



## WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

**2009 Assembly Bill 78**

**Assembly Amendment 2**

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A “John Doe” proceeding is essentially an inquest where a judge determines if a crime has been committed and by whom. Section 968.26, Stats. Any person, not just a district attorney, may complain to a judge that he or she has reason to believe that a crime has been committed. Under current interpretation of s. 968.26, a judge has limited discretion, upon receiving a complaint, whether to convene a John Doe proceeding and, following a proceeding, whether to issue charges.

Assembly Bill 78 revises John Doe proceedings where a person who is not a district attorney complains to a judge that he or she has reason to believe that a crime has been committed. Under the bill, the judge must refer such complaints to the district attorney and only if the district attorney refuses to issue charges does the judge determine if a John Doe proceeding should be convened. The bill provides the judge more discretion than under current law, both for deciding whether to convene a John Doe proceeding and, if a John Doe proceeding is convened, deciding whether to issue a criminal complaint.

The bill also extends the civil litigation indemnification protections of s. 895.46, Stats., to a state officer or employee who is the subject of a John Doe proceeding for acting within his or her official capacity, if found to be acting within the scope of employment and if the Attorney General determines the officer or employee acted in good faith. In addition, if a criminal action is commenced as a result of a John Doe proceeding, the officer or employee is extended the s. 895.46 protections “if not found guilty,” regardless of the Attorney General’s good faith determination. The protection provided includes the payment of reasonable attorney fees in defending the criminal action and payment of costs or “fines” arising out of the criminal action.

### **Assembly Amendment 2**

1. Assembly Amendment 2 replaces the bill’s indemnification provisions and provides for reimbursement of reasonable attorney fees and costs incurred by a state officer or employee in connection with a John Doe proceeding and a criminal action arising from a John Doe proceeding if the

officer or employee was acting within the scope of employment and the officer or employee is not convicted of a crime arising from conduct that is the subject of a criminal complaint issued as a result of the John Doe proceeding. (See item 1 of the amendment.)

(Changes to the bill's provisions in this regard include: (a) limiting the indemnification protections to John Doe proceedings initiated on a complaint by someone other than a district attorney; (b) eliminating the requirement that the Attorney General determine the officer or employee "acted in good faith"; (c) for indemnification of reasonable attorney fees and costs incurred in connection with a John Doe proceeding, requiring that the employee or officer is not convicted of a crime arising from the conduct that is the subject of any criminal complaint issued as a result of the John Doe proceeding; and (d) for indemnification of reasonable attorney fees and costs incurred in defending a criminal complaint issued as a result of a John Doe proceeding, requiring that the officer or employee "is not convicted of a crime arising from the conduct that is the subject of the criminal complaint," rather than "is not found guilty in the criminal action commenced as a result of" the John Doe proceeding; and removing reference to payment of any "fines" arising out of the criminal action.)

2. The amendment provides that if the complaint made to the judge relates to the conduct of the district attorney, the judge then refers the complaint to another prosecutor (rather than the district attorney). (See items 3 and 11 of the amendment.)

3. Under the bill, the district attorney to whom a complaint has been referred by a judge must, within 90 days of receiving the referral, either issue charges or refuse to issue charges. The amendment authorizes the judge to extend the 90-day period for "cause shown." (See item 8 of the amendment.)

4. Under the bill, if the district attorney refuses to issue charges following a referral of a complaint by a judge, the district attorney must forward to the judge all law enforcement investigative reports on the matter. The amendment clarifies that the district attorney is only to forward to the judge those law enforcement reports that "are in the custody of the district attorney." The amendment expressly allows a judge to require a law enforcement agency to provide any investigative reports that the law enforcement agency has on the matter. (See items 9 and 10 of the amendment)

### **Legislative History**

*Assembly Amendment 2* was offered by Representative Gundrum. The Assembly Committee on Judiciary and Ethics recommended adoption of the amendment by a vote of Ayes, 8; Noes, 2. The committee recommended passage of Assembly Bill 78, as amended, by a vote of Ayes, 9; Noes, 1.

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