

**Challenges of
Implementing Fair
Defense Act
Requirements & Indigent
Defense Grant
Opportunities**

**Effective Post-Arrest and Indigent
Defense Practices
Longview, TX**

August 10, 2018

**Scott Ehlers, Special Counsel
Texas Indigent Defense Commission**



Who We Are

Thirteen-member governing board administratively attached to the Office of Court Administration. Geoff Burkhart is the Executive Director. The Commission has eleven full-time staff.

OFFICERS:

Honorable Sharon Keller Chair – Presiding Judge,
Court of Criminal Appeals

EX OFFICIO MEMBERS:

Honorable Sharon Keller Austin, Presiding Judge, Court of Criminal Appeals
Honorable Nathan Hecht Austin, Chief Justice, Supreme Court of Texas
Honorable John Whitmire Houston, State Senator
Honorable Brandon Creighton Conroe, State Senator
Honorable Joseph “Joe” Moody El Paso, State Representative
Honorable Andrew Murr Junction, State Representative
Honorable Sherry Radack Houston, Chief Justice, First Court of Appeals
Honorable Vivian Torres Rio Medina, Judge, Medina County Court at Law

MEMBERS APPOINTED BY GOVERNOR:

Mr. Alex Bunin Houston, Chief Public Defender, Harris County
Public Defender’s Office
Honorable Jon Burrows Temple, Bell County Judge
Honorable Richard Evans Bandera, Bandera County Judge
Mr. Don Hase Arlington, Attorney, Ball & Hase
Honorable Missy Medary Corpus Christi, Presiding Judge,
5th Administrative Judicial Region of Texas

What We Do

Our Purpose

Is to provide financial and technical support to counties to develop and maintain quality, cost-effective indigent defense systems that meet the needs of local communities and the requirements of the Constitution and state law.

Our Grant Program

In FY 2017 \$38.3 million was disbursed to Texas counties. *Formula grant* awards totaled over \$31.7 million to all 254 counties. *Discretionary grants* totaled just under \$6.6 million.

Our Fiscal and Policy Monitoring Program

The Commission monitors each county that receives a grant to ensure state money is being properly spent and accounted for and to enforce compliance by the county with the conditions of the grant, as well as with state and local rules and regulations.

Our Innocence Program

Since 2005, the Commission has provided up to \$100,000 annually to University of Texas School of Law, the Texas Tech University School of Law, the Thurgood Marshall School of Law at Texas Southern University, and the University of Houston Law Center to operate innocence clinics. This funding has contributed towards 11 exonerations. In 2015 the 84th Legislature expanded funding to include \$100,000 per year for two new public law schools at the University of North Texas Dallas College of Law and the Texas A&M University School of Law in Fort Worth.

The Fair Defense Act of 2001

Local Reporting Requirements:

