

ANNUAL HEARING
Before
The Joint Judiciary Committee
Of The Colorado General Assembly



APPEARING ON BEHALF OF THE AGENCY:

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COLORADO STATE PUBLIC DEFENDER

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Friday, January 12, 2024

Hearing Agenda

Office of the State Public Defender

Introductions

Opening Comments

- Introductory remarks
- Our role under the United States and Colorado Constitutions

Mission

The mission of the Office of the State Public Defender is to defend and protect the rights, liberties, and dignity of those accused of crimes who cannot afford to retain counsel. We do so by providing constitutionally and statutorily mandated representation that is effective, zealous, inspired and compassionate.

OSPD Enabling Legislation:

The general assembly hereby declares that the state public defender at all times shall serve his clients independently of any political considerations or private interest, provide legal services to indigent persons accused of crime that are commensurate with those available to nonindigents, and conduct the office in accordance with the Colorado Rules of Professional Conduct and with the American Bar Association standards relating to the administration of criminal justice, the defense function. C.R.S. 21-1-101(1).

Vision

It is the vision of the Office of the State Public Defender that every OSPD client served receives excellent legal representation through the delivery of high quality legal services and compassionate support from a team of dedicated Public Defenders.

Current Budget

To support the OSPD in the representation of their FY 2023-24 projected caseload, the OSPD was appropriated \$155,572,694 and approximately 1098 FTE. This comprises approximately 577 attorneys, 167 investigators, 110 paralegals, 23 social workers, 154 administrative assistants, and 67 centralized management and support positions.

The OSPD functions as a single program devoted to providing criminal defense representation to indigent people charged with crimes where incarceration is a possibility unless there is a conflict of

interest. Courts appoint the OSPD when a person qualifies for public defender services under statute, applicable case law and Chief Justice Directives.

Because our mission is to provide legal representation in criminal cases to people who are indigent, we are a service-oriented agency. Eighty-five percent of our budget is spent on personal services, with the remaining fifteen percent supporting mandated and operational costs. Any changes to our personal services budget, such as those made through legislative action on common policies and new legislation, have a tremendous effect on our overall appropriation.

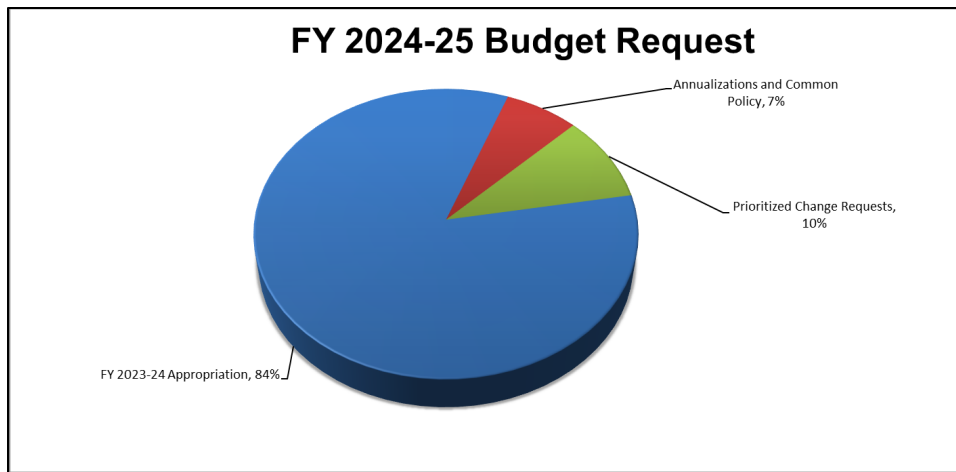
The drivers in OSPD's Budget Request for FY 2024-25 are the biggest challenges our defenders face. Dynamic factors expanding and challenging the criminal legal system are also increasing public defender workload. Statutorily mandated body worn camera and the volume of discovery in criminal cases continues to create more work for our individual defenders and the central office. Complex and high-tech policing strategies produce enormous files that require expertise and time to understand. Investigations that include collection of data from personal electronic devices are now routine in all types of cases, requiring time-consuming review by public defenders. The amount and complexity of discovery is the biggest driver of public defender staffing need.

