

VIA Certified Mail, Return Receipt Requested

September 26, 2014

John Chisholm, Esq.

District Attorney, Milwaukee County  
821 W. State Street  
Room 405  
Milwaukee, WI 53233

Copies To:

Wisconsin Attorney General J.B. Van Hollen  
Wisconsin Department of Justice  
P.O. Box 7857  
Madison, WI 53707

Hon. Jeffrey A. Kremers  
Milwaukee County Circuit Court, Chief Judge  
Milwaukee County Courthouse Room 104  
901 North 9th Street, Milwaukee, WI 53233

*Re: Petition of Eric O'Keefe for Investigation Concerning John Chisholm*

Mr. Chisholm:

As you know, I am a director of the Wisconsin Club for Growth, which your office targeted for investigation, along with 28 other right-of-center organizations, as part of a four-year-long effort to investigate Wisconsin Governor Scott Walker.

I am writing to notify you that your course of conduct in that matter merits criminal investigation for Misconduct in Public Office and related offenses. In short, Wisconsin law prohibits a district attorney from using the powers and privileges of his office for the financial benefit of himself, his immediate family members, or an organization with which his immediate family members are associated; from using those powers and privileges to obtain an unlawful advantage for third parties—such as political candidates and recall committees; from using information obtained through his official functions for those illegitimate purposes; and from allowing his office to become *de facto* campaign grounds. Recently, credible factual reports suggest that you may have done all these things. In addition, Wisconsin law prohibits public officers from intentionally soliciting or accepting for performance of a service or duty an amount greater or less than is fixed by law, but it is now publicly reported that the special prosecutor you selected for the investigation has accepted no payment for his services in that role.

Milwaukee County is an appropriate forum for an investigation of this matter, but due to the obvious conflict of interest inherent in your position as District Attorney, I request that you petition the Milwaukee County Circuit Court to appoint a special prosecutor in accord with Wisconsin Statutes § 978.045. The special prosecutor will have “all the powers of the district attorney,” will not be subject to your oversight, and will have authority to independently review the facts and law to determine whether prosecution is warranted.

I request that you take this action within two weeks. If you do not act on this request, I intend seek alternative means to pursue justice. *See, e.g.*, Wis. Stat. §§ 968.02(3), 968.26(am), 17.11(1), 165.50.

### Summary

The purpose of the investigation would be:

1. To determine whether and the extent to which you exercised the privileges of your office to obtain a private benefit for you, your wife, and an organization with which you were associated within the meaning of Wisconsin Statutes § 19.42(2), in violation of Wisconsin Statutes §§ 946.12(2), (3); 19.45(2), (5), by targeting Scott Walker and supporters of his policies in an effort to provide financial benefits and services to a labor union where your wife is an agent.
2. To determine whether and the extent to which you exercised the privileges of your office to obtain a dishonest advantage for the Committee to Recall Scott Walker, his special-election opponent Tom Barrett, and his current gubernatorial opponent Mary Burke, in violation of Wisconsin Statutes §§ 946.12(3), 19.45(5), by targeting Walker and supporters of his policies for the purpose of aiding the recall, special-election, and now general-election efforts.
3. To determine whether and the extent to which you exercised the privileges of your office inconsistent with the duties of that office by using and disclosing information both to obtain a private benefit (as stated above) and to obtain a dishonest advantage (as stated above) in violation of Wisconsin Statutes §§ 946.12(3), 19.45(4), by using the information you obtained through the John Doe investigation to identify further avenues to attack Walker and his allies as well as disclosing the information to aid the recall, special-election, and now general-election campaigns of Walker’s opponents.
4. To determine whether and the extent to which you failed to prohibit—and evidently encouraged—entry of a public building within your control by persons for the purpose of making or receiving a contribution within the meaning of Wisconsin Statutes § 11.36(5), in violation of Wisconsin Statutes §§ 11.36(3), 946.12(1), by allowing your subordinates to campaign in favor of the Committee to Recall Scott Walker and his special-election opponent Tom Barrett in the Office of the Milwaukee County District Attorney.

5. To determine whether a violation of Wisconsin Statutes § 946.12(5) occurred when the individual you proposed as special prosecutor for the various John Doe proceedings intentionally chose not to receive payment for his official duties.

In addition, the investigation would determine whether and the extent to which you violated Wisconsin conspiracy laws by working with others to violate these statutes and to determine whether any of your aides and subordinates committed violations similar to those discussed above.

### Facts

Enclosed are copies of recent reports in *Legal Newsline Legal Journal*. As you are aware, these news articles feature interviews with Michael Lutz, a former Milwaukee Police officer and, later, prosecutor in your office. Mr. Lutz had nothing to gain by speaking out about what he saw in his time in your office and, in fact, has, by his own account, damaged prospects for his current legal practice in Milwaukee.

Mr. Lutz's statements indicate that you may have intended to take official action against Governor Scott Walker and his political associates and allies to obtain a private benefit for you, your wife, and her teachers' union. In addition, his statements indicate that you may have exercised your discretionary power to obtain a dishonest advantage for the Committee to Recall Governor Walker, your political ally Tom Barrett, and gubernatorial candidate Mary Burke.

In February 2011, Governor Walker proposed a "Budget Repair Bill" that included a series of public-sector union reforms. Public-sector unions, including teachers' unions, took extreme steps to oppose that legislation, fearing that it was a threat to their viability. The Bill was passed and, as a result, some unions were forced to decertify, and some public-sector employees were adversely impacted financially, including by having to pay higher portions of their wages to insurance and pension plans.

The opposition only increased after the Bill was passed, resulting in a wave of recall petition drives and special elections. A petition drive was commenced against Walker in November 2011 by the Committee to Recall Walker (working in coordination with various left-leaning social-welfare organizations) and was certified in 2012, and Milwaukee Mayor Tom Barrett was chosen as Walker's special-election opponent. Public reports indicate that Tom Barrett is a political ally of yours, and you supported his campaigns to that office.<sup>1</sup> The purpose of these recall efforts was, of course, to achieve a repeal the Budget Repair Bill and thereby remove the very real impediments on public-sector unions.

Mr. Lutz stated that you informed subordinates in your office that your wife, a union shop steward at a school in St. Francis, feared that Walker's public-sector union reforms would result in decertification of her union, resulting in direct, adverse, pecuniary and proprietary consequences to you

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<sup>1</sup> <http://mediatrackers.org/wisconsin/2012/05/25/video-da-chisholm-endorsed-barrett-praised-flynn-in-2008/>

and your family. According to the reports, you also informed your subordinates that it was your “personal duty to stop Walker from treating people like this.” Mr. Lutz stated that, once this became your mission, your office became dominated by an “anti-Walker cabal of people...who were just fanatical about union activities and unionizing” and who joined the anti-Walker protests. Your office, according to Mr. Lutz, became a campaign ground against Walker, as you or your subordinates “hung those blue fists on their office walls” to support the recall efforts. Meanwhile, you preempted any efforts by your subordinates to support right-leaning candidates or policies, including an opportunity for Mr. Lutz to support David Prosser, then a candidate for the Wisconsin Supreme Court who was generally supported by conservatives.

During this very time period, court documents and public reports suggest your office was furiously digging to find something—anything—against Walker through an ongoing John Doe investigation. Evidence you submitted in federal court shows that your office sought 18 enlargements of that investigation during a span of 24 months that included the above-referenced events. I am personally aware that your office coordinated raids on the homes of numerous Walker aides, and some were subject to multiple home raids. It has also been shown in federal court through unrebutted, sworn testimony that your office took efforts to politicize the investigation, such as by offering immunity only for testimony against Walker (as opposed to other potential wrongdoers) and seeking to coerce false testimony from witnesses.

You used information obtained through these various investigative efforts to identify further avenues for investigation. Your office also apparently disclosed this confidential information publicly, such as through overbroad and unnecessary disclosures in criminal complaints and apparently through direct leaks to the press. This information, in turn, was used by Walker’s political opponents for campaign-advertisement material, and your investigation became the most prominent political issue of the 2012 gubernatorial special election. There is reason to suspect that, given your apparent mission to defeat Walker’s reforms, you or your aides intended that result.

