

**JUDICIAL BRANCH
OFFICE OF THE
ALTERNATE DEFENSE COUNSEL**



FY2011-2012 BUDGET HEARING

**Response to JBC Questions
November 18, 2010**

Lindy Frolich, Alternate Defense Counsel

QUESTIONS TO AGENCY

INTRODUCTIONS AND OPENING COMMENTS

1. Please describe how the OADC evaluates the effectiveness of its programs and services.

The mandate of the OADC is to provide competent and effective legal representation to indigent defendants (adults and juveniles) in cases where the state public defender has an ethical conflict of interest. This representation *must* uphold the federal and state constitutional and statutory mandates, ethical rules, and nationwide standards of practice for criminal defense lawyers. These legal services should be commensurate with those services available to non-indigent defendants.

To evaluate the effectiveness of the OADC mandate, the agency does the following: Recruits and contracts with private criminal defense lawyers; reviews and evaluates attorney performance; conducts a monthly review of the number of cases paid, the average hours billed by attorneys, investigators and paralegals by case type; and compares the agency's budget to actual expenditures to date for all appropriated line items.

Further, if the OADC is currently statutorily required to administer one or more programs that are no longer effective or appropriate, please identify such programs and the associated statutory provisions. **N/A**

2. Please identify the OADC's three most effective programs or services and the three least effective programs, and explain why you identified them as such. How do your most effective programs further the OADC's goals? What recommendations would you make to increase the effectiveness of the three least effective programs?

The OADC is a single program agency, whose only service is to provide legal representation to indigent defendants. To answer this question the OADC will address the three most effective and the three least effective measures that have been implemented in recent years.

MOST EFFECTIVE MEASURES

The agency has identified its three most effective measures based on how they meet the agency's objectives of providing cost-effective and competent legal representation statewide. A detailed description of the activities involved in these measures is included in the response to question number 3 below.

- A. Attorney Evaluations: This measure meets the agency's goals by insuring that each OADC contractor is competent to provide legal representation to indigent defendants, in a cost-effective manner, and meets the requirements of OADC's state performance audit of 2006.
- B. Appellate Project: This measure meets the agency's goals by streamlining the appellate process and insuring that the agency contracts with lawyers who specialize in appeals, resulting in higher quality representation for a reduced cost.
- C. Post-conviction Project: This measure meets the agency's goals by streamlining the post-conviction process, triaging cases prior to assignment to a qualified post-conviction lawyer, and contracting the case for a flat fee. This process insures that post-conviction cases have qualified lawyers that provide representation cost-effectively.

LEAST EFFECTIVE MEASURES

The agency has identified its three least effective measures based on how these measures fail to meet the agency's objectives of providing cost-effective and competent legal representation statewide. A detailed description of the activities involved in these measures is included in the response to question number 3 below.

- D. Attorney Hourly Rates: In 2005, because of the great disparity between the then existing rate , and the suggested rate of a judicial department study of \$75 per hour, the JBC recommended a five year implementation plan to secure a rate of \$75 per hour for court-appointed counsel. The OADC has not requested an hourly rate increase since FY2008-2009, due to the current state of the economy, and the state's budget shortfall. To avoid any hourly rate decrease, the OADC has implemented other savings such as not reimbursing attorney mileage, and closer scrutiny of expert, investigator and paralegal requests. The disparity between the private hourly rate and the CJA hourly rate of \$125 and the OADC \$65 hourly rate continues to deter extremely qualified attorneys from contracting with the OADC.
- E. Discovery Costs: The cost of discovery continues to rise every year. The agency has no control over the rates charged by individual district attorney's offices. As was requested by the JBC, the judicial branch, together with the Colorado District Attorney's Council, is working to create some uniformity by clarifying Crim. P. Rule 16, and providing additional information on how discovery rates are to be set. The OADC has implemented strategies in an attempt to offset some of the increases in the cost of discovery dissemination. This includes utilizing a contract computer specialist to

process discovery for OADC contractors. A pilot project is currently taking place in Jefferson County to see if this is a more cost-effective and efficient method of distributing discovery to OADC contractors.

F. **Attorney Hours Per Case:** Some case types are more labor intensive due to the complexity of litigation. These include death penalty cases on both the trial level and pursuant to the unitary appeal bill, actual innocence cases, habitual criminal cases, and Colorado Organized Crime Control Act (COCCA) cases. As a result, it is difficult to contain the number of attorney hours per case. If the number of death penalty cases, habitual filings and COCCA cases were reduced, the agency anticipates that there would be an overall reduction in the number of attorney hours. Through our appellate and post-conviction processes the agency has reduced the number of attorney hours for appellate and post-conviction cases.

