



**Second Follow-up Policy Monitoring
Review of Fort Bend County's
Indigent Defense Systems**

June 2019

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Background

The Texas Indigent Defense Commission (TIDC) monitors local jurisdictions' compliance with the Fair Defense Act (FDA) through on-site reviews.¹ These reviews seek to promote local compliance and accountability with the requirements of the Fair Defense Act and to provide technical assistance to improve county indigent defense processes.

In 2011, at the request of Senator Rodney Ellis and Representative Ron Reynolds, TIDC conducted an initial monitoring review of Fort Bend County's indigent defense practices and found that the County did not meet all of the FDA requirements (see Table 1 for a summary of findings from the initial and follow-up visits). TIDC conducted a follow-up review in 2016 and found many of the initial report's recommendations had been addressed while others were unresolved.

This report addresses a second follow-up review visit to examine unresolved Fair Defense Act issues related to two core FDA requirements:²

REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY

TIDC staff members, Claire Buetow and Joel Lieurance, conducted the visit on February 21 and 22, 2019. For this review, TIDC examined data from FY2018, including: felony and misdemeanor case files; appointment lists maintained by the Indigent Defense Office; records of juvenile CLE hours maintained by the Indigent Defense Office; and juvenile case data provided by the Juvenile Probation Office. TIDC observed juvenile detention hearings and misdemeanor dockets.

¹ TEX. GOV'T CODE § 79.037(a)–(b).

² 1 TEX. ADMIN. CODE § 174.28.

Table 1: History of Monitoring Findings

FDA Core Requirement	Description and Initial Year of Finding	Status after June 2019 Review	
		Satisfied	Pending
1. Prompt Magistration	Article 15.17 hearings must occur within 48 hours of arrest. (2011)	√ (2016)	
2. Indigence Determination	Determinations of indigence may only consider factors allowed by statute and the local indigent defense plan. (2011)	√ (2016)	
3. Minimum Qualifications	Attorneys on an appointment list must obtain the CLE requirements set in the local indigent defense plan. (2011)	√ (2019)	
3. Minimum Qualifications	Appointments of counsel must be made from an approved appointment list. (2011)	√ (2019)	
4. Prompt Appointment	In felony cases, timeliness in sample cases must meet TIDC's threshold for presuming a jurisdiction's processes ensure timely appointments. (2011)	√ (2019)	
4. Prompt Appointment	In misdemeanor cases, timeliness in sample cases must meet TIDC's threshold for presuming a jurisdiction's processes ensure timely appointments. (2011)	√ (2016)	
4. Prompt Appointment	Fort Bend County uses an attorney-of-the-day for misdemeanor dockets. If not used purely for administrative purposes, appointments must allow for continuity of representation and ability to meet with clients sufficiently in advance of a proceeding to allow adequate preparation for the proceedings. (2011)		√
4. Prompt Appointment	In juvenile cases, timeliness in sample cases (when a petition is served on the juvenile) must meet the Commission's threshold for presuming a jurisdiction's processes ensure timely appointments. (2011)	√ (2016)	
4. Prompt Appointment	In juvenile cases, timeliness in sample cases (when a detention hearing is held) must meet TIDC's threshold for presuming a jurisdiction's processes ensure timely appointments. (2011)	√ (2019)	
4. Prompt Appointment	The parent must be informed of the juvenile's right to counsel (and to appointed counsel if indigent) prior to a detention hearing. (2011)	√ (2016)	
6. Data Reporting	Data for the Indigent Defense Expense Report must be accurately reported. (2011)	√ (2016)	

Program Assessment

Requirement 3: Establish minimum attorney qualifications

Continuing Legal Education (CLE) Requirements

Under the TIDC's Administrative Rules and the local indigent defense plans, attorneys receiving appointments must annually obtain at least six CLE hours in criminal or juvenile matters.³ The 2016 review found that the courts handling juvenile matters did not have procedures in place to ensure all attorneys on the juvenile lists met the annual CLE requirement. In the current review, TIDC found the Indigent Defense Office had taken over management of CLE hours for juvenile attorneys and maintains records showing these attorneys have met their annual CLE requirement. Fort Bend County has successfully addressed this recommendation.

Attorney Appointment lists

Article 26.04(a) requires courts following a rotational appointment system to appoint an attorney from a public appointment list.⁴ The requirement has been incorporated into Fort Bend's indigent defense plan; it provides that the appointing authority must "us[e] a system of rotation from a list of approved counsel."

