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Bright Spots in Public Defense: The Colorado Office of the Alternate Defense Counsel: Supporting Indigent Defense Through a Statewide Conflict Counsel System

By Kevin Bishop, Darren Cantor, Stacie Colling, Lindy Frolich, and Jonathan Rosen

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Editor’s Note: From time to time, The Champion magazine will shine a light on public defender offices that employ innovative practices designed to provide clients with the best representation possible. “Bright Spots in Public Defense” will feature offices that cultivate an atmosphere in which advocates can learn and grow.

I. Introduction

Each state has its own system of providing counsel for indigent defendants. Colorado’s indigent criminal and juvenile defense system is bolstered by two important facts. First, Colorado is fortunate to have a state legislature that recognizes the importance of competent criminal and juvenile defense representation for indigent clients, and takes funding for indigent defense seriously. Like virtually every system in the country, Colorado’s indigent defense system still suffers from an inability to pay defense attorneys market rate fees. However, Colorado’s system is better funded than most. Second, Colorado has both a state-administered public defender’s office and a statewide conflict counsel office. In 2013, approximately half of U.S. states had statewide public defender systems.¹ Far fewer have a statewide system to provide counsel to indigent defendants when the public defender’s office declares a conflict of interest. Colorado’s statewide systems allow for easier assignment of experienced criminal and juvenile defense attorneys in even the most rural and remote communities. This system also ensures equal access to resources and support.

This article describes the history, function and evolution of Colorado’s statewide conflict counsel agency, the Colorado Office of the Alternate Defense Counsel (OADC).

II. Prehistory

Prior to the creation of the OADC, when the public defender’s office declared a conflict of interest, the local trial court appointed conflict counsel to the case. The appointed lawyers then submitted their bills for approval and payment to the individual trial courts that made the appointment. The result was a system that allowed judges to appoint friends or acquaintances who were not necessarily qualified, or worse yet, appoint lawyers who would work to appease the court rather than fight for their clients, in order to receive more appointments. Requests for adjunct services such as investigators, experts, and transcripts were also submitted for approval to the court. This sometimes resulted in the disclosure of confidential information about the case to the presiding judge. Further, the trial court, not counsel, determined what services were necessary through the “power of the purse.” The denial of requested services could result in a defense team having to change its strategy or abandon a defense entirely due to a lack of resources. This often limited an attorney’s ability to mount an effective and zealous defense.

III. The Creation Age

Recognizing the problems inherent in judicial control over defense appointments, the Colorado General Assembly established the OADC in 1996. The agency was created to serve “clients independently of any political considerations or private interests, 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.”² The OADC was structured as a small administrative office, tasked with providing services to indigent defendants and juveniles through independent contractors paid on an hourly basis. This structure was designed to avoid the potential conflicts of interest that can occur when multiple attorneys are employees of the same law firm or public defender office.³

Brian Shaha, the OADC’s first director, opened the agency’s doors on Jan. 1, 1997. He traveled across the state to meet with lawyers, judges, clerks, and others, and created a roster of lawyers in each of Colorado’s 22 judicial districts qualified to represent individuals charged with crimes. From 1997 until his retirement in 2006, Mr. Shaha grew the OADC into a well-organized, statewide indigent defense system.

IV. The Present Age: OADC 2.0

The OADC continues to expand resources and support for its independent contractors across the state. Today, OADC’s 13 employees provide administrative oversight and support to over 700 independent contract attorneys, investigators, paralegals, researchers, and social workers in over 20,000 criminal and juvenile cases throughout Colorado.

The OADC recognized that increased centralized resources, easily accessible by the vast number of geographically diverse contractors, create greater effectiveness for its contractors and better results for the clients. Increased efficiencies also reduce costs for the State. The OADC’s budget is presently calculated by multiplying an average cost per case by the number of cases for which it is appointed each fiscal year. Therefore, when the agency increases efficiency it not only more effectively serves its clients, but it also lowers the cost per case, saving the state money.

