



**REPORT OF**

**THE**

**STATE AUDITOR**

**Office of Alternate Defense Counsel**

**PERFORMANCE AUDIT**

**February 2006**

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This report contains the results of a performance audit of the Office of Alternate Defense Counsel. The audit was conducted under 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 Alternate Defense Counsel, the Alternate Defense Counsel Commission, and the Colorado Supreme Court.

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JOANNE HILL, CPA  
State Auditor

**Office of Alternate Defense Counsel  
Performance Audit  
February 2006**

**Authority, Purpose, and Scope**

This performance audit of the Office of Alternate Defense Counsel (OADC or the Office) was conducted pursuant to Section 2-3-103, C.R.S., which authorizes the Office of the State Auditor to conduct audits of all departments, institutions, and agencies of state government. The audit work, performed from November 2005 through February 2006, was conducted in accordance with generally accepted government auditing standards. The purpose of the audit was to evaluate the effectiveness and efficiency of the OADC's operations and Alternate Defense Counsel Commission (Commission) activities. We also conducted a follow up on the implementation status of prior audit recommendations. As part of our audit, we reviewed the Office's attorney selection procedures, contracts and performance reviews, billing and payment practices, and the structure and duties of the Commission. We acknowledge the assistance and cooperation extended by the Office of Alternate Defense Counsel, the Alternate Defense Counsel Commission, and the Supreme Court Chief Justice.

**Overview**

When a conflict of interest precludes the Office of the State Public Defender from representing an indigent defendant, the OADC provides legal representation, without charge, through contracted private attorneys. In Fiscal Year 2005 the OADC's expenses totaled about \$12.9 million and the Office had a total of about 11,100 cases.

The Colorado Supreme Court appoints a nine-member Commission to oversee the OADC. The Commission appoints, and has the ability to discharge for cause, an individual to serve as the Alternate Defense Counsel (ADC). In addition, the Commission serves as an advisory board concerning the development and maintenance of competent and cost-effective representation.

In our 2003 performance audit of the OADC we found that the Office needed to improve its operations to ensure greater accountability for the quality of attorney representation and for the expenditure of state resources. At that time we recommended that the Office develop processes and controls to strengthen accountability, and to ensure efficient operations and compliance with statutes and regulations. In our current audit we found that the Office has implemented or has made progress in implementing all of the prior audit recommendations. However, we identified areas in which additional improvements are needed to strengthen oversight of attorney selection, performance assessment, and billing. Additionally, the Colorado Supreme Court and the Commission need to make improvements related to the Commission's structure and procedures to ensure greater accountability. The significant findings and recommendations resulting from the audit are below.

*For further information on this report, contact the Office of the State Auditor at 303.869.2800.*

## Key Findings

- **Strengthen controls over attorney selection and hiring.** By statute, the OADC must provide legal services to indigent persons accused of crimes that are commensurate with the legal services available to nonindigent persons. This means the OADC must ensure that the attorneys with whom it contracts are licensed and competent. We found that the Office does not routinely conduct interviews with applicants prior to hire, attorneys' qualifications are not reviewed consistently, and staff do not check every attorney's background and references. For example, 15 of the 18 attorneys (83 percent) in our sample were not interviewed prior to being assigned a case. The OADC needs to require completed application forms, conduct interviews with potential hires, review references, license status, and disciplinary history prior to hire, and document the results of interviews and background checks.
- **Improve contracting and performance monitoring processes.** Statutes require the OADC to contract for the provision of attorney services and attorneys must agree to provide services based on the terms established in the contract. Although the Office has executed contracts with most of its current roster of attorneys, some attorneys still do not have contracts. In addition, more than one-third of the contracts we reviewed did not include the Alternate Defense Counsel's signature and/or the execution date which are necessary to document contract approval and the effective date of contractual services. Some contracts also lacked expiration or renewal dates, and appear to remain valid indefinitely. We also found that the Office does not formally document performance appraisals of its attorney contractors. For example, in Fiscal Year 2005 only 13 of 54 attorneys sampled had any type of performance assessment. The OADC needs to execute complete contracts prior to case assignment or payment, consistently assess and document attorneys' performance during the contract period, and notify attorneys of the requirement to comply with monitoring and assessments.
- **Ensure compliance with bill review policies and fully utilize the automated billing system.** We reviewed a sample of 30 bills and found that the Office does not ensure all staff follow the established policies, including the requisite review, approval, and documentation procedures. For example, 5 of the 30 invoices we reviewed that exceeded the maximum amounts allowed were not reviewed and approved by management prior to payment. We also found that few attorneys submit billing documentation electronically although the OADC has established an automated electronic system to do so. Full use of the electronic system could reduce administrative processing time and expedite payments. The Office needs to strengthen its processes by complying with policies requiring documented approval for payments above the maximum allowed, and encouraging attorneys to fully use the electronic billing system.
- **The Commission needs a mechanism for reviewing the performance of the Alternate Defense Counsel (ADC) on an annual basis.** Statute requires the Commission to appoint and discharge the ADC, however, the Commission does not conduct an annual performance

evaluation of the ADC. The last performance evaluation the Commission conducted was in 2001 when it reappointed the incumbent ADC. Annual performance reviews are important for providing timely feedback; documenting expectations and accomplishments; supporting salary changes; and establishing a point of control or accountability for the actions of public officials.

