



TEXAS INDIGENT DEFENSE COMMISSION

# Fair Defense Law

## A Primer for Texas County Officials

Updated February 2017

[www.tidc.texas.gov](http://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.*



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## **The Right to Counsel and Texas' Fair Defense Act**

In 1963, the U.S. Supreme Court held in *Gideon v. Wainwright* that a criminal defendant charged with a felony had the right to be represented by counsel paid for by the state if he was indigent.<sup>1</sup> Over time, the Supreme Court has expanded this constitutional right to guaranteeing indigent persons accused of crime with an attorney at state expense in juvenile delinquency proceedings,<sup>2</sup> misdemeanors that result in a defendant's loss of liberty,<sup>3</sup> and other situations. This constitutional mandate was left to the states to implement and finance. The state of Texas delegated its responsibility to provide and pay for these services to counties and local property taxpayers.

Article 1.051(c), Texas Code of Criminal Procedure, provides that "an indigent defendant is entitled to have an attorney appointed to represent him in any adversary judicial proceeding that may result in punishment by confinement and in any other criminal proceeding if the court concludes that the interests of justice require representation." In 2001, the 77th Texas Legislature modified state law to reform indigent defense practices through a group of amendments collectively known as "The Fair Defense Act" (FDA). Prior to the FDA, an absence of uniform standards and procedures along with a lack of state oversight allowed indigent defense rules and the quality of representation to vary widely from county to county and courtroom to courtroom. The accused in Texas were not uniformly assured prompt access to counsel. Furthermore, since the state did not provide funding for indigent defense, the entire financial burden was shouldered by counties. By changing the procedures for conducting magistrate hearings, determining indigence, and appointing counsel, the FDA addressed practices that had been under widespread scrutiny.<sup>4</sup>

## **The Texas Indigent Defense Commission**

The Fair Defense Act established the Texas Task Force on Indigent Defense (Task Force) as a permanent standing committee of the Texas Judicial Council, staffed through the Office of Court Administration. During the 82nd Legislative Session (2011), Governor Rick Perry signed House Bill 1754 into law, establishing the Texas Indigent Defense Commission (TIDC, or the Commission), the permanent organization that replaced the Task Force. The organization is led by the Honorable Sharon Keller, Presiding Judge, Court of Criminal Appeals. TIDC is a body of thirteen appointed and ex-officio members supported by eleven full-time staff members.

## **TIDC's Programs and Activities**

The Commission carries out a variety of programs and activities to assist counties in developing and maintaining quality, cost-effective indigent defense systems that meet counties' unique needs and the requirements of the Constitution and state law. Our programs include:

### **1. Grant Program**

In FY 2016, TIDC awarded almost \$33 million in grants to counties through its two funding strategies: formula grants and discretionary grants.

**a. Formula Grants:** The Commission awarded \$24 million in formula grants to 254 Texas counties in FY 2016 to help them ensure that all Texans can access constitutionally required legal defense services. Formula grants are awarded annually to all qualifying counties. Award amounts are determined by the county's population and indigent defense spending. Formula grant disbursements are detailed in TIDC's Annual Expenditure Report.

For more information on TIDC's Formula Grants Program, see:  
<http://tidc.texas.gov/grants-reporting/formula.aspx>.

**b. Discretionary Grants:** Discretionary grants encourage innovation, remedy non-compliance with the Fair Defense Act, or help counties facing extraordinary indigent defense costs. In FY 2016 the Commission awarded \$8.7 million in new and continuing discretionary grants to eighteen counties. Disbursements are detailed in the Annual Expenditure Report.

For more on discretionary grants, see:  
<http://tidc.texas.gov/grants-reporting/discretionary.aspx>.

## 2. Monitoring Program

TIDC is required by Texas Government Code, sec. 79.037, to monitor counties that receive a grant to ensure state money is being properly spent on authorized indigent defense expenditures, and to enforce compliance with the conditions of the grant, including following state laws related to the appointment of counsel. TIDC's Monitoring Program consists of Policy Monitoring, Fiscal Monitoring, and its related Complaints Processing system.

**a. Policy Monitoring:** Policy monitoring reviews seek to promote local compliance and accountability with the requirements of the Texas Fair Defense Act (FDA) and to provide technical assistance to improve county indigent defense processes where needed. A county is selected for an on-site monitoring review based on a combination of objective risk assessment scores and geographical distribution. A monitoring review may also be conducted at the request of an elected state or local official.

On-site policy reviews measure a jurisdiction's compliance with the six core requirements of the FDA:

- Article 15.17 hearings are held within 48 hours of arrest and defendants are able to request counsel at the hearing;
- The county's indigent defense plan sets a financial standard of indigence in compliance with Article 26.04 of the Code of Criminal Procedure;
- The jurisdiction has a method for tracking continuing legal education (CLE) hours of attorneys on the appointment list;
- Counsel is appointed within statutorily required times;
- Appointments are distributed in a fair, neutral, and non-discriminatory manner; and
- Attorneys are paid according to a standard payment process. The review may examine caseloads and usage of support services such as investigators and expert witnesses.

### Policy Monitoring Resources

- More information regarding TIDC's Policy Monitoring Program can be found online at: <http://tidc.texas.gov/monitoring/policy-monitoring.aspx>.
- Policy Monitoring Administrative Rules with Commentary: <http://tidc.texas.gov/media/40462/policymonitoringrulesadopted2015.pdf>.
- A checklist of documents that the Policy Monitor reviews as part of the policy monitoring process is available at Appendix A.

### DISCRETIONARY GRANT TYPES

**Competitive Discretionary Grants** assist counties in developing new, innovative programs or processes to improve the delivery of indigent defense services.

**Technical Support Grants** assist counties with improving local indigent defense services through projects that build the knowledge base about indigent defense and establish processes that can be replicated by other jurisdictions.

**Targeted Specific Grants** assist counties that have a challenge related to compliance with the Fair Defense Act.

**Extraordinary Disbursement Grants** reimburse a county for extraordinary indigent defense expenses causing a financial hardship.

**b. Fiscal Monitoring:** The standards used to conduct fiscal monitoring reviews are based on state law and administrative rules. The Commission is required by Texas Government Code, sec. 79.037, to monitor counties that receive grant funds and to enforce compliance by the county with the conditions of the grant. The fiscal monitoring process and regulations are described in sec. 173.401, Texas Administrative Code. The Uniform Grant Management Standards (UGMS) and grant rules set the monitoring criteria and priorities for counties. Counties are selected for a monitoring visit based on a combination of objective risk assessment scores and geographical distribution.

The fiscal monitor serves as a valuable resource to counties by providing technical assistance to county employees regarding the tracking and reporting of indigent defense expenses. By helping counties proactively identify and rectify reporting issues and providing technical assistance, the fiscal monitor fills a critical role. This effort helps ensure the overall integrity of the local and state Indigent Defense Expenditure Report.

The Commission always strives to make monitoring reviews constructive, not punitive. It is in both the county's and the state's interest to have the limited state resources allocated for indigent defense used for the intended purposes and for the expenditure data reported to the state to accurately reflect the financial state of indigent defense in that particular county.

#### **Fiscal Monitoring Resources**

- More information regarding TIDC's Fiscal Monitoring Program can be found online at: <http://tidc.texas.gov/monitoring/fiscal-monitoring.aspx>.
- A checklist of documents that the Fiscal Monitor reviews as part of the fiscal monitoring process is available at Appendix B.

