CHAPTER 967

CRIMINAL PROCEDURE — GENERAL PROVISIONS

967.01 Title and effective date. Chapters 967 to 979 may be referred to as the criminal procedure code and shall be interpreted as a unit. Chapters 967 to 979 shall govern all criminal proceedings and is effective on July 1, 1970. Chapters 967 to 979 apply in all prosecutions commenced on or after that date. Prosecutions commenced prior to July 1, 1970, shall be governed by the law existing prior thereto.

History: 1979 c. 89.

967.02 Words and phrases defined. In chs. 967 to 979, unless the context of a specific section manifestly requires a different construction:

(1) "Clerk" means clerk of circuit court of the county including the clerk's deputies.

(2) "Department" means the department of corrections, except as provided in s. 975.001.

(3) "Bail" means the amount of money set by the court which is required to be obligated and secured as provided by law for the release of a person in custody so that the person will appear before the court in which the person's appearance may be required and that the person will comply with such conditions as are set forth in the bail bond.

(4) "Bond" means an undertaking either secured or unsecured entered into by a person in custody by which the person binds himself or herself to comply with such conditions as are set forth therein.

(5) "Law enforcement officer" means any person who by virtue of the person's office or public employment is vested by law with the duty to maintain public order or to make arrests for crimes while acting within the scope of the person's authority.

(6) "Judge" means judge of a court of record.

(7) "Court" means the circuit court unless otherwise indicated.

(8) "Judgment" means an adjudication by the court that the defendant is guilty or not guilty.

History: 1971 c. 298; 1977 c. 323, 449; 1979 c. 89; 1989 a. 31; 1993 a. 486; 1995 a. 27; 1997 a. 27.

John Doe judge is not equivalent of a court and John Doe proceeding is not a proceeding in court of record. State v. Washington, 83 W (2d) 808, 266 NW (2d) 597 (1978).

967.03 District attorneys. Wherever in chs. 967 to 979 powers or duties are imposed upon district attorneys, the same powers and duties may be discharged by any of their duly qualified deputies or assistants.

History: 1979 c. 89.

967.04 Depositions in criminal proceedings. (1) If it appears that a prospective witness may be unable to attend or prevented from attending a criminal trial or hearing, that the prospective witness's testimony is material and that it is necessary to take the prospective witness's deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion and notice to the parties order that the prospective witness's testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If a witness is committed pursuant to s. 969.01 (3), the court shall direct that the witness's deposition be taken upon notice to the parties. After the deposition has been subscribed, the court shall discharge the witness.

(2) The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time. Upon request of all defendants, unless good cause to the contrary is shown, the court may order that a deposition under this section be taken on the record by telephone or live audiovisual means.

(3) A deposition shall be taken as provided in civil actions. At the request of a party, the court may direct that a deposition be taken on written interrogatories as provided in civil actions.

(4) (a) If the state or a witness procures such an order, the notice shall inform the defendant that the defendant is required to personally attend at the taking of the deposition and that the defendant's failure so to do is a waiver of the defendant's right to face the witness whose deposition is to be taken. Failure to attend shall constitute a waiver unless the defendant was physically unable to attend.

(b) If the defendant is not in custody, the defendant shall be paid witness fees for travel and attendance. If the defendant is in custody, the defendant's custodian shall, at county expense, produce the defendant at the taking of the deposition. If the defendant is in custody, leave to take a deposition on motion of the state shall not be granted unless all states which the custodian will enter with the defendant in going to the place the deposition is to be taken have conferred upon the officers of this state the right to convey prisoners in and through them.

(5) (a) At the trial or upon any hearing, a part or all of a deposition (so far as otherwise admissible under the rules of evidence) may be used if it appears: That the witness is dead; that the witness is out of state, unless it appears that the absence of the witness was procured by the party offering the depositions; that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena.

(b) Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only part of a deposition is offered in evidence by a party, an adverse party may require the offering party to offer all of it which is relevant to the part offered and any party may offer other parts.

(6) Objections to receiving in evidence a deposition may be made as in civil actions.

(7) (a) In any criminal prosecution or any proceeding under ch. 48 or 938, any party may move the court to order the taking of a videotaped deposition of a child who has been or is likely to be called as a witness. Upon notice and hearing, the court may issue

an order for such a deposition if the trial or hearing in which the child may be called will commence:

1. Prior to the child's 12th birthday; or

2. Prior to the child's 16th birthday and the court finds that the interests of justice warrant that the child's testimony be prerecorded for use at the trial or hearing under par. (b).