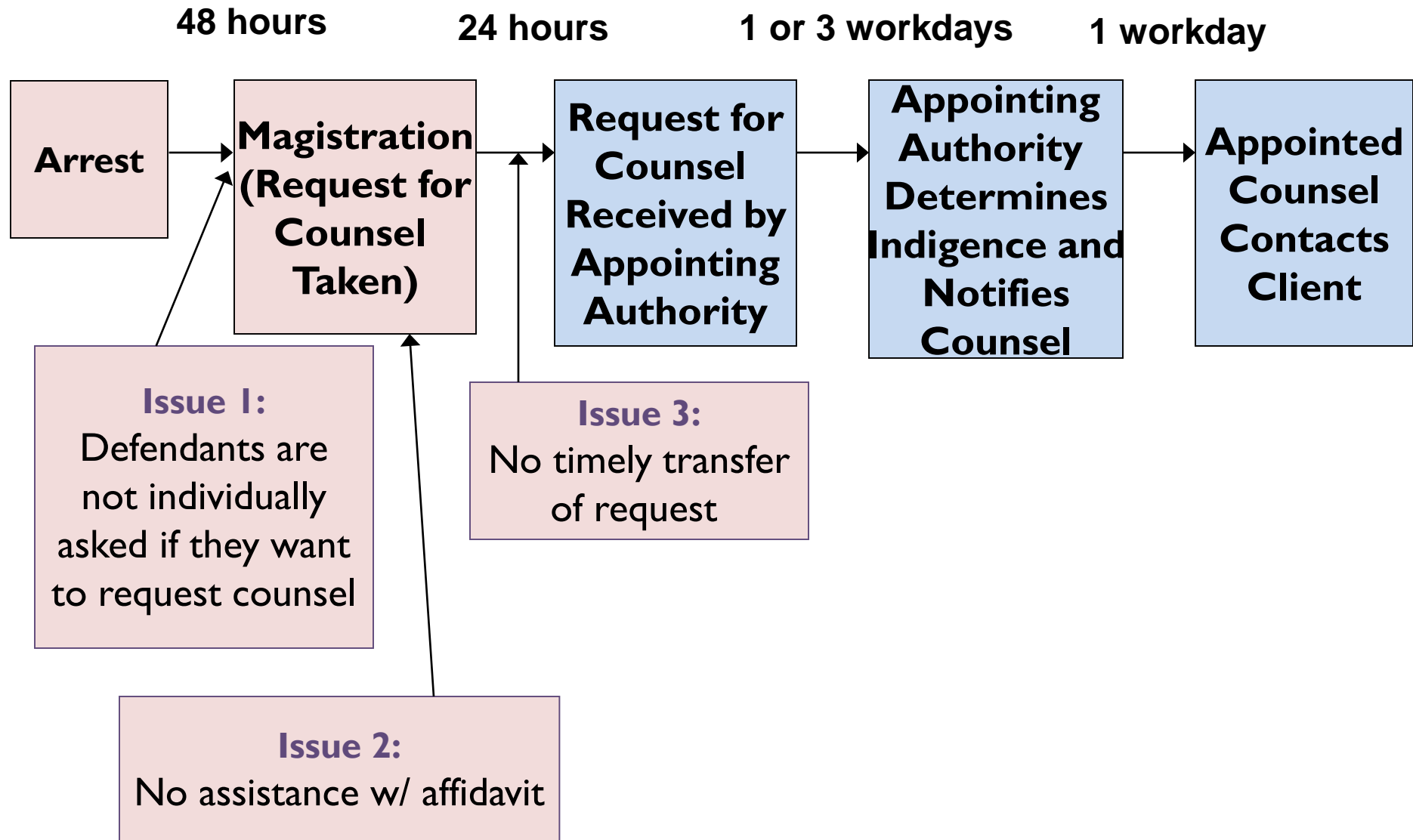
- Indigent Defense Plan (judiciary)
- Indigent Defense Expenditures and **Attorney Case Count (auditor/treasurer)**
- **Practice Time Figures (criminal defense attorneys)**

Created Mechanism for (partial) state funding through grants

The Fair Defense Act of 2001

Core Requirements:

- Prompt and accurate magistration hearings
- Develop a Standard of Indigence and Process to Determine Eligibility
- Minimum Attorney Qualifications
- Timely Appointment of Counsel
- Fair, neutral, and non-discriminatory attorney selection process
- Standard attorney fee schedule and payment process