Other factors are also driving workload stressors for public defenders. Prosecutions of people with mental and behavioral challenges, who are overwhelmingly represented by public defenders, are bloating our criminal legal system. Many of OSPD's most vulnerable clients remain logjammed in a collapsed competency-to-proceed process causing some to be incarcerated for unconstitutional periods. Public defenders must provide specialized and time-consuming representation for these clients failed by Colorado's behavioral health system. The proliferation of courtrooms and dockets, many handled by magistrates, demands the presence of public defenders. Ever-evolving standards in the representation of youth accused facing adult penalties require more time and attention from our youth defender teams. Increased staffing will be necessary to address these and other persistent and growing challenges.

FY 2024-25 Budget Request

The total FY 2024-25 budget request for the Office of the State Public Defender (OSPD) is \$186,370,774 and 1,259.1 FTE. We are asking for three prioritized Change Requests in our FY 2024-25 Budget Request.

- **FY 2023-24 Appropriation of \$ 155,673,494**
 - PLUS Annualizations of \$ 1,483,895
 - PLUS Common Policy of \$ 11,284,712
- **FY 2024-25 Base Request of \$ 168,442,101**
 - PLUS Change Request #1 for \$14,688,343
 - PLUS Change Request #2 for \$2,945,761
 - PLUS Change Request #3 for \$294,569
- **FY 2024-25 Budget Request of \$ 186,370,774**



Budget Priority & Challenges

The OSPD continually reviews, analyzes and focuses on its needs to efficiently use its limited resources to complete its mission. The primary priority for OSPD’s FY 2024-25 budget is to address the strain of meeting the increasing demands of the modern criminal legal system. The OSPD Decision Item 1 is for 70 attorney FTE to address staffing requirements necessary to comply the OSPD’s enabling statute, federal and state constitutions, the Colorado Rules of Professional Conduct, and American Bar Associations Standards.

In September 2023, the RAND Corporation issued its “National Public Defense Workload Study,” that created national workload standards for public defenders. This is the first update of national standards since 1973. The RAND report clarified that even nationally recognized public defense systems like the OSPD urgently need more resources if they are to uphold and safeguard the right to counsel guaranteed by Sixth Amendment. The study’s conclusion follows what the OSPD found in its own Delphi study in 2017 – the OSPD is drastically understaffed.

The RAND study highlighted the significant challenges faced by defenders that have exponentially increased workloads, noting that “[t]oday’s public defender must possess the skills and time to review police and public camera video, social media and cell phone data, forensic evidence from DNA to chemical drug analysis” and defenders must address “psychological and brain disorders and the impact on [their] clients.” Defenders must not only navigate the explosion of discovery in all case types but also help clients suffering from deficient and insufficient public policy addressing behavioral health conditions, criminalization of homelessness, and overuse of pretrial detention.

These are daily challenges in the life of a Colorado State Public Defender. While the OSPD’s FY 2023-24 budget request addressed a dire need to bring agency pay in line with Colorado’s public interest market and better pay is helping slow attrition, defenders still leave because of the size and demands of their caseloads. Exit interviews confirm that public defenders rarely want to leave the work but find themselves unable to sustain workload demands. While RAND studied the situation from a national perspective, Colorado’s specific challenges are many. OSPD’s FY 2024-25 budget addresses four categories of challenges: the exponential increase in the amount and complexity of discovery Colorado defenders must receive, organize, and review; the number of courtrooms and “nontraditional” dockets where public defenders are expected and required to appear; the increase in clients experiencing significant mental illness; and the work involved in representing children charged as adults.

At the same time, public defenders interact with prosecutors whose offices are overwhelmingly better

staffed, even after considering that the OSPD handles approximately 70% of criminal cases state-wide and not accounting for prosecutorial work done by law enforcement. For example, in the 1st Judicial District in Jefferson County, the OSPD has 58% of the attorney staffing of the district attorney's office, in the 17th Judicial District in Adams, the OSPD has 54%, and in the 20th Judicial District in Boulder County, the OSPD has 53% of the prosecution's attorney staff. Defenders in these jurisdictions confront specialized, highly trained and funded prosecution units, are stretched thin between multiple courtrooms, and are understaffed compared to their counterparts on the other side despite having additional ethical duties and needing to devote additional time to establish productive relationships with individual clients. Many OSPD clients are incarcerated in understaffed detention facilities, making meaningful client communication even more difficult and time-consuming.

These factors add up to an OSPD workload that exceeds the capacity of its existing staff, despite defenders working long hours at great cost to their own health and well-being to provide excellent representation for their clients. The national workload standards suggest that OSPD needs more staffing than can realistically be funded and recruited in the near term. The study sounds the alarm that even the nation's best public defender agencies are dangerously overburdened.