3. For the three most effective and the three least effective programs identified above, please provide the following information:

a. A statement listing any other state, federal, or local agencies that administer similar or cooperating programs, and outline the interaction among such agencies for each program;

The OADC is similar to the Office of the Public Defender in that we provide lawyers to represent indigent persons accused of crimes. OADC pays the lawyers for every hour they work and reimburses them for allowed expenses. This differs from the Public Defender system, where the lawyers, investigators, and paralegals are all salaried state employees. We are also similar to the Office of Child's Representative in terms of our contracting structure, although the services we provide are different.

The CJA (Criminal Justice Act) is the federal program similar to the OADC. The CJA is a panel of contract criminal defense attorneys that provides legal representation to indigent defendants in federal criminal cases where the federal public defender's office has an ethical conflict of interest. The major difference is that the OADC lawyers are paid at a rate which averages \$59 per hour less than then the CJA federal rate of \$125 per hour.

b. A statement of the statutory authority for these programs and a description of the need for these programs;

The Office of the Alternate Defense Counsel (OADC) is mandated by statute to "provide to indigent persons accused of crimes, *legal services that are commensurate with those available to non-indigents*, and conduct the office in

accordance with the Colorado Rules of Professional Conduct and with the American Bar Association Standards relating to the administration of criminal justice, the defense function." C.R.S. § 21-2-101(1) (emphasis added).

The right to counsel is guaranteed by the Colorado and the United States Constitutions. The Office of Alternate Defense Counsel contracts with private criminal defense lawyers who work in every judicial district at a designated state rate. There are two statutory requirements before an accused person can be appointed OADC counsel: First they must be indigent and second, the Public Defender's Office must have an ethical conflict of interest. The OADC attorney contractors must uphold the federal and state constitutional and statutory mandates, ethical rules and nationwide standards of criminal defense practice. OADC contracts with over 400 private lawyers on a regular basis and has worked with nearly 1,000 private lawyers over the past 10 years. In addition, OADC utilizes investigators and paralegals to provide necessary services required by lawyers to effectively represent indigent clients.

These private lawyers, on behalf of OADC, represent adults and children in criminal and delinquency cases filed in county, district, and appellate courts. The severity of case types range from lower class misdemeanors to capital murder cases where the potential sentence is death. Lawyers who contract with OADC are trained in criminal defense work in general and many have specialty areas such as: Colorado Organized Crime Control Act (COCCA), delinquency cases, death penalty cases, sex assault cases, mental health issues, etc. All OADC lawyers, investigators, and paralegals are independent contractors and not state employees.

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

- c. A description of the activities which are intended to accomplish each objective of the programs, as well as, quantified measures of effectiveness and efficiency of performance of such activities; **See response below in 3.) e.**
- d. A ranking of the activities necessary to achieve the objectives of each program by priority of the activities; **See response below in 3.) e.**
and
- e. The level of effort required to accomplish each activity associated with these programs in terms of funds and personnel.

Because subsections c., d., and e. are interrelated, the answers are combined into one section for each of the measures identified above.

A. Attorney Evaluations

Pursuant to the state performance audit of 2006, the OADC began a process to insure that all OADC lawyers and investigators are under a current contract. This process includes interviewing and evaluating all attorney contractors and contracting with investigators. To accomplish this, the agency has developed 7 basic components:

1. Maintain a tracking system with all attorney and investigator vendors including contract renewal dates.
2. Contact and request renewal applications from attorney contractors, interview and evaluate contractor, and renew contract if appropriate.
3. Receive feedback from judicial districts concerning OADC lawyers.
4. Verify attorney status with the Office of Attorney Regulation.
5. Monitor and evaluate lawyer court room practices.
6. Request applications from current investigators and secure a current contract. Contact investigators regarding contract renewal and renew when appropriate.
7. Conduct audit and time-efficiency studies of select OADC contract attorneys.

The process of evaluating attorneys is ongoing. However, there is a 3-4 month period each year that is more labor intensive and involves 4 separate FTE. This includes an administrative assistant, the training/evaluation director, the director and the deputy director.