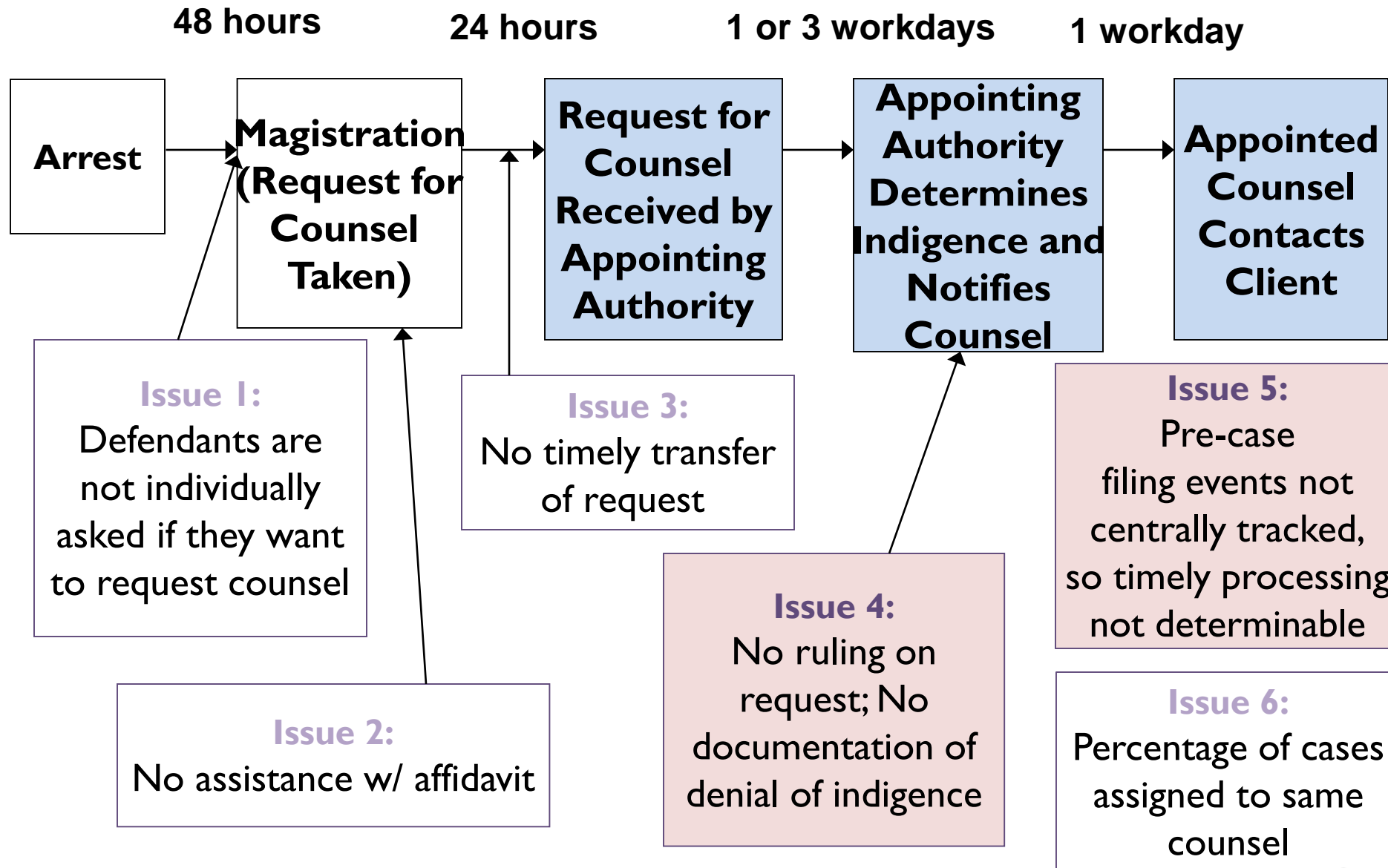
PROMPT AND ACCURATE MAGISTRATION PROCEEDINGS

Texas Code Crim. Proc. Article 15.17

- Hearing within 48 hours of arrest
- Must inform arrestee of right to request appointed counsel and whether person wants to request counsel
- Record must be made, incl. whether person requested appointment of counsel.
- Magistrate must ensure reasonable assistance
- Must transmit forms to appointing authority within 24 hours of request (unless authorized to appoint counsel)

RATES FOR REQUESTING COUNSEL AT JUSTICE OF THE PEACE ART. 15.17 HEARINGS

FY 2017	Misd. Requests / Warnings		Felony Requests / Warnings	
Bailey County	58 / 141	41%	50 / 90	56%
Cochran County	23 / 59	39%	22 / 62	35%
Garza County	78 / 301	26%	85 / 225	38%
Hockley County	90 / 254	35%	100 / 244	41%
Hale County	75 / 368	20%	157 / 399	39%
Parmer County	71 / 193	37%	26 / 74	35%
Swisher County	18 / 55	33%	12 / 29	41%



PROCESS QUESTIONS

- What if you, a magistrate, are too busy to assist defendants complete affidavits of indigence? What duty do you have to provide assistance in completing forms?
- What if a person with charges from another county [arrested on a warrant] is brought before you? Do you have a duty to ask the person whether he/she would like to request counsel? Where would you send a request for counsel?