To address this situation, the OSPD compiled data and surveyed OSPD trial office leadership before this year's budget request on some of the Colorado-specific factors creating an unsustainable work environment: the exponential explosion in the volume of discovery; the proliferation of court rooms handling criminal matters; the competency crisis in Colorado; and the prosecution of children as adults.

The realities of attorney recruitment and state fiscal limitations, however, lead OSPD to ask for a more conservative number of FTE in this budget cycle. While the OSPD has succeeded in recruiting attorney talent from law schools across the country, recruitment for new attorney positions is tempered by a limited number of nationwide law school graduates interested in public defense. According to the most recent American Bar Association data, only 8.4 percent of the 36,078 people who graduated from accredited law schools in 2022 were employed in "public interest" positions across all types of public interest work, of which public defense is an even smaller subset.¹ In reviewing its hiring data from recent years and expecting a continued drop in attrition related to the compensation decision item for the FY2023-24 budget cycle, the OSPD believes 70 attorney FTE is an achievable recruitment and hiring goal for the next fiscal year.

The OSPD seeks more staff and resources in this year's budget request while also laying the groundwork for additional staffing requests in later years if nothing is done to reduce the number of cases in Colorado's criminal courts. While hiring and keeping staff will be critical for the OSPD to meet the demands of its cases, other measures can be taken to address public defender workload and save the state money. If the General Assembly enacts common sense policy reforms reducing the number of people and cases being funneled into the criminal legal system, future OSPD budget requests could be smaller. If the system continues to function as is, however, the OSPD must have more resources, including staff, to meet its constitutional mandate to provide effective representation to clients and to uphold Gideon's Promise.

The OSPD Decision Item 2 is for 11 social workers FTE and 5 client advocates FTE to start July 1, 2024, and 20 more client advocates FTE to start January 1, 2025, to provide clients with mitigation and community support services.

The criminal legal system is filled with people living with mental illness and substance abuse disorders and people who have committed poverty-related crimes. These individuals are primarily represented by public defenders, who not only argue their legal positions in court but also seek to address the factors that contribute to the person's entanglement in the criminal legal system. While attorneys often do the

¹https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2023/class-2022-online-table.pdf.

work to mitigate the circumstances of the accusation and to provide community-based resources, other members of the public defense team, including licensed social workers and client advocates, can do that work.

OSPD's twenty-three social worker FTE and two temporary positions must focus almost entirely on the most serious cases, engaging in forensic mitigation investigation and advocacy, leaving little time to provide community-based resource planning for clients accused of lower-level offenses. New positions, split between licensed social workers and client advocates, will address both existing gaps in the OSPD's ability to provide forensic mitigation work on serious cases and allow for assessment of underlying concerns and identification of appropriate supports for clients accused in less serious cases, thus improving the outcomes for these clients. Overall, resource identification and planning will contribute to safer outcomes for the clients and the community.

With about 175,000 cases worked last year by the OSPD, twenty-three social workers can only address a fraction of the need. Social workers in rural areas covering wide geographic areas find it unrealistic to provide parity of service to non-Denver-metro communities. In bigger offices, social workers cannot meet the demand for their services, which places the burden on busy attorneys and costly outside experts. Additional social worker positions will help meet the current client need with an elevated level of expertise but at a lower cost than attorney positions. More clients will receive accurate assessment and connection with appropriate treatment and services, and our rural offices will receive more equitable access to social work services.

Legislation

OSPD supports legislation that will improve fairness and just outcomes for our clients involved with the criminal legal system. Our agency always engages, upon request, with legislators seeking support and information for bills that will protect the constitutional rights of people, support the disenfranchised and provide better and real opportunities for our clients who suffer from the failure of systems that do not adequately address poverty, mental illness, and addiction.

OSPD recently engaged with all our regional offices to identify the areas of greatest policy concern unfairly affecting our clients.

The number one priority reported across all public defender offices was to address the broken competency system. Despite a federal court consent decree and special master oversight of the Department of Human Services from a lawsuit that began over 12 years ago, the Office of Civil and Forensic Mental Health reported the highest number of people waiting in jails for restoration treatment and the longest waits since the lawsuit began. Our clients are suffering in jails in the face of systemic rights violations from these delays. Efforts at reform and financial investment during this legislative session will fail if focused only on restoration beds, as they will not address the inevitable revolving door created when people with serious mental illness cycle through the criminal legal system on new cases and new competency orders. The restoration process, which is not mental health treatment but a review of legal process, does little to help achieve stability for people with mental illness, break the cycle of the incarceration and prosecution, or provide for community safety. National research and Colorado's own experience show inpatient restoration beds alone will not solve the problem. OSPD hopes to lead the discussion about taking a research-based approach to reform the system in ways that will move toward solving the long-standing crisis.