Performance Measure		FY09 Actual	FY10 Actual	FY11 Approp.	FY12 Request
Interview contract applicants; evaluate contractors prior to contract renewal date, and ongoing performance monitoring. Contract with investigators.	Target Attorney	100%	100%	100%	100%
	Actual	99%	99%		
	Target Investigator	50%	50%	100%	100%
	Actual	50%	25%		

B. Appellate Project:

In FY2006-2007, the OADC began a pilot project to see if the appellate process could be streamlined through the use of an in-house appellate paralegal. Following the model used by the Colorado State Public Defender's office for appellate cases, the OADC contracted with a paralegal to initiate this project. Since the program began, the number of appellate attorney hours per case has decreased. This pilot project has now become a permanent cost-saving measure for the agency. This project involves the following components:

1. All appellate cases are initiated by the appellate paralegal by interfacing with all judicial district appellate clerks.
2. The paralegal contacts and arranges with every judicial department managing court reporter to prepare and receive the record on appeal and;
3. Insures deadlines are met by monitoring the appellate record and certification thereof through management and coordination of activities between OADC lawyers, court reporters, clerks of court, public defender's appellate division and the Colorado Court of Appeals and;
4. Drafts and files pleadings for appeals and;
5. Coordinates appellate assignments with the Court of Appeals and qualified OADC lawyer contractors.

The appellate process is ongoing. It requires ½ FTE, as well as some input from the director and deputy director.

	FY06	FY07	FY08	FY09	FY10
Appeal Cases	585	654	708	765	725
Average Hours per Case					
Out-of-Court	43.79	37.78	41.78	42.80	40.33
In-Court	0.00	0.00	0.00	0.00	0.00
Paralegal	2.77	2.25	1.19	0.63	0.46
Investigator	0.42	0.31	0.29	0.40	0.18
Other Travel	1.81	1.27	0.13	0.20	0.06
<i>Total Appeal Hours</i>	48.79	41.61	43.39	44.03	41.03

C. Post-Conviction Project:

In FY09-10, based on the success of the appellate project, and the burgeoning costs of post-conviction cases, the OADC expanded its in-house paralegal's responsibilities to include initial coordination of post-conviction cases. This project involves the following components:

1. The OADC paralegal responds to the notification from all judicial district courts where a *pro se* post-conviction petition requires assignment of OADC counsel and;
2. Arrangements are made to scan in a complete copy of the court file.
3. Each case is triaged by a lawyer, which involves a cursory review of the defendant's petition, the court file, and any other available information.
4. In most cases, a flat fee contract price is assigned, based on the triage results.
5. A contract is generated for each individual case with one of the agency's qualified post-conviction lawyers.

The post-conviction process is ongoing. It requires ½ FTE, as well as some input from the director and deputy director.

	FY06	FY07	FY08	FY09	FY10
Post-Conviction Cases	480	514	523	492	489
Average Hours Per Case					
Out-of-Court	28.16	29.70	37.71	40.65	36.38
In-Court	0.00	0.00	0.00	0.00	0.00
Paralegal	6.60	5.18	5.96	7.22	4.32
Investigator	3.33	4.36	6.10	8.41	5.82
Other Travel	4.01	2.73	1.60	2.08	1.85
<i>Post Conviction Hours</i>	42.1	41.97	51.37	58.36	48.37

D. Attorney Hourly Rates:

For fiscal years 2010, 2011 and 2012, the OADC did not request a rate increase due to the uncertainty of the economy and the anticipated state budget shortfalls. The minimal rate increases in prior years has assisted with recruitment and retention of competent lawyers. However, due to the ever increasing costs of overhead, including malpractice insurance, health care, support staff, utilities, etc., it is still not economically feasible for many attorneys to accept cases at the OADC rate.

Performance Measure		FY06 Actual	FY07 Actual	FY08 Actual	FY09 Actual	FY10 Actual	FY11 Appr.	FY12 Request
Maintain current compensation rates for contractors. Initial goal set in FY2004-2005 was to reach competitive rates by FY2008-2009 of \$75 per hour.	Target	\$55	\$60	\$68	\$75	\$75	\$75	\$75
	Actual	\$47 No funding received for rate increase	\$57	\$60	\$65	Status Quo	Status Quo	Status Quo

The American Bar Association (ABA) standards require that court-appointed attorney compensation be “reasonable” and “adequate.” The federal courts have indicated that they believe courts should pay court-appointed attorneys a rate that covers overhead and provides reasonable remuneration.