From in-house coordination of appellate and post-conviction cases, to a robust *eLibrary*, to a cohesive juvenile division and social worker program, the OADC is now a central point for ensuring that indigent clients across the state receive effective assistance of counsel at all stages of their proceedings. The OADC has worked hard over the years to increase efficiency through a variety of programs, pilot projects, and initiatives. The agency has made it easier for contractors to access information and request assistance directly through online resources. It has also hired employees to focus on specific areas of law and practice that are more efficiently handled in-house.

1. Increasing Access to Information and Assistance

a. Administrative Specialist

As the agency expanded, it became clear that the OADC needed an administrative specialist to organize the increasing flow of information and maintain effective communication with the contractors. The administrative specialist has redesigned the OADC website, which now has both a public and private (contractor login) side. On the public side, people can access information such as general information about the agency, its budget, and its statutory authorization. On the private side, contractors have access to the *eLibrary* and information on agency procedures such as how to initiate the appellate process, how to obtain an interpreter for out-of-court needs, and how to obtain transcripts. In addition, there are fillable forms to request the services needed to effectively represent clients.

b. Expert Database

The OADC recently created an expert database that holds contact information for experts willing to work at the reduced rates the OADC can pay, details about their expertise, their *curricula vitae*, and other relevant information. The database remains a work in progress and is constantly reassessed for its usefulness.

A contractor rating system will be implemented as more information is collected and added. Contractors that use an expert are asked to answer a few simple questions about their experience working with that expert and to assign a numerical rating to each question. The software averages the attorney ratings into one overall score. This feedback is available to the contractors so they can better determine which experts to use based on how they stand up to cross-examination, their timeliness, and other related areas. The contractor can then use the database to contact an expert, discuss a pending case, and determine if the expert has the time and expertise to take on the case.

Once the attorney selects an expert and determines how many hours the expert needs to assist on the case, the attorney can make a well-informed and detailed request for funds from the OADC. Contractors no longer need to contact the OADC deputy director, explain the case and expert needs, discuss potential relevant experts, discuss the rate the agency can pay, and obtain contact information before contacting an expert. Instead, contractors can easily select an expert pre-approved to work on OADC cases at a specific rate. This increases efficiency in the expert approval process and avoids the inherent delay in obtaining approval of an expert not already in the database.

c. Coordinator of Legal Resources and Technology (CoLRaT)

A majority of OADC attorney contractors work in solo or small law firms and thus do not have access to resources typically available in larger practices. Most contracting attorneys do not have paralegals, social workers, or investigators on staff. However, effective and efficient representation requires a team-oriented model for delivery of services that allows delegation of tasks to people working at the lowest possible price point, while maintaining the

quality of representation. Recognizing this gap in needed versus available resources, the OADC worked to become an on-demand resource clearinghouse for its contracting attorneys.

The OADC contracts directly with a range of service providers such as paralegals, investigators, social workers, legal researchers, and student interns. The attorney can go to an online system and request authorization for assistance by a contracting service provider. If the request is approved, funds are allocated so the service provider can submit requests for payment directly to the OADC. This means the attorney gets help and the OADC pays the bills.

This system reduces the attorney hours spent on tasks that can be performed, sometimes better, by specialists such as paralegals or social workers. It also allows the attorney to spend more time focusing on the client. Additionally, this business model long enjoyed by large law firms reduces the overall cost of the case as attorneys have the highest hourly rate. As a result, OADC clients get better results, the attorneys enjoy the benefits of assistance with zero overhead, and the State saves money.

Information is power. Duplication of effort is inefficient. These simple maxims drove the OADC to create centralized information resources available to all contractors, no matter where they are located within the 104,185 square miles of Colorado.

The OADC created an online repository of information, the *eLibrary*, to hold briefs, motions, research memoranda, recent opinions, case summaries, and best practices manuals specific to topics frequently reappearing in criminal cases (e.g., self-defense claims). The *eLibrary* even has a separate wing dedicated to social sciences information useful in criminal practice and another wing dedicated to information specific to representing juveniles. If contractors need information that is not in the *eLibrary*, they can contact the coordinator of legal resources and technology (CoLRaT) specialist to either create the document or arrange for a legal researcher or intern to create the document. And best yet, the document (minus any identifying information) is then placed in the *eLibrary* so the next attorney who faces that issue — wherever he or she is located — will have access to the information.

