

THE STATE OF COLORADO

Office of the Alternate Defense Counsel



Vision

- ★ *To create an environment that promotes thorough evaluation, training, and technology, such that the State of Colorado's Office of the Alternate Defense Counsel is recognized as a national leader in the delivery of competent and cost-effective representation to indigent defendants.*

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Statutory authority and historical perspective of the agency:

The United States and Colorado Constitutions provide every accused person with the right to be represented by counsel in criminal prosecutions, U.S. Const., amend. VI; Colo. Const., art. II, § 16. This constitutional right has been interpreted to mean that counsel will be provided at state expense for indigent persons in all cases in which actual incarceration is a possible penalty.

The Office of the Alternate Defense Counsel (OADC) was established pursuant to C.R.S. § 21-2-101, *et. seq.* as an independent agency of the Judicial Department of State Government. The OADC began operation on January 1, 1997.

The Office of the Alternate Defense Counsel is mandated by statute to "provide to indigent persons accused of crimes, *legal services that are commensurate with those available to non-indigents*, and conduct the office in accordance with the Colorado Rules of Professional Conduct and with the American Bar Association Standards relating to the administration of criminal justice, the defense function." C.R.S. § 21-2-101(1) (emphasis added).

The Colorado Supreme Court is the appointing authority for the nine-member OADC Commission. The OADC Commission is a bipartisan group of six lawyers and three non-lawyers. The OADC Commission oversees the agency pursuant to C.R.S. §21-2-101, *et. seq.* The members of the commission serve without compensation. The OADC Commission meets regularly and serves as an advisory board to the Alternate Defense Counsel.

Prior to the creation of the agency, there was no standardized method for the court to appoint counsel to indigent defendants where the public defender's office had an ethical conflict. The court could appoint a lawyer who happened to be present in court, or use an *ad hoc* attorney list for appointments, or the appointment might come from the clerk's office. A division of the Colorado State Public Defender's Office administered payments for all appointments.

The agency has experienced significant caseload increases since its inception in 1997. This has necessitated some radical changes in order to provide competent and effective counsel for all public defender conflict cases statewide. When the sheer number of payments to contractors became overwhelming, the OADC began developing its automated payment system (WEBPAY) in FY2001-2002. By FY2004-2005, all regular contractors were billing on line.

The mission of the Office of the Alternate Defense Counsel is to provide indigent individuals (adults and juveniles) charged with crimes with the best legal representation possible. This representation *must* uphold the federal and state constitutional mandates, ethical rules, and nationwide standards of practice for defense lawyers. As a state agency, the OADC strives to achieve this mission by balancing its obligation to the

criminally accused and to the taxpayers of the State of Colorado. The OADC is committed to insuring that indigent defendants receive the best legal services available.

Justification and Need for Program:

The Colorado and the United States Constitutions guarantee the right to counsel. The Office of the Alternate Defense Counsel contracts statewide with private criminal defense lawyers who work in every judicial district at a designated state rate. Before an indigent defendant is appointed an OADC contract lawyer, two statutory requirements must be met. **The individual must be indigent, and the public defender's office must have an ethical conflict of interest in representing that individual.** OADC currently contracts with approximately 400 private lawyers and has worked with nearly 1,000 private lawyers over the past thirteen years. The OADC contractors must uphold the federal and state constitutional and statutory mandates, ethical rules, and nationwide standards for criminal defense practice.

These private lawyers represent adults and juveniles in criminal and delinquency cases filed in county, district, and appellate courts. The severity of case types range from traffic to capital murder cases (where the potential sentence is death). OADC contracts with criminal defense lawyers who may specialize in one or more of the following areas: Colorado Organized Crime Control Act (COCCA), juvenile delinquency, death penalty, sex assault, and mental health issues, among others. The OADC also maintains a list of approved investigators and paralegals to provide necessary ancillary services. All OADC lawyers, investigators, and paralegals are independent contractors.

Criminal and delinquency cases often require additional resources such as discovery, transcripts, copying, experts, etc. These are mandated costs and constitute a separate line item in the OADC budget.

How the program works:

The OADC analyses each judicial district to determine the type and number of lawyers needed for conflict cases. Lawyers who want to contract with OADC complete an application. The agency then carefully screens each application for experience and competence. Prior to contracting with any applicant, the attorney is interviewed and their disciplinary history and references are checked. A contract is issued if the lawyer is suitable and the OADC determines their services are needed. The OADC also evaluates each lawyer prior to contract renewal. This process includes obtaining an updated application, interviewing the lawyer, soliciting feedback from the judicial districts, checking disciplinary history, and verifying compliance with the OADC policies and procedures. Not every applicant obtains a contract or has his or her contract renewed. The OADC contracts are neither sole source nor competitive bid contracts. These contracts do not contemplate or guarantee a specific dollar amount or a specific number of court appointments.

