

# Fair Defense Law

A Primer for Texas Legislators and Staff

85<sup>th</sup> Legislative Session (2017)

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



## TEXAS INDIGENT DEFENSE COMMISSION

### Ex Officio Members

Hon. Sharon Keller, *Chair, Presiding Judge, Court of Criminal Appeals*  
 Hon. Nathan L. Hecht, *Austin, Chief Justice, Supreme Court of Texas*  
 Hon. Sherry Radack, *\* Houston, Chief Justice, First Court of Appeals*  
 Hon. Brandon Creighton  
*Conroe, State Senator*

Hon. John Whitmire  
*Houston, State Senator*  
 Hon. Andrew Murr  
*Junction, State Representative*  
 Hon. Abel Herrero  
*Robstown, State Representative*  
 Hon. Linda Rodriguez\*  
*Hays County*

### Governor Appointees

Hon., Jon Burrows,  
*Temple, Bell County Judge*  
 Mr. Don Hase  
*Arlington, Attorney, Ball & Hase*  
 Hon. Missy Medary,  
*Corpus Christi, Presiding Judge, 5th Administrative Judicial Region*  
 Hon. Richard A. Evans  
*Bandera, Bandera County Judge*  
 Mr. Alexander Bunin  
*Houston, Chief, Harris County Public Defender's Office*

\*Designated by Governor

## **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. 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, misdemeanors that result in a defendant's loss of liberty, and other situations. This constitutional mandate was left to the states to implement and finance. The State of Texas delegated the responsibility to provide and pay for these services to counties and local property taxpayers.

Art. 1.051(c), Tex. Code Crim. Proc., 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.

## **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), 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**

TIDC 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. Formula and Discretionary Grant Program.** In FY 2016, TIDC awarded almost \$33 million in grants to counties through two funding strategies. Formula grants (\$24 million awarded in FY 2016) provide grants to all qualifying Texas counties, based on the county's population and indigent defense spending. Discretionary grants (\$8.7 million awarded in FY 2016) assist counties in implementing innovative programs or remedying compliance issues. (See Formula Grants: <http://tidc.texas.gov/grants-reporting/formula.aspx> and Discretionary Grants: <http://tidc.texas.gov/grants-reporting/discretionary.aspx>.)
- 2. Fiscal and Policy Monitoring Program.** TIDC is required by Texas Gov't 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. The fiscal monitor focuses on the finances of the county, whereas the policy monitor reviews local practices through in-court observation, interviews, and examination of records to determine how well jurisdictions meet the requirements of the FDA and TIDC policies. In general, jurisdictions are checked to ensure that: art. 15.17 hearings are held within 48 hours of arrest and defendants can request counsel at the hearing; the county's indigent defense plan sets a financial standard of indigence in compliance with art. 26.04, Tex. Code Crim. Proc.; the jurisdiction is 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.

(See Fiscal Monitoring: <http://tidc.texas.gov/monitoring/fiscal-monitoring.aspx> and Policy Monitoring: <http://tidc.texas.gov/monitoring/policy-monitoring.aspx>.)

**3. Resources, Publications, Education, and Awards.** TIDC provides information and resources that enhance understanding of the FDA and help improve indigent defense. TIDC serves this function through: the collection and dissemination of Texas-specific data on its website; trainings; model forms; original research; and recognizing outstanding achievements through its awards program. In FY 2016, TIDC staff and members trained more than 1,000 judges, county officials, and attorneys across Texas.

**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, 18 wrongfully convicted Texans have been exonerated with the help of this program.

**5. Recommendations to the Legislature.** Pursuant to sec. 79.035, Gov't 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, Gov't Code, to submit its own Legislative Appropriations Request separate and apart from the Office of Court Administration. (See <http://tidc.texas.gov/policies-standards/legislative-information.aspx>.)

## **Ten Key Provisions of Fair Defense Law**

**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>.

## 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>.

- **Fair Defense Law Codified:** <http://tidc.texas.gov/media/41826/fda-codified-10-12-15.pdf>.
- **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>.

### Other Organizations:

- **American Bar Association (ABA):** Standing Committee on Legal Aid and Indigent Defendants (SCLAID): [http://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defendants.html](http://www.americanbar.org/groups/legal_aid_indigent_defendants.html). The ABA's *Ten Principles of a Public Defense Delivery System* is the model for how state indigent defense systems should operate. See <http://tinyurl.com/ABA10Principles>.
- **National Association for Public Defense (NAPD):** Organization of public defense professionals working to improve indigent defense system See <http://www.publicdefenders.us>.
- **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>.
- **National Legal Aid and Defender Association (NLADA):** <http://www.nlada.org/tools-and-technical-assistance/public-defense-resources>.
- **State Bar of Texas Legal Services to the Poor in Criminal Matters:** <http://www.texasbar.com/lspcriminal>.
- **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>.

### 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.*