

picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

25-208. Actions for libel, slander, malpractice, and recovery of tax.

The following actions can only be brought within the periods stated in this section: Within one year, an action for libel or slander; and within two years, an action for malpractice which is not otherwise specifically limited by statute.

In the absence of any other shorter applicable statute of limitations, any action for the recovery of any excise or other tax which has been collected under any statute of the State of Nebraska and which has been finally adjudged to be unconstitutional shall be brought within one year after the final decision of the court declaring it to be unconstitutional. This section shall not apply to any action for the recovery of a property tax.

The changes made to this section by Laws 2000, LB 921, shall apply to causes of action accruing on and after July 13, 2000.

Nebraska Search Warrant Law

Neb. Rev. Stat. Section 29-813

29-813. (1) A warrant may be issued under sections 29-812 to 29-821 to search for and seize any property (a) stolen, embezzled, or obtained under false pretenses in violation of the laws of the State of Nebraska, (b) designed or intended for use or which is or has been used as the means of committing a criminal offense, (c) possessed, controlled, designed, or intended for use or which is or has been possessed, controlled, designed, or used in violation of any law of the State of Nebraska making such possession, control, design, or use, or intent to use, a criminal offense, or (d) which constitutes evidence that a criminal offense has been committed or that a particular person has committed a criminal offense.

(2) Notwithstanding subsection (1) of this section, no warrant shall be issued to search any place or seize anything in the possession, custody, or control of any person engaged in procuring, gathering, writing, editing, or disseminating news or other information for distribution to the public through a medium of communication unless probable cause is shown that such person has committed or is committing a criminal offense. For Purposes of this subsection, the terms person, information, and medium of communication shall be defined as provided in section 20-145, Reissue Revised Statutes of Nebraska, 1943.

Procedure for Criminal Actions

Preface

The adversary system, which is central to the administration of criminal justice, is a result of the slow evolution from trial by combat to a less violent form of testing by evidence and argument.

Justice Frankfurter probably said it best when he observed, "The history of American freedom is in no small part the history of procedure." The system of procedure governing trials to which Justice Frankfurter referred is man-made and is directed to higher values and greater purposes than a system which would guarantee the conviction of every person violating the law. For example, the constitution prohibits various investigatory methods which would be highly efficient but which would be incompatible with the values of free people. Accordingly, when a conviction is sought by methods repugnant to our basic values protected by the Constitution, reliable evidence gained from an illegal search of a residence, for example, may be excluded from a trial. Because of the exclusion of reliable evidence from trials, our system of criminal justice has frequently been subject to severe criticism.

Nevertheless, responsible people realize that the greatest peril to a people would come if the administrative agencies, courts, judges and procedures under which our government operates ever become mere creatures of the popular will. Then hysteria and passion take over.

The Prosecution Function

The office of the prosecutor, the chief law enforcement official in a jurisdiction, is an agency of the executive branch of the government.

The prosecutor has a duty to see that the laws are faithfully executed and enforced in his or her jurisdiction. Accordingly, the decision to institute criminal proceedings should be initially and primarily the responsibility of the prosecutor.

Two factors must be present before a prosecutor is justified in filing a charge. First, the prosecutor must possess sufficient evidence to support the belief that a person is guilty; second, the prosecutor must believe that the individual can be convicted of a crime. If both factors are present, the prosecutor has a duty to file a complaint. If either factor is missing, he or she is not justified in filing a complaint.

When there appears to have been a breakdown in the administration of justice, the district judges have the authority to call a grand jury. The citizens may also petition for a grand jury. After hearing the evidence presented by the prosecutor, the grand jury – rather than a prosecutor – determines whether or not charges should be filed against the accused. The grand jury is rarely used in state courts and is viewed by many as an expensive, archaic and cumbersome institution.

While a prosecutor ordinarily relies on police and other investigative agencies for investigation of alleged criminal acts, he or she has the affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies.

Finally, the prosecutor has the duty of presenting the evidence at the trial.

The Defense Function

Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite consisting of the judge (and jury, where appropriate), the prosecutor, and defense counsel.

The basic duty the lawyer for the accused owes to the administration of justice is to serve as the accused's counselor and advocate with courage and devotion, to the utmost of his or her ability, and according to law.

A question frequently heard is, "How can lawyers defend people they know are guilty?" The answer is simple. In their role as advocates, defense lawyers must press all points legally available even if that means subordinating their personal evaluation of their clients' conduct. Lawyers are prevented from disclosing what they learn in confidence from their clients. While they may personally believe that certain rules of law which benefit the client are wrong and ought to be changed, it is their obligation in the course of representing the client to invoke them on his or her client's behalf.

Often, when the accused is called to the bar of justice by the government, he or she finds in the defense lawyer a single voice on which the accused must be able to rely with confidence that his or her interests will be protected to the fullest extent consistent with due process of law.

