



SHAE SORTWELL

STATE REPRESENTATIVE • 2nd ASSEMBLY DISTRICT

Hearing Testimony
Assembly Committee on Judiciary
October 19, 2023
Assembly Bill 460

Chairman Tusler and members of the Assembly Committee on Judiciary – Thank you for giving me the opportunity to speak on AB 460, which would create an index of discovery database for our court system.

One of my priorities this session has been to alleviate the case backlog that has been stymieing our district attorney and public defender offices for several years. This backlog has consequently resulted in crimes not being prosecuted and people imprisoned waiting longer to have their day in court. According to the Wisconsin Court website, the median age for a felony case in 2022 was 218 days.

I sat down with the State Public Defender’s Office to brainstorm ideas that would help. The bill in front of you today is one of the policies we came up with, mirroring the federal system.

According to the State Public Defender’s office, conflict with evidence is a significant reason why a court case is delayed. An index of discovery would give both sides of a case a more organized system to file and present evidence, along with incentivizing both parties to cooperate more closely in cases, which would ensure a fairer trial and higher efficiency.

Lastly, regarding the technology of this system, the Wisconsin Department of Justice already utilizes the software. Therefore, the Department of Administration should have limited to no administrative cost in implementing the database under this bill.

I appreciate the opportunity to testify on this legislation and would gladly answer any questions the committee may have.



Van H. Wanggaard

Wisconsin State Senator

October 19, 2023

Testimony on Assembly Bill 460

Thank you Chairman Tusler and committee members for hearing Assembly Bill 460 today. This bill addresses the unacceptable case backlog within Wisconsin's court system and provides a new tool for district attorneys and public defenders to use.

At the end of 2022, there were 75,279 pending criminal cases in Wisconsin. In the year prior to the COVID-19 pandemic, there were just 58,678 pending cases. In addition, the median age of felony and misdemeanor cases since 2019 has increased by over 42%, and the median age of criminal traffic cases has increased by one-third.

In addition to the massive workload increase for district attorneys and public defenders, this backlog creates a serious public safety risk. The longer that a case drags on, the longer that potentially violent criminals are out in public, and given the opportunity to commit additional crimes.

The language of Assembly Bill 460 is incredibly simple. It creates a statute that specifically says that DOA "shall maintain an index system for discovery that allows district attorneys and public defenders to manage, access, and organize all discovery-related information." It is that simple.

Through this discovery index, both the prosecution and defendants will be able to access all evidence in one organized place. This will eliminate any potential conflicts with evidence, ensure the defendant receives a fair trial, and streamline the process so that there are less delays in the case.

Thank you for your consideration of Assembly Bill 460. I encourage you to support its passage.

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Assembly Committee on Judiciary
Assembly Bill 460
Thursday, October 19, 2023

Chairman Tusler and members,

Thank you for having this hearing on Assembly Bill (AB) 460. AB 460 creates a framework to require the creation of an index to track discovery materials in a criminal case. The State Public Defender's Office (SPD) is thankful to Representative Sortwell and Senator Wanggaard for authoring this legislation.

During the most recent biennial budget process, one of the central issues was the recruitment and retention of attorneys throughout the criminal legal system. The final budget addressed one of the most significant factors by increasing compensation for attorneys, for which SPD and the criminal justice budget coalition is grateful. The other significant component that affects recruitment and retention is the staggering workload. The most vital resource at SPD is attorney time. There are many ways in which that time could be more efficiently utilized. AB 460 is designed to address one of those factors that drives workload and places added burden on attorney time.

In many cases, there is a significant amount of discovery material such as written documents, video, and other electronic evidence. There are statutory and case law requirements on all parties to provide discovery material at any point it becomes available in the course of the case. While a majority of discovery is provided by law enforcement to prosecutors who then share it with defense counsel, the obligation applies to defense counsel sharing discovery with prosecutors as well. Because there is this ongoing obligation and the fact that additional discovery may come in, it is not uncommon for this scenario to occur: 10 pieces of discovery are provided at the outset of the case, 2 more come in on the eve of trial, but because there is no index or naming convention, instead of just sending the 2 new pieces of discovery, all 12 are provided and defense counsel has to figure out what is new and what they've already reviewed. I want to emphasize, this is not done maliciously, it is the practical impact of an overworked criminal justice system.