**c. Complaints Processing:** The Commission's statutory authority to inquire into complaints is governed by sec. 79.037, Texas Government Code. The purpose of any inquiry is to assist counties in improving their indigent defense systems and to promote compliance with the FDA. Any complaint related to a county's indigent defense processes submitted to a TIDC staff member by phone, email, or in person must be electronically logged when the complaint is received. Staff will then review the complaints and determine next steps based on the below considerations:

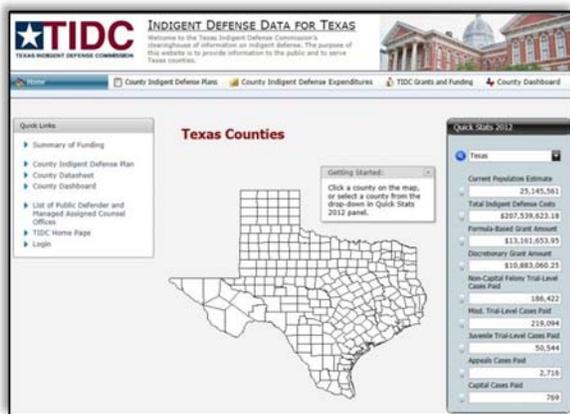
- Staff will review the complaint to determine if it is within the agency's scope (Fair Defense Act, policy monitoring rules and grant requirements, or other law related to the provision of indigent defense services).
- If appropriate, staff will advise local officials who may be in the best position to address the complaint (e.g. court manager, local administrative district court, local administrative statutory county court, chair of the juvenile board, or private/public defender) of the complaint. Staff may request a response from local officials.
- Staff will generally share a copy of the complaint with local officials, unless there are special privacy concerns or the complainant has asked for the complaint not to be shared.
- Based on the availability of staff resources, the seriousness of the allegation, and the availability of other avenues for handling the complaint, staff may conduct its own inquiry into a complaint. If staff determines that a review is necessary, staff may request additional information or conduct a drop-in review.
- The results of any inquiry will be reported to the local officials and the complainant, if determined appropriate. Staff will also update the Commission or its committees at the next regularly scheduled meeting.

- The complaint will be factored into the risk assessment used to determine which counties to visit as part of the evidence-based practices monitoring visits.
- Complaints against attorneys and judges will be routed to the appropriate entities charged with addressing such complaints.

TIDC staff will be developing model procedures to assist jurisdictions in addressing common issues that are the subject of complaints to TIDC.

### 3. Resources, Publications, Education, and Awards

TIDC provides information and resources to enhance understanding of the FDA and help improve indigent defense. TIDC serves county officials and court personnel through our:



- **Website:** The Commission's website (<http://tidc.texas.gov>) provides access to the data that drives its work, as well as information about indigent defense.

Local and statewide data is available at: <http://tidc.tamu.edu/public.net>.

- **Trainings:** In FY 2016, TIDC staff and members trained more than 1,000 judges, county officials, and attorneys across Texas on such issues as indigent defense reporting; fiscal monitoring; policy monitoring; indigence screening; and quality of representation.

Many of TIDC's training presentations are online at: <http://tidc.texas.gov/resources/training.aspx>.

- **Model Forms:** TIDC recently finalized six new or revised model forms as a resource to assist counties in implementing the front-end processes necessary for an effective appointment of counsel system. The Magistrate's Warning Form, Adult and Juvenile Affidavits of Indigence, and the Juvenile Intake Form replace prior forms and are intended to streamline and simplify procedures for counties. The Appointment of Counsel for Out-of-County Warrant Arrestees, Waiver of Counsel to Speak with the Prosecutor, and Waiver of Counsel to Plea or Proceed to Trial are new forms based on changes to the law and issues encountered during policy monitoring.

Model forms are available at: <http://tidc.texas.gov/policies-standards/model-forms-procedures.aspx>.

- **Original Research and Publications:** The Commission publishes original research and reports to assist counties in providing cost-effective and quality representation to indigent defendants. Examples of recent publications include: *Guidelines for Indigent Defense Caseloads*, a set of Texas-specific caseload studies that recommend caseload guidelines that will help ensure attorneys have enough time to devote to misdemeanor, felony, juvenile, and appellate representation; *Effective Indigence Screening*, a resource for courts and counties to utilize in developing and improving the processes used to determine whether defendants are eligible for appointed counsel; and *Indigent Defense Attorney Mentoring in Texas: A Guide to Establishing a Mentorship Program*, which was published in collaboration with the National Legal Aid and Defender Association.

Publications are online at: <http://tidc.texas.gov/resources/publications.aspx>.

- **Awards and Recognition Program:** TIDC pays tribute to counties and individuals for outstanding achievements in indigent defense through its Awards and Recognition Program. The Robert O. Dawson Indigent Defense Distinguished Service Award recognizes outstanding service by a group or an individual to improve the way Texas provides counsel for its poorest citizens accused of crimes. The Commission established the Texas Gideon Recognition Program to commend local governments and others across Texas that seek to meet a high standard for indigent defense. Counties may receive recognition for programs or achievements that demonstrate a significant level of innovation, such as a new solution to a problem, significantly streamlining a process, a measurable and significant increase in productivity, or improved service quality to indigent defendants or other stakeholders. Past recipients of Gideon Recognition include: Lubbock County (2015); Dickens County and Texas Tech University School of Law (2015); Cameron County (2014); Burnet County (2013); Montgomery County (2013); and Wichita County (2012).

More information about the Awards and Recognition Program is online at:

<http://tidc.texas.gov/resources/publications/general/awards-recognition/awards-recognition.aspx>.

#### ***4. Innocence Program***

The Legislature has directed TIDC to contract with the State's six public law schools to help operate innocence projects at a cost of \$100,000 per year per law school. Professors and attorneys with these projects train law students to review claims of actual innocence from Texas inmates. In addition, TIDC ensures that innocence projects file annual reports on their activities and an Exoneration Report on any exoneration secured with funding provided by the Legislature. To date, 15 wrongfully convicted Texans have been exonerated with the help of this program.

More information about the Innocence Program is at:

<http://tidc.texas.gov/innocence/innocence-program-overview.aspx>.

#### ***5. Recommendations to the Legislature***

Pursuant to sec. 79.035, Government Code, TIDC is charged with recommending to the Legislature ways to improve Texas' indigent defense system. Every year prior to the legislative session, TIDC gathers criminal justice stakeholders to propose and vet legislation to improve indigent defense in the state. TIDC is also authorized, pursuant to sec. 79.033, Government Code, to submit its own Legislative Appropriations Request separate and apart from the Office of Court Administration.

TIDC's Legislative Appropriations Request and other legislative materials are online at:

<http://tidc.texas.gov/policies-standards/legislative-information.aspx>.

## Ten Key Provisions of Fair Defense Law

The Fair Defense Act is the original blueprint for indigent defense developed by the Texas Legislature. The law provides the necessary structure and guidance to local officials carrying out constitutional responsibilities to ensure that all defendants have access to counsel. Following are the key provisions of the FDA that county officials should be aware of and which TIDC assesses during its Policy and Fiscal Monitoring visits.

### **1. Magistrate Responsibilities<sup>5</sup>**

The FDA assigns responsibility to different government actors at each phase of pretrial case processing to ensure that indigent defendants receive counsel in a timely manner. The magistrate is one of the most critically important actors in this process. Figure 1 (below) illustrates defendant case flow from arrest to appointment of counsel, including when “magistration” occurs. Although the term “magistration” is not actually found in the law, it is commonly used to describe the various activities that occur during the Article 15.17 hearing.<sup>6</sup>

An arresting officer must ensure that the accused is brought before a magistrate no later than 48 hours after arrest for the Article 15.17 hearing.<sup>7</sup> This magistration hearing serves as an important due process protection against unjust detentions and is considered the point at which the right to counsel “attaches” because it is when adversarial judicial proceedings against the accused begins.<sup>8</sup>

Among various other requirements as outlined in Figure 2, the magistrate is required by law to carry out various duties, including: making a determination that there is probable cause to detain the defendant; set bail; admonish the accused of his/her constitutional rights; and inform the accused of the right to appointed counsel if the person cannot afford counsel, and of the procedures for requesting appointment of counsel.

