



Follow-up Review of El Paso County's Indigent Defense Systems

March 2018

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Background

In fewer than four years, El Paso County has greatly improved its indigent defense system. These improvements are cause for celebration. The County's progress not only benefits indigent defense clients, criminal justice stakeholders, and El Paso residents, but it also serves as a model for other Texas counties.

2014 Review

Texas Indigent Defense Commission (Commission) staff visited El Paso County in 2014 to assess the county's indigent defense systems and to determine if the county was meeting Fair Defense Act (FDA) requirements. In November 2014, the Commission issued its initial policy monitoring report, which made several recommendations to assist El Paso County in meeting the core requirements of the FDA. Recommendations included (1) assistance with affidavits of indigence; (2) methods for conducting indigence screenings; (3) timeliness of counsel appointments; (4) distribution of attorney appointments; (5) methods for making payments; and (6) methods for annually reporting indigent defense case and expense data to the Commission.

2018 Follow-up Review

Staff members Joel Lieurance, Debra Stewart, and Brandon Bellows conducted the follow-up review. The review consisted of a site visit to El Paso County between October 23rd and 25th, 2017 and of records sent remotely to Austin.¹ The purpose of this review was to examine whether El Paso County successfully addressed the recommendations from the November 2014 report. The monitor relied on the following items in drawing report conclusions: observations of Article 15.17 hearings; felony and misdemeanor case files; case management data provided by the juvenile probation department; data reported to the Commission as part of the annual Indigent Defense Expense Report (IDER); vouchers paid to defense attorneys; and documents submitted to the Commission as part of the local indigent defense plan. The monitor's report follows. The county does not need to respond to this report as it has addressed all previous recommendations.

¹ Throughout this report, references to Commission staff will use the term "monitor."

Status of Monitoring Findings

Topic	Description of Recommendations from 2014 Policy Monitoring Report	Matter Addressed	Matter Pending
Magistrate Warnings	Arrestees requesting counsel at municipal court hearings did not have requests ruled upon because records of their financial status were not created. Arrestees making bail before completing financial work were not able to complete the financial questionnaires necessary for appointment of counsel until after a case was filed with the clerk's office.	√	
Indigence Determinations	Determinations of indigence considered factors beyond those listed in Article 26.04(m) of the Code of Criminal Procedure.	√	
Timely Felony Appointments	Appointments of counsel did not meet the Commission's threshold of 90% timeliness.	√	
Timely Misdemeanor Appointments	Appointments of counsel did not meet the Commission's threshold of 90% timeliness.	√	
Waivers of Counsel	Some requests for counsel were not ruled upon before defendants entered uncounseled pleas.	√	
Timely Juvenile Appointments	Appointments of counsel for juveniles who were released from custody did not meet the Commission's threshold of 90% timeliness.	√	
Distribution of Felony Appointments	The distribution of felony appointments fell outside the Commission's threshold for presuming a fair, neutral, and nondiscriminatory appointment system.	√	
Distribution of Misdemeanor Appointments	The distribution of misdemeanor appointments fell outside the Commission's threshold for presuming a fair, neutral, and nondiscriminatory appointment system.	√	
Payment Procedures	After a fee schedule change, some payments were adjusted by the auditor to meet the new fee schedule without a judge's signature authorizing the adjustment.	√	
Data Reporting	Appointed case counts were slightly inaccurate because payments for investigative / expert witness expenses were counted as separate cases and there was no process to check against duplicate case numbers for vouchers reporting multiple cases.	√	
Data Reporting	Salaries of mental health caseworkers from the public defender's office were recorded as administrative support salaries.	√	

Requirement 1: Conduct prompt and accurate Article 15.17 proceedings.

Under Article 15.17 of the Code of Criminal Procedure, arrestees must be brought before a magistrate within 48 hours of arrest, and the arrestee must be asked if he or she would like to request counsel. If the arrestee requests counsel, the magistrate must ensure reasonable assistance is provided in completing the forms necessary to request counsel. These forms must be transmitted to the appointing authority within 24 hours of the request being made.