In Fort Bend County, most indigent defense appointments are made through the Indigent Defense Office. The Office screens defendants for indigence, and if indigence is found, the Office appoints counsel from an approved appointment list. In some instances, appointments are not made by the Indigent Defense Office, but instead by a particular court. The 2011 review found that some courts made appointments in misdemeanor cases to attorneys who were not on an approved appointment list. The 2016 review found this practice continued.

In the current review, TIDC checked records of attorneys paid for indigent defense services in 2018 against appointment lists from 2015 and 2019. TIDC found that most attorneys paid were on at least one of these lists, indicating that attorneys are

³ 1 TEX. ADMIN. CODE §§ 174.1-2.

⁴ Article 26.04(d) of the Code of Criminal Procedure provides more detail regarding the appointment list. Article 26.04(d) states:

(d) A public appointment list from which an attorney is appointed as required by Subsection (a) shall contain the names of qualified attorneys, each of whom:

- (1) applies to be included on the list;
- (2) meets the objective qualifications specified by the judges under Subsection (e);
- (3) meets any applicable qualifications specified by the Texas Indigent Defense Commission; and
- (4) is approved by a majority of the judges who established the appointment list under Subsection (e).

appointed from approved lists.⁵ Fort Bend County has successfully addressed this recommendation.

Recommendations for Core Requirement 3: Establish minimum attorney qualifications

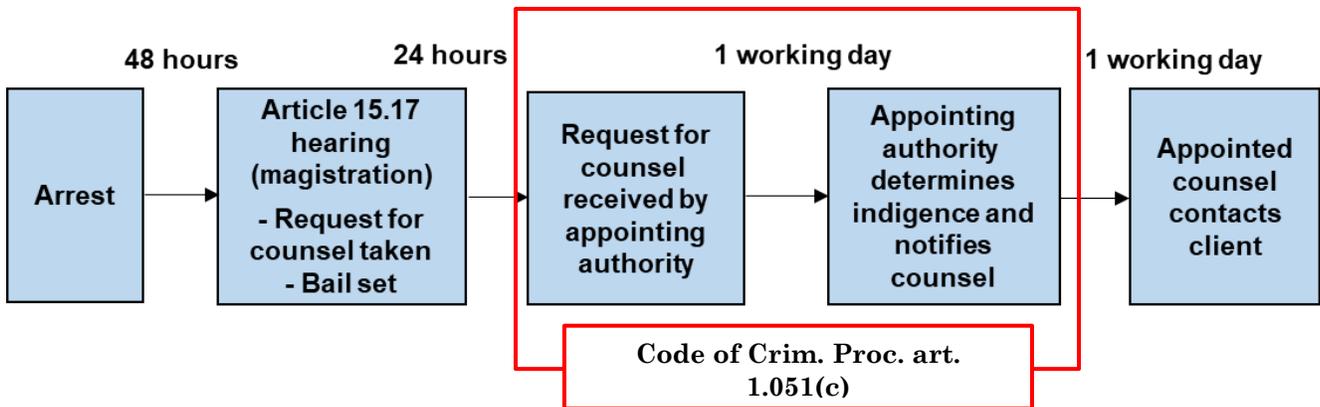
September 2016 Recommendation 1: The courts must make all appointments of counsel from an approved appointment list in accordance with the local indigent defense plan and with Article 26.04(b)(5). *Successfully Addressed.*

September 2016 Recommendation 2: Fort Bend County must ensure that all attorneys on the juvenile list have met annual CLE requirements set in the juvenile indigent defense plan. *Successfully Addressed.*

Requirement 4: Appoint counsel promptly

Article 1.051(c) of the Code of Criminal Procedure requires the court or its designee to appoint counsel by the end of the first working day following receipt of the request for counsel.⁶ If an arrestee makes bail, Article 1.051(j) sets the deadline for appointing counsel to be the defendant’s first court appearance or the initiation of adversarial judicial proceedings, whichever comes first. *Rothgery v. Gillespie County* clarified that the initiation of adversarial judicial proceedings occurs at the Article 15.17 hearing.⁷ Since the *Rothgery* decision, the meaning of the language from Article 1.051(j) cannot be construed to allow for a ruling on a request for counsel to be delayed because the defendant makes bond. Once adversarial judicial proceedings have been initiated, courts must provide a method for defendants to request and obtain appointed counsel.⁸

Figure 1: Timeline for Appointment of Counsel in Adult Criminal Cases



⁵ If an attorney was not on either list, TIDC searched adult case files for appointment orders for adult cases (appointment orders for juvenile cases were not available). If an appointment order came from the Indigent Defense Office, TIDC assumed the attorney was on a list at the time of appointment.

⁶ The time frame is three working days for counties with a population under 250,000.

⁷ *Rothgery v. Gillespie County*, 554 U.S. 191, 212 – 13 (2008).