In 2015, the Legislature clarified the procedures for the magistration of arrestees who are jailed on out-of-county warrants, and the assistance that must be provided for their requests for appointment of counsel. If a person arrested on an out-of-county warrant requests counsel, the magistrate must transmit within 24 hours the necessary request forms to the court or court’s designee who is authorized to appoint counsel in the county issuing the warrant.<sup>9</sup>

#### **Magistration Resources**

- **Model forms and procedures**, including “Magistrate Warning” form:  
<http://tidc.texas.gov/policies-standards/model-forms-procedures.aspx>.
- **Request for Counsel Checklist**, including a checklist for magistration requirements:  
[http://tidc.texas.gov/media/47953/request\\_for\\_counsel\\_checklist.pdf](http://tidc.texas.gov/media/47953/request_for_counsel_checklist.pdf).
- **Out-of-County Arrest Contacts for Counsel Requests and Affidavits of Indigence**:  
<https://tidc.tamu.edu/public.net/Reports/OutOfCountyArrestContacts.aspx>.

#### Select Statutes Pertaining to Appointment of Counsel

**Art. 1.051(c), Tex. Code Crim. Proc.:** Establishes the timelines for when indigent defendants must be appointed counsel – the end of the third working day after the court receives the defendant’s request (in counties with pop. less than 250,000) or the end of the first working day in counties with pop. of 250,000 or more).

**Art. 14.06:** Police must take arrested person before a magistrate within 48 hours.

**Art. 15.17:** Establishes duties of magistrates and magistration procedures, including assistance in processing requests for counsel.

**Art. 15.18:** Duties of magistrates and procedures for arrest for out-of-county warrant.

**Art. 26.04:** Establishes duty of judges in counties to publish written procedures for appointment of counsel in a fair, neutral, and nondiscriminatory manner, and various requirements of county appointment systems.

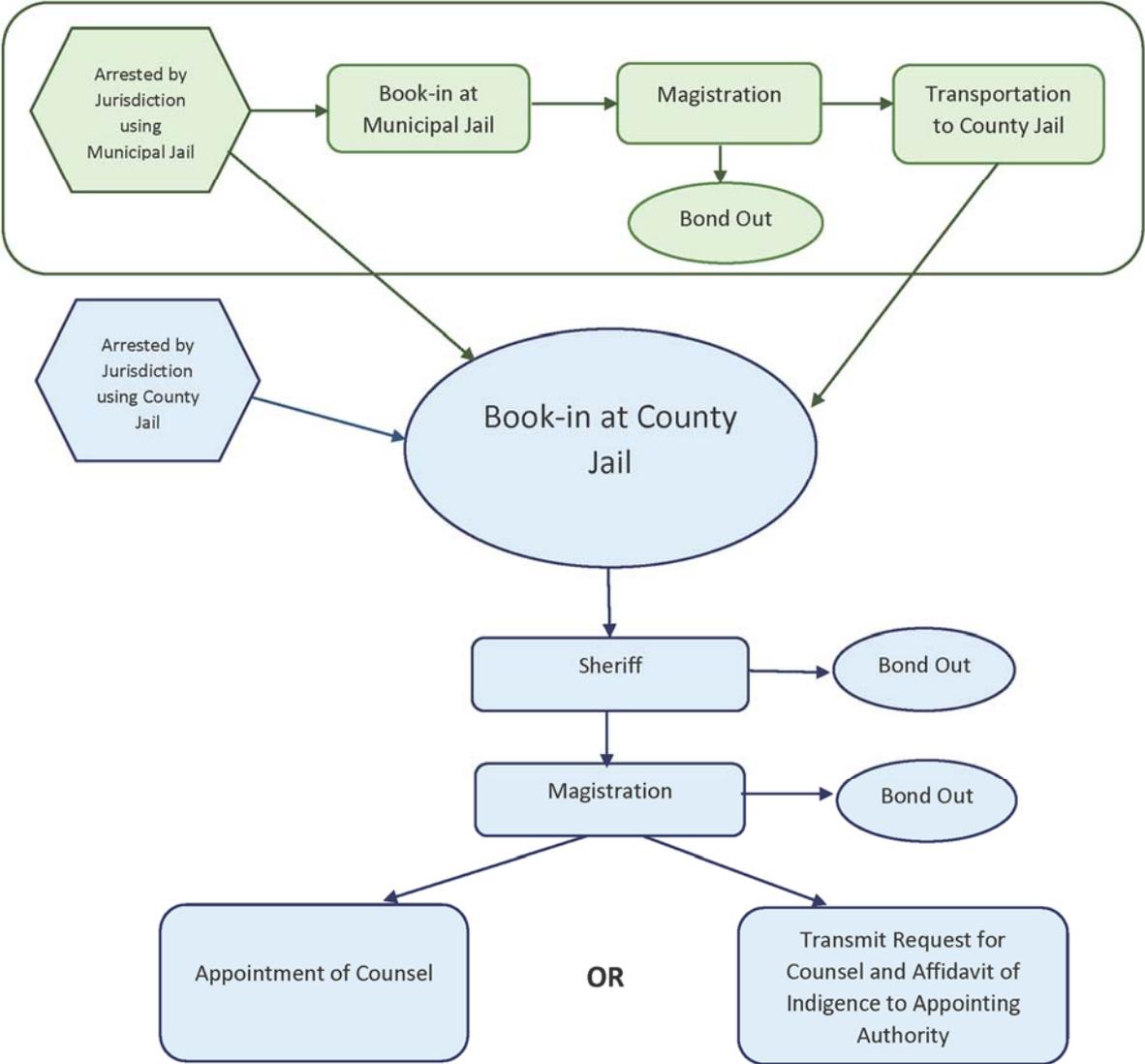
**Art. 26.05:** Requirements for the compensation of appointed counsel.

**Art. 26.044:** Public Defender’s Office requirements.

**Art. 26.047:** Managed Assigned Counsel requirements.

**Art. 26.052:** Requirements for the appointment and payment of appointed counsel in death penalty cases.

**Figure 1. Defendant Case Flow from Arrest to Magistration**



Source: "The Fair Defense Act and the Role of the Magistrate,"  
 The Recorder: The Journal of Texas Municipal Courts, vol. 24, no. 2, p. 22 (Feb. 2015)

## Figure 2. Magistration Requirements under Article 15.17, Code of Criminal Procedure

- ✓ **Magistration within 48 Hours:** Arrestees must be taken before a magistrate within 48 hours of arrest and informed of their rights.
- ✓ **Prompt Probable Cause Determination:** Although Article 15.17 does not explicitly mention probable cause determinations, appellate courts have held this is an essential function of the magistrate. When an arrest occurs without a warrant, the magistrate must determine if there is probable cause to detain the defendant or require a bond prior to release. The magistrate's review of probable cause should be based on sworn testimony or a written affidavit presenting the facts of the case and the circumstances of the arrest.
- ✓ **Warnings:** The magistrate must inform arrested individuals of the:
  - charges against them and any affidavit on file;
  - right to retain counsel;
  - right to remain silent;
  - right to have an attorney present during any interview with law enforcement or prosecutors and right to terminate the interview;
  - fact that the accused is not required to make a statement and that any statement made may be used against them;
  - right to have an examining trial (felonies only); and
  - right to request the appointment of counsel if the person cannot afford counsel.
- ✓ **Assistance in Requesting Counsel:** The magistrate must inform the person arrested of the procedures for requesting appointment of counsel and ensure reasonable assistance in completing the necessary forms for requesting counsel at the same time.
- ✓ **Appointment of Counsel by Magistrate if Authorized:** If the magistrate is authorized to appoint counsel, the magistrate shall appoint counsel or determine that the person is not indigent.
- ✓ **Or Transmission of Request for Counsel within 24 Hours:** If the magistrate is *not* authorized to appoint counsel, the magistrate must transmit the request to the appointing authority within 24 hours.
- ✓ **Set Bail:** After determining if the person arrested is currently on bail for another offense, the magistrate shall set a bail amount as allowed by law.
- ✓ **Recordings of Proceedings:** A recording of the communication between the arrested person and the magistrate must be made and preserved for set periods of time. In particular, the magistrate must make a record of:
  - informing the person of the right to counsel;
  - asking the person if they want to request counsel; and
  - whether the person requested counsel or not.

Model forms to be used at magistration available at: <http://tidc.texas.gov/policies-standards/model-forms-procedures.aspx>.