STANDARD OF INDIGENCE

Texas Code Crim. Proc. Article 1.051(b)

“Indigent” means “person who is not financially able to employ counsel.”

Texas Code Crim. Proc. Article 26.04 (Adults)

- Procedures must include financial standards
- Court may consider income, assets, and expenses of defendant (and defendant’s spouse). (m)
- Court may not consider bail or ability to post bail, “except to the extent that it measures the defendant’s financial circumstances”. (m)

LOCAL STANDARDS OF INDIGENCE

- Income Less than 150% of FPG: Upshur
- Income Less than 125% of FPG: Bell, Brazos, Camp, Harrison, Marion, Morris, Navarro, Panola, Rusk, Sabine, Smith, Titus, Tyler
- Income Less than 100% of FPG: Anderson, Cass, Cherokee, Gregg, Van Zandt

Household Size	100% FPG	125% FPG	150% FPG
1	\$12,060	\$15,075	\$18,090
2	\$16,240	\$20,300	\$24,360
3	\$20,420	\$25,525	\$30,630
4	\$24,600	\$30,750	\$36,900
5	\$28,780	\$35,975	\$43,170
6	\$32,960	\$41,200	\$49,440

TIMELY APPOINTMENT OF COUNSEL OR DENIAL OF INDIGENCE

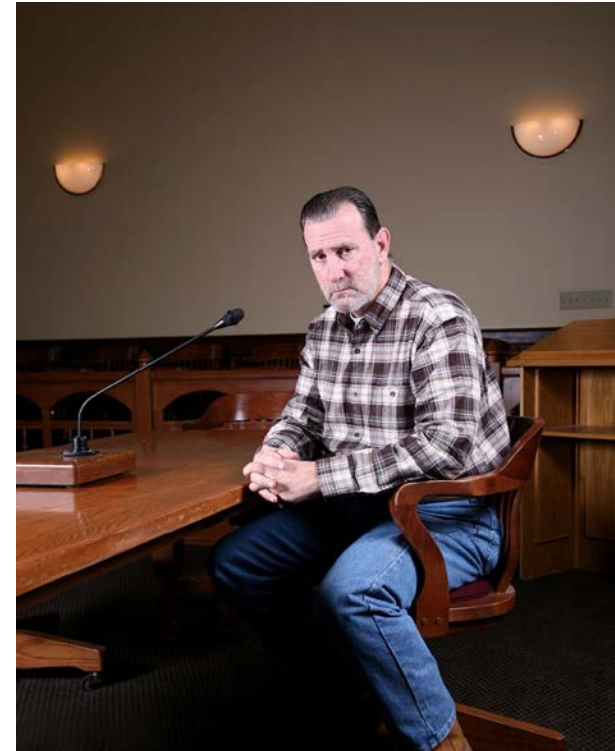
Texas Code Crim. Proc. Article 1.05 I

- Must appoint counsel /deny indigence within 1 or 3 working days of request for counsel (counties over 250,000 population = 1 day; under 250,000 = 3 days)
- If defendant is released from custody before appointment of counsel, then appointment not required until defendant's first court appearance "or when adversarial judicial proceedings are initiated, whichever comes first." CCP 1.05 I (j)

TIMELY APPOINTMENT OF BONDED DEFENDANTS

Rothgery v. Gillespie County, 554 US 191 (2008).