AB 460 creates a statutory framework, while leaving flexibility, to require that an index be provided of discovery from each party in the case. There are examples of systems like this in practice already. Several counties already employ a type of indexing or table of contents system. The federal court system and Wisconsin Department of Justice are familiar with "Bates stamping" used to create a numerical index for documents. While it may appear to add more

demand on staff time, we believe that the time saved later in the case will be greater than the time it takes to create the index in the first place.

SPD has had preliminary conversations with the District Attorney Information Technology (DAIT) program about different ways that AB 460 could be practically implemented in various ways on a county by county basis though the implementation is more practically based and not a one-size-fits-all technology solution. Again, we thank the authors for drafting this bill and look forward to future conversations with our criminal justice partners and policy makers on the concept of creating an index of discovery.



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October 19, 2023

Assembly Judiciary Committee

Re: AB- 460

Dear Judiciary Committee Members,

Thank you for taking the time to read my submission regarding AB- 460. Discovery is an important part of the court process which we take very seriously. My office has worked hard to have discovery distributed as quickly and completely as possible. If there is an issue raised by defense counsel, we work diligently to ensure they have all the materials. This is a very time intensive process. Each county has multiple law enforcement agencies with different record keeping systems and digital evidence systems. We receive this information in multiple formats. With the use of recordings by law enforcement agencies increasing the amount of digital discovery is increasing as well. The requirement to index all digital discovery is extremely time intensive and to upload into a system would add even more time to the process. Right now, some law enforcement agencies can provide digital discovery directly to defense counsel which is more efficient. This process would require us to slow that process down by requiring us to receive it, index it and upload it.

We are also required to redact some information by law. Before any paper discovery is released it must be redacted which as well is a time intensive process. We must comply with victim rights which may require a protective order on some discovery. To have a joint system which multiple parties can access would put some privacy and victim rights at risk.

Furthermore, the requirement that the Court set the time and sequence of discovery is not feasible. We do not control when we receive certain reports. For example, the Crime Laboratory has its own timeline for providing testing and reports. We do not control them. What would the remedy be if we do not turn over a report because we have not received it? Would a victim be precluded from justice because we didn't receive a report by an arbitrary timeline set by a Judge.

This bill would put an extreme burden on the staff of the District Attorney's Offices around the State. Which would require us to ask for additional staff from the Counties. My office alone would need at least one additional staff member, more likely two, to handle the requirements of this bill. Each additional staff member would have an estimated cost of \$65,000 (salary/ benefits).

I take the obligation to comply with discovery requirements very seriously, but I strongly oppose this bill. Thank you for your time and consideration.

Sincerely,

Jacalyn LaBre
District Attorney
Manitowoc County



BAYFIELD COUNTY DISTRICT ATTORNEYS OFFICE

Kimberly Lawton, District Attorney

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October 18, 2023

Assembly Committee on Judiciary
Hearing Thursday October 19, 2023

Via email to Kathryn.Heitman@legis.wisconsin.gov and Rep.Tusler@legis.wisconsin.gov

RE: Assembly Bill 460 – Relating to: Index of discovery for district attorneys and public defenders.

Representative Tusler and committee members,

I am the chair of the DA IT Steering Committee. This issue regarding discovery is deeper than just the technology that would be used for creating an index of discovery. Some background information may be helpful.

There are two main computer programs that DA IT has created for case management. The PROTECT system is for court filings, drafting documents, and justice information. This is the program that shares information with the Courts (CCAP) and with the Department of Justice and is seemingly referenced by the Analysis by the Legislative Reference Bureau. The information shared essentially comes down to statistical information such as types of crimes associated with a particular person, attorneys assigned, and electronic filing of documents with court. PROTECT does not share evidence or the discovery with the court system nor the Department of Justice. The PROTECT system does not store or manage discovery for district attorney offices. Even with the modernization of PROTECT that is currently ongoing, it will not have the capability to store and transfer discovery. It is anticipated that we could better internally track discovery, but it not the system envisioned by this bill. The only case-related information that is shared with other criminal justice partners is statistical, not substantive discovery.

The DA IT program has created a portal for secure transfer of discovery (DEST). This portal cannot store this discovery and is designed for **transfer only**. If this bill were to require any sort of ongoing storage and access system, this would have a significant fiscal impact on DA IT / DOA. The language of the bill states that district attorneys and public defenders would be able to manage, access, and organize all discovery-related information. The current infrastructure does not support this. This is more than just bates numbering documents or labeling digital items to then transfer to attorneys. Bates numbering and labeling are easy from a technological standpoint, but the problem is much deeper than simply numbering or labeling.