## 2. Indigence Determination

For purposes of appointing counsel, “indigent” means a person who is not financially able to employ counsel.<sup>10</sup> County indigent defense plans must include procedures and financial standards for determining whether a defendant is indigent and is eligible for appointed counsel. These procedures and standards must apply to all defendants in the county equally, regardless of whether the defendant is in custody or has been released from bail.<sup>11</sup> Every effort should be made to follow the indigence standard in the applicable local plan.

When making an indigency determination, the court may consider the following:<sup>12</sup>

- Defendant’s income;
- Source of income;
- Assets;
- Property Owned;
- Outstanding obligations;
- Necessary expenses;
- Number and ages of dependents; and,
- Spousal income available to defendant

The defendant’s posting of bail or ability to do so may not be considered except to the extent that it reflects the defendant’s financial circumstances as measured by the above considerations.

A defendant who requests a determination of indigency and appointment of counsel must complete a questionnaire under oath concerning his financial resources, or respond under oath to an examination regarding his financial resources by the judge or magistrate responsible for determining indigency, or both.<sup>13</sup> Before making a determination of whether the defendant is indigent, the court must request that the defendant sign under oath a statement substantially similar to the one at Article 26.04(o), Texas Code of Criminal Procedure. A defendant determined to be indigent is presumed indigent for the remainder of the proceedings unless a material change in the defendant’s financial circumstances occur.<sup>14</sup> A court may not threaten to arrest or incarcerate a person solely because the person requests the assistance of counsel.<sup>15</sup>

### Indigence Determination Resources

- **Model forms and procedures**, including “Affidavit of Indigence” forms and Determination of Indigence templates for county indigent defense plans: <http://tidc.texas.gov/policies-standards/model-forms-procedures.aspx>.
- **Effective Indigence Screening** is a September 2015 TIDC publication designed to assist counties in developing and implementing efficient indigence screening programs for appointing counsel. Available at: <http://www.tidc.texas.gov/media/40461/effective-indigence-screening-final.pdf>.

## 3. Waiver of Counsel Provisions

In 2007, the Texas Legislature established procedures for obtaining waivers of the right to counsel from defendants with the passage of H.B. 1178. Waivers of counsel obtained in violation of the procedures established in the law are presumed to be invalid, such as if a prosecutor encouraged a defendant to waive the right to counsel or a judge encouraged a defendant to speak with the prosecutor prior to denying the defendant’s request for counsel and giving the defendant a reasonable opportunity to retain counsel.<sup>16</sup>

Waivers of counsel must comply with the procedures outlined in Art. 1.051(g), Code of Criminal Procedure. If a defendant wishes to waive their right to counsel to enter a plea or go to trial, the court must advise the defendant of the nature of the charges against the defendant, and if the defendant is going to trial, the dangers and disadvantages of self-representation.<sup>17</sup> If the court determines the waiver of counsel is voluntarily and intelligently made, the court must provide the defendant with a form substantially similar to the form at Art. 1.051(g), have the defendant sign the form, and file the form with the court record. Under the law, a judge or magistrate may not order a defendant rearrested or require a higher bond because a defendant withdraws a waiver of counsel or requests the assistance of counsel.<sup>18</sup>

## Waiver of Counsel Resources

- **Model forms and procedures**, including “Waiver of Counsel to Speak with the Prosecutor” and “Waiver of Counsel to Plea or Proceed to Trial” forms:  
<http://www.tidc.texas.gov/policies-standards/model-forms-procedures.aspx>.

## 4. Deadlines for Appointment of Counsel

The judge (or the judge’s designee) must rule on requests for counsel and appoint counsel to indigent defendants within one working day of receiving requests in counties with populations of 250,000 or more, or within three working days in counties with populations of less than 250,000.<sup>19</sup> If an indigent defendant is released from custody before counsel is appointed, counsel must be appointed at the defendant’s first court appearance or when adversarial judicial proceedings are initiated (Art. 15.17 hearing), whichever comes first.<sup>20</sup>

In juvenile cases, counsel should be appointed before the initial detention hearing for eligible in-custody juveniles.<sup>21</sup> For out-of-custody juveniles, counsel should be appointed within five working days of service of the petition on the juvenile.<sup>22</sup>

If an indigent defendant arrested on an out-of-county warrant has not been transferred to the county issuing the warrant and has not been appointed counsel before the 11th day after arrest, counsel must be immediately appointed by the arresting county for matters under Chapter 11 (Habeas Corpus) or Chapter 17 (Bail), Code of Criminal Procedure.<sup>23</sup>

### Appointment Deadline Resources

- Texas Indigent Defense Commission, *U.S. Supreme Court Decision on Rothgery – What Does It Mean?* YOUTUBE (uploaded Feb. 15, 2012), <http://youtu.be/xbHWnuu5T8A?list> (presentation by Andrea Marsh, Texas Fair Defense Project, at the 2008 Indigent Defense Workshop, Austin, Texas).

## 5. Attorney Selection Methodology

The local indigent defense plan adopted by the judges under Art. 26.04(a), Code of Criminal Procedure, must include the method by which attorneys on the county’s appointment lists are assigned to cases. The plan shall “ensure that appointments are allocated among qualified attorneys in a manner that is fair, neutral, and nondiscriminatory.”<sup>24</sup> The juvenile board in each county must also adopt a plan that establishes the procedures for the appointment of counsel to represent children in various juvenile justice proceedings.<sup>25</sup> Many county plans provide that judges will make appointments in rotation order from appointment lists. This is the default appointment process under state law unless the court appoints counsel in another legally admissible manner.<sup>26</sup>

There are four basic types of attorney appointment systems that counties employ in Texas. A county may use a combination of these methods of appointing counsel as well.<sup>27</sup> Each of these systems has advantages and risks, and can work well or poorly depending on how they operated. The four methods of appointing counsel are:

**a. Assigned Counsel System:**<sup>28</sup> Private attorneys are appointed from an appointment list to handle individual assigned cases. Attorneys are appointed using a rotating “wheel” to randomly select the next appointment. Attorneys are compensated as independent contractors. Most widely used system in Texas.

**b. Public Defender System:**<sup>29</sup> Defense services and representation are provided by a county or state agency, or a non-profit organization under contract with a county. The public defender office is analogous to a prosecutor’s office, but for the defense side. Attorneys are salaried employees who are criminal defense specialists. A public defender system still requires a secondary system for the appointment of counsel when there is a conflict, which is usually assigned counsel but could also be a conflict public defender

office. There are 19 county, regional, and statewide public defender offices operating in Texas.

**c. Managed Assigned Counsel System (MAC):**<sup>30</sup> This system is essentially a hybrid of an assigned counsel and public defender system. Defense services are administered by a county department or non-profit organization under contract with the county. The MAC organization is responsible for maintaining the appointment list; ensuring attorneys meet minimum professional requirements; appointing attorneys, investigators, and experts to handle cases; training and supervision; and approving attorney vouchers. Attorneys are still compensated as independent contractors. There are three MAC's operating in Texas.

**d. Contract Defender Systems:** Contract defender systems can take a variety of forms. A county will typically contract with one private attorney or law firm to handle all cases in a single court or a group of courts, or contract with a small number of attorneys or firms to handle a large block of cases. Contract defender programs are regulated to establish basic requirements for the program, including: reporting requirements; notification and application process for members of the local bar; applicant selection process; contract requirements; and caseload limitations.<sup>31</sup>

As part of TIDC's Policy Monitoring Program, the Policy Monitor will check for documentation indicating that the county is complying with relevant statutes and regulations pertaining to the attorney selection process.<sup>32</sup> According to TIDC regulations, the percentage of appointments received by the top 10 percent of recipient attorneys in assigned counsel systems should not exceed *three times* their respective share of cases.<sup>33</sup>

#### Attorney Selection Resources

- *The Four Types of Defense Delivery Systems*, Texas Indigent Defense Commission (January 2015), available at: [http://tidc.texas.gov/media/30127/Defense\\_DeliverySystem\\_January2015.ppt](http://tidc.texas.gov/media/30127/Defense_DeliverySystem_January2015.ppt).
- Indigent defense plan templates for attorney selection processes: <http://tidc.texas.gov/policies-standards/model-forms-procedures.aspx>.