A criminal defendant's initial appearance before a magistrate judge, where he learns the charge against him and his liberty is subject to restriction, marks the initiation of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.



Gillespie Co. refused to appoint Walter Rothgery an attorney until after indictment. He sued the county for violating his 6th Amendment right to counsel.

HOW DOES TIDC MEASURE “PROMPT APPOINTMENT OF COUNSEL?”

“A county is presumed to be in substantial compliance with prompt appointment of counsel if, in each level of proceedings (felony, misdemeanor, and juvenile cases), at least 90% of indigence determinations in the policy monitor’s sample are timely.”

Sec. 174.28(c)(4)(B), Tex. Admin. Code



WAIVERS OF COUNSEL (CCP ART. 1.051(f)-(f-2))

- All waivers of right to counsel: Art. 1.051(f)
 - Must be in writing
 - Must be voluntarily and intelligently made
 - Waivers that violate Art. 1.051(f-1) or (f-2) presumed invalid.
- Unrepresented defendants speaking with the prosecutor: Art. 1.051(f-1),(f-2)
 - Prosecutor may not initiate or encourage waiver
 - All requests for counsel must first be denied before prosecutor communicates with defendant
 - Procedures for requesting counsel must be explained
- Unrepresented defendants entering a plea: Art. 1.051(g)
 - Court must determine waiver is voluntarily and intelligently made
 - Defendant must sign waiver that substantially conforms to Art. 1.051(g)

WHAT IF AN UNCOUNSELED MISDEMEANOR DEFENDANT WANTS TO SPEAK WITH THE PROSECUTOR?

- The court must advise the defendant of:
 - the right to counsel and
 - the procedure for requesting appointed counsel.
- A prosecutor may speak to a defendant who has requested appointed counsel only if
 - **the court has determined the defendant is not indigent, and**
 - the defendant: 1) has been given a reasonable opportunity to retain counsel; or 2) **has waived the opportunity to retain counsel.**
- Waivers obtained in violation of the above provisions are presumed invalid.

TIDC Model Form to Explain Rights to Unrepresented Defendants

IN THE [INSERT COURT]
[INSERT COUNTY] COUNTY, TEXAS

JUDGE'S EXPLANATION OF RIGHTS TO DEFENDANTS WITHOUT ATTORNEY

As a defendant in a criminal case, you have three options:

1. You may hire an attorney;
2. If you do not have enough money to hire an attorney, you may request an attorney be appointed to represent you;
3. You may represent yourself.

If you want an attorney to represent you and have enough money to hire an attorney, the case will be reset to give you time to do so.

If you want an attorney and do not have the money to hire one, you will need to fill out a financial questionnaire so that the proper person can determine whether or not to appoint an attorney to represent you.

You may not speak to the prosecutor about your case unless you sign a written waiver of your right to be represented by an attorney.

Be aware that there are dangers to self-representation. Waiving your right to an attorney and representing yourself may result in a worse outcome for you and your case, including the loss of significant legal rights and opportunities relating to military service, possession of a firearm, housing and public benefits, child custody, immigration status for non-citizens, and employment.

If you choose to proceed without an attorney, you may change your mind at any time and may request counsel from the Court.

Judge Presiding

DEFENDANT'S CHOICE [mark initials next to only **ONE** choice]

_____ I want to reset this case to hire my own attorney.

_____ I have hired an attorney, whose name is: _____

_____ I want to apply for court-appointed counsel.

_____ I have a court-appointed attorney, whose name is: _____

_____ I want to waive my right to an attorney and represent myself.

Defendant: _____ Date: _____

WHAT IF A MISDEMEANOR DEFENDANT WANTS TO ENTER AN UNCOUNSELED PLEA?