Each Friday, the CoLRaT sends all contractors an email with a summary of all relevant criminal cases issued that week from the Colorado Supreme Court, the Colorado Court of Appeals (published and unpublished), the Tenth Circuit, and U.S. Supreme Court. The summaries also include legislative changes, practice tips, current trends in the law, and even some music to enjoy while they read. Each week the summary is turned into a podcast so contractors who frequently spend long hours in their cars traveling to various jurisdictions can listen as they drive.

Resources are particularly difficult to come by in Colorado's many small, rural jurisdictions. By centralizing resources and integrating technology solutions, the OADC has increased access to resources for practitioners in these traditionally underserved areas. For example, the agency has a virtual meeting service account that allows contracting attorneys to set up virtual meetings with anyone, anywhere, anytime. Thus, an attorney in an outlying jurisdiction appointed to a complex organized crime case for the first time can set up a virtual brainstorming session, for free, with an attorney in another jurisdiction who has experience with these cases. Further, upon request, the OADC can arrange for paralegal, investigator, expert, or other support services for an attorney in an area without these local resources.

2. In-House Tasks

To further increase efficiency and help contractors better serve their clients, the OADC added team members specializing in individual areas of defense law and practice. The agency has added an appellate and post-conviction case coordinator, a training coordinator, a juvenile defense coordinator, and a social worker coordinator.

a. Appellate and Post-Conviction Case Coordinator

The OADC employs a full-time paralegal who manages the assignment of counsel, obtains the appropriate record, and generally troubleshoots procedural problems on all appellate and post-conviction matters. These cases are document-intensive and procedurally complex. By having a single, highly-qualified employee in-house to handle these tasks, the agency has reduced the risk of late filings, freed the attorneys from the monotonous and tedious aspects of perfecting appeals, and saved substantial money.

Over time, the OADC realized that trial counsel, who was traditionally responsible for filing the documents necessary to perfect an appeal, was often not particularly adept at this task. It also became clear that a majority of post-conviction ineffective assistance of counsel claims were handled by OADC contractors. The agency recognized that one well-qualified person could more effectively and efficiently manage the tasks associated with perfecting the initial stages of each appeal and coordinate the glut of post-conviction cases. In 2008, the agency received funding for a full-time appellate and post-conviction case coordinator position. For 10 years, this position has been held by a paralegal with significant training in these two areas of the law.

The paralegal developed an Appellate Transmittal Sheet, based on the form created and used by the Office of the State Public Defender. The form explains to the trial lawyer exactly what materials the OADC needs, when the materials need to be provided, and to whom the materials should be provided. The trial attorney simply follows the instructions and the OADC paralegal files the appeal. Once the record is certified by the appellate court, the paralegal assigns a contractor to enter on the case and litigate the appeal. By delaying assignment of an appellate attorney until the record is prepared, it is more likely that the attorney taking the case will be able to meet the court's deadline for filing the opening brief.

Colorado law requires a defendant to file an initial petition for post-conviction review. If, after reviewing the petition, the court determines relief could be obtained if the claims are proven, the court forwards the petition to the Office of the State Public Defender. If the public defender's office declares a

conflict of interest, the case is assigned to the OADC. Once received by the OADC, the appellate and post-conviction case coordinator obtains an electronic copy of the court file, which is bookmarked and forwarded to a post-conviction expert who reviews it and creates a triage memorandum. This memorandum describes the procedural history of the case, the factual background, and the issues raised in the petition. The paralegal and the director use the memorandum to select a contractor well suited to handle the case. This process ensures that counsel, once assigned the case, is ready to begin representing the client, significantly reducing the amount of time spent on the early part of the process and getting the indigent and usually incarcerated client an attorney and into court much more quickly.

b. Training and Evaluation Coordinator

As the agency's ranks of independent contractors grew, the need to centralize and improve the training and evaluation of OADC contractors became clear. In 2008, the OADC received funding for a part-time training coordinator, who was also primarily responsible for evaluating OADC contract attorneys and investigators. This allowed the agency to formalize an evaluation process. Previously, without such a process, the OADC lacked a mechanism to determine whether to renew a contract, to respond to complaints from clients, and to respond to the legislature as to the process of becoming or remaining an OADC contractor. In 2009, this became a full-time position.