Then, after Walker survived that effort, your office targeted for investigation 29 organizations in Wisconsin that supported Walker’s union reforms. Again, you used information obtained through the investigation for that purpose. You targeted my organization from the very beginning, as a subordinate in your office represented in court filings in August 2012 that he intended to subpoena the Club’s records and depose Club associates and contributors. You obtained warrants to review all emails of many Club associates, which were apparently broad enough to include information not related to the purported subject of the investigation. You helped coordinate the commencement of a John Doe proceeding targeting me, even though court filings made by a special prosecutor with whom you work admit that there was no evidence that I was involved in the activities you alleged were illegal. Then your office orchestrated a wave of pre-dawn home raids against conservative activists across the state. Many of them were advocates in favor of Walker’s Budget Repair Bill. The legal theory you selected for that effort has since been declared invalid by Retired Judge Gregory Peterson

Based on the foregoing facts, there is reason to believe that you may have used the powers and privileges of your office both to provide a benefit to the union with which your wife was associated and, by consequence, to your wife and yourself, as well as to provide an unfair advantage to the Committee to Recall Walker, special-election candidate Tom Barrett, and gubernatorial candidate Mary Burke.

## Reason To Believe a Crime Was Committed

Wisconsin prohibits the use of public offices for improper purposes. Wisconsin Statutes § 946.12(3) prohibits a public officer from exercising “a discretionary power in a manner inconsistent with the duties of the officer’s or employee’s office or employment or the rights of others and with intent to obtain a dishonest advantage for the officer or employee or another.” Section 946.12(2) prohibits a public officer from committing “an act which the officer or employee knows is...forbidden by law to do in the officer’s or employee’s official capacity.” Violation of these provisions is a Class I felony, punishable by a fine of up to \$10,000 or imprisonment of up to three and a half years, or both. Wis. Stat. § 939.50. As Milwaukee County District Attorney, you are a public officer within the meaning of that provision. *See* Wis. Stat. § 946.18. An official duty under Section 946.12 “may be imposed by common law, statute, municipal ordinance, administrative regulation, and perhaps other sources.” *State v. Chvala*, 678 N.W.2d 880, 888 (Wis. Ct. App. 2004), *aff’d per curiam*, 693 N.W.2d 747.

**Misconduct for Personal Benefit.** Wisconsin Statutes § 19.45 imposes duties enforceable through Section 946.12. *State v. Jensen*, 681 N.W.2d 230, 238 (Wis. Ct. App. 2004). Section 19.45(5) prohibits a state official from using his “public position...to influence or gain unlawful benefits, advantages or privileges personally or for others.” Section 19.45(2) provides that “[n]o state public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated.” Under this provision, a person is “associated” with an organization if a member of his immediately family is “an authorized representative or agent.” Wis. Stat. § 19.42(2). “Anything of value” includes “any...favor, service..., [or] forbearance.” Wis. Stat. § 19.42. A violation of these provisions on its own is a misdemeanor, meriting a fine of between \$100 and \$5,000 or up to a year’s imprisonment in the county jail, or both. Wis. Stat. § 19.58.

These provisions apply to district attorneys. Wis. Stat. §§ 19.42(13)(c), (14); 20.923(2). It is also likely that other provisions of law, such as those in official handbooks or ethics codes, prohibit prosecutors from using their office to aid political allies, punish political opponents, or obtain pecuniary or proprietary benefits for themselves, family members, and associated organizations. *See Chvala*, 678 N.W.2d at 889–90.

Based on the statements of Mr. Lutz and other publicly known information, there is reason to believe you used the privileges and powers of your office to obtain a financial benefit or other thing “of substantial value” for yourself, your immediate family members, or the union of your immediate family member. As a shop steward, your wife is “an authorized representative or agent” of the union. The defeat of the Budget Repair Bill would result in a financial benefit to the union and, by consequence, yourself, and your wife, as well as a proprietary benefit to your wife in the continuance of her position as a union shop steward. And the use of privileges and powers of a district attorney—such as the power to commence and conduct a John Doe investigation, Wis. Stat. § 968.26—to aid the union is a “service” or “favor.” Accordingly, the facts currently available provide reason to believe that you committed a felony by using your discretionary power for private and associational gain inconsistent with your duties as district attorney.

**Misconduct for Unfair Advantage.** It is also a violation of Sections 946.12 and 19.45 to use public office “to influence or gain unlawful benefits, advantages or privileges...for others.” Wis. Stat. § 19.45(5). The use of your powers and privileges to provide a benefit to the Committee to Recall Walker and Walker opponent Tom Barrett appears to violate that provision. The facts available suggest that you commenced and conducted an investigation to vindicate your “personal duty to stop Walker” and his reforms, which evidently included the recall and special-election efforts. Your efforts provided benefits to the Committee and to Barrett by providing them information unavailable through ordinary opposition research and by casting suspicion over Walker to influence public opinion.

In addition, your efforts appear intended to provide an advantage to current Walker gubernatorial opponent Mary Burke both by casting suspicion on Walker and by sidelining independent voices that support to his policies. After all, the result of your investigation has been to silence my organization as well as countless others, prevent them from raising funds, and otherwise interfere with their operations. That is likely a benefit for Ms. Burke’s campaign, and the facts suggest that this may have been your intent all along. Accordingly, the facts currently available provide reason to believe that you committed a felony by using your discretionary power for an unfair advantage to these persons (and possibly others) inconsistent with your duties as district attorney.

**Misconduct through Unlawful Use of Information.** You or your subordinates may also have violated Sections 946.12 and 19.45 through your use of information obtained in the John Doe investigation for partisan purposes. Section 19.45(4) prohibits a state official from using or disclosing “information gained in the course of or by reason of his or her official position or activities in any way that could result in the receipt of anything of value for himself or herself, for his or her immediate family, or for any other person, if the information has not been communicated to the public or is not public information.”

Information obtained through subpoenas and warrants from the John Doe investigation is undoubtedly information your office “gained in the course of or by reason of” your position. The facts suggest that your office used that information as a means of obtaining opposition research against Governor Walker and his allies. And the facts show that you disclosed that information, either through direct or indirect leaks to the press or by unnecessarily politicized disclosures in documents your office made public. Accordingly, the facts currently available provide reason to believe that you or your subordinates committed a felony by using your discretionary power by the improper use or disclosure of information for an unfair advantage to these persons and possibly others.

**Misconduct through Use of Public Property for Campaign Purposes.** Wisconsin Statutes § 11.36(3) prohibits any “person who has charge or control” of a public building from allowing the use of that building “for the purpose of making or receiving a contribution.” For purposes of Section 11.36 only, the term “contribution” and “political purposes” have different meanings from those accorded in Section 11.01. “Political purpose” includes “an act done for the purpose of influencing the election or nomination for election of a person to national office.” Wis. Stat. § 11.26(5). “Contribution” includes “an act done for that purpose.” Section 11.36(3) therefore prohibits any person with control of a public building from allowing it to be used for “an act done for the purpose of influencing” an election.

As Milwaukee County District Attorney, you have control of the office space where your subordinates work. Mr. Lutz's statements that this space became essentially a campaign ground against Walker and for his recall opponent provides reason to further investigate your authorization of the use, or failure to prohibit the use, of public property for political purposes. Mr. Lutz has stated that political paraphernalia covered the walls of that office space and that your subordinates were vocal in advancing their political views, evidently in that space. As Milwaukee County District Attorney, you have control over that space and are required to "prohibit the entry of any person into that building" for the purpose of helping elect or defeat a candidate for office. Violation of this provision may also be a violation of Section 946.12(1), which prohibits a state official from failing or refusing "to perform a known, mandatory, nondiscretionary, ministerial duty."

And there may be other implications under Chapter 11 or other law for using an official investigation for campaign purposes. Accordingly, the facts currently available provide reason to believe that you committed a felony by refusing to perform a nondiscretionary duty to prohibit entrance into the Milwaukee District Attorney's Office by persons intending to influence an election there.

**Acceptance of Value Less Than Fixed by Law.** Wisconsin Statutes § 946.12(5) prohibits a public official from intentionally soliciting or accepting "for the performance of any service or duty anything of value which the officer or employee knows is greater or less than is fixed by law." Publicly available information shows that Special Prosecutor Francis Schmitz was appointed by John Doe Judge Barbara Kluka at the request of several district attorneys, including yourself. A letter you signed informed Judge Kluka that Mr. Schmitz would accept a certain rate, \$130 per hour, as special prosecutor. Other publicly available information, which is attached to this letter, shows that as of the date of this petition, Schmitz has intentionally accepted less than the amount fixed by law for his service as special prosecutor, and in fact, has accepted nothing. Upon reasonable information and belief, you conspired with Schmitz to accomplish this result because you never planned to have Milwaukee County pay Schmitz, and knew that Milwaukee County was not in fact paying Schmitz anything to serve as special prosecutor, despite the terms of Judge Kluka's appointment of Schmitz.

