



REPORT OF
THE
STATE AUDITOR

Indigent Defense

Performance Audit
February 2003

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February, 2003

Members of the Legislative Audit Committee:

This report contains the results of a performance audit of Indigent Defense. The audit was conducted pursuant to Section 2-3-103, C.R.S., which authorizes the State Auditor to conduct audits of all departments, institutions, and agencies of state government. The report presents our findings, conclusions, and recommendations, and the responses of the Office of the State Public Defender, the Office of Alternate Defense Counsel, and the Judicial Department.

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JOANNE HILL, CPA
State Auditor

Indigent Defense Performance Audit, February 2003

Executive Summary

The Constitutions of Colorado and of the United States establish the right to counsel and due process of law. For indigent individuals in Colorado, these rights are upheld by a defense system which includes the Offices of the State Public Defender (OSPD) and the Alternate Defense Counsel (OADC). Both of these offices are autonomous agencies within the Judicial Branch of Colorado State Government and each is responsible for providing defense counsel to indigent persons. The Office of the State Public Defender provides criminal defense counsel, without charge, to indigent defendants requesting legal representation. The Office of Alternate Defense Counsel provides legal representation, without charge to indigent defendants, through contracts with outside attorneys in circumstances in which a conflict of interest precludes the Office of the State Public Defender from representing the defendant. In Fiscal Year 2002 these two agencies handled a total of almost 80,000 cases. The OSPD closed 70,920 cases, including felony, misdemeanor, and juvenile cases as well as miscellaneous proceedings and partial services. The OADC had an active caseload of 8,693 conflict cases.

In this audit we reviewed the performance of the Office of the State Public Defender and the Office of Alternate Defense Counsel. In addition, we examined some of the mandated costs incurred in processing cases through the criminal justice system. We made a total of 16 recommendations for improvement to the Office of the State Public Defender, the Office of Alternate Defense Counsel and the Office of the State Court Administrator. The three agencies agree or partially agree to all of our recommendations. Among the significant findings and recommendations resulting from the audit are:

Office of the State Public Defender

- C **Eligibility determination procedures are not always followed and defendant income information is not always verified.** Colorado statutes require that individuals be “indigent” to be eligible for public defender representation. The determination of indigence is to be made by the State Public Defender subject to review by the court. By statute, a public defender is not to be appointed if a defendant’s income does not fall within the fiscal guidelines established by the Colorado Supreme Court. We found, however, that staff in the public defender’s regional trial offices do not routinely verify applicants’ self-reported income. For example, 75 percent of the 145 open and closed case files we reviewed contained no documentation of income verification. Verification is essential to ensure that only those individuals meeting the income standards receive publicly-financed legal representation.

For further information on this report, contact the Office of the State Auditor at (303) 869-2800.

- C The Public Defender application fee is assessed and collected in only about 20 percent of all cases which are subject to the fee.** Consequently, between 1997 and 2002 fee revenue decreased from about \$202,100 in Fiscal Year 1997 to about \$186,000 in Fiscal Year 2002. We estimate that if the \$25 fee had been assessed and collected in all appropriate cases during this six-year period, more than \$5.1 million in revenue would have been added to the State's General Fund. Instead, since 1997, a total of about \$1.1 million in fee revenue was collected. The Offices of the State Public Defender and the State Court Administrator should work together to improve fee assessment and collection by adopting appropriate policies and procedures and recommending legislative change, as needed, to address the timing of fee assessment and collection, the amount of the fee, and the uses of fee revenue.

Office of Alternate Defense Counsel

- C The Office of Alternate Defense Counsel needs to ensure the quality of representation.** We found weaknesses in the OADC's existing practices for selecting, appointing, and monitoring its contract attorneys. For example, although statutes mandate that the Office execute contracts with the attorneys who represent indigent clients in conflict cases, we found that the Office has not executed any contracts since 1998. Consequently, in Fiscal Year 2001, fewer than one-third of the Office's roster of 454 paid attorneys were under contract. The Office not only needs to execute written contracts with all of its attorneys but it also needs to require all attorney-applicants to complete applications and undergo interviews and/or other appropriate reviews of background and qualifications, prior to selection.
- C Office of Alternate Defense Counsel staff spend an excessive amount of time reviewing and processing attorney bills and payments.** For Fiscal Year 2002, the OADC reported that it processed more than 15,450 payments to attorneys, totaling \$10.9 million. We believe if the Office were to implement several measures such as automating the billing and payment processes, reducing the billing cycle, and strengthening internal controls, greater efficiency and effectiveness in operations would result.

Court Reporter and Transcript Costs

- C State-employed court reporters are additionally compensated for transcripts that are often produced during normal working hours.** In Fiscal Year 2002, the Judicial Department paid almost \$7.8 million in compensation to the approximately 132 FTE it employed as official state court reporters. In addition, during this period, state agencies including the Office of the State Public Defender and the Office of Alternate Defense Counsel, paid individual court reporters more than \$978,000 for transcripts. Private sector entities and individuals also purchase transcripts from court reporters. However, court reporters are not required to divulge this information except for

income tax purposes. Consequently, total annual compensation is not known for this group of state employees. Without complete income information it is impossible to determine whether court reporters are being compensated appropriately or whether salary adjustments or work restructuring are in order. The Office of the State Court Administrator needs to review the current system for compensating court reporters to determine reasonable compensation.

- C **It is unclear what the \$2.35 per page rate for original transcripts and the \$.50 per page rate for transcript copies represent.** As stated above, nearly \$1 million in general funds was expended by state entities for the purchase of transcripts in Fiscal Year 2002. At least five other states are currently reevaluating the rates charged for court transcripts. Part of the reason for this is that technological advancements have resulted in greater efficiencies in the recording and transcribing of the record of the court since the time the traditional, per page rate was adopted nationally and in Colorado. We believe the Office of the State Court Administrator should reassess the current transcript fee structure. This should be done in conjunction with the evaluation of court reporter compensation and include consideration of eliminating the transcript fee for state general-fund entities.

RECOMMENDATION LOCATOR

Rec. No.	Page No.	Recommendation Summary	Agency Addressed	Agency Response	Implementation Date
1	19	Ensure income eligibility of clients by adopting standard, comprehensive income verification methods.	Office of the State Public Defender	Agree	March 2003
2	25	Improve fee assessment and collection by proposing legislative changes to address the purpose, amount, timing and verification of the Public Defender application fee.	Office of the State Public Defender	Partially Agree	June 2003
			Judicial Department	Partially Agree	June 2003
3	27	Ensure complete defendant applications by conducting comprehensive application reviews and including these reviews in annual internal audits.	Office of the State Public Defender	Agree	March 2003
4	32	Improve identification and evaluation of costs for services.	Office of the State Public Defender	Partially Agree	March 2003
5	33	Improve the timeliness of staff performance evaluations.	Office of the State Public Defender	Agree	March 2003
6	34	Routinely update the performance measures reported to the Joint Budget Committee.	Office of the State Public Defender	Agree	June 2003
7	42	Ensure greater accountability for the quality of representation by: a) requiring all applicants to complete and submit an application; b) documenting the results of interviews with all applicants; and c) reviewing and documenting the background and qualifications of applicants.	Office of Alternate Defense Counsel	Agree	a. June 2003
					b. March 2003
					c. March 2003

RECOMMENDATION LOCATOR

Rec. No.	Page No.	Recommendation Summary	Agency Addressed	Agency Response	Implementation Date
8	46	Execute written contracts with all attorneys selected to handle conflict cases within the State, including: a) notifying current and potential attorneys of statutory requirements; b) implementing contract time limits; c) ensuring performance expectations are clearly delineated and performance is formally evaluated and documented; and d) maintaining personnel files or records on all contract attorneys.	Office of Alternate Defense Counsel	a. Agree b. Agree c. Partially Agree d. Agree	a. June 2003 b. June 2003 c. June 2003 d. March 2003
9	49	Fully implement the online billing system by: a) establishing an implementation plan; b) developing reports to efficiently manage the system; and c) studying the feasibility of implementing an Electronic Funds Transfer (EFT) system.	Office of Alternate Defense Counsel	Agree	a. May 2003 b. Ongoing c. May 2003
10	51	Improve access controls to the online billing system by generating lists of all authorized users and strengthening system controls.	Office of Alternate Defense Counsel	Agree	Ongoing
11	54	Change current practice of allowing attorneys 180 days to submit bills by reducing the time allowed for bill submission and instituting consequences for exceeding time limits. This should be fully implemented by the end of Fiscal Year 2004.	Office of Alternate Defense Counsel	Agree	July 2004

RECOMMENDATION LOCATOR

Rec. No.	Page No.	Recommendation Summary	Agency Addressed	Agency Response	Implementation Date
12	55	Improve manual bill review and approval processes by: a) documenting criteria used to review and approve bills for payment; and b) reorganizing the filing of Notices of Appointment.	Office of Alternate Defense Counsel	a. Agree b. Agree	June 2003 June 2003
13	57	Evaluate the feasibility of developing a download of case information from ICON.	Office of Alternate Defense Counsel Judicial Department	Agree Agree	May 2003 June 2003
14	63	Review the current system for compensating court reporters, evaluate various methods, and report recommendations for implementing the most cost-effective compensation.	Judicial Department	Agree	March 2003
15	66	Conduct an analysis of the various methods of court reporting used nationwide and in Colorado to determine which is the most cost effective and reliable.	Judicial Department	Agree	March 2003
16	71	Reassess the current transcript fee structure and evaluate rate setting methods, the transcript fee, and fee revenue.	Judicial Department	Agree	March 2003

Indigent Defense

Background and Description

Description

The Constitutions of Colorado and of the United States establish the right to counsel and due process of law. For indigent individuals in Colorado, these rights are upheld by a defense system which includes the Office of the State Public Defender and the Office of Alternate Defense Counsel. Both of these offices are autonomous agencies within the Judicial Branch of Colorado State Government and each is responsible for providing defense counsel to indigent persons requesting legal representation. This audit included a performance audit of the Offices of the State Public Defender and the Alternate Defense Counsel and a review of the mandated cost appropriation used to pay for some services provided by these and other agencies within the judicial system. In particular, the audit focused on transcript costs and associated court reporter compensation.

State Public Defender

The Colorado General Assembly passed the Colorado Public Defender Act in 1970, creating the Office of the State Public Defender (OSPD.) The OSPD provides criminal defense counsel, without charge, to indigent defendants requesting legal representation. The Office has established 21 regional trial offices, one satellite office, and an appellate division to handle indigent defense in each of the State's 22 judicial districts. For Fiscal Year 2002 the OSPD expended more than \$29 million and reported a total closed caseload of 70,920.

Alternate Defense Counsel

The Office of Alternate Defense Counsel (OADC) was established as a separate agency within the Judicial Branch in 1997. Prior to that time, conflict of interest cases were financed through a separate line in the Public Defender's budget. The OADC is an integral component in the State's representation of indigent clients. The OADC contracts with private attorneys to represent indigent defendants in cases where the Office of the State Public Defender has a conflict of interest and may not ethically represent a defendant. In Fiscal Year 2002 the OADC expended \$11.3 million and had an active caseload of 8,693 conflict cases.

Audit Scope and Methodology

As part of this performance audit, we contacted and/or conducted site visits to the regional Public Defender Offices, District Courts, Office of Alternate Defense Council, Office of the Child's Representative, Office of the State Court Administrator and the District Attorneys' Council. Audit procedures included interviews, file reviews, document analyses, and surveys of other states, court reporters, district administrators, and attorneys. In addition, we observed operations at various district courts in Colorado. Audit work was conducted between April 2002 and October 2002. We would like to acknowledge the management and staff at the Office of the State Public Defender, the Office of Alternate Defense Counsel, the Office of the State Court Administrator, the Office of the Child's Representative, and the District Attorneys' Council for their efforts and cooperation during the audit.

The Office of the State Public Defender

Chapter 1

Background

The Constitutions of Colorado and of the United States establish the rights to counsel and to a speedy public trial. In Colorado, the Office of the State Public Defender (the Office or the OSPD) has responsibility for ensuring these rights are upheld for indigent clients. The Office was created in 1970. It is an autonomous agency within the Judicial Branch that provides criminal defense counsel, without charge, to indigent persons requesting legal representation. The Office's primary objective as stated in its mission is:

The single overriding objective of the Office of the State Public Defender is to provide reasonable and effective criminal defense representation for our clients and fulfill this constitutional requirement.

Organization Structure

To carry out its statutory responsibility for providing legal counsel to indigent persons in criminal cases across the State, the Office has established 21 regional trial offices, one satellite office, and an appellate division. Generally, the geographical areas covered by the regional trial offices correspond to the regional areas of Colorado's 22 Judicial Districts. Regional trial offices range in size from those with two staff attorneys—Salida, Steamboat Springs, and Trinidad—to those with 30 or more attorneys—Denver and Colorado Springs. Currently the Office plans to open an additional trial office in Broomfield in 2003.

The regional trial offices handle felony, misdemeanor, and juvenile criminal cases only when there is a possibility of imprisonment and the client is indigent. The appellate division handles appeals for indigent clients after they have gone to trial on their original charges. Each of the regional trial offices has a supervising attorney who is appointed by the State Public Defender. All of the offices have administrative support staff, although many support functions, such as accounting, budgeting, hiring, and training are administered at the state level by the central office in Denver.

Expenditures and FTE

As the following exhibit shows, both the Office's expenditures and the number of FTE increased during the last four fiscal years. For Fiscal Year 2002, the Office expended about \$29.6 million.

