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Joint Committee on Finance

Paper #391

Solicitor General and Special Counsel Appropriation (Administration-- Transfers, and Justice -- General Agency Provisions & Transfers)

[LFB 2013-15 Budget Summary: Page 32, #2, Page 272, #4, and Page 282, #2]

CURRENT LAW

The base budget for legal services at the Department of Justice (DOJ) totals \$18,000,200 and 158.40 positions annually including \$14,373,500 GPR and 128.75 GPR positions, \$2,501,800 PR and 19.90 PR positions, and \$1,124,900 FED and 9.75 FED positions. The staffing for legal services consists of: (a) 89.9 attorneys; (b) 22.25 legal secretaries; (c) 19.50 paralegals; and (d) 26.75 other supervisory and support personnel. Major responsibilities of the Division of Legal Services at DOJ include representing the legal interests of the state in and out of court, advising state officers and agencies of their rights and responsibilities, and representing the state in felony appeals.

In addition to these resources provided to DOJ to carry out its legal representation responsibilities, under current law the Governor has broad authority to appoint special counsel, including the authority to appoint special counsel to assist the Attorney General in any action or proceeding. Any costs associated with these special counsel appointments are paid for out of a GPR sum sufficient special counsel appropriation.

Under current law, the Governor may appoint 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 in any way 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 forces who is prosecuted for any action taken in the performance of military duty.

GOVERNOR

Provide \$411,600 GPR in 2013-14, \$548,900 GPR in 2014-15, and 4.0 GPR attorney positions annually to legal services' GPR annual appropriation to create a solicitor general and three deputy solicitor generals in DOJ. Convert an existing attorney position in the appropriation to a legal secretary position to provide a legal secretary for the envisioned Solicitor General's Office. As a result, DOJ would receive a net increase of 3.0 attorney positions under the recommendation.

Further, provide that the Attorney General may appoint, in the unclassified service, a solicitor general and not more than three deputy solicitor generals, each of whom would have to be an attorney licensed to practice in Wisconsin. The Attorney General may assign assistant attorneys general to assist the solicitor general.

Transfer the sum sufficient special counsel appropriation with its estimated annual expenditure level of \$611,900 GPR from DOJ to the Department of Administration.

DISCUSSION POINTS

Solicitor General

1. Under AB 40, a Solicitor General's office would be created under DOJ. This office would be staffed with: (a) 1.0 ESG (Executive Salary Group)-5 Solicitor General; (b) 3.0 deputy attorneys general; and (c) 1.0 legal secretary. While the office would be staffed with 5.0 positions, AB 40 provides 4.0 attorney positions for the office. The remaining position would be provided by converting an existing attorney position to a legal secretary position. The four attorney positions provided to the office under the bill would all be in the unclassified service. Table 1 provides a breakdown of the funding and positions that would be provided to the office under AB 40.

TABLE 1**Solicitor General Office under AB 40**

<u>Position</u>	<u>2013-14</u>	<u>2014-15</u>
ESG-5 Solicitor General		
Salary	\$94,000	\$125,300
Fringe Benefits	35,800	47,800
Supplies & Services	<u>3,600</u>	<u>4,800</u>
Subtotal	\$133,400	\$177,900
Deputy Attorney General		
Salary	\$84,000	\$112,000
Fringe Benefits	32,000	42,700
Supplies & Services	<u>3,600</u>	<u>4,800</u>
Subtotal for 1.0 Position	\$119,600	\$159,500
Subtotal for 3.0 Positions	\$358,800	\$478,500
Legal Secretary		
Salary	\$25,600	\$34,100
Fringe Benefits	9,800	13,100
Supplies & Services	<u>3,600</u>	<u>4,800</u>
Subtotal	\$39,000	\$52,000
Deleted Attorney		
Salary	-\$84,000	-\$112,000
Fringe Benefits	-32,000	-42,700
Supplies & Services	<u>-3,600</u>	<u>-4,800</u>
Subtotal	-\$119,600	-\$159,500
Total	\$411,600	\$548,900

2. Department of Justice staff indicates that the responsibilities of a Solicitor General's office could include: (a) supervising all cases and staff currently assigned to the criminal appeals unit; (b) supervising all appellate litigation, including cases before the U.S. and Wisconsin Supreme Courts; (c) carrying an appellate caseload (acting as appellate counsel of record, drafting briefs, appearing at oral argument); (d) assisting and supervising trial level litigation in cases involving significant or unique questions of law; (e) drafting and reviewing Attorney General opinions and other significant written legal advice produced by DOJ; (f) evaluating requests for the state to participate as an amicus in state or federal courts; and (g) drafting and reviewing multi-state amicus briefs in which the state is participating. ["Amicus curiae" literally means friend of the court. When the state files an amicus curiae brief it is not a party to the action. The brief is filed to present the state's view on the litigation before the court. Such briefs are commonly filed in appeals concerning matters of broad public interest.]

