



**Criminal
Procedure
in the
United States
and Canada**

**MILLER
CANFIELD**

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.



CRIMINAL PROCEDURE IN THE UNITED STATES AND CANADA

INTRODUCTION

The following materials provide an overview and comparison of the criminal court systems and criminal procedures of the United States and Canada, focusing on the State of Michigan and the Province of Ontario in particular. This booklet will be of primary interest to American attorneys with clients facing criminal charges in Canada, as well as Canadian lawyers with clients facing criminal charges in the United States. These materials are not intended to provide specific legal advice but only general information about the criminal justice systems of the United States and Canada. This booklet summarizes some of the pertinent provisions of American and Canadian law as of March 2006.

Established in 1852, Miller Canfield has grown to a professional staff of nearly 400 attorneys and paralegals. Our Windsor, Ontario office traces its history to 1919. Our lawyers have diverse backgrounds with varying business and practical experiences and personal and professional interests. They publish articles on legal issues, act as instructors and speakers at law schools and colleges, as well as participate at seminars and contribute to legal education programs.

Our Corporate Compliance and Criminal Defense Group features several experienced and uniquely skilled lawyers who can provide excellent legal counsel and a broad perspective in many areas.

CORPORATE COMPLIANCE

It is essential that corporate officers, directors, lawyers, auditors, and advisors know that their corporation, large or small, is operating in compliance with all applicable laws and regulations. Well crafted policies and procedures will help avoid the risk of exposing directors and executive officers to criminal liability, and the possibility of tarnishing or destroying a company's good name.

Our corporate compliance team can help you develop a program that fully meets with all applicable laws and regulations, and design internal monitoring controls that will ensure ongoing checks and balances.

Such proactive compliance programs can help reduce penalties if criminal activity is detected or possibly avoid charges altogether.

CRIMINAL DEFENSE

Defending corporations or their executives against criminal or regulatory charges today often requires the ability to sift through complex and extensive documentation. We at Miller Canfield have the resources and organizational skills and facilities to deal with the most difficult fact situation. Our team of experienced lawyers is well able to handle the most complex situation, and ensure that all avenues of defense are carefully reviewed and presented.

Since corporations both in the United States and Canada can be held criminally responsible for the acts of their employees, we act hand-in-hand with the compliance team to ensure that our clients are properly protected from this growing problem. Whether it is advice related to an ongoing government investigation, or whether the government has already proceeded with charges, we at Miller Canfield can quickly provide the crucial advice at the earliest moment to help resolve a corporation's most serious problem, the criminal charge.

INTERNAL INVESTIGATIONS AND EMPLOYEE MISCONDUCT

We are very experienced in situations where counsel, directors, or officers of a corporation believe that their employees, or executives, are involved in criminal activity or other inappropriate conduct. In such circumstances we can advise as to the viability or necessity of an internal corporate investigation either working with in-house counsel or apart, all protected by attorney client privilege. We can provide assistance and advice to in-house counsel and human resource personnel in regards to self-reporting, and working with the government while concurrent investigations by other agencies are being conducted.

REPRESENTATION DURING GOVERNMENT INVESTIGATION

We provide advice on appropriate response and compliance if your organization is presented with a government search warrant and will counsel you on what to do when presented with a grand jury or administrative subpoena. We can recommend how to work with government agents during the course of an investigation while protecting the interests of your business and aiding you to continue to operate efficiently while such investigation is being conducted.

SARBANES-OXLEY ACT OF 2002

With passage of the Sarbanes-Oxley Act of 2002, audit committees of publicly traded companies take on added duties and obligations as well as heightened exposure. For that reason, committees are entitled to engage independent legal counsel for advice and guidance. Our firm can help you meet your new responsibilities, and confirm your company's commitment to rigorous audit committee governance processes.

Turn to us for comprehensive audit committee counsel, including review and examination of your existing policies and procedures; an objective evaluation of vulnerabilities and recommendations for what measures need to be taken to achieve full compliance and implementation of an ongoing legal compliance maintenance program.

Depend on us to assist you with:

- Corporate Governance
- Internal Controls
- Securities Law
- Sarbanes-Oxley Requirements
- Audit Committee Oversight
- Director/Officer Insurance
- HIPAA Requirements
- TREAD Act Requirements
- U.S. Patriot Act Requirements
- Antitrust Issues
- Record Retention and Document Destruction
- Environmental and OSHA Requirements
- Customs Issues
- Immigration Issues
- Foreign Corrupt Practices Act Regulations
- Office of Foreign Assets Control

If you require assistance or have any questions regarding American matters, please contact any member of our Corporate Compliance and Criminal Defense team directly:

Saul A. Green (313) 496-7535; Thomas W. Cranmer (248) 267-3381;

Michael H. Gordner (313) 496-7963; Matthew F. Leitman (248) 267-3294;

Jeffrey T. Rogg (248) 267-3237; David D. O'Brien (734) 668-7761; Gerald J. Gleeson II (248) 267-3296.

Regarding Canadian matters, please contact Michael H. Gordner (313) 496-7963.