At the time of the initial review, El Paso County arrestees received magistrate warnings at various points within the county. Some received the warnings before an associate judge at the county jail. Others would be brought before a justice of the peace or before a municipal court judge from the City of El Paso before being booked into the county jail. Arrestees who requested counsel from justices of the peace or municipal judges would not have their requests ruled upon, unless the person later re-invoked the request at a later point in time. There were no methods to (1) transfer early requests to the courts or (2) screen persons for indigence if a person requested counsel prior to being booked into the county jail. The monitoring report recommended that the county provide reasonable assistance with financial questionnaires to all persons requesting counsel.

In response to this recommendation, El Paso County has been providing 24-hour magistrate warnings at the county jail. This eliminated the need to use multiple points of magistrate warnings for arrests occurring after regular business hours. Currently, almost all magistrate warnings occur at the county jail. For arrestees who post bond prior to an indigence screening, El Paso County provides directions to report to the county for an indigence screening interview.

In the current review, the monitor found that if there was a record of a defendant requesting counsel at the Article 15.17 hearing, the case file contained supporting documentation as to the defendant's indigence (*i.e.*, all counsel requests were accompanied by affidavits of indigence). The presence of these affidavits (in all case files with a counsel request) is an indication that the process changes adopted by El Paso County have addressed gaps in providing assistance to arrestees in completing necessary forms for requesting counsel.

Requirement 2: Determine indigence according to standards directed by the indigent defense plan.

Article 26.04(l) of the Code of Criminal Procedure requires the courts to adopt procedures and financial standards for determining whether a defendant is indigent. Article 26.04(m) provides guidance as to the factors that may be considered in determining indigence.²

² Tex. Code Crim. Proc. art. 26.04(m) states:

During the initial review, the monitor examined records with counsel requests that were denied based on factors beyond those found in Article 26.04(m). In response, El Paso County simplified its affidavit of indigence to only consider the income and expenses of the defendant and his or her spouse. The county also trained screeners as to factors allowed to be used in determining indigence.

In the present review, the monitor did not find any denials of indigence based on factors outside of those found in Article 26.04(m). All denials of indigence were based on the defendant and his or her spouse earning too much income. El Paso County appears to have successfully addressed matters of improper denials as indicated by the following facts: (1) the current affidavit of indigence is limited to the income and expenses of the defendant and his or her spouse; and (2) the monitor found no denials of indigence based on factors outside of Article 26.04(m).

Requirement 3: Establish minimum attorney qualifications.

No recommendations were made in the initial report because El Paso County's practices and procedures comported with the statutory requirements.

Requirement 4: Appoint counsel promptly.

In adult criminal cases, the court (appointing authority) has one working day from the receipt of a counsel request to determine indigence and appoint counsel for those determined to be indigent.³ The court cannot delay the appointment of counsel because the defendant makes bail.⁴

Sample felony and misdemeanor case files from the initial review fell below the Commission's threshold for presuming a jurisdiction has procedures in place to ensure timely appointment of counsel (90% threshold). The primary causes of late appointments were twofold: (1) the county did not receive financial paperwork from persons requesting counsel; and (2) some indigence screenings occurred after the indigence determination was due. In response to report recommendations, the county put in place 24-hour magistrate warnings at the county jail so that all counsel requests could be captured.

In determining whether a defendant is indigent, the court or the courts' 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 listed in this subsection.

³ Tex. Code Crim. Proc. art. 1.051(c). The one working day time frame applies to counties with a population over 250,000. Other counties have three working days.

⁴ Tex. Code Crim. Proc. art. 1.051(j). *Rothgery v. Gillespie County*, 554 U.S. 991 (2008).

Felony Appointments

The monitor examined 145 felony cases filed in FY16 (October 2015 – September 2016) to determine the timeliness of counsel appointments. The monitor based this timeliness determination on requests for counsel found in the case file or case management system. The monitor found that counsel was appointed in a timely manner in just over 95% of felony cases. See Table 1 for a summary of times from request to appointment of counsel in felony cases. This level of timeliness is a substantial improvement over the initial review and falls within the Commission’s threshold for presuming a jurisdiction has procedures in place to ensure timely appointment of counsel.

