



## Legislative Fiscal Bureau

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Joint Committee on Finance

Paper #419

### Office of the Solicitor General (Justice)

[LFB 2015-17 Budget Summary: Page 276, #12]

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#### CURRENT LAW

The base budget for legal services in the Department of Justice (DOJ) totals \$17,337,500 and 158.40 positions annually, including \$13,679,000 GPR and 127.75 GPR positions, \$2,453,200 PR and 20.90 PR positions, and \$1,205,300 FED and 9.75 FED positions. The staffing for legal services consists of: (a) 91.9 assistant attorneys general (AAG) and AAG supervisors; (b) 21.25 legal secretaries; (c) 19.5 paralegals; and (d) 25.75 other supervisory and support personnel. Major responsibilities of DOJ's Division of Legal Services include representing the legal interests of the state in and out of court, advising state officers and agencies regarding their rights and responsibilities, representing the state in felony appeals, and participating in the preparation of legal opinions requested of the Attorney General.

The Governor may appoint a private attorney as special counsel if, in the Governor's opinion, the public interest requires such action. The Governor may appoint special counsel: (a) to assist the Attorney General in any action or proceeding; (b) to act instead of the Attorney General in any action or proceeding, if the Attorney General is interested adversely to the state; (c) to defend any action instituted by the Attorney General against any officer of the state; and (d) to institute and prosecute an action or proceeding which the Attorney General, by reason of the Attorney General's opinion as to the validity of any law, or for any other reason, deems it the duty of the Attorney General to defend rather than prosecute. In addition, the Governor, upon the request of the Adjutant General, may appoint special counsel to defend a member of the National Guard or State Defense Force who is prosecuted for any action taken in the performance of military duty. Finally, the Government Accountability Board may appoint special counsel to prosecute actions brought by the Board.

## **GOVERNOR**

Provide \$443,200 PR in 2015-16, \$584,500 PR in 2016-17, and 4.0 PR positions annually, to establish a Solicitor General's office. Provide the Attorney General authority to appoint, in the unclassified service, a Solicitor General and no more than three deputy solicitors general, each of whom must be an attorney at law licensed in Wisconsin. Further, provide the Attorney General authority to assign assistant attorneys general to assist the Solicitor General.

Create a continuing, program revenue appropriation to support the Office of the Solicitor General. Program revenue for the appropriation would be generated from funds transferred from other DOJ appropriations for expenses related to the Office.

## **DISCUSSION POINTS**

1. Under the bill, the Attorney General is granted the authority to establish a Solicitor General's office, and appoint one Solicitor General and three deputy solicitors general in the unclassified service. According to the Executive Budget Bill, "The creation of the office will allow the department to provide a more in-depth level of representation for the state at both the state and federal appellate levels for increasingly complicated legal issues."

2. Positions appointed in the unclassified service serve at the pleasure of the appointing authority. In the case of the Solicitor General and the deputy solicitors general created under the bill, the appointing authority would be the Attorney General.

3. According to the Department, the Solicitor General's office would focus on appellate litigation. While the specific duties of the Office have yet to be established, the Department indicates that the office may perform the following: (a) supervise criminal and civil appellate litigation before the United States and Wisconsin Supreme Courts; (b) act as appellate counsel of record; (c) draft briefs; (d) appear at oral arguments, (e) assist and supervise trial level litigation in cases involving a significant question of law; (f) draft Attorney General opinions; (g) evaluate requests for the state to participate as an amicus participant in state or federal courts; and (h) any other duties the Attorney General assigns the office.

4. The state currently employs attorneys within the Department of Justice to perform the duties identified above. Notably, DOJ's Special Litigation and Appeals Unit litigates cases for the state in a wide variety of complex areas, including constitutional law and governmental authority. The Unit also litigates the State's civil appeal cases and drafts the majority of the Attorney General opinions and amicus curiae briefs. Currently, staffing assigned to the Unit include: (a) 12.5 assistant attorneys general (AAG); (b) 1.0 AAG supervisor; (c) 1.0 AAG manager; (d) 1.0 paralegal; (e) 1.0 legal associate; and (f) 2.75 legal secretaries. In addition, the Department's Criminal Appeals Unit represents the state in felony appeals before the Wisconsin Court of Appeals, the Wisconsin Supreme Court, and the United States Supreme Court. Current staffing assigned to the Criminal Appeals Unit include: (a) 21.25 AAGs; (b) 2.0 AAG supervisors; (c) 1.0 AAG manager; (d) 1.0 legal associate; and (e) 7.0 legal secretaries.