3. The Department indicates that it is requesting additional staffing for the office, "because the primary benefit of the solicitor general's office is to provide a qualitative improvement

to the state's advocacy." The recommended staffing for the office is not based on any quantitative data or analysis as to the estimated workload for the office and the staffing needed to address it. Rather, the development of the recommendation relied on conversations with other state Attorney General's offices, the National Association of Attorneys General Supreme Court Counsel, and others. The staffing recommendation was also based on the anticipated duties to be assigned to the office.

4. It is unclear to what extent, if any, a Solicitor General's office would be a cost-savings measure. Under current law, the Governor has broad authority to appoint special counsel to assist the Attorney General in any action or proceeding. Table 2 provides information on special counsel expenditures incurred by the state over the last ten completed state fiscal years. Special counsel costs ranged from a low of \$240,000 in 2009-10, to a high of \$1,945,800 in 2011-12. [The Department indicates that special counsel assisting in cases related to 2011 Act 10 and Acts 43 and 44 (redistricting) were paid approximately \$1.8 million.]

TABLE 2

Special Counsel Expenditures

<u>Fiscal Year</u>	<u>Expenditures</u>
2002-03	\$702,800
2003-04	353,100
2004-05	389,100
2005-06	681,200
2006-07	805,700
2007-08	726,700
2008-09	723,500
2009-10	240,000
2010-11	316,300
2011-12	1,945,800

5. To the extent that the Governor reduced special counsel appointments as a result of the creation of a Solicitor General's office, the state could experience offsetting savings from reduced special counsel costs. Department staff indicates that while the hourly billing rates of private attorneys ranges from \$200 to \$500 per hour, the hourly rate used for DOJ attorneys is \$146 (which factors in the costs of salaries, fringe benefits, overhead, and support staff). As Table 2 indicates, however, in two recent fiscal years (2009-10 and 2010-11) the state expended less money under current law than it would have, had it created and funded a Solicitor General's office as envisioned under AB 40. In addition, as the main intent of the proposal is to provide a qualitative improvement to the state's advocacy, it is unclear to what extent this proposal would lead to reduced special counsel costs. Notwithstanding the recommended creation of a Solicitor General's office, AB 40 does not: (a) eliminate or amend the Governor's current law authority to appoint special counsel to assist the Attorney General in any action or proceeding; or (b) eliminate or modify the GPR sum sufficient special counsel appropriation under which the administration is authorized to pay any special counsel costs incurred as a result of the appointment of special counsel by the Governor.

6. In order to permit DOJ to "provide a qualitative improvement to the state's advocacy" the Committee could consider creating a Solicitor General's office as envisioned under AB 40. [Alternative A1]

7. While the Legislature typically creates new positions at the minimum salary for the position, under AB 40, the deputy attorneys general for the Solicitor General's office would be budgeted annual salaries of \$112,000, instead of the minimum starting salary for a state attorney of \$49,400 annually. Typically, if state agencies wish to fill a newly created position above the minimum starting salary, the agency must receive approval from the Office of State Employment Relations, and is expected to utilize base resources to fund the difference.

8. The Department could raise concerns that funding positions at lower salary levels may make it more difficult for the Department to recruit the level of candidate that it seeks for these new positions. In responding to this concern, the Committee could approve the recommendation for the office as submitted under AB 40. [Alternative A1]

9. On the other hand, in order to reduce the initial cost of creating the office, and as state agencies are typically provided positions at the minimum starting salary, the Committee could choose to create the office as envisioned under AB 40, but fund the deputy attorneys general at the minimum starting salary for a state attorney. Under this alternative, funding for the office could be reduced by \$194,100 in 2013-14, and by \$259,500 in 2014-15. [Alternative A2]

10. The Committee could also consider providing additional resources to "provide a qualitative improvement to the state's advocacy," but at reduced levels from those recommended under AB 40. If the Committee provided for a Solicitor General's office with a 1.0 ESG 5 Solicitor General, a 1.0 deputy attorney general funded at the minimum starting salary, and a 1.0 legal secretary funded at the minimum starting salary, funding to create the office could be reduced by \$303,900 GPR in 2013-14, and by \$405,500 in 2014-15. [Alternative A3] As a result of reallocated base funding and positions as well as funding and positions provided under AB 40, under this alternative the Department would be provided \$227,300 GPR and 3.0 GPR positions in 2013-14, and \$302,900 GPR and 3.0 GPR positions in 2014-15, to create a Solicitor General's office.

