

Policy Monitoring

Fair Defense Act -- Core Requirements

Introduction

Texas Indigent Defense Commission Background

In January 2002, the 77th Texas Legislature established the Task Force on Indigent Defense (now Texas Indigent Defense Commission or “Commission”). The mission of the Commission is to improve the delivery of indigent defense services through fiscal assistance and professional support to State, local judicial, county, and municipal officials. The purpose of the Commission is to promote justice and fairness to all indigent persons accused of criminal conduct, including juvenile respondents, as provided by the laws and constitutions of the United States and Texas. The Commission is given a directive under Tex. Gov’t Code § 71.062(b) to monitor local jurisdiction compliance with the Fair Defense Act (“FDA”).

Goal

Promote local compliance and accountability with the requirements of the Fair Defense Act through evidence-based practices and provide technical assistance to improve processes where needed.

Core Requirements of the Fair Defense Act

1. Conduct prompt magistration proceedings:
 - Inform and explain right to counsel to accused;
 - Provide reasonable assistance to accused in completing necessary forms to request counsel;
 - Maintain magistrate processing records.
2. Determine indigence according to standard in local indigent defense plan.
3. Establish minimum attorney qualifications.
4. Appoint counsel promptly.
5. Institute a fair, neutral, and non-discriminatory attorney selection process.
6. Promulgate standard attorney fee schedule and payment process.

Core requirement 1. Conduct prompt and accurate magistration proceedings:

- Inform and explain right to counsel to accused;
- Provide reasonable assistance to accused in completing necessary forms to request counsel;
- Maintain magistrate processing records.

Statutory Provisions

The Fair Defense Act (FDA) requires that magistration is conducted without unnecessary delay, but not later than 48 hours after the person is arrested. At magistration, the arrestee is to be informed in clear language of the following:

- the accusation against him/her and of any affidavit filed;
- the right to retain counsel;
- the right to remain silent;

- the right to have an attorney present during any interview with peace officers or attorneys representing the state;
- the right to terminate the interview at any time;
- the right to have an examining trial; and
- the person's right to request the appointment of counsel if the person cannot afford counsel.

The magistrate shall inform the person arrested of the procedures for requesting appointment of counsel. If the person does not speak and understand the English language or is deaf, the magistrate shall inform the person in a manner consistent with Articles 38.30 and 38.31, as appropriate. The magistrate shall ensure that reasonable assistance in completing the necessary forms for requesting appointment of counsel is provided to the person at the same time. Tex. Code Crim. Proc. Art. 15.17(a). If the arrestee requests appointed counsel, the arrestee is required to complete under oath a questionnaire concerning his financial resources. Tex. Code Crim. Proc. Art. 26.04(n).

If the person arrested is not a US Citizen, he/she has the right to request that the consulate for his/her native country is informed that he/she is in jail. The consulate is to keep the family informed of the arrestee's situation and to make sure that the arrestee's rights are protected. The magistrate is to ask, "Do you request that the court notify the consulate for your native country that you are in jail at this time?" This is a continuing legal right that the arrestee may exercise at any time. (If the accused requests notification of his/her consulate, the magistrate must determine the country of origin and send notice to consulate by fax, if possible.) For more information regarding this subject please go to: http://www.oag.state.tx.us/AG_Publications/pdfs/vienna_guidebook.pdf (*Magistrate's Guide to the Vienna Convention on Consular Notifications*).

The record of the magistrate's warning must comply with Article 15.17(e), and must contain information indicating:

- (1) the magistrate informed the person of the person's right to request appointment of counsel;
- (2) the magistrate asked the person whether the person wanted to request appointment of counsel; and
- (3) whether the person requested appointment of counsel.

This record may consist of written forms, electronic recordings, or other documentation as authorized by procedures adopted in the county under Article 26.04(a). Tex. Code Crim. Proc. Art. 15.17(e)-(f).

Core Requirement 2. Determine indigence according to standard in local indigent defense plan:

Statutory Provisions

Each jurisdiction must establish procedures and financial standards for determining indigence. The procedures must apply to each defendant equally, regardless of whether or not bail has been posted. In determining whether a defendant is indigent, the court or the court's designee may consider the defendant's income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, and spousal income that is available to the defendant. The court or the courts' designee may not consider whether the

defendant has posted or is capable of posting bail, except to the extent that it reflects the defendant's financial circumstances as measured by the considerations previously listed. Tex. Code Crim. Proc. Art. 26.04(1)-(m).