### **Requested Action**

As Milwaukee County District Attorney, you are responsible for prosecuting crimes in Milwaukee County. Wis. Stat. § 978.05(1). This case presents a conflict of interest, and Wisconsin Statutes § 978.045 provides the appropriate resolution. Under Subsections (1r) and (1g), a district attorney may request the appointment of a special prosecutor who, once appointed, "shall have all the powers of the district attorney." Notably, the statute contemplates instances where "[t]he district attorney stands charged with a crime" as a paradigmatic scenario where a special prosecutor is appropriate.

A special prosecutor would be able to choose among the various options available to a district attorney, including grand jury or John Doe proceedings, other forms of investigation, or immediate prosecution. A special prosecutor will be best situated to discern what, if any, statutes have been violated and exercise appropriate prosecutorial discretion as to the proper response, from prosecution to declining to take further action.

I therefore believe it is appropriate for you to present this letter to the Milwaukee County Circuit Court with a petition for appointment of a special prosecutor to review and take whatever action he or she sees fit. Consistent with Section 978.05, the Circuit Court will be responsible for selecting the special prosecutor, and (in light of your conflict of interest) you should not make recommendations for this post. The special prosecutor should be neutral and have no ties or relationship with you, the Wisconsin Government Accountability Board, myself, the Wisconsin Club for Growth, or any other persons involved in the underlying John Doe proceedings or course of conduct.

If you refuse to act on this request or do not take action within two weeks, I intend to seek other avenues for resolving this issue in accordance with Wisconsin law. *See, e.g.*, Wis. Stat. §§ 968.02(3), 968.26(am), 17.11(1), 165.50.

Sincerely,

A handwritten signature in black ink that reads "Eric O'Keefe". The signature is written in a cursive, flowing style.

Eric O'Keefe

(Enclosures)

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## District attorney's wife drove case against Wis. Gov. Walker, insider says

September 9, 2014 12:28 PM

By STUART TAYLOR, JR., AMERICAN MEDIA INSTITUTE

CHICAGO – The future of the Wisconsin's governor's race could hang on a federal appeals court in Chicago hearing a potentially explosive case today.

Depending on how the three-judge panel of the U.S. Court of Appeals for the Seventh Circuit decides, the ruling will have major impact on the scope of political speech, the role of voter's donations in politics, and the fate of Wisconsin Gov. Scott Walker, a 2016 Republican presidential hopeful.

The governor's race is virtually tied, according to recent polls, and the court's ruling may move undecided voters. The investigation, critics say, has paralyzed conservative advocacy in Wisconsin, giving an advantage to unions when Gov. Walker is locked in a tight re-election race against Democrat Mary Burke.



Walker

Gov. Walker, a Republican, is at the center of a sweeping and secretive four-year criminal investigation by Milwaukee District Attorney John Chisholm, a Democrat, and other prosecutors, that is now focused on alleged "illegal coordination" of campaign funding by the governor and 29 independent nonprofits — virtually the entire conservative movement in Wisconsin.

Those conservatives say that the long-running criminal investigation has unconstitutionally prevented them and their allies from participating in politics and tilted the political field to favor Democrats, whose campaign practices are almost identical to the Republicans' but largely ignored by the prosecutors. The probe, conservatives say, has forced them to pay hundreds of thousands of dollars in legal bills and harassed some of them with pre-dawn raids on their suburban homes that seized cell phones and computers of all family members, including a child's iPad. Prosecutors imposed "gag orders" to prevent the investigation's targets from publicly complaining.

Wisconsin Republicans, and some Democrats in Washington, contend that the Democratic district attorney is distorting campaign finance laws to criminalize ordinary politics.

The district attorney and some campaign-finance experts say that Wisconsin has long had some of the nation's toughest campaign-finance laws and those laws bar outside groups from working together with a candidate's campaign.

A federal judge in Milwaukee recently halted the district attorney's investigation, finding that the conduct of Gov. Walker's political allies is actually legal. U.S. District Court Judge Rudolph Randa found that the investigation is contrary to both Wisconsin law and the U.S. Constitution's First Amendment.

The prosecutors' appeal of judge Randa's ruling will be heard today. This marathon legal battle may well end up at the U.S. Supreme Court.

The case began in 2009 when then-Milwaukee County Executive Walker's staff uncovered that \$11,242.24 had apparently been embezzled from a county charity. Walker's staff asked the district attorney for a criminal investigation.

While the thief was ultimately convicted, District Attorney Chisholm took the opportunity to focus his investigation mainly on Walker's personal staff.

Walker's team would not learn of the secret investigation for more than a year, when Walker was first campaigning for governor in 2010. Walker's then-chief of staff, the late Tom Nardelli, learned that Chisholm's staff had won a court order in May 2010 to start a secretive "John Doe" probe into the "origin" of the allegedly embezzled \$11,242.24.

A "John Doe" is a legal proceeding under Wisconsin law that allows prosecutors, with a judge's approval, to require complete secrecy from any one involved. This "gag order" provision, almost unique in American law, effectively disables targets or witnesses from publicly defending themselves or responding to damaging leaks.

Nardelli wrote a letter to Chisholm in 2010, evincing suspicion of the investigation. The "origin" of the missing money was already known – the question was where had it gone — and the case seemed like small potatoes for a John Doe proceeding. "Again, John, why is this a secret John Doe?" wrote Nardelli. Noting that Walker's office had requested an ordinary investigation of the apparent theft, he added: "Why are you going this route? What is the motive?"

Nardelli's implication was that Chisholm's people were improperly digging for dirt on Walker or his staff in an election year. Chisholm denied this.

Meanwhile, Walker became a national figure in 2011, when his "Budget Repair" bill cut state spending and sharply curbed public employee unions — perhaps the biggest reversal of public union power in U.S. history. Conservatives were delighted and liberals alarmed.

Now a longtime Chisholm subordinate reveals for the first time in this article that the district attorney may have had personal motivations for his investigation. Chisholm told him and others that Chisholm's wife, Colleen, a teacher's union shop steward at a school in St. Francis, which is near Milwaukee, had been repeatedly moved to tears by Walker's anti-union policies in 2011, according to the former staff prosecutor in Chisholm's office. Chisholm said in the presence of the former prosecutor that his wife "frequently cried when discussing the topic of the union disbanding and the effect it would have on the people involved ... She took it personally."

Citing fear of retaliation, the former prosecutor declined to be identified and has not previously talked to reporters.

Chisholm added, according to that prosecutor, that "he felt that it was his personal duty to stop Walker from treating people like this."

Chisholm was referring to Gov. Walker's proposal – passed by the legislature in March 2011 – to require public employee unions to contribute to their retirement and health-care plans for the first time and to limit unions' ability to bargain for non-wage benefits.

Chisholm said his wife had joined teachers union demonstrations against Walker, said the former prosecutor. The 2011 political storm over public unions was unlike any previously seen in Wisconsin. Protestors crowded the State Capitol grounds and roared in the Rotunda. Picketers appeared outside of Walker's private home. There were threats of boycotts and even death to Walker's supporters. Two members of the Wisconsin Supreme Court almost came to blows. Political ad spending set new records. Wisconsin was bitterly divided.

Still, Chisholm's private displays of partisan animus stunned the former prosecutor. "I admired him [Chisholm] greatly up until this whole thing started," the former prosecutor said. "But once this whole matter came up, it was surprising how almost hyper-partisan he became ... It was amazing ... to see this complete change."

The culture in the Milwaukee district attorney's office was stoutly Democratic, the former prosecutor said, and become more so during Gov. Walker's battle with the unions. Chisholm "had almost like an anti-Walker cabal of people in his office who were just fanatical about union activities and unionizing. And a lot of them went up and protested. They hung those blue fists on their office walls [to show solidarity with union protestors] ... At the same time, if you had some opposing viewpoints that you wished to express, it was absolutely not allowed."