- **The Commission and State Supreme Court should develop fundamental processes to guide Commission operations.** Commissions and boards must comply with Article 18 of Title 24 of the Colorado Revised Statutes which outlines public officials' duties to act impartially and avoid real or perceived conflicts of interest. We found that the ADC Commission does not have a policy requiring its members to disclose conflicts of interest. We also found that the Commission does not have processes to provide meeting notice to the general public or offer a forum for public comment, in compliance with Section 24-6-402, C.R.S. Lastly, it is the duty of the Colorado Supreme Court to fill Commission vacancies and statute requires that the Commission have nine members, six of which must be criminal defense attorneys practicing in Colorado. At the time of our audit, only seven of the nine Commission positions were filled, and the Commission's membership only included four of the required six criminal defense attorneys. Also, Commission vacancies have not been publicly announced. The Commission needs to strengthen accountability for its operations by requiring its members to sign annual conflict of interest statements, posting notice of meetings, and adopting a standard process for public comment. The Colorado Supreme Court should ensure that the composition of the Commission complies with statutory requirements by assigning a liaison to coordinate the filling of vacancies in a timely manner, including announcing vacancies and proposing statutory change, as needed.

Our recommendations and the Office of the Alternate Defense Counsel, Alternate Defense Counsel Commission, and Colorado Supreme Court's responses can be found in the Recommendation Locator on page 5 of this report.

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## RECOMMENDATION LOCATOR

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Rec. No.	Page No.	Recommendation Summary	Agency Addressed	Agency Response	Implementation Date
1	15	Strengthen attorney selection by (a) requiring completed application forms, (b) conducting interviews with potential hires and reviewing references, license status, and disciplinary history prior to hire, and (c) documenting the results of interviews and background checks.	Office of Alternate Defense Counsel	Agree	June 2006
2	17	Improve contracting and performance monitoring by (a) executing complete contracts, including effective or renewal dates, prior to case assignment or payment, (b) consistently assessing and documenting contracted attorneys' performance during the contract period, and (c) notifying attorneys, through a contract provision, of the requirement to comply with performance assessments.	Office of Alternate Defense Counsel	Agree	January 2007
3	19	Strengthen billing and payment processes by (a) complying with policies requiring documented approval for payments above the maximum allowed, (b) determining why attorneys do not use the online system and making changes, as needed, and (c) offering incentives encouraging attorneys to fully use the electronic system.	Office of Alternate Defense Counsel	Agree	February 2006
4	21	Improve processes and accountability by implementing a formal annual performance review of the Alternate Defense Counsel, and determining other areas where oversight can be improved.	Alternate Defense Counsel Commission	Agree	November 2006
5	23	Strengthen accountability for operations by (a) requiring Commissioners to sign annual conflict of interest statements, and (b) posting notice of meetings and implementing a public comment form or link on the Web site.	Alternate Defense Counsel Commission	Agree	July 2006
6	23	Ensure that the composition of the Commission complies with statutory requirements by assigning a liaison to coordinate the filling of vacancies in a timely manner, including announcing vacancies and proposing statutory change, as needed.	Colorado Supreme Court	Agree	August 2006

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# Overview

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## Background

An individual's rights to counsel and due process of law are established in both the United States and Colorado Constitutions. For indigent individuals in Colorado, these rights are upheld by a defense system consisting of the Offices of the State Public Defender (State Public Defender) and Alternate Defense Counsel (OADC or the Office). These two entities provide legal representation, without charge, to indigent defendants requesting counsel. In most cases (more than 85 percent), indigent defendants are represented by the State Public Defender's Office. However, when a conflict of interest precludes the State Public Defender from acting as legal counsel, the court appoints an OADC attorney to represent the defendant.

The General Assembly established the OADC as an agency within the Judicial Department in 1997. Prior to that time, conflict of interest cases were financed through a separate line item in the State Public Defender's budget. By statute, the OADC is to provide indigent persons accused of crimes with legal services that are commensurate with those available to nonindigents. Statute also requires the OADC to operate in accordance with the Colorado Rules of Professional Conduct and American Bar Association standards for representing criminal defendants.