## 6. Attorney Fees

All court-appointed attorney fees must be paid in accordance with a schedule of fees adopted by formal action of the local judges.<sup>34</sup> Fee schedules "shall state reasonable fixed rates or minimum and maximum hourly rates, taking into consideration reasonable and necessary overhead costs and the availability of qualified attorneys willing to accept the stated rate."<sup>35</sup> Attorney fees cannot be paid until a voucher is submitted itemizing the legal services provided, and approved by the judge or director of the managed assigned counsel program, if applicable.<sup>36</sup> If a judge disapproves an attorney's fee request, the judge must make written findings stating the amount approved and the reason for disapproving the requested amount.<sup>37</sup> The attorney may appeal the disapproval of payment to the presiding judge of the administrative judicial region.

As part of TIDC's Policy Monitoring Program, the Policy Monitor will check for documentation indicating that the county is complying with relevant statutes and regulations pertaining to attorney fees and payments, such as that payments are being made in accordance with a fee schedule; payments are approved by judges after submission of an attorney fee voucher; and that written findings are issued if a judge disapproves of a fee voucher.

#### Attorney Fee Resources

- Model attorney fee vouchers and indigent defense plan templates for fee and expense payment processes are available at: <http://tidc.texas.gov/policies-standards/model-forms-procedures.aspx>.

## 7. Experts and Investigators

Appointed counsel must be reimbursed for “reasonable and necessary expenses, including expenses for investigation and for mental health and other experts.” Such reimbursements shall occur with and *without* prior court approval if they are “reasonably necessary and reasonably incurred.”<sup>38</sup>

## 8. Local Reporting Requirements for the Indigent Defense Expenditure Reports

Texas Government Code sec. 79.036(e) requires that all Texas counties report to TIDC the amounts spent on attorney fees, licensed investigators, expert witnesses, and other direct litigation costs, among other items. This information is submitted annually to TIDC in the counties’ Indigent Defense Expenditure Report (IDER). The passage of House Bill 1318 by the 83rd Legislature amended the law to require counties to report the number of adult and juvenile criminal appointments made to each attorney in the preceding fiscal year, along with the amount paid to each as well.<sup>39</sup>

The IDER is important because each year TIDC distributes formula grants to Texas counties to be used to support indigent defense programs. The expenses reported in the IDER are used in the calculation of the county’s formula grant in each subsequent year. Errors in the IDER could result in counties being awarded more funds in the formula grant and may result in a reduction in award or return of grant funds.

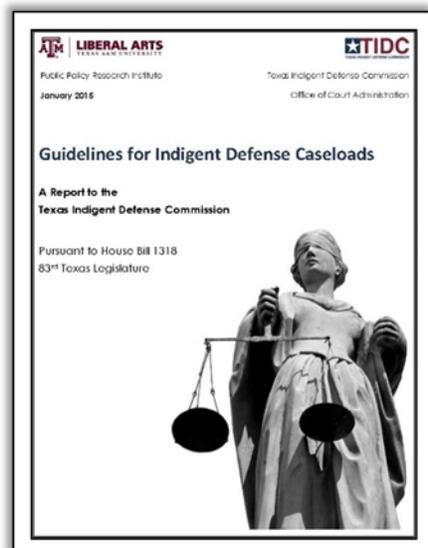
As part of TIDC’s Policy Monitoring Program, the Policy Monitor will check for documentation indicating that the county has established a process for collecting and reporting itemized indigent expense and case information.<sup>40</sup> In addition, TIDC’s Fiscal Monitoring Program conducts formal audits, monitoring reviews, and technical assistance to ensure that TIDC grant funds are used for authorized purposes in compliance with laws, regulations, and provisions of grant agreements.<sup>41</sup>

### IDER Resources

- **Online collection of resources** on IDER: <http://tidc.texas.gov/grants-reporting/ider.aspx>.
- **Indigent Defense Expenditure Report Manual** for FY 2016: <http://tidc.texas.gov/media/48321/fy16-ider-manual.pdf>.
- **Indigent Defense Data for Texas**, where IDER data is provided to the public: <http://tidc.tamu.edu/Public.net/>.

## 9. Attorney Caseload and Practice Time Reports

Beginning in 2014, the Texas Legislature requires all attorneys who accept appointments in adult criminal and juvenile delinquency cases to submit an annual statement that describes the percentage of their practice time that is dedicated to work on appointed cases.<sup>42</sup>



TIDC has developed both a paper form and an online portal that attorneys can use to file the practice time report. The online portal permits attorneys to report their work in all counties at the same time directly to TIDC, with the report viewable by the counties. The judges in each county may specify through their indigent defense plan the method for attorneys to use for submitting their report (online or paper form).<sup>43</sup>

While TIDC has not instituted regulations imposing limits on the number of cases that attorneys may appointed, the Commission has conducted research on the matter and issued publications on caseload guidelines to help counties ensure reasonable workloads for appointed counsel.

## Attorney Caseload and Practice Time Reporting Resources

- **Online resources** for attorney caseload reporting: <http://tidc.texas.gov/policies-standards/attorney-caseload-reporting.aspx>.
- **Electronic Attorney Reporting Portal:** Online form where attorneys can report the percentage of their practice time devoted to criminal and juvenile delinquency cases appointed under Article 26.04, Code of Criminal Procedure, and Title 3, Family Code, in each county. <https://tidc.tamu.edu/attorneyreporting/>.
- **Attorney Reporting Instructions and Form (Paper Form):** <http://tidc.texas.gov/media/2157/DefenseAttyReportingInstructionsFormv3.pdf>.
- **Guidelines for Indigent Defense Caseloads:** TIDC publication mandated by the legislature. Provides guidelines on the number of misdemeanor and felony cases attorneys should carry annually to provide competent and effective representation. Based on data collected from criminal defense attorneys practicing in Texas. Available at: [http://tidc.texas.gov/media/31818/150122\\_weightedcl\\_final.pdf](http://tidc.texas.gov/media/31818/150122_weightedcl_final.pdf).
- **Appellate Addendum: Guidelines for Indigent Defense Caseloads:** Provides guidelines on the number of appellate cases attorneys should carry annually to provide competent and effective representation. Available at: [http://tidc.texas.gov/media/50833/161214\\_wcl-appellate.pdf](http://tidc.texas.gov/media/50833/161214_wcl-appellate.pdf).
- **Juvenile Addendum: Guidelines for Indigent Defense Caseloads:** Provides guidelines on the number of juvenile cases attorneys should carry annually to provide competent and effective representation. Available at: [http://tidc.texas.gov/media/50834/161214\\_wcl-juvenile.pdf](http://tidc.texas.gov/media/50834/161214_wcl-juvenile.pdf).

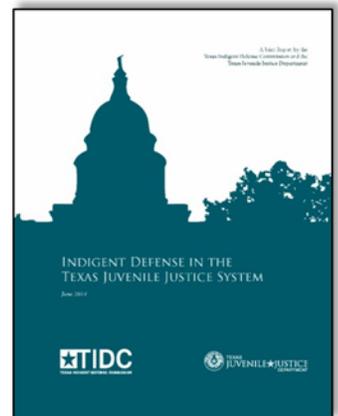
## 10. Adult and Juvenile Local Indigent Defense Plans

The Fair Defense Act requires the criminal court judges and juvenile board in each county to adopt and publish countywide indigent defense plans. Government Code section 79.036(a) requires that each county submit to the Commission its countywide indigent defense plans, procedures and forms on how it will provide court-appointed counsel to eligible persons. These reports must be submitted by November 1 of odd-numbered years.

In 2015, TIDC adopted a regulation stating that county procedures for appointing counsel “must provide a method to allow defendants to obtain the necessary forms for requesting appointment of counsel and to submit completed forms for requesting appointment of counsel at any time after the initiation of adversary judicial proceedings.”<sup>44</sup> Such procedures should be included in a county’s indigent defense plan submitted to TIDC.