Table 1: Timeliness of Felony Appointments

El Paso Felony Appointment Sample	Sample Size	Number from sample	Percent
Number of Case Files Examined	145		
Number of Case Files Containing a Request for Counsel		110	
Appointment / Denial of Indigence Occurred in:	110		
0 work days		49	44.5%
1 work day + 24 hour transfer ⁵		56	50.9%
Total Timely Appointments		105	95.5%
2 to 5 working days + 24 hour transfer		4	3.6%
More than 5 working days + 24 hour transfer		1	0.9%
Total Untimely Appointments		5	4.5%

Misdemeanor Appointments

The monitor examined 174 misdemeanor cases filed in FY16 (October 2015 – September 2016) to determine the timeliness of counsel appointments. The monitor based this timeliness determination on requests for counsel found in the case file / case management system. The monitor found that counsel was appointed in a timely manner in 92% of misdemeanor cases. (See Table 2 for a summary of times from request to appointment of counsel in misdemeanor cases.) This level of timeliness is a substantial improvement over the initial review and falls within the Commission’s threshold for presuming a jurisdiction has procedures in place to ensure timely appointment of counsel.

⁵ Article 15.17(a) of the Code of Criminal Procedure allows for 24 hour period for transmitting requests to the appointing authority. Thus, the maximum time from request to a determination of indigence is one working day plus 24 hours for transferring the request.

Table 2: Timeliness of Misdemeanor Appointments

El Paso Misdemeanor Appointment Sample	Sample Size	Number from sample	Percent
Number of Case Files Examined	174		
Number of Case Files Containing a Request for Counsel		125	
Appointment / Denial of Indigence Occurred in:	125		
0 work days		66	52.8%
1 work day + 24 hour transfer		49	39.2%
Total Timely Appointments		115	92.0%
2 to 5 working days + 24 hour transfer		3	2.4%
More than 5 working days + 24 hour transfer		7	5.6%
Total Untimely Appointments		10	8.0%

Statutory Requirements for Waivers of Counsel

If a defendant comes to court without counsel, the court may not direct or encourage an unrepresented defendant to communicate with the prosecutor until the court advises the defendant of the right to counsel and the procedure for requesting appointed counsel, and the defendant has been given a reasonable opportunity to request appointed counsel.⁶ If a defendant has requested counsel, the prosecutor cannot communicate with a defendant until the request for counsel is denied, and the defendant waives the right to retain counsel.⁷ If a defendant wishes to enter an uncounseled plea, the defendant must sign a written waiver of counsel that substantially conforms to Article 1.051(g). Under Article 1.051(f), waivers obtained in violation of Article 1.051(f-1) or (f-2) are presumed invalid.

In the initial review, some requests for counsel were not ruled upon, and misdemeanor defendants later entered uncounseled pleas. For the current review, the monitor did not examine any case files having uncounseled pleas. El Paso County appears to have addressed matters relating to handling uncounseled pleas.

Juvenile Appointments

If a juvenile has been released from custody, the court must either order the retention of counsel or appoint counsel within five working days of the petition being served on the juvenile.⁸ This requirement can be problematic if the court is unable to quickly meet with the parents so that an indigence determination can be made. For juveniles in detention, counsel must be appointed prior to the detention hearing, unless

⁶ Tex. Code Crim. Proc. art. 1.051(f-2).

⁷ Tex. Code Crim. Proc. art. 1.051(f-1).

⁸ Tex. Fam. Code § 51.101(c)-(d).

the court finds that the appointment of counsel is not feasible due to exigent circumstances.⁹

The initial review found that counsel was appointed in a timely manner for juveniles appearing at detention hearings, but was not timely if the juvenile was released at intake and a petition was later filed against the juvenile. The county responded to the report by stating that the process server must now notify the court of the service within one business day of serving the petition on the juvenile.