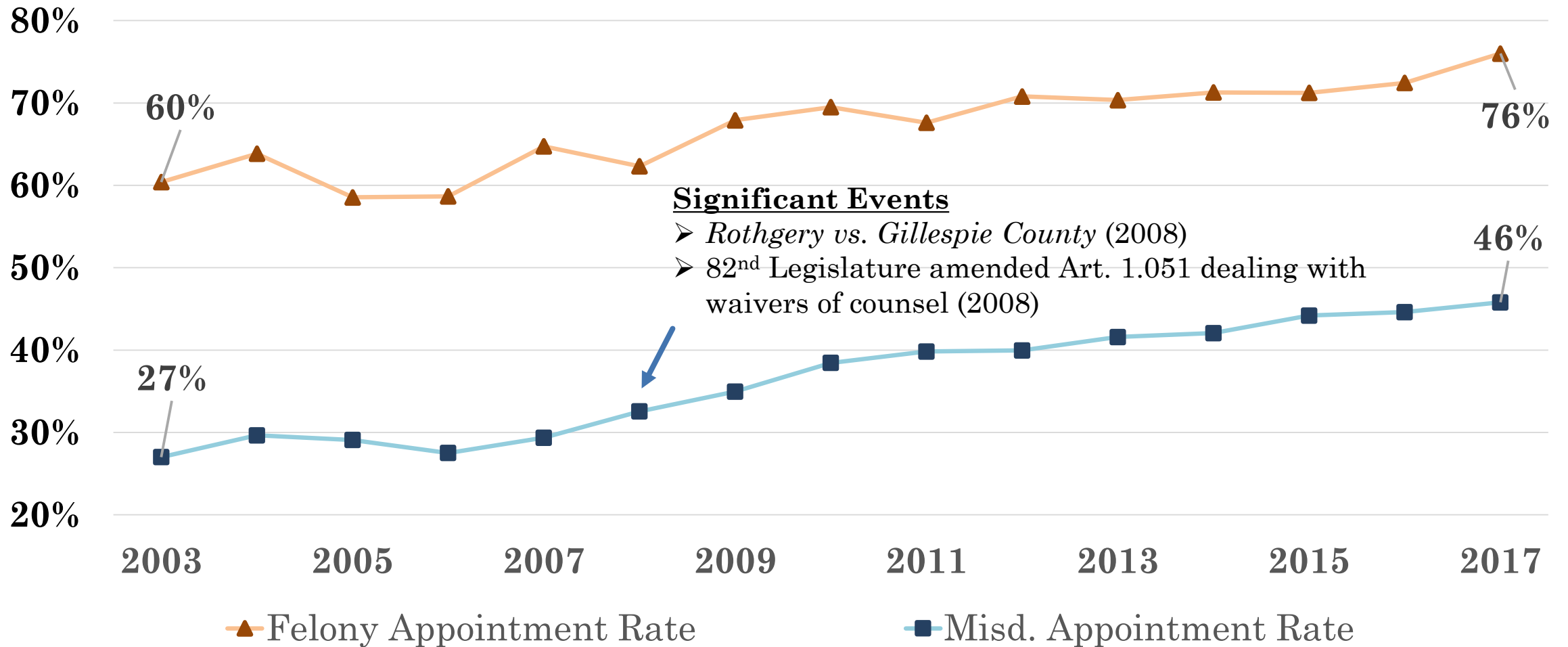
- If a defendant wishes to waive the right to counsel to enter guilty plea, the court must:
 - advise the defendant of the nature of the charges against him
 - if the defendant is proceeding to trial, the dangers and disadvantages of self-representation.
 - **determine that the waiver is voluntarily and intelligently made**
 - must provide the defendant with a statement in substantially the following form:

“I have been advised this ___ day of ___ 2___, by the (name of court) Court of my right to representation by counsel in the case pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge. Understanding my right to have counsel appointed for me free of charge if I am not financially able to employ counsel, I wish to waive that right and request the court to proceed with my case without an attorney being appointed for me. I hereby waive my right to counsel. (signature of defendant).”

HOW CAN A COURT DETERMINE A WAIVER IS VOLUNTARILY AND INTELLIGENTLY MADE?

