

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-1210/1dn  
JEO:jlg:hmh

Monday, January 4, 1999

This is a redraft of assembly substitute amendment 2 to 1997 Assembly Bill 452. Please note the following when reviewing this draft:

1. This draft deletes the amendment of s. 969.07, stats., because, on further reflection, the amendment of that statute is unnecessary.
2. Like ASA 2 to 1997 AB-452, this draft does *not* restrict the use of a summons under s. 968.04, stats., which would avoid the arrest of the person and simply require the person to show up in court to answer the charge at some future date.
3. The application of proposed s. 968.077 might be unconstitutional if, in a particular case, there is an unreasonable delay in setting conditions of release.

A person arrested for and charged with a crime and awaiting trial has a right to release, albeit under reasonable conditions. Article I, section 8 (2), Wisconsin Constitution; compare *Rohl v. State*, 90 Wis. 2d 18, 53 (Ct. App. 1979) (right to bail). At the same time, however, the right to bail is not absolute, and an arrested person does not have an automatic right to immediate bail, though he or she does have the right not to be denied bail arbitrarily. *Syarto v. Baker*, 500 F. Supp. 888, 890-91 (E.D. Wis. 1980), citing *Mastrian v. Hedman*, 326 F. 2d 708 (8th Cir. 1964), *cert. denied*, 360 U.S. 965, and other cases. See also *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095 (1987).

Proposed s. 968.077 denies release only for a limited time (until the person sees a judge who sets conditions of release under ch. 969) and not for the entire time before trial. The person will have to be taken before a judge "within a reasonable time". This is because a person to whom proposed s. 968.077 applies has been arrested and is therefore also subject to s. 970.01 (1), stats., which provides that "[a]ny person who is arrested shall be taken within a reasonable time before a judge in the county in which the offense was alleged to have been committed." Thus, the effect of proposed s. 968.077 is somewhat comparable to s. 969.07, stats., which allows a person to be held in custody under certain limited circumstances until the initial appearance. (This statute has not been directly ruled on in a reported court decision, but the attorney general has implied that there is no trouble with it. 75 *Opinions of the Attorney General* 209, 210-11 (1986). See also *Demmith v. Wisconsin Judicial Conference*, 166 Wis. 2d 649, 660-62, 669-71 (1992).)

Section 970.01 (1), stats., "does not provide for a specific time frame in which this [initial] appearance must take place." *State v. Koch*, 175 Wis. 2d 684, 696, *cert. denied*,

510 U.S. 880, 114 S. Ct. 221 (1993). Instead, what is a “reasonable time” depends initially on whether the person was arrested with or without a warrant, as follows:

A) If the person was arrested *without* a warrant, the United States Supreme Court has said that there must be a probable cause determination by a judge within 48 hours of the arrest, barring extraordinary circumstances. *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S. Ct. 1661 (1991). In *Koch*, the Wisconsin supreme court concluded that the *Riverside* 48-hour rule is applicable in Wisconsin. *Koch*, 175 Wis. 2d at 696. Thus, for a warrantless arrest, a reasonable time under s. 970.01 (1), stats., will generally have to be within 48 hours.

B) If the person was arrested *with* a warrant, what is a reasonable time under s. 970.01 (1), stats., will depend on the circumstances of the particular case. The *Riverside* 48-hour rule does not apply to arrests with a warrant because, in issuing the arrest warrant, a judge has already made a determination of probable cause to arrest the person. *Koch*, 175 Wis. 2d at 696 n.7; compare *Wagner v. State*, 89 Wis. 2d 70, 76 (1979).

Thus, in a case in which proposed s. 968.077 applies and in which the defendant was arrested *without* a warrant, he or she will probably be denied release for less than 48 hours because under *Riverside* and *Koch* he or she will generally have an initial appearance within that time. However, if the defendant was arrested with a warrant, the timing of the initial appearance is judged according to the circumstances of the case, which, in addition to the person’s right to reasonable release, now include the fact that the person can’t be released until a court sets conditions of release. (Of course, nothing in proposed s. 968.077 prohibits a court from setting conditions of release *before* the initial appearance is held.)

Please let me know if you have any questions or changes.

Jefren E. Olsen  
Legislative Attorney  
266-8906