In the current review, the monitor examined 50 juvenile cases filed in FY16 (October 2015 – September 2016) to determine the timeliness of counsel appointments in instances when a petition was filed against the juvenile. The monitor found that counsel was appointed in a timely manner in 96% of sample cases. This timeliness falls within the Commission’s threshold for presuming a jurisdiction has procedures in place to ensure timely appointment of counsel. (See Table 3 for a summary.)

Table 3: Timeliness of Counsel Appointments (Juvenile Served with a Petition)

El Paso County Juvenile Appointment Sample	Sample Size	Number from sample	Percent
Number of Juvenile Case Files Examined	50		
Petitions where juvenile received appointed counsel within 5 working days of service		45	90.0%
Petitions where juvenile's family retained counsel (or ordered to retain counsel) within 5 working days of service		3	6.0%
Total Cases with Timely Presence of Counsel		48	96.0%
Petitions where juvenile received counsel more than 5 working days after being served		2	4.0%

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

Article 26.04(b)(6) of the Code of Criminal Procedure requires procedures for requesting counsel, “ensure that appointments are allocated among qualified attorneys in a manner that is fair, neutral, and nondiscriminatory.” For assigned counsel systems, the monitor assesses whether a jurisdiction’s appointment system is fair, neutral, and nondiscriminatory by analyzing the distribution of appointments. If the top ten percent of recipient attorneys receive less than three times their representative share of appointed cases, the monitor presumes the appointment system is fair, neutral, and nondiscriminatory.¹⁰

⁹ Tex. Fam. Code § 54.01(b-1).

¹⁰ Title I § 174.28(c)(5)(D) of the Texas Administrative Code states:

For assigned counsel and managed assigned counsel systems, the number of appointments in the policy monitor's sample per attorney at each level (felony, misdemeanor, juvenile, and appeals)

At the time of the initial review, El Paso did not maintain differentiated appointment lists. The monitor found the distributions of appointments in combined felony cases and in misdemeanor cases fell outside the Commission's threshold for presuming a jurisdiction's appointment system were fair, neutral, and nondiscriminatory.¹¹ Since the initial review, El Paso County has established the following appointment lists: first degree felonies; second and third degree felonies; state jail felonies and misdemeanors; capital murder; capital murder appeals; murder and all noncapital felonies involving death; and appeals for felony/misdemeanor cases. El Paso County now tracks appointments made formally under the wheel for each list. Excluding the three lists with very few cases, the appointment distributions for wheel appointments to all lists fell within the Commission's presumed threshold.¹²

Not all appointments seem to be captured by the tracking of wheel appointments, so the monitor analyzed the distribution of felony and misdemeanor appointments through data maintained by the auditor (data showing the number of cases for which attorneys were paid).¹³ The top ten percent of recipient felony attorneys received 2.1 times their representative share of appointments, and the top ten percent of recipient misdemeanor attorneys received 1.8 times their representative share of appointments.¹⁴ This falls well within the Commission's threshold for presuming a fair, neutral, and nondiscriminatory appointment system, and is a great improvement over the previous system.

*during the period of review and the percentage share of appointments represented by the top 10% of attorneys accepting appointments. A county is presumed to be in substantial compliance with the fair, neutral, and non-discriminatory attorney appointment system requirement if, in each level of proceedings (felony, misdemeanor, and juvenile cases), the percentage of appointments received by the top 10% of recipient attorneys **does not exceed three times their respective share**. If the county can track attorney list changes, the monitor will only examine the distribution of cases for attorneys that were on the appointment list for the entire year. The top 10% of recipient attorneys is the whole attorney portion of the appointment list that is closest to 10% of the total list.*

¹¹ For combined felony cases, the top 10% of recipient attorneys received 3.7 times their representative share of appointments. In misdemeanor cases, the top 10% of recipient attorneys received 4.8 times their representative share of appointments.

¹² These three lists with few appointments include: capital murder; murder and noncapital felonies involving death; capital murder appeals.