That same year, the agency began offering an intensive, annual trial advocacy training based on the National Criminal Defense College's model. Initially, the training was available only to OADC contractors, but over the years it has expanded to include any defense attorney wishing to hone and broaden his or her advocacy skills. Recently, this training has incorporated tracks specializing in juvenile defense and post-conviction advocacy, as well as a track devoted to practitioners who represent parents in child welfare cases who are in danger of losing custody or parental rights of their children.

The OADC offers many other trainings throughout the year on a broad array of topics, from specific practice areas such as defending sex assault or racketeering cases, to general areas such as improving legal writing and improving client communication skills. In addition, the agency strives to keep contractors up to date on changes in criminal defense law and practice through specific, targeted trainings. For example, with the advent of mandatory electronic discovery in Colorado, the OADC has offered trainings on the use of Adobe Acrobat to help attorneys, paralegals, and other support staff prepare for trial in a paperless world. Further, each year the CoLRaT travels around the state with a presentation of that year's significant cases affecting criminal defense.

The training and evaluation coordinator is also primarily responsible for evaluating contract attorneys and investigators. Through a formalized process, the training and evaluation coordinator conducts in-court observations of approximately one-third of OADC's attorney contractors annually. The observations are recorded on a form developed in-house to facilitate feedback to the attorney and communicate information to the director and deputy director necessary for informed contract renewal decisions. The OADC also solicits feedback on attorney contractors from local judicial officers. Given the nature of criminal defense practice and defense counsel's close interaction with the court, this information can be informative as to an attorney's timeliness, interaction with clients and court staff, and general professionalism. As the end of his or her contract approaches, each contractor meets with a member of the OADC virtually, by telephone or in person. The OADC makes a renewal decision based on the interview, court observations, judicial feedback, and any other relevant information. The training and evaluation coordinator also reviews each contract investigator prior to any contract renewal.

c. Juvenile Defense Coordinator

As the legal community's understanding of adolescent development and brain science has evolved, so has the practice of defending juveniles in delinquency and criminal courts. The OADC adapted to this changing landscape by evaluating and changing the way it delivers juvenile defense services.

Recognizing the needs of juvenile clients, in 2014 the OADC added a full-time juvenile defense coordinator position. The juvenile defense coordinator makes sure that a qualified juvenile defender is available on very short notice at each juvenile detention hearing (the initial appearance after arrest) when the public defender declares a conflict of interest. Also, the juvenile defense coordinator acts as a central hub to gather information about local and statewide issues facing OADC juvenile defenders, as well as resource and training needs.

The OADC created a Juvenile Division to ensure that juveniles receive quality representation by attorneys specializing in defending juveniles. Any attorney wishing to represent juveniles for the OADC must apply separately to the Juvenile Division, and the juvenile defense coordinator then provides lists of contractors eligible for juvenile appointments to each Colorado judicial district. Training and resources are also coordinated and provided to ensure ongoing effective and efficient representation.

With the guidance and assistance of national experts in juvenile defense, the OADC traveled throughout Colorado to conduct interviews for the Juvenile Division. The OADC designed the application and interview process to identify talented and knowledgeable defense attorneys who also had specialized juvenile defense abilities. To this end, the agency looked for attorneys with strong litigation skills, both in the courtroom and through written pleadings; a thorough understanding of criminal and juvenile law and procedure; an ability to critically analyze ethical dilemmas per the Rules of Professional Responsibility; the ability to effectively communicate with adolescent clients; and a passion for defending the rights of juveniles. At the end of this process, the OADC identified a core group of specialized juvenile defenders who signed contract addendums to their general OADC contracts, specific to the role and duties of a juvenile defense attorney.

