



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 #273

State Prosecutors Board (District Attorneys)

[LFB 2003-05 Budget Summary: Page 136, #7]

CURRENT LAW

Prior to January 1, 1990, district attorneys (DAs), deputy DAs and assistant DAs were county employees. Under 1989 Wisconsin Act 31, prosecutors became state employees on January 1, 1990, and the state now pays for prosecutors' salaries and fringe benefits. The adjusted base for the District Attorneys function is \$36,395,900 GPR and \$1,645,800 PR annually.

In order to administer the state's responsibility as employer of DAs, deputy DAs and assistant DAs, Act 31 also created the State Prosecutors Office (SPO) in the Department of Administration (DOA). The SPO is responsible for coordinating DOA administrative duties regarding district attorney offices. Major responsibilities include: (1) payroll; (2) fringe benefits; (3) budgets; (4) billing counties for program revenue positions; (5) collective bargaining; (6) advising elected DAs on their rights and responsibilities under the assistant DA collective bargaining agreement; (7) producing fiscal notes and bill analyses for legislative proposals affecting DAs; and (8) serving as a central point of contact for all prosecutors. The SPO is budgeted \$114,300 GPR in 2002-03.

The office of district attorney is a partisan office. A district attorney is elected for a two-year term at the general election held in each even-numbered year. There are 71 district attorneys in Wisconsin. 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.

GOVERNOR

State Prosecutors Board Created under DOA. Create a State Prosecutors Board, attached administratively to the Department of Administration (DOA). Specify that the Board would consist of eight district attorneys, appointed by the Governor to staggered four-year terms. Establish initial two-year terms for the first four members appointed to the Board. Provide that: (1) members of the Board may not continue to serve if they cease to hold the office of district attorney; and (2) Board membership would not disqualify an individual from holding any other public office or employment. Specify that the Board Chair would be designated annually by the Governor.

Powers and Duties of the Board. Provide that the Board must: (1) adopt advisory guidelines or standards for DAs to use in determining when criminal cases should be prosecuted or diverted to nonprosecutorial programs; (2) promulgate and administer rules regarding the temporary assignment of DAs and deputy and assistant district attorneys (DDAs and ADAs) from one prosecutorial unit to another; (3) hire and assign "assignable prosecutors" to prosecutorial units for the period the Board sees fit; and (4) supervise the State Prosecutors Office. Authorize the Board to hire staff to assist it in the performance of its duties. No Board staff would be authorized under the bill. Additionally, no appropriation would be created or modified to fund Board staff.

Under current law, sexually violent person commitment prosecutors (one ADA in both Brown and Milwaukee Counties) may file and prosecute sexually violent person commitment proceedings under Chapter 980 in any prosecutorial unit in the state at the request of the district attorney of the prosecutorial unit. Delete the requirement that these actions be filed and prosecuted at the request of the DA of the relevant prosecutorial unit, and instead provide that these actions be filed and prosecuted as permitted or required under rules adopted by the Board.

Under current law, two ADAs (one ADA in both Milwaukee and Outagamie Counties) have a duty to assist DAs in establishing restorative justice programs in the state. Provide that these ADAs have this duty as permitted or required under rules adopted by the Board.

Modified Duties of District Attorneys. Provide that in determining whether to prosecute a case, a DA must consider the guidelines adopted by the Board. Further provide that a DA is not bound by these guidelines and that there is no right to appeal based on a prosecutor's decision to depart in any way from any guideline. Specify that DAs must consult with the Board regarding the appointment of temporary counsel. Provide that DAs must also supervise assignable prosecutors assigned to their prosecutorial units and make appropriate assignments of such assignable prosecutors throughout their prosecutorial units.

Assignable Prosecutors Employed and Assigned by the Board. Specify that an "assignable prosecutor" is an attorney employed directly by the Board and who is assignable by the Board to any of the current 71 prosecutorial units in the state. Provide that any such assignable prosecutor may exercise any power or perform any duty required by law to be

performed by the DA of a prosecutorial unit. Modify the District Attorneys GPR-funded salaries and fringe benefits appropriation to permit its use to fund assignable prosecutor staffing costs.

Specify that assignable prosecutors, in addition to DAs, DDAs and ADAs generally under current law, may not: (1) receive any fee or reward from or on behalf of any prosecutor or other individual for services in any matter to which it is the district attorney's official duty to attend; (2) be concerned as attorney for either party, other than the state or county, in any civil action depending upon the same state of facts upon which any criminal prosecution commenced but undetermined depends; (3) hold any judicial office; (4) hold the office or act as corporation counsel or municipal attorney; (5) defend a person against a crime if they served as prosecutor for the county in the same case at the time of the person's arrest, examination, or indictment; and (6) engage in the private practice of law. Extend a current law prohibition against a common carrier or non-municipal utility from retaining or employing ADAs, to also include assignable prosecutors.

Include clarifying language that the two citizen members of the Crime Victims Rights Board, attached to the Department of Justice, may not be assignable prosecutors. Further provide that no member of the Public Defender Board may be an assignable prosecutor.