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I. PROSECUTION

United States Criminal Law

Jurisdiction and Classification of Offenses

In the United States' system, the federal government, each state and the District of Columbia all have authority to create their own substantive criminal law and procedure. The federal government's power to criminalize conduct is much different than that of the states. The state government which possesses a broad "police power" has the inherent power to regulate its internal affairs for the protection or promotion of public health, safety and morals. Since the federal government is a government of limited, enumerated powers it must rely on a constitutional provision for each exercise of its power to make conduct criminal. The constitution does grant the federal government power to criminalize conduct expressly (e.g. counterfeiting, piracy, felonies of the high seas, treason, etc.) and impliedly through the "necessary and proper" clause in conjunction with other powers of the federal government such as the power to regulate interstate commerce.

In the United States, there are two general levels of crimes: misdemeanors and felonies. Most misdemeanors encompass less serious offenses punishable by no more than one year in jail. Felony classification is reserved for more serious offenses and is punishable by one year to life in prison and/or a fine of \$500 or more. Many states as well as the United States Federal Government have enacted statutes providing for the death penalty.

Canadian Criminal Law

Jurisdiction and Classification of Offenses

In Canada, criminal law is enacted by the Federal parliament. Constitutional authority for the judicial system in Canada is divided between the federal and provincial governments. The provinces have explicit jurisdiction over the administration of justice in the provinces, including the constitution, organization and maintenance of the Ontario Court of Justice, both civil and criminal, as well as civil procedure in those courts. Parliament has, as part of its criminal-law power, exclusive authority over the procedure in courts of criminal jurisdiction.

The Criminal Code of Canada does not distinguish

between misdemeanors and felonies. Rather, crimes are broadly classified as either indictable offenses or offenses punishable by summary conviction. Generally, the punishment for a summary offense is no more than two thousand dollars or imprisonment for six months, or both, although for certain offenses the maximum has been raised to imprisonment for eighteen months.

More serious crimes are prosecuted as indictable offenses (roughly equivalent to felonies in the United States) punishable by higher fines and lengthier prison sentences. Some crimes, such as impaired driving, have the hybrid character of being both indictable and summary conviction offenses, where the Crown Attorney (the Prosecutor) has the absolute right to select how the offense will be prosecuted. The maximum penalty for indictable offenses is life imprisonment with no possibility for parole for 25 years (first degree murder). There is no death penalty in Canada.

American Prosecution Authority

Power of Policing

Policing is largely a local activity in the United States. Primary responsibility for policing criminal activity is placed in units of local government (such as city police forces). However, local law enforcement is complemented by state police (e.g. Michigan State Police). Federal law enforcement officers (e.g. Federal Bureau of Investigation) rarely act as general peacekeepers; rather they have more specific training and duties as compared to the local law enforcement officers that enforce criminal laws generally. Federal officers generally are responsible for enforcing specific Federal legislation i.e. income tax act, customs, immigration, securities etc.

Federal Power to Prosecute

United States Attorneys, under the direction of the Attorney General, are responsible for investigating and prosecuting violations of federal law. Dispersed amongst the United States in 93 headquarter offices and 128 staffed branch offices, United States Attorneys are responsible for the prosecution of criminal cases brought by the federal government for violations of federal criminal law including criminal activities, domestic and international terrorism, organized drug trafficking, white-collar crime and

regulatory offenses. United States Attorneys are appointed by the President of the United States with the advice and consent of the United States Senate. They serve at the discretion of the President of the United States.

State Power to Prosecute

The state Attorney General is basically the lawyer for the people of the state and has multiple duties including defending the laws and the constitution of the state, and representing the state in litigation. The Attorney General has original jurisdiction to prosecute violations of the law but generally criminal prosecutions are initiated through the offices of the local prosecuting attorneys.

Prosecuting Attorneys represent each county in Michigan. The Prosecuting Attorneys must appear for the state or county and prosecute violations of state criminal law. Each county in Michigan elects its Prosecuting Attorney every four years.

Local prosecutors (city attorneys) are primarily responsible for the prosecution of minor offenses including traffic violations.

Canadian Prosecution Authority

Power of Policing

Although the federal government has authority over criminal law and procedure, Canadian provinces retain authority over the administration of justice within the province. Each province administers most of the criminal and penal law through provincial and municipal police forces. Most municipalities of any size have established their own police forces. In addition Ontario (and many other provinces) has established its own provincial police force, the Ontario Provincial Police, which supplements the work of the local police department and acts in much the same way as the Michigan State Police.

The federal police force, The Royal Canadian Mounted Police, handles the policing of much of northern Canada in addition to handling matters of national security and policing of federal statutes other than those under the Criminal Code (e.g. The Controlled Drugs and Substances Act).

Federal Power to Prosecute

For offenses that violate federal statutes other than the Criminal Code, prosecutions are handled by the Department of Justice of the Federal Government. Federal prosecutors may either be full time or employed for specific cases or on a contractual basis with the Department of Justice.

Provincial Power to Prosecute

In Canada, prosecutors are appointed by the provincial government, and are known as Crown Attorneys or Assistant Crown Attorneys. They undertake prosecutions of violations of the federal Criminal Code. The Crown Attorney is the Agent of the Provincial Attorney General, the chief law enforcement officer in the province.

Municipal prosecutors are hired by the city to prosecute minor offenses such as municipal bylaws and traffic matters.