Another area of concern for the OPSD is SB23-164, the sunset review of the Sex Offender Management Board. In addition to the reforms advanced by the Department of Regulatory Agencies, the OSPD successfully advocated for common-sense amendments to statute so individuals whose current case did not involve sexual allegations but had a history of a sexual crime at any previous point in their life would

no longer automatically be subject to the costly and time-consuming mandatory psychosexual evaluation unless requested by the court or prosecutor.

The OSPD also highlighted decades of failure by the Colorado Department of Corrections (CDOC) to provide timely access to CDOC's SOMB-based Sex Offense Treatment and Monitoring Program (SOTMP). For individuals sentenced under the Lifetime Supervision Act (LSA), progress in SOTMP is required to become eligible for consideration by the Parole Board, yet inadequate access to SOTMP has caused many people to die in prison before becoming eligible for parole and others to serve 400-1000% of the sentence imposed by the Court before being granted parole. SB164 required SOMB to staff a committee to evaluate the crisis in access to SOTMP. The committee met from August to November 2023 with OSPD providing input whenever possible, although SOMB excluded attorneys from the committee's membership.

Critically, the OSPD repeatedly alerted the committee to the evolution in a federal district court's recognition of an individual's due process rights under the LSA. Because SOTMP is required for a person to be eligible for parole under the LSA, the federal court had previously recognized a due process right to access the required treatment *prior* to a person's Parole Eligibility Date. In orders issued in May 2023 (after the close of the legislative session), however, federal district court Judge Wang, recognized the LSA's statutory scheme itself creates an independent due process right to access the treatment that is instead *coextensive* with a person's imprisonment.

In November 2023, Judge Martinez, another federal district court judge, also acknowledged Judge Wang's analysis with approval. Unfortunately, the SOMB committee refused to take up the impact of these decisions on DOC's SOTMP provision meaning that over 1,500 people in the DOC serving LSA sentences without access to SOTMP have standing to raise this due process claim, creating liability for the state.

Still, the SOMB committee will produce a report on the treatment crisis pursuant to statute and it is expected it will have no meaningful solutions to expand the capacity of DOC to increase staffing or timely inmate access to the required programming.

Several legislative changes that impact courtroom process have affected the work of public defenders and have required advocacy by the OSPD. HB23-1182 mandated the presumptive livestreaming of all criminal cases. The OSPD presented concerns with effects on the fundamental fairness of criminal trials and especially the inability to monitor and enforce sequestration orders, which prevent witness from tailoring their testimony based on the testimony of other witnesses and presentation of evidence. To address this issue, the legislation empowered the court to require virtual observers to identify themselves to make sure none are witnesses. In implementation, the judicial branch has not used these protections, instead, creating livestreams in which the number and identity of the viewers cannot be discerned. There is also no mechanism for the court to interact with those watching and properly intercede if there is inappropriate behavior. Public defenders who have raised these concerns as a part of their litigation have been told that they must monitor the livestream despite not having the access to do so. The OSPD remains concerned that livestreaming will harm the fundamental fairness of proceedings and allow witnesses tailor their testimony with no ability to detect sequestration violations.

SB23-075 passed with the intention of protecting juvenile victim and witness names in criminal justice records from being released publicly. In December, six months after the legislation was signed and just a few weeks before it was implemented, the OSPD learned that the Judicial Department did not have the capacity to identify juvenile names in historic courts records. Therefore, the Judicial Department decided it would eliminate access to most records in the electronic filing system for all non-law enforcement attorneys and staff, including public defenders. The result is an imbalance and unfair dynamic wherein historic court records, even those without juvenile names, are accessible by the courts and prosecutors, but not by public defender's offices. The OSPD is engaged with stakeholders including

Judicial but believes a legislative fix to ensure defenders have efficient and timely access to electronic courts records is critically important.

Finally, through SB22-188, the legislature provided funding for mental health support for district attorney staff and OSPD employees. This investment has been critically important to address the vicarious trauma and significant stressors inherent in public defender work and furthered OSPD's goal to focus on our staff's well-being as we carry out our mission in courts throughout the state.