Every year the OADC provides each judicial district with an updated appointment list for the court to use when the public defender's office declares a conflict. For certain types of cases, such as death penalty, first-degree murder, juvenile direct file, appeals, and post-conviction cases, the courts contact the OADC office directly and the office arranges for the appointment of counsel.

Comparable Agencies:

The OADC is similar to the Office of the Public Defender in that we provide lawyers to represent indigent persons accused of crimes. The OADC pays the lawyers, investigators, and paralegals for every hour they work and reimburses them for allowed expenses. This differs from the public defender system, where the lawyers, investigators, and paralegals are all salaried state employees.

On a federal level, the OADC contractors are similar to the Criminal Justice Act (CJA) panel attorneys; these lawyers accept appointments in federal court when there is a conflict with the Federal Public Defender. The major difference between these programs is the hourly rate. OADC lawyers are paid at a rate that is \$60 per hour *less* than the CJA federal rate of \$125 per hour (effective January 1, 2010). The CJA hourly rate for capital crimes is \$178 per hour (effective January 1, 2010); more than double the OADC rate of \$85 per hour.

Funding and Staffing:

The OADC received \$23.7 million general fund dollars from the Colorado State Legislature for fiscal year 2009-2010. The agency has 7.5 full time employees (FTE), and its total administrative costs are less than 4% of its total budget.

Reduction of services:

The mandate of the OADC, by both the federal and state constitutions, as well as by Colorado statute, is to provide representation for indigent defendants and juveniles. The agency has no control over the number of individuals it must serve in any given year so it is not possible to reduce these constitutionally mandated services.

Performances Measures:

Secure competitive compensation for all contractors. The success or failure of this objective is measured by the current rate funded compared to the competitive rate. In order to acquire and retain qualified attorneys that can effectively and efficiently represent indigent parties, the OADC must endorse reasonable and competitive hourly rates. The agency implemented a goal over 5 years ago to attain a reasonable and competitive rate of \$75 per hour by FY2008-2009. Thus far funding has only allowed the current rate of \$65 per hour.

Contain total hours per case and monitor ancillary costs. The success or failure of this objective is measured by the number of total hours and associated ancillary costs per case. The OADC continues to find ways to contain case costs. This includes pilot projects geared toward reducing contractor hours and associated mandated costs, and monitoring case expenditures.

Provide statewide training for lawyers, investigators, paralegals, and court personnel. The success or failure of this objective is measured by the number of trainings conducted each year and the feedback received from the participants. The overall goal is to insure that OADC contractors are benefiting from the trainings, resulting in more effective and efficient OADC contractors.

Continue developing and maintaining a Brief and Motions Bank. The success or failure of this objective is measured by the number of briefs and motions made available to OADC contractors. The overall goal is to accumulate and make accessible as many briefs and motions as possible thereby reducing the need for each individual lawyer to reinvent the wheel each time they are confronted with a new issue. This should reduce the number of lawyer hours required per case.

Provide competent and effective legal representation statewide by evaluation and monitoring of contractors. The success or failure of this objective is measured by the OADC's ability to interview all new and renewing contractors. This includes observing and evaluating the contractors in the courtroom. The overall goal is to evaluate and address courtroom performance, case preparation, and knowledge of criminal law and procedure.

The OADC now has more than a decade of data, experience, and institutional wisdom with which to move forward. We are conducting a detailed analysis of not just the number and type of cases assigned to OADC but the cost of each case. As these costs increase, it is vital that the OADC be able to carve out the costs that can be impacted by increased efficiencies and those costs that are truly uncontrollable. With this information, OADC will then be able to continue in its endeavor to provide quality representation at a reasonable cost.

Priorities for the Office of the Alternate Defense Counsel for FY2010-2011:

In anticipation of a state budget crisis, the OADC has dramatically pared down its budget request for FY2010-2011, and preemptively instituted cost-saving measures. The OADC has projected a very slight increase in number of cases, but a much larger increase in those cases that are most expensive, i.e. death penalty trial cases and death penalty unitary appeal cases, actual innocence post-conviction cases and sexual assault on children trials. The OADC has requested \$864,171 to cover the additional costs of the most expensive cases.