A defendant who requests a determination of indigence and appointment of counsel must:

- (1) complete under oath a questionnaire concerning his financial resources;
 - (2) respond under oath to an examination regarding his financial resources by the judge or magistrate responsible for determining whether the defendant is indigent; or
 - (3) complete the questionnaire and respond to examination by the judge or magistrate.
- Tex. Code Crim. Proc. Art. 26.04(n).

In addition the defendant is required to sign an oath that substantially conforms to the following:

On this _____ day of _____, 20 ____, I have been advised by the (name of the court) Court of my right to representation by counsel in the trial of the charge pending against me. I certify that I am without means to employ counsel of my own choosing and I hereby request the court to appoint counsel for me. (signature of the defendant)

Tex. Code Crim. Proc. Art. 26.04(o).

A defendant who is determined by the court to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occurs. If there is a material change in financial circumstances after a determination of indigence or non-indigence is made, the defendant, the defendant's counsel, or the attorney representing the state may move for reconsideration of the determination. Tex. Code Crim. Proc. Art. 26.04(p).

For juveniles, Tex. Fam. Code § 51.10(f)-(g) states:

- (f) The court shall appoint an attorney to represent the interest of a child entitled to representation by an attorney, if:
 - (1) the child is not represented by an attorney;
 - (2) the court determines that the child's parent or other person responsible for support of the child is financially unable to employ an attorney to represent the child; and
 - (3) the child's right to representation by an attorney:
 - (A) has not been waived under Section 51.09 of this code; or
 - (B) may not be waived under Subsection (b) of this section.
- (g) The juvenile court may appoint an attorney in any case in which it deems representation necessary to protect the interests of the child.

The rules of Article 26.04 still apply to juveniles, except that the income and assets of the person responsible for the child's support are used in determining whether the child is indigent. Tex. Fam. Code § 51.102(b)(1).

Core Requirement 3. Establish minimum attorney qualifications:

Statutory Provisions

Judges of the statutory county courts are to establish an appointment list of qualified attorneys to provide representation in misdemeanor cases. Likewise, judges of the district courts are to establish an appointment list of qualified attorneys to provide representation in felony cases. The judges are to specify objective qualifications necessary to be included on the list and may establish graduated lists, according to the seriousness of the offense. Each attorney applying to be on an appointment list must be approved by a majority of the judges who try criminal cases at that court level. In a county where a public defender is used, the courts may appoint the public defender to represent defendants. Tex. Code Crim. Proc. Art. 26.04(d)-(f). Attorneys accepting appointments are required to annually obtain 6 hours of criminal law continuing legal education (CLE) credit per Title 1, §174.1 of the Texas Administrative Code.

For juveniles, the juvenile board is to establish qualifications necessary for an attorney to be included on the appointment list. The plan must recognize the differences in qualifications and experience necessary for appointments involving supervision, delinquent conduct, or commitment to the Texas Youth Commission [now Texas Juvenile Justice Department]. Tex. Fam. Code § 51.102. Attorneys accepting appointments are required to annually obtain 6 hours of juvenile law continuing legal education (CLE) credit per Title 1, §174.2 of the Texas Administrative Code.

Appointed attorneys are to contact the defendant by the end of the first working day after receiving the appointment and to interview the client as soon as practicable. Tex. Code. Crim. Proc. Art. 26.04(j). The public defender may have additional objective qualifications in providing quality representation as the duties of the public defender are to be specified by the commissioner's court in a written agreement. Art. 26.044(b). Attorneys must also meet the standard of care set by the Texas Bar in the Texas Disciplinary Rules of Professional Conduct.

