



# **Limited Scope Policy Monitoring Review – Galveston County**

**June 2017**



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**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.

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## **Background of Limited Scope Policy Monitoring Review**

The Texas Indigent Defense Commission (“Commission”) monitors local jurisdictions’ compliance with the Fair Defense Act (“FDA”) through on-site reviews.<sup>1</sup> These reviews seek to promote local compliance and accountability with the requirements of the FDA and to provide technical assistance to improve county indigent defense processes where needed. Additionally, the review process aims to assist local jurisdictions in developing procedures to monitor their own compliance with their indigent defense plans and the FDA.

In response to a complaint received in May 2016, the Texas Indigent Defense Commission completed a limited case file and attorney voucher review of Galveston County’s misdemeanor appointment and payment processes. As a result of the preliminary data received from the county, staff conducted a limited scope monitoring review of local procedures for (1) appointing counsel and (2) attorney reporting and case counts. Throughout this report, references to Commission staff will use the term “monitor.” This review encompasses the policy monitoring core requirements listed below:<sup>2</sup>

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS.

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.

REQUIREMENT 6: PROMULGATE STANDARD ATTORNEY FEE SCHEDULE AND PAYMENT PROCESS.

REQUIREMENT 7: STATUTORY DATA REPORTING.

The monitor conducted an on-site review from September 19 - 20, 2016 and from February 6 - 9, 2017.<sup>3</sup> The monitor examined clerk and case management records, county auditor records, and appointment list records maintained by court administration.<sup>4</sup> The monitor observed Article 15.17 hearings, misdemeanor jail dockets, misdemeanor bonded dockets, felony jail dockets, and felony bonded dockets. The monitor interviewed judges, court coordinators, and personnel from court administration. The monitor also conducted a survey of defense attorneys taking appointed misdemeanor cases in Galveston County. The resulting report includes a program assessment with accompanying findings and recommendations.

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<sup>1</sup> TEX. GOV’T CODE § 79.037(a)–(b).

<sup>2</sup> A full monitor review will cover all seven core requirements. This review does not cover:

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

Requirement 3: Establish minimum attorney qualifications; or

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

<sup>3</sup> The review team consisted of policy monitors Brandon Bellows, Jamie Dickson, and Joel Lieurance and fiscal monitor Debra Stewart.

<sup>4</sup> Records examined were for FY2015 (October 2014-September 2015). Records examined by the monitor included clerk case files, auditor’s office files, and court management data.

## Program Assessment

### **REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS**

On September 19<sup>th</sup> and 20<sup>th</sup>, 2016, the monitor observed Article 15.17 hearings (magistrate warnings) for arrestees at the Galveston County Jail. The magistrate informed arrestees as a group of their rights, including the right to counsel and the procedures for requesting counsel. The magistrate noted that any request for counsel would be accompanied by additional bond conditions and asked each arrestee who requested counsel to sign for additional bond conditions.<sup>5</sup> The magistrate found probable cause, set bond, and asked each arrestee if he/she wanted to request counsel.

#### ***Timeliness of Warnings***

Article 15.17(a) of the Code of Criminal Procedure requires that magistrate warnings occur within 48 hours of arrest. To analyze the timeliness of warnings, the monitor calculated the number of days between arrest and the Article 15.17 hearing for 440 cases.<sup>6</sup> If the Article 15.17 hearing occurred within two days of arrest, the monitor presumed the warnings were timely.<sup>7</sup> Of the 440 cases reviewed, the magistrate warnings occurred within two days of arrest for 439 of the cases. This sample was 99.8% timely and within the Commission's threshold for presuming processes are in place to promptly conduct Article 15.17 hearings.<sup>8</sup>

**Table 1: Timeliness of Article 15.17 Hearings**

	<b>Sample Size</b>	<b>Percent</b>
Number of records examined	440	
Article 15.17 hearing occurs x days after arrest:		
0 days	145	33.0%
1 day	287	65.2%
2 days	7	1.6%
<b>Timely Hearings</b>	<b>439</b>	<b>99.8%</b>
More than 2 days	1	0.2%

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<sup>5</sup> The additional bond conditions are as follows:

1. You shall keep all appointments with your attorney;
2. You shall attend all court settings, and;
3. You shall notify your attorney or your attorney's office of any changes in your residence address, business address or telephone numbers within twenty-four (24) hours of such change.