Asked to respond to the former prosecutor's allegations, Samuel Leib, Chisholm's private lawyer, said that they amount to a "baseless character assault" that "is inaccurate in a number of critical ways." He provided no specifics. He added that "John Chisholm's integrity is beyond reproach" and sent a 2012 article signed by a Republican retired judge and six others expressing confidence in Chisholm's impartiality and honesty.

As the governor's showdown with public unions wound down, Chisholm's probe grew. Prosecutors successfully petitioned the "John Doe judge," Barbara Kluka, some 18 times to enlarge the investigation's scope, as Chisholm's assistants kept citing new leads for potential offenses ranging from bid-rigging to sexual misconduct.

This first John Doe investigation of Walker led to convictions of six people for what federal judge later called "a variety of minor offenses" that did not implicate Walker. A second investigation, focusing on campaign finance, began in August 2012.

One of the biggest champions of Walker's legislation curbing public unions was 59-year-old Eric O'Keefe. He said Walker's budget laws are "the most important state reform in this country because it revives local control of local government, undoing half a century of centralization."

So O'Keefe threw himself into the battle as chief strategist and fundraiser for the Wisconsin Club for Growth, a nonprofit advocacy group. The Club raised \$12 million in 2011 and \$8 million in 2012, spending about half of those sums on "issue ads" supporting the budget bill and giving the rest to allied groups, some of which O'Keefe says aired their own issue ads.

Chisholm's raids on Walker's office – one of them on the eve of the November 2010 election in which he won the governorship – and other investigative moves put into the hands of the Democratic district attorney thousands of pages of sensitive communications between Walker, his staff, Republican leaders, activists and contributors. Some of those documents soon appeared in the press.

After the anti-union legislation became law, unions pushed for recall elections to unseat several state senators in 2011 and 2012, and ultimately to oust Walker himself. He ended up being the first governor in U.S. history to win a recall election, on June 5, 2012.

Two months later, Chisholm's assistant district attorneys drew on the trove of confidential information collected in the first John Doe investigation of Walker to launch a second, larger one, this time into suspected campaign-finance violations before and during Walker's 2012 recall campaign.

They obtained sweeping subpoenas for records from at least eight phone companies and records from every major private email provider including Google and Yahoo, ultimately amassing hundreds of thousands of pages on the activities of every major conservative group in Wisconsin and many around the country, as well as of Walker and his team. They seized documents from people's offices and homes.

Armed officers raided the homes of Walker's supporters across the state, using bright floodlights to illuminate the targets' homes. Deputies executed the search warrants, seizing business papers, computer equipment, phones, and other devices, while their targets were restrained under police supervision and were denied the ability to contact their lawyers.

At other times, the prosecutors jailed at least two witnesses "who did not possess the information they sought" and "blanketed conservative activists nationwide with [more than 100] invasive subpoenas," according to court filings.

In the process, Chisholm began targeting the governor's outside supporters, including O'Keefe and the Club. They counterattacked with a federal civil rights lawsuit in February 2014, claiming that Chisholm's probe was pretext for an "open-ended fishing expedition into Walker's office" and "a political vendetta."

O'Keefe filed suit against the wishes of Gov. Walker's camp, which feared negative publicity during the governor's campaign, according to a source with knowledge of the exchange.

While O'Keefe stresses that he is an "issues guy," not loyal to any political party, he does not deny that his ads were helpful to Walker and other GOP candidates.

The effect of Chisholm's aggressive tactics, including the gag orders, say the Club and O'Keefe in court papers, has "virtually silenced one half of policy debate in Wisconsin" by paralyzing their targets' fundraising and political speech.

This, say the plaintiffs, has been the prosecutors' goal from the start, and explains their "harassment" of and threats to imprison conservative activists for "illegal coordination."

The plaintiffs add that "[l]iberal groups involved in the Wisconsin recall campaigns conducted precisely the same activities that [the prosecutors] have identified as justifying an investigation into conservative groups, but there is no John Doe investigation into these groups."

The prosecutors point out that the investigators are not all Democrats and have been assisted by a unanimous vote of the state's nonpartisan, six-member Government Accountability Board.

The prosecutors also point out that two Republican district attorneys opened related John Doe proceedings to help Chisholm enlarge his investigation's territorial scope and that of Francis Schmitz, a politically independent former federal terrorism prosecutor who was made Special Prosecutor and titular head of the investigation in August 2013, largely to counter conservative cries that it was a partisan vendetta.

Rivkin and other critics say that the Republican district attorneys have done little more than show professional courtesy to Chisholm; that he brought in Schmitz "to provide a veneer of impartiality," with no legal expertise in campaign-finance law; and that Chisholm still effectively runs the show.

Prosecutors ran into trouble in November when the longtime "John Doe" judge supervising the investigation suddenly recused herself, citing an undisclosed conflict of interest. Judge Kluka had approved every petition, subpoena, and search warrant the prosecutors sought over the past few years.

Kluka was replaced by retired Wisconsin Court of Appeals Judge Gregory Peterson, who in January quashed a number of subpoenas for failing to show "probable cause that [the targets] committed any violations of the campaign finance laws."

Prosecutors have appealed Judge Peterson's ruling to Wisconsin's appellate courts, which have not yet ruled. If Peterson's decision stands, the judge said, it would effectively end the five-year investigation.

Moving on a parallel track in federal courts, O'Keefe and the Wisconsin Club for Growth launched their so-far successful federal civil rights suit against District Attorney Chisholm, his assistants Bruce Landgraf and David Robles, and Special Prosecutor Francis Schmitz. Their court papers accuse Chisholm and the others of using a frivolous and unconstitutional theory of "illegal coordination" to target and "silence political speech [they do] not like."

Chisholm and his colleagues lost that case in May, when Judge Randa issued his surprisingly strong opinion, rejecting the prosecutors' legal theory that conservative activists had illegally coordinated with Walker's 2012 campaign as "simply wrong."

Even if the Club and other groups did collaborate closely with Gov. Walker in raising and spending money, Judge Randa found, they had a legal right to do so under both Wisconsin law and the U.S. Constitution.

The prosecutors had argued that coordinated issue ads are tantamount to a campaign contribution and thus subject to the laws limiting contributions and requiring disclosure of donors, even if they stop short of urging a vote for a candidate.

But, Judge Randa held, coordinated ads can constitutionally be regulated only if they contain “express advocacy” or its “functional equivalent.” That’s campaign-finance-law jargon for a clear appeal to vote for or against a specific candidate.

Flashing outrage at the investigators’ pre-dawn raids by armed officers who carried off files and computers, cellphones, and more from the homes of conservative activists, Randa wrote that “attempts to purify the public square lead to ... the Guillotine and the Gulag.”

In handing down his decision to temporarily halt the investigation, Judge Randa ruled that the prosecutors have no “reasonable expectation of obtaining a valid conviction.”

Chisholm and his allies appealed to the federal Seventh Circuit in Chicago. The plaintiffs’ high-powered, hard-charging Washington lawyer, David Rivkin and his team have squared off against the prosecutors’ lawyers in their briefs and will do so in the oral argument today.

The prosecutors have argued in court papers that Randa’s view of the law would allow candidates to exercise “direct control over millions of dollars of undisclosed corporate and individual contributions without limitation [and to urge allied nonprofit groups] to run overwhelming and negative advertising, while the candidate remains above the fray.”

“At no time was such conduct illegal,” attorney Rivkin responds in court papers. “And, if it were, perhaps the majority of politicians in Wisconsin and across the nation would be at risk of prosecution and conviction.”

Indeed, Rivkin notes, in February 2012, “President Barack Obama’s official campaign committee threw its support behind Priorities USA Action, a ‘super PAC’ supporting Democratic candidates ... [T]op campaign staff and even some cabinet members [would] appear at super PAC events, and they helped Priorities USA Action raise millions that it spent in support of Democratic candidates.”

The outcome of the prosecutors’ appeal is uncertain because the law in this area is still somewhat unsettled.

The vague rules of some states barring “illegal coordination” between candidates and independent groups are in tension with the U.S. Supreme Court’s repeated emphasis that donors forfeit free-speech protections only if their ads are essentially campaign contributions, such as running television spots specifically endorsing a candidate or allowing the candidate to dictate content and timing.

The prosecutors vigorously defend their theory of illegal coordination, but do not deny the plaintiffs’ assertion that “after years of investigation, [the prosecutors] have been unable to identify a single advertisement by the Club so much as referencing Governor Walker when he was a candidate.”