II. COURTS

United States Court System

United States Federal Court System

The United States Constitution provides that “the Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts, as the Congress may from time to time ordain and establish.”

District Courts

Cases involving violations of federal criminal laws begin in district courts. There are 94 district courts throughout the United States serving as the trial courts of the federal system. All federal judges are appointed for life by the President of the United States with the approval of the United States Senate. Magistrate Judges are judicial officers of the district court appointed by a majority vote of the active district judges and exercise jurisdiction over matters set out by statute and delegated by the district judges.

The writ of habeas corpus, which serves as a check on state courts in regards to federal constitutional rights, is first filed in these federal district courts.

Courts of Appeals

The district courts are broken down within 12 circuits. Each circuit has a Court of Appeals that hears appeals from the decisions of the district courts within its circuit. Court of Appeals judges are also appointed for life and are nominated by the President and confirmed by the United States Senate.

United States Supreme Court

The United States Supreme Court serves as the court of last resort for all claims. The Supreme Court consists of a Chief Justice and such number of Associate Justices as may be fixed by Congress. The number of Associate Justices is presently eight. The United States Supreme Court hears appeals from the Federal Courts of Appeals, as well as from the states. Applications to the Court are commenced by Writs of Certiorari. The Supreme Court accepts only a small fraction of the cases submitted to it. Those cases generally involve constitutional issues of great national importance, where there is a split in the Circuit Courts of Appeals, or a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort, or of a United States Court of Appeals.

Michigan State Court System

District Courts

All criminal cases involving adults commence in the District Court, which handles all misdemeanors, including arraignment, setting and accepting bail, trial and sentencing. The accused may have a jury trial in District Court for most offenses or a bench trial where the accused so elects and the prosecution consents. Additionally, District Courts handle preliminary examinations in felony cases. District Court judges are elected for six-year terms.

The District Court in Michigan also handles ordinance violations and most traffic violations. There are also presently four municipal courts in Michigan that are located in the Grosse Pointe area which handle misdemeanors, traffic and ordinance violations with fines less than five hundred dollars and sentences less than one year, as well as felony preliminary hearings.

Circuit Courts

Following a preliminary examination (or waiver of same) the case is transferred to the Circuit Court which handles all criminal cases where the offense involves a felony or certain serious misdemeanors. The accused may have a jury trial in circuit court or a bench trial if the accused so elects and the prosecution consents. Circuit Courts also hear appeals from District Courts and Municipal Courts. Circuit Court judges are also elected for six-year terms.

Court of Appeals

Final decisions from the Circuit Courts may be appealed to the Court of Appeals. Court of Appeals judges are also elected for six years.

Michigan Supreme Court

The Michigan Supreme Court is a court of last resort within the state system. The Michigan Supreme Court considers applications for leave to appeal from Court of Appeals decisions. Generally, the Michigan Supreme Court only accepts cases involving important constitutional issues and questions of public policy. The Court consists of a chief justice, seven justices, and six associate justices all elected for eight-year terms.

United States Supreme Court

As set out above in certain circumstances, cases may be appealed from the Michigan Supreme Court to the Supreme Court of the United States.

Canadian Court System

The enactment of criminal law is under the jurisdiction of the federal government and thus Canada has one Criminal Code that is applicable throughout Canada. As the provincial governments are responsible for the administration of justice, the provincial courts are set up to deal with criminal offenses generally.

The Canadian Federal Court System

The Federal Court's principal areas of jurisdiction relate to cases arising out of decisions and orders of federal boards, commissions, and other tribunals, and to such matters as copyrights, patents and inter-provincial railways. In addition, tax courts are set up by the federal government that have exclusive jurisdiction over civil tax matters. Criminal tax offenses are tried in the courts set up by the provinces.

Ontario Provincial Court System

Ontario Court of Justice

The Ontario Court of Justice was designated to preside over cases involving either federal or provincial laws. All criminal cases commence in the Ontario Court of Justice which has exclusive jurisdiction over summary conviction offenses as well as certain indictable offenses as set out in the Canadian criminal code. All preliminary inquiries – hearings to determine whether there is enough evidence to justify a full trial in serious criminal cases – take place in the Ontario Court of Justice. This court also has jurisdiction over indictable offenses where the accused so elects. All trials before the Ontario Court of Justice are bench trials. Judges of the Ontario Court of Justice are appointed by the provincial government.

The Provincial Offenses Division of the Ontario Court of Justice is set up to hear minor offenses including municipal bylaws and traffic violations. In addition, provincial offenses such as offenses contrary to the Occupational Health & Safety Act and the Environmental Protection Act are also heard in this court. Justices of the Peace preside over this court. Appeals from this court are to the Ontario Court of Justice.

Justices of the Peace who preside over the Provincial Offenses Division and who perform such other duties as set out by statute and delegated by Justices of the Ontario Court of Justice are also appointed by the Ontario Provincial government.

Superior Court of Justice

Following a preliminary hearing or waiver of same, the Superior Court of Justice handles all indictable offenses unless the accused elects to have the charge

tried in the Ontario Court of Justice. The accused may be tried by a judge without a jury or by a judge and jury in the Superior Court of Justice. Superior courts also hear summary appeals based on facts established in summary conviction proceedings. Superior Court judges are appointed by the federal government, but must be chosen from the bar of the province in which the court sits.