In FY2004, the Joint Budget Committee recommended that the judicial agencies work together to have Court Appointed Counsel hourly rates consistent within the judicial branch. In fiscal year 2004-2005, a judicial department study recommended an hourly rate of \$71.00 per hour for attorney contractors. Because of the great disparity between \$47 per hour and \$71 per hour, the JBC recommended a five year implementation plan to secure a rate of \$75 per hour. The agencies have continued to pursue these hourly increases as the general fund has allowed. The OADC is not requesting an hourly rate increase for fiscal-year 2011-2012, due to the current state of the economy, and the state’s budget shortfall.

As lawyers gain experience they are able to increase their private client base, where they may be paid anywhere from \$150 to \$350 per hour. This makes them less willing to accept court appointments. In an effort to retain qualified attorneys, the OADC is striving to maintain the current hourly rates by seeking alternative solutions to reduce its budget. These efforts include a contract fee for certain post conviction and appellate cases; curtailing some expert costs, increased monitoring of investigator and paralegal requests; and no longer reimbursing lawyers for travel mileage. However, the disparity between the private hourly rate and the OADC \$65 hourly rate continues to deter some attorneys from contracting with the OADC.

As of January 1, 2010, the federal government raised its court-appointed attorney’s¹ hourly rate to \$125 per hour; for capital crime (death penalty) cases, the new maximum hourly rate for federal appointments is \$178 per hour.

¹ Federal court-appointed attorneys are referred to as Criminal Justice Act (CJA) lawyers.

State of Colorado Felony Type	Hourly Rate Effective 1/1/1991	Hourly Rate Effective 7/1/1999 ₁	Hourly Rate Effective 2/1/2003 ₁	Hourly Rate Effective 7/1/2003 ₁	Hourly Rate Effective 7/1/2006 ₁	Hourly Rate Effective 7/1/2007 ₁	Hourly Rate Effective 7/1/2008 ₁
Death Penalty	\$40 out court \$50 in-court (\$41.66) ²	\$65	\$60	\$65	\$85	\$85	\$85
Felony A	\$40 out court \$50 in-court (\$41.66) ²	\$51	\$46	\$51	\$60	\$63	\$68
Felony B	\$40 out court \$50 in-court (\$41.66) ²	\$47	\$42	\$47	\$56	\$59	\$65
Juv, Misd, DUI, Traffic	\$40 out court \$50 in-court (\$41.66) ²	\$45	\$40	\$45	\$54	\$57	\$65

- 1 In court and out of court are paid at the same rate.
- 2 Based on the ABA standard (for every 6 hours worked 1 hour is in-court and 5 hours are out-of-court).

CJA Rates	Hourly Rate Effective 1984	Hourly Rate Effective 1/2000	Hourly Rate Effective 4/2001	Hourly Rate Effective 5/2002	Hourly Rate Effective 1/2006	Hourly Rate Effective 5/2007	Hourly Rate Effective 1/2008	Hourly Rate Effective 3/2009	Hourly Rate Effective 1/2010
Death Penalty	4/24/96 \$125			2/1/2005 \$160	\$163	\$166	\$170	\$175	\$178
Non-Capital	\$40 out court \$60 in-court (\$43.33) ²	\$50 out court \$70 in-court (\$53.33) ²	\$55 out court \$75 in-court (\$58.33) ²	\$90	\$92	\$94	\$100	\$110	\$125

E. Discovery Costs:

As stated above, discovery costs continue to escalate. These costs reside in the mandated appropriation line. The agency has tracked the differences among all district attorney offices and requested clarification on how these charges are determined. These efforts have had no impact. The OADC has an overall strategy to assist in minimizing the expenditures within the mandated line to offset some of the largest cost increases that are charged by judicial district attorney's offices for discovery.

In spite of a continued increase in discovery costs charged by each jurisdiction's district attorney's office, the OADC successfully reduced mandated costs throughout FY2010. This was accomplished by increased scrutiny of expert requests and expanding the electronic distribution of discovery on multiple defendant cases to include complex cases. The OADC is continuing to explore cost savings in cases including increased use of electronic distribution of discovery. Contracting with document management and paralegal professionals has allowed the OADC to reduce several thousand pages of paper discovery (costing a minimum of ten cents up to fifty cents per page to reproduce), to one or two compact disks, costing very little to reproduce.