### Indigent Defense Plan Resources

- **Indigent Defense Plan Templates**, available at: <http://tidc.texas.gov/policies-standards/model-forms-procedures.aspx>.
- **Indigent Defense Countywide Plan Instructions (2015):** [http://tidc.texas.gov/media/41822/2015-biennial-idp-submission-instructions\\_amended.pdf](http://tidc.texas.gov/media/41822/2015-biennial-idp-submission-instructions_amended.pdf).
- **County Indigent Defense Plans:** <http://tidc.tamu.edu/public.net/Reports/IDPlanNarrative.aspx>.
- **A Joint Report on Indigent Defense in the Texas Juvenile Justice System** (July 2014) includes information on what counties must include in their juvenile indigent defense plans: <http://www.tidc.texas.gov/resources/publications/general/indigent-defense-in-the-texas-juvenile-justice-system.aspx>

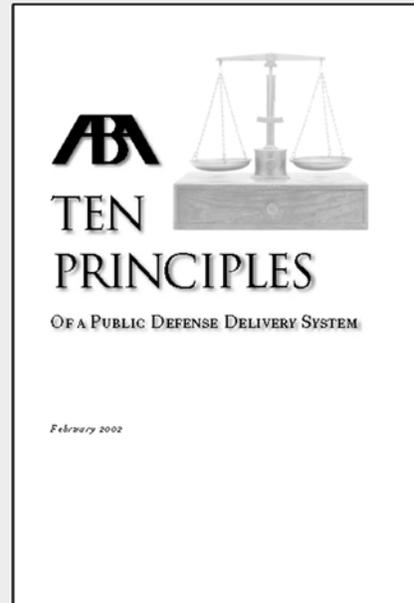


## American Bar Association's Ten Principles of a Public Defense Delivery System

Although the American Bar Association's (ABA) *Ten Principles of a Public Defense Delivery System* do not carry the weight of law, they are widely viewed as the best practices that states and counties should strive to implement. "The Principles constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney."<sup>45</sup>

Following are the "Black Letter" Ten Principles. The Ten Principles with commentary are available at <http://tinyurl.com/ABA10Principles>.

1. *The public defense function, including the selection, funding, and payment of defense counsel is independent.*
2. *Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.*
3. *Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.*
4. *Defense counsel is provided sufficient time and a confidential space within which to meet with the client.*
5. *Workload is controlled to permit the rendering of quality representation.*
6. *Defense counsel's ability, training, and experience match the complexity of the case.*
7. *The same attorney continuously represents the client until completion of the case.*
8. *There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.*
9. *Defense counsel is provided with and required to attend continuing legal education.*
10. *Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.*



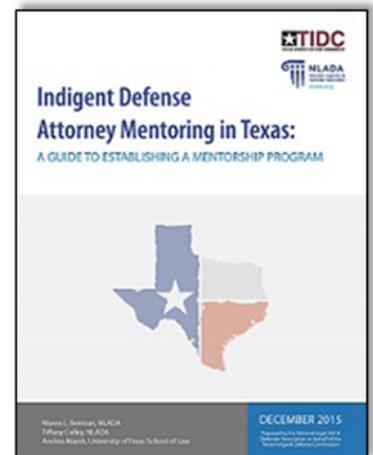
## Online Resources

To promote best practices and accountability, TIDC serves as a clearinghouse of indigent defense information via its website. The public has access to all county plans, expenditures, guides, model forms, rules, publications, e-newsletters and press releases. Visit our website at <http://www.tidc.texas.gov> for more information.

Following are just a few highlights of what you can find on TIDC's website:

- **Fair Defense Law Codified:** Includes all provisions of the Fair Defense Act as modified over the past 15 years, along with other statutes and provisions of the Texas Administrative Code pertaining to indigent defense and TIDC's powers and duties. Available at: <http://tidc.texas.gov/media/41826/fda-codified-10-12-15.pdf>.

- **Discretionary Grant Information:**  
<http://tidc.texas.gov/grants-reporting/discretionary.aspx>.
- **Formula Grant Information:**  
<http://tidc.texas.gov/grants-reporting/formula.aspx>.
- **Guidelines for Indigent Defense Caseloads:** Texas-specific guidelines for the number of felony and misdemeanor cases that appointed counsel should carry on an annual basis to ensure effective assistance of counsel. Available at:  
[http://tidc.texas.gov/media/31818/150122\\_weightedcl\\_final.pdf](http://tidc.texas.gov/media/31818/150122_weightedcl_final.pdf).
- **Juvenile Addendum: Guidelines for Indigent Defense Caseloads:** Texas-specific guidelines for the number of juvenile cases that appointed counsel should carry. Available at: [http://tidc.texas.gov/media/50834/161214\\_wcl-juvenile.pdf](http://tidc.texas.gov/media/50834/161214_wcl-juvenile.pdf).
- **Appellate Addendum: Guidelines for Indigent Defense Caseloads:** Texas-specific guidelines for the number of appellate cases that appointed counsel should carry. Available at: [http://tidc.texas.gov/media/50833/161214\\_wcl-appellate.pdf](http://tidc.texas.gov/media/50833/161214_wcl-appellate.pdf).
- **Performance Guidelines for Non-Capital Criminal Defense Representation:** Step-by-step guide to what lawyers should do in criminal cases. Adopted by the State Bar of Texas in January 2011. Available at: <http://tinyurl.com/tx-non-cap-perform-guide>.
- **Indigent Defense Attorney Mentoring in Texas: A Guide to Establishing a Mentorship Program:** A 2015 report from TIDC and the National Legal Aid and Defender Association. Available at:  
<http://www.tidc.texas.gov/resources/publications/reports/special-reports/indigent-defense-attorney-mentoring-in-texas.aspx>.
- **Legislative Information:** A list of Commission recommendations for the 85th Legislature and other information is available at: <http://tidc.texas.gov/policies-standards/legislative-information.aspx>.



## **Texas Organizations**

- **State Bar of Texas Legal Services to the Poor in Criminal Matters Committee:** Standing committee of the State Bar of Texas with a mission to study the indigent defense system in Texas, collect data and other information relevant to their defense and to develop recommendations for action by the State Bar, the Texas legislature and all other entities that are or should be involved in the provision of quality representation to indigent persons involved in criminal matters. The committee has developed multiple performance guidelines for defense counsel. More at: <http://www.texasbar.com/lspcriminal>.
- **Texas Appleseed:** A public interest justice center “that works to change unjust laws and policies that prevent Texans from realizing their full potential.” The organization was instrumental in documenting the shortcomings of Texas’ indigent defense system prior to the passage of the Fair Defense Act and the need for the Act. More at: <https://www.texasappleseed.org>.
- **Texas Criminal Justice Coalition:** Advances solutions that transform the adult and youth justice systems to strengthen families and foster safer communities. See <http://texascjc.org/>.

- **Texas Fair Defense Project:** Works to improve the fairness and accuracy of the criminal justice system in Texas, with a primary focus on improving access to counsel and the quality of indigent defense. See <http://www.fairdefense.org>.

## **National Organizations**

- **American Bar Association (ABA) Standing Committee on Legal Aid and Indigent Defendants:** Developed the ABA's *Ten Principles of a Public Defense Delivery System* and *Eight Guidelines of Public Defense Related to Excessive Workloads*. More at: [http://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defendants.html](http://www.americanbar.org/groups/legal_aid_indigent_defendants.html).
- **American University Right to Counsel Consortium:** A group of national, state, and local criminal justice stakeholders, community advocates, and policymakers who are committed to ensuring the fulfillment of the Sixth Amendment right to counsel and the effective delivery of public defense services. More at: <http://www.rtcnationalcampaign.org/>.
- **National Association of Criminal Defense Lawyers:** Membership organization for the nation's defense bar. NACDL seeks to ensure justice and due process for persons accused of crime, and foster the integrity, independence, and expertise of the criminal defense profession. Resources related to indigent defense are available at: <https://www.nacdl.org/publicdefense>.
- **National Association for Public Defense (NAPD):** Organization of public defense professionals working to improve the nation's indigent defense systems. See <http://www.publicdefenders.us>.
- **National Legal Aid and Defender Association (NLADA):** Membership organization that promotes excellence in the delivery of legal services for people who cannot afford counsel. Resources pertaining to indigent defense can be found at: <http://www.nlada.org/tools-and-technical-assistance/public-defense-resources>.
- **Sixth Amendment Center:** Assists governments in meeting their constitutional obligation to protect citizens' right to counsel under the 6<sup>th</sup> Amendment. See <http://sixthamendment.org>.