5. With regards to the difficulty the Department currently has in providing quality representation to the state at the appellate level, DOJ indicates the following:

"Present staff allocation and caseloads requires the Department to staff its cases thinly and typically with a single attorney handling all aspects of a case. Out of necessity, supervisors often carry their own caseload in addition to their supervisory duties. While the current staffing situation allows us to handle a high volume of cases, the Solicitor General's Office would improve our ability to ensure the state's legal arguments are expertly developed and uniform. Furthermore, it will improve the Department's overall ability to use existing staff resources and create savings from not having to hire outside counsel in some complex legal cases."

6. Under current law, special counsel may be appointed for a variety of reasons, one of which is to assist the Attorney General in any action or proceeding if, in the Governor's opinion, the public interest requires such action. Special counsel appointments are supported by a sum sufficient GPR appropriation. Table 1 provides information on special counsel expenditures incurred by the state over the last five fiscal years.

**TABLE 1**

**Special Counsel Expenditures**

<u>Fiscal Year</u>	<u>Expenditures</u>
2009-10	\$240,000
2010-11	316,300
2011-12	1,945,800
2012-13	931,400
2013-14	1,150,300

7. To the extent that special counsel appointments would be reduced as a result of the creation of a Solicitor General's office, the state could experience savings from reduced special counsel costs. It is unclear however, what, if any, savings in special counsel costs would be generated from establishing the Office. Special counsel may be appointed in a variety of instances that would not occur less frequently as a result of the creation of the Solicitor General's office, including: (a) to act instead of the Attorney General in any action or proceeding, if the Attorney General is interested adversely to the state; (b) to defend any action instituted by the Attorney General against any officer of the state; (c) to institute or prosecute an action or proceeding which the Attorney General, by reason of the Attorney General's opinion as to the validity of any law, or for any other reason, deems it the duty of the Attorney General to defend rather than prosecute; and (d) to prosecute actions brought by the Government Accountability Board. Further, even with a Solicitor General's office, special counsel may need to be appointed to assist DOJ with an overflow of cases or with cases requiring specialized expertise. To this point, notwithstanding the creation of the Office, the bill does not: (a) reduce expenditure authority for the special counsel appropriation; or (b) modify the instances in which special counsel may be appointed.

8. According to the National Association of Attorneys General, in March, 2014, attorney general offices in 42 states, as well as the District of Columbia, Puerto Rico, and the Virgin Islands, had a person appointed to oversee their offices' civil appellate practice, and in some cases criminal appellate practice. Typically, this individual has the title of Solicitor General, State Solicitor, or Appellate Chief; however, there are states that have appointed an individual to oversee appellate litigation without such a title. Table 2 provides a list of states and territories that have appointed an individual to oversee appellate litigation.

**TABLE 2**

**States and Territories With a Solicitor General,  
State Solicitor, Appellate Chief, or Similar Position**

Alabama	Indiana	Nebraska	Puerto Rico
Alaska	Iowa	Nevada	South Carolina
Arizona	Kansas	New Hampshire	South Dakota
California	Louisiana	New Jersey	Tennessee
Colorado	Maine	New York	Texas
Connecticut	Maryland	North Carolina	Utah
Delaware	Massachusetts	North Dakota	Vermont
District of Columbia	Michigan	Ohio	Virginia
Florida	Minnesota	Oklahoma	Virgin Islands
Georgia	Missouri	Oregon	Washington
Hawaii	Montana	Pennsylvania	West Virginia
Illinois			

9. The bill provides DOJ 4.0 unclassified PR positions (1.0 Solicitor General and 3.0 deputy solicitors general) for the state's Solicitor General's office. Table 3 provides the annual cost of these 4.0 positions during the 2015-17 biennium. The bill authorizes DOJ to appoint the Solicitor General in the unclassified service in executive salary group (ESG)-5, while the deputy solicitors general may be appointed in the unclassified service in ESG-4. Employees appointed in an executive salary group may receive compensation within a given range depending on their salary group, at the discretion of the appointing authority. The ESG-5 range is \$82,453 to \$127,802. The ESG-4 range is \$76,344 to \$118,333.

