



Legislative Fiscal Bureau

One East Main, Suite 301 • Madison, WI 53703 • (608) 266-3847 • Fax: (608) 267-6873

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Joint Committee on Finance

Paper #310

Prosecutorial Staffing (District Attorneys)

[LFB 2009-11 Budget Summary: Page 230, #1, and Page 230, #2]

CURRENT LAW

District attorney offices are primarily responsible for prosecuting criminal and juvenile delinquency offenses at the trial level. The Department of Justice represents the state in felony and other significant criminal and juvenile delinquency cases on appeal. District attorney offices generally represent the state in misdemeanor, juvenile delinquency, and traffic appeals.

There are 71 district attorneys (DAs) in Wisconsin. Beginning with the general election in November, 2008, under Article VI, Section 4 of the Wisconsin Constitution, a DA is elected to a four-year term of office at the general election held in each presidential election year. Each county in the state is termed a "prosecutorial unit" except that Shawano and Menominee Counties form a two-county prosecutorial unit and jointly elect a single district attorney. Under current law, district attorneys are part-time positions in Buffalo (0.5), Florence (0.5), and Pepin (0.8) Counties, and are full-time in all other prosecutorial units.

While some counties have a single district attorney, most also have assistant district attorney (ADA) positions. In addition, counties over 100,000 in population have deputy DA positions. Deputy DAs perform supervisory and administrative responsibilities in addition to prosecuting cases.

Prior to January 1, 1990, DAs, deputy DAs and ADAs were county employees, and each county determined the level of prosecutorial staffing for its DA office. When DAs, their deputies, and assistants became state employees, all existing prosecutorial positions at the time transferred to state employment. As of May 1, 2009, 435.40 prosecutor positions are authorized, including 380.90 funded from general purpose revenue (GPR) and 54.50 funded from program revenue (PR). Funding for DAs in 2008-09 is \$44,226,500 GPR and \$3,398,100 PR. The PR

funding derives primarily from federal grant funds.

In order to administer the state's responsibility as employer of DAs, deputy DAs and ADAs, the state created the State Prosecutors Office (SPO) in the Department of Administration (DOA). The SPO is responsible for coordinating DOA administrative duties relating to district attorney offices.

GOVERNOR

Delete \$213,600 GPR annually associated with turnover reduction from the salaries and fringe benefits appropriation. Under standard budget adjustments, agencies are required to reduce adjusted base permanent salaries by three percent annually for all appropriations funding more than 50 permanent positions to account for estimated savings associated with turnover.

Delete \$442,300 GPR annually from the salaries and fringe benefits appropriation as part of an across-the-board 1% reduction in most non-federal appropriations.

DISCUSSION POINTS

Recent Budget History

1. In their agency budget request for the 2007-09 biennium, elected DAs requested an additional 37.05 GPR prosecutor positions, including: (a) 11.0 GPR positions in Milwaukee County to replace 11.0 PR positions that were anticipated to expire; (b) 22.5 GPR ADA positions in offices across the state; (c) 3.05 GPR ADA positions to convert various part-time prosecutor positions to full-time; and (d) 0.5 GPR DA position to increase the part-time elected district attorney positions in Trempealeau and Vernon Counties to full-time. These positions were not included in the Governor's biennial budget recommendations to the Legislature.

2. The provisions of 2007 Wisconsin Act 20 (the 2007-09 biennial budget act) included the following 5.75 positions: (a) 0.4 GPR position to Trempealeau County to convert the elected DA to full-time status; (b) 0.1 GPR position to Vernon County to convert the elected DA to full-time status; (c) 4.0 additional GPR ADA positions (0.5 ADA to Rock County effective January 1, 2008; 0.5 ADA to St. Croix County effective January 1, 2008; 1.0 ADA to Polk County effective January 1, 2009; and 2.0 ADAs to Kenosha County effective January 1, 2009); and (d) 1.25 additional PR ADA positions funded under the federal Byrne Justice Assistance Grant Program (0.25 ADA to Chippewa County effective October 27, 2007; and 1.0 ADA to St. Croix County effective January 1, 2008).

3. In order to balance the state's 2007-09 budget, Act 20 required state agencies to lapse \$226 million over the biennium. The provisions of 2007 Wisconsin Act 226 (the 2007-09 budget adjustment act) subsequently required state agencies to lapse an additional \$270 million during the biennium. It should be noted that the district attorney program was exempted from these lapses. As a result, local DA offices remain authorized to fully utilize provided position authority.