## Conflicts of Interest

For a case to be transferred from the State Public Defender to the OADC, it must have a legal conflict of interest. There are many types of legal conflicts and it is possible for one case to have multiple conflicts. Common types of conflicts include those in which the State Public Defender is representing co-defendants or represents both a witness and a defendant in the same case. According to Section 21-2-103(1.5), C.R.S., State Public Defender case overload, lack of resources, and other similar circumstances do not constitute a conflict. Also, by statute, if the court appoints an OADC attorney and later determines that a case does not have a legal conflict, then the State Public Defender must reimburse the OADC for the cost of representation. According to the OADC, since 1999 the State Public Defender has had to reimburse the OADC for only one case in which it was determined that a conflict did not exist.

## Attorney Appointments

When the court determines that a conflict of interest exists, it sets forth the reason for the conflict in a written order and appoints the Alternate Defense Counsel. By statute, the Alternate Defense Counsel (ADC) is to contract for the provision of attorney services. Terms of the contract are to be negotiated between the ADC, who serves as director of the Office, and the attorneys. In addition, statute requires the Office to establish a list of qualified attorneys for use by the court in making appointments to conflict cases. The court then notifies the contract attorney who is to represent the defendant. In instances in which a defendant has a conflict with the appointed OADC attorney, the case is transferred to an alternate approved attorney. The court also has judicial discretion to appoint a private attorney who is not on the approved OADC list. In July 2005, *People v. Hodges* concluded that “nothing in statutory language requires the attorney appointed as alternate defense counsel to be on the list [of approved attorneys], and existence of such a list is not a prerequisite to the provision of alternate defense counsel representation.” According to OADC staff, the appointment of an attorney who is not on the approved list is not a common practice, and only occurs in about three to four cases per year.

## Organizational Structure

Section 21-2-101(2), C.R.S., directs the Colorado Supreme Court to appoint a nine-member Alternate Defense Counsel Commission (the Commission) to advise the Office. The Commission is to meet at least annually in its capacity as an advisory board to the ADC on matters related to the development and maintenance of competent and cost-effective representation. Statute requires that Commission members serve four-year terms and that each of Colorado’s seven congressional districts must be represented by a Commissioner. In addition, six Commissioners must be practicing criminal defense attorneys in the State and the remaining three members must be non-attorney citizens of Colorado. The Commission is also charged with appointing, and has the ability to discharge for cause, an individual as the ADC. The ADC serves a five-year term and is not subject to term limits.

The OADC’s main office is located in Greeley. In addition, the OADC has an office in Grand Junction to oversee alternate defense counsel attorneys on the Western Slope. Office staff handle duties including selecting and assigning attorneys, executing contracts, examining attorney case assignments to ensure true conflicts exist, reviewing attorney invoices for appropriateness, and approving payments.

## Budget and FTE

As the following table shows, the OADC's budget has increased by 21 percent over the past five fiscal years. During this period, the Office had 3 FTE employees, supplemented by several part-time staff. Beginning in the current Fiscal Year 2006, the Office has been appropriated 5 FTE positions.

<b>The Office of Alternate Defense Counsel Appropriations, Expenditures, and FTE Fiscal Years 2001 Through 2005</b>						
	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>Percent Change 01-05</b>
Appropriations (In Millions)	\$10.7	\$12.0	\$11.7	\$11.9	\$12.9	21%
Expenditures (In Millions)	\$10.7	\$11.3	\$11.6	\$11.9	\$12.9	21%
FTE	3.0	3.0	3.0	3.0	3.0	0%
<b>Source:</b> Colorado Financial Data Warehouse data and Long Bills for Fiscal Years 2001 through 2005.						

The number of attorneys engaged by the Office has decreased over the last several years. In Fiscal Year 2001 the Office had 454 attorneys representing clients in conflict cases. In Fiscal Year 2006 this figure decreased to 324 attorneys. The attorneys are not classified state employees; they are considered independent contractors and are either permanently assigned to courtrooms or temporarily appointed to represent defendants on a case-by-case basis.

The OADC's contract attorneys bill the Office for incurred court costs and expenses (expert witnesses, investigators, paralegals, interpreters). Most of the attorneys bill on an hourly basis for their costs associated with each case. Others are paid a flat, per case fee. The hourly rates, shown in the table below, are established by the Supreme Court and were last adjusted in Fiscal Year 2000.