Provide that when a county civil service commission holds a demotion, suspension, discharge or reinstatement hearing, it may request the presence of a DA to act with the commission in an advisory capacity. Under current law, the commission may request the presence of an ADA. This change would: (1) specifically authorize county civil service commissions to request the presence of the elected DA; and (2) authorize assignable prosecutors, as well as ADAs, to serve these commissions, as assignable prosecutors and ADAs may perform any duty required by law to be performed by the elected DA.

Assignable Prosecutor Employment Rights and Status. Provide that for purposes of labor relations, collective bargaining in state employment, and salary administration, assignable prosecutors would be considered ADAs. Further provide that for purposes of current law coverage of demotion, suspension, discharge and layoff rights for ADAs, an ADA would include an assignable prosecutor. As a result, an assignable prosecutor: (1) who has served with the state for a continuous period of 12 months or more may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause; and (2) may appeal such an action if the appeal alleges that the decision was not based on just cause. Specify that assignable prosecutors would be assigned to the unclassified service.

Further provide that state employee annual leave and Wisconsin Retirement System coverage provisions that apply to other prosecutors would not apply to assignable prosecutors. The apparent intent of these annual leave and retirement provisions is to exempt assignable prosecutors from the application of transitional provisions governing the transfer of DAs, DDAs, and ADAs to state service on January 1, 1990. As drafted, however, these prohibitions may create ambiguity regarding whether assignable prosecutors qualify for these benefits generally.

DISCUSSION POINTS

1. The Governor's State Prosecutors Board initiative contains a number of key elements which the Committee may wish to review. These matters include: (a) the powers and duties of the new Board; (b) granting the Board the ability to transfer certain assignable prosecutors between prosecutorial units; and (c) the appointment and operation of the Board. A technical consideration relating to the bill's treatment of assignable prosecutor employee benefits is also presented. The following discussion presents some of the rationale and argued benefits that may be advanced with respect to the recommendations in the bill on these matters. The discussion also presents some of the principal concerns or questions that may be raised in each area.

Powers and Duties of the State Prosecutors Board

2. Under Senate Bill 44, a State Prosecutors Board (Board) would be created to provide guidance to the prosecution efforts of the 71 DA offices and to administer prosecutorial resources statewide. Under the bill, the Board would be responsible for: (a) adopting advisory guidelines or standards for DAs to use in determining when criminal cases should be prosecuted or diverted to nonprosecutorial programs; (b) promulgating and administering rules regarding the temporary assignment of DAs, DDAs and ADAs from one prosecutorial unit to another; (c) hiring and assigning "assignable prosecutors" to prosecutorial units for the period the Board sees fit; and (d) supervising the State Prosecutors Office.

3. While the Board would have the power to temporarily reassign any DA, DDA or ADA in the state, the exercise of this power under the bill would be governed by administrative rules developed by the Board. Many of the details relating to how the new Board would operate are not spelled out in the language of the bill. Those matters would presumably be addressed through the rule-making process, with the attendant opportunities for legislative review.

4. Under the bill, the Board would also have the power to hire and assign assignable prosecutors to prosecutorial units for the period the Board sees fit. According to the Executive Budget Book, 15.0 assignable prosecutors would be created and employed by the Board. According to DOA budget staff, the Governor's intent is to transfer 15.0 prosecutorial positions from individual DA offices in the state to the Board to function as assignable prosecutors. DOA budget staff further indicate that it would be the Governor's intent to designate positions for transfer through a Board decision-making process based on consensus-building.

5. The following considerations may be advanced in support of the powers and duties proposed for the Board under the bill:

- Requiring the Board to adopt advisory guidelines or standards for DAs to use in determining when criminal cases should be prosecuted or diverted to nonprosecutorial programs could encourage the development of uniform charging practices across the state.
- The development of these advisory guidelines or standards could lead to increased consensus among DAs as to which types of cases warrant diversion to potentially less costly

nonprosecutorial programs.

- The development and administration of rules regarding the temporary assignment of DAs, DDAs and ADAs from one prosecutorial unit to another could lead to the more efficient use of prosecutors as a statewide resource.

- Creation of assignable prosecutors could permit the state greater flexibility to reassign prosecutorial resources from offices with decreasing need to offices with a growing need.

- Placing the State Prosecutors Office under the supervision of the Board would give elected DAs greater oversight over the state administration of the District Attorney function.

6. On the other hand, a number of issues may be identified regarding the powers and duties provided to the Board under the bill:

- The authority of the Legislature to determine the allocation of prosecutorial staff to the 71 district attorney offices statewide could be reduced as a result of the Board's new powers. The Board would have ongoing authority to alter staffing allocations made by the Legislature through the: (a) temporary reassignment of prosecutors from one prosecutorial unit to another; and (b) assignment and reassignment of assignable prosecutors to prosecutorial units.

- The Board would have the authority to temporarily reassign elected district attorneys away from the prosecutorial units they were elected to serve.

- While a DA would not be bound by the advisory guidelines or standards on when to prosecute or divert a case to nonprosecutorial programs, the existence of such guidelines or standards could open DAs to criticism, if they departed from these guidelines or standards. Such guidelines or standards could reduce the independence of elected DAs.