4. On September 15, 2008, the SPO submitted the District Attorneys 2009-11 biennial budget request. In total, including standard budget adjustments and other position and non-position funding requests, the District Attorneys budget request would increase GPR funding from a base of \$44,226,500 GPR to \$49,058,800 GPR in 2009-10 and \$50,964,300 GPR in 2010-11 (a 13.1% increase over the base year doubled). Included in the request, the District Attorneys sought 121.23 new GPR prosecutor positions as follows: (a) 100.63 GPR positions in various offices statewide (\$4,695,600 GPR in 2009-10 and \$6,408,300 GPR in 2010-11); (b) 12.5 GPR positions to convert existing positions from program revenue funding (\$828,600 GPR annually); and (c) 8.1 GPR positions to increase certain part-time ADA positions to full time status (\$479,000 GPR in 2009-10 and \$638,600 GPR in 2010-11).

5. The provisions of 2009 AB 75, as introduced, do not include recommendations to provide increased funding or position authority for additional prosecutors. In addition to standard budget adjustments (including the turnover reduction of \$213,600 GPR annually), the District Attorney function is subject to the 1% across-the-board reduction that was applied to most non-federal appropriations across state government.

Measuring the Need for Additional Prosecutors

6. Every two years during budget deliberations, the Governor and Legislature assess the need for additional prosecutors in the 71 separate DA offices across the state. The caseload of these DA offices, both individually and collectively, has been viewed by the Legislature as an important factor in determining the allocation of additional prosecution staff to these DA offices. In two audits in 1995 and 2007, the Legislative Audit Bureau (LAB) has reviewed the caseload measurement of prosecutorial workload utilized by DA offices. The workload measurement identifies the number of prosecutors that could be added to or deleted from DA offices across the state to permit prosecutors, on average, to work 40-hour work weeks.

Legislative Audit Bureau Audit December, 1995—Allocation of District Attorney Positions

7. In 1995, a number of legislators and district attorneys raised questions about the caseload measurement of prosecutorial workload that was in place at the time. In response to those concerns, the Joint Legislative Audit Committee directed the LAB to review options for measuring prosecutorial workload and improving the system for assessing the need for prosecutorial resources.

8. The results of the LAB findings were released in December, 1995, and identified a number of problems with the caseload weighting system then in use. After reviewing Wisconsin's and other states' methods of measuring prosecutorial caseload, the LAB made a number of recommendations, including improving the caseload measurement to: (a) use currently available data to express caseload in hours (for example, assign a Class A Homicide a weight of 100 hours to complete); (b) recognize that certain types of cases within a broader category may take more time than other cases within that category (for example, homicides require more time than other felonies); and (c) use a three-year average for case filing data.

9. The LAB also recommended that once a more accurate case measurement system

was developed, a productivity standard be created for prosecutors to determine the time that a prosecutor has available to prosecute cases. The LAB conducted the first step of the calculation by estimating the average number of state holiday hours, personal hours, sick leave, and vacation time per prosecutor. This total, estimated at 300 hours per year, was then subtracted from 2,088 hours (the total number of full-time hours per prosecutor position per year) to derive a 1,788 working hours per year standard. The LAB recommended that either a Legislative Council special committee be established or a committee be organized by the SPO with appropriate prosecutor representation to estimate the average time spent on other duties such as administrative and investigative work, training, and reviewing cases that are never charged. The average time spent on these other duties could then be subtracted from the available working hours estimate to calculate the average number of hours actually available to prosecute cases on an annual basis.

Response to the 1995 LAB Audit

10. In response to the LAB's recommendations, the Wisconsin District Attorneys Association (WDAA) appointed a committee to rework the measurement of prosecutor position allocation, taking into account some of the LAB recommendations. The WDAA is an association of elected district attorneys that meets to discuss various issues that affect DAs. Since DAs do not have an official state governing board, the WDAA acts, de facto, on behalf of elected district attorneys.

11. The WDAA committee estimated the amount of time spent by prosecutors on various activities such as administrative work, community service, search warrants, appeals, contested ordinance and civil traffic cases, training and other such duties that are not counted as part of a specific case. The estimate was then reviewed by all district attorney offices. The resulting estimate indicated that prosecutors spend approximately 561 hours per year on these other activities as identified in Table 1.