## Appendix A

### Policy Monitoring Review Checklist

*The standards used to conduct policy monitoring reviews are based on state law and administrative rules. The Texas Indigent Defense Commission (TIDC) is required by Texas Government Code, sec. 79.037, to monitor counties that receive grant funds and to determine that counties demonstrate a commitment to compliance with the requirements of state law relating to indigent defense. The policy monitoring process and regulations are described in Subchapter C. Policy Monitoring Requirements, sec. 174.26-174.28, Texas Administrative Code.*

*Following are the six core requirements of the Fair Defense Act on which the Policy Monitor bases his review, and what policies and procedures should be in place for a county to be in compliance with the Fair Defense Act:*

#### **Requirement 1: Conduct prompt and accurate Article 15.17 proceedings.**

- The accused must be brought before a magistrate within 48 hours of arrest.<sup>1</sup>
  - A person arrested for a misdemeanor without a warrant must be released on bond in an amount no more than \$5,000 not later than 24 hours after arrest if a magistrate has not determined probable cause by that time.<sup>2</sup>
- The magistrate must inform and explain the right to counsel and the right to appointed counsel to the accused.<sup>3</sup>
- The magistrate must ensure that reasonable assistance in completing forms necessary to request counsel is provided to the accused.<sup>4</sup>
- A record must be made of the following:
  - the magistrate informing the accused of the accused's right to request appointment of counsel;
  - the magistrate asking whether accused wants to request appointment of counsel;
  - and whether the person requested court appointed counsel.<sup>5</sup>
- If authorized to appoint counsel, the magistrate must do so within one working day after receipt of request for counsel in counties with a population of 250,000 or more and within three working days in counties under 250,000.<sup>6</sup>

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<sup>1</sup> Tex. Code Crim. Proc. art. 14.06(a).

<sup>2</sup> Tex. Code Crim. Proc. art. 17.033.

<sup>3</sup> Tex. Code Crim. Proc. art. 15.17(a).

<sup>4</sup> *Id.*

<sup>5</sup> Tex. Code Crim. Proc. art. 15.17(e).

<sup>6</sup> Tex. Code Crim. Proc. art. 15.17(a) requires the magistrate to appoint counsel according to the time frames set in Tex. Code Crim. Proc. art. 1.051.

- If not authorized to appoint counsel, the magistrate must transmit or cause to be transmitted to the appointing authority an accused's request for counsel within 24 hours of the request being made.<sup>7</sup>

## **Requirement 2: Determine Indigence According to Standards Directed by the Indigent Defense Plan**

- Provide detailed procedures used to determine whether a defendant is indigent.<sup>8</sup>
- State the financial standard(s) to determine whether a defendant is indigent.<sup>9</sup>
- List factors the court will consider when determining whether a defendant is indigent.<sup>10</sup>

## **Requirement 3: Establish minimum attorney qualifications.**

- Establish objective qualification standards for attorneys to be on an appointment list.<sup>11</sup>
  - Standards must require attorneys to complete at least six hours of continuing legal education pertaining to criminal law during each 12-month reporting period or be currently certified in criminal law by the Texas Board of Legal Specialization.<sup>12</sup>
  - Standards must require attorneys to submit by October 15 each year the percentage of the attorney's practice time that was dedicated to work based on appointments accepted in this county for adult criminal and juvenile delinquency cases. The report must be made on a form prescribed by the Texas Indigent Defense Commission for the prior 12 months that begins on October 1 and ends on September 30.<sup>13</sup>
- Attorneys must be approved by a majority of the judges who established the appointment list to be placed on the appointment list.<sup>14</sup>

## **Requirement 4: Appoint counsel promptly.**

- Incarcerated persons: After receipt of a request for counsel, counsel must be appointed within one working day in counties with a population of 250,000 or more and within three working days in counties under 250,000.<sup>15</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> Tex. Code Crim. Proc. art. 26.04(l)-(r).

<sup>9</sup> Tex. Code Crim. Proc. art. 26.04(l).

<sup>10</sup> Tex. Code Crim. Proc. art. 26.04(m).

<sup>11</sup> Tex. Code Crim. Proc. art. 26.04(d).

<sup>12</sup> 1 Tex. Admin. Code §§174.1-174.4.

<sup>13</sup> Tex. Code Crim. Proc. art. 26.04(j)(4).

<sup>14</sup> Tex. Code Crim. Proc. art. 26.04(d).

<sup>15</sup> Tex. Code Crim. Proc. art. 1.051(c).

- Persons out of custody: Counsel must be appointed at the defendant's first court appearance or when adversarial judicial proceedings are initiated, whichever comes first.<sup>16</sup>
- All unrepresented defendants must be advised of the right to counsel and the procedures for obtaining counsel.<sup>17</sup>

### **Requirement 5: Institute a fair, neutral, and nondiscriminatory attorney selection process.**

- Rotational method: The court must appoint an attorney from among the next five names on the appointment list in the order in which the attorneys' names appear on the list, unless the court makes a finding of good cause on the record for appointing an attorney out of order.<sup>18</sup>
- Public Defender: The system must meet the requirements set out in Article 26.044 of the Code of Criminal Procedure. The appointment process must be listed in the indigent defense plan.<sup>19</sup>
- Alternative appointment method:<sup>20</sup>
  - The local processes must be established by vote of two-thirds of the judges.
  - The plan must be approved by presiding judge of administrative judicial region.
  - The courts must allocate appointments reasonably and impartially among qualified attorneys.

### **Requirement 6: Promulgate standard attorney fee schedule and payment process.**

- Payments shall be in accordance with a schedule of fees adopted by the judges.<sup>21</sup>
- No payment shall be made until the judge approves payment after submission of the attorney fee voucher.<sup>22</sup>
- If the judge disapproves the requested amount of payment, the judge shall make written findings stating the amount that the judge approves and each reason for approving an amount different from the requested amount.<sup>23</sup>
- Expenses incurred without prior court approval shall be reimbursed if the expenses are reasonably necessary and reasonably incurred.<sup>24</sup>

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<sup>16</sup> Tex. Code Crim. Proc. art. 1.051(j). *Rothgery v. Gillespie County*, 554 U.S. 191 (2008).

<sup>17</sup> Tex. Code Crim. Proc. art. 1.051(f-2).

<sup>18</sup> Tex. Code Crim. Proc. art. 26.04(a).

<sup>19</sup> Tex. Code Crim. Proc. art. 26.044.

<sup>20</sup> Tex. Code Crim. Proc. art. 26.04(g)-(h).

<sup>21</sup> Tex. Code Crim. Proc. art. 26.05(b).

<sup>22</sup> Tex. Code Crim. Proc. art. 26.05(c).

<sup>23</sup> *Id.*

<sup>24</sup> Tex. Code Crim. Proc. art. 26.05(d). Tex. Code Crim. Proc. art. 26.052(h).

## Requirement 7: Statutory data reporting.

- The county auditor shall prepare and send to OCA an annual report of legal services provided in the county to indigent defendants during the fiscal year and an analysis of the amount expended:
  - In each district, statutory county, and appellant court;
  - In cases for which a private attorney is appointed for an indigent defendant;
  - In cases for which a public defender is appointed for an indigent defendant;
  - In cases for which counsel is appointed for an indigent juvenile; and
  - For investigation expenses, expert witness expenses, or other litigation expenses.