And that fact alone may spell defeat for the prosecutors if the U.S. Supreme Court hears the case. Five of the justices have repeatedly found restrictions on issue ads offensive to free speech rights.

Champions of tough campaign finance restrictions are worried that a U.S. Supreme Court decision affirming Judge Randa would “eviscerate contribution limits and disclosure, leaving governments vulnerable to quid pro quo corruption,” in the words of a friend-of-the-court brief filed with the Seventh Circuit by the liberal Brennan Center for Justice.

Bob Bauer, one of the nation’s leading election law experts, counters that however valid the reformers’ concerns may be, the Wisconsin investigation raises important constitutional and policy issues. “There are serious problems with the effort to prohibit or limit issue ad coordination,” Bauer said. “I’m very wary of using the criminal law to enforce them.”

Punishing coordination, Bauer said, would “drive apart natural allies who should be free to collaborate on common political goals.” As an example, he suggested that Planned Parenthood and the 2016 Democratic presidential nominee might want to pair their fundraising and ads for maximum effect, if it would help defeat an anti-abortion Republican candidate in 2016.

Since Bauer served as President Obama’s White House Counsel, he cannot be discounted as a conservative partisan.

Urging donors to make large, anonymous, unregulated contributions to allied nonprofits that fund ads helpful to Republicans, as Gov. Walker has done, is too often presented by the press as scandalous, according to O’Keefe and other supporters of the governor.

When some secret court filings were unsealed on June 19, almost all major news outlets trumpeted the prosecutors’ theory that Walker was at the center of a “criminal scheme” to channel big contributions through conservative groups to help him win his 2012 recall vote. They also headlined subsequently unsealed documents revealing that Gov. Walker had personally solicited wealthy donors, such as Donald Trump and Sheldon Adelson, to give large sums to the Club for television ads that would also benefit his own campaign.

The New York Times ran a front-page article highlighting prosecutors’ claims of “an elaborate effort to illegally coordinate fundraising and spending between [Walker's] campaign and conservative groups.” Buried in paragraphs 10 and 11 was the fact that both a federal judge and a state judge had ruled that the investigation should be shut down as legally groundless.

Amid the debate over whether it is Gov. Walker and conservative activists like O’Keefe – or Chisholm and his fellow prosecutors – who are corrupting Wisconsin politics, one issue emerges: Campaign finance laws designed by reformers to stop the corruption of American politics can take a toll on the freedom of speech. The question that the federal courts will decide is whether the benefits are worth the costs.

*Editor’s note: A previous version of this article misidentified the school at which Colleen Chisholm worked.*

This entry was posted in Campaigns & Elections, News, U.S. Circuit Court of Appeals, Wisconsin. Bookmark the permalink.

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## Decorated Wis. cop says he paid dearly for blowing whistle on DA's crusade against Gov. Walker

September 19, 2014 4:00 AM

By STUART TAYLOR, JR., AMERICAN MEDIA INSTITUTE

*By Stuart Taylor, Jr., AMERICAN MEDIA INSTITUTE*

MILWAUKEE (Legal Newsline) – After missing a scoop on Milwaukee District Attorney John Chisholm's long-running investigation into Wisconsin Gov. Scott Walker, *Milwaukee Journal Sentinel* writers, along with the district attorney's staff, hunted down the key source who had asked for anonymity, fearing retaliation.

That [story](#), produced by the [American Media Institute](#) and published by *Legal Newsline* last week, said that the district attorney's wife was a teachers union shop steward, had taken part in demonstrations against the Republican governor's proposal to curb public employee unions and was repeatedly moved to tears by governor's legislative crusade.

Chisholm, a Democrat, said privately that it was his "personal duty to stop Walker," the confidential source said.

AMI's confidential source was a former prosecutor in Chisholm's office who feared his reputation and his law practice would suffer if he were unmasked.

The district attorney's staff launched a Nixon-style "mole hunt" to find the anonymous source, a *Journal Sentinel* columnist said, and was annoyed that the description of the confidential source wasn't precise enough to identify him. The staff developed a list of roughly a dozen suspects, the columnist said. The *Journal Sentinel* never reported this secret search.

The feared retaliation was not long in coming. The *Journal Sentinel*'s Dan Bice, whose "political watchdog" column is titled "No Quarter," appeared after dark at the source's home on Sept. 11. Bice's persistent door-bell ringing and heavy knocks awakened and frightened the source's sleeping 12-year-old daughter, he said. The noise was so loud that a neighbor came out to investigate the din, he said.

When the source, a decorated and disabled-in-the-line-of-duty police officer, Michael Lutz, came to the door, he opened it a crack to hear Bice demand to know if he was the person quoted in the story. He did not deny it and speaks exclusively on the record in this story for the first time.

Lutz says he has been friends with John and Colleen Chisholm for more than a decade. He admires the district attorney, considering him a role model and mentor. He says he worked with Chisholm as a police officer and in the district attorney's office, first as a law school intern in 2010 and as a special prosecutor in 2011 – a period of more than a year, not the five-and-a-half months reported by Bice.

(An editing change in this reporter's Sept. 9 article identified Lutz as a "longtime Chisholm subordinate," which has been faulted as inaccurate. Even if valid, the criticism has little or no relevance to Lutz's credibility in light of what can now be revealed about him. In any event, police officers can be called subordinate to the district attorney.)



Chisholm



Bice

Lutz says he met with Chisholm in his private office in 2011 and was surprised when he heard the district attorney say that his wife had wept repeatedly and joined demonstrations against Walker, who was fighting for and winning legislative approval of his union reforms. Lutz said Chisholm demonstrated what he called a "hyper-partisan" bias against Walker.

Lutz's motivation for speaking out was based on principle: "I don't like what he [Chisholm] has done in regard to political speech that he disagrees with."

Revealing how Chisholm allegedly spoke of his wife's anguish in connection with his own determination to "stop" Walker, Lutz said, wasn't meant to harm her. "I never did anything to hurt anyone," Lutz said. "I just wanted to speak the truth because I don't think it's right the way they are stifling speech."

Citing one previously unreported example, Lutz mentions not being "allowed" to express an opposing viewpoint. He wrote in an May 20, 2012, email to an unidentified person:

When "I was a Special Prosecutor in the DA's office and [Wisconsin Supreme Court] Justice [David] Prosser approached me to do a [pre-election] video spot about how the decision authored by him about the guy who shot me was a very important ruling for Police officers in general, DA Chisholm ... stated that he couldn't allow me to do it and he wants to stay as far away from these Republicans as he can ... Fast forward 8 months and HIS [Chisholm's] liberal block of DA's, 80% of them, are actively campaigning, emailing, and even verbally bashing Walker at meetings. I think Chisholm has left the reservation and now has his flag firmly planted in the liberal left's camp."

Prosser won his election in April 2011. He voted with the majority on July 31 when the state Supreme Court upheld Walker's reforms by a vote of 5-2.

Lutz felt he had a lot to lose if his identity were revealed, which Bice and the *Journal Sentinel* did on Sept. 12. Lutz felt that if he were exposed as the source, it would be hard to find clients once everyone in the county knew that the district attorney was now his enemy.

Most journalists' first instinct is to protect the identity of whistleblowers against powerful people likely to retaliate against them. Not columnist Bice or the *Journal Sentinel*. They have devoted their energy to exposing Lutz's identity, subjecting him to attacks, and seeking to discredit him.

Chisholm's wide-ranging investigation into Walker, his staff and 29 nonprofit conservative groups was accompanied by sweeping subpoenas for documents, phone records, emails, cell phones, computers and more; predawn raids on conservative activists' homes without allowing them to call their lawyers; and "gag orders" about the investigation. These gag orders silenced virtually all of the conservative movement in Wisconsin by denying its leaders the chance to defend themselves publicly.

This was by design, say critics who characterize the investigation itself as a political vendetta by a Democratic district attorney against a Republican governor.

Over the years, Chisholm's office has consistently denied political motivations, stressing the roles of two Republican district attorneys who opened proceedings to help enlarge his investigation's territorial reach, and that of Francis Schmitz, a political independent who was made Special Prosecutor and titular head of the investigation in August 2013.

The entire investigation was found unconstitutional and temporarily blocked by U.S. District Judge Rudolph Randa in a May 8 decision that is now on appeal. During the Sept. 9 oral arguments, one of the three federal appellate judges, Frank Easterbrook, noted that the gag orders appeared to be "screamingly unconstitutional" while expressing doubt (as did Judge Diane Wood) that the case belonged in federal court.