TABLE 1

**WDAA Estimate of Annual Time Commitments Per Prosecutor
on Non-Case Specific Responsibilities**

<u>Activity</u>	<u>Hours Annually</u>
Investigations with law enforcement	100
Contested ordinance and civil traffic cases	100
General administrative duties	50
Criminal appeals	50
Prosecutor training	40
Community service	30
Review of law enforcement referrals not charged	30
Search warrants	30
Service on boards and commissions	25
Post-conviction hearings	25
Providing training for law enforcement	24
John Doe proceedings	20
Document subpoenas	20
Wage claims, public record requests, writs, weatherizations, and probation revocations	12
Deferred prosecution cases prior to charging	<u>5</u>
Total	561

12. The above estimates of time spent on non-case specific responsibilities have not been updated since adoption 12 years ago. Subtracting the WDAA estimate of time spent on these activities (561 hours per year) from the LAB's baseline estimate of 1,788 annual working hours available per full-time prosecutor, 1,227 hours per year per full-time prosecutor were projected as being available for prosecution.

13. The WDAA committee also estimated prosecutorial hours required for different types of cases. This estimate was based: (a) in part, on information resulting from a time study conducted by prosecutors in 1993-94 for which prosecutors recorded hours spent on various cases; (b) in part, on information provided by a survey of prosecutors; (c) on various modifications to the time study as recommended by the WDAA committee; and (d) on recommendations of the WDAA committee made independent of the time study or survey.

14. The WDAA committee adopted the following time estimates for completing the following types of cases as identified in Table 2. Except for termination of parental rights (TPR) and children in need of protection and services (CHIPS) cases, these case weights have not been updated since adoption 12 years ago. The WDAA has subsequently increased the weight for a TPR case from 7.00 hours per case to 35.00 hours per case, and has increased the weight for a CHIPS case from 2.61 hours per case to 6.00 hours per case.

TABLE 2

Case Weights Adopted by the WDAA After the 1995 LAB Audit

<u>Case Type</u>	<u>Hours Per Case</u>
Class A homicides	100.00
Class B homicides	100.00
Inquests	64.00
All other felony cases	8.49
Termination of parental rights	7.00
Juvenile delinquency	3.32
Children in need of protection and services	2.61
Misdemeanors	2.17
Writs of habeas corpus	2.00
Criminal traffic	1.68

Further WDAA Modifications to the Caseload Measurement of Prosecutorial Workload

15. In subsequent years, additional categories of cases have been created by the WDAA. These new categories of cases either credit prosecutors for work on cases for which no credit was provided in the past, or break out subsets of cases that were previously a part of the "all other felonies" category. These new case categories, and the estimated time to complete these cases, are specified in Table 3. These changes were primarily adopted based on a WDAA conducted survey.

TABLE 3

Additional WDAA-Created Case Types

<u>Case Type</u>	<u>Hours Per Case</u>
Sexual predator	100.00
Homicides, other than Class A and B homicides	50.00
Second and third strike non-homicide cases	50.00
Security fraud	30.00
Children in need of protection and services extensions	3.50
Guardianships	3.50

LAB Audit July, 2007—Allocation of Prosecutor Positions

16. In response to renewed concerns about the caseload measurement of prosecutorial workload, the Joint Legislative Audit Committee again directed the LAB to review the allocation of prosecutor positions, including the caseload measurement for prosecutor workload. The LAB completed this updated audit in July, 2007.

17. In its 2007 audit, the LAB found that the current caseload measurement of prosecutorial workload uses incomplete data and out-of-date measures of the time required to prosecute cases. The current caseload measurement divides the caseload of prosecutors into 16 categories including Class A homicides, Class B homicides, all other felonies, misdemeanors, and juvenile delinquency. Only five of these 16 categories have case weights that were determined based on a 1994 time study in which prosecutors tracked the amount of time actually spent on these case types (all other felonies, misdemeanors, criminal traffic, juvenile delinquency, and CHIPS cases). The results of this time study have not been updated to account for changes that could affect the time required by prosecutors to prosecute various types of cases, such as changes to criminal law and criminal procedure, and the effects of computer automation on prosecutor productivity.