(b) Among the factors which the court may consider in determining the interests of justice are any of the following:

1. The child's chronological age, level of development and capacity to comprehend the significance of the events and to verbalize about them.

2. The child's general physical and mental health.

3. Whether the events about which the child will testify constituted criminal or antisocial conduct against the child or a person with whom the child had a close emotional relationship and, if the conduct constituted a battery or a sexual assault, its duration and the extent of physical or emotional injury thereby caused.

4. The child's custodial situation and the attitude of other household members to the events about which the child will testify and to the underlying proceeding.

5. The child's familial or emotional relationship to those involved in the underlying proceeding.

6. The child's behavior at or reaction to previous interviews concerning the events involved.

7. Whether the child blames himself or herself for the events involved or has ever been told by any person not to disclose them; whether the child's prior reports to associates or authorities of the events have been disbelieved or not acted upon; and the child's subjective belief regarding what consequences to himself or herself, or persons with whom the child has a close emotional relationship, will ensue from providing testimony.

8. Whether the child manifests or has manifested symptoms associated with posttraumatic stress disorder or other mental disorders, including, without limitation, reexperiencing the events, fear of their repetition, withdrawal, regression, guilt, anxiety, stress, nightmares, enuresis, lack of self−esteem, mood changes, compulsive behaviors, school problems, delinquent or antisocial behavior, phobias or changes in interpersonal relationships.

9. The number of separate investigative, administrative and judicial proceedings at which the child's testimony may be required, the likely length of time until the last such proceeding, and the mental or emotional strain associated with keeping the child's recollection of the events witnessed fresh for that period of time.

10. Whether a videotaped deposition would reduce the mental or emotional strain of testifying and whether the deposition could be used to reduce the number of times the child will be required to testify.

(8) (a) If the court orders a deposition under sub. (7), the judge shall preside at the taking of the deposition and enforce compliance with the applicable provisions of ss. 885.44 to 885.47. Notwithstanding s. 885.44 (5), counsel may make objections and the judge shall make rulings thereon as at trial. The clerk of court shall keep the certified original videotape deposition under sub. (7) in a secure place. No person may inspect or copy the deposition except by order of the court upon a showing that inspection or copying is required for editing under s. 885.44 (12) or for the investigation, prosecution or defense of the action in which it was authorized or the provision of services to the child.

(b) If the court orders a videotape deposition under sub. (7), the court shall do all of the following:

1. Schedule the deposition on a date when the child's recollection is likely to be fresh and at a time of day when the child's energy and attention span are likely to be greatest.

2. Schedule the deposition in a room which provides adequate privacy, freedom from distractions, informality and comfort appropriate to the child's developmental level.

3. Order a recess whenever the energy, comfort or attention span of the child or other circumstances so warrant.

4. Determine that the child understands that it is wrong to tell a lie and will testify truthfully if the child's developmental level or verbal skills are such that administration of an oath or affirmation in the usual form would be inappropriate.

5. Before questioning by the parties begins, attempt to place the child at ease, explain to the child the purpose of the deposition and identify all persons attending.

6. Allow any questioner to have an adviser to assist the questioner, and upon permission of the judge, to conduct the questioning.

7. Supervise the spatial arrangements of the room and the location, movement, and deportment of all persons in attendance.

8. Allow the child to testify while sitting on the floor, on a platform, on an appropriately sized chair, or on the lap of a trusted adult, or while moving about the room within range of the visual and audio recording equipment.

9. Permit the defendant to be in a position from which the defendant can communicate privately and conveniently with counsel.

10. Upon request, make appropriate orders for the discovery and examination by the defendant of documents and other evidence in the possession of the state which are relevant to the issues to be covered at the deposition at a reasonable time prior thereto.

11. Bar or terminate the attendance of any person whose presence is not necessary to the taking of the deposition, or whose behavior is disruptive of the deposition or unduly stressful to the child. A reasonable number of persons deemed by the court supportive of the child or any defendant may be considered necessary to the taking of the deposition under this paragraph.

(9) In any criminal prosecution or juvenile fact−finding hearing under s. 48.31 or 938.31, the court may admit into evidence a videotaped deposition taken under subs. (7) and (8) without an additional hearing under s. 908.08. In any proceeding under s. 304.06 (3) or 973.10 (2), the hearing examiner may order and preside at the taking of a videotaped deposition using the procedure provided in subs. (7) and (8) and may admit the videotaped deposition into evidence without an additional hearing under s. 908.08.

