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October 12, 2007

Sec. Michael Morgan
Office of the Secretary
Dept. of Administration
101 E. Wilson Street
Madison, Wisconsin 53702

RE: Legislative Audit Bureau (LAB) Report 07-9
An Evaluation: Allocation of Prosecutor Positions

Dear Sec. Morgan:

WDAA applauds the Legislative Audit Bureau (LAB) for providing an independent and objective report that confirmed the prosecution program in the State of Wisconsin is severely underfunded and dangerously understaffed. WDAA asks the Wisconsin Department of Administration (DOA) to support the observation from the LAB report that the "current staffing levels and the consequences of understaffing justify adding new prosecutor positions." LAB 07-9 at 65.

WDAA further recommends that DOA support the reinstatement of a plan that permits assistant district attorneys to progress through their pay range because, as the LAB report notes, "[p]rosecutors have been state employees since 1990 . . . largely as a means of . . . reducing turnover in prosecutor positions." LAB 07-9 at 10. In 2001, pay progression was diluted and by 2003 it was removed entirely resulting in 180 assistant district attorneys leaving the program, which amounted to a turnover rate of approximately 50 percent in only six years. WDAA also recommends that when senior assistant district attorney leaves employment, DOA reinvest the costs savings attributable to hiring a less experienced assistant district attorney at a lower salary into the existing salary pool, rather than simply diverting the savings to the general fund.

WDAA is confident that DOA recognizes the importance of public safety in Wisconsin which requires a fully funded and fully staffed prosecution program that rewards experience and encourages retention of prosecutors. Enclosed are WDAA Resolution Nos. 07-01 and 07-02. Please support these important resolutions to ensure the vitality of the prosecution program and, ultimately, ensure offender accountability and victim safety.

The remainder of this letter addresses WDAA's position of the eight recommendations presented in the LAB report as highlighted on page seven of the report. While the LAB report provided a wealth of valuable empirical information about the program, many of the recommendations failed to adequately address the severe plight of the program. WDAA trusts that DOA recognizes the importance of receiving feedback from those within the system which includes not only WDAA but also the Association of State Prosecutors (ASP). Below is WDAA's response to the eight LAB recommendations, which was provided to ASP in the interest of providing a broad perspective to the issue:

LAB Recommendation: 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. LAB 07-9 at 40.

WDAA does not embrace the recommendation that the Department of Administration should focus on short-term improvements to the weighted caseload formula because such a short-term focus dilutes attention to the serious problems presently existing within the severely understaffed prosecution program. Simply altering the formula with a short-term fix would be illogical if not insincere because the change would do nothing to cure a underlying problem. The LAB report confirmed that the understaffing is a significant problem resulting in prosecution delays, inadequate time to meet with victims and witnesses, settling cases with lesser charges or lighter penalties, and many cases never being prosecuted at all. LAB 07-9 at 21-22.

WDAA certainly recognizes the need for improvements to the weighted caseload formula, such as modifications to reflect time needed for review of referrals that are not filed. This formula is more than ten years old, written in a time before the proliferation of computer and internet crimes as well as the increased complexity associated with new forensic science and DNA evidence. The LAB report properly notes that "DOA could develop plans for using PROTECT as the source of data for the weighted caseload formula" because "[t]his change would provide a more complete measure of prosecutors' caseloads that is more consistent across counties and less subject to variations in charging practices." LAB 07-9 at 40. However, the LAB report also recognizes that a transition to PROTECT is not a short-term solution because "DOA would need to first assess the feasibility and cost of such a change and identify any obstacles to its implementation" and "[p]lans for implementation will need to include a

time line for PROTECT implementation in the six counties not currently using the system.” LAB 07-9 at 40.

The recommendation provides false promise that a short-term solution may provide meaningful relief to a systemic problem requiring a calculated and planned response by this state. Rather than diverting limited state resources in a patchwork system of short-term solutions, WDAA recommends creating a feasible and fully funded plan for the statewide implementation of PROTECT.

LAB Recommendation: The Department of Administration report to the Joint Legislative Audit Committee by March 14, 2008, on its plans for using PROTECT referral data in the weighted caseload formula. LAB 07-9 at 41.