18. The estimate of prosecutor time spent on other activities such as administrative and investigative responsibilities (561 hours per year for a full-time prosecutor) is also 12 years old. This estimate was not created utilizing data from a time study on how much time, on average, prosecutors spend on these other activities.

19. In its 2007 audit the LAB made the following recommendation: "We recommend the Department of Administration report to the Joint Legislative Audit Committee by March 14, 2008, on its plans for initiating a new time study to more accurately measure prosecutors' work."

20. In its letter to the Joint Legislative Audit Committee responding to the audit, the SPO and DOA (on behalf of state prosecutors) indicated that:

"The SPO has considered the initiation of a new time study to measure prosecutors' work. However, there is no consensus among stakeholder groups on this issue. More specifically, there is no agreement as to how long the study should last, which activities should be included, how the study should consider all time worked by prosecutors, and how the data should be verified. In addition, there are concerns among prosecutors that a new time study conducted under current staffing levels will not accurately measure their workloads under optimal conditions. Based upon the status of discussions on this issue, the SPO has not developed a specific plan to initiate a new time study."

21. In addition to utilizing dated measures of the time required to both prosecute cases and complete other prosecutorial responsibilities, the audit also identified that variations in charging practices between DA offices may undermine the reliability of the current caseload measure. The July, 2007 audit indicated that:

"The effect of charging practices on caseload counts can be illustrated using an example of similar situations in two different counties. In the first situation, a prosecutor combined five worthless check offenses, committed by one defendant over a four-month span, into one case. The defendant was found guilty of one charge, and the other charges were considered in sentencing. In the second situation, a prosecutor filed 12 separate cases for worthless check offenses committed by one defendant in a three-week span. As in the first situation, the defendant was found guilty of one charge, and the other charges

were considered in sentencing. Although the two situations had similar circumstances and outcomes, the first county was credited with 1 misdemeanor case, while the second was credited with 12 cases."

"Prosecutors also noted that because felonies are weighted more heavily in the caseload formula, prosecutors could increase their measured staffing needs by filing felony charges on cases that could be misdemeanors. After filing, felony charges may be reduced to misdemeanors as one method of encouraging defendants to accept settlement offers."

22. The LAB recommended that, "the Department of Administration report to the Joint Legislative Audit Committee by March 14, 2008, on its efforts to implement short-term improvements to the weighted caseload formula, including voluntary guidelines for case charging practices and modifications to reflect time needed for review of referrals that are not filed."

23. In the SPO and DOA letter (on behalf of state prosecutors) responding to the Audit Committee, the SPO indicated that:

"With respect to establishing voluntary guidelines for charging practices throughout the State, several prosecutors have proposed that all charges against an individual be joined in one complaint whenever practicable. However, prosecutors are hesitant to limit the discretion of other prosecutors to decide whether or not to issue a charge based on specific circumstances of the crime, criminal history of the accused, etc. The current weighted caseload formula could be improved by implementing a guideline under which all charges would be joined in a single complaint whenever practicable. This would ensure greater consistency of data among the various DA offices."

24. As of this writing, such a guideline has not been adopted by the DA offices.

Additional Need for Prosecutorial Staffing

25. When prosecutors became state employees on January 1, 1990, 332.05 prosecutors became state employees. As of May 1, 2009, 435.40 prosecutor positions are authorized (although some federally-funded positions may no longer be filled due to the loss of grant funding). Prosecutors have expressed the concern that there is a significant need for increased prosecutor staffing in Wisconsin.

26. In its 2009-11 agency budget request, the District Attorney function requested the creation of 121.23 additional GPR-funded prosecutors annually. Under the request, these positions would generally be authorized effective October, 2009. To support the creation of these additional positions, the request sought additional funding of \$6,003,200 GPR in 2009-10, and \$7,875,500 GPR in 2010-11. Table 4 identifies the county DA offices seeking additional position authority under the agency budget request. In many cases, the requests for additional position authority by county DA offices varied from the findings of the WDAA caseload measurement. In some cases offices sought position authority in excess of the caseload findings, while in other cases offices

requested less position authority than was identified as needed under the caseload.

