearsay evidence, which is a statement by a witness reporting what the witness or another person said on a prior occasion, is generally not admissible. The judge is responsible for resolving questions of admissibility of evidence.

A party's presentation of evidence often consists of witness testimony, presentation of documents and perhaps of other tangible objects. Witnesses must testify under oath. The party that presents a witness has the first opportunity to ask questions of the witness under direct examination. The opposing party may then

cross-examine the witness, asking questions on any matter that is relevant to any issue in the case. Any further questioning of a witness after the initial direct examination and cross-examination is generally limited to the issues raised on direct or cross-examination. Lay witnesses may only testify as to matters on which they have personal knowledge. However, an expert witness, a person who is demonstrated to have specialized knowledge, skill, experience, training, or education, may provide opinion testimony of a technical, scientific, or other specialized nature, if such expert testimony is useful.

Like witness testimony, documents and tangible objects must be relevant in order to be admissible as evidence at trial. To present tangible evidence such as written material, voice recordings, or other objects, the party presenting must first show that it is what it is purported to be; for example, a note written by a specified person, or a tape recording of the voice of a specified person, or a photograph of a particular place.

If a party believes that certain evidence should not be admitted, the party must object to admission of the evidence before it is admitted. The judge may give the parties an opportunity to argue for or against admission, generally out of the hearing range of the jurors, and then will rule on whether the evidence is admissible. If a party does not make a timely objection to admissibility of evidence, the party generally loses the right to contest admission of the evidence and to challenge any result that is based on the evidence.

How a judge makes decisions

In the course of a case, a judge will make decisions not just on evidence, but on many issues that arise. Some decisions he or she can make without delay by applying his or her knowledge of the law to the facts at hand. Other questions require research. A trial judge may read appellate court opinions dealing with questions similar to the one that he or she must answer. Even if no appellate court has written a decision dealing with exactly the same question, the opinions may cover similar scenarios or provide guidance. In addressing the broad range of questions that arise in the course of a case, judges often consult a reference manual called the *Wisconsin Benchbook*. There are *Benchbooks* for criminal, civil, family, juvenile, and probate cases – all revised on an annual basis by teams of judges and court commissioners. Judges use the *Benchbooks* to guide their research. If case law does not provide a clear answer to the questions, a judge may ask the parties to submit written arguments, called briefs, explaining why a question should be answered in their favor and citing case law to back up their arguments.

After the plaintiff or state finishes presenting evidence, the defendant may argue to the court that the case should be dismissed because the other side has not proven its case. If the court rejects the defendant's motion or delays ruling on it, the defense may present evidence in the case.

Jury instructions

In a jury trial, after both sides have presented their evidence, the judge confers with the attorneys and determines the wording of questions for the jury as well as the judge's instructions for the jury. The court may submit a single question to the jury, essentially asking which party should prevail, or may submit multiple questions, each addressing a determinative fact in the case. For example, in a civil negligence case, the judge may ask the jury whether the defendant used ordinary care; whether the defendant's actions caused the plaintiff's injury; and if the defendant did not use ordinary care and did cause the plaintiff's injury, what amount of damages the plaintiff should be awarded. In a criminal case, the judge asks the jury to determine whether the prosecution proved every element of a crime. For example, in a theft case, the judge asks the jury to determine whether the defendant intentionally took property of another; whether the owner of the property did not consent to this; whether the defendant knew that the owner did not consent; and whether the defendant intended to deprive the owner permanently of the property. The jury's answers to the series of questions determine in a civil case whether the plaintiff or defendant wins, and in a criminal case, whether the defendant is guilty or not guilty. A committee of legal experts in Wisconsin publishes guidebooks of suggested jury instructions for both civil and criminal cases. These model instructions, provided online to all judges, may be modified to fit a specific case.

The jury box in the Lafayette County Courthouse awaits 12 citizens to exercise their role in the judicial process. Opposite page: The "Sword of Justice" greets defendants and officers of the court. *(Kathleen Sitter, LRB)*

In spoken and written instructions the judge advises the jurors of their responsibility to answer the questions and may give guidance on matters such as the burden of proof and determining the credibility of witnesses. The burden of proof includes both a burden of production (producing sufficient evidence that a jury or judge may find in the party's favor) and a burden of persuasion (the duty to convince the jury or judge of the party's view of the facts). The burden of production

is generally on the plaintiff or state, except for certain defense claims, such as that a criminal defendant is not guilty by reason of mental disease or defect. The burden of persuasion in a civil case is generally by the preponderance of the evidence, and in a criminal case it is usually beyond a reasonable doubt.