The Function of the Trial Judge

The trial judge has the responsibility for safe-guarding both the rights of the accused and the interests of the public in the administration of criminal justice.

It is the trial judge's responsibility to direct and guide the course of the trial so as to allow the jury a fair opportunity to reach an impartial result on the issue of guilt.

The trial judge, mantled with neutrality, presides at all hearings commencing with the arraignment and concluding with the imposition of sentence. He or she is empowered to clarify obscure issues or evidence, prevent unnecessary delay, and promote the expeditious, fair and dignified course of the trial.

Procedure Before Trial

Generally speaking, the Constitution and the statutory law guarantee every citizen the right:

1. To receive notice of the charges against him or her;
2. To receive notice in the state court, as distinguished from the federal court, of the names of the witnesses who will be called by the prosecution to testify against him or her;
3. To bail;
4. To be represented by counsel;
5. To a public trial;
6. In the case of state law violations, to have the case heard by a jury if the individual so desires;
7. To refuse to testify against oneself;
8. To confront and examine one's accuser;
9. To be tried only once by the same sovereignty for the same offense;
10. To call or subpoena witnesses in one's own defense; and
11. To require the state to prove his or her guilt beyond a reasonable doubt.

If a prosecutor, based upon an investigation of the facts, believes that the accused is guilty of committing a crime and, also, believes that the accused can be convicted of a crime, he or she initiates the criminal charges by filing a complaint in the county court. A warrant is then issued for the arrest of the accused. After the accused is arrested, he or she is brought before the *magistrate* (usually a county judge) for a bond hearing. The Bill of Rights of the Constitution of the State of Nebraska provides in Section 9:

“All persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”

After the amount of bond is fixed and the defendant meets the conditions of the bond, he or she is released from custody pending the preliminary hearing. The magistrate will set a date not far distant for a preliminary hearing. At the preliminary hearing the prosecutor has the burden of producing evidence:

1. That a crime has been committed; and
2. That there is probable cause to believe that the defendant committed the crime.

If evidence is produced to support the above elements, the magistrate will *bind over* the defendant to stand trial in district court. If the evidence does not support the above elements, the complaint will be dismissed.

After the transcript of the proceedings in the magistrate's court reaches the district court, the prosecutor files an *information* formally charging the defendant with committing the crime. At the arraignment in district court, the charge is read to the defendant and he or she is called upon to plead “guilty” or “not guilty.”

If the defendant enters a plea of “guilty” and is adjudged guilty, the judge orders a pre-sentence investigation and, at a later date, imposes sentence.

If the defendant enters a plea of “not guilty,” the judge schedules the case for trial.

In most instances, the defendant has the right to have the case heard by a jury, or may elect to waive his or her right to a jury trial and have the case heard by a judge.

If at any time prior to the trial of the case it appears that the accused has become mentally incompetent to stand trial, the county attorney, the accused, and the accused's attorney or the court on its own motion may raise the issue. The Court must make a determination as to whether or not the accused is, in fact, competent to stand trial. The test of mental competency to stand trial is whether the defendant has the capacity to understand the nature and object of the proceedings against him or her, and comprehend his or her own condition in reference to those proceedings, and to make a rational defense.

If the court finds the accused to be incompetent to stand trial, the court may commit the individual to a mental institution for treatment in order to assist the accused to become competent to stand trial. If it is determined that the accused will not become competent to stand trial in the reasonable future, the court must discharge the defendant and dismiss the criminal charges. If this occurs, the county attorney can file a petition alleging that the accused is mentally ill and dangerous and can seek a commitment to a mental health facility.

Before the criminal trial begins, counsel for the defendant may file a number of procedural motions.

The procedural motions serve the following needs:

1. To promote an expeditious as well as a fair determination of the charges;
2. To provide the defendant with sufficient information to make an informed plea;
3. to permit thorough preparation for trial and minimize surprise;
4. to avoid repetitious trials by exposing any latent procedural or constitutional issues and affording remedies therefore prior to trial;
5. To reduce interruptions and complications of trials by identifying issues collateral to guilt or innocence, and determining them prior to trial; and
6. To effect economies in time, expense, and talents of the judges and lawyers.

Examples of the above procedural motions would be motions concerning:

1. A change of venue;
2. The suppression of illegally obtained evidence;
3. The defendant's mental capacity to stand trial; and
4. The severance of a defendant's trial from the trial of a co-defendant.

All of the procedural motions filed by the prosecutor and counsel for the defendant will be heard and decided by the judge prior to trial.

Often, the net effect of the judge's rulings on the procedural motions is that the charges are dismissed, the defendant enters a plea of "guilty" to the charges, or a plea bargain is agreed upon.

Procedure During Trial

The defendant has the right to determine whether to have the case heard by a jury or by a judge, if it involves a state statutory violation. Violators of city or village ordinances which carry penalties not exceeding six months' imprisonment do not have the right to a jury trial.