<b>Office of Alternate Defense Counsel Pay Rates As of January 2006</b>	
<b>Vendor Type</b>	<b>Hourly Rate</b>
<b>Attorney</b>	
Death Penalty Cases	\$65
Type A Felonies (violent crimes)	\$51
Type B Felonies (nonviolent crimes)	\$47
Juvenile, Misdemeanor, & Traffic Criminal Cases	\$45
<b>Investigator</b>	\$33
<b>Expert Witness</b>	Hourly or Flat Rate <sup>1</sup>
<b>Translator/Interpreter</b>	\$25
<b>Paralegal/Legal Assistant</b>	\$20
<b>Travel Time</b>	\$30
<b>Mileage</b>	\$0.28 Per Mile
<b>Source:</b> The Office of Alternate Defense Counsel data and Chief Justice Directive 04-04.	
<sup>1</sup> Expert witness rates vary depending on expert qualifications and case type.	

Attorneys and other vendors who provide legal services represent the single largest percentage of the Office's total expenditures. In Fiscal Year 2005 total attorney and vendor expenditures were about \$12.4 million, or 96 percent of the Office's total expenditures.

## Caseload

In Fiscal Year 2005 the OADC had an active caseload of about 11,100 cases for an average cost per case of about \$1,110. A case is considered to be "active" until the Office receives the final bill from the contracted attorney. The majority of cases during this period—91 percent—were criminal cases. The remaining 9 percent (approximately 1,000 cases) were post-conviction and appellate cases. As the following table shows, the majority of the Office's criminal caseload during the past five fiscal years was felony cases followed by juvenile cases.

<b>Office of Alternate Defense Counsel Active Criminal Caseload by Charge <sup>1</sup> Fiscal Years 2001 Through 2005</b>						
<b>Charge</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>Percent Change</b>
Adult Felonies	4,640	5,000	6,590	7,590	7,790	68%
Adult Misdemeanors <sup>2</sup>	1,090	1,210	960	1,000	1,040	-5%
Juveniles	2,290	1,550	1,640	1,490	1,270	-45%
<b>TOTALS</b>	<b>8,020</b>	<b>7,760</b>	<b>9,190</b>	<b>10,080</b>	<b>10,100</b>	<b>26%</b>

**Source:** The Office of Alternate Defense Counsel data.  
<sup>1</sup> The table does not include post-conviction or appellate proceedings.  
<sup>2</sup> Includes DUI, Traffic, and Adult Probation cases.

Adult felony cases represent an increasing portion of the Office's total criminal caseload, ranging from about 58 percent in Fiscal Year 2001 to about 77 percent in Fiscal Year 2005. In addition, the number of adult felony cases grew by 68 percent during this period while the total number of active criminal cases increased by 26 percent. According to the State Public Defender and OADC staff, many factors have led to this increase in felonies, including changes in Colorado criminal laws and a trend toward prosecuting juveniles as adults.

## Audit Scope and Methodology

This audit reviewed the performance of the Office of Alternate Defense Counsel including a follow-up on the implementation status of seven recommendations made in our prior February 2003 performance audit. The follow-up areas we reviewed included attorney selection and hiring processes, billing and payment practices, and information systems and controls. Additionally, in this audit we evaluated the issue of accountability at both the Commission and ADC levels. As part of our audit work, we reviewed attorney contracts, personnel records, license and disciplinary histories, and billing and payment records. We interviewed the Alternate Defense Counsel Commissioners; and staff from the OADC, the Office of the State Public Defender, the Office of the Child Representative, and the Attorney Regulation Counsel. We also interviewed staff and judges in the Judicial Department. We surveyed other commissions, boards, committees, and states including the Colorado State Public Defender Commission, the Office of the Child Representative Board; the Colorado Attorney Regulation Advisory Committee; and the Massachusetts, Arkansas, and Wisconsin Public Defender Commissions.

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# Alternate Defense Counsel

## Chapter 1

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### Background

In our 2003 performance audit of the Office of Alternate Defense Counsel (OADC or the Office), we found that the Office needed to improve its operations to ensure greater accountability for the quality of attorney representation and for the expenditure of state resources. Specifically, we found weaknesses in the Office's practices for selecting, appointing, and monitoring the attorneys with whom it contracts. We also found that the Office's manual billing and payment practices were unnecessarily labor-intensive and inefficient. Consequently, we recommended that the Office develop processes and controls to strengthen accountability in these areas and to ensure efficient operations and compliance with statutes and regulations.

In our current audit we found that the Office has implemented or has made progress in implementing all of the prior audit recommendations. However, we also identified areas in which additional improvements are needed to strengthen oversight of attorney selection, performance assessment, and billing. Additionally, we identified structural and procedural areas related to the Commission that also should be addressed to ensure greater accountability.

### Attorney Selection

By statute, the OADC is responsible for providing legal services to indigent persons accused of crimes that are commensurate with the legal services available to nonindigent persons. To fulfill this mandate, the OADC must ensure that the attorneys with whom it contracts are licensed and competent. This statutory charge is reinforced by Chief Justice Directives that require the Office to maintain a list of *qualified* attorneys for use by the court in making appointments to conflict cases (emphasis added).