<sup>6</sup> The monitor reviewed 571 combined felony and misdemeanor cases filed in FY2015 (October 2014 – September 2015). Both the date of arrest and the magistrate warning form were present in 440 of these cases.

<sup>7</sup> 1 TEX. ADMIN. CODE § 174.28. A county is presumed to be in substantial compliance with the prompt magistrations requirement if at least 98% of Article 15.17 hearings sampled are conducted within 48 hours of arrest.

<sup>8</sup> This data was limited by available records, and did not account for instances in which the magistrate warning form was not part of the case file.

### ***Ability of Arrestees to Request Counsel***

Article 15.17(a) of the Code of Criminal Procedure requires the magistrate to ask the arrestee whether he/she would like to request counsel. Article 15.17(e) requires the magistrate to make a record of the request. The monitor analyzed the percentage of felony and misdemeanor arrestees who requested counsel at magistrate warnings and found 68% of felony arrestees and 57% of misdemeanor arrestees requested counsel at the hearing. These request rates indicate that arrestees generally understand and are properly advised of their right to appointed counsel. While the rates of persons requesting counsel are reasonable, the county reported that a much smaller percentage of persons received misdemeanor appointments of counsel. This discrepancy is addressed later in the report.

**Table 2: Percent of Arrestees Requesting Counsel at Article 15.17 Hearing**

	<b>Felony Sample</b>	<b>Misdemeanor Sample</b>
Number of records showing whether counsel requested at Article 15.17 hearing	168	266
Requested counsel	114	152
Did not request counsel	54	114
<b>Percent Requesting Counsel</b>	<b>67.9%</b>	<b>57.1%</b>

### ***Reasonable Assistance in Completing Forms for Requesting Counsel***

Article 15.17(a) further requires the magistrate ensure reasonable assistance to arrestees in completing the necessary forms for requesting appointment of counsel at the time of the hearing. The magistrate must then transmit the forms to the appointing authority within 24 hours of the request. Observation of Article 15.17 hearings conducted at the Galveston County Jail and the monitor's file review indicate that the magistrate is marking an arrestee's request for counsel, and these forms are promptly completed after the Article 15.17 hearing.<sup>9</sup>

#### **FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1**

##### **Conduct Prompt and Accurate Article 15.17 Proceedings.**

No findings.

#### **REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.**

The first opportunity to request counsel is typically at the Article 15.17 hearing. Under Article 15.17(a), once an arrestee requests counsel, the county has 24 hours to transmit the request to the appointing authority. Article 1.051(c) of the Code of Criminal Procedure requires the court or its designee to appoint counsel by the end

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<sup>9</sup> The monitor's conclusions are limited by the records in the case file and do not take account of requests not recorded in the clerks' files.

of the first working day following receipt of the request for counsel.<sup>10</sup> Once counsel is appointed, Article 26.04(j)(2) requires the attorney to represent the defendant through case disposition unless the attorney is permitted or ordered by the court to withdraw after a finding of good cause is entered on the record.

### ***Description of Local Counsel Appointment Procedures in Felony Cases***

Upon book-in at the Galveston County Jail, defendants' cases are assigned to an individual court. Defendants then go before a magistrate who determines whether probable cause is present to detain the individual, sets bail, and asks each defendant whether he/she would like to request counsel. If a defendant requests counsel, the determination of indigence is made by the judge scheduled to hear the felony jail docket.