TABLE 4

Additional Prosecutors Requested Under the 2009-11 Agency Budget Request

<u>County</u>	<u>Additional ADA Positions</u>	<u>County</u>	<u>Additional ADA Positions</u>
Adams	0.80	Monroe	3.00
Ashland	0.50	Oconto	1.00
Bayfield	0.50	Outagamie	4.60
Brown	7.31	Ozaukee	2.00
Burnett	0.75	Portage	1.00
Chippewa	1.25	Price	0.50
Columbia	2.00	Racine	8.00
Dane	11.03	Rock	5.76
Dodge	2.00	St. Croix	1.80
Douglas	1.00	Sauk	1.50
Dunn	1.50	Shawano/Menominee	2.00
Eau Claire	2.00	Sheboygan	1.00
Fond du Lac	3.00	Walworth	2.00
Green	0.75	Washburn	0.25
Green Lake	1.00	Waukesha	5.91
Iowa	0.25	Waupaca	1.00
Jefferson	2.60	Winnebago	5.00
Juneau	1.00	Wood	<u>4.00</u>
La Crosse	3.00		
Langlade	1.50	Total	121.23
Lincoln	1.50		
Marathon	4.50		
Marinette	1.50		
Marquette	0.67		
Milwaukee	19.00		

27. It could be argued that additional prosecutor position authority should be allocated statewide and on a county-by-county basis, based on an updated and reliable analysis of need. Without this type of analysis, the Legislature could overstaff or understaff the prosecutorial function on a statewide basis, and could inequitably allocate prosecutorial staffing between county DA offices. Given the unresolved issues identified in the most recent LAB audit, however, the reliability of the current caseload measurement for identifying the need for prosecutors may be questioned. As a result, it cannot be determined at this time how many additional prosecutors would be required to permit prosecutors to work a standard 40 hour work week on a statewide or county-by-county basis. Further, concerns could also be raised that providing a disproportionate amount of new resources to the district attorney function could burden the court and public defender

functions. It may also be worth noting that the Governor did not include the agency budget request for additional prosecutorial staffing under AB 75.

28. Under the provisions of AB 75, as introduced, as with all other state agencies the District Attorney function was subject to the turnover reduction. State agencies are required to reduce adjusted base permanent salaries by three percent annually for all appropriations funding more than 50 permanent positions to account for estimated savings associated with turnover. As a result, the salaries and fringe benefits appropriation was reduced by \$213,600 GPR annually. In addition, this appropriation was also subject to an across-the-board 1% reduction. This 1% reduction totals an additional \$442,300 GPR annually.

29. As an alternative, the Committee could consider utilizing the funding associated with the 2010-11 turnover and 1% reductions to the salaries and fringe benefits appropriation, and allocate this funding of \$655,900 GPR to the Joint Committee on Finance's GPR supplementation appropriation. Under this alternative, if any concerns regarding outdated measures and variant charging practices were sufficiently addressed in a revised weighted caseload analysis, the Committee would have sufficient funding in its GPR supplementation appropriation to create 10.0 additional prosecutors in the second year of the biennium to be allocated to those offices identified as having the greatest need under the revised caseload analysis. [Alternative 2]

30. The Committee could also consider restoring the annual turnover and 1% reductions to the salaries and fringe benefits appropriation. While this alternative would not create additional prosecutor positions, it would provide additional funding to the appropriation to permit county DA offices to aggressively fill any vacancies that may occur during the biennium. [Alternative 3]

31. Finally, the Committee could consider adopting the Governor's recommendations and maintain the turnover and 1% reductions to the salaries and fringe benefits appropriation. The Committee could conclude that, like other state agencies, the District Attorney function may have to accept reduced funding in order to balance the state budget. [Alternative 1]

ALTERNATIVES

1. Approve the Governor's recommendation to delete \$213,600 GPR annually associated with turnover reduction from the salaries and fringe benefits appropriation. Delete \$442,300 GPR annually from the salaries and fringe benefits appropriation as part of an across-the-board 1% reduction in most non-federal appropriations.

2. Provide \$655,900 GPR in 2010-11 to the Joint Committee on Finance's GPR supplementation appropriation for possible future release to the District Attorney function to create additional prosecutor positions. This alternative would provide sufficient funding to create 10.0 additional prosecutor positions in 2010-11.

ALT 2	Change to Bill Funding
GPR	\$655,900

3. Delete provisions. As a result, the standard budget adjustment for turnover reduction (\$213,600 GPR annually) and the 1% across-the-board reduction (\$442,300 GPR annually) would be restored.

ALT 3	Change to Bill Funding
GPR	\$1,311,800

Prepared by: Paul Onsager