We reviewed a sample of 18 attorneys' personnel records to evaluate the adequacy of the Office's current selection practices. All of the 18 attorneys in our sample had been hired since our prior audit, and all have represented clients within the last two fiscal years. We found that since our last audit, controls over the selection process have improved. Most significantly, we found that the Office has executed contracts with all of the 18 attorneys in our sample. This compares favorably with our 2003

audit when we found that the Office had not entered into any contracts since 1998. Consequently, fewer than one-third of the attorneys working for the Office at that time had a contract.

Despite this improvement, in our current audit we identified several areas in the application and selection process that still require attention. First, we found that the Office does not routinely conduct interviews with applicants prior to hire. Specifically, we found no evidence that 15 of the 18 attorneys (83 percent) in our sample were interviewed by the ADC or other staff prior to being assigned a case. Second, we found that attorneys' qualifications are not reviewed consistently and staff do not check every attorney's background and references. Additionally, staff indicated that when they do verify qualifications and experience, they do not formally document the results. Therefore, there is no written record that the Office has verified the license status, disciplinary history, or employment references of any of the 18 attorneys in our sample. Finally, we found that although the Office requires all applicants to submit applications, it does not ensure the accuracy or completeness of the information provided in the applications. For example, 2 of the 18 applications we reviewed did not include the names of references, which are important for verifying background and qualifications. One form was not signed by the applicant. The applicant's signature is important for attesting to the accuracy of the information contained on the application.

Although the OADC has a small staff, it has a statutory responsibility and duty to defendants to take every measure to ensure quality representation. Management at the Office of the State Public Defender, the District Attorney's Council, and the Office of the Child's Representative told us that they require applications, verify references, and conduct formal interviews for all applicants. We believe the OADC can streamline its application review process and still ensure that a consistent and complete review occurs for all applicants. In cases in which Office staff may have prior knowledge of some applicants, formal interviews could be shortened and focus could be placed on discussing performance expectations. Another way in which the Office can streamline its review of attorney qualifications is to use the Attorney Regulation Council's Web site to verify license status and disciplinary actions. We used this site to search the records of 54 attorneys under contract with the Office in about two hours and estimate that a search of all of the attorneys currently under contract with the Office would take about 12 to 14 hours. A search of this database should become a standard component in the application review and selection process. Computer printouts from the search should be included in personnel files as evidence that the Office made reasonable effort to verify the applicants' qualifications.

Overall, the Office needs to further strengthen its controls over attorney selection and hiring. This should include conducting interviews and discussing expectations; checking references, license status, and disciplinary history; and documenting the results. These controls help ensure the quality of representation.

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## **Recommendation No. 1:**

The Office of Alternate Defense Counsel should strengthen its attorney selection practices by:

- a. Requiring all attorneys to submit a complete and signed application form, and maintaining these forms.
- b. Conducting interviews, by phone or in-person, with all potential hires and discussing expectations, reviewing references, license status, and disciplinary history prior to hire.
- c. Documenting the results of all applicant interviews and background checks.

## **Office of Alternate Defense Counsel Response:**

Agree.

- a. Implementation Date: February 2006. The staff has reviewed each and every application for completeness and signatures, and have made the necessary corrections.
- b. Implementation Date: June 2006. The ADC will begin immediately to comply with these recommendations for new hires.
- c. Implementation Date: June 2006. A standardized method of documentation will be determined by the new director of the agency.

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## **Attorney Contracts**

Statutes require the OADC to contract for the provision of attorney services. In addition, contracts are to specify that services shall be provided subject to Colorado Rules of Professional Conduct and that as a condition of hire, the attorneys agree to provide services based on the terms established in the contract. We reviewed the contracts on file for a sample of 54 of the Office's 324 attorneys. We found that in contrast with the prior audit, the Office has executed contracts with most of its current roster of attorneys. In addition, the Office notifies all attorneys of the statutory requirements for contracts. Although the OADC has made improvements, we found it needs to continue focusing efforts in this area.

First, we found that 2 of the 54 attorneys in our sample did not have a contract. Both of these attorneys were engaged by the Office in 1996, prior to the time of our last audit. In Fiscal Years 2005 and 2006 these two attorneys represented clients in a total of 32 cases, for which they were paid a total of \$38,400. We also found that for the 52 attorneys that did have contracts, 20 (38 percent) were either not signed or not dated by the Alternate Defense Counsel. The signature of the hiring authority, in this case the ADC, and the date the contract was signed are necessary to document contract approval and the effective date of contractual services.