The verdict and damages or sentencing

In a civil case, five-sixths of the jurors may return a verdict. In a criminal case, all the jurors must unanimously agree on the verdict in order to find the defendant guilty. In a trial before a judge without a jury, the judge determines which party prevails. Even in a trial to a jury, the judge may disregard the jury's finding (except a judge cannot disregard a jury's not guilty finding in a criminal case) and direct a verdict for one party, although this rarely occurs.

In a civil case, the jury or judge usually awards damages to a prevailing plaintiff. The judge may also direct the losing party to reimburse the prevailing party for costs incurred in connection with the trial.

In a criminal case, the judge determines the sentence for a defendant who has been convicted of a crime. The sentence may consist of a fine or imprisonment or both, or the judge may place a defendant on probation instead of imposing a sentence. If the defendant violates conditions of probation established by the judge, the judge may subsequently impose a sentence. Sentencing must accomplish several things. It must incapacitate the offender so that he or she cannot commit additional crimes, and also punish and rehabilitate the offender. Most judges believe that sentencing is the toughest part of the job because of the difficulty in structuring a sentence that will adequately serve these purposes. Without a crystal ball, it is impossible to know whether lengthy incarceration, probation, or something in between will best meet the needs of the defendant, the victim, and society.

Personnel in the courtroom

The court relies on a number of highly skilled assistants who perform a variety of jobs during trials. A clerk of court maintains a docket sheet recording the events in each case, is the custodian of the court's case file, and assists the judge in managing jurors and scheduling future court dates. The court reporter is a stenographer who makes a record of all the words spoken in open court. Wisconsin is currently facing a shortage of court reporters and the courts are working to increase the number of people entering this profession and exploring recording court proceedings by electronic means when court

reporters are unavailable. The bailiff is in charge of security and maintaining order in the courtroom. Some bailiffs are deputy sheriffs while others are civilians. In some cases an interpreter is needed to assist in communications with parties or witnesses who do not speak English well or who require sign-language interpretation.

Focus on the role of court interpreters

The increasing number of non-native-English speakers in Wisconsin has focused attention on the judicial system's need for a pool of qualified court interpreters. A good court interpreter must not only be fluent in English and the other language he or she is translating, but also must understand terminology used in court. In 1999, the director of state courts appointed a multidisciplinary committee to study the need for and use of interpreters in Wisconsin's courts and to recommend improvements.

When the Committee to Improve Interpreting in Wisconsin Courts commenced its work, the state's courts had no means of evaluating the skills of people providing language interpretation and no ability to hold these individuals to accepted professional standards. The interpreters' skills varied widely, and, in some cases, people who were providing interpretation had conflicts of interest. Consider the following stories – just a small sample – told to the committee:

- an interpreter confused "hat" and "gloves" until corrected by an observer in the gallery;
- a judge asked a woman to interpret for the woman's husband during their divorce trial;
- a judge asked an arresting officer to interpret for a prisoner;
- an interpreter asked the non-English-speaking person to pay him, even though he was already being paid by the county.

The Supreme Court has since implemented the committee's recommendations for improvement. The court adopted standards for interpreters, which were developed by the committee, in its Code of Ethics. The court has also engaged in an effort to educate judges, attorneys, and court staff on how to recognize when an interpreter is needed, how to properly use interpreters, and how to provide oversight of interpreter performance.

The most important change arising out of the committee's work is a rigorous testing and certification process for interpreters. Only those who speak English and another language at the level of a highly educated native speaker and can demonstrate a clear understanding of legal terminology will be certified. The process includes a two-day training program focusing on court process and ethics, a multipart written exam, and a lengthy oral exam. Of the first class of 34 Spanish language interpreters who reached the oral exam phase, eight passed. The 25 percent pass rate exceeds the average national rate of 12 percent. These interpreters – the first to be certified in Wisconsin – were sworn in at a ceremony in the Supreme Court Hearing Room in May 2004. Another class of Spanish interpreters was sworn in several months later, and the first class of Hmong interpreters is moving through the process. A roster of certified interpreters has been developed and distributed not only to judges and attorneys, but also to the law enforcement community to ensure accurate interpretation at every stage of the criminal justice process.

Dane County Court – Taking the Oath of Office for Court Interpreters: ". . . I will interpret truly, accurately, completely, and impartially, in accordance with the standards prescribed by law, the code of ethics for court interpreters, and Wisconsin guidelines for court interpreting . . ." (Kathleen Sitter, LRB)

Jury Service in Wisconsin

Managing the jury system is a delicate balancing act for a court. A successful system is attentive to both the efficiency of the process and the jurors' level of satisfaction. Those who manage the system must supply sufficient numbers of jurors to try all matters before the court without wasting court resources or the time and good will of the jurors.