Lutz

Wisconsin Judge Gregory Peterson has also suggested that the Republicans under investigation have committed no crimes and the entire investigation of their campaign finance practices is without legal foundation and should be halted. His decision is on appeal to a Wisconsin appellate court.

When Bice identified Lutz in the *Journal Sentinel* on Sept. 12, he smeared him for an alleged "troubled past" and accused him of making a "death threat." The "troubled past" involved a police shooting after which Lutz was exonerated. That review, the *Journal Sentinel* editorialized at the time, "should be the end of the matter." The "death threat" allegation is completely false, Lutz says, contrary to Bice's claim that Lutz had not disputed it.

In his *Journal Sentinel* [article](#) headlined "Source who accused Chisholm of vendetta has troubled past," Bice wrote: "But here is the shocker: Lutz issued a death threat, apparently in a drunken rage, against the prosecutor [Chisholm] and his family last year — a charge not in dispute, though it was never prosecuted."

In reality, Lutz says, here's what happened: His best friend and former police partner, Jon Osowski (also the brother of Chisholm's wife) was in trouble and requesting help in alarming phone conversations with Lutz. Urgently, Lutz phoned the Chisholms, leaving messages expressing increasing and agitated concern for his friend, Osowski.

Finally, Lutz says, he succeeded in reaching the district attorney, goading him into action to aid his brother-in-law. Chisholm responded by going out into the night to help Osowski, Lutz says.

Lutz couldn't go himself because Osowski wouldn't say where he was, but Lutz was confident that Chisholm knew how to find him. Lutz also knew that the only person that Osowski would listen to in his time of trouble was his sister, Chisholm's wife.

There was no death threat, Lutz stresses. "Any person who knows anything about the friendly relationship between myself, John Chisholm and Jon Osowski and my intense desire to get some family help for a dear friend knows, in context, what that call truly means. I think it is shameful to distort its intent. I do admit I could have used more tact in spurring the Chisholms to action."

Lutz also adds that he and Chisholm "laughed about it" the next day and on subsequent occasions.

If he had said anything close to a death threat, Lutz notes, he would surely have been criminally prosecuted. He was not.

Osowski, reached by telephone, denied the episode ever happened.

"He's ruining my family," Osowski said of Lutz.

The recorded messages that Lutz left are apparently still in Chisholm's possession, Lutz claims, adding that the district attorney could clarify the matter by making them public. Bice said that he has not heard the recordings himself.

None of this explanation for the supposed "death threat" appeared in Bice's Sept. 12 *Journal Sentinel* column.

Chisholm's lawyer, Samuel Leib, and Chisholm's top deputy, Kent Lovern, have not responded to a Sept. 17 email detailing Lutz's claims that would be reported in this article. Nor has Chisholm or anyone else ever denied Lutz's specific allegations point by point.

Lutz provided additional information and documents that call into question the objectivity of the *Journal Sentinel*'s reporting.

As a police officer working in Milwaukee, Lutz was named "Professional Law Enforcement Officer of the Year" in 1997 and again in 2007. He received the Milwaukee Police Department's Purple Award of Valor in 2009, commendations for heroism in 1996 and 2006, and an Award of Merit from the FBI in 2006. In all, he won 11 honors and decorations.

Injured in the line of duty, he retired on disability pay and went to law school, earning his degree in December 2010. He worked in Chisholm's office to gain experience from June 2010 to July 2011.

When Lutz went into private practice, Chisholm wrote a memo to him on July 27, 2011, that said his service "has been exemplary," that his "dedication and hard work ... have proved to be invaluable," and that "I am extremely grateful for the service you provided."

In a previous letter of recommendation from November 2007, Chisholm wrote that Lutz had been "one of the best investigators in the Milwaukee police department" and had "removed some of the most dangerous offenders from the streets of Milwaukee" while combining "a remarkable memory with unceasing hard work and courage."

Critics of the *Journal Sentinel's* coverage of Chisholm's investigation of Walker, his staff and his allies have long complained of what they call biased reporting and commentary, especially by Bice, overseen by Managing Editor George Stanley.

"Dan Bice and the *Journal Sentinel* have abandoned journalistic standards in covering the long-running investigation of Gov. Scott Walker, his staff, and allied conservative advocacy groups," said George Mitchell, a former journalist who worked for former U.S. Rep. Les Aspin and former Wisconsin Gov. Pat Lucey – both Democrats.

"Bice and the paper have relied heavily on material that originated from illegal leaks. They have smeared numerous innocent people who were barred by secrecy orders from responding to rumors and leaks. They have dishonestly portrayed completely legal and widespread political conduct. The list goes on. It is long."

Lutz says he has no animus toward Chisholm, adding he gave \$200 last month for a Chisholm campaign fundraiser. He has visited the Chisholms' home several times and gone to dinners, after-work functions, and other outings with one or both of them over the years.

As to the effect of the *Journal Sentinel* campaign to discredit him, Lutz said in an email:

"I have relocated my kids to prevent them from being brought to tears by any more *J-S* reporters and to protect them from the onslaught that has already begun. All for telling the truth."

The consequences for telling that truth are already being felt, Lutz writes. "My law practice ... is over in MKE [Milwaukee]. There is no doubt, as one person has put it, that I am already blacklisted. . . . Supporting the family will be difficult. Of course, it has been a huge undertaking to go through 4 surgeries, take care of 2 children, drive back and forth to Madison daily in order to get my law license ... only to be persecuted for simply telling the truth."

In response to suggestions by the *Journal Sentinel* that Lutz must not be telling the truth because no other current or former employee of the district attorney's office has corroborated his allegations, Lutz says: "No one in the current DA's office or any practicing attorney in Milwaukee would dare speak up against Chisholm or even mention a suggestion of partisanship. Their [private] practice would be killed in Milwaukee. Mine is finished but I can still rely on my police pension."

*Stuart Taylor, Jr. is a Washington journalist, author, and lawyer and a nonresident senior fellow with the Brookings Institution.*

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## Legislative Fiscal Bureau

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September 3, 2014

TO: Senator Tom Tiffany  
Room 409 South, State Capitol

FROM: Michael Steinschneider, Fiscal Analyst

SUBJECT: Funding for Special Prosecutors Under s. 978.045

At your request, this memorandum provides information on the funding for special prosecutors.

### Background

Under s. 978.045 of the statutes, a court may appoint a special prosecutor on its own motion or at the request of a district attorney (DA). A district attorney may request that the court appoint a special prosecutor to assist the DA in: (a) the prosecution of persons charged with a crime; (b) grand jury or John Doe proceedings; (c) sexually violent person commitment proceedings; or (d) investigations. The court may appoint a special prosecutor if any of the following conditions exist:

- There is no district attorney for the county;
- The district attorney is absent from the county;
- The district attorney has acted as the attorney for the accused party in a matter relating to which the accused stands to be tried;
- The district attorney is near of kin to the accused party;
- The district attorney is physically unable to attend to his or her duties or has a mental incapacity that impairs his or her ability to substantially perform his or her duties;
- The district attorney is serving in the U.S. armed forces;
- The district attorney stands charged with a crime;
- The district attorney determines that a conflict of interest exists regarding the district attorney or the district attorney staff; or
  - A complaint received by the court may relate to the conduct of the district attorney to whom the court would normally refer the complaint.

An attorney appointed as a special prosecutor has all of the powers of the district attorney. Under s. 978.045, when appointing a special prosecutor for work exceeding six hours the court or district attorney (depending on whether or not the appointment came from the court's own motion

or at the request of the district attorney) must submit a form to the Department of Administration (DOA) notifying DOA that the court or DA was unable to obtain assistance from another prosecutorial unit or an assistant attorney general. This form is to be provided by DOA.

According to the State Prosecutors Office (SPO), current practice dictates that the courts and DAs appointing special prosecutors submit an "Appointment of Special Prosecutor" form (Attachment I) notifying DOA of the appointment of a special prosecutor. The court and DA generally work cooperatively when submitting the form. Information provided on the form includes: (a) the period of time or specific case for which the special prosecutor is being appointed; (b) the reason for the appointment; (c) the rate of compensation paid to the special prosecutor; and (d) signature lines for the judge, district attorney (if necessary), and attorney being appointed as a special prosecutor. The form allows the courts or DA to cite a reason other than those listed in s. 978.045 when appointing a special prosecutor. Additionally, the form allows the court or DA to provide a compensation rate for the special prosecutor other than that specified in s. 977.08, which is discussed below. The form does not include information notifying DOA that the DA or court was unable to obtain assistance from another prosecutorial unit or assistant attorney general.