While the DEST system is a helpful tool, for various and important reasons this DEST portal is not uniform throughout the state. Here is some information on how discovery is being transferred currently in the state:

1. Each law enforcement agency has their own budget considerations on how to provide the district attorney's offices with the discovery. In a small city like Washburn, they do not have the capacity to electronically send discovery to the DA's office. Officers are handing in paper reports and CDs with media (videos, audio) to our office.
2. Law enforcement agencies have body cameras or other electronic evidence systems that work only with those specific manufacturers. For example, the State Patrol uses AXON system and there is an internet link that gets sent to our office to download those videos. State Patrol must use that proprietary portal, they cannot just switch to DEST.
3. Electronic evidence is transmitted through other services such as evidence.com, icrimefighter, AXON, Motorola solutions, and the list goes on. Individual law enforcement agencies decide which evidence provider to use, if at all, and often it is based on fiscal decisions. Due to the cost of these products, we are seeing some police departments decide against body cameras because they simply do not have the capacity to manage the electronic evidence. On any one simple drunk driving traffic stop, there could be 5 hours of video footage and then that footage is multiplied by the number of cameras – squad camera, body camera, inside squad camera, wide angle squad camera.
4. Since the DA IT DEST system is transfer only, it does not solve the problem of storage of this data. It certainly is not an index that could be accessed by law enforcement, defense attorneys, and prosecutors. Some counties have decided to have their sheriff's office invest in evidence systems and use a product like evidence.com and some district attorney offices then use that system too since the county is already paying for it. Absent significant state funding for law enforcement electronic evidence equipment and corresponding data retention, this is not likely to change. Counties and municipalities are grappling with the costs of retention of this data.
5. Not all electronic evidence can legally be managed in a system accessible to even district attorneys. Appropriately, child pornography cannot be placed prosecutor laptops nor on servers where others could access the data. This evidence is still available to prosecution and defense, but it must have special arrangements to view. Sensitive crime cases also implicate significant privacy issues of victims and should not be transferred electronically and are inappropriate for duplication. The proposed legislation will harm victims.
6. Additionally, discovery is obtained from sources beyond the local law enforcement agencies. DA offices will receive voluminous discovery from the Crime Lab, the State lab of Hygiene, cell phone providers, internet services providers, State Patrol reconstruction, and items obtained from individual citizen media such as surveillance videos and cell phone recordings. Each of this data can have their own proprietary software.

7. Some of the data obtained contains thousands of files. I have had 5 vehicular homicides and an intentional homicide that each had data so large and complicated that I needed law enforcement's specialized computer to run the programs. The program is also available to defense attorneys, and we already assist them in our offices to utilize that discovery. We do not however have time available to index those files, and absent a dedicated discovery paralegal assigned to each attorney and corresponding specialized equipment, this bill would have impossible mandates. It also would not relieve the defense attorney of their obligation to view that same evidence.
8. Once discovery does make it to a DA's office, then the practical obligation of the DA's office includes: verifying the media, redacting information – this includes redaction of sensitive information within media, ensuring that the media sent to defense does not contain illegal items (like child pornography) and make sure that any updates from the law enforcement agency are also included. This is where the fiscal impact of this bill would significantly increase within individual offices. Across the state, prosecutors have already felt the significant demands due to the increased redaction needs after Marsy's law. Our offices are already begging our counties for more support staff due to the volume.
9. After the redaction and verification process, the evidence then is transmitted to the defense attorneys. Often, we have attorneys that will only accept paper documents and CDs with the media. Some attorneys will accept electronic transmission, but there is not a requirement to do so, and it all depends on the capacity of the individual attorney offices. While public defender's office generally accepts digital transfer, that is not the same for all attorneys including private bar taking public defender appointments.
10. After the initial batch of discovery is sent to defense attorneys, then often we will receive updates to police reports or electronic evidence from the police departments. We have had it where a police officer corrects their report, so while it may appear it is the same report, it has a significant and meaningful difference that we are required to again release to defense. If we were to withhold that version of the report, and not send it a second time, that could lead to a dismissal of charges and potentially an inability to prosecute a defendant. The prosecutors also must review items twice because of this, and while that is inconvenient and time consuming, it is unavoidable. An index of discovery will not solve that problem.