11. Under current law, the Division of Legal Services at DOJ is authorized 89.9 attorneys to represent the legal interests of the state in and out of court, to advise state officers and agencies of their rights and responsibilities, and to represent the state in felony appeals. In addition, the Governor is authorized to appoint special counsel to assist the Attorney General in any action or proceeding. A GPR sum sufficient appropriation exists to pay all special counsel costs incurred by the state. The current system permits the state to retain additional counsel for specialized assistance and caseload relief when necessary. As Table 2 indicates, the utilization of special counsel has varied but in two recent fiscal years (2009-10 and 2010-11) the special counsel costs incurred by the state were less than the costs the state would incur by creating the envisioned Solicitor General's office under AB 40. As it could be argued that current law has effectively provided for the state's legal needs, and as it is unclear what savings, if any, may accrue to the state if a Solicitor General's office is created, the Committee could also consider deleting the recommendation. [Alternative A4]

Special Counsel Appropriation

12. Under current law, the Governor may appoint 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 in any way 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 forces who is prosecuted for any action taken in the performance of military duty. Any special counsel costs are paid for out of the GPR sum sufficient special counsel appropriation.

13. The provisions of AB 40 would transfer the GPR sum sufficient special counsel appropriation with its estimated annual expenditure level of \$611,900 from DOJ to the Department of Administration (DOA). The administration indicates that as DOA processes other expenses of the Governor's office that it would be appropriate to also transfer the special counsel appropriation to DOA. If the Committee agrees, the Committee could approve this appropriation transfer. [Alternative B1]

14. Alternatively, as the expenses of the special counsel appropriation relate primarily to the duties and responsibilities of DOJ, it could be argued that retaining the appropriation at DOJ permits the public a more accurate reflection of the budgetary costs to operate DOJ. As a result, the Committee could choose to delete the transfer and maintain the appropriation at DOJ. [Alternative B2]

15. As Table 2 reflects, special counsel costs have varied from fiscal year to fiscal year, sometimes substantially. In order to permit the Legislature to exercise greater oversight of special counsel expenditures, the Committee could amend the special counsel appropriation and make it a biennial appropriation. [Alternative B3] A biennial appropriation would permit the administration flexibility to address fluctuating special counsel costs as higher expenses in one fiscal year could be addressed by utilizing expenditure authority from the other fiscal year in the biennium. A biennial appropriation would permit the Legislature to exercise more oversight over special counsel costs as the administration would have to seek additional funding under s. 13.10 or separate legislation if biennial special counsel costs exceeded the amounts provided to the appropriation for the biennium. On the other hand, as special counsel costs can vary from fiscal year to fiscal year and from biennium to biennium, the Committee could choose to maintain the appropriation as a sum sufficient to ensure available funding to address these costs.

ALTERNATIVES

A. Solicitor General

1. Approve the Governor's recommendation to provide \$411,600 GPR in 2013-14,

\$548,900 GPR in 2014-15, and 4.0 GPR unclassified attorney positions annually to legal services GPR annual appropriation to create a solicitor general and three deputy solicitor generals in the Department of Justice (DOJ). Approve the statutory language associated with the creation of a Solicitor General's office in DOJ.

2. Modify the Governor's recommendation by funding the 3.0 deputy solicitor general positions at the minimum starting salary for a state attorney position. Reduce funding for the office by \$194,100 GPR in 2013-14, and by \$259,500 GPR in 2014-15, to reflect this change.

ALT A2	Change to Bill	
	Funding	
GPR	- \$453,600	

3. Modify the Governor's recommendation by: (a) deleting 2.0 attorney positions; and (b) funding the 1.0 deputy solicitor general position at the minimum starting salary for a state attorney position. Reduce funding for the office by \$303,900 GPR in 2013-14, and by \$405,500 GPR in 2014-15, to reflect these changes.

ALT A3	Change to Bill	
	Funding	Positions
GPR	- \$709,400	- 2.00

4. Delete provision.

ALT A4	Change to Bill	
	Funding	Positions
GPR	- \$960,500	- 4.00

B. Special Counsel Appropriation

1. Approve the Governor's recommendation to transfer the GPR sum sufficient special counsel appropriation with its estimated annual expenditure level of \$611,900 from DOJ to the Department of Administration.

2. Delete provision.

3. *This alternative may be selected in addition to Alternative B1 or B2.* Convert the GPR special counsel appropriation from a sum sufficient appropriation to a biennial appropriation.

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