SM-12 JOHN DOE PROCEEDINGS

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Scope

The Wisconsin John Doe proceeding is a criminal investigatory inquiry provided for by § 968.26. Its purpose is to ascertain whether a crime has been committed and by whom. Only a judge may conduct a John Doe proceeding. The judge has the power to subpoena and examine witnesses and to determine the extent of the examination.

The procedural and legal aspects of a John Doe proceeding are outlined at CR-46, Wisconsin Judicial Benchbook, Volume I, Criminal and Traffic. This Special Material provides scripted material that is not included in the Benchbook.

I. Instruction to a Witness[1]

After administering the oath or affirmation, the judge should address the witness as follows or direct the prosecutor to do so.[2]

A. Introduction

"You are advised that you are appearing in a John Doe proceeding before (me) (Judge _____) as Circuit Court Judge for _____ County.

"Under Wisconsin law, the circuit judge has the power to subpoena witnesses and compel testimony before this John Doe. You are directed to answer all questions put to you, remembering your oath or affirmation.

"If you believe that a truthful answer to any question asked of you would incriminate you, that is, subject you to criminal prosecution, you may refuse to answer the question on the grounds that it may incriminate you.[3] Do you understand that?

"Do you understand that your answers to questions put to you may be used against you by this John Doe or in another legal proceeding?

"Do you understand that if you testify falsely you may be criminally prosecuted for perjury or false swearing committed during your testimony before this John Doe proceeding?[4]

"Under Wisconsin law, several types of confidential communications are privileged. These include[5] communications between spouses, between a health care provider and patient, between attorney and client, and between a person and a member of the clergy. Do you understand that you may refuse to answer any question asked of you if it would require you to reveal conversations which are privileged by law?

"Do you understand that there are no other lawful grounds upon which you may refuse to answer questions before this John Doe?"

B. Right to Counsel[6]

"You are also advised that you have the right to have an attorney present with you during your testimony. Further, you may confer with your attorney during your testimony. However, your attorney will not be allowed to ask you questions, cross-examine other witnesses, or argue before the judge. Do you understand that?"

[IF THE WITNESS APPEARS WITH COUNSEL, READ THE "INSTRUCTION TO COUNSEL" PROVIDED BELOW AFTER COMPLETING THE INSTRUCTION TO THE WITNESS.]

[IF THE WITNESS APPEARS WITHOUT COUNSEL, ADD THE FOLLOWING.]

"You are appearing before this John Doe without an attorney. Do you understand that (here identify the prosecutors) represent the state of Wisconsin and may not and cannot act as your attorney? Do you understand that if you do not have an attorney but wish to consult with one about these proceedings or have an attorney appear with you, you will be required to return and testify at a future time? Do you wish to have an attorney present with you at this time? If not, has anyone made any threats or promises to get you to give up your right to consult with an attorney or have an attorney appear with you during this John Doe?"[7]

C. Conclusion

"Your testimony at this proceeding will be recorded word-for-word and will be transcribed. Do you understand that?

"I am giving you a copy of the instruction which I have just read to you. Do you acknowledge that you have received a copy of this instruction?"

II. Instruction to Attorney Representing a John Doe Witness

The following should be read to the attorney who appears with a witness subpoenaed before the John Doe.[8]

"(Name of witness) appears with Attorney _____. Attorney _____, you are advised that you are subject to the restrictions set forth in § 968.26(3)(c) of the Wisconsin Statutes.

"Section 968.26(3)(c) allows a witness subpoenaed before a John Doe proceeding to have counsel present at the examination. However, you may not examine your client, cross-examine other witnesses, or argue before the judge.

"If your client wishes to consult with you before answering any question, your client may do so off the record."

III. Order of Secrecy[9]

[ADD THE FOLLOWING IF A SECRET JOHN DOE PROCEEDING HAS BEEN AUTHORIZED.]

"Under Wisconsin law, a circuit judge may order that a John Doe proceeding be secret. That has been done in this case. You are ordered to maintain the

secrecy of this John Doe proceeding and to inform no one of the questions asked, the answers given, or any other matters observed or heard during this proceeding. Violation of this secrecy order may be subject to a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both.[10]

"You are now being given a copy of the Order of Secrecy. Do you acknowledge receipt of this Order of Secrecy?"

IV. Inquiry When a Witness Claims the Privilege Against Self-Incrimination; Grants of Immunity

The judge presides over proceedings relating to the assertion of the privilege against self-incrimination. Section 968.26(3)(d) provides: "A court, on the motion of a district attorney, may compel a person to testify or produce evidence under s. 972.08(1). The person is immune from prosecution as provided in s. 972.08(1), subject to the restrictions under s. 972.085." Note that while a John Doe proceeding is conducted by a judge, the compelling of testimony and granting of immunity is undertaken by a court. See Special Material 55 for recommended procedures for compelling testimony, evaluating a claim of the privilege against self-incrimination, and the granting of immunity.

COMMENT

SM-12 was originally published in 1974, withdrawn in 1993, and republished in 1995. It was revised in 1999, 2007, 2009, 2010, and 2011. This revision reflects extensive changes to John Doe procedure made by 2015 Wisconsin Act 64 and was approved by the Committee in June 2019.