In Galveston County, some defendants charged with nonviolent third degree or state jail felony offenses and who remain in custody appear at the felony jail docket. The judge overseeing the jail docket determines indigence, and if indigent, the defendant will receive the jail docket attorney (usually assigned for a specific week). The prosecutor makes a plea offer within hours of arrest. The jail docket attorney communicates the plea offer, reviews the limited discovery available after the arrest, and acts as the defendant's attorney if the defendant wishes to take the plea. If a defendant does not accept the plea offer, the defendant moves from the jail docket to an individual court's docket.

Persons interviewed by the monitor stated the jail docket attorney may in some instances stay with the case beyond the scheduled week, but will typically be replaced by other counsel. Article 26.04(j)(2) of the Code of Criminal Procedure requires attorneys who are appointed to a case continue with the case through disposition unless the attorney is permitted or ordered by the court to withdraw after a finding of good cause is entered on the record.<sup>11</sup>

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<sup>10</sup> *Rothgery v. Gillespie County*, 554 U.S. 991 (2008), held that the Sixth Amendment right to counsel attaches when a defendant appears before a magistrate and learns of the charges against him and his liberty is subject to restriction (i.e., the Article 15.17 hearing which was held to be the initiation of adversarial judicial proceedings). Article 1.051(j) of the Code of Criminal Procedure then sets the timing of counsel appointments for persons who make bond:

*...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.*

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.

<sup>11</sup> Article 26.04(j)(2) states:

*(j) An attorney appointed under this article shall:*

*(2) represent the defendant until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the attorney is permitted or ordered by the court to withdraw as counsel for the defendant after a finding of good cause is entered on the record;*

For those defendants who are not on the jail docket, their cases are heard by the court of dispositive jurisdiction. The judge presiding at the jail docket usually makes the determination of indigence, but the coordinator in the court of dispositive jurisdiction selects the attorney for the case. For about ten percent of counsel requests, the judge over the jail docket does not make a determination of indigence, but refers the matter to the court of dispositive jurisdiction.<sup>12</sup>

***Timeliness of Appointments in Felony Cases***

To assess the timeliness of Galveston County’s appointment procedures in felony cases, the monitor examined the time from request for counsel until appointment of counsel or denial of indigence. Under the Commission’s monitoring rules, a county is presumed to be in compliance with the prompt appointment of counsel requirement if at least 90% of indigence determinations in the monitor’s sample are timely.<sup>13</sup> The monitor examined 196 cases filed in FY2015 and found 147 requests for counsel. Counsel was appointed in a timely manner in almost 87% of cases. This falls below the Commission’s threshold for presuming a jurisdiction’s practices ensure timely appointment of counsel.<sup>14</sup>

A total of fifteen sample cases had requests for counsel in which the jail docket court did not make a determination of indigence but referred the matter to the court of dispositive jurisdiction. If those cases had been immediately ruled upon, Galveston County would have met the Commission’s threshold for presuming systems are in place to ensure timely appointment of counsel in felony cases.