Under ss. 977.08 and 978.045, any private attorney appointed as a special prosecutor is paid by the state at the following rate: (a) \$50/hour for time spent in court; (b) \$40/hour for time spent out of court, excluding travel, related to a case; and (c) \$25/hour for time spent in travel related to a case if the trip is outside the county in which the attorney's principal office is located or if the trip requires travelling a distance of more than 30 miles, one way, from the attorney's principal office. [According to SPO, a the district attorney or court submitting an Appointment of Special Prosecutor Form will on occasion list a rate of pay for special prosecutors that differs from that specified under s. 977.08 because of the special prosecutor's level of experience.] After providing services as a special prosecutor, a private attorney must submit a list of their time spent relating to a case in court, out of court, and in travel to be approved by the court for payment. If a special prosecutor is not paid within 30 days of the court approving their compensation, the individual receives an additional 12% monthly compounded interest on the amount owed to them under s. 16.528(2)(a).

### **Funding for the Special Prosecutors**

State funding for DA offices is provided primarily from an annual GPR appropriation titled "Salaries and fringe benefits" (s. 20.475(1)(d)). Total budgeted funding for the appropriation in 2012-13 was \$42,434,300, and in 2013-14 was \$42,466,200. This appropriation provides funding for the salary and fringe benefit costs of the 71 locally elected district attorneys, and the deputy and assistant district attorneys working for these officials. Included within the "Salaries and fringe benefits" appropriation, \$223,200 GPR annually is budgeted for supplies and services costs. The supplies and services line is utilized to support special prosecutor and non-special prosecutor costs.

The non-special prosecutor costs supported by the supplies and services line may include: (a) DOA financial service charges from the State Controller's Office; (b) DOA risk management charges for liability; (c) DOA risk management charges for worker's compensation; (d) personnel service charges from the Office of State Employee Relations; (e) unemployment insurance costs;

(f) record storage charges from the State Historical Society; (f) DOA procurement service charges; and (g) transcript request services. In recent years, some or all of these non-special prosecutor costs have been paid from the GPR budget for the State Prosecutor's Office budgeted under the Department of Administration's general program operations appropriation (s. 20.505(1)(a)).

In 2012-13, the initial budget for supplies and services within DA's annual salary and fringe benefits appropriation was \$223,200 GPR. The state incurred \$558,300 in compensation costs for special prosecutors (\$529,700 in costs and \$28,600 in interest charges due to late payments). Additionally, the supplies and services line expended \$3,200 on non-special prosecutor costs. A net total of \$340,500 GPR was transferred to the supplies and services line from within the DA's GPR appropriation from salaries and fringe benefits. In 2012-13, the supplies and services budget expended a total of \$561,500 GPR. [It should be noted that for both 2012-13 and 2013-14, the amount of payments made to special prosecutors is derived from data reported by counties. With regards to payments made to special prosecutors, there is a discrepancy between the state and county data of \$300 in 2012-13, and \$200 in 2013-14.]

In 2013-14, the initial budget for supplies and services within DA's annual salary and fringe benefits appropriation was again \$223,200 GPR. The state incurred \$534,700 in compensation costs for special prosecutors (\$513,600 in costs and \$21,100 in interest charges due to late payments). Additionally, the supplies and services line expended \$55,000 for non-special prosecutor costs. A net total of \$380,700 GPR was transferred to the supplies and services line from within the GPR appropriation from salaries and fringe benefits. In 2013-14, the supplies and services budget expended a total of \$589,700 GPR.

As indicated above, when available, funding has been transferred to the supplies and services line from within the DA's salary and fringe benefit appropriation to support the costs of the special prosecutors. These transferred funds have become available predominately due to staff position turnover and position vacancies. The State Prosecutor's Office indicates that because funding for special prosecutors must typically be transferred to the supplies and services line and special prosecutor payment requests must be approved by the court and processed by DOA, special prosecutors may wait a number of months after rendering their services to be paid. Special prosecutors receive 12% monthly compounded interest on the amount owed if not paid within 30 days of the court approving their compensation.

On September 15, 2012, the District Attorney's Agency Budget Request for the 2013-2015 biennium proposed an additional \$225,000 GPR annually for the supplies and services line within DA's GPR appropriation. In the request, the State Prosecutors Office noted that in recent fiscal years costs associated with the supplies and services budget line had exceeded the budgeted amount and SPO anticipates that special prosecutor costs would remain high. The proposal, however, was not included in the Governor's budget recommendations or in 2013 Act 20 (the 2013-15 biennial budget). Table 1 indicates the amounts initially budgeted and expended for the supplies and services line within DA's GPR appropriation from 2008-09 to 2013-14.

**TABLE 1**

**District Attorneys Supplies and Services  
Budgeted and Expended, 2008-09 to 2013-14**

	<u>2008-09</u>	<u>2009-10</u>	<u>2010-11</u>	<u>2011-12</u>	<u>2012-13</u>	<u>2013-14</u>
Originally Budgeted Amount	\$248,000	\$248,000	\$248,000	\$223,200	\$223,200	\$223,200
Expenditures	<u>479,400</u>	<u>317,500</u>	<u>520,800</u>	<u>571,700</u>	<u>561,200</u>	<u>589,500</u>
Difference	-\$231,400	-\$69,500	-\$272,800	-\$348,500	-\$338,000	-\$366,300

While in recent years the supplies and services line has incurred more expenditures than initially budgeted, the DA's annual GPR appropriation as a whole has remained within its authorized budget. In order to fund all special prosecutor and non-special prosecutor costs associated with the supplies and services budget line, the State Prosecutors Office has been able to: (a) transfer additional resources from within the DA's annual GPR appropriation for salaries and fringe benefits to the supplies and services budget line; and (b) use the SPO's annual GPR budget to pay for some or all of the non-special prosecutor service costs. Table 3 indicates the amounts budgeted and expended from DA's annual GPR appropriation from 2008-09 to 2013-14.

**TABLE 2**

**District Attorney Appropriation  
Budgeted and Expended, 2008-09 to 2013-14**

	<u>2008-09</u>	<u>2009-10</u>	<u>2010-11</u>	<u>2011-12</u>	<u>2012-13</u>	<u>2013-14</u>
Total budget	\$43,706,600	\$37,478,400	\$35,831,900	\$44,025,900	\$42,432,300	\$42,466,200
Expenditures	<u>42,895,500</u>	<u>37,346,900</u>	<u>35,716,000</u>	<u>43,889,100</u>	<u>42,427,600</u>	<u>42,451,800</u>
Difference	\$811,100	\$131,500	\$115,900	\$136,800	\$4,700	\$14,400

**Payments to Special Prosecutors, by County and Reason for Appointment**

As stated above, the state incurred \$558,300 in compensation costs for special prosecutors in 2012-13 and \$534,700 in 2013-14. Attachment II and Attachment III indicate the amount paid to special prosecutors in each county (excluding interest), and the reasons the special prosecutors were appointed, in 2012-13 and 2013-14 respectively. Attachment IV indicates the total amount expended on special prosecutors (excluding interest) for each reason for appointment in 2012-13 and 2013-14.

[In reviewing Attachments II, III, and IV, it is important to note that according to the State Prosecutor's Office, when submitting the Appointment for Special Prosecutor form several district attorneys have cited that they were physically unable to attend to their duties if their caseload was too high, while other district attorneys have indicated that they have an attorney shortage if their caseload was too high. Further, the category of "unknown" is due to clerical error when compiling

the data in 2012-13.]

### **Assistance from Other State Prosecutors and Public Service Special Prosecutors**

There are typically two instances in which a special prosecutor is not compensated. The first instance is when a state employee who is a prosecutor from another county or from the Department of Justice is appointed to be a special prosecutor. State employees who act as a special prosecutor are not paid any rate in addition to their normal state salary and benefits. The other instance in which a special prosecutor is not compensated is when a district attorney appoints a private attorney who is available and willing to serve as a public service special prosecutor. A public service special prosecutor performs the duties of the district attorney without state compensation and at the pleasure of the district attorney. A full time public service special prosecutor may not engage in the private practice of law. However, a public service special prosecutor serving part time may engage in the private practice of law.