Office of the State Public Defender Expenditures and FTE Fiscal Years 1999 through 2002					
	1999*	2000	2001	2002	Percent Change 1999-2002
Expenditures (In Millions)	\$22.8	\$25.9	\$26.8	\$29.6	29.8%
FTE	304.6	317.2	320.1	335.1	10.0%
<p>Source: Office of the State Auditor's analysis of Office of the State Public Defender data. Note: * Fiscal Year 1999 expenditures do not include the \$1.4 million mandated cost transfer from the Judicial Department to the Public Defender's Office.</p>					

Attorneys represent the single largest percentage of the Office's FTE. In Fiscal Year 2001 slightly more than 62 percent of FTE were attorneys. The remaining FTEs included administrative support staff, paralegals, and investigators.

Caseload

In Fiscal Year 2002, the OSPD closed 70,920 cases. The total number of cases represented by the regional trial offices increased by more than 21 percent between Fiscal Years 1997-2002. The following table displays this increase by case type—felony, misdemeanor, and juvenile. As the table shows, the largest increase has been in felony cases (27.3 percent).

Closed Caseload by Type of Case							
Fiscal Years 1997 through 2002							
Case Type	1997	1998	1999	2000	2001	2002	Percent Change
Felony	32,034	34,142	36,337	35,959	38,173	40,789	27.3
Misdemeanor	17,029	16,712	17,658	18,535	19,698	20,607	21.0
Juvenile	9,492	10,020	9,818	10,244	9,701	9,524	.3
TOTAL	58,555	60,874	63,813	64,738	67,572	70,920	21.1%
Source: Office of the State Auditor's analysis of Office of the State Public Defender FY 2003 Budget Request data.							

Workload

As distinguished from caseload, workload refers to the distribution of cases among attorney staff. Standards dictate that attorneys' workloads should never be so large as to interfere with the quality of representation and that attorneys are obligated to decline appointments above certain levels. Prior to 1996, Colorado used a system to measure workload that relied on American Bar Association (ABA) standards. The ABA standards are based on a felony equivalent system that assigns the same unit of measure to all types of felony cases, regardless of their complexity and the corresponding time involved. As the number and complexity of cases increase, the felony equivalent system does not adequately reflect this fact. Consequently, the OSPD, like other states' public defender offices, has reevaluated its workload measurement system. To do this, the Office hired an outside consultant (the Spangenberg Group) to develop a more accurate method of measuring workload and allocating resources.

The following table compares the Office of the State Public Defender's Fiscal Year 2001 actual workload with ABA and Spangenberg standards. As the table shows, the average number of cases handled by attorneys within the OSPD is either within or below ABA or Spangenberg standards for each type of case. For example, for felony cases, the OSPD's average workload of 140 exceeds the Spangenberg standard of 139, but is within the ABA standard of 150. For juvenile cases, the ABA recommends no more than 200 cases per attorney. The OSPD exceeds this with an average caseload of 301. However, this figure is within the Spangenberg standard of no more than 309 cases per attorney.

Public Defender Workload Compared with Workload Standards			
Case Type	American Bar Association	Spangenberg Study	Fiscal Year 2001 Average No. of Cases
Felonies	150	139	140
Misdemeanor	400	410	377
Juvenile	200	309	301
Source: Office of the State Auditor's analysis of the OSPD, American Bar Association, and 1996 Spangenberg workload study data.			

The Office is about to undergo another reevaluation of its workload by the same consulting group that conducted the 1996 study. The Office has identified other variables which it believes should be included in its workload measures to more accurately reflect existing conditions. Some of these variables include:

- **Length of time to close a case** - Time varies considerably depending upon case complexity, number of witnesses, and the ability to plea bargain.
- **Case mix** - Attorneys do not necessarily handle a single type of case such as misdemeanors or juvenile cases. Individual attorneys handle a mix of case types.
- **Specialized cases** - The existing standards do not consider the specialized nature of some types of cases such as death penalty cases.

Eligibility and Fees

In 1995 we conducted a performance audit of the Office of the State Public Defender. At that time we identified areas for improvement related to the eligibility determination, application, and fee payment processes. Our recommendations in these areas were directed to both the OSPD and the Office of the State Court Administrator (OSCA) because eligibility determination and fee assessment and collection are systemwide issues. In our current audit we found that steps were taken to address deficiencies. Individually and jointly, the OSPD and the OSCA adopted and disseminated procedures for establishing greater uniformity in eligibility determination, application processing, and fee collection. Some improvements have occurred.

Overall, however, we concluded that the fundamental problems we identified seven years ago still exist. Specifically, eligibility determination procedures are not always followed, defendant income information is not always verified, and the public defender application fee is not consistently assessed or waived. Consequently, statutory intent is not being met in all cases, insufficient documentation exists about the eligibility of those provided publicly-funded legal representation, and the State does not collect all of the revenue it is due. Therefore, in this section we present recommendations for more systemic changes in eligibility determination and fee collection.

Eligibility Determination

Colorado statutes require that individuals be “indigent” to be eligible for public defender representation. The Colorado Supreme Court has determined that to be deemed indigent, the defendant need not be destitute. Rather, it is sufficient that the defendant lack the necessary funds, on a practical basis, to retain competent counsel. The determination of indigence is to be made by the State Public Defender subject to review by the court. Supreme Court Directives state that when a defendant requests representation, he or she must submit an application, “the form of which shall state that such application is signed under oath and under the penalty of perjury and that a false statement may be prosecuted as such.” By statute, the court is not to appoint a public defender to represent a defendant if the defendant does not fall within the fiscal standards or guidelines established by the Colorado Supreme Court. Currently, these standards are set at 125 percent of the national poverty level, as shown in the following exhibit.

Public Defender Representation Income Eligibility Guidelines Fiscal Year 2002		
Family Size	Maximum Monthly Income at 125 Percent of National Poverty	Maximum Annual Income at 125 Percent of National Poverty
1	\$923	\$11,075
2	\$1,244	\$14,925
3	\$1,565	\$18,775
4	\$1,885	\$22,625
5	\$2,206	\$26,475
6	\$2,527	\$30,325
7	\$2,848	\$34,175
8	\$3,169	\$38,025
Source: Colorado Supreme Court Directives		

Improve Income Verification

The regional trial offices do not routinely or adequately verify applicants' self-reported income information. Because indigence is the basis for public defender representation, income must be determined. Verification is essential to ensure that only those individuals meeting the income standards established by the Colorado Supreme Court receive publicly-financed legal representation. Comprehensive and routine verification of income provides preventative measures against erroneously qualifying ineligible and non-indigent applicants. Although the Office has adopted some procedures addressing income verification, they are not disseminated comprehensively and compliance is not required. Specifically, we found:

- Three-quarters (75 percent) of the 145 open and closed case files we reviewed contained no documentation of income verification. Further, 70 percent of the out-of-custody files did not contain any documentation of income verification. Out-of-custody status refers to individuals charged with an offense, but not confined to jail.

- C Verification procedures adopted by the Office are vague and are distributed only to secretaries during their training. Although secretaries and other administrative staff determine eligibility in about one-half of all cases (based on our file review findings), attorneys, interns, paralegals, and investigators determine eligibility in the remaining 45-50 percent of cases. In addition, a review of these verification procedures revealed that the Office is aware that not all regional offices require verification.
- C Although instructions given to applicants may specify that they bring "proof of income such as a pay stub, pay check, or income tax return" to the Public Defender's Office, this directive is rarely enforced. Trial office staff told us it is unlikely they would send away an applicant for failure to supply income verification unless they had reason to doubt the applicant's statements.

As stated previously, defendants may be charged with perjury if it is determined that they have provided false income information. In addition, Section 21-1-106, C.R.S., requires the court to assess fees or charges against any defendant who is found to be able to repay all or part of the expense of state-supplied counsel. Statewide data do not exist to establish the frequency with which perjury charges have been filed or recoupment of costs has occurred. However, the OSPD staff told us they are aware of several instances in which perjury charges have been filed and the Office of the State Court Administrator, which collects recoupments, verified that in Fiscal Years 2001 and 2002 recoupments did occur. State Court Administrator's staff were not able to provide us with exact figures, but estimated that recoveries from those found ineligible (which include fees other than those of the Public Defender) were about \$120,000 for this two-year period.

Other Income-Based Programs Require Proof

Verification of information provided by applicants and recipients of other income-based eligibility programs is common practice. For example:

- C **Food Stamps** - The Food Stamp Program has extensive standards and criteria for determining eligibility, including acceptable forms of income verification for earnings and other income such as Social Security, SSI, unemployment, and student income. Criteria also exist for verifying cases of no reported income. According to Food Stamp standards, the "primary source of verification for earning and other income is the applicant. Applicants are primarily responsible for furnishing verification documents or sources, including the authorization needed to secure sufficient information to allow written or verbal verification by the eligibility worker."

- C **Temporary Assistance to Needy Families (TANF)** - TANF requirements specify that each decision of eligibility or ineligibility shall be supported by a review of the applicant's statements and by written evidence or other information. The Department of Human Services (DHS) matches applicant/recipient Social Security numbers with source data from the Social Security Administration, the Internal Revenue Service, and the Colorado Department of Labor and Employment. The purpose for the data match is to identify earned and unearned income and other resources. In addition, other items such as residency, property ownership, family composition, and alien status are also verified.

- C **Colorado Indigent Care Program (CICP)** - Policies and procedures for CICP provide for the determination of the applicant's income whether it be employment, self-employment, or in-kind earned income. Documentation in the form of pay stubs is used to verify employment income. In cases of unearned income such as Unemployment Compensation, Old Age Pension, SSI, and Retirement Pensions, no verification is required. These sources of income can be self-declared.

- C **Children's Basic Health Plan (CBHP)** - Eligibility rules for the Children's Basic Health Plan program require that earned income is to be verified "within 30 days of the application."

Ensure Income Eligibility

We recognize there are distinct differences between the systems within which the Office of the State Public Defender operates and those of the other eligibility programs described above. Unlike the Food Stamps or TANF programs, for example, services for indigent defendants are not discontinued or postponed if the client fails to provide adequate verification of income. The judicial process continues, criminal charges are not dropped, or court proceedings delayed, because of a defendant's failure to provide income verification. In addition, some applicants are automatically deemed eligible by virtue of their in-custody status. Despite these differences, we believe the Office of the State Public Defender has a mandate to ensure eligibility. Specifically, we believe the Office should:

- C Require income verification in the form of pay stubs, paychecks, or written statements from employers. In the case of no reported income, the Office should access, as other agencies do, database systems through the Department of Labor and Employment, the Social Security Administration, and the Internal Revenue Service.

- C Require defendants to provide Social Security numbers. Social Security numbers are required for accessing various databases, including income tax and unemployment systems.
- C Consider extending the verification period to within a specified time, such as 30 or 45 days, after application.
- Use alternative methods of verification including eligibility for or receipt of food stamps or TANF as evidence of their low income status.
- Ensure regional office compliance by training staff and including appropriate internal audit review categories.
- Add income verification measures to its overall performance goals and objectives.

Recommendation No. 1:

The Office of the State Public Defender should ensure the income eligibility of its clients by adopting standard, comprehensive income verification requirements and practices to include:

- a. Disseminating written requirements to all staff indicating the acceptable forms of verification.
- b. Documenting verification to be included in all case files.
- c. Accessing available database verification systems, particularly in cases of no reported income.
- d. Monitoring of the regional trial offices' compliance with requirements through the internal audit function and the adoption and reporting of performance measure(s) related to improvements in income verification in budget documents.

Office of the State Public Defender Response:

Agree. To be implemented by March 2003. New Procedures for Determining Indigency and Appointment of Counsel have been issued. Our internal audit function has been expanded to include broader monitoring of compliance with the new procedures. Last fall, the Office of the State Public Defender began an

evaluation of utilizing other databases in conjunction with the eligibility determination process.

Fee Assessment and Collection

By statute, applicants for public defender representation must submit an application along with a non-refundable application fee of \$25, prior to representation. The Public Defender application fee is just one of many court fees and costs the Office of the State Court Administrator is responsible for collecting. Section 21-1-103, (3), C.R.S., states that the court may reduce the \$25 application fee to \$10, or waive it entirely, if the individual remains in custody or if the court determines the individual does not have the financial resources to pay the fee. The State Court Administrator credits all revenue collected from the public defender application fee into the State's General Fund.

Fee Revenue Has Decreased

Revenue collected from the Public Defender application fee has decreased by about 8 percent during the last six fiscal years, from slightly more than \$202,000 in Fiscal Year 1997 to less than \$186,000 in Fiscal Year 2002. This means that only about 7,440 of the 37,073 cases which would have been subject to the fee in Fiscal Year 2002 could have paid the full-fee amount. It is important to note that not all of the Office's Fiscal Year 2002 closed caseload of 70,920 would have been subject to the fee. This is because the Office includes various case-related proceedings and partial services in its total closed caseload count. Miscellaneous proceedings and partial services such as probation revocations, sentence re-considerations, and appeals are not subject to the application fee. As the following exhibit shows, the decrease in revenue occurred at the same time the Public Defender's caseload increased by 13 percent.

Office of the State Public Defender			
Cases and Fee Revenue			
Fiscal Years 1997 and 2002			
	1997	2002	Percent Change 1997-2002
Cases Subject to Fee	32,822	37,073	13%
Fee Revenue	\$202,092	\$185,814	-8%
Source: Office of the State Auditor's analysis of the Offices of the Public Defender and State Court Administrator data.			