**TABLE 3**

**Cost of 4.0 Positions for Solicitor General's Office, As Identified Under AB 21/ SB 21**

	<u>2015-16</u>	<u>2016-17</u>
<b>1.0 Solicitor General (ESG-5)</b>		
Salary	\$83,500	\$111,300
Fringe	33,600	44,800
Supplies and Services	<u>4,800</u>	<u>4,800</u>
Total	\$121,900	\$160,900
<b>1.0 Deputy Solicitor General (ESG-4)</b>		
Salary	\$73,000	\$97,300
Fringe	29,300	39,100
Supplies and Services	<u>4,800</u>	<u>4,800</u>
Total	\$107,100	\$141,200
3.0 Deputy Solicitors General	\$321,300	\$423,600
Total	\$443,200	\$584,500

10. In order to support the positions, the bill creates a solicitor general continuing appropriation. While the bill provides the appropriation expenditure authority totaling \$443,200 PR in 2015-16 and \$584,500 PR in 2016-17, since the appropriation is continuing, the Department would be authorized to expend amounts beyond that appropriated without legislative approval, based on available cash balances. Under the bill, the new continuing appropriation would receive monies from funds transferred from other DOJ appropriations for expenses related to the Office. The Department indicates that, "If the provision creating a Solicitor General's Office is enacted into law, the department will evaluate the full range of funding alternatives to support the new office, including moneys received for the expenses of investigation and prosecution of violations, including attorney fees."

11. Generally, the statutes permit DOJ to recover expenses, including attorney fees, associated with the investigation and prosecution of violations relating to: (a) the Medical Assistance (MA) program; (b) marketing and trade practices; (c) trusts and monopolies; and (d) various environmental violations enforced by the Department of Natural Resources. Amounts collected by DOJ as a result of its litigation of these cases are received by the agency's legal services investigation and prosecution continuing appropriation. This appropriation may expend monies for the purpose of supporting expenses related to the investigation and prosecution of violations, including attorney fees. Table 4 identifies the revenues and expenditures from the Department's investigation and prosecution appropriation from 2010-11 through 2014-15 (through March, 2015). According to the Department, generally, DOJ did not expend monies from the investigation and prosecution continuing appropriation from 2010-11 through 2013-14 so that the appropriation could accrue revenue balances that could be utilized if necessary. In 2014-15, the Department has utilized the appropriation to provide partial support for a new DOJ Data Center, as well as a new case management system.

**TABLE 4**

**Investigation and Prosecution Revenues and Expenditures 2010-11 Thru 2014-15**

<u>Fiscal Year</u>	<u>Revenues</u>	<u>Expenditures</u>
2010-11	\$529,100	\$0
2011-12	340,400	0
2012-13	577,000	0
2013-14*	3,300,600	4,500
2014-15	774,400	969,300

\*Revenue in 2013-14 includes an amount totaling \$1,524,600 received as a result of DOJ's litigation against Pharmacia for Medicaid fraud and deceptive trade practices.

12. Another potential funding source for the Solicitor General's office would be discretionary settlement funds. Discretionary settlement funds are amounts that may be expended for purposes permitted by state law, at the sole discretion of the Attorney General. These discretionary awards are deposited in the Department's administrative services gifts, grants and proceeds continuing appropriation. Table 5 identifies discretionary settlement funds deposited in the appropriation from 2010-11 through 2014-15 (through March, 2015).

**TABLE 5**

**Discretionary Settlement Funds Received 2010-11 Thru 2014-15**

<u>Fiscal Year</u>	<u>Amounts Received</u>
2010-11	\$2,992,800
2011-12	2,457,300
2012-13	11,483,400
2013-14	639,100
2014-15	3,300,100

13. Given that the administration indicates that the creation of a Solicitor General's office would allow the Department to provide a "more in-depth level of representative for the state," and that 45 other states and territories have a position similar to a Solicitor General, the Committee could approve the Governor's recommendation [Alternative 1].