Appellate Courts

Each province and territory has a Court of Appeals or appellate division presiding over appeals from the Superior Court of Justice and the Ontario Court of Justice. In Ontario this court is known as the Court of Appeal of Ontario. An appeal of an indictable offense, whether tried by jury or by a judge alone, must be taken directly to the court of appeal for the province. Appellate courts also hear appeals from summary convictions after they have been heard by the Superior Court of Justice. Appellate court judges are appointed by the federal government for life.

Supreme Court of Canada

The Supreme Court consists of a chief judge and eight associate justices, all of whom are appointed by the federal government. Prior to being heard by the Supreme Court, a case must generally have used up all available appeals at lower levels of the judiciary. Even then, the Supreme Court must grant permission or “leave” to hear an appeal before it will preside over the case. Leave applications are usually made in writing and reviewed by three members of the Court, who then grant or deny the request without providing reasons for the decision. Leave to appeal is not given routinely – it is granted only if the case involves a question of public importance; if it raises an important issue of law or mixed law and fact; or if the matter is, for any other reason, significant enough to be considered by the Supreme Court.

In certain situations, however, the right to appeal is automatic. For instance, no leave is required in criminal cases where a judge of a Court of Appeal has dissented on how the law should be interpreted. Similarly, where a Court of Appeal has found someone guilty who had been acquitted at the original trial, he or she automatically has the right to appeal to the Supreme Court.

III. THE CRIMINAL CASE

Typical Process in the United States State Court System

Commencement of Criminal Process

Initial Steps: Observations or Reported Crime

Law enforcement officers may become aware of criminal activity through their own observations, through reports of the activity by witnesses, or through an investigation. Once the police believe that a crime was committed, it will be recorded as a “known offense.”

The Warrant

A warrant may only be issued upon a showing of probable cause. “Probable cause” exists when the facts and circumstances within an officer’s personal knowledge, and about which he has reasonably trustworthy information, are sufficient to warrant a “person of reasonable caution” to believe that:

- (1) In the case of an arrest, an offense has been committed and the person to be arrested committed it.
- (2) In the case of a search, an item described with particularity will be found in the place to be searched.

The Arrest

Once a suspect has been identified and the police have probable cause to believe that he or she committed a crime, an arrest will take place. Generally, an arrested suspect will be taken into custody pending charges, but for some lesser crimes the suspect will be issued a citation mandating his or her appearance in court rather than being detained.

Most arrests are made without an arrest warrant. The police will obtain an arrest warrant in some circumstances, particularly when the suspect is located outside the jurisdiction of the police seeking to arrest him or her. A warrant allows any officer to arrest the suspect and extradite him or her back to the jurisdiction where the crime was allegedly committed.

Booking

After the arrest takes place, suspects are usually brought to the police station or nearby prison and are put through the “booking” process. This process includes a recording of routine matters including the suspect’s name and suspected offense, fingerprinting and photographing. The suspect is also searched at this point for objects that may endanger the suspect or fellow inmates, in addition to a search for evidence of crime or contraband. For minor offenses, the suspect may be allowed to post “stationhouse bail” gaining release pending his or her trial. For more serious offenses, however, the suspect is held in “lockup” until he or she is presented before a magistrate.

The Decision to Charge

Review of the Charges

After booking the suspect, but before the suspect is taken before the magistrate, the police will make an internal review of the decision to arrest. At this point, the reviewing officer may decide to adjust the recommended charges in the initial police report. It may also be determined that no charges should be brought, in which case the suspect is released.

Prosecutors generally first determine whether charges should be filed at all; this determination generally turns on the sufficiency of the evidence. If the prosecutor determines that charges are appropriate, then he or she must decide exactly what charges should be brought in the circumstances.

For arrests made without a warrant, the magistrate will review the evidence presented and determine whether probable cause exists to charge the suspect. If there is not sufficient evidence, the prosecutors will be directed to present more evidence.

Pre-Trial Processes

District Court Arraignment

a) Felonies

At the initial appearance in regards to felonies:

- (1) The defendant is arraigned, that is receives formal notice of the charges against him.

- (2) Relevant constitutional rights are explained to the defendant.
- (3) A date is set for a preliminary hearing.
- (4) Counsel is appointed if the defendant is indigent.
- (5) A Gerstein [420 U.S. 103] probable cause determination may be made at such time if the defendant was arrested without a warrant.
- (6) The magistrate determines whether the defendant should be set free on his own recognizance, released on bail, or detained pending further proceedings.

b) Misdemeanors

At the initial appearance in regards to misdemeanors, the defendant is arraigned as set out above and advised as to his constitutional rights. At the misdemeanor arraignment, the defendant will be given the opportunity to plead. The defendant may plead guilty, not guilty, *nolo contendere* (no contest with consent of court), not guilty by reason of insanity (available in some states), or stand mute. If the defendant stands mute (remains silent) a not guilty plea will be entered by the judge.

If the defendant pleads guilty, he may be sentenced on the spot or the court may order the probation department to prepare a pre-sentence report.

If the defendant stands mute or pleads not guilty, the case may be scheduled for a pre-trial conference.

