

Wisconsin Legislative Council



Anne Sappenfield
Director

TO: REPRESENTATIVE MARK SPREITZER
FROM: Peggy Hurley, Staff Attorney, and Brian Larson, Senior Staff Attorney
RE: Legislative Subpoena Authority and Special Counsel
DATE: October 6, 2021

You asked this office to review copies of subpoenas issued to elections officials in the Cities of Green Bay and Milwaukee and to determine whether the subpoenas comply with the requirements of s. 13.31, Stats. State law specifically states that a legislative subpoena may compel a person to appear before, or to provide documents to, a legislative committee. However, other statutes and case law support the conclusion that a duly authorized representative of a committee may serve as agent for the committee. Therefore, issuance of the subpoenas appears to be valid, and carrying out and enforcing the subpoenas must protect the due process and First Amendment rights of the individuals subpoenaed.

BACKGROUND

2021 Assembly Resolution 15 was passed by the Assembly earlier this year and directs the Assembly Committee on Campaigns and Elections to investigate the administration of elections in Wisconsin, focusing in particular on elections conducted after January 1, 2019. Pursuant to this resolution, the Committee on Assembly Organization adopted separate ballots on May 28 and August 27, 2021, to authorize the Speaker of the Assembly to hire legal counsel and to designate that individual as special counsel to oversee an Office of Special Counsel.

The August 27, 2021, ballot provides that the Special Counsel shall direct an elections integrity investigation, assist the Assembly Committee on Campaigns and Elections, and hire investigators and other staff.

On September 28, 2021, the Speaker and the Chief Clerk of the Assembly executed subpoenas, on behalf of the Assembly Committee on Campaigns and Elections, to require certain officials to appear before the Special Council on October 15, 2021. The subpoenas were signed and served in accordance with the statutes.

LEGISLATIVE SUBPOENA AUTHORITY

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

The legislative subpoena statute, s. 13.31, Stats., states:

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. (Emphasis added.)

This statute and case law¹ establish that a witness may be compelled to appear before a legislative committee charged with investigatory authority.

DISCUSSION

Validity of Subpoena

A plain language reading of the phrase "before any committee of the legislature, or of either house thereof, appointed to investigate any subject matter" in s. 13.31, Stats., appears to contemplate that a witness may be compelled to appear and to produce documents before a legislative committee, so long as that committee is appointed to investigate the subject matter to which the subpoena pertains. The Office of Special Counsel is not a legislative committee, although it has been charged with assisting the Assembly Committee on Campaigns and Elections.

Some of the duties of the chair established in ss. 13.32 (1) and 13.34, Stats., also indicate that current statutes anticipate that a witness would appear before a legislative committee. Specifically, the chair of the committee may file with the presiding officer a certificate stating that the summoned person failed to appear or refused to answer questions or provide requested documents. Additionally, s. 13.36, Stats., directs that the chair of the committee before which a witness appeared may document the witness' appearance in order to authorize the payment of witness fees.

If a court considers the statutes directly and specifically relating to legislative subpoenas and applies a plain language analysis, these statutes appear to compel a witness to appear, and produce documents for, a legislative committee and not a separate entity. However, a court may refrain from questioning whether an authorized investigation should be carried out in a specific manner by an independent branch.² When considering the Legislature's authority to carry out its duties, the Wisconsin Supreme Court has consistently held that unless an action interferes with a constitutional provision or right, it

¹ See *Goldman v. Olson*, 286 F. Supp. 35 (W.D. Wis. 1968).

² The Wisconsin Supreme Court has held that the Legislature has all "authority ... appropriate to achieve the ends" of its express law-making authority. *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19 ¶ 54 n.38; *Johnston v. City of Sheboygan*, 30 Wis.2d 179, 186 (1966) (quoting *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.")).

will not interfere with the Legislature on matters of legislative procedure or purely legislative matters. [*Ozanne v. Fitzgerald*, 2011 WI 43 (2011); *La Follette v. Stitt*, 114 Wis. 2d 358 (1983).] In addition, a court may find that it is not entirely clear what it means for a witness to appear "before" a committee for purposes of this provision and that a plain language analysis is insufficient.

There are several facts that indicate an appearance before the Special Counsel might be interpreted as an appearance before the committee. First, a legislative committee may utilize outside experts to perform work on its behalf under appropriate circumstances. In this case, the Assembly has charged a committee with conducting an investigation; and, in connection therewith, the house has directed the Speaker to hire an investigator to perform work on behalf of the committee. This could be viewed as similar to other instances in which the legislative branch utilizes outside experts to perform tasks that may require specialized knowledge or skills, such as actuarial services to oversee the retirement system or legal counsel. In some cases, these outside experts are hired in accordance with specific statutory procedures.³ In other cases, the house or body authorizes the hiring of the outside expert in a resolution or motion approved by the relevant committee on organization.⁴

Second, the ballot adopted by the Committee on Assembly Organization instructs the Special Counsel to assist the committee. The subpoenas signed by the Speaker and Chief Clerk, and requiring attendance before the Special Counsel, were issued in the name of the committee. This may also support the view that an appearance before the Special Counsel could be considered an appearance before the committee for purposes of s. 13.31, Stats.

There is statutory support, as well, for the proposition that an individual or an entity may be authorized to hear testimony on behalf of a legislative committee. Under ss. 13.32 and 13.34, Stats., the chair of the committee for which a subpoena was issued may initiate contempt proceedings against a person who fails to comply with the terms of the subpoena. However, the legislative subpoena statute indicates that the subpoena must "state when and where, **and before whom**, the witness is required to appear," and the general legislative contempt statute states that a person may be held in contempt for "[r]efusing to attend or be examined as a witness, either before the house or a committee, **or before any person authorized to take testimony in legislative proceedings**, or to produce any books, records, documents, papers or keys according to the exigency of any subpoena." [ss. 13.31 and 13.26 (1) (c), Stats.; emphasis added.] This language appears to indicate that someone other than the legislative committee may investigate or take testimony on behalf of the committee.

A court adopting this view would likely determine that an appearance before the Special Counsel should be considered an appearance before the committee. In that case, the subpoenas would be deemed valid because all of the requirements under s. 13.31, Stats., would be met.

³ The Joint Survey Committee on Retirement Systems (JSCRS) routinely contracts for outside actuarial reports to assist the committee in evaluating proposed changes to the retirement system, as provided under the statutes. [s. 13.50, Stats.] The statutes specifically authorize the Joint Survey Committee on Tax Exemptions (JSCTE) to employ personnel as required for the performance of its duties, in accordance with procedures specified in the statutes. [s. 13.52, Stats.] Also, the Joint Committee on Legislative Organization (JCLO) is specifically authorized to employ an outside staff of professional consultants for the purpose of studying ways to improve legislative staff services and organization. [s. 13.90 (1) (f), Stats.]

⁴ Most often, this approach has been used to hire outside legal counsel to represent the body, a house, or a subunit or member. For example, on October 12, 2005, JCLO authorized the hiring of an outside law firm to represent the defendants in *State of Wisconsin v. David A. Zien and Scott L. Gunderson*. On February 14, 1997, JCLO adopted a ballot authorizing the Co-Chairs of JCLO to select and retain legal counsel to represent the Joint Committee on Review of Administrative Rules (JCRAR) in a lawsuit, *Wisconsin's Environmental Decade v. Dept. of Commerce*, and to direct costs to be paid in equal shares by the Senate and Assembly.