Since 1997 a total of \$1,124,415 in revenue has been collected from the Public Defender application fee. By contrast, if the \$25 fee had been assessed and collected for all of the OSPD's clients during the six-year period, Fiscal Years 1997 through 2002, more than \$5.1 million in revenue would have been added to the State's General Fund. If the fee had been applied in only one-half of the cases from Fiscal Years 1997 through 2002, about \$2.6 million would have been generated. Overall, in Fiscal Year 2002 we estimate that the fee was waived or was not collected in almost 80 percent of the OSPD cases.

The following exhibit shows the disparity between caseload and fee revenue among the regional trial offices. As shown, there does not appear to be a strong relationship between caseload size and fee revenue collected. That is, offices with larger/smaller caseloads do not necessarily collect a corresponding proportional share of fee revenues. For example, the Denver regional trial office represented almost 14 percent of the OSPD's total caseload in Fiscal Year 2002. Yet, the fee collected by the Court in Denver represented less than two percent of total fee collections. The lack of fee assessment and collection is clearly demonstrated in Brighton where it appears only 8 of that office's 3,413 cases were assessed the \$25 fee, for a total of \$200 in revenue.

Office of the State Public Defender				
Fee Revenue and Caseload				
By Regional Office				
Fiscal Year 2002				
Regional Office*	Total Fees Collected	Total Caseload	Percent of Total Fees	Percent of Total Caseload
Alamosa	\$12,100	834	6.5	2.2
Arapahoe	1,100	2,787	0.6	7.5
Boulder	600	2,473	0.3	6.7
Brighton	200	3,413	0.1	9.2
Colorado Springs	33,775	5,723	18.2	15.4
Denver	2,815	5,131	1.5	13.8
Denver Drug Court	28,375	862	15.1	2.3
Douglas	5,250	520	2.8	1.4
Durango	1,000	883	0.5	2.4
Fort Collins	1,325	1,406	0.7	3.8
Glenwood Springs	1,475	376	0.8	1.0
Golden	15,230	2,445	8.2	6.6
Grand Junction	7,520	1,461	4.1	3.9
Greeley/Sterling	16,253	2,338	8.8	6.3
La Junta	3,881	828	2.1	2.2
Montrose	6,400	609	3.5	1.6
Pueblo	23,290	2,885	12.6	7.8
Salida	9,375	473	5.1	1.3
Silverthorne	5,250	570	2.8	1.5
Steamboat Springs	4,725	536	2.5	1.4
Trinidad	5,875	520	3.2	1.4
Total	\$185,814	37,073	100%	100%
Source: Auditor's analysis of Office of the State Public Defender caseload data and Office of the State Court Administrator fee collections receipt data.				
Note:* Table does not include Broomfield or Appellate Division.				

Fee Problems Persist

From our review of public defender case files, interviews with public defender and court clerk staff, and observations at several court clerk offices, we identified several inconsistencies and problems with the assessment and collection of the public defender fee. These include:

- **Payment or waiver of the fee is not routinely verified prior to public defender representation.** Except as described below, by statute, “a nonrefundable application fee of twenty-five dollars shall be paid at the time the application is submitted, and no application shall be accepted without payment of the fee.” However, in almost one-half (47 percent) of the files we reviewed, the application for public defender representation did not indicate whether the fee had been paid, reduced, or waived. Yet, legal representation was provided in all of these cases.
- **Defendants initiate fee waivers.** As stated previously, the Office of the State Public Defender is statutorily responsible for determining eligibility, however, “the court may, based upon the financial information submitted,” reduce the \$25 application fee to ten dollars or waive the fee, if the person remains in custody or if the court determines that the individual does not have the financial resources to pay the fee. We found, however, that this statutory directive is not always followed. Specifically, during two of our site visits, we observed defendants, rather than the court, initiating waivers of their own fees. In addition, we saw no financial information requested or submitted to support the defendants’ claims of an inability to pay the fee as is required in the State Court Administrator’s Fiscal Procedures.
- **Inconsistencies exist in the application of established procedures.** Not all courts are aware of the statutory fee options of \$25, \$10 and \$0. One court assesses a \$15 fee. In other cases, information given to the defendant makes mention only of the \$25 fee with no reference to the reduced fee of \$10 or the possibility of fee waiver.

Propose Statutory Change

Current practice in other states supports the notion of a fee for indigent defense services. Ten of eleven states we contacted with public defense systems similar to Colorado have adopted either a fee or a method for clients to reimburse all or a portion of their public defender costs. Public defense fees in these states range from \$10 in New Mexico to \$150 in Massachusetts. Both New Jersey and Delaware assess a \$50 fee. In Wyoming and Iowa, statutes prescribe that clients reimburse the State, if they have the ability to pay.

If Colorado is to continue attaching a fee related to public defender representation, fundamental changes are needed in its design and application. Two primary reasons for the problems associated with the public defender application fee are: the timing of fee assessment, and, the lack of emphasis on fee collection. Changing Colorado's current public defender application fee statute could address these issues and improve the viability of the fee. Specifically:

- C **Changing the point at which the fee is assessed from the time of application to sometime later in the process.** By statute, the fee is currently established as an application fee to be paid at the time the defendant's application for representation is submitted. The ways in which court proceedings are handled make fee assessment, verification, and collection at the time of application difficult.

Assessing the fee later in the process such as the time of "first appearance" in court, could have positive results. The fee would no longer be an "application" fee, but rather, a fee for public defender services. Correspondingly, the fee would be re-categorized from a "miscellaneous charge for services of the clerk's office" to, possibly, a "defense" or "counsel" fee. Currently it is categorized as a charge for court clerk services as are writs of garnishment and attachment, certificates of dismissal, and returned check charges. Categorizing the fee as a counsel fee would more appropriately place it among fees such as the victims compensation fund, drug and sex offender surcharges, youthful offender surcharge, and cost of prosecution fee.

- C **Changing the fee amount to more closely reflect increases in the costs for public defender services as well as court costs associated with assessment and collection.** Eliminating the existing reduced fee amount of \$10 is reasonable and would simplify the process. A differential or sliding fee scale based on whether the criminal charge is a felony or misdemeanor could also be explored.
- C **Improving methods of verifying fee payment, waiver, and collection.** After our 1995 audit, fiscal policies were developed and disseminated by the Colorado Supreme Court regarding responsibilities for the OSCA to collect the fee and the OSPD to verify fee payment. However, these procedures are not being followed, and monitoring for compliance is limited.

The Offices of the State Public Defender and of the State Court Administrator need to work together to propose legislative changes, no later than the 2004 Legislative Session, and adopt appropriate policies and procedures accordingly.

Recommendation No. 2:

The Office of the State Public Defender and the Office of the State Court Administrator should work together to improve fee assessment and collection by proposing legislative change no later than the 2004 Legislative Session. Legislative changes should address the:

- a. Timing of fee assessment and collection.
- b. Amount of the fee.
- c. Use of fee revenue for a specified purpose such as reimbursement for public defender services.
- d. Verification of fee payment, collection, or waiver.

Office of the State Public Defender Response:

Partially Agree. To be implemented by June 2003. The Office of the State Public Defender will meet with the Office of the State Court Administrator to improve fee assessment, timing, and collection. In conjunction with the State Court Administrator we will evaluate whether legislation is necessary.

Judicial Department Response:

Partially Agree. To be implemented by June 2003. The State Court Administrator's Office will work with the State Public Defender's Office to review the assessment and collection of the fee and determine if legislation is necessary.

Completeness of Files

During our review of Public Defender case files we found numerous instances in which case files did not contain information needed to determine defendant eligibility or to verify essential components of the application process. Most significantly, in our review of 145 open and closed case files from eight of the regional offices we found that 21 files (14 percent) did not include an application. The public defender application is critical because it is used to determine and document applicants' indigence, and thus, eligibility for public defender representation. Also, Section 21-1-103(3), C.R.S., states:

When a defendant or, if applicable, his parent or legal guardian requests representation by a public defender, such person shall submit an appropriate application, the form of which shall state that such application is signed under oath and under the penalty of perjury and that a false statement may be prosecuted as such.

Without an application signed by the applicant attesting to his/her indigence, there is no evidence to support the filing of perjury charges in the event the applicant knowingly provided false statements to establish eligibility.

Of the 124 case files in our review that did contain applications, we found the following with regard to missing or incomplete information:

- Ⓒ In 20 cases, (16 percent) the applicant did not sign the application.
- Ⓒ Thirty-five percent (43 cases) did not include information about the applicant's income.
- Ⓒ Forty percent (49 cases) of applications did not include the applicant's expenses.
- Ⓒ More than one-half (52 percent) of applications did not include the applicant's assets.
- Ⓒ Although most applications (92 percent) were signed by the attorney, paralegal, secretary, intern, investigator, or court personnel who took the application and determined eligibility as required, in ten cases, or eight percent, applications did not include a signature or name.

The types of information noted above are either currently required to determine if the applicant is eligible for Public Defender representation or needed to document whether eligibility determination was accurate and whether the application was processed correctly.

We believe the Office of the State Public Defender should ensure the completeness of case files in relation to defendant applications. Currently the annual internal audits of the regional trial offices do not include adequate reviews for the completeness of applications and the accuracy of eligibility determination. A more comprehensive review of defendant applications would include items such as required signatures, income data, evidence of income verification, and evidence of fee payment/waiver. In offices where deficiencies are identified, steps should be taken in a timely manner to correct errors and omissions and ensure future applications are complete.

Recommendation No. 3:

The Office of the State Public Defender should ensure the completeness of defendant applications by conducting comprehensive reviews of these applications. Application reviews should be made part of the internal audit function along with appropriate follow-up procedures including corrective measures when errors and omissions are identified.

Office of the State Public Defender Response:

Agree. To be implemented by March 2003. The internal audit guidelines for Fiscal Year 2003 have been changed to include application reviews. Based on the data collected in these Fiscal Year 2003 audits, the Office of the State Public Defender will implement corrective measures as needed. It should be noted that we have already implemented new Procedures for Determining Indigency and Appointment of Counsel.

Resource Management

We also reviewed the Office's resource management practices and identified three areas in which the Office should make improvements: cost evaluations, performance evaluations, and performance measures. In the following sections we present our recommendations for these three areas.

Evaluate Costs

The Office of the State Public Defender does not routinely or comprehensively evaluate its costs per case and costs per regional trial office. In our last audit we recommended the Office develop a system to document the demand for services, distribute staff resources, and determine the costs for its legal services. Since that time the Office has made enhancements in allocating and monitoring its staffing resources, and did conduct a cost-per-case analysis in 1999. However, improvements are still needed in determining and evaluating costs. Cost evaluation is an important management tool for any agency. For the Office of the State Public Defender, systematic, comprehensive cost assessments are needed to adequately explain and address:

- **Changes in costs by case type** - Felony cases are considered to be the most complex and thus, most costly, of the three types of cases (felony, misdemeanor, and juvenile) handled by the OSPD. However, as the following table shows, the OSPD's costs for misdemeanor and juvenile cases have increased at a greater rate than have its felony case costs.

Office of the State Public Defender Cost Per Closed Case by Case Type Fiscal Years 1999 and 2002						
Case Type	Total Caseload 1999	Average Cost per Case	Total Caseload 2002	Average Cost per Case	Percent Change in Cases 99-02	Percent Change in Cost/Case 99-02
Felony	36,337	\$384	40,789	\$439	12.3	14.3
Misdemeanor	17,658	231	20,607	305	16.7	32.0
Juvenile	9,818	204	9,524	248	-3.0	21.6
TOTALS	63,813	\$314	70,920	\$373	11.1%	18.8%
Source: Office of the State Auditor analysis of Office of the State Public Defender data.						

- **Cost differentials among regional trial offices** - Average costs per case among the regional trial offices range from a low of \$112 at the Sterling satellite office to a high of \$614 in Salida. Office management provide various explanations for the cost variances shown in the exhibit on the following page. For example, management told us that Boulder's average cost of \$254 per case (which is almost \$100 less than the state average) can be attributed to the "charge bargain" process (as opposed to plea bargaining). This process allows the attorneys more flexibility to negotiate with the prosecution and avoid going to trial. The Glenwood and Steamboat Springs Offices' above average costs are both the result of higher office rents in those two locations, according to the OSPD management. Although these explanations may be accurate, we believe the Office needs to provide more systematic and objective analyses of the cost per case differentials among its trial offices to include such components as office overhead expenses, travel, and personal services expenses for attorneys and support staff, etc.

Office of the State Public Defender Cost Per Closed Case By Regional Office Fiscal Year 2001			
Regional Office	Total Caseload	Average Cost Per Case	Dollar Variance from State Average
Alamosa	1,068	\$424	\$70
Arapahoe	6,032	\$364	\$7
Boulder	4,328	\$254	-\$97
Brighton	5,608	\$347	-\$8
Colorado Springs	10,060	\$287	-\$67
Denver	10,112	\$351	-\$3
Denver Drug Court	3,107	\$150	-\$204
Douglas	755	\$509	\$155
Durango	1,408	\$377	\$22
Fort Collins	2,404	\$381	\$26
Glenwood Springs	746	\$511	\$157
Golden	4,223	\$406	\$51
Grand Junction	2,721	\$344	-\$11
Greeley	3,334	\$377	\$22
La Junta	1,427	\$339	-\$16
Montrose	945	\$416	\$62
Pueblo	4,874	\$314	-\$40
Salida	511	\$614	\$259
Silverthorne	987	\$430	\$75
Steamboat Springs	861	\$417	\$63
Sterling	1,328	\$112	-\$242
Trinidad	733	\$377	\$23
TOTAL	67,572	\$354	n/a
Source: Office of the State Auditor's analysis of the Office of the State Public Defender data.			