## **Appendix B**

### **Fiscal Monitoring Review Checklist**

*The standards used to conduct fiscal monitoring reviews are based on state law and administrative rules. The Texas Indigent Defense Commission (TIDC) is required by Texas Government Code, sec. 79.037, to monitor counties that receive grant funds and to enforce compliance by the county with the conditions of the grant. The fiscal monitoring process and regulations are described in sec. 173.401, Texas Administrative Code.*

*Counties should be prepared to provide the following documents and answers to the following questions as part of a TIDC fiscal review:*

- 1) The General Ledger of activities that support the Indigent Defense Expenditure Report (IDER).
  - The Fiscal Monitor will trace the information provided by the General Ledger to the IDER.
  
- 2) A sample of paid attorney fee vouchers will be tested for the following attributes:
  - Are the vouchers related to one of the allowed expense categories?
    1. attorney fee
    2. investigation
    3. expert witness or
    4. other direct litigation expense.
  - Are the vouchers submitted by the attorney?
  - Is there documentation that the payment is related to a criminal case, including case number?
  - Does the voucher include more than one case? If yes, what are the accounting procedures used to verify that each case is counted separately on the IDER?
  - Does the voucher include an itemization of services performed by the attorney? Itemization at a minimum should include:
    1. The payee
    2. The service(s) provided which must include the case(s) level by type
    3. The date(s)
    4. The amount.
  - Are fees consistent with the published fee schedule?
  - Is the court listed?
  - Did the judge approve the fee requested? If not, is an explanation in writing provided?
  - Did the judge sign and approve the voucher?
  
- 3) A copy of the published attorney fee schedule.
  
- 4) A copy of the public appointment list.

- 5) The records that exist which document that an attorney applied to be included on the public appointment list.
- 6) The records that exist that document continuing legal education (CLE) of attorneys on the public appointment list.
- 7) Written policies and procedures regarding grant reporting.
- 8) Written accounting procedures related to criminal indigent defense expenses.
- 9) If applicable, a copy of any written contract(s) for indigent defense services.
- 10) If applicable, a copy of the open bidding and selection process used to solicit contract attorneys, such as a Request for Qualification.
- 11) If applicable, documentation to support contractual and equipment expenses.
- 12) If applicable, inventory record of grant-funded equipment purchases.
- 13) If applicable, records which outline equipment with more than 1 year of usefulness and items of equipment with an acquisition cost of \$5,000 or more.
- 14) If applicable, documentation to support salaries allocated to Administrative Expense

## Endnotes

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- <sup>1</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).
- <sup>2</sup> *In re Gault*, 387 U.S. 1 (1967).
- <sup>3</sup> *Argersinger v. Hamlin*, 407 U.S. 25 (1972).
- <sup>4</sup> See Catherine Greene Burnett et al., *In Pursuit of Independent, Qualified, and Effective Counsel: The Past and Future of Indigent Criminal Defense in Texas*, 42 S. Tex. L. Rev. 595 (2001).
- <sup>5</sup> Much of this section taken from “The Fair Defense Act and the Role of the Magistrate,” *The Recorder: The Journal of Texas Municipal Courts*, vol. 24, no. 2 (Feb. 2015), by Jim Bethke and Dottie Carmichael. Online at: [http://tidc.texas.gov/media/33920/150213magistraterolerecorder\\_vol24\\_no2.pdf](http://tidc.texas.gov/media/33920/150213magistraterolerecorder_vol24_no2.pdf).
- <sup>6</sup> Tex. Code Crim. Proc. art. 15.17 (2016).
- <sup>7</sup> Tex. Code Crim. Proc. art. 14.06 (2016).
- <sup>8</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008).
- <sup>9</sup> Tex. Code Crim. Proc. art. 15.18(a-1) (2016).
- <sup>10</sup> Tex. Code Crim. Proc. art. 1.051(b) (2016).
- <sup>11</sup> Tex. Code Crim. Proc. art. 26.04(l) (2016).
- <sup>12</sup> Tex. Code Crim. Proc. art. 26.04(m) (2016).
- <sup>13</sup> Tex. Code Crim. Proc. art. 26.04(n) (2016).
- <sup>14</sup> Tex. Code Crim. Proc. art. 26.04(p) (2016).
- <sup>15</sup> Tex. Code Crim. Proc. art. 26.04(r) (2016).
- <sup>16</sup> Tex. Code Crim. Proc. art. 1.051(f)-(f-2) (2016).
- <sup>17</sup> Tex. Code Crim. Proc. art. 26.04(g) (2016).
- <sup>18</sup> Tex. Code Crim. Proc. art. 17.09, Sec. 4 (2016).
- <sup>19</sup> Tex. Code Crim. Proc. art. 1.051(c)(1)-(2) (2016); see also 1 Tex. Admin. Code § 174.28(c)(4)(A)(i) (2016).
- <sup>20</sup> See Tex. Code Crim. Proc. art. 1.051(j) (2016) and *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008).
- <sup>21</sup> Tex. Fam. Code § 54.01(b-1) (2016); see also 1 Tex. Admin. Code § 174.28(c)(4)(A)(ii) (2016).
- <sup>22</sup> Tex. Fam. Code § 51.101(d) (2016); see also 1 Tex. Admin. Code § 174.28(c)(4)(A)(ii) (2016).
- <sup>23</sup> Tex. Code Crim. Proc. art.
- <sup>24</sup> Tex. Code Crim. Proc. art. 26.04(b)(6) (2016).
- <sup>25</sup> Tex. Fam. Code § 51.102 (2016).
- <sup>26</sup> Tex. Code Crim. Proc. art. 26.04(a) (2016).
- <sup>27</sup> Tex. Code Crim. Proc. art. 26.04(g)-(h) (2016).
- <sup>28</sup> See generally Tex. Code Crim. Proc. art. 26.04(a)-(e) (2016) (procedures and requirements for appointing counsel in assigned counsel systems).
- <sup>29</sup> See Tex. Code Crim. Proc. art. 26.044 (2016) (statutory authorization and requirements of a public defender’s office). See also Tex. Code Crim. Proc. art. 26.04(f) (2016), (“the court or the courts’ designee shall give priority in appointing that [public defender’s] office to represent the defendant”).
- <sup>30</sup> See Tex. Code Crim. Proc. art. 26.047 (2016) (statutory authorization and requirements of a managed assigned counsel program (MAC)). See also Tex. Code Crim. Proc. art. 26.04(f-1) (2016) (statutory language pertaining to the MAC appointing counsel in accordance with guidelines for the program).
- <sup>31</sup> See 1 Tex. Admin. Code § 174.10-174.25 (2016).
- <sup>32</sup> See 1 Tex. Admin. Code § 174.28(c)(5) (description of what type of documentation the policy monitor examines to determine if a county meets the core requirements of the attorney selection process).
- <sup>33</sup> 1 Tex. Admin. Code § 174.28(c)(5)(D) (2016).
- <sup>34</sup> Tex. Code Crim. Proc. art. 26.05(b) (2016).
- <sup>35</sup> Tex. Code Crim. Proc. art. 26.05(c) (2016).
- <sup>36</sup> *Id.*
- <sup>37</sup> *Id.*
- <sup>38</sup> Tex. Code Crim. Proc. art. 26.05(d), 26.052(f)-(h) (2016).
- <sup>39</sup> Tex. Gov’t Code § 79.036(a-1) (2016).
- <sup>40</sup> 1 Tex. Admin. Code § 174.28(c)(6) (2016).
- <sup>41</sup> 1 Tex. Admin. Code § 173.401 (2016).
- <sup>42</sup> Tex. Code Crim. Proc. art. 26.04(j)(4) (2016).
- <sup>43</sup> *Attorney Caseload Reporting*, Texas Indigent Defense Commission, <http://tidc.texas.gov/policies-standards/attorney-caseload-reporting.aspx> (last visited January 4, 2017).
- <sup>44</sup> 1 Tex. Admin. Code § 174.51 (2016).
- <sup>45</sup> ABA, Standing Committee on Legal Aid and Indigent Defendants, *Ten Principles of a Public Defense Delivery System*, Introduction (Feb. 2002), available at <http://tinyurl.com/ABA10Principles>.