WDAA embraces the recommendation that the PROTECT referral data in the weighted caseload formula “would more accurately measure prosecutors’ caseload . . . rather than CCAP data.” LAB 07-9 at 32. Unfortunately, less than two-thirds of prosecutors presently use PROTECT so widespread use of PROTECT data is impractical at the present time.

The LAB report properly noted that “PROTECT is not currently used in six counties—Milwaukee, Racine, La Crosse, Vernon, Iron, and Portage” because budgetary constraints prevent full implementation statewide. LAB 07-9 at 32. The six counties account for a disproportionately high number of attorneys employed in prosecution. In 2006, these six counties accounted for 156.9 (36.9 percent) full-time equivalent prosecutor positions of the 424.65 positions statewide.

In a prior evaluation related to the allocation of prosecutor positions, the Legislative Audit Bureau properly recognized comparability problems occur when counties file data in different programs. LAB 95-24 at 25. At the time, the state was transitioning to the CCAP case management system when, in December 1995, the Legislative Audit Bureau noted that the full implementation of the program was scheduled for completion in 1997, but there had “been implementation delays in the past.” LAB 95-24 at 26. The report essentially concluded that comparability problems would continue without a standardized system. LAB 95-24 at 25.

WDAA embraces full funding of information technology staff to ensure statewide implementation of the PROTECT case management system. The Legislative Audit Bureau recognized the value to the PROTECT system and even noted that this system “would more accurately measure prosecutors’ caseloads.” LAB 07-9 at 32. The full implementation of the system requires adequate funding from the state and a sufficient number of years to ensure that the program is completely implemented with all offices familiar with how to properly use the system.

LAB Recommendation: 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. LAB 07-9 at 41.

WDAA does not embrace the recommendation that initiating a new time study would more accurately measure prosecutors' work because "it would measure the amount of time prosecutors currently spend on various activities, which in some cases may be less than optimal." LAB 07-9 at 39. The Legislative Audit Bureau explained that the understaffing of prosecutor positions at a time of "increasing caseloads have resulted in less-timely prosecutions, more decisions not to prosecute cases, and settling cases out of court with lighter penalties." LAB 07-9 at 4.

The LAB report focused on the allocation of prosecutor positions without attention toward the extremely high rate of turnover that occurred over the last several years. WDAA agrees that the lack of a stable pay progression plan since 2001 resulted in approximately 50 percent of assistant district attorneys leaving employment as a prosecutor during the last six years. The high understaffing of district attorney offices further worsens the work environment where approximately ten percent of criminal cases are never charged because of staffing shortages. LAB 07-9 at 21.

The recommendation builds mediocrity into the system by validating a system of high turnover, severe understaffing, and victims losing opportunities to receive justice because some cases cannot be charged due to the preceding problems. Certainly, a "well-designed and executed time studies generally provide more accurate and reliable information upon which to develop relative weights to be assigned to each case type." LAB 95-24, 17. Equally important, the time study must work in concert with the goals of the program, such as "reducing turnover in prosecutor positions" which has been a primary goal of the prosecution program since the inception of state employment for prosecutor positions. LAB 95-24, 9. A new time study under the present system of high turnover and severe understaffing simply operates as a reset button, measuring the state's inadequate funding without regard to the concerns of victims, law enforcement, the courts and public safety.

LAB Recommendation: District attorneys in counties that house prisons work with prison officials to develop guidelines for handling crimes committed by inmates. LAB 07-9 at 49.

WDAA embrace the recommendation for prosecutors in counties that house prisons to work with prison officials to develop guidelines for handling crimes committed by inmates. However, the LAB report properly noted that any change in this area "would be unlikely to have much effect, particularly given the relatively small number of such cases." LAB 07-9 at 49.

The LAB report stated that from 2002 through 2005, inmate crimes prosecuted by the district attorney's office accounted for only 0.1 percent of all felony and misdemeanor

prosecutions. LAB 07-9 at 48. In 2006, the state had 424.65 full-time equivalent prosecutor positions so inmate prosecutors would account only for approximately 0.42 positions; that is to say, a single prosecutor working less than halftime could handle all inmate crimes committed in the state. LAB 07-9 at App. 1, 1-2.