Second, some attorney contracts we reviewed lacked expiration or renewal dates. Fifteen of the fifty-two attorney contracts (29 percent) in our sample did not include an expiration date. Consequently, these contracts would appear to remain valid indefinitely. Valid contracts, in which both parties understand the performance expectations and contractual terms, including the time at which the contract will be reevaluated, reduce the chances for disputes if problems arise. Contract renewals can also provide a means for documenting attorney performance. Therefore, it is important that all contracts have expiration or renewal dates, or dates at which all attorneys' services will be reviewed.

## **Performance Assessments**

In reviewing contracts, we also found that the Office does not formally document performance appraisals of its attorney contractors. For example, only 13 of 54 attorneys in our sample had any type of performance assessment in Fiscal Year 2005. There was no evidence of any attorney performance assessments in Fiscal Years 2003 and 2004. Performance assessments are necessary to support contract renewals and personnel actions. They also provide a means of regular feedback from management, a tool for measuring the Office's goals and objectives, and a means of ensuring the Office is fulfilling its statutory duty to provide adequate and competent counsel.

Unlike most other state agencies, the majority of the OADC staff are under contract and have contract terms spanning two to four years. Although it may not be possible to formally conduct a performance evaluation on each attorney annually, it is essential that the Office monitor and record attorney performance and provide the attorneys with feedback in conjunction with contract reviews. These assessments could include observing attorney behavior in court; obtaining feedback from judges, other attorneys, and prosecutors; evaluating complaints received during the contract period; and reviewing license and disciplinary information as we suggest in Recommendation No. 1. Possibly, the Office could develop a standard form for judges and other court personnel to record their feedback. In addition, we believe it would be helpful for the Office to include a provision in its contracts notifying attorneys that the Office will actively monitor their performance and that as a

condition of employment, all attorneys must cooperate with the assessments and any other performance-related investigations the Office may conduct during the contract period.

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## **Recommendation No. 2:**

The Office of Alternate Defense Counsel should improve contracting and performance monitoring processes by:

- a. Executing complete written contracts, including signatures and effective/renewal dates, prior to the assignment of cases and/or the payment for services.
- b. Implementing a standard process to consistently assess and document all contracted attorneys' performance during the contract period and using this information when renewing contracts.
- c. Including a contract provision notifying all attorneys that the Office will actively monitor performance and that as a condition of employment, all attorneys must comply with the Office's assessments and/or investigations.

## **Office of Alternate Defense Counsel Response:**

Agree.

- a. Implementation Date: February 2006. The staff has reviewed each and every contract for completeness and signatures, and have made the necessary corrections. The ADC will remind all staff to enforce this recommendation. All new contracts will have a two year expiration date.
  - b. Implementation Date: January 2007. The ADC will evaluate each contracting lawyer at the time of his or her contract renewal, documenting that a process was used that considered the standards laid out in the contract. The ADC is working to place all current contractors on a renewal cycle that will add Recommendation 2(c) and this evaluation to the process. Evaluations will begin in January 2007.
  - c. Implementation Date: March 2006. This language will be added to all contracts that are issued or renewed after March 15, 2006.
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## Billing and Payments

Most of the Office's contract attorneys are paid for their services on an hourly basis. Others are paid a flat, per case rate. Regardless of whether payment is based on an hourly or per case rate, the total amount the Office will pay an attorney for each case is capped, based upon the type of case. For example, Class 1 felonies that go to trial are capped at \$15,000. Those that do not go to trial are capped at \$7,500. The maximum allowable payments for Class 1, 2, and 3 misdemeanors are \$1,000 and \$500, with trial and without trial, respectively. Similar to the hourly rates, these maximum allowable per case payments have been established by the Colorado Supreme Court. If invoices exceed the maximum allowed, Colorado Supreme Court rules do allow the Office to pay them. However, according to Office staff, such overages must be approved by either the Alternate Defense Counsel and/or Deputy Alternate Defense Counsel. The approval is also to be documented prior to the payment's being made.

In 2003 we found that the Office relied heavily on inefficient manual practices for processing attorney bills and payments. Since that time, the Office has made marked improvements. The Office has implemented an online billing and payment system which reduces data entry, verifies the use of correct billing rates, ensures the accuracy of payments, and identifies bills that exceed the maximum per case rates. However, we identified two areas in which the Office could further streamline its operations, as described below.