Committees, Boards, Task Forces, & Specialty Courts

The OSPD actively engages in many committees, boards, task forces, work groups, and specialty courts throughout the state to improve fairness and operation of the courts. The workload in these areas continues to increase.

Several legislative acts have created (or reauthorized) task forces, commissions, or subcommittees in which the OSPD actively participates, including:

- The Jail Standards Commission to make recommendations about Jail Standards created by HB22-1063.
- The Task Force Concerning the Treatment of Persons with Behavioral Health Disorders in the criminal and juvenile justice systems, reauthorized by SB22-021.
- The Victim and Survivor Training Task Force created by HB23-1008.
- The Court Data sharing Task Force created by HB23-1108.

Under Executive Order B 2023-001, the OSPD serves as co-chair of the Working Group on Transforming Criminal and Juvenile Justice. The Working Group's mission is to make recommendations regarding the creation of a future permanent entity or entities to address matters related to criminal and juvenile justice by March 1, 2024. The recommendation will address the structure, location, purpose and composition of any future entity or entities.

Some of the additional committees, boards, and task forces on which members of OSPD serve include:

- The state-level Correctional Treatment Board,
- All the local Correctional Treatment Boards throughout the judicial districts,
- Community Corrections Boards throughout the state,
- Criminal Justice Coordinating Committees in several judicial districts,
- The Sex Offender Management Board,
- Task Force Concerning the Treatment of Persons with Behavioral Health Disorders,
- The Statewide SB-94 Advisory Committee,
- Local SB-94 Boards,
- The Pre-Adolescent Services Task Force,
- The Jail Standards Task Force,

- E-Discovery Steering Committee,
- Committees of the Colorado Supreme Court including:
 - The Public Access Committee,
 - The Rules of Appellate Procedure Committee,
 - The Rules of Criminal Procedure Committee,
 - The Advisory Committee on the Rules of Evidence,
 - Public Access Committee

In addition, OSPD staff work in specialty treatment courts. This work often entails specialized training and involves attending meetings and staffings in addition to courtroom work. Several types of specialty courts operate in some districts across the state:

- Substance Abuse courts
- DUI courts
- Veterans courts
- Behavioral Health courts
- Competency dockets

SMART ACT - Goals, Strategies and Performance Measures

To achieve our mission of providing high-quality, effective criminal defense representation for each client, the OSPD makes sure our goals, strategies and measures address our people and our process. We have developed three overarching goals, five strategies and nineteen measures, all focused on improving service to our clients.

While our goals, strategies and measures overlap, they all tie directly to our vision and our mission. As part of our organizational structure planning, these components are continually reviewed and refined.

Goals:

1. Provide high quality attorney services and advocacy in both the trial and appellate courts throughout Colorado for indigent clients.
2. Hire and retain enough quality staff to effectively manage the ever- increasing workload in each office in the state.
3. Provide enough opportunity for excellent staff development, training, technology support and other resources to adapt our response to the constantly changing criminal legal system and ensure our advocacy is commensurate with those available for non-indigent people as required by our statute.

Strategies:

1. Hire a sufficient number of skilled and committed staff and keep an adequate level of experienced staff to effectively manage the assigned caseload.
2. Track and analyze trends in caseloads and adjust staffing levels.
3. Provide training to address the changing legal climate.

4. Continually evaluate administrative processes and organizational infrastructure needs such as office space, technology, and staffing.
5. Work all cases as efficiently as possible, while keeping a high quality of effective and reasonable representation.

Measures:

Input

1. Number of new trial court cases.
2. Number of active trial court cases.
3. Percent of trial court attorney staff allocated vs. total required for closed trial court cases.
4. Number of attorney applications received.
5. Percent of total attorney staff allocated versus total required for closed trial court cases and active appellate cases.
6. Annual rates of attrition.
7. Percent of experienced, fully capable staff.
8. Percent compliance with minimum standards for total staffing requirements.
9. Established standard percentages for reasonable staff supervision, management, and development.
10. Number of new appellate cases.
11. Number of active appellate cases (cases awaiting filing of Opening Brief).
12. Percent of appellate attorney staff allocated vs. total required for active appellate cases.

Output

1. Number of trial court cases closed.
2. Days of training provided.
3. Number of CLE credit hours provided.
4. Ethics training hours provided, focus on Colorado criminal law.
5. Number of administrative processes and organizational infrastructure evaluations performed.
6. Number of appellate cases for which an Opening Brief has been filed.
7. Number of backlogged appellate cases.