If the matter cannot be resolved at the pre-trial conference, a trial will be scheduled. Prior to the trial there may be pre-trial hearings related to constitutional issues or other motions to suppress evidence, etc.

Preliminary Hearing in Regards to Felonies

In Michigan a preliminary hearing must be held within two weeks after the initial appearance before the District Court Judge unless the defendant waives the hearing or agrees to an adjournment. The primary purpose of a preliminary hearing is to determine whether there is probable cause to believe that the defendant committed a specified criminal offense. The preliminary hearing is adversarial in nature; defense counsel may be present, and

the prosecutor and the defendant may call witnesses on their behalf and cross-examine adverse witnesses. If the judge hearing the preliminary examination finds "probable cause" that an offense has been committed, he will bind the accused over to Circuit Court for trial. The District Court also has some jurisdiction to bind the accused over for trial on other offenses not charged as disclosed by the evidence and may review the bail decision at that time.

At the time of this publication, the Michigan legislature is considering limiting preliminary hearings to felonies carrying a potential prison term of ten years or more at the request of the prosecution or defense. The legislation calls for a conference to take place for all other felonies.

Circuit Court Arraignment

Where the defendant is bound over by the District Court to stand trial, the defendant is then arraigned on an information in Circuit Court. At that time the defendant is provided with a copy of the information. The defendant may then enter one of the pleas to the offense charged as described above (under misdemeanors).

Grand Jury

Grand juries are not required in Michigan, but are sometimes utilized nonetheless. When they are, the grand jury convenes and weighs only the prosecutor's evidence in making its determination whether it is sufficient to justify a trial. If the majority of the jurors find that the evidence is insufficient, the charges are dismissed. If a majority finds the evidence sufficient, an indictment is filed and a second arraignment based on the indictment takes place.

In indictment jurisdictions, a defendant may not be tried for a serious offense unless he is indicted by a grand jury or waives the right to a grand jury hearing. If a majority of grand jurors believe that the prosecutor presented sufficient evidence on which a trial may proceed, the grand jury issues an indictment, a document that states the charges and the relevant facts relating to them. If the jury does not indict the defendant (a "no-bill"), the complaint is dismissed and the defendant is discharged.

The Trial

Presumptions and Burdens

In criminal trials, there is a presumption that the accused is innocent until proven guilty. The prosecution has the burden of proving beyond a reasonable doubt that the defendant committed the crime.

Defendant's Rights

Defendants have broad rights to a jury trial in both felony and misdemeanor cases which may only be waived at the defendant's election and with the prosecution's consent. If a jury is summoned, it must reach a unanimous verdict to either acquit or convict. Further, the prosecutor cannot compel the defendant to testify in the trial.

Motions *in limine* (pre-trial motions) are often held to determine the admissibility of evidence, severance of accused or charges, change of venue, etc.

Trial Process

Typical trials proceed in the following manner:

Voir Dire (questioning of jurors by judge or counsel, method to be determined by trial judge);

Selection of jury. Twelve jurors are selected in felony proceedings (six in misdemeanor cases). Both sides are given peremptory and challenges for cause. Alternates are usually selected;

Opening statements by the prosecution and defense (defense may reserve its right to open after prosecution's case is complete);

Examination of witnesses and presentation of evidence. The prosecution calls evidence first, and defense may then cross examine. The defense then may, if it chooses, call evidence with the prosecution having the same right to cross examination;

After both sides complete their cases the prosecution has the right of rebuttal subject to the discretion of the trial judge;

Closing statements by the prosecution and defense. The prosecutor addresses the jury first followed by the defense. The prosecutor is then entitled to a final address;

Charging the jury (the judge providing the jury with

instructions);

Verdict rendered by the jury after due deliberation (which must be unanimous);

Entering of the verdict (either guilty, guilty of a lesser included offense, or not guilty); and

Sentencing (where applicable).

After a verdict is issued, the defendant may file post trial motions, such as a motion for a new trial.

Sentencing

If a defendant is convicted, the court then must turn to sentencing. Typical sentences include fines, probation or prison. In Michigan, most often sentences are at the judge's discretion. In order to aid the judge in sentencing, a pre-sentencing report normally will be ordered. In regards to certain felony crimes the judge must consult the sentencing guidelines which have been established by the Michigan Supreme Court in order to determine the appropriate sentence.

Appeals

After sentencing, the defendant has the right to appeal the conviction or penalty, first in the Court of Appeals, and then to the Michigan Supreme Court if leave is granted.

Typical Process in the Canadian Court System

Commencement of Criminal Process

Initial Steps: Observations or Reported Crime

As in the United States, law enforcement officers may become aware of criminal activity through their own observations, through reports of the activity by witnesses, or through an investigation.

The Decision to Charge

Once the police believe that a crime was committed, and know who committed it, an information (i.e., written complaint) will be sworn to under oath before a justice of the peace. In most cases, the informant is a police officer who has already prepared an information which is presented to the jus-

tice of the peace to be sworn. If the justice determines that there are reasonable and probable grounds for the charge against the accused, the justice will issue either a summons or a warrant for the accused's arrest. There are also provisions for a private complainant to attend to lay an information before a justice of the peace.