Each year, across Wisconsin, about 70,000 people are summoned for jury duty. They are selected at random by the clerk of the circuit court for each county. Clerks primarily use lists provided by the state Department of Transportation (DOT) of individuals who hold driver's licenses or identification cards. Because the selection process must be random, no one may volunteer for jury duty. After the clerk determines how many jurors will be needed for a given period, a computer program randomly selects that number of names and juror questionnaires are sent out to those people. When the questionnaires are returned, they are reviewed to ensure that each potential juror is eligible under law to serve.

Jurors must be United States citizens, residents of Wisconsin, and residents of the circuit where they are summoned in order to serve. They must be at least 18 years of age and able to understand the English language.

When the people who have been summoned report to the local courthouse, they are checked in, provided with an orientation, and taken to the appropriate courtroom for the final selection process.

An American Sign Language interpreter signs for a juror at a jury orientation at the Milwaukee County Courthouse. People with disabilities regularly serve on Wisconsin juries and are accommodated in a variety of ways. At the podium is Jury Services Coordinator Lori Watson Schumann. (Kathleen Sitter, LRB)

The final step in the selection process is called *voir dire*, which is a French phrase meaning "to speak the truth." This involves the judge and attorneys questioning the jurors, both as a group and as individuals, to try to develop a jury panel that both sides believe will be fair and impartial. The judge may ask prospective jurors whether they know any of the parties, attorneys, or witnesses in a case, and will explore whether the prospective jurors have any prejudice with respect to anyone they may know. The judge also will ask the prospective jurors if there are any reasons they cannot serve. After the judge concludes his or her questioning, the attorneys have an opportunity to question the prospective jurors.

Attorneys winnow the jury panel through the use of "for cause" and "peremptory" challenges. If an attorney challenges a juror for cause, he or she must provide a reason. There is no limit to the number of challenges made for cause. If an attorney claims a peremptory challenge, the juror is excused and the reason need not be given. Peremptory challenges may not be based upon race. There are a limited number of peremptory challenges allowed. After the jurors have been selected, the judge will instruct the members of the jury regarding the case and the rules of conduct.

Next Section

These rules of conduct are very specific and important to the fairness of the process. Generally, they include prohibitions on discussing the case with anyone, including family, the court staff or other jurors (until it's time for deliberation), watching or reading news accounts of the trial, and conducting one's own investigation by looking at the Internet or going to places involved in the case, or consulting maps or calendars. All these rules are designed to ensure that the jurors reach a decision based only upon the law and the evidence presented in court.

Jury Diversity

In June 1996, the *Kenosha News* ran a story on a drug trial in that county's circuit court. The story began as follows:

A black defendant glanced at the white crowd from which a jury would be selected to decide her fate on a drug charge. She then asked her attorney, "Why aren't there any black people here?" [The attorney] scanned the 135 potential jurors filling the Kenosha Circuit courtroom and found no African-Americans.

Following her conviction, the woman based an appeal on Kenosha's jury selection system, but lost.

Efforts to ensure that Wisconsin juries reflect the racial and ethnic make-up of each county's population are many and varied – as are opinions on whether this is necessary. In that same *Kenosha News* story, criminal defense lawyers differed on the importance of a racially mixed jury. One lawyer said: "Diversity gives a sense of fairness to litigants. You wouldn't want, for example, only members of one occupation, political party or religion on a jury." But others opined that jurors' ability to understand testimony and arrive at a verdict based upon the facts and the law is all that matters. Another lawyer told the newspaper that he prefers white juries for his black clients, based upon conversations with blacks who have served as jurors. "Black jurors hold black defendants to a higher standard," the lawyer said. "Black jurors usually are in the middle class and see a black defendant as the bad apple."

While it is unreasonable to expect any one jury to represent the racial mix of a county, it is reasonable to expect that, over time, a county's jurors will be representative of the county population. In an effort to improve jury diversity, the legislature has given the courts the ability to tap different source lists in addition to the Department of Transportation list. Utility company customer lists, phone books, voter registration lists, lists of people receiving public assistance, and lists of high school graduates are among those acceptable for use by clerks who find that their DOT sampling has not provided an adequate representation of minorities. However, few Wisconsin counties actually use the supplemental lists, because they have not proven useful.