(10) If a court or hearing examiner admits a videotaped deposition into evidence under sub. (9), the child may not be called as a witness at the proceeding in which it was admitted unless the court or hearing examiner so orders upon a showing that additional testimony by the child is required in the interest of fairness for reasons neither known nor with reasonable diligence discoverable at the time of the deposition by the party seeking to call the child. The testimony of a child who is required to testify under this subsection may be taken in accordance with s. 972.11 (2m), if applicable.

History: 1983 a. 197; 1985 a. 262; Sup. Ct. Order, 141 W (2d) xiii (1987); 1989 a. 31; 1993 a. 486; 1995 a. 77; 1997 a. 252, 319.

Judicial Council Note, 1985: Subs. (7) to (10) replace prior sub. (7) and ss. 967.041 to 967.043. See the legislative purpose clause in Section 1 of this act.

Like the prior statute and rules, these provisions authorize the court or hearing examiner to order the taking of a videotape deposition from a child likely to be called as a witness in a criminal trial or a hearing in a criminal, juvenile, probation revocation or parole revocation case, and to admit that deposition into evidence at such a trial or hearing.

This revision repeals statutory language limiting such videotape depositions to cases where there is a substantial likelihood that the child would otherwise suffer severe mental or emotional strain. It authorizes such depositions to be taken whenever the trial or hearing at which the evidence is to be offered will commence before the child's 16th birthday. If it will commence after the child's 12th birthday, however, the court or hearing examiner must also determine whether the interests of justice warrant the taking and use of the child's testimony in this fashion. A nonexhaustive list of factors to be considered in making this determination is provided in sub. (7) (b), substantially similar to prior s. 967.041 (3), stats.

Sub. (8) (a) is substantially similar to prior ss. 967.042 (3) and (4) and 967.043. Sub. (8) (b) is substantially similar to prior s. 967.042 (2).

Sub. (10) is new. It prohibits the child from being called as a witness at the trial or hearing in which the videotape statement is admitted into evidence unless fairness

so requires for reasons not known or reasonably discoverable when the deposition was taken. [85 Act 262]

Judicial Council Note, 1988: Sub. (2) is amended to allow depositions to be taken on the record by telephone or live audio−visual means on request of all defendants, unless good cause to the contrary is shown. [Re Order effective Jan. 1, 1988]

See note to Art. I, sec. 7, citing Sheehan v. State, 65 W (2d) 757, 223 NW (2d) 600.

Use at trial of videotaped deposition of 8−year−old sexual assault victim during which screen was placed between victim and accused didn't deny confrontation right. State v. Thomas, 144 W (2d) 876, 425 NW (2d) 641 (1988), confirmed and supplemented, 150 W (2d) 374, 442 NW (2d) 10 (1989).

A retrial with new counsel does not render a videotape deposition admissible at the first trial inadmissible at the retrial without a showing that additional testimony by the child was required in the interest of fairness. State v. Kirschbaum, 195 W (2d) 11, 535 NW (2d) 462 (Ct. App. 1995).

If state makes adequate showing of necessity, it may use special procedure, such as one−way closed−circuit television, to transmit child witness's testimony to court without face−to−face confrontation with defendant. Maryland v. Craig, 497 US 836, 111 LEd 2d 666 (1990).

State v. Thomas: Face to Face With Coy and Craig − Constitutional Invocation of Wisconsin's Child−Witness Protection Statute. 1990 WLR 1613.

967.05 Methods of prosecution. (1) A prosecution may be commenced by the filing of:

(a) A complaint;

(b) In the case of a corporation or limited liability company, an information;

(c) An indictment.

(2) The trial of a misdemeanor action shall be upon a complaint.

(3) The trial of a felony action shall be upon an information.

History: 1979 c. 291; 1993 a. 112.

967.055 Prosecution of offenses; operation of a motor vehicle or motorboat; alcohol, intoxicant or drug. (1) INTENT. (a) The legislature intends to encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, controlled substance and controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving or having a prohibited alcohol concentration, as defined in s. 340.01 (46m), or offenses concerning the operation of commercial motor vehicles by persons with an alcohol concentration of 0.04 or more.

(b) The legislature intends to encourage the vigorous prosecution of offenses concerning the operation of motorboats by persons under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, controlled substance and controlled substance analog to a degree which renders him or her incapable of operating a motorboat safely, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of operating a motorboat safely or having an alcohol concentration of 0.1 or more.

(1m) DEFINITION. In this section, "drug" has the meaning specified in s. 450.01 (10).