This Special Material was withdrawn in 1993 because procedures for John Doe proceedings are outlined at CR 46, Wisconsin Judicial Benchbook, Volume I, Criminal and Traffic. It was restored after being revised to provide scripted material that is not included in the Benchbook.

2015 Wisconsin Act 64 [effective date: October 25, 2015] made extensive changes in the standards and procedures for John Doe investigations. Among the most significant:

- the crimes that may be investigated are limited to specified felonies
    - Class A, B, C, or D felony under chs. 940 to 948 or 961 – § 968.26(1b)(a)1.
    - violation of listed statutes if a Class E, F, G, H, or I felony penalty applies – § 968.26(1b)(a)2.
    - other offenses specified in § 968.26(1b)(a)3., 4., or 4m.
    - crimes committed by a law enforcement officer, corrections officer, or state probation, parole, or extended supervision officer if the individual was engaged in his or her official duties at the time – § 968.26(1b)(a)5.

- secrecy orders apply only to the judge, the district attorney or other prosecuting attorney who participates in the proceeding, law enforcement personnel admitted to the proceeding, an interpreter who participates in the proceeding, or a reporter who makes or transcribes a record of a proceeding. See footnote 7, below.

- the proceeding may not investigate a crime that was not part of the original request unless "a majority of judicial administrative district chief judges find good cause to add specified crimes and the identification of the vote of each judge is available to the public" – § 968.26(5)(b)

- there is a six-month time limit – § 968.26(5)(a) – which "may be extended only if a majority of judicial administrative district chief judges find good cause for the extension and identification of the vote of each judge is available to the public" – § 968.26(5)(a)2.

- reserve judges may not conduct the proceeding – § 968.26 (1b)(b)

- a judge may issue a search warrant relating to a John Doe proceeding only if the judge is not presiding over that proceeding – § 968.26(5)(c)

Section 968.26 was amended by 2009 Wisconsin Act 24 to provide different procedures for John Doe requests made by district attorneys and requests made by other persons. If a district attorney makes a request, "the judge shall convene a hearing . . ." Section 968.26(1m). If a person other than a district attorney makes a request, "the judge shall refer the complaint to the district attorney . . ." Section 968.26(2)(am). The district attorney must decide within 90 days whether to issue charges or refuse to issue charges. If the district attorney refuses, he or she must forward the records and explanation of the refusal to the "judge in whose jurisdiction the crime was allegedly committed." Section 968.26(2)(b). The judge "shall convene a proceeding . . . if he or she determines that a proceeding is necessary to determine if a crime has been committed." Section 968.26(2)(b).

In State ex rel. Reimann v. Circuit Court, 214 Wis.2d 605, 622, 571 N.W.2d 385 (1997), the Wisconsin Supreme Court held that:

> . . . § 968.26 imposes a threshold requirement on persons filing petitions for John Doe proceedings. Before a circuit court judge's obligation to conduct an examination . . . is

> triggered, the John Doe complainant must establish that he or she has "reason to believe" that a crime has been committed
> . . . [A] John Doe complainant must do more than merely allege that a crime has been committed
> . . . [the] complainant . . . must allege objective, factual assertions sufficient to support a reasonable belief that a crime has been committed.

If the Riemann test is met, the John Doe judge does not have the authority to analyze the merits of the case. Even if the judge "applied his common sense and reasonably concluded that conducting a John Doe would be a waste of time," the John Doe must be held. The John Doe judge is not to assess credibility or choose between competing inferences. State ex rel. Williams v. Fiedler, 2005 WI App 91, ¶2, 282 Wis.2d 486, 698 N.W.2d 294.

The Wisconsin Court of Appeals reviewed § 968.24 as amended by 2009 Wisconsin Act 24 in Naseer v. Miller, 2010 WI App 142, 329 Wis.2d 724, 793 N.W.2d 209:

> We therefore conclude that the same interpretation of the "reason to believe" language relating to the prior statute's examination duty should also apply to the amended statute's referral duty. That is, under the amended statute, a judge has a mandatory duty to refer a John Doe complaint to the district attorney only if the four corners of the complaint provide a sufficient factual basis to establish an objective reason to believe that a crime has been committed in the judge's jurisdiction. ¶11.

Suppression of testimony is not required by statute or constitutional principles where a witness was questioned at the John Doe proceeding by a law enforcement officer who was not licensed to practice law. State v. Noble, 2002 WI 64, 253 Wis.2d 206, 646 N.W.2d 38.

John Doe proceedings are sometimes used in an attempt to secure the issuance of charges where the district attorney has refused to charge. The Wisconsin Supreme Court has upheld the constitutionality of the use of the John Doe statute in that situation. See State v. Unnamed Defendant, 150 Wis.2d 352, 441 N.W.2d 696 (1989). Also see State v. Schober, 167 Wis.2d 371, 481 N.W.2d 689 (Ct. App. 1992), holding that a criminal complaint resulting from a John Doe is subject to the regular standard for deciding whether to grant a prosecution motion to dismiss – whether dismissal "is in the public interest."