¹³ The monitor is not familiar with local methods for tracking wheel appointments, but the total number of wheel appointments was less than the total number of cases paid for FY2016. One possibility for this difference is that some appointments are made off wheel. Because data reported by the auditor's office contained more cases, the monitor used this data for analysis of appointment distributions.

¹⁴ The monitor excluded attorneys who received payments but were not on the latest appointment list as they may have received an appointment at a time in the distant past, and only recently disposed the case.

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

Article 26.05(c) of the Code of Criminal Procedure disallows payments for indigent defense services until the judge approves the payment.¹⁵ At the time of the initial review, the monitor noted the auditor's office was adjusting the judge's approved payment amount. The county had just adopted a new attorney fee schedule and the auditor was re-calculating each line item of each voucher based on the date the work was performed to reflect the fee schedule that was in effect at the time of the service. The auditor did not have documentation from the judge approving the changed amount.

In the current review, the monitor reviewed 13 attorney fee vouchers and found that all vouchers were paid in accordance with the judge's approved amount. The El Paso county auditor provided minutes from the May 28, 2015 Council of Judge's board meeting allowing the auditor's office the discretion to correct an error of up to \$100 on an approved voucher without returning it to the judge for further approval. El Paso County appears to have addressed issues with making payments according to amounts approved by the judge ordering the payment.

Requirement 7: Statutory data reporting.

According to Section 79.036(e) of the Texas Government Code, the county auditor (or other person designated by the commissioners' court) must annually prepare and send indigent defense data to the Commission. This data is to include the total expenses for cases in which an attorney was appointed for an indigent defendant or indigent juvenile in each district court, county court, statutory county court, and appellate court. Beginning in November 2014, the financial data reports expanded to include attorney-level information.

At the time of the initial review, the case count amounts reported on the Indigent Defense Expense Report (IDER) appeared to be inaccurate. The monitor noted:

- (1) Payments for investigative and expert witness expenses were counted as separate cases from the corresponding cases in which attorneys were paid.
- (2) Some attorney fee vouchers contained multiple cases. The number of cases on these vouchers were recorded, but there was no procedure to validate that multiple payments to attorneys listing the multiple cases were not reported more than once.

The above two situations overstated the case counts reported.

¹⁵ Tex. Code Crim. Proc. art. 26.05(c) states:

... No payment shall be made under this article until the form for itemizing the services performed is submitted to the judge presiding over the proceedings or, if the county operates a managed assigned counsel program under Article 26.047, to the director of the program, and until the judge or director, as applicable, approves the payment. ...

In the current review, the monitor verified the information provided on the FY2016 IDER by reviewing the general ledger for the appropriate accounts. This general ledger was provided in an excel spreadsheet which contained enough detail to identify each case paid to an attorney. Cases appeared to be counted when they were paid to attorneys and not double-counted when paid for other services. The county appears to have addressed issues concerning accurately reporting indigent defense case counts.

In the initial review, the public defender addendum did not categorize any salaries under the “Mental Health Professional Salaries and Fringe” category. The public defender’s office utilizes the services of social workers, and those salaries were miscategorized as administrative and support salaries rather than as mental health salaries. For the current review of the FY2016 IDER, salaries and fringe benefits were noted under the “Mental Health Professional Salaries and Fringe” category of the public defender addendum. The county appears to have addressed issues regarding correctly categorizing public defender expenses.

Conclusion

The monitor appreciated the professionalism and assistance provided by El Paso County officials and staff. El Paso County has addressed each of the past monitoring recommendations. The county does not need to make a further response. The Commission congratulates El Paso County for its diligent planning to address matters raised in the initial monitoring report.

Status of Past Monitoring Recommendations

Requirement 1: Conduct prompt and accurate magistration proceedings.

Recommendation 1: The County must ensure that reasonable assistance in completing affidavits of indigence is provided, so that all arrestees who request counsel can have the request ruled upon. Under Article 15.17(a), this duty falls on the magistrate presiding over the Article 15.17 hearing.