The recommendation proposed does not state that inmate prosecutions would be eliminated because the recommendation only suggests that guidelines would provide some reduced impact on prosecutors. If one assumes that this recommendation would result in a decrease in workload to prosecutors any savings would be limited to the 0.42 position noted in the previous paragraph and have no impact on the remaining 424.23 full-time equivalent prosecutors.

The recommendation essentially provides no relief to the severe understaffing of prosecution positions because inmate prosecutions account for such a small percentage of total prosecutions. The LAB report recognized that changes in this area “would be unlikely to have much effect” so this recommendation offers no significant solution to the severe understaffing of prosecutor positions. LAB 07-9 at 49.

LAB Recommendation: The State Prosecutors Office work with district attorneys and the state courts to facilitate sharing of best practices for managing workloads through court structures and policies. LAB 07-9 at 53.

WDAA embraces the recommendation that district attorneys work with the state courts to facilitate sharing of best practices for managing workloads through court structures and policies. The recommendation, however, fails to consider that prosecutors already engage in this worthwhile practice. The recommendation further fails to consider that there is no recourse for a district attorney when a circuit court rejects an efficiency strategy, such as “arranging rotation schedules or court specialization.” LAB 07-9 at 53.

The LAB report properly recognized that many district attorneys’ office already work with the courts on strategies to “promot[e] cooperation and communication between district attorneys and judges.” The recommendation fails to articulate how the present system of cooperation fails to achieve the desired level of efficiency; that is to say, the recommendations implies that the present method of cooperation is inadequate. To the contrary, district attorneys’ offices always have had a vested interest in fostering relationships with circuit courts to maximize the efficient administration of justice because such a practice provides the dual benefit of “reduc[ing] the amount of time prosecutors spend traveling between courtrooms” and ensuring a “speedy disposition of the case . . . [for] a victim in order to minimize the length of time they must endure the stress of their responsibilities in connection with the matter.” LAB 07-9 at 53, Wis. Stat. § 950.04(1v)(k).

The recommendation further fails to recognize that the Rules of Judicial Administration already contemplate that “[t]he chief judge of each judicial administrative district shall design a plan for the rotation of judicial assignments in multijudge circuits within the

district." SCR 70.23(3). The Subcommittee on Court Efficiencies for the Planning and Policy Advisory Committee (PPAC) of the Wisconsin Supreme Court also recognized that "organization of the large courts by case-type divisions provides efficiencies for management of caseloads, staff and facilities." Final Report and Recommendations at 22 (August 2006). Therefore, individual circuit courts already have directives from their own supervisory entity to engage in essentially what the LAB report recommends.

The recommendation essentially provides no relief to lessen the burden to prosecutors because district attorneys' offices already employ this recommendation into their practice and the circuit courts have no requirement to follow a best practices model. Prosecutors always have recognized the value of the efficient administration of justice, but the district attorneys' offices have no authority to force a circuit court to follow directives as demonstrated in the preceding paragraph highlighting that some court systems do not follow the recommendations from their own supervisory entity.

LAB Recommendation: District attorneys work with local law enforcement agencies to develop guidelines addressing which crimes will be referred for prosecution and which will be handled by law enforcement. LAB 07-9 at 55.

WDAA embraces the recommendation that prosecutors work with local law enforcement agencies to develop guidelines addressing which crimes will be referred for prosecution and which will be handled by law enforcement. The recommendation, however, fails to consider that the prosecutors already engage in this worthwhile practice.

The present weighted caseload formula estimates that each prosecutor spends 124 hours per year on investigative work with and training law enforcement. LAB 07-9 at App. 4, 4-1. The formula properly identifies the ongoing professional relationship that already exists between prosecution and law enforcement agencies because both agencies understand that open communication ensures better cooperation and the efficient administration of justice. Part of these hours include the time a district attorney spends working with local law enforcement agencies to develop guidelines addressing which crimes should be referred for prosecution.