⁸ 1 Tex. Admin Code § 174.51.

Timeliness of Appointment in Felony Cases

To assess the timeliness of Fort Bend County’s current appointment procedures in felony cases, TIDC staff examined 116 sample felony cases filed in FY2018 (October 2017 – September 2018). Counsel was appointed in a timely manner in 75 of 82 cases having a request for counsel (**92% timely**) (see Table 2). This percentage exceeds TIDC’s 90% timely threshold for presuming a jurisdiction’s procedures ensure prompt appointment of counsel. Fort Bend County has successfully addressed the recommendation that local procedures must ensure the timely appointment of counsel in felony cases.

Table 2: Times to Appointment in Felony Cases

Fort Bend Felony Appointment Sample Data	Sample Size	Number from sample	Percent
Number of case files examined	116		
Total cases with a counsel request		82	
Appointment / denial of indigence occurred in:			
0 work days		38	46.4%
1 work day + 24 hour transfer		37	45.1%
2 work days + 24 hour transfer		6	7.3%
More than 2 work days		1	1.2%
Timely appointments (0 – 1 work days)		75	91.5%
Late appointments (more than 1 work day)		7	8.5%

Attorney-of-the-day in Misdemeanor Cases

In 2011, the statutory county courts used attorneys-of-the-day who would communicate with and advise defendants at misdemeanor dockets. The attorney-of-the-day assumed two roles: court administrator and legal counsel. As a court administrator, the attorney determined which defendants needed a re-set to hire counsel and informed defendants of the procedures for requesting counsel. As legal counsel, the attorney reviewed the prosecutor’s file, advised the defendant, and handled pleas. Some defendants would receive legal advice from the attorney, but if the defendant did not accept the plea, the attorney would not continue with the case. Instead, a new attorney-of-the-day would be available at the next docket.

Under Article 26.04(j)(2) of the Code of Criminal Procedure, once counsel is appointed, he or she must represent the defendant until the case is disposed, unless permitted or ordered by the court to withdraw after a finding of good cause is entered on the record. Article 1.051(a) requires that, once appointed, attorneys be given sufficient time to adequately prepare for a proceeding. TIDC’s initial review recommended that attorneys be given sufficient time to adequately prepare a case and continue to represent the client through case disposition.

In the responses to both the 2011 and 2016 monitoring reports, the statutory county courts stated the usage of the attorney-of-the-day would be included in the indigent defense plan. The statutory county courts also stated the attorney-of-the-day would only be used for administrative purposes, not for legal representation. In October 2017, the county courts added an addendum to its indigent defense plan which states the role of the attorney-of-the-day is “to assist with administrative functions during the dockets of the assigning court”.

To determine what role attorneys-of-the-day are acting in and if they are meeting FDA requirements, TIDC observed misdemeanor dockets in three statutory county courts on February 22, 2019. In two courts, the attorney acted as a court administrator, explaining unrepresented defendants’ options for requesting or retaining counsel, or representing themselves.⁹ If defendants wanted to request counsel, the attorney-of-the-day would assist them in completing an indigence affidavit and direct them to the Indigent Defense Office. Once defendants returned from the Indigent Defense Office with appointed counsel, or if they decided to proceed without appointed counsel, the attorney-of-the-day would assist them in resetting their cases. The processes in these two courts met the requirements of the FDA and helped defendants understand their options for representation.

In a third court, the attorney-of-the-day acted as both a court administrator and legal counsel. The attorney spoke to unrepresented defendants to discuss their options for representation, but did not appear to explain the procedures for requesting counsel; TIDC observed the attorney providing defendants with his business card to encourage them to retain him, but did not see him provide indigence affidavits or direct defendants to the Indigent Defense Office. The attorney also assisted a defendant in entering a guilty plea and negotiating the terms of probation.¹⁰ This dual role appeared to make the procedures for requesting counsel unclear to defendants; when one defendant asked, “What happens next? Do I need to hire an attorney? Can you represent me?” the attorney-of-the-day responded, “Yes to both of those.”

Courts must provide a method for defendants to request and obtain appointed counsel, and may do so by using an attorney-of-the-day as a court administrator (and can further assist defendants by providing written instructions from the judge, like those attached as Appendix). As a court administrator, expenses of the attorney-of-the-day are not to be reported on the annual Indigent Defense Expense Report and are not eligible for reimbursement by TIDC. If the attorney is also providing legal advice (such

⁹ In one of these courts, the bailiff provided defendants with the judge’s written explanation of their options and space to make a selection, which is a best practice for taking requests for counsel. See Appendix. This form is similar to TIDC’s model form for entering a waiver of counsel to speak with the prosecutor, available at <http://www.tidc.texas.gov/policies-standards/model-forms-procedures/>.