The Arrest

A peace officer may arrest without a warrant;

a person who has committed an indictable offense or who, on reasonable grounds, the officer believes has committed or is about to commit an indictable offense; or

a person whom the officer finds committing a criminal offense; or

a person the officer has reasonable grounds to believe that a warrant of arrest or committal, with certain exceptions, is in force within the territorial jurisdiction in which the person is found.

A summons is an alternative to arrest. It is a written order notifying an individual that he or she has been charged with an offense, directing the person to appear in court to answer the charge. It is used primarily in instances of low risk, where the person will not be required to appear until a later date. If the offense charged is one that can be proceeded with pursuant to an indictment, the accused may also be ordered to appear at the police station for fingerprinting. Failure to show up for fingerprinting can lead to the issuance of an arrest warrant. The summons must be signed by the issuing justice of the peace, and served personally by a peace officer.

Booking

After the arrest and during the booking process, the police create an administrative record of arrest listing the offender's name, address, physical description, date of birth, employer, the time of arrest, the offense, and the name of arresting officer. Photographing and fingerprinting of the offender are also part of the booking process.

Initial Appearance

A peace officer who arrests a person, with or without a warrant, or receives an arrested person in his or her custody, must present that person to a justice:

(a) Where a justice is available, as soon as possible and without unreasonable delay, and in any case within 24 hours; or

(b) Where a justice is not available within the 24 hour period, as soon as possible thereafter unless prior to the time stated above, the peace officer or officer-in-charge releases the person either conditionally or unconditionally.

The Initial Decision to Hold or Release Accused

Presentation to Justice of the Peace

After arrest, every individual is entitled to have a lawyer when appearing before a justice of the peace. At that time, the question of bail will be raised. This first court appearance may result in the following:

The justice may order that the person remain in custody pending a "show cause" hearing to determine if the accused should be released;

The justice may release the person with or without conditions and in certain circumstances require that the person deposit money or property with the court to ensure appearance in court if released;

If the accused intends on proceeding immediately by way of a "guilty plea" on a "summary charge," the court may either accept the plea if it is within the jurisdiction of the judicial officer or remand the accused to a court for that purpose. If the accused intends on pleading guilty to an indictable offense in regards to most cases he may elect to enter that plea in the Ontario Court of Justice or may elect to enter that plea in the Superior Court of Justice.

The Pre-Trial Process

Attendance

After release from custody the accused is not required to attend court save for contested matters in regards to summary conviction offenses as he may appear by agent unless ordered to attend by the court. In regards to all other offenses, accused may also avoid attendance save for contested matters by filing a Designation of Counsel which allows defendant's counsel to appear on his behalf.

Arraignment and Election

On a summary offense, after the accused is arraigned he or she will be asked to plead. When the accused is charged with a hybrid offense (an offense that may be tried by way of summary conviction or by way of indictment) the prosecutor has an election as to whether the offense will be tried by way of summary conviction or by way of indictment. If the prosecutor elects to have the matter tried by way of summary conviction the matter proceeds as a summary offense. If the prosecutor elects to have the matter tried by way of indictment, the matter proceeds as an indictable offense.

If the matter is an indictable offense, or if the prosecutor elects to have the matter tried by way of indictment, the accused has an election. The accused may elect to be tried in the Ontario Court of Justice (save for certain very serious offenses), or may elect to be tried by a judge of the Superior Court, or may elect to be tried by a judge and jury in the Superior Court. If the accused elects to be tried by the Ontario Court of Justice, she or he will enter a plea. If the accused chooses to be tried by a Superior Court judge or by a jury, she or he will not enter a plea until she or he reaches Superior Court, but may set a date for a Preliminary Inquiry.

Pleas

The accused may plead guilty, not guilty, or enter one of the special pleas of *autrefois acquit* (already been indicted, tried, and acquitted of the same offense), *autrefois convict* (already been convicted of the same offense) or pardon. If the accused refuses to plead, the court automatically enters a not guilty plea on the accused's behalf.

Preliminary Inquiry

Where an accused elects to be tried by a judge of the Superior Court of Justice with or without a jury, or the alleged offense is one within the absolute jurisdiction of the Superior Court, the accused may request a preliminary inquiry.

The purpose of the preliminary inquiry is to determine whether the accused should be ordered to stand trial. Both the prosecution and defense may call evidence although, much like the United States, the defense rarely does. After examining the evidence, the judge who conducts the inquiry is

required to decide whether there is sufficient evidence to put the accused on trial, or to dismiss the information. This decision is not a guilt or innocence determination but is a determination as to whether there is any evidence upon which a reasonable jury, properly instructed, could convict.

Grand Jury

The grand jury has been eliminated from the Canadian system.

The Trial

Presumptions and Burdens

As in the United States, there is a presumption in all cases that the accused is innocent until proven guilty beyond a reasonable doubt.

Defendant's Rights

With some exceptions, the accused has the waivable right to a jury trial for all indictable offenses. If a jury is summoned, it must reach a unanimous verdict to either acquit or convict.

The Crown prosecutor cannot compel the accused to testify in the trial and neither the judge nor the prosecutor may comment on the accused's failure to testify.

Motions may be brought prior to the trial to determine the admissibility of evidence, questions of severance, change of venue, etc. Pre-trials are required by the criminal code and are presided over by a judge other than the trial judge.