- **Costs for all case-related services** - In Fiscal Year 2002 miscellaneous proceedings and partial services represented almost 48 percent of the OSPD's total annual caseload. Yet, the Office does not evaluate the costs for these case-related proceedings. Examples of miscellaneous proceedings and partial services include probation revocations, sentence re-considerations, and appeals. In calculating costs, the Office simply categorizes these services with their corresponding original case type. As the table below shows, miscellaneous proceedings and partial services have also increased at a much faster rate than felonies, misdemeanors, and juvenile cases during the six-year period, Fiscal Years 1997-2002.

Office of the State Public Defender Change in Cases and Miscellaneous Proceedings Fiscal Years 1997 and 2002			
Type	1997	2002	Percent Change
Felony	16,585	18,736	13.0
Misdemeanor	11,695	13,864	18.6
Juvenile	4,542	4,473	-1.5
Miscellaneous Proceedings	18,318	23,974	30.9
Partial Services	7,415	9,873	33.2
TOTAL	58,555	70,920	21.1%
Source: Office of the State Auditor's analysis of the Office of the State Public Defender data.			

- **Costs for new offices** - In response to a new court and the appointment of an additional judge in Broomfield, the OSPD is in the process of opening a new office in that community. In its Fiscal Year 2002 Budget Request, the Office prepared a cost analysis for this new office. However, with the exception of felony case data, the Office was unable to substantiate amounts supporting the cost estimates at the time of our audit. In addition, because the Office does not routinely evaluate individual office costs, it was unable to provide a comparative analysis of these costs. As a result, we were unable to determine the appropriateness and reasonableness of the estimates presented by the Office in its Fiscal Year 2002 Budget Request.
- **Statutory recovery of costs** - As previously stated, statutes mandate that the court recover public defender costs whenever it determines that a defendant has the ability to pay. Currently, the Office does not evaluate costs on a per case, per

attorney, or per regional office basis. Consequently, determining an accurate amount to be recovered for a specific case would be a difficult and laborious process.

Timekeeping System is Recommended

The Office of the State Public Defender is unique among state agencies and legal offices in its lack of a timekeeping system for documenting and monitoring the ways in which its staff spend their time. For example, timekeeping systems are used in other legal offices including:

- Ⓒ State Department of Law (State Attorney General's Office)
- Ⓒ Office of the Federal Public Defender
- Ⓒ Other states' public defender offices
- Ⓒ Private legal firms.

Office management believes that implementation of a timekeeping system would be burdensome and difficult. They believe it would be almost impossible to identify and account for the multitude of tasks involved in each case. Additionally management questions the costs and benefits of a timekeeping system. Yet, there is precedent for timekeeping within the OSPD. Specifically, attorney time is kept on all death penalty cases so that costs can be reported to the Joint Budget Committee. Also, timekeeping serves as the basis for the consultant studies the Office has twice contracted for (at a total cost of about \$120,000) to develop workload measures. These workload measures are then used by the OSPD in budgetary/staffing requests and resource allocations.

We believe that a timekeeping system is the most logical and time-tested method for determining costs. Although the Office employs a systematic method, the Spangenberg model, to determine workload, this model cannot provide explanations for cost variances among regional trial offices. Currently the Office closes more than 70,000 cases per year and employs more than 300 staff, located in 22 offices statewide. As a result, a more objective and reliable method other than the current anecdotal and ad hoc method used to explain cost variance is needed. In addition, in an agency like the Office of the State Public Defender, where personal services represent the majority of total agency costs (almost 82 percent in Fiscal Year 2001), a timekeeping system could significantly enhance case management. Unless the Office can establish some other method of identifying and evaluating costs and managing resources that provides the detail needed on a case-by-case, office-by-office, attorney-by-attorney basis, then, we believe a timekeeping system is essential.

Recommendation No. 4:

The Office of the State Public Defender should improve its identification and evaluation of its costs for services by:

- a. Implementing a timekeeping system for all staff, including attorneys.
- b. Routinely evaluating and explaining changes in costs, including costs on a case-by-case, attorney-by-attorney, office-by-office basis, and using this information in management decisions.

Office of the State Public Defender Response:

Partially agree. To be implemented by March 2003. The Office of the State Public Defender will more routinely evaluate changes in costs and use this information in management decisions. The Office of the State Public Defender routinely and cost effectively evaluates time utilization by Deputy Public Defenders. Current costs for implementation of a formal time-keeping system is not now cost effective. We will continue to review the feasibility and effectiveness of a time keeping system, noting that the reason private firms and the Department of Law track their time is for billing purposes.

Timeliness of Performance Evaluations

In our 1995 audit we found that the Office was not conducting timely evaluations of senior staff, including office heads, at the regional trial offices. As a result, we recommended that the Office ensure timely and formal evaluations of all staff including senior staff and regional trial office heads. In our current audit, we found that the Office has made improvements in its performance evaluation process in the following ways:

- C The Office implemented a system to evaluate all office heads biennially. We sampled 24 employee files and found that these evaluations were conducted in a timely manner.
- C The Office has designed a system to provide confidential staff feedback in the evaluation of Office heads. From our sample, we found that 98 percent of staff participated in these evaluations. In addition, the State Public Defender solicits feedback from judges and district attorneys.

- C The Office has developed a database system which can be queried by State Office staff to determine when performance evaluations for all other staff are due, excluding senior staff. State Office staff then send reminders to the regional offices to submit evaluations by the annual date in compliance with Office policy.
- C Finally, one component of the Office's annual internal audits is a review of personnel files to ensure evaluations are current.

Although improvements have been made, the Office needs to continue working on the staff evaluations, overall. We sampled staff performance evaluations from each regional trial office, the Denver Drug Court, and the Appellate Division, and found that 5 of 24 (21 percent) of the evaluations were not conducted annually. Further, of the five personnel not evaluated annually, one had not been evaluated for more than two years. The Office's own internal audits found that 7 of 22, or, 32 percent, of the regional trial offices did not conduct timely evaluations in 2001.

In addition, the Office of the State Court Administrator conducted an audit in July 2000 and found that the Public Defender employee evaluations were not being conducted annually. The Judicial Department recommended that the Office improve its tracking system and follow Office policy to evaluate staff annually. Although the Office has made positive changes, it should continue to ensure that evaluations are completed in a timely manner. The Office has a tracking tool to notify staff when evaluations are due. However, administrative staff do not routinely check the monthly due dates. Formal evaluation systems are important because they provide support for personnel actions including salary increases, a historical record of performance, a guarantee of regular feedback, and an important management tool for identifying and measuring statewide goals and objectives.

Recommendation No. 5 :

The Office of the State Public Defender should improve the timeliness of staff performance evaluations by tracking them routinely, on a monthly basis.

Office of the State Public Defender Response:

Agree. To be implemented by March 2003. The Office of the State Public Defender has improved the timeliness of performance evaluations and a revised procedure is in place to verify timely evaluations. We believe that evaluations are now close to 100 percent in compliance.

Performance Measures

At the time of our 1995 audit the Office was reporting only one measure of its performance to the Joint Budget Committee during the annual budget process. This single performance measure was to handle a specified number of cases in each fiscal year. Since 1995 the Office has made significant progress in adopting appropriate and measurable performance goals and objectives. Some of these are:

- Ⓒ Ensuring compliance with applicable constitutional and statutory requirements.
- Ⓒ Streamlining routine processes.
- Providing a high level of training.
- Maintaining a competitive work environment to attract and retain qualified staff.

In our current audit we found that the Office should continue making improvements in measuring its performance. This could be done by reviewing goals and objectives to ensure all aspects of its performance are measured and obsolete measures are eliminated. In addition, the Office continues to maintain, as a measure of its effectiveness, its caseload. The Office could develop qualitative measures of attorney effectiveness. We also identified performance measures that are no longer applicable because they have been accomplished, yet, they are still included in the Office's budget requests. These obsolete measures need to be eliminated and other measures established if the overall goals and objectives remain the same. Routinely updating performance measures provides the Office, the Joint Budget Committee, and others who monitor and evaluate the activities of state entities, benchmarks from which to measure accomplishments and assess the effectiveness and efficiency of operations.

Recommendation No. 6 :

The Office of the State Public Defender should routinely update the performance measures reported to the Joint Budget Committee in its Annual Budget Request, eliminate any fully-implemented performance measures, and design new measures of efficiency and effectiveness to meet existing objectives.

Office of the State Public Defender Response:

Agree. To be implemented by June 2003. The Office of the State Public Defender will work with the Joint Budget Committee staff to routinely update the performance measures it reports and will eliminate fully-implemented measures a year after they have been implemented and design new measures.

The Office of Alternate Defense Counsel

Chapter 2

Background

Conflict of interest cases occur when the Office of the State Public Defender (OSPD) has a conflict with a client, and therefore, is precluded from acting as legal counsel. Prior to 1997, conflict of interest cases were financed through a separate line in the OSPD budget. Judges appointed private attorneys to handle cases in which the OSPD had a conflict. The OSPD was responsible for paying private attorneys representing conflict clients. Although the attorneys representing conflict clients were independent of the Public Defender, the administrative and financial elements of a case were not.

The Office of Alternate Defense Counsel (OADC or the Office) was established as a separate agency within the Judicial Branch in 1997. According to Section 21-2-101(1), C.R.S., an alternate defense counsel was established to provide legal representation in circumstances in which the state public defender had a conflict of interest in providing legal representation. Although not organizationally located within the Office of the State Public Defender, the OADC is an integral component of the State's representation of indigent clients. The OADC must uphold federal and state constitutional amendments for the right to counsel and due process, and provide defense to indigent persons, accordingly. The Office is responsible for retaining private attorneys to provide counsel to indigent defendants requesting representation in criminal cases where a conflict of interest exists. The Office and its attorneys must comply with Colorado Rules of Professional Conduct and American Bar Association standards relating to the administration of the defense function of criminal justice.

Audit Findings

Overall, we found that the Office of Alternate Defense Counsel needs to improve its operations to ensure greater accountability for the quality of representation and the expenditure of resources for which it is responsible. We found weaknesses in the Office's existing practices for selecting, appointing, and monitoring its contract attorneys. We also

found that the Office needs to implement better controls to ensure efficient program operations, effective monitoring and oversight of vendors, compliance with statutes and regulations, and appropriate data management. The findings presented in this chapter include:

- Ⓒ The Office cannot demonstrate that it has instituted adequate selection and hiring processes to ensure the engagement of qualified attorneys.
- Ⓒ The Office does not execute contracts with attorneys, as required in statute.
- Ⓒ The Office's billing and payment practices are labor-intensive and inefficient and do not provide needed controls over the expenditure of state resources.

Conflicts of Interest

In order for a case to be transferred from the Office of the State Public Defender to the OADC, the case must have a conflict of interest that is a true legal conflict. For example, conflicts of interest may exist when:

- Ⓒ Co-defendants are represented by the Office of the State Public Defender.
- Ⓒ A client has been represented previously by the Office of the State Public Defender.
- Ⓒ Both a witness and a defendant in the same case are represented by the Office of the State Public Defender.

In total, there are over twenty types of conflicts of interest, and it is possible for one case to have multiple conflicts. However, Section 21-2-103(1.5)(c), C.R.S., states that case overload, lack of resources, and other similar circumstances do not constitute a conflict of interest.

According to Colorado Chief Justice Directive 97-01, the Office of Alternate Defense Counsel must maintain a list of qualified attorneys for use by the courts in making appointments to conflict cases. When the Court determines that the Public Defender has a conflict of interest with a client, it sets forth, in a written order, the reason for the conflict, appoints the Office of Alternate Defense Counsel, and notifies the approved OADC private attorney who is to represent the defendant. In instances where a defendant has a conflict with the appointed OADC attorney, the case is transferred to an alternate approved attorney.

Organization Structure

A nine-member Alternate Defense Counsel Commission (the Commission), appointed by the Colorado Supreme Court, oversees the OADC. The Commission appoints, and has the ability to discharge, an individual to serve as the Alternate Defense Counsel (the OADC Head). In addition, the Commission serves as an advisory board to the OADC Head concerning the development and maintenance of competent and cost-effective representation. Six members of the Commission, representing each of the six congressional districts, must practice criminal law in the State of Colorado. Three members are non-attorney citizens of Colorado. The OADC Head serves a term of five years and is not subject to term limits. The OADC office is located in Greeley. Office staff handle duties including selecting and assigning attorneys, examining attorney case assignments to ensure true conflicts exist, reviewing vendor bills for appropriateness, and approving vendor payments.

Budget and FTE

In Fiscal Year 2002 the OADC expended about \$11.3 million. The Office has four employees—three FTE, and one full-time contract employee. In addition, the Office sometimes employs two part-time seasonal staff. In Fiscal Year 2001, the Office paid a total of 454 attorneys for their services on conflict cases. Total payments to individual attorneys ranged from a low of \$208 to a high of more than \$135,340. These attorneys are not classified state employees. Rather, they are considered contract employees and are either permanently assigned to courtrooms or temporarily appointed to represent defendants on a case-by-case basis. Attorneys and other vendors (expert witnesses, investigators, interpreters) who provide legal services on a contract basis represent the single largest percentage of the Office's total expenditures. In Fiscal Year 2002, total vendor and contract expenditures were \$10.9 million, representing 96 percent of the Office's total expenditures.

Caseload

In Fiscal Year 2002, the OADC had an active caseload of 8,693. The majority of cases (7,758) were criminal and 935 were post-conviction and appellate cases. A case is "active" until the Office receives the final bill. The following table displays a breakdown of the Office's active criminal caseload by case type—felony, misdemeanor, and juvenile—for Fiscal Years 1999 through 2002. Adult felony cases represent an increasing portion of the active criminal cases, ranging from about 55 percent of the criminal caseload in Fiscal Year 1999 to more than 64 percent in Fiscal Year 2002. In addition, as the table shows, the

number of adult felony cases increased by 7.3 percent during this period while the total number of active criminal cases decreased by almost 8 percent.