I hope this information answers your request. If you have any additional questions, please do not hesitate to contact me.

MS/sas  
Attachments

# ATTACHMENT I

## Blank Appointment of Special Prosecutor Form

STATE OF WISCONSIN, CIRCUIT COURT, _____ COUNTY	<i>For Official Use</i>
<b>Appointment of Special Prosecutor under Chapter 978</b>	

I am the district attorney for \_\_\_\_\_ County and request the appointment of a special prosecutor under §978.045, Wisconsin Statutes.

Signature of District Attorney	Name Printed or Typed	Date
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The court on its own motion is appointing a special prosecutor under §978.045, Wisconsin Statutes.

### APPOINTMENT ORDER

**THE COURT FINDS AND ORDERS:**

1. Attorney \_\_\_\_\_ is appointed special prosecutor for:
  - The period \_\_\_\_\_ to \_\_\_\_\_, plus reasonable preparation time.
  - The matter of: State of Wisconsin  Other: \_\_\_\_\_, Case No. \_\_\_\_\_
2. The reason for the appointment:
  - There is no district attorney for the county.
  - The district attorney is absent from the county.
  - The district attorney is physically unable to attend to duties or has a mental incapacity that impairs ability to perform duties.
  - The district attorney has a conflict of interest under statute: \_\_\_\_\_
  - The district attorney is serving in the U.S. armed forces.
  - The district attorney is charged with a crime and the governor has not acted under §17.11, Wisconsin Statutes.
  - Other statutory reason: \_\_\_\_\_ Cite statute: \_\_\_\_\_
3. Compensation is set at the following rate:
  - No compensation is to be paid because this person is from another prosecutorial unit or an assistant attorney general.
  - Hourly rate specified in §977.08(4m)(b), Wisconsin Statutes.
  - Other: \_\_\_\_\_
4. Disbursements shall be submitted to \_\_\_\_\_ County for payment, if incurred.
5. The Department of Administration shall pay the compensation ordered by the court.

> Send a copy of this Appointment to:

1. Director State Prosecutor's Office Department of Administration P.O. Box 7869 Madison, WI 53707-7869 Telephone: (608)267-2700	2. Agency responsible for paying disbursements.
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**BY THE COURT:**

Circuit Court Judge
Name Printed or Typed
Date

### OATH AND CONSENT TO SERVE

I accept this appointment and (swear) or (affirm) that I will support the constitutions of the United States and the State of Wisconsin, and will faithfully discharge the duties of this office to the best of my ability.

Subscribed and sworn to before me  
on \_\_\_\_\_  
  
\_\_\_\_\_  
Notary Public, State of Wisconsin  
My commission expires: \_\_\_\_\_

Signature of Attorney	Telephone Number
Name Printed or Typed	Bar Number
Address of Principal Office	

## ATTACHMENT II

### 2012-13 Payments to Special Prosecutors (excluding interest) by County and Reason for Appointment

<u>County</u>	<u>Amount</u>	<u>Reason(s) for Appointment</u>
Adams	\$4,700	Conflict of interest (\$3,900); DA absent from county (\$800)
Bayfield	300	Allegations of DA impropriety
Buffalo	3,200	Conflict of interest
Crawford	100	DA absent from county
Dane	154,800	DA unable to attend to duties
Dodge	14,300	DA unable to attend to duties
Door	8,200	Conflict of interest
Eau Claire	41,400	No DA for the county
Florence	11,100	Conflict of interest
Fond du Lac	2,100	Unknown
Forest	1,400	Conflict of interest
Green Lake	600	Conflict of interest
Jackson	29,200	DA in U.S. Armed Forces (\$28,600); DA physically unable to attend to duties (\$600)
Jefferson	100	Conflict of interest
Kenosha	31,200	ADA on medical leave
Lafayette	100	DA absent from county
Manitowoc	1,200	Conflict of interest (\$1,100); prosecutor shortage (\$100)
Marathon	1,900	Conflict of interest
Marinette	1,100	Appointment by Judge (\$900); conflict of interest (\$200)
Oconto	28,400	Conflict of interest
Oneida	17,300	No DA for the county (\$16,400); conflict of interest (\$900)
Ozaukee	200	Conflict of interest
Polk	17,200	DA absent from county (\$8,900); ADA on medical leave (\$8,300)
Portage	16,900	No DA for the county
St. Croix	44,800	DA physically unable to attend to duties (\$42,600); conflict of interest (\$2,200)
Sheboygan	20,100	DA physically unable to attend to duties (\$15,400); DA unable to attend to duties (\$4,700)
Trempealeau	25,700	DA physically unable to attend to duties
Washington	12,600	ADA on maternity leave
Waushara	2,200	DA absent from county
Winnebago	16,700	Unknown (\$14,800); conflict of interest (\$1,900)
Wood	<u>20,600</u>	Conflict of interest
<b>Total</b>	<b>\$529,700</b>	

### ATTACHMENT III

#### 2013-14 Payments to Special Prosecutors (excluding interest), by County and Reasons for Appointment

<u>County</u>	<u>Amount</u>	<u>Reason(s) for Appointment</u>
Adams	\$22,600	DA physically unable to attend to duties (\$21,000); no DA for county (\$1,600)
Buffalo	800	Conflict of interest
Columbia	3,900	ADA on medical leave
Crawford	500	No DA for county
Dane	61,900	DA physically unable to attend to duties
Door	1,300	Conflict of interest
Dunn	2,400	ADA on medical leave
Florence	4,200	Conflict of interest
Fond du Lac	2,200	Conflict of interest
Forest	20,400	Assist DA
Iron	5,000	Conflict of interest
Jackson	2,200	DA absent from county
Kenosha	31,900	ADA on medical leave
Lafayette	200	Conflict of interest
Manitowoc	37,200	No DA for county (\$22,000); attorney shortage (\$9,400); conflict of interest (\$5,800)
Marathon	300	Conflict of interest
Marinette	200	Conflict of interest
Monroe	14,000	No DA for county
Oconto	72,100	Conflict of interest (\$66,600); DA physically unable to attend to duties (\$5,200); DA absent from county (\$300)
Oneida	10,300	Assist DA (\$9,000); conflict of interest (\$1,300)
Racine	16,300	ADA on medical leave
Rusk	11,800	DA physically unable to attend to duties
Sawyer	400	DA physically unable to attend to duties
Sheboygan	6,600	DA physically unable to attend to duties
St. Croix	57,700	Special need - office/special caseload (\$50,200); specific request of victim (\$4,600); conflict of interest (\$1,700); DA declined prosecution, appointment by judge (\$1,000); attorney shortage (\$200)
Washburn	37,100	No DA for county
Washington	10,300	ADA on medical leave
Waukesha	11,800	ADA on medical leave
Waushara	6,400	Conflict of interest
Winnebago	11,700	Conflict of interest
Wood	<u>49,900</u>	Conflict of interest
Total	\$513,600	

## ATTACHMENT IV

### Amount Expended on Special Prosecutors (excluding interest) by Reason for Appointment

<u>Reason for Appointment</u>	<u>2012-13</u>		<u>2013-14</u>	
	<u>Amount</u>	<u>% of Total</u>	<u>Amount</u>	<u>% of Total</u>
DA Physically Unable to Attend to Duties	\$258,100	48.7%	\$106,900	20.8%
Conflict of Interest	85,900	16.2	157,600	30.7
No DA for County	74,700	14.1	75,200	14.6
ADA on Medical/Maternity Leave	52,100	9.8	76,600	14.9
Special Need - Office/Special Caseload	---	N.A.	50,200	9.8
DA Absent from County	12,100	2.3	2,500	0.5
Assist DA	---	N.A.	29,400	5.7
DA in U.S. Armed Forces	28,600	5.4	---	N.A.
Unknown	16,900	3.2	---	N.A.
Specific Request of Victim	---	N.A.	4,600	0.9
Prosecutor Shortage	100	0.0	9,600	1.8
Appointment by Judge	900	0.2	1,000	0.2
Allegations of DA Impropriety	<u>300</u>	<u>0.1</u>	<u>---</u>	<u>N.A.</u>
Total	\$529,700	100.0%	\$513,600	100.0%