### Billing Exceptions

Alternate Defense Counsel staff review invoices and supporting detail to ensure all charges are accurate and reasonable. When attorneys submit invoices exceeding the maximums allowed or they request higher hourly rates, the Office's billing system flags the invoices. We reviewed a sample of 30 invoices from Fiscal Years 2005 and 2006 and found that staff do not always follow Office policy before making payments. For example, of the 30 invoices we reviewed, 8 exceeded the maximum amounts authorized for the types of cases involved. All eight of these invoices were paid by the Office. However, we found no evidence that management had reviewed and approved five of the eight payments. In total, the payments were approximately \$3,000 over the maximums allowed. In another example, we found no documented approval for one attorney's request for an hourly travel rate increase from \$30 to \$40. The Office paid a total of \$400 in additional travel reimbursement, but there was no documented approval for the rate increase.

Controls, such as formal review and approval, help to ensure payments are in compliance with fiscal policies and reduce the risk for fraud and abuse. The OADC

needs to ensure all staff follow the established policies, including the requisite review, approval, and documentation procedures.

## **Electronic Billing**

According to the Office's Web site, all attorneys must submit bills via the electronic online system. Supporting documentation for each invoice is also required. We found that although attorneys submit invoices online, the Office does not require that supporting documentation be submitted electronically. Rather, attorneys may fax hard copies to the Office. During our review of a sample of 30 invoices, we found that few attorneys submit billing documentation electronically. Specifically, attorneys used the electronic method for only 5 of the 30 bills we reviewed. Consequently, the process is less efficient because staff must review hard copy documentation manually. We estimate that staff currently process an average of 80 bills and payments per day. Full use of the electronic system by attorneys could reduce administrative processing time and expedite payments. The OADC should evaluate the reasons attorneys and vendors do not use the electronic system for documentation purposes and should make improvements to the system, as needed. The Office should also consider incentives that encourage use, such as prioritizing payment to attorneys who file documentation electronically.

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## **Recommendation No. 3:**

The Office of Alternate Defense Counsel should strengthen billing and payment controls and processes by:

- a. Complying with all policies and procedures, including documenting management approval for payment of invoices exceeding the maximum allowable.
- b. Determining why attorneys and vendors do not use the online system, and making improvements, as needed.
- c. Offering incentives to encourage attorneys and vendors to fully utilize the online billing systems.

## **Office of Alternate Defense Counsel Response:**

Agree. Implementation Date: February 2006.

- a. Implemented.

- b. Staff and the ADC will continue to assess the use of and non-use of all aspects of the billing system.
  - c. Staff and the ADC will continue to assess the use of incentives to encourage attorneys and vendors to use the automated billing system.
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## Accountability

When the General Assembly created the Office of Alternate Defense Counsel (OADC) in 1997, it also created a nine-member Alternate Defense Counsel Commission (Commission) to be appointed by the Colorado Supreme Court. The Commission's sole duties are twofold. First, the Commission is to appoint, and discharge for cause, the individual who serves as the Alternate Defense Counsel (ADC). Second, it is to serve as an advisory board to the OADC concerning the development and maintenance of competent and cost-effective representation. The Commission does not have rule-making authority, nor is it involved in the day-to-day operations of the Office. Rather, the Colorado Supreme Court is statutorily charged with establishing rules of procedure to guide the Commission in the conduct of its activities.

The Commission's duty to appoint and discharge the Alternate Defense Counsel is clearly mandated in statute. There is, however, no comparable mandate or policy defining to whom the Alternate Defense Counsel is accountable on a routine, practical basis. That is, there is no established mechanism for providing feedback or comment on the performance of the ADC to the Commission. In addition, the Commission does not conduct an annual performance evaluation of the ADC. We found the Commission has documented its five-year appointment and reappointment activities and decisions; however, it has not adopted a practice of formally evaluating the ADC on an annual basis. The last performance evaluation the Commission conducted was in 2001 when it reappointed the incumbent ADC. Annual performance reviews are important for many reasons, including providing timely feedback; documenting expectations and accomplishments; supporting salary changes; and establishing a point of control or accountability for the actions of public officials.

The Commission should develop processes to strengthen accountability for ADC activities. This should include reviewing the ADC's performance annually, and incorporating feedback from contract attorneys, court personnel, clients, and others in annual reviews. Also, the Commission should identify other areas in which grievances, concerns, and disputes with the Office and the ADC can be addressed. For example, there is no formal grievance or appeals process available to attorneys dissatisfied with the decisions of the ADC regarding assignments, caseload, or

payment disputes, among others. The Commission should work with the ADC and other Judicial Department agencies and personnel, such as the Colorado Supreme Court and the Office of the State Court Administrator, to develop processes to improve accountability.

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### **Recommendation No. 4:**

The Alternate Defense Counsel Commission should improve accountability by implementing a formal annual performance review of the Alternate Defense Counsel. The Commission should also determine other areas where oversight and accountability are not clearly established and develop processes to ensure greater accountability.

#### **Alternate Defense Counsel Commission Response:**

Agree. Implementation Date: November 2006. The Commission will conduct an annual performance review of the ADC which will be of a lesser scope than the 5 year review of the ADC.