- Authorizing the Board either to temporarily reassign prosecutors or to transfer assignable prosecutors could limit the ability of individual DA offices to plan and effectively manage their individual workloads.

- DA offices already reallocate staffing resources on a cooperative basis in order to address workload spikes in individual DA offices. It could be argued that granting the Board the power to temporarily reassign prosecutors is unnecessary.

- The Legislature, through budgetary and other legislative action, may currently reassign prosecutorial resources from offices with less identified need to offices with a greater identified need. It could be argued that creating assignable prosecutors and permitting their assignment and reassignment by the Board is unnecessary.

Assignable Prosecutors

7. Senate Bill 44 would create a new class of prosecutors called assignable prosecutors.

An assignable prosecutor would be employed directly by the Board and would be assignable by the Board to any of the current 71 prosecutorial units in the state. An assignable prosecutor would be permitted to exercise any power or perform any duty required by law to be performed by the DA of a prosecutorial unit.

8. Individual elected DAs would be required to supervise assignable prosecutors assigned to their prosecutorial units and make appropriate assignments of such assignable prosecutors throughout their prosecutorial units.

9. The following considerations may be advanced in support of the creation of assignable prosecutors under the bill:

- Assignable prosecutors could provide the state with greater flexibility to reallocate prosecutorial resources as needed between prosecutorial units in the state.
- Assignable prosecutors could facilitate the sharing of expertise, experience and information between individual DA offices.

10. On the other hand, a number of issues may be identified regarding the creation of assignable prosecutors under the bill:

- Potential oversight and control issues could emerge if the Board and an individual DA office disagreed on whether to terminate or take other employment action against an assignable prosecutor. A similar concern might arise if the Board and an individual DA office disagreed regarding what work demands could properly be placed on an assignable prosecutor.
- The Board's authority to assign prosecutors could impact the types of individuals that might seek employment as an assignable prosecutor. Attorneys might not be willing to accept employment as assignable prosecutors, knowing that they might be required to move if directed by the Board. The bill includes no provisions concerning how frequently an assignable prosecutor might be subject to transfer. Presumably, this matter would be determined by rule.
- It could be disruptive to the operation of individual DA offices to have assignable prosecutors removed and transferred to another DA office.

Appointment to and Operation of the State Prosecutors Board

11. Under Senate Bill 44, the State Prosecutors Board would be attached for limited administrative purposes to DOA. The Board would consist of eight elected district attorneys appointed by the Governor to staggered four-year terms. In addition, the Board Chair would be designated annually by the Governor.

12. The following considerations may be advanced in support of the Board's structure, as provided under the bill:

- Elected district attorneys would be responsible for the administration of the District Attorney function. These individuals would presumably have the greatest knowledge and expertise regarding staffing and workload aspects of the District Attorney function.

- An even number of Board members (eight elected DAs) would provide an incentive for arriving at a consensus in decision-making.

13. On the other hand, a number of issues may be identified regarding the appointment to and operation of the Board.

- Members of the Board would not be appointed with the advice and consent of the Senate. There is no guidance under the bill with respect to whether or not a partisan or a geographical balance should be a factor in appointments to the Board.

- The Governor, not Board members, would have the authority to designate the Board Chair.

- The Governor and all Board members would be officials elected to partisan offices, thereby creating the perception of partisanship in regards to the operation of the Board or in the assignment of prosecutors.

- An even number of Board members could just as well lead to gridlock rather than consensus-building on difficult issues.

Assignable Prosecutor Benefits

14. The language of the bill creates some ambiguity concerning whether assignable prosecutors would be entitled to the same annual leave and retirement benefits as other ADAs. The apparent intent of these annual leave and retirement provisions is to exempt assignable prosecutors from the application of transitional provisions governing the transfer of DAs, DDAs, and ADAs to state service on January 1, 1990, and not to bar assignable prosecutors from qualifying at all for these benefits. If the Committee chooses to adopt the Governor's recommendations, the Committee should include technical modifications to eliminate this ambiguity by specifically providing that assignable prosecutors would be entitled to the same annual leave and retirement benefits as comparably situated ADAs.

15. If the Committee concludes that the creation of a State Prosecutors Board and the delineation of its powers, duties and structure are appropriate and that the proposal is desirable public policy, it could approve the creation of the Board and associated provisions.

16. Alternatively, if the Committee concludes that the creation of such a Board either requires more deliberation or is unnecessary at this time, given that the current system has permitted the state to administer the District Attorney function since January 1, 1990, it could delete the Governor's recommendation.

ALTERNATIVES

1. Approve the Governor's recommendations: (a) creating a State Prosecutors Board; (b) prescribing the powers and duties of the Board; (c) modifying the duties of district attorneys; and (d) creating assignable prosecutors.

2. *In addition to Alternative 1*, include a clarification that assignable prosecutors are eligible for the same annual leave and retirement benefits as comparably situated assistant district attorneys.

3. Delete provision.

Prepared by: Paul Onsager