- Indigent defense plan for Brewster, Culberson, Hudspeth, Jeff Davis, and Presidio Counties includes a *Faretta* script. Under *Faretta*, a defendant has a constitutional right to represent himself / herself if he/she knowingly and voluntarily waives the right to counsel. Sample questions:
 - Have you ever before represented yourself in a criminal action? Do you understand how to conduct legal research?
 - Are you familiar with the Rules of Evidence? Are you familiar with the Code of Criminal Procedure?
 - Do you understand that you will be on your own and will receive no advice, guidance or help from the court? Understanding these questions, is it still your desire to represent yourself and give up your right to be represented by an attorney?

Since Passage of the FDA, Appointment Rates Have Increased



LOCAL APPOINTMENT RATES

FY2017	Misd. Cases Paid / Cases Added		Felony Cases Paid / Cases Added	
Bailey	40 / 148	27%	68 / 97	70%
Cochran	21 / 35	60%	22 / 48	46%
Garza	14 / 237	6%	68 / 120	57%
Hockley	225 / 467	48%	300 / 332	90%
Hale	250 / 788	32%	252 / 310	81%
Parmer	9 / 221	4%	49 / 101	49%
Swisher	22 / 92	24%	28 / 64	44%
TEXAS	217,002 / 473,896	46%	212,428 / 279,474	76%

COMPARE ART. 15.17 REQUESTS TO APPOINTMENTS

FY2017	15.17 Misd. Requests (JP + Muni. Cts) / Warnings	Misd. Cases Paid / Cases Added
Bailey	74 / 165 (45%)	40 / 148 (27%)
Cochran	23 / 59 (39%)	21 / 35 (60%)
Garza	78 / 301 (26%)	14 / 237 (6%)
Hockley	172 / 422 (41%)	225 / 467 (48%)
Hale	75 / 407 (18%)	250 / 788 (22%)
Parmer	71 / 193 (37%)	9 / 221 (4%)
Swisher	21 / 58 (36%)	22 / 92 (24%)

Estimate of Pro Se Misdemeanor Cases

% of Pro Se Misd. Dispositions	FY11	FY12	FY13	FY14	FY15	FY16	FY17
Statewide	33.2%	28.8%	27.5%	25.4%	23.8%	24.1%	21.3%
Counties Under 50k Pop.	68.7%	66.3%	66.4%	63.5%	61.7%	58.5%	56.7%
Counties Between 50k & 250k Pop.	56.9%	50.8%	48.4%	46.6%	42.5%	39.2%	41.7%
Counties Over 250k Pop.	19.6%	15.2%	13.3%	11.6%	11.3%	13.0%	8.8%

- Since 2011, when OCA began tracking the number of retained cases, the percentage of pro se misdemeanor cases has decreased
- The number of pro se dispositions can be estimated by the following formula:

Pro Se Dispositions = Total Dispositions – Total Retained Cases – Total Cases in Which Attorneys were Paid

PROCESS QUESTIONS

- What must you do if a defendant requested counsel at magistration but did not complete the affidavit of indigence?
- If 50 defendants in your county request appointment of counsel in misdemeanor cases and you appoint counsel in 40 of those cases, how many denials of indigence should there be?

FOR MORE INFORMATION:

- TIDC Model Forms and Procedures:

<http://www.tidc.texas.gov/policies-standards/model-forms-procedures/>

- A Primer for Local Officials:

http://www.tidc.texas.gov/media/52836/2017_primer-for-county-officials_final3.pdf



Fair Defense Law

A Primer for Texas County Officials

Updated February 2017

www.tidc.texas.gov



Our Mission

The Texas Indigent Defense Commission provides financial and technical support to counties to develop and maintain quality, cost-effective indigent defense systems that meet the needs of local communities and the requirements of the Constitution and state law. In addition, we require local planning for indigent defense and reporting of expenditures and provide an array of resources for counties to improve these services.

