

 Click to Print[SAVE THIS](#) | [EMAIL THIS](#) | [Close](#)

# Effort to streamline cases takes aim at preliminary hearings

## Senate hearsay measure revives talk of dropping stage in process

By [Bruce Vielmetti](#) of the Journal Sentinel

Jan. 28, 2012 | [\(13\) Comments](#)

A new effort to streamline criminal prosecutions in Wisconsin takes aim at hearings once considered a critical stage in the process, but which some argue have morphed into costly, time-consuming tools for the defense: the preliminary examination.

A Senate [bill](#) would allow all forms of hearsay at preliminary hearings and has rekindled talk of eliminating them - something the state's Judicial Council supports.

Sen. Glenn Grothman (R-West Bend) said he introduced the bill at the request of Ozaukee County District Attorney Adam Gerol, president of the state district attorneys association. Grothman put a lot of stock in the position of the Judicial Council, which he called "a do-gooder, almost liberal" body.

"You're not going to get something radically conservative past them," he said.

But defense lawyers expressed concerns that the move could be the start of erosion of due process rights in the name of saving money.

Hearsay is testimony from a witness about what another witness said, offered for the truth of the statement. It is generally prohibited because it is considered less reliable and because defendants have the right to confront witnesses against them, though there are exceptions in the rules of evidence.

But Gerol notes that preliminary hearings are not trials. They are statutory creations, not required by the state or federal constitutions. In the vast majority of cases, defendants either waive their right to the preliminary examination, or a judge finds sufficient probable cause to bind the defendant over for trial. He said when the hearings are held, defense lawyers often use them to get an early feeling for testimony from state witnesses, almost like taking a deposition.

Hearsay is allowed at preliminary examinations to show ownership of property, or lack of consent to enter a building, or any element of identity theft. The new law would expand it to any use - such as letting a detective state what the victim of a violent crime said happened to them.

Preliminary hearings must be granted within 20 days after someone is charged with a felony via a complaint, which itself is generally hearsay - an officer's narrative of the evidence, including witness statements.

The examinations "are solely to determine if, given the testimony and evidence presented, there is probable cause to believe the defendant committed a felony," said Sheboygan County District Attorney Joe DeCecco. "Plausibility, not credibility, is the issue with all factors to be considered in favor of the state."

Defense lawyers are expected to oppose the measure.

"The point of the prelim is to try and eliminate bad cases right at the outset," said John Birdsall, a Milwaukee defense lawyer. "It's a pretty big deal. I believe there will be some constitutional issues even though it's a statutory creation."

The preliminary hearing is "not onerous by any stretch," said Daniel Blinka, a Marquette University law professor and former prosecutor who teaches evidence and criminal procedure. "It forces a prosecutor to get serious early in the process on whether a case has evidentiary merit."

Randy Kraft, a spokesman for the State Public Defender's Office, said having witnesses present at preliminary examinations helps the prosecution as often as the defense. "The current system often encourages criminal cases to come to a speedier resolution, whether a prosecutor declines to pursue charges or a defendant decides to accept a plea offer," Kraft said.

Preliminary examinations do eat up a lot of court staff, lawyer, law enforcement and civilian witness time, costs that seem even higher given how infrequently magistrates rule for the defense. In large counties like Milwaukee, there are courts devoted full time to preliminary examinations.

"The prelim is like a solution in search of a problem," said Dean Stensberg, with the state Department of Justice.

But justice has never been cheap, warn skeptics of the new bill.

"We have a tradition of bringing the person in, under oath, to articulate their testimony," said Blinka, the law professor. "It's a very effective way to impress upon people how serious it is, that you not exaggerate and you get it as right as you possibly can."

"An officer recounting a summary is just not the same guarantee."