OADC Active Caseload by Charge					
Fiscal Years 1999 through 2002					
Charge	FY 1999	FY 2000	FY 2001	FY 2002	Percent Change
Adult Felonies	4,661	4,770	4,641	5,001	7.3%
Adult Misdemeanors*	1,207	1,164	1,085	1,205	- .2
Juvenile	2,532	2,528	2,292	1,552	- 38.7
TOTALS	8,400	8,462	8,018	7,758	-7.6%
Source Office of the State Auditor analysis of the Office of Alternate Defense Counsel data.					
Note: The table does not include 935 post conviction or appellate proceedings.					
*Includes DUI, Traffic, and Adult Probation cases.					

Attorney and Vendor Payments

The OADC attorneys and other vendors bill the Office of Alternate Defense Counsel for reimbursement for incurred court costs and expenses. Most attorneys bill on the basis of hourly rates while others are paid a flat rate. In Fiscal Year 1999 the hourly rates were adjusted to provide a pay increase. The following table reflects the Fiscal Year 2002 pay rates.

Office of Alternate Defense Counsel Pay Rates	
Fiscal Year 2002	
Vendor	Rate
Attorney	
Death Penalty Cases	\$65.00/hr
Type A Felonies (violent crimes)	\$51.00/hr
Type B Felonies (non-violent)	\$47.00/hr
Juvenile, Misdemeanor & Traffic	\$45.00/hr
Investigator	\$33.00/hr
Expert Witness	\$80.00/hr and up
Translator/Interpreter	\$25.00/hr
Paralegal	\$20.00/hr
Travel	\$30.00/hr
Mileage	\$0.28/mile
Source: Office of the State Auditor analysis of OADC data.	

Attorney Selection

The Office does not consistently screen attorneys prior to hiring them. Consequently, the Office cannot ensure that it is engaging licensed attorneys to provide adequate legal representation of indigent clients, as directed in statute. To determine how the Office selects attorneys we reviewed the applications on file for a sample of 35 attorneys who represented clients in Fiscal Year 2001. We also surveyed these attorneys and interviewed OADC management regarding their hiring practices. We found the following weaknesses:

- C **Five of thirty-five attorneys did not have an application on file in the OADC office.** Of these five attorneys, two told us that they had never completed an application. The Office paid the five attorneys a total of more than \$74,000 in Fiscal Year 2001. In addition, the Office assigned two of the five permanently to a courtroom.

- C **Seven of thirty-five attorneys reported that they were not interviewed by the OADC staff or management prior to appointment to a case.** Interviews are a necessary element of the hiring process. Whether conducted over the phone or in person, interviews provide an employer more substantive knowledge about potential employees. In addition, by not conducting standard interviews, the Office is not following the same selection procedures with all of its applicants. Therefore, there is at a minimum, the appearance of inequitable hiring practices.

- C **The OADC does not verify the qualifications and references of all of the attorneys it hires.** Management told us that they review some attorneys qualifications more than others and contact references and other entities associated with the attorney. However, management also told us that they do not always check every attorney's qualifications and references.

It is important that the Office of Alternate Defense Counsel adopt and document standard procedures for selecting and hiring attorneys. First, applications should be completed and kept on file for all attorneys. Although the OADC's web site states that an attorney must complete an Application for Admission to the Alternate Defense Counsel Appointment List, this requirement is not enforced. Completion of the application is critical because it requires candidates to provide information, such as the attorney registration number, which is essential for verifying credentials. The registration number and/or the attorney's name is needed to determine an attorney's status and disciplinary history through the Colorado Supreme Court's website database. In addition, keeping applications on file documents attorneys' attestations to the truthfulness of the information provided.

Second, the OADC needs to verify the background and qualifications of applicants and conduct interviews. Management at the Office of the State Public Defender, the District Attorney's Council, and the Office of the Child's Representative all told us that they require applications, verify references, and conduct formal interviews. In the case of district attorneys, background checks are also conducted at the time of hire. After that time however, district attorneys, like public defenders, are relied upon to self-report issues or activities that may compromise their ability to practice law in the State.

Recommendation No. 7:

The Office of Alternate Defense Counsel should ensure greater accountability for the quality of representation it provides by:

- a. Requiring all applicants to complete and submit an application.
- b. Documenting the results of interviews with all applicants.
- c. Reviewing the background and qualifications of applicants prior to selection, and documenting this review.

Office of Alternate Defense Counsel Response:

Agree. To be implemented by June 2003.

- a. ADC will require all applicants to complete and submit an application.
 - b. ADC will document the results of interviews with all applicants.
 - c. ADC will review the background and qualifications of applicants prior to selection. ADC will also document this review.
-

Attorney Contracts

Statutes mandate that the Office execute contracts with the attorneys who represent indigent clients in conflict cases. Specifically:

- c. **Section 21-2-103(4),C.R.S.**, states that the Office of Alternate Defense Counsel shall provide legal representation for indigent persons by contracting with licensed attorneys pursuant to Section 21-2-105.

- C **Section 21-2-105(1), C.R.S.**, states that the Office shall contract, where feasible, without prior approval of the court, for the provision of attorney services. The contract must specify that the services shall be provided subject to Colorado Rules of Professional Conduct.

In addition, statutes stipulate that the OADC shall establish, where feasible, an approved list of attorneys to serve as counsel. As a condition of placement on the approved list, the attorneys must agree to provide services based on the terms established in the contract. After selecting an attorney, the Office places his or her name on a list of available attorneys. In Fiscal Year 2001 the OADC paid 454 private attorneys to represent conflict cases. The Office assigned 202 of these attorneys to specific courtrooms, judges, divisions, or districts. These attorneys handle all conflict cases in their assigned locations. The remaining 252 attorneys were not assigned to a specific location, but were on-call for appointment.

Contrary to statutes, we found that the OADC does not routinely execute contracts with the attorneys paid to represent defendants in conflict cases. For example:

- C **The Office has not executed any contracts since 1998.** As a result, in Fiscal Year 2001, fewer than one-third (143) of the Office's roster of 454 paid attorneys were under contract with the Office.
- C **Even in 1998 the Office did not execute a contract with all of its attorneys.** More than one-half (52 percent) of the 363 attorneys retained by the Office in June of 1998 did not have contracts.
- C **Of the 202 attorneys the Office assigned to courtrooms in Fiscal Year 2001, only 82 had a contract.** This means that only about 41 percent of the attorneys with permanent OADC assignments in 2001 were working under contract.

Contracts Provide Safeguards

As noted earlier, Section 21-2-105, C.R.S., declares that as a condition of placement on the approved list, the OADC attorneys must agree to provide services based on the terms established in a contract. A contract provides necessary safeguards for the Office and for the State in its representation of indigent defendants in conflict cases. Without a written, valid contract, the Office has limited recourse if an attorney fails in the discharge of his or her responsibilities to the client and to the State. For example, the Office's existing contracts specify that the attorney:

- C Must be licensed and must provide representation in a thorough, competent, and professional manner subject to all applicable standards, rules, regulations, and statutes.
- C Must provide representation upon appointment and continue in all matters arising from appointment, including the filing of an appeal.
- C Must maintain client files and records for at least five years, and may not subcontract his or her duties.
- C Must agree to the OADC hourly pay rates, and bill in a timely and accurate manner.

By not executing contracts with its attorneys, OADC has no means of enforcing these contract terms and conditions. Moreover, the contract developed by OADC stipulates that attorneys must render services in accordance with Colorado Rules of Professional Conduct and remain in good standing with the Colorado Supreme Court. This is a contract provision required by statute. It is, therefore, the duty of the Office to notify attorneys of this requirement. Without written contracts, OADC cannot ensure that attorneys adhere to these provisions. Lack of contracts could also subject the OADC and the State to risks because an agent of the State is paying for services without a written agreement. These contracts safeguard the agency and the State against future liability issues. We also found additional risk associated with the lack of written contracts as attorneys may engage in improper billing practices.

In addition, contracts provide one means of monitoring and documenting attorney performance. Currently the Office does not conduct performance reviews or evaluations of all of its attorneys. Similar to its hiring practices, the OADC's performance evaluation practices are informal and sporadic. They are also undocumented. We requested attorney files to review applications, contracts, workloads, performance evaluations, and related information. We found that the Office does not maintain attorney personnel files or collect and compile this type of information. Implementing a formal monitoring system is important because it provides support for personnel actions, a record of performance, a means of regular feedback, and a tool for measuring the Office's goals and objectives. By outlining performance expectations in the contract, the Office and the attorney have a basis upon which to evaluate success or failure. Documenting this information is critical because it provides accountability for Constitutional, statutory, and legal provisions and requirements regarding the quality of representation. The contract can also serve as a mechanism to inform contract employees about complaint and grievance processes which are standard practice in human resource management.

Execute Contracts

In August of 2002, the Office updated its 1998 contract to include guidelines for indigent defense and appellate procedures. As a result, it would appear that the 1998 contracts, under which some attorneys are still engaged, are no longer valid. In September 2002 the Office placed a copy of the revised attorney contract on its web site. Yet, it does not require attorneys to complete the contract or indicate on the web site that a contract is required.

We recognize there are instances in which it may not be feasible (as indicated in statute) for the Office to enter into written, contractual agreements with attorneys. In some circumstances judges appoint private counsel in conflict cases without the prior knowledge of the Office. However, this is not common practice. As indicated previously, in Fiscal Year 2001, only 82 of the 202 attorneys the Office had assigned to specific locations or courtrooms were under contract. Therefore, the Office is aware that it hires and permanently assigns the majority of its attorneys without benefit of a written contract.

The Office should execute contracts with all of its attorneys. We found that other offices which represent indigent defendants, such as the Office of the Child's Representative (OCR) and other states' conflict offices, execute written contracts with private attorneys. According to OCR staff, they execute contracts with each of the approximately 225 private attorneys who handle cases, and Connecticut, Maryland, Wyoming, and North Carolina also contract with the private attorneys who represent their clients in conflict cases.

In developing its contracts, the Office of Alternate Defense Counsel should consider adopting a time limit at which contracts would naturally expire. Currently, a contract remains valid until a new one is signed. However, a contract may be terminated at any time by either the OADC or the attorney. A time limit, such as three years, would provide benefits by balancing the need for administrative efficiency with the need for both parties to periodically and formally renew their understanding of the responsibilities of each. We found that more than three-quarters of the attorneys who contracted with the Office in 1998 continued to provide legal representation for the Office in 2001. This indicates that many attorneys continue their association with the OADC for extended periods. Consequently, more frequent contractual renewals are even more relevant.

Recommendation No. 8:

The OADC should execute written contracts with all attorneys selected to handle conflict cases within the State. This should include:

- a. Notifying current and potential attorneys, through the Office's web site or some other method, of the statutory requirement for contracts.
- b. Implementing contract time limits.
- c. Ensuring performance expectations are clearly delineated and performance is formally evaluated and documented as part of the contract renewal process.
- d. Maintaining personnel files or records on all contract attorneys.

Office of Alternate Defense Counsel Response:

- a. Agree. To be implemented by June 2003. The ADC will notify ADC attorneys of the statutory requirement for contracts.
- b. Agree. To be implemented by June 2003. The ADC will establish time limits on the contracts.
- c. Partially agree. To be implemented by June 2003. The ADC will clearly delineate performance expectations. The Guidelines for Indigent Defense is posted on the ADC website and incorporated by reference in the contract. ADC will also evaluate performance and document this on an ongoing basis.
- d. Agree. To be implemented by March 2003. The ADC will maintain all pertinent documents on all contract attorneys.

Billing and Payment Practices

The OADC staff spend an excessive amount of their time—we estimate about 70 percent—reviewing and processing attorney bills and payments. We believe that if the Office were to implement several measures such as reducing the billing cycle, automating billing and payment practices, and strengthening internal controls, greater efficiency and effectiveness in

operations would result. For example, if the time spent on processing bills and payments were reduced, staff could devote more time to ensuring the adequate selection, hiring, and monitoring of attorneys as discussed in the previous sections.

We estimate that the OADC spends about \$150,000 a year manually processing attorney bills. Attorneys submit an average of 1.8 bills per case. For Fiscal Year 2002, the OADC reports that it processed 15,456 payments to attorneys for its 8,693 active cases. These payments totaled \$10.9 million. We estimate that each day the Office processes an average of 120-130 bills and payments. At the time our audit, processing these bills and payments required the majority of time for two full-time staff and two part-time seasonal staff.

As the following table shows, during the past five fiscal years, the number of bills processed has increased significantly from fewer than 9,400 in 1998 to more than 15,400 in 2002.

Office of Alternate Defense Counsel Change in Number of Bills Processed Fiscal Years 1998 through 2002					
FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	Percent Change
9,357	12,682	14,182	14,992	15,456	65%
Source: Office of the State Auditor's analysis of OADC data.					

The increase can be attributed to the additional bills generated by mandated costs and from an increase in felony cases. Felony cases generally involve more complex procedures and take longer to close than other types of cases. The OADC anticipates the trend will continue. In addition, shortening the billing cycle may also result in an increase in the number of bills processed.