(2) DISMISSING OR AMENDING CHARGE. (a) Notwithstanding s. 971.29, if the prosecutor seeks to dismiss or amend a charge under s. 346.63 (1) or (5) or a local ordinance in conformity therewith, or s. 346.63 (2) or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle or an improper refusal under s. 343.305, the prosecutor shall apply to the court. The application shall state the reasons for the proposed amendment or dismissal. The court may approve the application only if the court finds that the proposed amendment or dismissal is consistent with the public's interest in deterring the operation of motor vehicles by persons who are under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, controlled substance and controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving, or in deterring the operation of commercial motor vehicles by persons with an alcohol concentration of 0.04 or more. The court may not approve an application to amend the vehicle classification from a commercial motor vehicle to a noncommercial motor vehicle unless there is evidence in the record that the motor vehicle being operated by the defendant at the time of his or her arrest was not a commercial motor vehicle.

(b) Notwithstanding s. 971.29, if the prosecutor seeks to dismiss or amend a charge under s. 30.681 (1) or a local ordinance in conformity therewith, a charge under s. 30.681 (2), a charge under s. 30.684 (5) or a local ordinance in conformity therewith or a charge under s. 940.09 or 940.25 if the offense involved the use of a motorboat, except a sailboat operating under sail alone, the prosecutor shall apply to the court. The application shall state the reasons for the proposed amendment or dismissal. The court may approve the application only if the court finds that the proposed amendment or dismissal is consistent with the public's interest in deterring the operation of motorboats by persons who are under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, controlled substance and controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of operating a motorboat safely, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of operating a motorboat safely.

(3) NO DEFERRED PROSECUTION. A prosecutor may not place a person in a deferred prosecution program if the person is accused of or charged with any of the following offenses:

(a) A violation of s. 346.63 (1) or (5) or a local ordinance in conformity therewith.

(b) A violation of s. 346.63 (2) or (6).

(c) A violation of s. 940.09 if the offense involved the use of a vehicle.

(d) A violation of s. 940.25.

History: 1981 c. 20, 184; 1983 a. 459; 1985 a. 146 s. 8; 1985 a. 331, 337; 1987 a. 3, 101; 1989 a. 105; 1991 a. 277; 1995 a. 113, 436, 448; 1997 a. 252.

NOTE: For legislative intent see chapter 20, laws of 1981, section 2051 (13).

Sub. (2) does not conflict with separation of powers doctrine and is constitutional. State v. Dums, 149 W (2d) 314, 440 NW (2d) 814 (Ct. App. 1989).

967.06 Determination of indigency; appointment of counsel; preparation of record. As soon as practicable after a person has been detained or arrested in connection with any offense which is punishable by incarceration, or in connection with any civil commitment proceeding, or in any other situation in which a person is entitled to counsel regardless of ability to pay under the constitution or laws of the United States or this state, the person shall be informed of his or her right to counsel. Persons who indicate at any time that they wish to be represented by a lawyer, and who claim that they are not able to pay in full for a lawyer's services, shall immediately be permitted to contact the authority for indigency determinations specified under s. 977.07 (1). The authority for indigency determination in each county shall have daily telephone access to the county jail in order to identify all persons who are being held in the jail. The jail personnel shall provide by phone information requested by the authority. In any case in which the state public defender provides representation to an indigent person, the public defender may request that the applicable court reporter or clerk of circuit court prepare and transmit any transcript or court record. The request shall be complied with. The state public defender shall, from the appropriation under s. 20.550 (1) (f), compensate the court reporter or clerk of circuit court for the cost of preparing, handling, duplicating and mailing the documents.

History: Sup. Ct. Order, 71 W (2d) ix (1975); 1977 c. 29, 418; 1979 c. 356; 1981 c. 20; 1983 a. 377; 1993 a. 16.

Defendant was entitled to court−appointed counsel in state−initiated civil contempt action. Brotzman v. Brotzman, 91 W (2d) 335, 283 NW (2d) 600 (Ct. App. 1979).

This section gives public defender right to receive juvenile records of indigent client notwithstanding 48.396 (2). State ex rel. S. M. O. 110 W (2d) 447, 329 NW (2d) 275 (Ct. App. 1982).

See note to 971.04, citing State v. Neave, 117 W (2d) 359, 344 NW (2d) 181 (1984).

See note to Art. I, s. 8, citing State v. Hanson, 136 W (2d) 195, 401 NW (2d) 771 (1987).

County must provide free transcripts to state public defender. State v. Dresel, 136 W (2d) 461, 401 NW (2d) 855 (Ct. App. 1987).

A public defender appointed as post conviction counsel is entitled to all court records including the presentence investigation report; access may not be restricted under s. 972.15 (4). Oliver v. Goulee, 179 W (2d) 376, 507 NW (2d) 145 (Ct. App. 1993).