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## **Commission Operations**

Similar to many state government boards and commissions, the ADC Commissioners are volunteers, representing various geographical regions of the State, and are statutorily required to convene a minimum number of times each year. Unlike many other boards and commissions, however, the Commission has limited statutory duties and authority, and has not established some fundamental processes to guide its operations. We evaluated the Commission's activities and identified several areas in which structural and procedural clarification and changes would improve operations as follows:

- **Conflict of interest statements.** Commissions and boards must comply with the code of ethics and standards of conduct contained in Article 18 of Title 24 of the Colorado Revised Statutes. These standards outline public officials' duties to act impartially and to avoid real or perceived conflicts of interest. We found that the ADC Commission does not have a policy requiring its members to disclose conflicts of interest. For example, one current Commissioner has served as an expert witness on several OADC cases in Fiscal Year 2005. Although there is nothing prohibiting this practice, it could appear to be inappropriate particularly because the ADC approves payments to expert witnesses and the Commissioners appoint the

ADC. Commissioners should disclose conflicts of interest formally, and disclosures should be documented. Commissioners should also refrain from voting or advising in matters that may concern a conflict of interest.

- **Public feedback.** Section 24-6-402, C.R.S., requires that “all meetings of two or more members of any state public body at which any public business is discussed, or at which any formal action may be taken, be open to the public at all times.” In addition, the statute requires full and timely notice to the public for meetings at which formal action occurs or at which a quorum is in attendance or is expected. We found that although the Commission makes efforts to invite judges, attorneys, and other interested parties to its meetings, it does not provide adequate notice to the general public. One way in which the Commission could accomplish this would be to post meeting information, in advance, on the OADC Web site. In addition, the Commission could make itself more accessible by accepting feedback from the public, contract attorneys, and others. Other states’ public defender commissions, which oversee representation in conflict cases in Massachusetts, Wisconsin, and Arkansas, have standard procedures and forms for public feedback, and allow comments to be submitted via Web links, mail, and/or email. We believe the ADC Commission should establish a similar forum for public comment.
- **Commission composition.** According to statute, it is the duty of the Colorado Supreme Court to fill Commission vacancies. Additionally, statute requires that the Commission have nine members and that six of the nine be criminal defense attorneys currently practicing in Colorado. We have concerns about current practices for filling vacancies. First, at the time of our audit, only seven of the nine Commission positions were filled, and one of these was vacant for more than one year. Second, at the time of our audit, the Commission’s membership did not include the required six criminal defense attorneys. Rather, only four were practicing criminal defense attorneys. Also, Commission vacancies have not been publicly announced. According to Commission members and other representatives from the Judicial Department, it is difficult to find practicing criminal defense attorneys to serve on the Commission. These individuals suggested that as an alternative, criminal defense experience, rather than active practice, might be more reasonable. The Colorado Supreme Court and the Commission should work together to fill vacancies and seek statutory change, as needed. Additionally, responsibility for coordinating this activity has not been clearly assigned. Therefore, the Supreme Court should designate a liaison to the Commission to coordinate the search for new members, including announcing vacancies through various venues, such as legal periodicals, newspapers, the Colorado Bar Association, and the Judicial Department Web site.

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### **Recommendation No. 5:**

The Alternate Defense Counsel Commission should strengthen accountability for its operations by:

- a. Requiring Commission members to sign conflict of interest statements on an annual basis and provide the statements to the full Commission for review.
- b. Improving public accessibility by posting notice of meetings and by adopting a standard process for public comment via the Web site or other means.

### **Alternate Defense Counsel Commission Response:**

Agree. Implementation Date: July 2006.

- a. The Commission will incorporate this procedure into its rules.
- b. The Commission will post meeting dates and locations on the OADC Web site. The Commission also agrees to provide a location on the Web site for public comments and complaints.

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### **Recommendation No. 6:**

The Colorado Supreme Court should ensure that the composition of the Alternate Defense Counsel Commission complies with statutory requirements by assigning a liaison to coordinate the filling of vacancies in a timely manner, including announcing vacancies and proposing statutory change, as needed.

### **Colorado Supreme Court Response:**

Agree. Implementation Date: August 2006. The Chief Justice has appointed two new members, satisfying the statutory requirements and filling the vacancies on the Commission. In addition, she has appointed Justice Alex J. Martinez as the liaison, although this assignment may be shifted to an appropriate person in the Office of the State Court Administrator in the future. Thus, the Court has already partially implemented the recommendations. The Court intends to announce future vacancies, the next of which is not expected until August 2006, through our Web site and with the Colorado Bar Association. Further, we will work through our Administrator with the Commission to seek the recommended statutory changes.

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