Fully Implement Online Billing

The OADC has an online billing system. However, at the time of our audit, the OADC estimated that only 10-20 of the attorneys from its roster of more than 450 use the system. In addition, the Office has processed only about 600 bills online. Furthermore, only between 30-40 attorneys have access to the system. We believe the Office could significantly reduce its administrative costs if it were to fully implement its online billing system. The online billing system offers the following benefits:

- C **Reduces time spent on data entry.** Rather than the OADC staff manually entering data from the Notices of Appointment and Requests for Payment, the attorney enters this data directly. This reduces the OADC's data entry time and expense.

- C **Prevents incorrect rates and verifies amounts billed.** The OADC has limits on hourly rates for the different case types. These amounts are included in the billing screen and cannot be changed by the attorney. The attorney enters the hours billed and based on the case type the system uses a preset rate and calculates the total bill. This reduces errors caused by manually calculating totals and prevents incorrect rates from being entered, thereby eliminating the need for the OADC staff to manually verify billing rates and recalculate totals as is the current practice.
- C **Reduces administrative workload.** Attorneys must submit a Notice of Appointment prior to submitting Requests for Payments. The OADC's billing system rejects Requests that do not have a prior Notice and sends an electronic message to this effect to the attorney. Having the system automatically notify attorneys who have not submitted a Notice of Appointment eliminates the need for the OADC staff to verify the bill is within approved limits and create written correspondence to attorneys.
- C **Immediately identifies bills exceeding the maximum.** Requests that exceed maximum limits are also rejected and an electronic message to this effect is sent to the attorney. By allowing the system to perform this check, the OADC staff can perform other functions.

In addition, the benefits from an online system would not be limited to the Office. Attorneys would also derive benefits such as reduced delays and more prompt payment and automated records for their own use.

Develop an Implementation Plan

The OADC has notified some attorneys of its online capabilities through its web site and has discussed the system at training sessions and conferences. However, the Office has not developed a plan to systematically implement its online billing capabilities. In May of 2001, the Office reported to its Commission that it expected to have all attorneys online by the end of the calendar year. However, the number of attorneys using the system at the time of our audit in 2002 was less than 5 percent.

The OADC management told us they have a general idea about how they will bring all of their attorneys online (for example, bringing them on in one district at a time.) However, the Office has not developed a comprehensive plan for completing the implementation. The OADC staff have estimated they would complete the implementation in six months—the same time frame given to the Commission over a year ago. Other problems we noted with the OADC's approach to implementing its online billing system which need to be addressed include:

- C Deficiencies in reporting capabilities.** Office staff stated that some “canned” or prewritten reports available from the online system may not be accurate due to inconsistencies in data entry. Canned reports have predefined parameters which can be changed only slightly, if at all. As a result, staff sometimes print a canned report and also create a special queried report, if greater accuracy is needed. Queried reports require the user to input parameters of the data such as time frames. The OADC does not generally document the parameters it uses for queried reports, therefore, some queries must be recreated and the data re-verified to ensure the correct parameters were used.
- C The lack of a means of notifying attorneys of changes.** Currently, information about the system is disseminated in an impromptu fashion. Some attorneys have been notified at training seminars and those who have Internet access may view some announcements on the OADC website. However, the Office does not systematically notify all attorneys nor does it place all announcements on the website. At times, the Office may send information via email to its attorneys, however this list is not complete. Of the 454 attorneys OADC billed in calendar 2001, it has email addresses for only 119 of these attorneys. In addition, we determined that 31 of the 119 addresses were invalid. For attorneys to receive this information the OADC needs correct and current email addresses.
- C Inadequate list of active users.** The Office does not maintain an adequate list of the users accessing its billing system.

The Office should also consider, in conjunction with its implementation plan, the feasibility of implementing an Electronic Funds Transfer (EFT) process. The EFT could be used to make electronic deposits to vendors’ accounts. Although it is unclear whether electronic funds transfers would reduce the time needed for processing payments, use of this system has the potential to reduce costs by eliminating the need for postage and the issuance of paper warrants.

Recommendation No. 9:

The OADC should fully implement its online billing system by:

- a. Establishing an implementation plan to bring all attorneys online. This plan should include a time-line of milestones with status reports to its Commission and a communicated deadline after which it will not accept any billings except those submitted electronically.

- b. Developing reports to efficiently manage the system. These may include a printable list of all users who have access to the system and a printable list of which users have accessed the system over a specified time period.
- c. Studying the feasibility, including the costs and benefits, of implementing an Electronic Funds Transfer (EFT) system for making payment deposits into vendors' accounts.

Office of Alternate Defense Counsel Response:

Agree. To be implemented by May 2003.

- a. ADC will develop an implementation plan with planned goals and a timeline that is achievable, given the limited staff.
- b. ADC will develop reports as necessary, after doing an economic analysis of the expenses vs. the potential benefits derived.
- c. ADC will coordinate with the State Controller's office to study the feasibility of implementing an EFT system.

Improve System Controls

In addition to lacking a comprehensive implementation plan for its online billing system, the OADC also lacks adequate controls over access to the system. System controls are critical for several of reasons. They help prevent unauthorized use of programs and data on the system. This includes access to confidential information. In May 2001, an unauthorized user successfully broke into the OADC's billing system. Although no damage to the system occurred, case data may have been inappropriately accessed. Controls over system access reduce the chances that unauthorized individuals could change or delete data, create fictitious accounts, change pay rates, or otherwise obtain confidential case information. Controls also reduce the risks for errors and other irregularities.

In evaluating the OADC's existing online system, we found the Office lacks a complete list of system users. In addition, no limit exists for unsuccessful logins. After a user has three unsuccessful log-ins a message appears on the screen for the user to notify the system administrator. However, the user only needs to exit and re-enter the web page to reset their user identification. Consequently, unauthorized users have unlimited attempts to log into the OADC's online billing system. It should be noted that since the completion of our audit fieldwork, OADC staff report that they have restricted the number of unsuccessful log-ins to three.

Concurrent with developing a plan for fully implementing its online billing system, the Office needs to improve its controls over system access. Two elements of access security include authentication and authorization. Authenticating users involves identifying those who attempt to log on to the system. This includes maintaining a list of users authorized to access the system. Authorizing users means allowing access based on the password entered.

Recommendation No. 10:

The Office of the Alternate Defense Counsel should improve access controls to its online billing system by generating lists of all authorized users and strengthen controls by locking out users who fail to successfully log in after three attempts.

Office of Alternate Defense Counsel Response:

Agree. Ongoing. ADC will develop reports as necessary, after doing an economic analysis of the expenses vs. the potential benefits derived. ADC has already strengthened controls that lock-out users after a specified number of failed log-in attempts.

Billing

We estimate that at any given time, the Office has approximately 3,000 outstanding Notices of Appointment on file. This means that attorneys have been appointed to 3,000 cases yet no bills for these cases have been submitted for payment. We sampled 82 of these Notices to determine the length of time between the OADC's receipt of the Notice and its receipt of an initial bill. We found:

- 10 of 82 Notices had been on file at the OADC for more than 365 days without receipt of a bill for legal services.
- 25 Notices (30 percent) had been on file at the Office for more than 180 days.
- On average, a Notice is outstanding for 161 days.

In Fiscal Year 2000, the OADC staff manually tracked the bills it received each day for the entire year, documenting the fiscal year in which the service was rendered. The Office compiled these data in an effort to identify the magnitude of outstanding attorney bills. From these data, we determined:

- Eight months following the 2000 fiscal year end, almost one out of every five bills the OADC received (18 percent) pertained to the previous fiscal year.
- OADC paid attorneys an estimated \$1.5 million in Fiscal Year 2001 for services rendered during the previous fiscal year.
- In Fiscal Years 2000 and 2001 more than 90 percent of bills paid 30 days after fiscal year end were for attorney services rendered the prior fiscal year.

The lengthy period between appointment of an attorney and the submission of bills is the result of the Office's 180 day billing policy. This means that attorneys have 180 days or 6 months to submit bills for legal services rendered. Furthermore, we found that the Office does not enforce the 180 day policy and accepts bills significantly beyond the 180 day period. At the time of our audit, this practice had caused the following problems:

- **Unnecessarily high workload at the end of the fiscal year.** The Office processed an average of \$790,000 in monthly attorney payments during Fiscal Year 2001. In June 2001, the last month of Fiscal Year 2001, the Office processed about \$1.4 million in attorney payments, or 178 percent more than the monthly average for the rest of the year. The June increase occurred because the staff attempted to process and record most of its outstanding bills (we estimate six month's worth) by fiscal year end.
- **Increased risk of over expenditures.** The OADC allows its liabilities (attorney bills) to remain outstanding for up to and beyond 180 days and cannot identify this liability at the fiscal year end. In Fiscal Year 1999, the Office over expended its budget by \$624,488 due to additional attorney bills received in the last two months of the fiscal year. This over expenditure led the State to hold \$624,488 worth of warrants payable to attorneys for 30 days until an emergency supplemental budget was approved. Due to the OADC's lengthy billing period and the \$624,488 over expenditure, the State Controller's Office developed special year-end closing procedures for the OADC at the end of Fiscal Year 1999. In Fiscal Year 2000 the Office over expended its budget by \$110,656 due to additional attorney bills received at the end of the fiscal year.
- **Decreased forecasting and budgeting ability.** Accounting standards require expenditures be recorded in the fiscal year in which they are incurred unless they cannot be reasonably estimated. Properly differentiating expenditures between fiscal years is also crucial to the budgeting and forecasting processes. In each of the past five fiscal years, significant adjustments had to be made to the OADC's budget.

These included a roll forward in 1998, over expenditures in 1999 and 2000, a supplemental in 2001, and a negative supplemental in 2002. It should be noted, that all additional funds the OADC received (through rollforwards or supplementals) increased the amount available to pay attorney expenses. In addition to these increases, the Office transferred monies from other line items into the contracted attorney line items. This transfer is authorized through a Long Bill Footnote which permits the OADC to transfer up to 1.5 percent between line items. For Fiscal Years 1998 through 2002, budget adjustments resulted in a \$3.3 million increase to the contract attorney line item.

Reduce Billing Cycle

The OADC recently changed the billing requirements contained in its standard attorney contract from every six months to every three to six months. However, the Office does not enforce this requirement. It should also be noted that this requirement is contained in the OADC's new contract which, as previously indicated, is not routinely used. On its website, the OADC requires its attorneys to submit requests for payment every three months and at the end of the case. The OADC has denied payments for excessively untimely bills—one was over two years old. However, the general practice is to pay bills regardless of when they are received. As noted above, from our sample of 82 attorney notices, we found that 10 Notices were more than 365 old. One important reason bills should be submitted in a timely fashion is that the longer they are outstanding, the more difficult is it to verify the reasonableness of the charges. Because conflict attorneys typically are paid based on the number of hours charged for services, timely bill submission is critical for documenting and verifying the accuracy of the charges.

Also, more frequent billing throughout the year alleviates the backlog of bills at year end and the excessive workload on staff to process this higher volume during June and July. In addition, although the State Controller developed closing procedures for the OADC, these procedures alone have not been enough to ensure that the OADC's expenditures are recorded in the proper fiscal year. Finally, in May 2001, the OADC's Commission requested the Office have all attorneys submit bills in the year in which they performed the service. However, the OADC has not yet taken adequate steps to implement this directive. We believe the OADC should shorten the time in which it allows attorneys to submit bills from 180 days to a shorter increment, such as 30, 60, or 90 days. Recently, Joint Budget Committee staff discussed with OADC management the possibility of implementing a quarterly or 90 day billing cycle. A shorter billing cycle would reduce the unknown liability balance at fiscal year end, allowing the OADC to have more complete information for budgeting thus reducing the risk of over expenditures.

Recommendation No. 11:

The Office of the Alternate Defense Counsel should change its current practice of allowing attorneys 180 days to submit bills for services by reducing this to a period of between 30 and 90 days and by instituting consequences for attorneys who exceed this time limit. The OADC should fully implement this recommendation by the end of Fiscal Year 2004.

Office of Alternate Defense Counsel Response:

Agree. To be implemented by July 2004.

We agree with this concept and have already begun working on changing the billing period for all contractors from 180 to 90 days. We will continue to work toward completing this change over by the end of Fiscal Year 2004. Reducing the billing period to half its original length could potentially increase the number of bills we receive by 100 percent. Where an attorney would bill us one time in a 180 day period, he/she will now bill two times in 180 days (once every 90 days).

Processing the increased number of bills will be a challenge, but we believe that by using the on-line system and other initiatives that we have implemented, we will be able to meet the challenge. We don't feel we have the resources necessary to reduce the billing period less than 90 days. Even with automation, an increase of this magnitude could easily overwhelm our small office.

ADC will work with legal counsel and others to develop reasonable and allowable consequences for attorneys who are expected to bill quarterly and exceed this time limit.

Manual Systems

Until the Office fully implements its online billing system there are several manual practices the Office needs to address to increase efficiency and improve controls over the billing process. When online billing is implemented, including the possible use of electronic fund transfers to pay attorneys, these manual processes will likely become obsolete. Until that time however the Office should take steps to address the following:

- C Undocumented bill review and payment procedures.** There is no documentation of the factors reviewed or criteria used in determining the reasonableness of charges and payments. The Alternate Defense Counsel has stated that he is personally acquainted with most the OADC attorneys. Therefore, he is aware of their capabilities and prior performance with the Office. However, in Fiscal Year 2002, the OADC paid over 450 attorneys. As previously stated, payments to individual attorneys ranged from \$208 to over \$135,340. The lack of controls over bill review increases the risk of errors and irregularities.
- C Inefficient and inadequate system for monitoring outstanding Notices.** The OADC does not effectively use its data to monitor the timing and magnitude of outstanding Notices. OADC staff file the Notices of Appointment alphabetically, by attorney name. Each of these Notices represents a case for which the OADC has not yet received a bill. Filing the Notices chronologically, rather than alphabetically, would provide a system for easy and quick identification of late bill submission and cases that had been dropped with no time charged. Organizing Notices chronologically would also help the Office anticipate and identify periods of high volume billing.