In State ex rel. Hipp v. Murray, 2008 WI 67, 310 Wis.2d 342, 750 N.W.2d 873, the court held that a John Doe judge has exclusive authority to subpoena witnesses in a John Doe proceeding; the clerk's general authority to issue subpoenas under § 885.01(1) does not apply. The court also held that the subpoenas should have been issued in this case, but "saved for another day" the issue whether a John Doe judge is required to subpoena every witness that a John Doe petitioner requests. 2008 WI 67, ¶52. [A motion for reconsideration was denied at 2008 WI 118, 314 Wis.2d 67, 756 N.W.2d 34.]

The issue "saved for another day" in State ex rel. Hipp v. Murray, supra, was addressed in State ex rel. Robins v. Madden, 2009 WI 46, 317 Wis.2d 342, 766 N.W.2d 837:

> ¶2 The issue we address today is whether the judge in a John Doe hearing is required under Wis. Stat. § 968.26 to examine all the witnesses a complainant produces and to issue subpoenas to all the witnesses a complainant wishes to produce. We read the statute as extending judicial discretion in a John Doe hearing not only to the scope of a witness's examination, but also to whether a witness need testify at

all. Accordingly, we hold that a judge is not required by § 968.26 to examine all the witnesses a complainant produces at a John Doe hearing, or to subpoena all the witnesses a complainant wishes to produce.

1. The 2010 version of SM-12 included a warning to a target witness:

> You are now advised that your testimony given here can be used against you in criminal proceedings and to support the issuance of a warrant for your arrest. You can claim the privilege against self-incrimination and you have the right to have counsel present during your testimony and to consult your counsel before answering.

Both federal and state courts have rejected the need to provide investigatory targets with special warnings. The advice given all witnesses adequately apprises them of the privilege against self-incrimination and other rights. United States v. Washington, 431 U.S. 181, 189 (1977); Ryan v. State, 79 Wis.2d 83, 96, 255 N.W.2d 910 (1977).

2. Practice apparently varies with respect to whether the judge reads the advice personally or allows the prosecutor to do so. The material has been drafted to be usable in either situation.

3. In State v. Hanson, 2019 WI 63, ¶35, 387 Wis.2d 233, 928 N.W.2d 607, the Wisconsin Supreme Court concluded that Miranda warnings are not required for a John Doe witness, but recommended that the advice contained here be given:

> A witness at a John Doe proceeding is not subject to custodial interrogation and therefore Miranda warnings are not required. Although we do not require Miranda warnings be given at John Doe proceedings, we recommend a John Doe judge address a witness in accordance with Special Materials 12.

The court noted that this is the case even if the witness happens to be in custody on charges unrelated to the John Doe.

4. Failure to give the witness this advice will not preclude a perjury prosecution. See United States v. Wong, 431 U.S. 174, 178 (1977). However, providing the advice may impress upon the witness the seriousness and importance of the John Doe and may reinforce the obligation to testify truthfully.

5. The list of privileges is not exhaustive. See, for example, § 905.045 Domestic violence or sexual assault advocate-victim privilege. Rather, it is intended to give the witness an idea of what types of communications may be privileged. If there is reason to believe that other privileges may apply, additional description should be given.

6. The right to counsel is provided in § 968.26(3)(c): "Any witness examined under this section may have counsel present at the examination but the counsel shall not be allowed to examine his or her client, cross-examine other witnesses or argue before the judge."

7. If it appears to be necessary to take a more formal waiver of counsel at this point, see Special Material 30 which provides a model for a full waiver.

"A John Doe judge has the authority to disqualify counsel for a witness in a John Doe proceeding but must ensure that there is a record of that decision for review." Unnamed Persons Numbers 1, 2, and 3 v. State, 2003 WI 30, 260 Wis.2d 653, 660 N.W.2d 260.

8. See note 5, supra.

9. The rules relating to secrecy orders were significantly changed by 2015 Wisconsin Act 64. The judge's general authority to order that the proceeding be secret was eliminated and replaced by § 968.26(4)(a) which provides:

- a secrecy order may be issued upon a showing of good cause by the district attorney
- a secrecy order applies only to:
  - the judge
  - the district attorney or other prosecuting attorney who participates in the proceeding
  - law enforcement personnel admitted to the proceeding
  - an interpreter who participates in the proceeding
  - a reporter who makes or transcribes a record of a proceeding
- the order may not apply to any other person

The scripted material formerly provided in SM-12 was clearly directed at a witness; it has been revised to reflect the Act 64 changes.

Any secrecy order shall be terminated if any person applies to the judge and establishes that good cause no longer exists – § 968.26(4)(b). If a complaint is filed following a proceeding in which a secrecy order was entered, the order is terminated at the initial appearance and § 971.23 governs disclosure of information from the proceeding – § 968.26(4)(c).

10. See § 968.26(4)(d), created by 2015 Wisconsin Act 64. Prior law provided that violation of the secrecy order was punished as contempt of court.