The OADC did not request a rate increase for its contractors in its FY2009-2010 budget proposal or for FY2010-2011. This was done in spite of a 5-year plan proposed by the JBC in FY2004-2005, where the goal was to increase the hourly rate for contract attorneys up to \$75.00 per hour. The current rate averages \$65.00 per hour.

The agency is requesting funding for the following:

Case Cost Due to Complexity: Although the agency cannot control its caseload or the type of cases filed, it can work to make the agency and contractors more cost effective through structured efficiency efforts. The FY2010-2011 budget request is based on an increase in costs due to more complex cases.

Increase in serious criminal cases, including murders, sexual assaults and other violent crimes. In the past ten years, the average cost per case has increased. Cases are more complicated, statewide grand juries have increased and often include numerous defendants. Colorado Organized Crime Control Act cases involve tens of thousands of pages of discovery, and sex assault trials have dramatically increased. There is currently one death penalty case pending on the trial court level. The defendant is represented by OADC contractors. Additionally, there have been two death verdicts in first-degree murder cases in the past two years. One of these cases is already proceeding under the Unitary Appeal Bill, and the defendant is represented by OADC contractors. The other case is currently pending sentencing by the court, and the OADC trial team continues to litigate post-trial issues. It is anticipated that this case will have new teams of OADC contractors appointed under the Unitary Appeal Bill once the defendant has been sentenced to death by the court.

The Unitary Appeal Bill requires that a post conviction process be set in motion at the same time as the direct appeal. In actual dollars, this means that at least 2 separate teams of lawyers are working on one case at the same time with an inability to work "together" because of potential conflict issues. See C.R.S. §16-12-201 *et. seq.* and Crim. P. 32.2. The time limits of the Unitary Appeal Bill are very strict, forcing counsel to file an exhaustive post-conviction motion within 150 days of the advisement, and a direct appeal combined with an appeal of any denial of the post-conviction motion within two years of the date of sentencing. This requires more than full-time work by the post conviction and appellate teams. These cases are the most expensive cases in terms of lawyer hours and ancillary costs.

The OADC implemented the following budget reduction items to offset partial cost increases in cases due to capital cases and Unitary Appeal appointments and to assist in keeping the fiscal year 2010-2011 request to a minimum.

1. On July 15, 2009, the OADC changed its payment policy to reimburse only investigators and paralegals for case work mileage and not attorneys. The

agency anticipates that this administrative change will save the agency approximately \$410,000 in fiscal year 2009-2010 and 2010-2011.

2. Effective August 1, 2009, the OADC began reducing by 10% any attorney contractor fee that exceeds the OADC's maximum guidelines. The agency anticipates that this change will save the agency approximately \$250,000 in fiscal year 2009-2010, and 2010-2011.
3. The OADC cost of DNA testing rose in FY08 and FY09, resulting primarily from the litigation of "actual innocence" cases. In an attempt to counteract the increased ancillary costs, the OADC applied for a federal post-conviction DNA grant. Unfortunately, the OADC did not receive this funding. However, the Colorado State Attorney General's office did receive a 1.2 million dollar post-conviction DNA grant. The OADC has met with the Attorney General to discuss DNA testing in pending OADC post-conviction cases.
4. The cost of post conviction cases continues to increase. The OADC has implemented a post conviction pilot project to contain the costs of these cases.
5. Reducing expert fees and curtailing expert costs. The agency anticipates that this administrative change will save the agency approximately \$85,000 in fiscal year 2009-2010 and 2010-2011.
6. The agency continues the in-house appellate project that streamlines the OADC appellate cases from inception through transmittal of the record on appeal.
7. The agency contracts with a document manager and paralegal professionals who specialize in organization and distribution of discovery in Colorado Organized Crime Control Act (COCCA) cases, death penalty cases, and other voluminous cases.
8. Training and granting contract attorney's governmental access to electronic court records through Courtlink, pursuant to HB 08-1264.
9. Expanding and promoting the Brief and Motions bank.
10. Evaluation of contractor efficiency and effectiveness while performing casework.

CONCLUSION

During this economic down turn, the OADC has worked diligently to contain costs that it does have control over while striving to meet its performance measures and insure the continued provision of cost effective and competent representation to indigent defendants. Although the agency **cannot** control the caseload or capital filings, it strives to make the agency and contractors more cost effective through structured efficiency efforts.