¹⁰ A defendant went to the bench with this attorney to enter a plea and, when the defendant raised questions about conditions of probation, the judge sent them back for further consultation. The attorney returned to request to modify the conditions of probation, and the defendant entered the plea.

as negotiating and advising defendants on the consequences of pleas), then the court must allow for adequate time and space for the attorney to meet with clients and ensure that the attorney continues to represent defendants who do not plead guilty. If the attorney-of-the-day is used to represent defendants, this usage must be described in the indigent defense plan.

Juvenile Detention Hearings

Under Section 54.01(b) of the Family Code, prior to a detention hearing, the court must inform the parents of the child's right to appointed counsel if they are indigent. Under Section 54.01(b-1), unless the court finds the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing.

At the time of the 2011 review, Texas law did not require appointment of counsel for juveniles prior to the initial detention hearing. At that time in Fort Bend County, the court would inform juveniles and their parents that a juvenile was not entitled to appointed counsel at the initial detention hearing. Under local practice, counsel was not appointed until the second detention hearing.

In the current review, the monitor observed detention hearings and sampled case files to determine if counsel was appointed prior to detention hearings. The monitor observed detention hearings for eight juveniles on February 21, 2019. This was the initial hearing for three of the juveniles. All juveniles were represented by attorneys who had met with their clients prior to the hearing.

The Juvenile Probation Office provided summary data for 70 juvenile cases (selected sequentially from cases filed in FY2018). A total of 34 sample cases involved juvenile detention hearings, and all sample juveniles were represented by attorneys at the initial hearing (**100% timely**). This percentage exceeds TIDC's 90% timely threshold for presuming a jurisdiction's procedures ensure prompt appointment of counsel. Fort Bend County has successfully addressed the recommendation that local procedures must ensure the timely appointment for juveniles having detention hearings.

Recommendations for Core Requirement 4: Appoint counsel promptly

September 2016 Recommendation 3: Fort Bend County must implement processes to ensure timely appointment of counsel in felony cases. *Successfully Addressed.*

September 2016 Recommendation 4: The courts handling misdemeanor cases must ensure that all persons who require appointment of counsel have the ability to consult with their attorney in private in advance of a proceeding.

Under Article 26.04(j)(2), if a court determines a defendant is indigent, counsel must represent the defendant until the case is disposed unless permitted or ordered by the court to withdraw after a finding of good cause is entered on the record. *Issue Pending. The June 2019 Recommendation replaces this recommendation.*

September 2016 Recommendation 5: Fort Bend County must implement processes that ensure timely appointment of counsel for juveniles facing detention hearings. *Successfully Addressed.*

June 2019 Recommendation: If appointed to represent defendants, the attorney-of-the-day's representation must allow for adequate preparation and continuity of representation. If the attorney-of-the-day is used to represent defendants, this usage must be described in the indigent defense plan.

Conclusion

TIDC appreciates the support of Fort Bend County officials and staff in completing this review. Fort Bend County has addressed all past TIDC recommendations, except for issues related to the attorney-of-the-day in misdemeanor cases. Fort Bend County must respond to how it will address this recommendation. TIDC stands ready to provide any assistance the County may need in addressing the remaining issue identified in this report.

Recommendation from the June 2019 Review

June 2019 Recommendation: If appointed to represent defendants, the attorney-of-the-day's representation must allow for adequate preparation and continuity of representation. If the attorney-of-the-day is used to represent defendants, this usage must be described in the indigent defense plan.

Appendix – Judge’s Explanation of Rights to Defendants

IN THE COUNTY COURT AT LAW NUMBER TWO (2) FORT BEND COUNTY, TEXAS

Judge's Explanation of Rights to Defendants

As a defendant in a criminal case, you have three options:

1. You may hire an attorney;
2. You may request an attorney be appointed to represent you, if you are financially unable to hire one; or
3. You may represent yourself.

If you want an attorney to represent you and are financially able to hire an attorney, I will reset this case to give you time to do so.

If you want an attorney and do not have the money to hire one, you will need to fill out a financial questionnaire so that the proper person can determine whether or not to appoint an attorney to represent you.

You may not speak to one of the prosecutors about your case unless you decide to waive your right to an attorney.

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DEFENDANT'S CHOICE



Jeffrey A. McMeans
Judge Presiding

_____ I want to reset this case to hire my own attorney.

_____ I want to apply for a court-appointed attorney.

_____ I want to waive my right to an attorney and represent myself.

— — — — I have an attorney, whose name is: — — — — —

Name: Signature: Date: Cause Number: