

## Criminal Discovery Issues

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### Attempted Avenues of Investigation

Discovery Request

Civil Subpoena

Public Records Request

Criminal Subpoena

**2.14(3) Disclosure of evidence by the defendant.**

**a. Documents and tangible objects.** *If the court grants the relief sought by the defendant* under rule 2.14(2)(b)(1), the court may, upon motion of the state, order the defendant to permit the state to inspect and copy books, papers, documents, statements other than those of the accused, photographs or tangible objects which are not privileged and are within the possession, custody or control of the defendant and which the defendant intends to introduce in evidence at trial.

**b. Reports of examinations and tests.** *If the court grants relief sought by the defendant* under rule 2.14(2)(b)(2), the court may, upon motion of the state, order the defendant to permit the state to inspect and copy the results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant and which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial when such results or reports relate to the witness's testimony.

**c. Time of motion.** A motion for the relief provided under rule 2.14(3) shall be made, if at all, within five days after any order granting similar relief to the defendant.

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## The Discovery Agreement Solution

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### Attempted Avenues of Investigation



JENCKS ACT = Federal Statute, adopted in the Iowa case law. If asked, we must turn over prior statements of a witness before cross . . .

Upon request, and after witness has testified on direct examination, all of witness's prior statements (or parts thereof) which have not been already made available to the defendant and which are "germane" to the subject matter of his direct testimony must be turned over to the defense. State v. Horn, 282 N.W.2d 717 (Iowa 1979).

BRADY MATERIAL = We must turn over ANYTHING that shows D is not guilty or that mitigates punishment.

Due process is violated when the prosecution suppresses exculpatory evidence material to guilt or punishment, irrespective of prosecutor's good or bad faith. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). "A prosecutor is charged with the responsibility of seeing that important evidence is not suppressed so as to deny accused a fair trial." State v. Niccum, 190 N.W.2d 815 (Iowa 1971).

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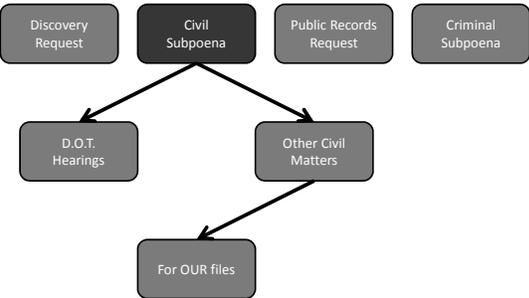
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### Attempted Avenues of Investigation



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### Attempted Avenues of Investigation



- Iowa Code Section 22.1(3) defines public records – and the definition includes all records regarding a criminal case.
- Iowa Code Section 22.7 lists exceptions, *public records that are to be kept confidential*.
  - Subsection 22.7(5) "[p]eace officers' investigative reports . . . if that information is part of an ongoing investigation. . . ."
    - "However the date, time, specific location and immediate facts and circumstances surrounding a crime or incident shall not be kept confidential. . . Except in those unusual circumstances where disclosure would plainly and seriously jeopardize an investigation or pose a clear and present danger to the safety of an individual."

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### Attempted Avenues of Investigation

Discovery Request	Civil Subpoena	Public Records Request	Criminal Subpoena
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#### Rule 32:3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused **and exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement** that the prosecutor would be prohibited from making under rule 32:3.6 or this rule.

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### Attempted Avenues of Investigation

Discovery Request	Civil Subpoena	Public Records Request	Criminal Subpoena
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### Can a criminal defense attorney issue a subpoena from their own printer?

Rule of CIVIL Procedure 1.1701	Rule of CRIMINAL Procedure 2.15
<ul style="list-style-type: none"> <li>• "The clerk must issue a subpoena, but otherwise in blank, to a party who requests it. . . . An attorney licensed or otherwise authorized to practice law in Iowa may issue and sign a subpoena as an officer of the court."</li> </ul>	<ul style="list-style-type: none"> <li>• There is NO such provision in the criminal rules.</li> <li>• "<u>A magistrate</u> in a criminal action before the magistrate, <u>and the clerk of court</u> in any criminal action pending therein, <u>shall issue blank subpoenas</u> for witnesses signed by the magistrate or clerk, <u>with the seal of the court.</u> . . ."</li> </ul>

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Can a criminal defense attorney issue a subpoena from their own printer?

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- “The clerk must issue a subpoena, but otherwise in blank, to a party who requests it. . . . An attorney licensed or otherwise authorized to practice law in Iowa may issue and sign a subpoena as an officer of the court.”
- **2.15(4) Depositions.** An order to take a deposition authorizes the clerk of the court for the county in which the deposition is to be taken to issue subpoenas for the persons named or described therein.

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Can a criminal defense attorney issue a subpoena from their own printer?

**NO.**  
Criminal Subpoenas **MUST**  
be issued by the clerk or  
a magistrate.

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**Don't the civil rules apply to criminal cases?**

- **When they do, the rules say so.**
- **See e.g. Rule of Criminal Procedure 2.13,** “A defendant in a criminal case *may **depose** all witnesses listed by the state on the indictment or information or notice of additional witnesses in the same manner and with like effect and with the same limitations as in civil actions. . . .”*

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**Don't the civil rules apply to criminal cases?**

**2.19(4) Reporting of trial.** Unless otherwise provided in these rules, all the provisions relating to mode and manner of the trial of civil actions, report thereof, translation of the shorthand reporter's notes, the making of such reports and translation of the record, and in all other respects, apply to the trial of criminal actions. Opening statements and closing arguments shall be reported. The reporting of opening statements and closing arguments shall not be waived as provided in Iowa R. Civ. P. 1.903(2).

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**Don't the civil rules apply to criminal cases?**

**Rule 2.21 Evidence.**

**2.21(1) Rules.** The rules of evidence prescribed in civil procedure shall apply to criminal proceedings as far as applicable and not inconsistent with the provisions of statutes and these rules.

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**Don't the civil rules apply to criminal cases?**

**Rule 2.34 Motions, orders and other papers.**

**2.34(2) Service of motions, orders and papers.** Service and filing of written motions, notices, orders and other similar papers shall be in the manner provided in civil actions.

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**Don't the civil rules apply to criminal cases?**

**SOMETIMES.  
But the Rules SAY SO when  
Civil Rules apply and  
they DON'T say so for  
discovery.**

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**Subpoena Power**

*Can a criminal defense attorney issue an "investigative subpoena?"*

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**Rule 2.5(6) authorizes *the State* to obtain investigative subpoenas only with court approval. . .**

2.5(6) **Investigation by prosecuting attorney.** The clerk of the district court, on written application of the prosecuting attorney and the approval of the court, shall issue subpoenas including subpoenas duces tecum for such witnesses as the prosecuting attorney may require in investigating an offense, and in such subpoenas shall direct the appearance of said witnesses before the prosecuting attorney at a specified time and place. Such application and judicial order of approval shall be maintained by the clerk in a confidential file until a charge is filed, in which event disclosure shall be made, unless the court in an in-camera hearing orders that it be kept confidential. The prosecuting attorney shall have the authority to administer oaths to said witnesses and shall have the services of the clerk of the grand jury in those counties in which such clerk is regularly employed. The rights and responsibilities of such witnesses and any penalties for violations thereof shall otherwise be the same as a witness subpoenaed to the grand jury.

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**If the State must get court approval for an investigative subpoena. . .**

*. . . does it make sense that a criminal defendant has MORE power to investigate a crime with less (NO!) judicial oversight?*

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**If the defense CAN issue investigative subpoenas. . .**

*Wouldn't the rules provide limits on that power?  
Imagine under the defense no-limits theory, a defendant thinks the judge and victim are friendly and wants investigate a motion to recuse. They could legally subpoena their phone records to see if they talk privately . . .*

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**Can a criminal defense attorney issue an "investigative" subpoena?**

Rule of CIVIL Procedure 1.1701	Rule of CRIMINAL Procedure 2.15
<ul style="list-style-type: none"> <li>• <i>"A <u>command to produce documents</u>, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, <u>or may be set out in a separate subpoena.</u>"</i></li> </ul>	<ul style="list-style-type: none"> <li>• <i>"A subpoena may contain a clause <u>directing the witness to bring with the witness any book, writing, or other thing</u> under the witnesses control which the witness is bound by law to produce as evidence. The court on motion may dismiss or modify the subpoena if compliance would be unreasonable or oppressive.</i></li> </ul>

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Can a criminal defense attorney issue an "investigative" subpoena?

Rule of CIVIL Procedure 1.1701	Rule of CRIMINAL Procedure 2.15
<ul style="list-style-type: none"> <li>• <u>"A person commanded to produce documents,</u> electronically stored information or tangible things, or to permit inspection of premises, <u>need not appear in person.</u> . Unless also commanded to appear for a deposition, hearing, or trial. "</li> </ul>	<ul style="list-style-type: none"> <li>• There is NO such provision in the criminal rules, instead:</li> <li>• "A subpoena may contain a clause directing the witness <u>to bring with the witness</u> any book, writing, or other thing under the witnesses control which the witness is bound by law to produce as evidence. The court on motion may dismiss or modify the subpoena if compliance would be unreasonable or oppressive.</li> </ul>

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Can a criminal defense attorney issue an "investigative" subpoena?

Rule of CIVIL Procedure 1.1701	Rule of CRIMINAL Procedure 2.15
<ul style="list-style-type: none"> <li>• <u>"If the subpoena commands the production of documents,</u> electronically stored information, or tangible things, or the inspection of premises before trial, <u>then before it is served, a notice must be served on each party."</u></li> </ul>	<ul style="list-style-type: none"> <li>• There is NO such provision in the criminal rules. . .</li> <li>• If a criminal defendant CAN issue a subpoena duces tecum, why isn't there a similar notice requirement?</li> <li>• Because the rules only allow a subpoena for a scheduled proceeding (where they can BRING THE RECORDS as stated in the rule). The state HAS notice of scheduled depositions, trials and hearings.</li> </ul>

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Can a criminal defense attorney issue an "investigative" subpoena?

**NO.**  
A criminal subpoena duces tecum can only be issued for production when the witness appears for a deposition, hearing, or trial.

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**Even if the civil rules DID allow unlimited, investigative defense subpoenas in criminal cases. . .**

- **Under Rule 1.1701 a subpoena:**
  - Duces tecum, can be issued ONLY AFTER NOTICE.
  - Must have rules 1.1701(4) & (5) printed on the subpoena.
  - Requires giving materials received to your opponent.
  - Requires that proof of service be filed with the clerk.
  - Requires pre-payment of witness fees.

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**WHO can be issued a subpoena in a criminal case?**

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| <p>Rule of CIVIL Procedure<br/>1.1701</p> | <p>Rule of CRIMINAL Procedure<br/>2.15</p> |
|---|--|
- Every subpoena must. . . (3) command each person to whom it is directed to do the following at a specified time and place. . .
  - “A magistrate in a criminal action before the magistrate, and the clerk of court in any criminal action pending therein, shall issue blank subpoenas for witnesses signed by the magistrate or clerk, with the seal of the court. . .”

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**WHO can be issued a subpoena in a criminal case?**

**Only WITNESSES can be issued subpoenas in a criminal case not any PERSON.**

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### Best Defense Refutation?

- A criminal defendant SHOULD have the power to investigate. The civil rules allow investigative subpoenas -- does it make sense that a criminal defendant has less power?

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### A criminal defendant SHOULD have the power to investigate.

- They MAY – in others ways – the issue HERE is only secret, unrestricted subpoena power.
- The Rule that LOOKS like it should apply is 2.13(2):

#### 2.13(2) Special circumstances.

a. Whenever the interests of justice and the special circumstances of a case make necessary the taking of the testimony of a prospective witness not included in rule 2.13(1) or 2.13(3), for use at trial, the court may upon motion of a party and notice to the other parties order that the testimony of the witness be taken by deposition and that any designated book, paper, document, record, recording, or other material, not privileged, be produced

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### Is that right?

- *Tangie*: “the special circumstances contemplated by rule 2.13(2) only apply to a deposition to perpetuate testimony for trial, not for discovery purposes.”

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**Then how CAN a criminal defendant get information needed for a defense?**

**Rule 2.35 Rules of court.**

**2.35(1)** *District court practice rules.* The supreme court and district court shall have authority to adopt rules governing practice in the district court which are not inconsistent with these rules and applicable statutes.

**2.35(2)** *Procedures not specified. If no procedure is specifically prescribed by these rules or by statute, the court may proceed in any lawful manner not inconsistent therewith.*

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**Then how CAN a criminal defendant get information needed for a defense?**



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**How the new subpoena forms solve this problem**

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