Trial Process

Trials proceeding by indictment typically proceed in the following manner:

Voir Dire (questioning of jurors by judge). This is much more limited in Canada than in the United States' state courts and is more akin to the questioning by judges in the Federal Court System. Rarely do the lawyers do the actual questioning of jurors in Canada.

Selection of jury. Twelve jurors are selected. Both sides are given peremptory and challenges for cause. Often alternates are selected;

Opening statements by the prosecution and defense (defense may reserve to open after prosecution's case is complete);

Examination of witnesses and presentation of evidence (prosecution calls evidence first, and defense may then cross examine, then defense may if it chooses call evidence, with the prosecution having right to cross examination. After both sides complete their cases the prosecution has the right of rebuttal subject to the discretion of the trial judge);

Closing statements by prosecution and defense. Each side is only given one opportunity to address the jury. If the defense calls evidence the defense must address first, followed by the prosecution. If the defense does not call evidence the prosecution addresses first, followed by the defense.

Charging the jury (the judge provides the jury with its instructions);

Verdict rendered by the jury after due deliberation (which must be unanimous);

Entering of the verdict (either guilty, guilty of a lesser or included offense, or not guilty); and

Sentencing (where applicable).

After a verdict is issued, the defendant may not file post trial motions, such as a motion for a new trial.

Sentencing

If the accused is convicted, the court then must determine an appropriate sentence. Typical sentences include fines, probation and/or imprisonment. In Canada, much discretion is given to judges in determining sentences. There are no sentencing guidelines as in the United States; however, general principles of sentencing are set out in the Canadian Criminal Code.

Although some offenses have mandatory minimum sentences, most penalties are within the court's discretion. Courts generally consider the criminal's previous criminal record, the conduct of the accused, and any other mitigating factors in determining an appropriate sentence. Specific sections of the

Criminal Code deal with the factors to be taken into account in sentencing.

The maximum penalty in Canada is life imprisonment for first degree murder, with no possibility for parole for 25 years. There is no death penalty in Canada.

Appeals

After sentencing, the defendant has the right to appeal the decision. The prosecution may also appeal the decision first to the provincial appellate court if indictable, and then to the Supreme Court of Canada as allowed by the Criminal Code.

If the offense was a summary conviction offense, the first appeal is to the Superior Court of Justice.

IV. IMMIGRATION CONSEQUENCES

Effect of Criminal Conviction on Entry into the United States

For individuals who are not United States citizens, the immigration consequences of a criminal conviction may be far greater than any punishment of incarceration and/or a fine. These consequences flow from even relatively minor offenses and impact all non-United States citizens. Such convictions can affect a non-citizen's ability to study in the United States, remain in the United States on a nonimmigrant work visa, or even a future entry to the United States on a student, work, or tourist visa.

Generally non-United States citizens are liable to be deported as a result of convictions in three principal categories a) general crimes, b) controlled substances, and c) firearms offenses and miscellaneous crimes. There are various rules set out in Federal legislation regarding when a person is subject to deportation following a conviction or other criminal adjudication and it is most important to check with counsel prior to entering a plea to determine what effect such a plea would have on the person's status.

For those foreign nationals who are not United States citizens and are convicted of crimes, particularly those given state or federal prison sentences, the Citizenship & Immigration Service ("CIS") systematically moves to deport them from the United States, regardless of the length of time in the

United States, family ties in the United States, or the United States government's diplomatic relations with the person's home country (18 U.S.C. Section 3181 (b)). Based on a criminal conviction, or even a pre-trial diversion that a state does not define as a "conviction," a foreign national may be subject to deportation from the United States. Foreign nationals may also be ineligible for discretionary relief (to avoid deportation), and often become permanently barred from returning to the United States.

Effect of Criminal Conviction on Entry into Canada

In general, non-Canadian citizens are considered to be inadmissible to Canada due to past criminal activity if they were convicted of an offense in Canada or were convicted of an offense outside of Canada that is considered a crime in Canada.

In that an individual can show that he/she has a stable lifestyle and that it is unlikely that an individual will be involved in any further criminal activity, approval of rehabilitation permanently overcomes inadmissibility arising from the offense declared. In order to determine inadmissibility, foreign convictions, acts, or omissions are equated to Canadian law as if they occurred in Canada. An individual has to provide complete details of charges, convictions, court dispositions, pardons, photocopies of applicable sections of foreign law(s), and court proceedings. Then a determination will be made on whether or not an individual is inadmissible to Canada.

V. CONCLUSION

Although the underlying principles of both the American and Canadian systems of criminal procedure are the same and based on British common law, there are also a great number of differences especially in regards to the procedures of the individual courts.

In criminal matters arising in either country, accused individuals are well-advised to seek the advice of lawyers who are well versed in the system in place in their jurisdiction. Miller Canfield understands the needs of the accused and can provide prompt solutions when criminal proceedings are commenced in either the United States or Canada.

VI. ABOUT MILLER, CANFIELD, PADDOCK and STONE, P.L.C.

Miller Canfield traces its history to 1852 when Sidney Davy Miller (1830-1904) opened a practice on Detroit's Jefferson Avenue. Today Miller Canfield has the most lawyers in Michigan and is one of the nation's leading firms in its specialty areas. We have grown to a professional staff of nearly 400 attorneys and paralegals.