The purpose of the jury is to guard against the exercise of arbitrary power and to make available the common sense judgment of the community as a hedge against excesses by the prosecutor or the judge.

Jury Selection

It has been said that the jury is the only governmental body which does not seek to perpetuate itself in office. The jury convenes, does its duty, and then melts back into the community from whence it came.

A group of 12 citizens are given the duty of listening to the evidence and, thereafter, the power of decision. They are permitted to deliberate in secret and to announce their verdict without giving reasons for it. Their decision, if based upon proper evidence, is final. Thus, it is important to know something of the background or experience of each juror.

The prosecutor and the defense counsel are, by law, allowed to challenge prospective jurors “for cause” and, in addition, are allowed a specific number of “peremptory challenges.” *For cause* means for reasons which the law recognizes as sufficient to show bias or inability to be impartial. An example of a challenge for cause would be if one of the prospective jurors were a relative of the victim or of the defendant. A *peremptory challenge* allows counsel to excuse a limited number of jurors without name a reason. There need not be a legal cause.

The procedure under which jurors are examined prior to being selected is known as the *voir dire* (to speak the truth) examination. The purpose of the *voir dire* examination is to elicit information that will assist the attorney in determining whether each juror should be challenged, whether for cause or as a peremptory challenge.

After the jury has been impaneled and sworn, the trial begins.

The prosecutor is permitted to make a short opening statement outlining the evidence which will be presented in support of the charges which he or she has filed against the defendant. At the conclusion of the prosecutor’s opening statement, defense counsel is permitted to make a short opening statement outlining the evidence which he or she intends to produce at the trial.

It must be remembered that under our system of criminal justice, the defendant is presumed to be innocent and is not required to produce any evidence. The prosecutor has the duty of proving the essential elements of the crime charged by evidence beyond a reasonable doubt.

Since the prosecutor has the burden of proof, he or she must call witnesses first, and each witness is subject to cross-examination by defendant’s counsel. After the prosecution has called all of its witnesses and presented all of its evidence (*the prosecution rests its case*), the defense has the right to present evidence.

After the defense has rested its case and the prosecution has presented any rebuttal evidence relating to the defendant’s evidence, the prosecution and defense counsel are allowed to *sum up* the evidence to the jury. Again, since the prosecution has the burden of proof, the prosecutor is allowed a short rebuttal argument to the jury after defense counsel has completed his or her summation.

Next, written instructions on the law pertaining to the case are read to the jury. The trial judge is the judge of the *law* pertaining to the case and the members of the jury are the judges of the *facts* pertaining to the case.

After listening to the instructions on the law of the case, the jurors retire to the jury room to begin deliberations. After agreeing upon a unanimous verdict, the jurors are brought back into the courtroom and announce their verdict in the presence of the judge, counsel and the defendant. After the verdict is accepted by the judge, the jurors are discharge.

Insanity Defense

Any person prosecuted for an offense may plead that he or she is not responsible by reason of insanity at the time of the offense. The burden is upon the defendant to prove the defense of not responsible by reason of insanity by a preponderance of the evidence. Notice of intention to rely on the insanity defense must be given to the county attorney no later than 60 days before trial.

When notice has been given that insanity will be a defense, the court may order the defendant to be examined by one or more qualified experts appointed by the court.

If the jury finds that the defendant is not responsible by reason of insanity, the court must hold a hearing to determine whether there is probable cause to believe that the person is dangerous to himself or herself or to others by reason of mental illness or defect, or that the individual will be dangerous in the foreseeable future as demonstrated by an overt act or threat. If the court finds probable cause, the court shall determine whether and under what conditions of confinement the acquitted person should be committed to a Regional Center or other appropriate facility for a period not to exceed 90 days for an evaluation of the person’s

mental condition. Prior to the expiration of the 90-day period the court must conduct an evidentiary hearing regarding the condition of the person. If the court finds that there is clear and convincing evidence that the person is dangerous to himself or herself or to others by reason of mental illness or defect, or will be dangerous in the foreseeable future, as demonstrated by an overt act or threat, the court must commit the person for treatment to one of the Regional Centers or other appropriate facility. Thereafter, the acquitted person's case must be reviewed on an annual basis by the court.

Sentencing Alternatives

The public intends to evaluate the disposition of a criminal case more in terms of the kind of sentence handed down than anything else.

In no other judicial function is the judge more alone, no other act carries greater potentialities for good or evil than the determination of how society will treat its transgressors.

Someone once said that there is a little furry animal inside of us that calls out for blood under certain circumstances. This additional pressure places a heavy burden upon the sentencing judge.

After a defendant is adjudged guilty of a felony by jury verdict or by the court when a jury trial has been waived, the judge will order a pre-sentence investigation.