14. In order to support the Solicitor General's office, the bill creates a continuing appropriation that would be funded from funds transferred from other DOJ appropriations for expenses related to the Office. Given that the appropriation does not identify a specific program revenue source for the Office, it is unclear how DOJ would continually support the Office. Typically, permanent positions are not created unless a consistent funding stream for the employees is identified. Further, given that the solicitor general appropriation could receive funding from

transfers from any other DOJ appropriation, it is conceivable that funding appropriated for purposes unassociated with the Solicitor General's office would be utilized to provide partial support for the Office.

15. According to the Department, one potential funding source for the Solicitor General's office is monies recovered by the Department's investigation and prosecution continuing appropriation. Table 4 indicates that the appropriation has collected an average of \$1,104,300 annually from 2010-11 through 2014-15. It should be noted, however, that this appropriation is authorized to support expenses related to the investigation and prosecution of violations. The Solicitor General's office would perform a variety of tasks that may not be directly related to the investigation and prosecution of violations. As such, it could be argued that this appropriation may not be an acceptable source of funding for the Office, under current law.

16. In order to address the issues noted above, if the Committee decided to establish the Solicitor General's office, the appropriation created under the bill could be eliminated. Instead, to support the Solicitor General's office, the Committee could modify the statutory language associated with the investigation and prosecution appropriation to explicitly authorize the appropriation to support the Solicitor General's office [Alternative 2]. Further, the Committee could provide the investigation and prosecution continuing PR appropriation \$443,200 PR in 2015-16, \$584,500 PR in 2016-17, and 4.0 unclassified PR positions annually in order to support the Office. Under this alternative, in addition to monies recovered by the Department for investigating and prosecuting violations, DOJ could utilize discretionary settlement funds to support the Office.

17. Alternatively, in order for the Legislature to retain more oversight over the Department's expenditures related to the Solicitor General's office, the solicitor general appropriation could be converted from a continuing appropriation to an annual appropriation. As an annual appropriation, DOJ could not spend amounts beyond what is appropriated in a fiscal year by the Legislature [Alternative 3].

18. General purpose revenue could also be provided to the Department to support the Office. Amounts recovered by DOJ can vary widely from year to year, and as a result, it is conceivable that funding may not be available to support the Office in future years. Given that the Solicitor General's office would be staffed by permanent employees, it could be argued that funding for the positions should be provided from a more consistent funding stream, such as GPR. Therefore, if the Committee decided to establish the Solicitor General's office, the Committee could also provide DOJ \$443,200 GPR in 2015-16, \$584,500 GPR in 2016-17, and 4.0 GPR unclassified positions annually in order to support the Office [Alternative 4]. Under this alternative, the Committee could delete the program revenue funding and position authority provided under the bill to support the Office. The Committee could also delete the solicitor general continuing PR appropriation created under the bill.

19. A reduced staffing level for the Office, as compared to the bill, could also be considered. For example, instead of providing DOJ 4.0 unclassified positions (1.0 Solicitor General and 3.0 deputy solicitors general), the Committee could provide funding and position authority for 2.0 unclassified positions (1.0 Solicitor General and 1.0 deputy solicitor general).

20. As a result, if the Committee decides to create the Office through the use of program revenue, the Committee could provide the Department with \$229,000 PR in 2015-16, \$302,100 PR in 2016-17, and 2.0 PR unclassified positions annually to support 1.0 Solicitor General and 1.0 deputy solicitor general [Alternative 5a]. Alternatively, if the Committee decides to create the Office through the use of GPR, the Committee could provide the Department with \$229,000 GPR in 2015-16, \$302,100 GPR in 2016-17, and 2.0 GPR unclassified positions annually to support the two positions [Alternative 5b].