	FY06	FY07	FY08	FY09	FY10
Discovery paid to local DAs/electronic duplication Grand Jury, etc.	\$389,500	\$435,361	\$470,098	\$567,917	\$635,061
Total	\$389,500	\$435,361	\$470,098	\$567,917	\$635,061

F. Attorney Hours Per Case

The OADC reviews each individual contractor bill for reasonableness and accuracy. In an effort to increase the quality and efficiency of the OADC contract attorneys, the agency has implemented and will continue to seek out measures that will reduce billable contractor hours. These measures include:

1. Continuing the in-house appellate project that streamlines the OADC appellate cases from inception through transmittal of the record on appeal.
2. Attorney access to electronic court records pursuant to HB 08-1264.
3. Expanding and promoting the Brief and Motions bank.
4. Evaluating contractor efficiency and auditing contractor billing.
5. Continuing to expand the Post Conviction project.
6. Training paralegals and attorneys for electronic filing of appellate briefs.

Performance Measure		FY09 Actual	FY10 Actual	FY11 Projection	FY12 Request
Contain the number of Attorney hours per case.	Target Attorney hours	19.64	19.64	20.54	20.54
	Actual	20.55	20.81		

As the chart above indicates, in spite of efforts to contain the average number of attorney hours per case, this average continues to increase, due to more complex case litigation. It is more difficult to contain and reduce attorney hours per case in more complex cases. For example:

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

There is currently one death penalty case pending on the trial court level. The defendant is represented by OADC contractors. There are two death penalty cases proceeding under the Unitary Appeal Bill and both defendants are represented by OADC contractors.

All of these death penalty cases arise out of prosecutions from the 18th Judicial District.

Actual Innocence Cases:

After more than a decade in prison, Tim Masters walked out of a courtroom a free man. Tim Masters has become synonymous with Colorado innocence cases. Although Tim Masters’ case concluded in fiscal year 2008, the OADC currently has a number of actual innocence cases. These cases are time and expert intensive and therefore expensive.

4. Detail what could be accomplished by the OADC if funding is maintained at the fiscal year 2009-10 level.

If funding to the Office of the Alternate Defense Counsel (OADC) were maintained at the FY2009-2010 level, it would be a reduction of \$434,461 from its current request for FY2011-2012. If the caseload and case type in FY2011-2012 is the same or similar to the caseload in FY2009-2010, we would be able to provide services at the FY2009-2010 level.

ADDENDUM: OTHER QUESTIONS FOR WHICH SOLELY WRITTEN RESPONSES ARE REQUESTED

5. Please provide a table comparing the actual number of OADC FTEs in FY 2000-01 and the requested number for FTEs in FY 2011-12.

The Office of the Alternate Defense Counsel (OADC) was established pursuant to C.R.S. § 21-2-101, et. seq. as an independent governmental agency of the State of Colorado Judicial Branch as of January 1, 1997.

	FY2000-2001	FY2011-2012
FTEs	4.0	7.5
Payment Transactions	14,992	44,573

The agency has 7.5 FTE. All personnel wear multiple hats. With those FTE, the agency must interview, review, evaluate, and monitor over 500 attorney/investigator contractors state-wide; write and review any contracts; perfect the appellate record; assign appellate and post-conviction cases; insure approximately 10,000 appointments are correctly recorded; process all payments - for FY2010 total payments processed were over 43,500; correspond with inmates concerning requests for counsel; perform all purchasing, accounting, purchasing and budgeting functions; perform human resource and benefit functions; perform training to address contractor effectiveness and efficiencies; review and respond to legislative fiscal notes; assist with computer maintenance; provide oversight of discovery processing and grand jury counsel assignments; respond to court requests for specific counsel needs; maintain its website; respond to requests from family members about incarcerated inmates status and counsel requests; review requirements needed to track and calculate case payment information need in Court Appointed Counsel (CAC) system.

6. Please provide a table comparing the actual number of FTEs in FY 2008-09 and FY 2009-10 to the appropriated level of FTE for each of those fiscal years.

	FY2008-2009	FY2009-2010
FTEs Appropriated	7.5	7.5
Actual FTEs	7.5	7.5

7. Please identify the number of attorneys employed by your office, as well as the number of attorneys with whom you contract.

The OADC has three FTE that are attorneys. The Director, the Deputy Director and the Training/Evaluation Director.

The OADC currently has contracts with 437 lawyers to perform services statewide as mandated by statute.