The pre-sentence investigation report will contain the circumstances surrounding the commission of the crime, the defendant's history of criminality, physical and mental condition, occupation and personal habits, and a victim impact statement.

After studying the pre-sentence investigation report and examining the range of penalties provided by law, the judge has available the following sentencing alternatives:

1. The judge may withhold sentence of imprisonment and place the defendant on probation for a fixed term under specific conditions unless, having regard for the nature and circumstances of the crime and history, character and condition of the defendant, the court finds that imprisonment is necessary for the protection of the public.
2. The judge may place the defendant on probation, but require that the defendant, as a condition of probation, be confined periodically in the county jail for a period not to exceed 90 days.
3. The judge may sentence the defendant to the State Department of Correctional Services for a period of time with the range fixed by the legislature.

Procedural Steps in Felony Prosecution Where Defendant Is Not Yet in Custody of Law Enforcement Officials

1. Prosecutor files a complaint with magistrate. The complaint, the charging document, states the allegations against the accused in the language of the state statute which is alleged to have been violated.

2. Warrant of arrest issued by magistrate. The warrant is a command from the magistrate to all law enforcement personnel to take the accused into custody and bring him or her before the magistrate.

3. Defendant taken into custody.

4. Bond hearing. Bond is set by the magistrate. Constitutional provisions of both the federal and state constitutions provide that excessive bail must not be required. State statutes require that the accused be released on his or her personal recognizance (an agreement to come to court when ordered) unless the judge determines that such a release will not reasonably assure the appearance of the accused as required. When such a determination is made, the magistrate shall, either in lieu of or in addition to such a personal recognizance release, impose any number of conditions listed by statute. These include placing the accused in the custody of a designated person or organization agreeing to supervise the accused, or requiring the execution of an appearance bond in a specified amount and the deposit with the

Clerk of the Court in cash a sum not to exceed ten percent of the amount of the bond. The court can also require a surety bond or cash deposit for the full amount of the bond.

5. Preliminary hearing before the magistrate. The magistrate, usually a county judge, must determine from the evidence whether a crime has been committed and whether there is probably cause to believe the accused committed the crime.

6. Defendant is either ordered to stand trial in district court or released.

7. Appearance bond for district court set by magistrate. The original appearance bond is often simply continued in full force and effect.

8. Prosecutor files information in district court. The information is the charging document in the district court.

9. Preliminary motions filed attacking the sufficiency of the evidence at the preliminary hearing (Plea in Abatement), attacking the sufficiency of the charge (Demurrer) and/or attacking the constitutionality or other defects in the state statute (Motion to Quash).

10. Arraignment in District Court. The accused enters a plea (guilty or not guilty, no contest, not responsible by reason of insanity) or stands mute. If the accused stands mute (does not enter a plea) the court will enter a plea of not guilty on the accused's behalf.

11. Pre-trial motions are filed. These can include Motions to Discovery and Motions to Disclose to provide the defense with the evidence upon which the charges are based. They may also include Motions to Suppress, which can related either to evidence illegally seized by law enforcement officials or to statements that were made by the accused that were either involuntary or were not take in compliance with constitutional requirements.

12. Trial by jury or to the court. The accused can waive his or her right to a trial by jury and choose to have the judge determine his or her guilt or innocence.

13. Motions for New Trial. This motion, following a conviction, gives the judge an opportunity to review alleged errors that occurred which may require a new trial. This motion is no longer required as a precedent to appeal.

14. Final judgment – sentence. Following conviction of a felony, the judge is required to order a pre-sentence investigation before imposing sentence.

15. Notice of appeal filed. Notice of appeal must be filed within 30 days following final judgment.

Libel Law

A. Summary of Libel Law

1. Introduction

Nebraska Libel Law derives from court cases decided in this state and in the United States Supreme Court, from statutes found at Nebraska Revised Statutes sections 25-208, 25-839, 25-840 and 25-840.01, and from the First Amendment to the United States Constitution, Free Speech and Free Press clauses. Basically, libel law is a series of checks and balances between the concept of free speech and the concept of the right to personal reputation.

The technical definition of "libel" is a publication of language, the obvious meaning of which imputes to a person a criminal act, or subjects the person to ridicule or disgrace, public hatred or contempt, and which in essence detracts from the person's reputation in a substantial way. To be actionable, a libel must be a false statement, and in most cases it must be a statement of fact, not a statement of opinion. Truth is a "defense," but actually the burden of proving falsity is on the plaintiff or complaining party, rather than on the defendant to prove the truth. That applies both in public figure and private figure in plaintiff cases.

In cases where a person is a public official and acting in an official capacity, or a public figure who has voluntarily put himself in the spotlight, then almost all of the applicable law derives from the United States Supreme Court decisions and the First Amendment to the Constitution. In those cases, particularly New York Times v. Sullivan decided in 1964, and