



WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

2003 Assembly Bill 142

**Assembly Substitute
Amendment 1**

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BACKGROUND

Under current law, an attorney of record in a civil action or special proceeding has express authority to issue a subpoena to compel the attendance of a witness for a deposition, hearing or trial. [s. 805.07 (1), Stats.] In addition, an attorney of record may also issue a subpoena to compel the attendance of a witness in a state or local administrative contested case. [See, generally, ss. 68.11 (2) and 227.45 (6m), Stats.]

Currently there is no express authority for the attorney of a defendant in a criminal proceeding to issue a subpoena. Section 885.01, Stats., in pertinent part, authorizes a judge, clerk of court, or court commissioner to issue a subpoena requiring the attendance of a witness. [s. 885.01 (1), Stats.] District attorneys also have subpoena authority under that provision. [s. 885.01 (2), Stats.] The provisions of ch. 885 expressly apply to criminal proceedings. [s. 972.11 (1), Stats.] Section 972.11 (1), Stats., provides: “. . . the rules of evidence and practice in civil actions shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction.”

Apparently, the lack of express authority for a criminal defendant’s attorney to issue a subpoena to compel the attendance of a witness and the contrasting express authority for court officials and district attorneys to issue subpoenas in criminal proceedings has led to the conclusion that a judge, clerk of court, or court commissioner must issue the subpoena for the defendant. **Assembly Bill 142** is intended to clarify the ability of the attorney for a defendant in a criminal proceeding to issue a subpoena to compel the attendance of a witness.

THE SUBSTITUTE AMENDMENT

Assembly Bill 142, as originally drafted, combines the new authority of an attorney to issue a subpoena in a criminal action with the current authority to issue a subpoena in a civil action. Thus, under the bill, a subpoena may be signed and issued “By an attorney of record in a civil action, criminal

action, or special proceeding, to require the attendance of a witness for a deposition, hearing, or trial in the action or special proceeding. That expanded authority may be read to expand the discovery available in a criminal action to include the authority to require the attendance of a witness for a deposition. Discovery in criminal proceedings is limited and does not generally include depositions. [See, s. 971.23, Stats.]

Substitute Amendment 1 clarifies that the proposal only authorizes the issuance of a subpoena by an attorney of record in a criminal action or proceeding and is not intended to expand discovery in criminal actions or proceedings.

The substitute amendment was offered by Representative Ziegelbauer. It was recommended for adoption by the Assembly Committee on Judiciary by a vote of Ayes, 7; Noes, 0; on June 19, 2003.

DD:tlu;ksm