TIDC Discretionary Grant Program

Goals

- Develop new programs or processes to improve indigent defense services
- Support policy initiatives and strategic objectives of TIDC
- Aimed at permanent programs sustainable beyond end of grant

How It Works

- Competitive (evaluated by committee of outside reviewers)
- Grant payments made on a reimbursement basis
- Require county matching funds
- 4-Year Grants for Public Defenders; avg. 50% match over 4 years

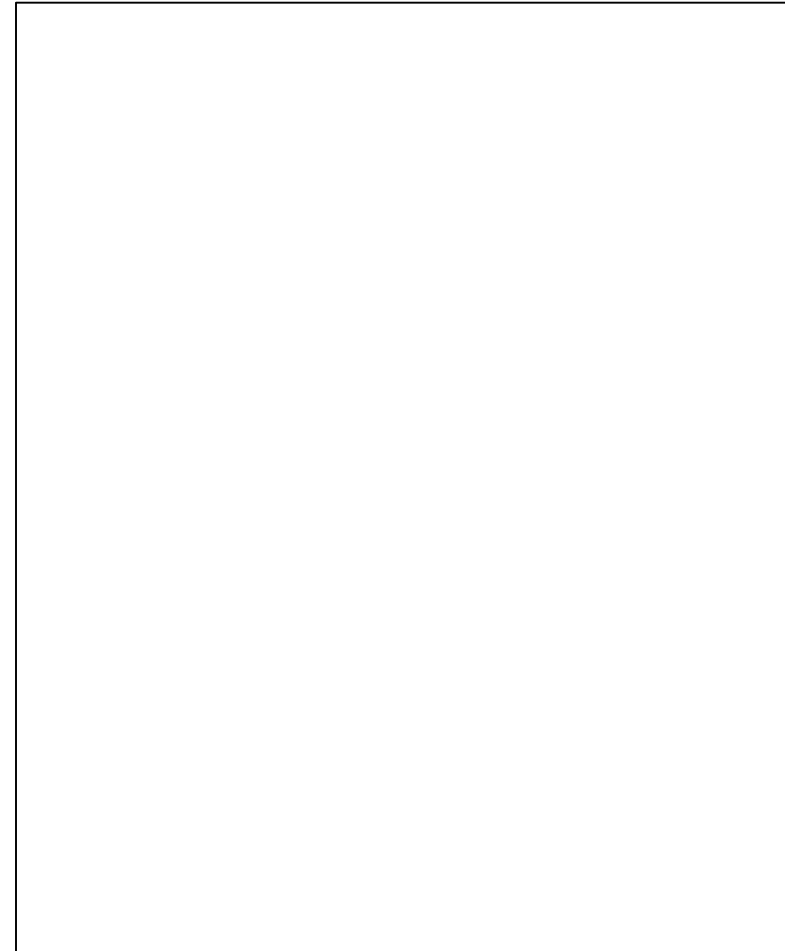
TIDC Discretionary Grant Program (cont'd)

FY 2019 Discretionary Grant Request for Applications (RFA)

Available on TIDC Website
Under “Grants and Reporting” Tab

[http://www.tidc.texas.gov/media/57909/fy19-
discretionary-grant-rfa.pdf](http://www.tidc.texas.gov/media/57909/fy19-discretionary-grant-rfa.pdf)

Essential Reading!



TIDC Discretionary Grant Program (cont'd)

FY20 Discretionary Grant Timeline

- Request for Application (RFA) issued **January 2019**
- Intent to Submit Application due **March 2019**
- Full Applications due **May 2019**
- Start Date for Funded Programs **October 1, 2019**

TIDC Discretionary Grant Program (cont'd)

More FY20 Funding Details

- Grant period: October 1, 2019 to September 30, 2020
- Quarterly fiscal and progress reports required
- Multi-year programs awarded year by year

TIDC Contacts

Scott Ehlers, Special Counsel—sehlers@tidc.texas.gov

Joel Lieurance, Senior Policy Analyst—jlieurance@tidc.texas.gov

Edwin Colfax, Grants Manager—ecolfax@tidc.texas.gov

Geoff Burkhardt, Executive Director—gburkhardt@tidc.texas.gov

Ph: 512.936.6994