The recommendation provides no relief to lessen the number of cases referred by law enforcement for prosecution because prosecutors already employ this recommendation into their practice. The weighted caseload formula confirms such collaboration and highlights that prosecutors spend more time working with law enforcement than the entire amount of time prosecutors spend prosecuting all traffic and forfeiture cases combined. LAB 07-9 at App. 4, 4-1.

LAB Recommendation: The Legislature consider statutory changes to clarify the allowable use of special prosecutor appointments. LAB 07-9 at 61.

WDAA embrace the recommendation that the Legislature consider statutory changes to clarify the allowable use of special prosecutor appointments. The suggested focus to the statutory changes “would better align the law with current practice.” LAB 07-9 at 62.

The recommendation, however, demonstrates that the present system is woefully inadequate at providing adequate staffing to district attorney offices and the solution cannot rely upon an increase in special prosecutor appointments. In an earlier LAB report, the bureau cautioned against too much reliance on special prosecutors because such positions tend to “be more expensive than using permanent assistant district attorney positions.” LAB 95-24 at 39. Moreover, “it can undermine the Legislature’s efforts to allocate resources because the . . . weighted caseload comparison credits district attorneys with the cases prosecuted by special prosecutors; that is, the special prosecutor’s caseload is included in the workload measure, but the special prosecutor position is not included when the average weighted caseload per prosecutor is determined.” LAB 95-24 at 39.

The recommendation provides a statutory change to better align the law with current practices, but this recommendation does not provide relief to the severe understaffing of prosecution positions because increased reliance on special prosecutors is more expensive and inefficient, as noted by the earlier LAB report. Certainly, counties need access to special prosecutors for the reasons provided in the statutes but the reliance on such prosecutors to solve understaffing issues undermines the overall vitality of the statewide program.

LAB Recommendation: The Department of Administration report to the Joint Legislative Audit Committee by March 14, 2008, on the feasibility of implementing floating assistant district attorney positions or expanding the use of existing alternative resources to better assist counties facing short-term or unexpected workload increases. LAB 07-9 at 67.

WDAA does not embrace the recommendation for implementing floating assistant district attorney positions because the use of such positions provides an inefficient alternative to simply increasing the staffing levels for the “63 counties [that] are understaffed.” LAB 07-9 at 5. Moreover, the recommendation provides no recommendation as to who has the authority to hire, allocate and supervise these floating prosecutors.

The recommendation does not articulate the number of floating positions envisioned, but one may infer a recommendation of 15 to 30 positions based upon the examples cited in the report. LAB 07-9 at 67. Once created, these assistant district attorneys “could be regional or statewide,” such as being “based in Madison, Milwaukee, and Eau Claire but travel[ing] statewide to conduct hearings.” LAB 07-9 at 67. Essentially,

assistant district attorneys in these positions would function similar to “court-appointed special prosecutors.” LAB 07-9 at 67.

An earlier LAB report recognized the inefficiency of such a system when the report noted that “the long-term use of special prosecutors could be more expensive than using permanent assistant district attorney positions.” LAB 95-24 at 39. The expense becomes evident when considering that assignment of a floating attorney requires expenses related to travel and lodging, such as mileage reimbursement and lodging expenses. The positions also contain an loss of productivity because a portion of this attorney’s work hours would include traveling from one locale to another.

The recommendation builds an inherent inefficiency into the system without providing an explanation how the creation of a few positions solves the understaffing of prosecution positions that exists in nearly every county in this state. Certainly, WDAA welcomes a recommendation that provides meaningful relief to small counties “disrupted by a small number of unusually serious or complex crimes or an unexpected spike in cases.” This recommendation simply does not provide such relief when considered against the backdrop of the severely understaffed present system.

Thank you for taking the time to read this letter in its entirety. If you have any questions or comments, please do not hesitate to contact me.

Sincerely,

Tim Baxter, President
Wisconsin District Attorneys Association

cc: Sen. Jim Sullivan
Sen. Julie Lassa
Sen. Russell Decker
Sen. Alan Lasee
Sen. Robert Cowles
Rep. Suzanne Jeskewitz
Rep. Samantha Kerkman
Rep. Kitty Rhoades
Rep. David Cullen
Rep. Joe Parisi
Janice Mueller, State Auditor