There are several other important problems this bill creates. First, is a separation of powers issue, the court system already has the power to set reasonable deadlines but to micromanage district attorney's offices to that level would lead to disastrous results. Second, district attorneys are tasked with protecting victim information as well in accordance with Wis. Stat. 950 and Marsy's law, and to have arbitrary deadlines to comply with those discovery demands may also be squarely at odds with these responsibilities. This will harm victims. Third, district attorney's offices do not control when we receive the evidence. The court is not better positioned than the

district attorney to decide the sequence and timing of disclosure. Judges do not see any discovery in 95-99% of the cases. Even in a jury trial, the court does not see all the discoverable material and would not be able to intelligently order these types of disclosures. This would lead to dismissals of criminal cases. The cost to the system to then refile these cases far outweighs any perceived benefit of an index, especially considering that the attorneys have the duty to review that discovery anyway.

I wish I could be in person to discuss further. Prosecutors too are extremely busy, and the travel time prevents me from being there in person. If anyone has any questions, I'd certainly love to discuss this topic further. My direct phone number is (715) 373-3265.

Sincerely,

Kimberly A. Lawton
District Attorney
Bayfield County

Schmidt, Melissa

From: Gerol, Adam Y - DAIT
Sent: Wednesday, October 18, 2023 4:35 PM
To: Rep.Tusler
Cc: Heitman, Kathryn
Subject: SB458 District Attorney Information related bill

Representative Tusler,

I am writing to express my concerns regarding [2023 Senate Bill 458](#), which may have a version in the Assembly, [2023 Assembly Bill 460](#). I am asking that you delay action on these bills because they present serious organizational and fiscal concerns for the district attorneys, their law enforcement partners, and also the counties that pay for and provide our necessary staffing. The purpose and aims of this measure seem to be somewhat unclear, but the language chosen has created great concern within the DA program. As best we can understand this measure, there would be a significant fiscal impact to the individual DAs offices, together with a related impact to the law enforcement agencies who provide us with their reports and other discovery.

Our suspicion is that these costs and complications would be significant and they would impact existing county resources as well as statewide funding. This is because these bills seem to assume that a new obligation will be created to organize the data that might be shared through this new system. What is also presumed, but left unsaid, is the effect this would have on the way DAs offices conduct business. It would transform the manner in which we currently fulfil these tasks. While the discovery obligations of the district attorney are well understood, the mechanism of how this occurs differs from county to county. It must. All of us must deal with law enforcement agencies which have differing levels of technology and use different database systems. While most of us have worked through many of those challenges with the current DA IT system when electronically accepting cases from law enforcement for prosecution electronically, the marshalling of other media that commonly accompanies criminal investigations is a much larger issue. In other words, we have all worked out how to process digital police reports and smaller media files into the DA PROTECT system, but collecting larger data files, such as squad camera recordings, body camera recordings, business security recordings, recorded interviews, cell phone downloads, can't be done the same way. To collect these from law enforcement, and to share them with the defense, DAIT has already created their own file sharing system called Cerberus. While Cerberus may work for some counties, it simply cannot for others. This may be due to the level of technology resources in a county, available internet speeds, sophistication of partner law enforcement agencies, and simply just the number of support people available to do the work. For this reason, most DAs offices have chosen file sharing systems that work better for their circumstances. A 'one size fits all,' scalable system, is simply not realistic.

The presumption of this bill is that a single system can be created that would fulfil the needs of all 71 days offices. That's speculative at best. However, the more troubling aspect of this is this bill is the suggestion that the data be "organized" before it is uploaded to the new file sharing system. While the bill says that this would be a shared obligation of both the prosecution and the public defender, in practice this would be an almost entirely one-sided burden. DAs rarely receive reciprocal discovery from defense attorneys – in Ozaukee County perhaps a handful of times a year. However, for DAs to organize and upload their discovery into such a system would be a massive undertaking. Consider, we receive electronic discovery from law enforcement as a collection of document and media files, usually without any type of meaningful names associated with them. "Organizing" these files would essentially require assigning meaningful labels to them. That would require opening each file, reviewing it to determine how to name it, renaming the file in the system and then uploading it. Doing this would be massively time intensive. Even if it were to only require 1.5 hours per case, which I think is low, this is what it would really mean to Ozaukee County: 1.5 hours * approximately 2000+ referrals per year = 3,500 hours of additional work time. I do not have these hours available to my office currently. I suspect we

would need to have a paralegal do this work, likely at a cost of a \$60,000+ salary – together with the cost of benefits. To meet this obligation, we would likely need two paralegals, and these positions would have to be paid for by the county.

This may seem like a small, innocuous bill, but the possible related context is enormous. Please put a pause to this so that these related concerns can be ironed out.

I regret that I cannot appear tomorrow and present my concerns in person. Please do not hesitate to contact me if I could be of any further assistance.

Thank you,

Adam

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