As stated previously, we believe the Office needs to fully implement its online systems and eliminate the current cumbersome and inefficient manual methods of bill monitoring, review, approval, and payment. Until the online systems are fully operational, however, the Office should take appropriate steps to increase efficiency and improve controls over billing processes.

Recommendation No. 12:

The Office of Alternate Defense Counsel should improve its manual bill review and approval processes by:

- a. Documenting criteria used to review and approve bills for payment.
- b. Reorganizing its filing of Notices of Appointment.

Office of Alternate Defense Counsel Response:

Agree. To be implemented by June 2003.

- a. ADC will document the criteria used to review and approve bills for payment.

- b. ADC will either reorganize its filing system, or utilize some other method such as developing a system report to determine which contractors need to be contacted for billing after an established time period.

Use of Case Information

Court clerks enter case information onto the Integrated Colorado Online Network (ICON) and create an Order of Appointment for each assigned attorney. This is a statewide system with case information accessible by the Office of the State Public Defender, the Office of Alternate Defense Counsel, and the Offices of the District Attorneys. Two part-time and one full-time OADC staff spend the majority of their day duplicating this data entry to establish the OADC's assigned cases on its Court Appointed Counsel (CAC) database. In addition to the data entry duplication, the OADC requires its attorneys to complete an additional form (the Notice of Appointment) using information from the official Order of Appointment. These two forms contain much of the same information. The OADC requires attorneys to submit a completed Notice along with the Order of Appointment which provide the Office proof of the court assignment.

The Office's manual data entry is redundant, time consuming, and expensive. In its Fiscal Year 2002 budget request, the Office requested and received almost \$12,500 in additional general funds for a part-time position to assist with the data entry of the Notices. In addition to this part-time position, the OADC also uses another part-time contracted individual for data entry. Currently, the Office uses ICON data to manually perform a random check during its daily review and approval of bills. One attorney bill is selected and verified against information on ICON. The OADC does this very limited random check to prevent paying bills submitted by attorneys for cases not assigned by the Court. Although we did not find any instances of inappropriate bill payment, the Office's practice of selecting one case a day does not provide the level of control needed to ensure that the OADC processes only court-appointed cases. Downloading comprehensive case information would provide the OADC with the data to ensure that state funds are being used appropriately while making the manual verification unnecessary.

Automating data entry through an ICON download would allow OADC to increase its efficiency in establishing cases on its database. The Office of the Child's Representative (OCR) downloads information that establishes basic case data on its own database. As a result, OCR does not have to manually enter basic case information such as the attorney name and case number and type. Currently, the Office of Alternate Defense Counsel does not have the necessary software to extract data related to its cases. However, this software could be

developed in conjunction with the Office of the State Court Administrator. We were unable to obtain an estimate of the cost to develop a download of ICON case data for the OADC. However, we believe that initial costs would likely be offset by future efficiencies. Therefore, an evaluation of the costs and benefits is something the OADC should undertake in conjunction with the Office of the State Court Administrator.

Recommendation No. 13:

The Office of Alternate Defense Counsel should work with the Office of the State Court Administrator to evaluate the feasibility of developing a download of case information from ICON.

Office of Alternate Defense Counsel Response:

Agree. To be implemented by May 2003. ADC will work with the Office of the State Court Administrator to evaluate the feasibility of developing a download of case information from ICON.

Judicial Department Response:

Agree. To be implemented by June 2003. The Office of the State Court Administrator will work with Office of Alternate Defense Counsel to evaluate the feasibility of developing a download of case information from ICON.

Court Reporter and Transcript Costs

Chapter 3

Background

The term “mandated costs” refers to a variety of expenses incurred in the processing of cases through the criminal justice system. Services for which mandated costs are incurred include obtaining transcripts and interpreters, issuing subpoenas, calling witnesses, paying some attorney fees, and retaining experts, when necessary. These services, which are normally available to private litigants, are also available to persons who are indigent. Although they are in addition to basic legal representation, they are considered a required part of the legal process. Statutes outline the services considered to be mandated, and, in some cases, set the limits for mandated costs. In Colorado, the Offices of the Public Defender, Alternate Defense Counsel, Child’s Representative and the District Attorneys’ Council all incur mandated costs. In addition, the trial courts, through the Office of the State Court Administrator, also incur mandated costs.

Audit Findings

In this chapter we present findings related to mandated costs. In particular, we discuss the costs for transcripts. As discussed later in this chapter, transcript costs represent a significant portion of the Office of the State Public Defender’s mandated cost budget. We also present issues related to the compensation paid to court reporters who create the written record of court proceedings or the transcript. In general, we found that court reporter compensation and the fees for transcripts should be reassessed to ensure that appropriate amounts are charged and paid. We provide several alternatives to the current practices, some of which could result in cost savings to the State.

Court Reporter Compensation

In Fiscal Year 2002, the Judicial Department employed approximately 132 FTE as court reporters. These individuals were salaried and classified employees within the Judicial

Department. As such, they received medical, dental, and retirement benefits in addition to their salaries. In Fiscal Year 2002, the State paid almost \$7.8 million in court reporter compensation for these FTE. This figure includes \$6.7 million in salaries and an estimated \$1.1 million in benefits. An official state court reporter is classified as either a Court Reporter I or a Court Reporter II. On average, in Fiscal Year 2002, Court Reporter I's were paid \$46,800 and Court Reporter II's were paid \$59,900. Almost 95 percent of total FTE were classified as Court Reporter II's. In addition to the 132 FTE court reporters, the Department contracted with other court reporters to fill in for the FTEs during vacations and leaves of absence. In total, approximately 180 court reporters were employed by the Department during Fiscal Year 2002.

According to the Colorado Judicial Branch's Job Description for court reporters, essential functions of the position (Court Reporter I and II) include:

- C Reporting the proceedings of court trials, hearings, or conferences.
- C Transcribing the proceedings into accurate transcripts for appeal or by order of the court and preparing and distributing transcripts.
- C Reading aloud statements of participants as requested during proceedings.
- C Maintaining files and records of notes and exhibits.
- C Performing clerical duties.
- C Performing other duties as assigned.

The job description also states that the duties of the job "regularly require transcription duties outside working hours." Consequently, in addition to their salaries, court reporters are compensated for the transcripts they produce. This practice of compensating court reporters separately for transcripts is a long-standing and universal one. As we discuss later in this chapter, in Colorado, transcript fees are set at \$2.35 per page for originals and \$.50 per page for copies. Fees are paid directly to the court reporters preparing the transcripts.

We queried the State's accounting system to determine payments made to all court reporters (FTE and contracted) from transcript sales to state agencies. We found in Fiscal Year 2002 the Offices of the State Public Defender, Alternate Defense Counsel, Child's Representative, and the District Attorneys' Council paid more than \$978,000 in transcript fees to court reporters. We also found that almost all (92 percent) of the approximately

180 court reporters employed by the Department during this period supplemented their income with sales of transcripts to state entities. Of those selling transcripts to state entities, about 30 court reporters received over \$10,000 from the sale of transcripts and 7 received more than \$20,000. It is important to note that the transcript revenue estimates cited above were derived from transcript fees paid by state entities only. Data on revenue from the sales of transcripts to private sector entities and individuals were not available. Therefore, we were unable to estimate total court reporter compensation from all sources.

Total Compensation is Unknown

We found that although court reporters are salaried state employees, their total compensation is unknown to the Judicial Department. This is because court reporters earn income from the sale of transcripts which is not reported to the Judicial Department. As stated previously, state agencies, including the Office of the State Public Defender and the Office of Alternate Defense Counsel, spent more than \$978,000 for court transcripts in Fiscal Year 2002. In addition, private sector entities and individuals purchase transcripts from court reporters. However, court reporters are not required to report this information, other than for state income tax purposes. Consequently, total annual compensation is not known for this group of state employees. The additional income from the sale of transcripts to private sector entities could be significant. We conducted a survey of 62 court reporters. Almost three-quarters (45) of them told us their most frequent requests for transcripts comes from the private sector.

Without complete income information it is impossible to determine whether court reporters are being compensated appropriately or whether salary adjustments are in order. This is especially troublesome because both court reporters' salaries and the revenue they collect from the sale of transcripts derive, in large part, from general fund sources. Moreover, we question whether it is appropriate to allow court reporters to be compensated for transcripts that are often produced during normal working hours for which they are already receiving a state salary. From our survey of 62 court reporters, 50 indicated that they have transcribed "during business hours" and 18 of these 50 ranked "during business hours" as the most common time during which they transcribe.

Review Compensation

Statutes permit other court personnel to transcribe and receive the rates outlined in the Chief Justice Directives (CJD) as long as the transcription is done outside normal work hours. Specifically, Section 13-5-128 C.R.S., states:

Where, in a court of record, no shorthand reporter is employed and trial transcripts are prepared by other court personnel, such personnel shall be similarly compensated for any transcript preparation required to be accomplished in other than normal working hours.

There is no policy in place, however, to prevent salaried court reporters from transcribing during normal working hours or from collecting fees for transcripts produced during normal work hours. In fact, Chief Justice Directive 98-07—Concerning Equitable and Effective Utilization of Court Reporters—appears to permit transcription during the course of the normal work day. Although the Directive does not explicitly authorize the practice, it also does not explicitly prohibit it. According to the Directive, there are “certain inherent priorities among the various duties of the court reporters employed by the Colorado State Judiciary.” First among these is reporting the record for the judge to whom the court reporter is primarily assigned. The second priority is reporting for other judges, as assigned by the chief judge. The third priority is the timely production of transcripts on appeal and of other transcripts ordered by judges. The fourth and fifth priorities, respectively, are the production of other transcripts and assisting other court personnel. The Directive states that the first three priorities are preeminent and court reporters should not commence or continue duties under the last two priorities unless their first three priorities have been completed. According to state court reporter personnel we spoke with, they interpret this directive to mean that they may produce transcripts during business hours as long as it does not interfere with their other duties.

We believe the Judicial Department should undertake a comprehensive review of the compensation structure under which court reporters in Colorado currently operate. Five of twelve states we contacted are currently evaluating or have evaluated the methods and amounts of compensation for their court reporters. We believe a similar assessment has the potential to result in cost savings for Colorado. Two options to consider include:

- C **Using contracted court reporter services.** We compared the costs associated with salaried court reporters currently employed by the State with the costs of contracting these same services with the private sector. Private sector freelance court reporters typically charge a higher per page rate for transcripts. However, we estimate their base pay rate or appearance fee would be less than the salaried court reporters. Consequently, we estimate savings could be more than \$1 million per year if these services were contracted. In this analysis we did not include the costs to the State for leased space, or unemployment insurance. If state court reporters were paid overtime for their transcription work, rather than per page, our savings estimate would be reduced; nonetheless a savings would be likely. It is important to note that the amount of savings is contingent upon the number of

pages transcribed per year. That is, if a contracted court reporter transcribes more than certain number of pages in a year, the savings will be reduced or eliminated.

- C **Restructuring work duties.** The state of Montana conducted an analysis of its court reporter compensation and found a 23 percent savings when transcripts from sound-recorded hearings were prepared during normal working hours.

The Department should also consider the following as part of the evaluation:

- C **Requiring income attestations.** Federal court reporters are required to attest to total income. Without data related to the total compensation of court reporters an accurate determination cannot be made as to whether their salaries or fees for services are appropriately set. The United States District Court Administrators (USDCA) require their salaried court reporters to submit income documentation on an annual basis. This documentation outlines the court reporters' incomes in the previous year, from both transcripts made for the court, as well as any private work done outside their regular duties. The attestation form also outlines the time spent transcribing and the types of transcripts produced. This information assists the USDCA in evaluating the various transcription methods used by court reporters. The USDCA staff told us this information is vital for use in monitoring court reporters salaries as well as in managing workflow from district to district. To enforce honest submissions of income and statistical data, income attestations are submitted under the penalty of perjury.
- C **Eliminating compensation for transcripts produced during regular business hours or in the courtroom.** Court reporters receive a salary for the duties they perform as part of their normal work day or regular job responsibilities. They should not be doubly compensated for transcripts produced during state-compensated work hours.

Recommendation No. 14:

The Judicial Department should review the current system for compensating court reporters, evaluate various methods, and report on and make recommendations for implementing the most cost-effective method of compensation. This should include:

- a. Adopting a method to track transcripts prepared in-house and eliminate any overlap in compensation for transcripts prepared during normal business hours.

- b. Requiring court reporters to submit annual income attestation documents, compiling and analyzing these documents, and adjusting court reporter salaries as necessary.

Judicial Department Response:

Agree. To be implemented by March 2003.

At the request of the Chief Justice, the Office of the State Court Administrator, last fall, began an evaluation of various methods of court reporting and a review of court reporter compensation, including transcripts. We will present a report to the Joint Budget Committee regarding these matters in March, and will also send a copy to the Office of the State Auditor.

