
Wisconsin Legislative Council

Anne Sappenfield
Director



TO: REPRESENTATIVE MARK SPREITZER

FROM: Peggy Hurley, Staff Attorney

RE: Legislative Subpoena Authority

DATE: August 10, 2021

You asked for an analysis of ss. 13.31 and 885.01 (4), Stats., relating to issuing subpoenas, and a determination of whether s. 13.31, Stats., establishes the exclusive means by which a witness may be compelled to appear before a legislative committee. Although s. 885.01 (4), Stats., provides that a committee member may issue a subpoena, it appears that s. 13.31, Stats., is the sole means for issuing a subpoena to appear before a duly authorized legislative committee.

LEGISLATIVE SUBPOENAS

Sections 13.31 to 13.36, Stats., establish the procedures for compelling a witness to appear before a legislative committee or either house of the Legislature and produce documents and records before the committee.¹ The statutes set forth specific provisions relating to service of process, summary process to take custody of a witness, consequences for refusal to testify, use immunity for testimony procured by subpoena, and witness fees for testifying before a legislative committee or house of the Legislature.

Under these statutes, the authority to issue a subpoena to appear before a legislative committee or house is limited to the presiding officer and the chief clerk of the house he or she serves; however, any member of a legislative committee may administer an oath to a person appearing before the committee. [s. 13.45 (6), Stats.]

¹ Under s. 13.31, Stats. “The attendance of witnesses before any committee of the legislature, or of either house thereof, appointed to investigate any subject matter, may be procured by subpoenas signed by the presiding officer and chief clerk of the senate or assembly. Such subpoenas shall state when and where, and before whom, the witness is required to appear, and may require such attendance forthwith or on a future day named and the production of books, records, documents and papers therein to be designated, and may also require any officer of any corporation or limited liability company, or other person having the custody of the keys, books, records, documents or papers of any such business entity, to produce the same before such committee. Such subpoenas may be served by any person and shall be returned to the chief clerk of the house which issued the same as subpoenas from the circuit court are served and returned.”

GENERAL SUBPOENA AUTHORITY UNDER S. 885.01, STATS.

Section 885.01, Stats., sets forth broadly who may issue a subpoena:

...any arbitrator, coroner, medical examiner, board, commission, commissioner, examiner, committee or other person authorized to take testimony, or ... **any member of a board, commission, authority or committee which is authorized to take testimony**, within their jurisdictions, to require the attendance of witnesses, and their production of documentary evidence before them, respectively, in any matter, proceeding or examination authorized by law; and likewise by the secretary of revenue and by any agent of the department of agriculture, trade and consumer protection. [Emphasis added.]

In some cases, this broad authority is further defined by other statutory sections. For example, while s. 885.01 (4), Stats., confers subpoena authority to any member of a committee that is authorized to take testimony, s. 885.01 (3), Stats., limits that authority as it relates to municipal and county boards to the “chairperson of any committee of any county board, town board, common council or village board to investigate the affairs of the county, town, city or village, or the official conduct or affairs of any officer thereof.” In addition, although s. 895.01 (4), Stats., provides that any agent of the Department of Agriculture, Trade and Consumer Protection may issue a subpoena, s. 93.14, Stats., limits that authority to “authorized agents...in relation to any matter within the department's power.”

ANALYSIS

Principles of statutory construction and relevant case law demonstrate that when ss. 885.01 and 13.31, Stats., are read together, s. 13.31 provides the sole means for issuing a subpoena to appear before a legislative committee or house. First, a longstanding principle of statutory construction holds that when a more general statute (s. 885.01 (4)) and a specific statute (s. 13.31) address the same topic, the more specific statute controls in the event of a conflict. [*Lornson v. Siddiqui*, [2007 WI 92, ¶ 65, 302 Wis.2d 519, 735 N.W.2d 55](#).] Second, statutes are to be read, whenever possible, to avoid making any statute superfluous. [*Hutson v. State pers. Comm’n*, [2003 WI 97, ¶ 49, 263 Wis.2d 612, 665 N.W.2d 212](#).] If s. 885.01 (4), Stats., governs issuance of subpoenas by legislative committee members, a specific statute relating to legislative committees’ authority to issue subpoenas is arguably superfluous.

General Versus Specific Provisions

Section 885.01 (4), Stats., confers general subpoena authority to any member of any committee that is authorized to take testimony; s. 13.31, Stats., confers specific subpoena authority for summoning a witness to appear before a legislative committee or house. Moreover, ss. 13.32 to 13.36, Stats., establish procedures, rights, and requirements that are specific and unique to witnesses who are subpoenaed to appear before a legislative committee or house.

A legislative subpoena, unlike a subpoena issued under the more general authority of s. 885.01, may procure the attendance of witnesses only if the committee is authorized and “appointed to investigate” the particular subject matter. [s. 13.31, Stats.]

In *Goldman v. Olson*, a federal district court considered a challenge to a legislative subpoena issued by a Wisconsin Senate resolution to anti-war demonstrators in the 1960s. The court held that a resolution authorizing an investigation must satisfy the following requirements to be constitutionally valid:

- Define the subject matter of an investigation with sufficient explicitness and clarity to afford the witness a reasonable basis for judgment as to whether a particular question is pertinent to the subject matter under investigation.
- If the investigation impinges First Amendment freedoms, establish the state's interest in making such an investigation by showing a substantial relationship between the information sought and a comprehensive, compelling state interest or concern.

[*Goldman*, 286 F. Supp. at 43.]

The more general subpoena power requires only that a committee be “authorized to take testimony” and that the proceedings be “authorized by law.” Additionally, subpoenas issued pursuant to general authority under ch. 885, Stats., are subject to different witness fees and different liabilities for refusal to appear. [ss. 13.36, 13.35, 885.05, and 885.11, Stats.]

