

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 likely 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.

Prior to the creation of the agency there was no standardized method of court appointments. The court might appoint a lawyer who happened to be present in court, there might be a list from which appointments were made, or the appointment might come from the clerk's office. Payments for the appointment were administered by a division of the Colorado State Public Defender's Office.

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." Section 21-2-101(1) (emphasis added).

The Colorado Supreme Court is the appointing authority for the nine-member OADC Commission made up of six lawyers and three non-lawyers. The Commission is charged with appointing, and may discharge for cause, a person to serve as Alternate Defense Counsel. The OADC Commission meets regularly, and serves as an advisory board to the Alternate Defense Counsel.

The agency has experienced significant case load 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 state wide. 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 children) 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 right to counsel is guaranteed by the Colorado and the United States Constitutions. The Office of the Alternate Defense Counsel contracts with private criminal defense lawyers who work in every judicial district at a designated state rate. There are two statutory requirements before an accused person can be appointed OADC counsel: The individual must be indigent and the Public Defender's Office must have an ethical conflict of interest in representing the

individual. OADC currently contracts with approximately 400 private lawyers and has worked with nearly 1,000 private lawyers over the past ten years. The OADC attorney contractors must uphold the federal and state constitutional and statutory mandates, ethical rules and nationwide standards of criminal defense practice. OADC also has a list of approved investigators and paralegals to provide ancillary services required by lawyers to effectively represent indigent clients.

These private lawyers, on behalf of OADC, represent adults and children in criminal and delinquency cases filed in county, district, and appellate courts. The severity of cases range from lower class misdemeanors, to capital murder cases where the potential sentence is death. Lawyers who contract with OADC are trained in criminal defense work in general and many have specialty areas such as: Colorado Organized Crime Control Act (COCCA), juvenile delinquency, the death penalty, sex assault, mental health issues, etc. All OADC lawyers, investigators, and paralegals are independent contractors.

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

How the program works:

OADC analyses each Judicial District to the type and number of lawyers needed. Lawyers apply to participate in the program. They complete an application and, if accepted, a contract for services is executed. Not every lawyer who applies is accepted into the program. Each application is carefully screened, and experience and competence are taken into consideration for those who want to participate in the assigned counsel program. Prior to contracting with any applicant, the individual attorney is personally interviewed, their attorney disciplinary history is checked as well as their references. The OADC also strives to obtain lawyer specialization in certain areas, including: appellate, post conviction, COCCA, juvenile delinquency, and murder and death penalty cases.

Every year, the OADC provides each Judicial District with an updated list of contracted private lawyers that the court may appoint when the public defender's office declares a conflict. The OADC 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.

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. OADC pays the lawyers 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. Our contracting process is similar to that of The Office of the Child's Representative, although the services we provide are different.

On a federal level, the OADC is similar to the Criminal Justice Act (CJA) panel attorneys, who are appointed in federal court when there is a conflict with the Federal Public Defender. The major difference is that the OADC lawyers are paid at a rate which averages \$35 per hour less than the

CJA federal rate of \$100 per hour. The CJA hourly rate for capital crimes is \$170 per hour in comparison to the OADC rate of \$85 per hour.

Funding and Staffing:

The OADC received \$23.2 million general fund dollars from the State Legislature for fiscal year 2009. The agency consists of only 7.5 full time employees, and our administrative costs are below 4% of our total budget.

Reduction of services:

The OADC is mandated by both the federal and state constitutions, as well as by Colorado statute 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 services that are constitutionally guaranteed.

Performances Measures:

Provide competent and effective legal representation statewide by evaluation and monitoring of contractors. This consists of interviewing contract applicants, evaluating contractors prior to contract renewal date, and ongoing performance monitoring. The success or failure of this objective is measured by the OADC's ability to interview all renewing contractors and new contractors and the ability to evaluate and observe some of the contractors in the courtroom. The overall goal is to evaluate and address courtroom performance, case preparation, and knowledge of criminal law and procedure.

Provide state-wide 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. Training court personnel will reduce the number of inappropriate appointments.

Continue developing and maintaining a Brief and Motions Bank. The success or failure of this objective is measured by the successful development of the Brief and Motions Bank and 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 will in turn reduce the number of lawyer hours required for a case.

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

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 as required by Colorado statutes and the Colorado and United States Constitutions, the OADC must endorse reasonable and competitive hourly rates. The agency implemented a goal over 5 years ago to attain reasonable and competitive rate of \$75 per hour by FY2007-2008. Thus far funding has allowed the current rate of \$65 per hour.

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 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 Alternate Defense Counsel:

What's New In Our Budget Request for FY2009-2010?

In anticipation of a state budget crisis, the OADC did not request a rate increase for its contractors in its FY2009-2010 budget proposal. 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.

- 1. CASE LOAD/CASE COST:** OADC is 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 its caseload or the type of case filed, it can work to make the agency and contractors more cost effective through structured efficiency efforts. It is anticipated that there will be a case load increase of 1.5% above the expected caseload for FY2008-2009. Prior history indicates that when there has been an economic down turn there is an increase in criminal filings.

The request also includes the additional 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, state-wide 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 has also been an increase in the number of cases where the prosecution has filed its intent to seek the death penalty. There are currently four death penalty cases pending on the trial court level across the state. All of these are in the 18th Judicial District, and in three of these cases the defendants are represented by Alternate Defense Counsel contractors. Not included in the previous number is the appointment of OADC contractors in December, 2008, to the Unitary Appeal of a death sentence, also in the 18th Judicial District. The Unitary Appeal Bill requires that the 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. This requires more than full-time work by the post conviction lawyers. OADC will likely be responsible to appoint counsel in all cases where a death sentence is imposed, including those defendants represented by the State Public Defender. OADC is now tracking these increases closely and attempting to develop procedures and technology that will help contain these costs

2. **INCREASE CASH FUND SPENDING AUTHORITY:** The agency is requesting an additional \$12,000 cash spending authority for its training program. The OADC conducts live trainings which are recorded and Webcast so they are available in every judicial district to those unable to attend in person. This will allow the agency to collect fee reimbursement to cover these additional expenditures without expending general fund money. The increase in the number of annual trainings has a correlating increase in expenditures, which can be met through an increase in cash fund spending authority.

OADC has met and exceeded its training program target. Attendance at trainings has surpassed expectations and feedback has been excellent. The OADC has been able to train on a variety of subjects that concern its contractors, including death penalty mitigation, juvenile issues, post-conviction cases, mental health issues, investigation, etc. For contractors who are unable to attend trainings in person, the OADC has created DVD reproductions of several training sessions and collected reimbursement costs for each training DVD. The agency has also begun web-casting any training that does not involve hands-on participation. This decision item is being requested to assist the agency in meeting the following goals: provide statewide training for lawyers, investigators, paralegals and court personnel, and containing total hours per case cost.

The main priority of the OADC is to continue to increase the effectiveness and efficiency of the agency while continuing to provide the high quality representation for indigent adults and juveniles statewide.