The OADC emphasizes the importance of appointing only those on the Juvenile Division lists to juvenile cases. When this is not possible, to avoid having a case handled by a local attorney who is not a juvenile defender, a juvenile defender in another jurisdiction will take the case. At times, a juvenile defender will drive two or more hours to make sure a juvenile in a remote or rural area is represented by a specialized juvenile defender. Juvenile Division contractors, like all OADC contractors, undergo a regular contract renewal process.

Ongoing juvenile-specific training for the Juvenile Division is essential to maintaining its quality, and the OADC must be strategic and creative to provide quality training to attorneys across the state. For example, OADC annually co-sponsors a two-day, multitrack Excellence in Juvenile Defense Conference in Denver. In addition, it provides several trainings per year outside of the Denver metropolitan area to accommodate attorneys who would otherwise drive several hundred miles to get to Denver. Further, the juvenile defense coordinator strives to keep the Juvenile Division apprised of relevant in-person and web-based local and national trainings and conferences. Leveraging outside training by other agencies and organizations vastly increases the capacity of the OADC to provide its own training.

The OADC recognizes holistic juvenile defense as a best practice, and aims to provide it in every case. For OADC juvenile defenders, the juvenile defense coordinator acts as central dispatch to connect defense teams to resources such as:

- juvenile appellate specialists for general consultation, assistance with complex litigation, and petitions for review of a magistrate's decision or appeal;
- OADC contractors who are subject matter specialists and experts in areas like competency and juvenile sex offense cases;
- education advocates to gather and analyze education records and communicate with schools, for use in litigation, negotiation and identifying and securing appropriate services;
- immigration experts for consultation and advice (as available to all OADC contractors in all cases);
- social workers to develop social history information, identify areas of concern, assist with matching services to a client's needs, and establish trust through regular, supportive, developmentally appropriate interaction;
- investigators who specialize in juvenile defense cases;
- paralegals, case assistants, interns, and researchers to help with organization, research, and other attorney requests; and
- the juvenile and social sciences sections of the *eLibrary*, as well as weekly case summaries maintained by the CoLRaT.

d. Social Worker Coordinator

Public criminal defense agencies across the country have found it beneficial to clients to engage social workers in providing a cost-effective, multidisciplinary approach to representation. In 2013, the OADC initiated a social worker pilot program, integrating two social work interns into defense teams working on cases in which a juvenile was facing a sentence of life without parole. After graduation, the two original interns continued working on OADC cases as independent contractors, and the agency has since gradually contracted with additional social workers. The OADC contracts with 28 forensic social workers and two licensed professional counselors (LPC) who act as consultants and sentencing advocates.

As the number of social work and sentencing advocate contractors has grown, so has the scope of their representation. Social workers and sentencing advocates began joining teams with juvenile clients facing adult charges, and the OADC continues to prioritize assigning social work resources to juvenile cases. However, in 2015 social workers and sentencing advocates expanded the scope of their work to cases for adult clients charged with capital crimes and felonies. In response to growing interest in incorporating social work resources into defense teams as well as an increasing number of social worker and licensed professional counselor contractors, in 2016 the OADC hired a full-time social worker coordinator. This licensed clinical social worker has extensive experience working with defense teams on juvenile, adult, and capital cases.

The social worker coordinator provides training and supervision to OADC social worker and LPC contractors, clearly defining their roles and responsibilities and assisting with their integration into defense teams. In addition, the social worker coordinator has formalized internship offerings through the state's accredited masters level social work programs. The social worker coordinator has made great strides in formalizing the program around the OADC's mission to defend clients through a multidisciplinary approach involving social work and sentencing advocacy. The availability of a full-time staff member to coordinate these services has given the program the opportunity to grow in a strategic and efficient manner, and to increase the scope and availability of its services for clients. The OADC is invested in offering support to clients and attorneys in outlying and rural jurisdictions, and the social work program is no exception. Before the social worker coordinator came on board, most contractors were located in the Denver Metro area. But now there is an effort to contract with social workers who live in the communities they serve, particularly in the rural and mountainous regions of the state.

