



Ten Key Provisions of the Fair Defense Act

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.

1. Magistrate Responsibilities.

An arresting officer must ensure that the accused is brought before a magistrate no later than 48 hours after arrest (Art. 14.06, Tex. Code Crim. Proc.). Among various other requirements, the magistrate must admonish the accused of his/her constitutional rights, set bail, inform the accused of the right to appointed counsel if the person cannot afford counsel and the procedures for requesting appointment of counsel (Art. 15.17, Tex. Code Crim. Proc.).

2. Indigence Determination/ Consideration of Bail.

The defendant’s ability to post bail may not be considered apart from the defendant’s actual financial circumstances (i.e., the defendant’s income, source of income, assets, property owned, obligations and expenses, etc.). A court may not threaten to arrest or incarcerate a person solely because the person requests the assistance of counsel. The local indigent defense plan must include financial standards for determining whether a defendant is eligible to receive appointed counsel. “Indigent” means a person who is not financially able to employ counsel.

3. Waiver of Counsel Provisions.

In 2007, the Texas Legislature established procedures for obtaining waivers of the right to counsel from defendants. It also imposed limits on when prosecutors may speak with unrepresented defendants and when judges may direct such defendants to speak with prosecutors. 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.

4. Time Frames 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. For persons out of custody, counsel must be appointed at defendant’s first court appearance or when adversarial judicial proceedings are initiated, whichever comes first (see Art. 1.051(j), Tex. Code Crim. Proc., and *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008)).



5. Attorney Selection Methodology.

The local indigent defense plan must include the method by which attorneys on the county's appointment lists are assigned to cases. For example, in many counties the plan provides that judges will make appointments in rotation order from the appointment lists.

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. 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. The attorney may appeal to the presiding judge of the administrative judicial region.

7. Experts and Investigators.

The law requires reimbursement of expert and investigative expenses with and *without* prior court approval if they are reasonably necessary and reasonably incurred.

8. Indigent Defense Expenditure Report (IDER).

Texas Gov't Code sec. 79.036(e) requires that all Texas counties report amounts spent on attorney fees, licensed investigators, expert witnesses, and other direct litigation costs.

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. Each county must also annually report by November 1 with its IDER the number of cases handled by each attorney for the preceding fiscal year along with the amount paid.

10. Adult and Juvenile Local Indigent Defense Plan Report.

The FDA requires the criminal court judges and juvenile board in each county to adopt and publish countywide indigent defense plans. Gov't Code sec. 79.036 requires that each county submit to TIDC 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. Plans are at <http://tidc.tamu.edu/public.net>.