State public defender may be denied access to jail inmates who have not requested counsel, and jail authorities need only provide over telephone that information necessary for public defender to assess need to make indigency determination in person under 977.07 (1) for inmate who has requested counsel and claims indigency. WAC sec. SPD 2.03 (3) and (5) (July, 1990) exceed bounds of this section. 78 Atty. Gen. 133.

967.07 Court commissioners. A court commissioner may exercise powers or perform duties specified for a judge if such action is permitted under s. 757.69.

History: 1977 c. 323.

967.08 Telephone proceedings. (1) Unless good cause to the contrary is shown, proceedings referred to in this section may be conducted by telephone or live audiovisual means, if available. If the proceeding is required to be reported under SCR 71.01 (2), the proceeding shall be reported by a court reporter who is in simultaneous voice communication with all parties to the proceeding. Regardless of the physical location of any party to the call, any plea, waiver, stipulation, motion, objection, decision, order or other action taken by the court or any party shall have the same effect as if made in open court. With the exceptions of scheduling conferences, pretrial conferences, and, during hours the court is not in session, setting, review, modification of bail and other conditions of release under ch. 969, the proceeding shall be conducted in a courtroom or other place reasonably accessible to the public. Simultaneous access to the proceeding shall be provided to persons entitled to attend by means of a loudspeaker or, upon request to the court, by making a person party to the telephone call without charge.

(2) The court may permit the following proceedings to be conducted under sub. (1) on the request of either party. The request and the opposing party's showing of good cause for not conducting the proceeding under sub. (1) may be made by telephone.

(a) Initial appearance under s. 970.01.

(b) Waiver of preliminary examination under s. 970.03, competency hearing under s. 971.14 (4) or jury trial under s. 972.02 (1).

(c) Motions for extension of time under ss. 970.03 (2), 971.10 or other statutes.

(d) Arraignment under s. 971.05, if the defendant intends to plead not guilty or to refuse to plead.

(3) Non−evidentiary proceedings on the following matters may be conducted under sub. (1) on request of either party. The request and the opposing party's showing of good cause for not conducting the proceeding under sub. (1) may be made by telephone.

(a) Setting, review and modification of bail and other conditions of release under ch. 969.

(b) Motions for severance under s. 971.12 (3) or consolidation under s. 971.12 (4).

(c) Motions for testing of physical evidence under s. 971.23 (5) or for protective orders under s. 971.23 (6).

(d) Motions under s. 971.31 directed to the sufficiency of the complaint or the affidavits supporting the issuance of a warrant for arrest or search.

(e) Motions in limine, including those under s. 972.11 (2) (b).

(f) Motions to postpone, including those under s. 971.29.

History: Sup. Ct. Order, 141 W (2d) xii (1987); 1987 a. 403; Sup. Ct. Order, 158 W (2d) xvii (1990); 1995 a. 27, 387; 1997 a. 252.

Judicial Council Note, 1988: This section [created] allows various criminal proceedings to be conducted by telephone conference or live audio−visual means, if available. Requirements for reporting and public access are preserved. [Re Order eff. 1−1−88]

Judicial Council Note, 1990: [Re amendment of (1)] Supreme Court Rule 71.01 (2) specifies when a verbatim record is required of a judicial proceeding. Such a record should not be required solely because the proceeding is conducted by telephone or live audio−visual means. Likewise, the requirement in the prior rule that all telephone proceedings be conducted in the courtroom or other reasonably accessible public place discouraged the practice of setting and modifying bail by telephone conference during hours the court was not in session.

[Re amendment of (2)] The appearances, motions and waivers listed in this subsection are rights of the defendant. If the defendant consents that telephone procedures be used, any party objecting should show good cause. [Re Order eff. 1−1−91]

967.09 Interpreters may serve by telephone or video. On request of any party, the court may permit an interpreter to act in any criminal proceeding, other than trial, by telephone or live audiovisual means.

History: Sup. Ct. Order, 141 W (2d) xiii (1987); 1987 a. 403.

967.10 Waiting area for victims and witnesses. (1) In this section:

(a) "Victim" has the meaning given in s. 950.02 (4).

(b) "Witness" has the meaning given in s. 950.02 (5).

(2) If an area is available and use of the area is practical, a county shall provide a waiting area for a victim or witness to use during court proceedings that is separate from any area used by the defendant, the defendant's relatives and defense witnesses. If a separate waiting area is not available or its use is not practical, a county shall provide other means to minimize the contact between the victim or witness and the defendant, the defendant's relatives and defense witnesses during court proceedings.

History: 1997 a. 181.