In *Hipp v. Circuit Court for Milwaukee County*, [2008 WI 67](#), [310 Wis. 2d 342](#), [750 N.W.2d 873](#), [07-0230](#), the Wisconsin Supreme Court considered whether the general provisions of s. 885.01 allowed a party to a John Doe case to ask a clerk of court to issue a subpoena to procure the attendance of witnesses on his behalf, where a separate statute conferred subpoena authority to a judge in a John Doe case. The Court concluded that the more specific statute granting judges subpoena authority in a John Doe case precluded the application of the more general subpoena authority statute and that the more specific statute gave the judge “the exclusive authority to subpoena witnesses for a John Doe hearing.” [*Hipp*, ¶12.]

In the *Hipp* case, a party to a John Doe case acknowledged that s. 968.26, Stats. (2005-06),² authorized a judge in a John Doe proceeding to subpoena a witness but argued that statute did not provide exclusive authority to do so. Section 968.26, Stats., provided, in relevant part:

If a person complains to a judge that he or she has reason to believe that a crime has been committed within his or her jurisdiction, the judge shall examine the complainant under oath and any witnesses produced by him or her and may, and at the request of the district attorney shall, subpoena and examine other witnesses to ascertain whether a crime has been committed and by whom committed....

Section 885.01 (1), Stats., on the other hand, provided that a clerk of court could issue a subpoena in any action, matter or proceeding pending or to be examined into before any court.

The Court found that, although s. 968.26, Stats., did not specifically notwithstanding s. 885.01 (1), it was intended to confer subpoena authority exclusively to judges in John Doe proceedings. The *Hipp* Court noted that “applying the § 885.01 subpoena provisions to the proceedings here would require applying a more general statute regarding subpoenas where there is a more specific statute controlling subpoenas within the context of John Doe proceedings. This would be contrary to the principle of statutory construction that where two statutes applying to the same subject conflict, the more specific statute is controlling.” [*Hipp* at ¶41, citing *Lornson*.]

² All references to s. 968.26, Stats., refer to the 2005-06 version.

In the case of issuance of subpoenas by a legislative committee, the statutes in ch. 13, Stats., impose specific requirements. These specific requirements include the purpose for which a legislative subpoena may be issued, the manner in which it must be served, and the authority for signing the subpoena, which is vested solely in the presiding officer and chief clerk of each house of the Legislature. It would contradict the rule of statutory interpretation to apply a more general statute where a specific statute exists.

Avoidance of Making a Statute Superfluous

In *Hipp*, the Court also noted that a broad reading of s. 885.01, Stats., would render the specific subpoena authority relating to John Doe cases superfluous:

Section 968.26 provides John Doe judges shall examine witnesses produced by the complainant and “may, and at the request of the district attorney shall, subpoena and examine other witnesses.” Section 885.01 (1) provides judges and clerks of court with the authority to issue subpoenas, and § 885.01 (2) provides district attorneys with subpoena power. However, if clerks of court and district attorneys have the power under § 885.01 to subpoena witnesses in John Doe proceedings, then the language in § 968.26 regarding subpoenas is superfluous. Construction of statutes should avoid whenever possible interpretations that render language superfluous. [*Hipp*, at ¶38, citing *Hutson*.]

The same argument holds if any member of a legislative committee is authorized to issue a subpoena pursuant to s. 885.01 (4), Stats. Such a finding would render the procedures and authority established in ss. 13.31 to 13.36, Stats., superfluous.

History and Intended Use of Legislative Subpoena Authority

In the *Hipp* case, the Court also considered the history and intended use of the John Doe statute vesting the judge with subpoena powers and concluded that “John Doe proceedings are conducted through the authority of the presiding judge” and that allowing another party to issue a subpoena because of the general authority to do so would “in essence dilute the John Doe judge’s power.” [*Hipp* at ¶35]

For legislative committees, the legislative rules anticipate that legislative subpoenas will be issued pursuant to s. 13.31, Stats. Assembly Rule 3 (1) (o) states that the Speaker of the Assembly shall “[i]ssue subpoenas, with the countersignature of the chief clerk, for the attendance of witnesses before any assembly committee, and issue summary process for the arrest of any witness disobeying the mandate of the subpoena.” Assembly Rule 5 (1) (j) assigns the Chief Clerk of the Assembly the duty to “[c]ountersign with the speaker documents that, by law or rule, require the personal signature of the chief clerk.” Senate Rule 44 states that “[t]he original of all enrolled acts and joint resolutions, all engrossed resolutions, and all writs, warrants, and subpoenas issued by order of the senate shall be signed by the president, and attested by the chief clerk.”

The statutory and administrative rule language reinforce the intent and current practice of vesting in the presiding legislative officer the exclusive duty and authority to issue subpoenas to appear before a legislative committee. Statutory language allows any committee member to administer an oath to a person appearing before the committee, but reserves the authority to issue a subpoena for each house’s presiding officer.

In *Hipp*, the court noted: “Although district attorneys, clerks of court, and judges have subpoena powers under s. 885.01, s. 968.26 precludes district attorneys and clerks from issuing subpoenas in

John Doe proceedings. Instead, the statute allows that only judges retain their subpoena power.” [*Hipp*, ¶ 40.] Similarly, while s. 885.01 (4), Stats., confers subpoena powers on any member of any committee authorized to hear testimony, s. 13.31, Stats., precludes the application of the general authority in the specific context of subpoenaing a witness to appear before a legislative committee.

Please let me know if I can provide any further assistance.

PH:ksm