With our Michigan offices, located in Ann Arbor, Detroit, Grand Rapids, Howell, Kalamazoo, Lansing, Monroe, Saginaw, and Troy, and other offices located in New York City, Pensacola, Florida, Windsor, Ontario, Canada, and in Gdynia, Wroclaw, and Warsaw, Poland, we provide a broad range of integrated services to meet the needs of clients. Working together with the U.S. offices, the offices in Poland expand the firm's reach to clients throughout Eastern Europe, and the Windsor, Ontario office broadens the firm's ability to offer clients seamless cross-border representation to organizations interested in doing business in North America.

Miller Canfield's leadership position is an advantage it shares with each of its clients. Currently, we represent 7 of the top 10 Fortune 500 companies and more than 20% of the overall list. For nearly 75 years, we have served as Martindale-Hubbell's reviser law firm for the state of Michigan law section. In addition, 19 of the firm's attorneys belong to prestigious American Colleges, including the College of Labor and Employment Lawyers, and the American Colleges of Bond Counsel, Employee Benefits, Tax Counsel, Trial Lawyers, and Trust and Estate Counsel.

Our attorneys have diverse backgrounds with varying business and practical experiences and personal and professional interests. Numerous Miller Canfield attorneys are licensed to practice law outside the state of Michigan. Educational backgrounds include advanced degrees in accounting, architecture, engineering, business management, economics, personnel management, political science, city planning, history, mathematics, chemistry, tax, public health, and education. Our attorneys publish articles on legal issues, act as instructors and speakers at law schools and colleges, participate at seminars and continuing legal education programs, and provide in-house educational seminars about legal issues for our clients and their employees.

The firm also has a number of former general counsel of major corporations practicing with it. We believe their combined experience in-house gives us a better appreciation of the myriad legal problems confronting corporations today.

Members of the firm continue to make extraordinary volunteer contributions to civic life and to the legal profession. A few examples suggest the breadth of this commitment. Organizations assisted by Miller Canfield include Big Brothers/Big Sisters; the NAACP; Catholic Social Services; the Anti-Defamation League of B'nai B'rith; Food Gatherers; Goodwill Industries; the Nature Conservancy; and countless churches, hospitals, colleges and schools. The firm takes as much pride in its community service as it does in its lawyers who have served in high-profile positions. These include, to name a few, the current head of the U.S. Department of Energy; a president of the American Bar Association; a member of the National Economic Council under President Clinton; the current director of the Michigan Department of Environmental Quality; two U.S. Senators; a U.S. District Judge; and four justices of the Michigan Supreme Court.

Our technology permits us to provide legal service in a timely, cost-efficient manner. All offices are connected by a wide-area network and a teleconferencing network. We offer sophisticated computerized capabilities for word processing, litigation support, legal research and internet document transmittal. We have established private extranets for clients permitting real-time information communication and status updates.

Our clients are diverse in size and character. We represent individuals in their personal and business concerns, trusts and estates, publicly traded and multinational companies, and many start-up, small, and medium-sized businesses. Clients also include public bodies such as the state of Michigan and many of its agencies, authorities and universities, cities, counties, townships, school and community college districts, and special authorities throughout the state. We represent many nonprofit, tax-exempt institutions, such as hospitals, charitable corporations, and professional associations.

VII. SERVICES: PRACTICE AREAS AND INDUSTRIES & SPECIALTY AREAS

Practice Areas

- Bankruptcy
- Corporate and Securities
- Environmental and Regulatory
- Federal Tax and Employee Benefits
- Financial Institutions and Transactions
- Health Care
- Immigration
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- International Business
- Labor and Employment
- Litigation
 - Litigation and Dispute Resolution
 - Product Litigation and Torts
 - State and Local Tax
- Personal Services
- Public Law
- Real Estate

Industries & Specialty Areas

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- Construction Industry
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- Governmental Entities
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Detroit Office (Main)
150 West Jefferson Avenue, Suite 2500
Detroit, Michigan 48226
Phone (313) 963-6420
Fax (313) 496-7500

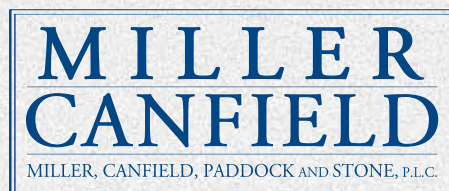
Windsor Office
443 Ouellette Avenue, Suite 300
Windsor, Ontario, Canada, N9A 6R4
Phone (519) 977-1555
Fax (519) 977-1566

www.millercanfield.com

Author

Michael H. Gordner
(313) 496-7963
gordner@millercanfield.com

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John Millhouse, Heather Bozimowski,
Penny Damore, John Jedlinski,
Andrea Olivos-Kah, and Gerald Gleeson.



Detroit Office (Main)
150 West Jefferson Avenue, Suite 2500
Detroit, Michigan 48226
Phone (313) 963-6420
Fax (313) 496-7500

Windsor Office
443 Ouellette Avenue, Suite 300
Windsor, Ontario, Canada, N9A 6R4
Phone (519) 977-1555
Fax (519) 977-1566

www.millercanfield.com