Alternate Methods of Taking the Record

There are viable alternatives to the current methods of taking the record of the court that could lead to cost savings with little risk to the State. Technological advancements in the field of court reporting make determining the most reliable and least costly method an important management decision. The traditional method used by court reporters for recording the record of the court was a shorthand machine. With the shorthand machine, the court reporter would enter phonetic symbols which then recorded a verbatim record of the court in shorthand. These phonetic symbols were then transcribed into written text for the judge and any other requesting party as a certified transcript. In the past, court reporting traditionally was a two-part process. However, with technological advancements, taking the record of the court and transcription are often almost simultaneous, and in some cases, instantaneous. The following outlines various methods currently in use nationwide:

- C **Computer Aided Transcription (CAT).** This allows the court reporter to take the record of the court in shorthand, while a transcript is electronically produced on a computer diskette. The court reporter then uses the diskette, in conjunction with a computer, to proofread and correct errors in the transcript.
- C **Real-time reporting.** With real-time capabilities, a court reporter's record becomes a transcript instantly and available for both attorneys and judges to see. The court reporter does not have to read aloud any statements that were not heard in the courtroom. In addition, while real-time reporting allows the judge and

attorneys to see the transcript as it is produced, a computer integrated courtroom allows them to go back through earlier depositions, re-read parts of a transcript, and even flag sections of a transcript as necessary.

- C **Digital audio and compact diskette recording.** Digital audio records the record of the court onto a computer or multiple computers. The digital format is then transcribed by a transcriptionist. With digital audio recording, it is important that monitoring by court staff be conducted. However, staff who operate digital audio recorders do not need to be trained court reporters. With compact disk recording, a court recorder uses a compact disk to maintain the record of the court. Monitoring of the recording is necessary to ensure accuracy.

We contacted both the Office of the State Court Administrator (OSCA) and the Colorado Court Reporters Association (CCRA) to determine whether either has evaluated the least costly and most reliable way to record and transcribe courtroom proceedings. The CCRA was unable to provide us with a detailed comparative analysis of the cost effectiveness of these alternative methods. However, the OSCA conducted a comparative analysis in October 2001, pursuant to a Long Bill footnote. The analysis found that alternative methods to traditional stenotype court reporting are less costly. The analysis concluded, however, that there are some risks associated with eliminating written records of the court or with the use of audio recording systems. Most importantly, the loss of the record of the court can and has resulted in cases being overturned on appeal in district courts. Although the OSCA's analysis was a first step in examining this issue, it was not a comprehensive evaluation of the costs and benefits associated with the various alternate methods. In addition, although the OSCA indicated that various methods are being used throughout the State, it did not conduct a pilot or a comparative analysis to determine which method is the least costly and most reliable. Because the OSCA's analysis was limited, with no follow-through to compare outcomes, we believe these various options need to be explored more thoroughly.

In a November 2000 performance audit of the Department of Personnel's Division of Administrative Hearings (the Division) we recommended that the Division assess alternate methods of documenting workers' compensation hearings. We found that if the Division were to invest in adequate recording equipment, rather than primarily relying on court reporters, a total of almost \$403,000 in costs could be saved over a three-year period. Other states, such as Montana and Wisconsin, have also attributed cost-savings to the use of differing methods of court reporting. Montana found a cost savings of 63 percent by using a sound recording device to record hearings rather than using court reporters to transcribe proceedings. Wisconsin found that using a monitored sound recording device

could be effective and less costly if the monitoring was conducted by lower salaried administrative staff that were already in the courtroom, such as court clerks.

Also in November 2000, the Chief Justice of the Supreme Court of Illinois reported that he was “impressed” with the results of a pilot project in one county which had implemented a digital recording system to preserve official records of testimony in civil cases in 15 of 38 courtrooms. The purpose of the pilot was to see how new technology could better distribute resources and introduce efficiencies in the court reporting system and save taxpayers money. The system consisted of several microphones placed in each courtroom along with small video cameras. A continuing audio/video feed was transmitted to a control room where one court reporter or electronic recording operator was responsible for monitoring four courtrooms. An internal survey of judges and lawyers working with the digital system gave it an “overwhelmingly positive response” in terms of ease, speed of obtaining a transcript, and accuracy. As a result of this initial pilot project, digital recording systems were initiated in at least eight other Illinois counties. Currently in Colorado, many of the county courts use similar audio recorder devices. However, the use of such recording devices in district courts requires greater scrutiny due to the risks associated with the loss of the court record and the possibility of criminal cases being overturned on appeal as described above.

With the current cost of transcripts for state entities approaching \$1 million per year, we believe alternate methods should be evaluated. The Judicial Department should pilot or analyze the various methods already being used throughout the State as well as other alternatives used nationwide. To aid in this analysis, we found tools for courts to use in measuring the differences between the various types of court reporting. These tools include computer software and workshops. The cost for these analytical tools range from \$90 to \$175 (not including licensing fees) which is minimal in comparison to the savings they may generate.

Recommendation No. 15:

The Judicial Department should conduct an analysis of the various methods of court reporting used both nationwide and in Colorado to determine which is the most cost-effective and reliable.

Judicial Department Response:

Agree. To be implemented by March 2003.

As noted in our response to Recommendation No. 14, we are in the process of completing this analysis and will submit a copy of our report to the Office of the State Auditor in March.

Mandated Costs

Mandated or mandatory costs refer to the costs for certain services, in addition to basic legal representation, which are considered a required part of the legal process. These include the costs for language and hearing interpreters, expert witnesses, transcripts, and subpoenas. Prior to Fiscal Year 2001, the General Assembly made a single appropriation for mandated costs to the Office of the State Court Administrator. Each of the agencies which incurred mandated costs requested payment for these costs from the OSCA. Due to increases in mandated costs, it was determined that greater accountability for expenditures could result by appropriating funds directly to each entity. Therefore, beginning in Fiscal Year 2001 the five entities—the Office of the State Public Defender, the Office of Alternate Defense Counsel, the Office of the Child’s Representative, the District Attorneys’ Council and the Office of the State Court Administrator for the trial courts—began receiving separate appropriations for their respective mandated costs. The following table provides a breakdown of mandated costs among the five entities who purchased these services in Fiscal Year 2002.

Mandated Cost Expenditures By Entity Fiscal Year 2002		
Entity	2002	Percent of Total
Trial Courts (OSCA)	\$11,410,439	49
District Attorneys	1,978,994	9
Public Defender	1,398,320	6
Alternate Defense	912,129	4
Child's Representative*	7,372,668	32
Total	\$23,072,550	100%

Source: Joint Budget Committee staff data.
Note:* The Office of the Child’s Representative’s expenditures for the most part represent personal services costs for the attorneys who provide the legal services mandated in statute.

Although most of the entities may use these funds for similar mandated costs, each has its own specialized needs. For example, the Office of the State Public Defender spends a majority of its mandated cost appropriation on transcript fees (52 percent,) the OADC spends the majority (68 percent) of its appropriation on witness fees and District Attorneys spend a significant portion on mailing subpoenas and in-state standard witness travel.

Transcript Fees

Court reporters typically take verbatim records of speeches, conversations, legal proceedings, meetings, and other events when written accounts of spoken words are necessary. The process of converting the verbatim record from spoken words into written text is called “transcribing” and, for this reason, the written record is traditionally called a “transcript.” Court reporters are responsible for ensuring a complete, accurate, and secure legal record. Consequently, they are required to swear an oath attesting to the truth and completeness of the transcript. Federal statutes, as well as case law, require that transcripts be maintained for all cases tried in open court. Transcripts are used in appellate cases primarily because a written record of court procedures must be filed with the higher court prior to hearing the case. Other circumstances also warrant the use of a transcript. These include attorney discovery, depositions between attorneys and clients, governmental hearings, and arbitrations.

Historically, court reporters have been compensated for their transcriptions on a “page rate” basis. This is because the “page” was originally the only visible measure and, therefore, the most appropriate measure, of the cost of the work performed. Over time, however, transcripts have evolved from handwritten text to computer-generated electronic documents which then can be printed on paper. Despite these technological advancements, the per page rate remains the predominate method of compensating court reporters for transcriptions.

In Colorado the fees for transcripts are set at \$2.35 per page for originals and \$.50 per page for copies. The revenues for these fees are paid directly to the court reporter preparing the transcript. The Division of Administrative Hearings within the Department of Regulatory Agencies also uses court reporters who charge the same transcript rates. In Fiscal Year 2002, nearly \$1 million of general funds was expended by state entities for the purchase of transcripts. As stated above, when the per page rate system was developed nationally and in Colorado, court reporters primarily used shorthand stenography machines to transcribe. This process was cumbersome and transcription was time consuming. With advancements in technology, court reporting has become much more efficient and timely.

Consequently, we believe the current rates for transcript fees needs to be reassessed and possibly, restructured, as discussed in the following sections.

Evaluate Costs

Currently, it is unclear what the fees for transcripts represent. We found that the fees for transcripts, currently set by Chief Justice Directive (CJD), were recommended by the Colorado Court Reporter Association (CCRA). The CCRA did not conduct an evaluation of actual costs to establish the recommended fee amounts. According to court reporters we spoke with, one significant reason they are reimbursed for the costs for transcripts is because, unlike other state employees, they must purchase, maintain, and upgrade the equipment and supplies needed to produce transcripts. Computer hardware and software, shorthand machines, equipment insurance, printer cartridges, paper, and computer disks are among the costs borne by court reporters. In addition, they pay the costs for proofreaders and scopists, when needed. Scopists are individuals who can read stenotype and transcribe either the court reporter's shorthand notes or edit the translated computer disk. We understand that the costs associated with purchasing and maintaining equipment and supplies can be significant. However, these costs need to be evaluated thoroughly to arrive at an appropriate cost for transcripts.

We found five other states either have or are currently reevaluating the rates charged for transcripts. We surveyed 12 states and found that the average rates for transcripts are \$2.10 per page for originals and \$.38 per page for copies. The rates range from a low of \$1.25 per page for originals in Pennsylvania and \$.08 per page for copies in Minnesota. The highest rates are in Florida (which is currently reevaluating the rates) at \$4 per page for originals and \$1 per page for copies.

We also do not believe that the rate for copies is indicative of the cost to produce them. As stated previously, the rate for an original transcript is \$2.35 per page. The rate for copies of the original is \$.50 per page. This means that if there are five co-defendants in a criminal case, one of the defendant's legal representatives would have to purchase the original transcript at \$2.35 per page, and the other four would have to purchase copies at \$.50 per page. This would include the Offices of the State Public Defender and Alternate Defense Counsel if they were representing any or all of the defendants. It should be noted that in the summer of 2002, representatives of the official state court reporters recommended to the Office of the State Court Administrator that the copy fee for the Public Defender and the Alternate Defense Counsel be eliminated. Specifically, the court reporters recommended that, "any copies requested for co-defendants will be the responsibility of the original requesting party. The Court Reporter is not allowed to bill the

Public Defender or Alternate Defense Counsel for copies for co-defendants.” At the time of our audit, this recommendation had not been adopted.

Section 24-72-306, C.R.S., states that "Criminal Justice agencies may assess reasonable fees, not to exceed actual costs, including but not limited to personnel and equipment, for the copying of criminal justice records. Where fees for certified copies or other copies are specifically prescribed by law, such specific fees shall apply." Section 24-72-302, C.R.S., defines a criminal justice agency as "any court with criminal jurisdiction, or any judicial district" and also defines "Criminal Justice Records" as "recordings or documentary materials regardless of form that are made, maintained or kept by the Criminal Justice agency". Although there is no statutory conflict due to the overriding clause that other prescribing laws are allowable, we believe that the General Assembly intended to offset the costs to produce copies with the fees charged for them. Currently, statutes prescribe that the charge for copies of other legal documents be set at \$.10 per page. Additionally, we surveyed local area copy centers and found, on average, they charge \$.06 per page for black and white copies. The \$.06 per page represents the costs to the private sector agency to make the copy, as well as to make a profit.

Set Appropriate Fees

As has been discussed, court reporters now use more advanced methods to transcribe court records and often produce transcripts within normal working hours. The Judicial Department (the Department) should reassess the fees charged for transcripts. When evaluating these fees, the Judicial Department should determine what the fees are intended to represent or offset. Specifically, in addressing the costs of transcripts, the Judicial Department should determine the costs associated with producing the transcript and any copies of the original transcript. In conjunction with this, the Department should evaluate other alternatives to the page rate method of measuring the work performed. For example, we found one study that proposed using a “volume of text” method rather than the page rate method. According to this Canadian study, “using a ‘Page’ as a measure of the cost of transcribing text is antiquated, inaccurate, and unfair.” This study found that it is the volume of text that represents the real product of the court reporter’s work, not the number of pages produced. Regardless of the measure chosen, the determination of an appropriate fee for transcripts should be closely linked to the review of court reporter compensation discussed in Recommendation No.14. For example, the costs and benefits of the State, rather than the individual court reporters, purchasing and maintaining transcription equipment and supplies, should be evaluated. The Department should also consider eliminating the transcript fee for state general-fund entities or have these entities pay the fee, but have the revenues go directly to the General Fund. The revenues could

then be used to supplement existing court reporter compensation, rather than being paid directly to the court reporters.

Recommendation No. 16:

The Judicial Department should reassess the current transcript fee structure by:

- a. Evaluating the rates set for transcript originals and copies including the purpose for the revenue generated by the transcript fee.
- b. Evaluating the feasibility of setting rates based on methods other than a per page rate.
- c. Evaluating the transcript fee and fee revenue in conjunction with an evaluation of court reporter compensation.

Judicial Department Response:

Agree. To be implemented by March 2003.

As noted in our response to Recommendation No. 14, we are in the process of reviewing transcript fees and will submit a copy of our report to the Office of the State Auditor in March.

The electronic version of this report is available on the Web site of the
Office of the State Auditor
www.state.co.us/auditor

A bound report may be obtained by calling the
Office of the State Auditor
303-869-2800

Please refer to the Report Control Number below when requesting the report.

Report Control Number 1504