Performance Measures

		FY 19-20	FY 20-21	FY 21-22	FY 22-23	FY 23-24	FY 24-25	FY 25-26	FY 26-27	FY 27-28
		(actual)	(actual)	(actual)	(actual)	(projected)	(projected)	(projected)	(projected)	(projected)
MEASURE 1:		Target	147,479	119,229	136,144	135,034	139,085	143,258	147,556	151,982
Number of new trial court cases.	Actual	124,586	113,453	127,391	125,329					
MEASURE 2:		Target	189,760	165,029	175,221	184,968	190,517	196,233	202,120	208,184
Number of active trial court cases.	Actual	168,512	159,292	179,581	174,489					
MEASURE 3:		Target	100%	100%	100%	100%	100%	100%	100%	100%
Percent of actual trial court attorney staff vs. total required for closed trial court cases.	Actual	82%	80%	79%	77%					
MEASURE 4:		Target	500	500	500	500	500	500	500	500
Number of attorney applications received.	Actual	524	500	410	507					
MEASURE 5:		Target	100%	100%	100%	100%	100%	100%	100%	100%
Percent of actual total attorney staff vs. total required for closed trial court cases and appellate cases.	Actual	82%	81%	80%	76%					
MEASURE 6:		Target	12%	12%	12%	12%	12%	12%	12%	12%
Annual rates of attrition:										
Attorneys	Actual	12%	15%	21%	18%					
Investigators	Actual	7%	9%	10%	8%					
Paralegals	Actual	43%	41%		9%					
Administrative Assistants	Actual	22%	19%	30%	19%					
Total All Employees	Actual	12%	14%	19%	16%					
MEASURE 7:		Target	70%	70%	70%	70%	70%	70%	70%	70%
Percent of experienced, fully capable staff (journey level or higher):										
Attorneys	Actual	37%	39%	39%	40%					
Investigators	Actual	56%	57%	53%	52%					
Paralegals	Actual	43%	41%		21%					
Administrative Assistants	Actual	43%	41%	36%	30%					
Total All Employees	Actual	43%	45%	43%	39%					
MEASURE 8:		Target	100%	100%	100%	100%	100%	100%	100%	100%
Percent compliance with minimum standards for total staffing requirements.	Actual	83%	83%	80%	77%					
MEASURE 9:		Target	12%	12%	12%	12%	12%	12%	12%	12%
Maintain established standard percentages for reasonable staff supervision, management and development.	Actual	10%	10%	9%	10%					
MEASURE 10:		Target	574	524	450	480	495	510	525	541
Number of new appellate cases.	Actual	514	256	379	430					

		FY 19-20	FY 20-21	FY 21-22	FY 22-23	FY 23-24	FY 24-25	FY 25-26	FY 26-27	FY 27-28
		(actual)	(actual)	(actual)	(actual)	(projected)	(projected)	(projected)	(projected)	(projected)
MEASURE 11:	Target	1,938	1,870	1,627	1,629	1,596	1,590	1,596	1,613	1,613
Number of active appellate cases.	Actual	1,878	1,602	1,556	1,564					
MEASURE 12:	Target	100%	100%	100%	100%	100%	100%	100%	100%	100%
Percent of actual appellate attorney staff vs. total required for appellate cases awaiting filing of initial brief.	Actual	81%	85%	84%	60%					
MEASURE 13:	Target	145,337	105,353	129,507	134,333	138,362	142,512	146,786	151,189	151,189
Number of trial court cases closed.	Actual	122,712	107,099	130,421	130,856					
MEASURE 14:	Target	144	132	132	193	267	266	266	266	266
Days of training provided.	Actual	144	69	182	250					
MEASURE 15:	Target	15	15	15	15	15	15	15	15	15
Number of CLE credits provided to all attorneys.	Actual	21	12	14	29					
MEASURE 16:	Target	3	3	3	3	3	3	3	3	3
Hours of ethics training provided, focusing on Colorado criminal law.	Actual	6	2.2	2	4					
MEASURE 17:	Target	15	15	15	15	15	15	15	15	15
Number of administrative processes and organizational infrastructure evaluations performed.	Actual	12	15	15	15					
MEASURE 18:	Target	447	447	358	343	378	378	378	378	378
Number of appellate cases for which an Opening Brief has been filed.	Actual	454	433	310	222					
MEASURE 19:	Target	592	490	271	324	324	336	360	395	395
Number of backlogged appellate cases.	Actual	530	287	299	451					