V. The Future

The OADC continues to assess its model of providing indigent defense services and look for ways to improve. The Access to Justice Initiative, confidential video communication with inmates, and coordination of Colorado municipal defense appointments are just a few things in the development

a. Access to Justice Initiative: Addressing the Need for Qualified Attorneys in Underserved Locations

The OADC has struggled with a chronic shortage of qualified attorneys in rural and remote areas of Colorado. This is particularly problematic in the southeastern quadrant of the state, where there are thousands of indigent persons and only one or two OADC attorneys. To begin solving this problem, the OADC is partnering with the University of Denver, Sturm College of Law (DU) to create an Access to Justice Initiative that would provide a rural public interest fellowship. Through this partnership, the OADC will place fellows who want to become part of that community in a rural area. The agency will provide a stream of criminal cases and mentorship to assist the fellows in developing successful practices. The goal is to permanently increase the number of qualified attorneys willing to contract with the OADC in these underserved communities.

b. Confidential Video Communication with State Prison Inmates

After many years of discussion and advocacy, OADC is hopeful that attorneys will soon be able to have confidential, two-way video communication with inmate clients at one Colorado Department of Corrections facility. While video communication should never completely replace in-person visits between an attorney and client, driving to a facility is not always necessary. Almost all Department of Corrections facilities in Colorado are two or more hours away from the Denver metropolitan area, so even a one-hour visit between a client and Denver-based attorney results in at least five hours of billable time. If this can be avoided when, for example, an attorney needs to check in with the client and inform him or her of the status of a motion or brief, it saves the attorney several hours of time that could be spent on another case, and saves the agency resources that could be allocated elsewhere. A video meeting is more personal than a phone call, which may not be private on the client's end, and allows the attorney to answer the client's questions immediately, unlike written communication.

c. Municipal Court Coordination

Much like state courts prior to the establishment of the OADC, defense attorneys in Colorado's municipal courts are largely appointed by the court. The state legislature passed a bill in 2018 allowing the OADC to evaluate and provide lists of attorneys eligible for appointment in municipal courts that elect to participate in this process. This is an important step toward providing municipal court defenders with the independence afforded in the state courts. The OADC has begun implementing this legislation through a full-time municipal court coordinator.

Conclusion

The OADC was born from the need for an independent agency, rather than the courts, to oversee the appointment and payment of conflict counsel. In the 22 years since its inception, the OADC has expanded its role far beyond the simple identification of available defense counsel for indigent defendants and juveniles.

In today's world, a criminal defendant or juvenile charged with a crime needs more than just a lawyer; he or she needs a lawyer specialized in criminal or juvenile defense who is supported by sufficient resources. A good criminal or juvenile defense attorney may need the assistance of an investigator, social worker, paralegal, research assistant, case assistant, or intern. He or she may need to consult with an experienced trial attorney in a specific area of practice, an appellate attorney, or an expert. These resources free up the lawyer to focus on the aspects of representation in which he or she excels. Further, the attorney needs relevant, timely and accessible training, as well as regular updates regarding changes in law and practice. Coordinating, connecting and providing all of these resources from one central hub provides more effective representation throughout a geographically diverse and expansive state while increasing efficiencies that create cost-saving for the state.

Notes

1. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *State-Administered Indigent Defense Systems, 2013*, at <https://www.bjs.gov/content/pub/pdf/saids13.pdf>. In this context, the term "state-administered public defense system" refers to a system which either is completely funded and administered by the state, or is funded by the state and county, but administered by the state. As of 2013, the following jurisdictions had such a system: Alaska, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.
2. C.R.S. §21-2-101.
3. See Colorado RPC 1.10.

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