21. On the other hand, some might question the need for a Solicitor General's office. It would appear as though positions currently allocated to the Department perform the duties that would be performed by the Solicitor General's office. The Department's budget for legal services includes 91.9 attorney positions that represent the legal interests of the state in and out of court. The Division of Legal Services' Special Litigation and Appeals Unit litigates complex legal cases for the state, handles the majority of the state's civil appeals, and drafts the majority of Attorney General opinions and amicus curiae briefs. Further, the Division's Criminal Appeals Unit litigates felony appeals before the Wisconsin Court of Appeals, the Wisconsin Supreme Court, and the United States Supreme Court. In addition, while the administration has argued that the Solicitor General's office would allow the Department to provide a "more in-depth level of representation," the Governor currently has broad authority to appoint special counsel to assist the Attorney General in any action or proceeding, if necessary. As a result, it could be argued that current law has effectively provided for the state's legal needs.

22. Further, under the bill as introduced, it is unclear how the Solicitor General's office would be funded. Generally, permanent positions are not created unless a consistent funding stream is identified to support the positions. In addition, while it is possible that the creation of Office would reduce special counsel expenditures, it is unclear if any savings would actually be generated. As indicated above, special counsel may be appointed for several purposes that may not occur less frequently if the Solicitor General's office is established.

23. For the reasons discussed above, the Committee could delete the Governor's recommendation to authorize the Attorney General to establish a Solicitor General's office [Alternative 6].

24. Finally, it should be noted that in the 2013-15 budget bill, the Governor recommended authorizing the Attorney General to appoint a Solicitor General and up to 3.0 deputy solicitors general in the unclassified service. Unlike the provision currently before the Committee, the 2013-15 budget bill utilized GPR to support the Solicitor General's office. The 2013-15 budget provision was deleted from the bill during deliberations of the Committee.

## **ALTERNATIVES**

1. Approve the Governor's recommendation.
2. Approve the Governor's recommendation to create a Solicitor General's office but eliminate the solicitor general continuing PR appropriation created under the bill. In addition, delete

\$443,200 PR in 2015-16, \$584,500 PR in 2016-17, and 4.0 unclassified PR positions annually provided to the continuing solicitor general appropriation. Instead, provide statutory language to the bill to authorize the legal services investigation and prosecution continuing PR appropriation to support the Solicitor General's office. Further, increase funding and position authority of the investigation and prosecution continuing appropriation by \$443,200 PR in 2015-16, \$584,500 PR in 2016-17, and 4.0 unclassified PR positions annually.

3. Approve the Governor's recommendation to create a Solicitor General's office but modify the bill to convert the new solicitor general continuing PR appropriation to an annual appropriation.

4. Approve the Governor's recommendation to create a Solicitor General's office but provide \$443,200 GPR in 2015-16, \$584,500 GPR in 2016-17, and 4.0 unclassified GPR positions annually to support the Office. Further, delete \$443,200 PR in 2015-16, \$584,500 PR in 2016-17, and 4.0 unclassified PR positions annually provided under the bill to support the Office. Finally, delete the solicitor general continuing PR appropriation created under the bill.

ALT 4	Change to Bill	
	Funding	Positions
GPR	\$1,027,700	4.00
PR	<u>-1,027,700</u>	<u>-4.00</u>
Total	\$0	0.00

5. Approve the Governor's recommendation to create a Solicitor General's office but provide funding and position authority for a reduced staffing level. Funding could be provided in either of the following manners.

a. Reduce PR funding and position authority provided in Alternatives 1, 2, or 3 by \$214,200 PR in 2015-16, \$282,400 PR in 2016-17, and 2.0 PR unclassified positions annually. *Alternative 5a may be chosen in addition to Alternatives 1, 2, or 3.*

ALT 5a	Change to Bill	
	Funding	Positions
PR	-\$496,600	-2.00

b. Reduce GPR funding and position authority provided in Alternative 4 by \$214,200 GPR in 2015-16, \$282,400 GPR in 2016-17, and 2.0 GPR unclassified positions annually. *Alternative 5b may be chosen in addition to Alternative 4.*

ALT 5b	Change to Bill	
	Funding	Positions
GPR	-\$496,600	-2.00

6. Delete provision.

<b>ALT 6</b>	<b>Change to Bill</b>	
	<b>Funding</b>	<b>Positions</b>
PR	- \$1,027,700	- 4.00

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