Initial Year Made: 2014

Status: *Successfully addressed with the March 2018 review.*

Requirement 2: Determine indigence according to standards directed by the indigent defense plan.

Recommendation 2: In making determinations of indigence, the screener must consider only factors provided in Article 26.04(m) and the local indigent defense plan. As to income, both Article 26.04(m) and the indigent defense plan allow only for income of the defendant and the defendant's spouse to be considered. In practice, some screenings were examining income of other individuals.

Initial Year Made: 2014

Status: *Successfully addressed with the March 2018 review.*

Requirement 3: Establish minimum attorney qualifications.

No recommendations. County practices and procedures comport with statutory requirements.

Requirement 4: Appoint counsel promptly.

Recommendation 3 (felony appointments): The monitor's sample of attorney appointments in felony cases fell below the Commission's threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel (90% timely). The felony courts must implement methods to rule on all requests for counsel within one working day (plus 24 hours allowed for transferring requests to the courts) of the request being made.

Initial Year Made: 2014

Status: *Successfully addressed with the March 2018 review.*

Recommendation 4 (misdemeanor appointments): The monitor's sample of attorney appointments in misdemeanor cases fell below the Commission's threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel (90% timely). The misdemeanor courts must implement methods to rule on all requests for counsel within one working day (plus 24 hours allowed for transferring requests to the courts) of the request being made.

Initial Year Made: 2014

Status: *Successfully addressed with the March 2018 review.*

Recommendation 5 (misdemeanor appointments): All requests for counsel must be ruled upon. If a defendant makes a request for counsel that is never ruled upon and later enters an uncounseled plea, the waiver of counsel is presumed invalid under Article 1.051(f) of the Code of Criminal Procedure.

Initial Year Made: 2014

Status: *Successfully addressed with the March 2018 review.*

Recommendation 6 (juvenile appointments): The monitor's sample of attorney appointments to juveniles who were served with a petition fell below the Commission's threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel (90% timely). The juvenile court must implement methods to ensure that all appointments to juveniles served with a petition occur within five working days of service on the juvenile. If financial affidavits could be obtained from parents at intake prior to the filing of the petition, almost all appointments of counsel would likely be timely.

Initial Year Made: 2014

Status: *Successfully addressed with the March 2018 review.*

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

Recommendation 7 (felony appointments): Recommendation: Based on data provided by the El Paso County Auditor's Office, the distribution of attorney appointments fell outside of the Commission's thresholds for presuming a fair, neutral, and nondiscriminatory appointment system in felony cases. The felony courts must examine their appointment methods and implement a system that demonstrates that appointments of counsel are made in a fair, neutral, and nondiscriminatory manner.

Initial Year Made: 2014

Status: *Successfully addressed with the March 2018 review.*

Recommendation 8 (misdemeanor appointments): Recommendation: Based on data provided by the El Paso County Auditor's Office, the distribution of attorney appointments fell outside of the Commission's thresholds for presuming a fair, neutral, and nondiscriminatory appointment system in misdemeanor cases. The misdemeanor courts must examine their appointment methods and implement a system that demonstrates that appointments of counsel are made in a fair, neutral, and nondiscriminatory manner.

Initial Year Made: 2014

Status: *Successfully addressed with the March 2018 review.*

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

Recommendation 9: Under Article 26.05(c) all payments for indigent defense services must be approved by the judge presiding over the proceedings. El Paso County must implement procedures so that any differences between voucher totals and amounts paid to attorneys are approved by the judge presiding over the proceedings.

Initial Year Made: 2014

Status: *Successfully addressed with the March 2018 review.*

Requirement 7: Statutory data reporting.

Recommendation 10: The auditor's procedures for reporting the number of assigned counsel cases paid must be amended to accurately reflect the number of cases in which attorneys were paid.

Initial Year Made: 2014

Status: *Successfully addressed with the March 2018 review.*

Recommendation 11: Public defender personnel expenses must be properly categorized on the IDER.

Initial Year Made: 2014

Status: *Successfully addressed with the March 2018 review.*