Core Requirement 4. Appoint counsel promptly:

Statutory Provisions

An indigent defendant is entitled to have an attorney appointed to represent him/her in any adversarial 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. Tex. Code Crim. Proc. Art. 1.051(a). If the magistrate is authorized under Article 26.04 to appoint counsel for indigent defendants in the county, the magistrate shall appoint counsel in accordance with Article 1.051. Art. 15.17(a). For counties with a census population over 250,000, **if an indigent defendant is not released from custody prior to the appointment of counsel**, the court or court's designee shall appoint counsel as soon as possible, but **not later than the end of the first working day** after the date on which the court or the court's designee receives the defendant's request for appointment of counsel. For counties with a census population under 250,000, **if an indigent defendant is not released from custody prior to the appointment of counsel**, the court or court's designee shall appoint counsel as soon as possible, but **not later than the end of the third working day** after the date on which the court or the court's designee receives the defendant's request for appointment of counsel. Art. 1.051(c). **If an indigent defendant is released from custody prior to the appointment of counsel** under this section, appointment of counsel is not required until **the defendant's first court**

appearance or when adversarial judicial proceedings are initiated, whichever comes first.
Art. 1.051(j).

For juveniles, unless the court finds that the appointment of counsel is not feasible due to exigent circumstances, the court must appoint counsel within a reasonable time before the first detention hearing is held to represent the child at the hearing. Tex. Fam. Code § 54.01(b-1). If the child was not represented by an attorney at the detention hearing required code and a determination was made to detain the child, the child shall immediately be entitled to representation by an attorney. The court must order the retention of an attorney or appoint an attorney. Tex. Fam. Code § 51.10(c).

If a determination was not made to detain the child, determinations of indigence are made on the filing of a petition if: (1) the child is released by intake; (2) the child is released at the initial detention hearing; or (3) the case was referred to the court without the child in custody. Tex. Fam. Code § 51.101(c). A juvenile court that makes a finding of indigence under Subsection 51.101(c) must appoint an attorney to represent the child on or before the fifth working day after the date the petition for adjudication or discretionary transfer hearing was served on the child. § 51.101(d).

Waivers of Counsel: Once adversarial judicial proceedings have been initiated, a prosecutor may not initiate or encourage waivers of counsel. If a defendant has requested counsel but is not represented, the prosecutor may not communicate with the defendant unless the court has denied indigence. If indigence has been denied, the prosecutor may communicate with the defendant if the defendant has been given a reasonable opportunity to retain counsel but has failed to do so or if the defendant has waived the opportunity to retain private counsel. Tex. Code Crim. Proc. art. 1.051(f).

If counsel has not been requested but the defendant is not represented, the court must advise the defendant of the right to court appointed counsel and of the procedures for making the request and give the defendant a reasonable opportunity to request appointed counsel. If the defendant refuses to make a request for appointed counsel, a waiver of counsel may be obtained, and the court may proceed with the matter on 10 days' notice to the defendant of the dispositive setting. Art. 1.051(e)-(g).

Core Requirement 5. Institute a fair, neutral, and non-discriminatory attorney selection process:

Statutory Provisions

Tex. Code Crim. Proc. Art. 26.04(b) requires that appointments are allocated among qualified attorneys in a fair, neutral, and non-discriminatory manner. Article 26.04(a) states: "A court shall appoint an attorney from a public appointment list using a system of rotation, unless the court appoints an attorney under Subsection (f), (h), or (i)." Subsection (f) allows for the court to appoint the public defender. Subsection (h) allows the court to appoint counsel via an alternative program. Subsection (i) allows for appointment of attorneys from the court's administrative judicial region when a person is accused of a felony and the court is unable to adequately appoint appropriate counsel. When a rotational system is used for appointments, "the court shall appoint attorneys 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". Art. 26.04(a).

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

Statutory Provisions

Attorneys are to be paid a reasonable fee for the following: time spent in court making an appearance; reasonable and necessary time spent out of court on the case, supported by documentation that the court requires; preparation of an appellate brief and preparation and presentation of oral argument to an appellate court; and preparation of a motion for rehearing. A fee schedule is to govern these payments, taking into account reasonable and necessary overhead rates. No payment is to be made to the attorney unless the judge approves the payment. If the judge disapproves the requested amount, the judge shall make written findings stating the amount of payment and the reasons for any disapproval. An attorney whose request for payment is disapproved may appeal the disapproval. Tex. Code Crim. Proc. Art. 26.05(a)-(e).

Counsel is to be reimbursed for reasonable and necessary investigation and expert witness fees. Expenses incurred without prior court approval shall be reimbursed if the expenses were reasonably necessary and reasonably incurred. Tex. Code Crim. Proc. Arts. 26.05(d), 26.052(h).