**Table 3: Times to Appointment in Felony Cases**

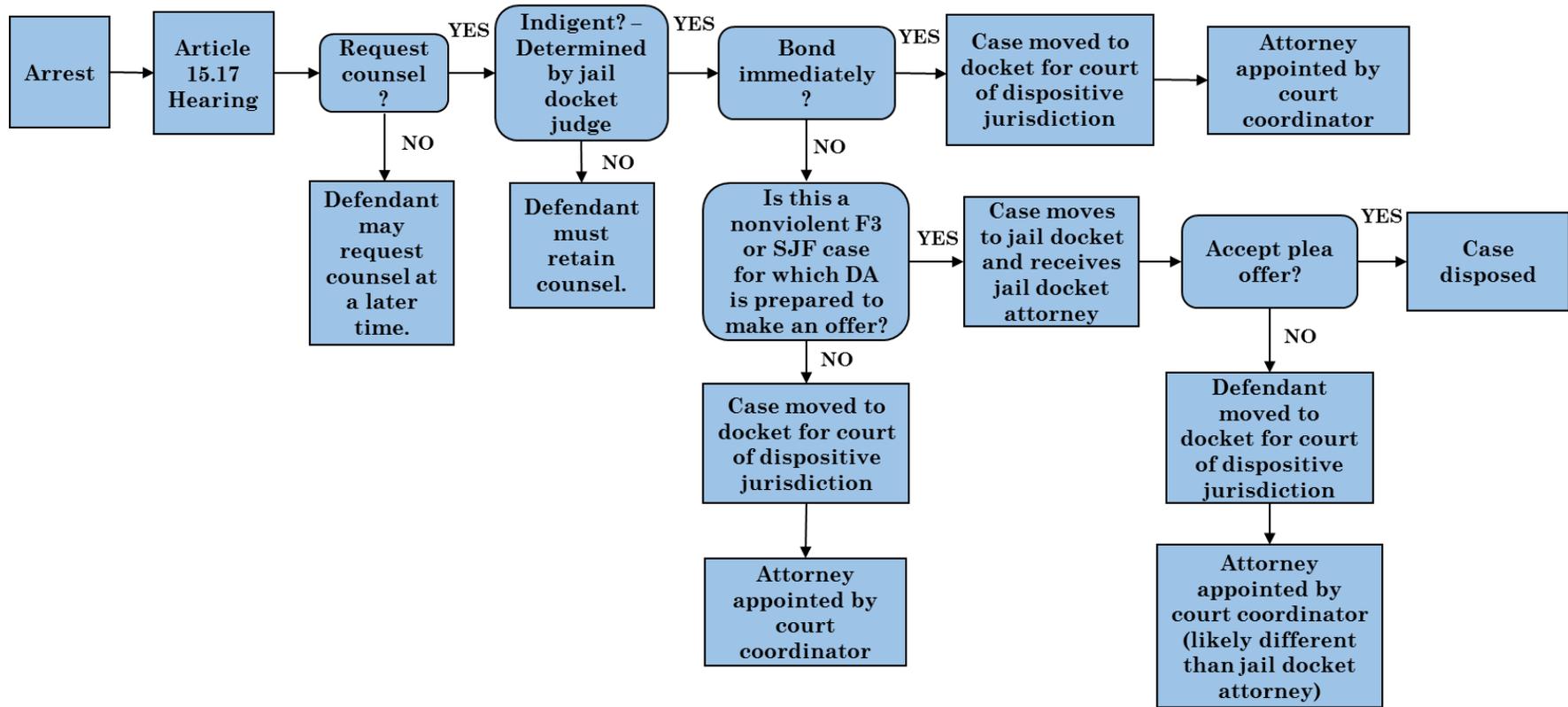
	Number from Sample	Percent of Sample
Total cases in which defendants requested counsel	147	
Request for counsel ruled upon in ‘x’ workdays		
0 workdays	88	59.9%
1 workday + 24 hours allowed to transmit a request	39	26.5%
<b>Timely Rulings on Requests</b>	<b>127</b>	<b>86.4%</b>
2 – 4 workdays + 24 hours allowed to transmit a request	11	7.5%
More than 4 workdays	5	3.4%
No ruling on request	4	2.7%
<b>Total Untimely / No Rulings on Requests</b>	<b>20</b>	<b>13.6%</b>

<sup>12</sup> These cases are either instances with incomplete indigence applications or are instances in which the defendant is near the border for being considered indigent.

<sup>13</sup> 1 TEX. ADMIN. CODE § 174.28.

<sup>14</sup> The monitor’s conclusion is based on the quality of records examined. If an appointment of counsel or denial of indigence was not contained in a case file, the lack of a record affected the monitor’s finding.

Figure 1: Counsel Appointment Procedures in Felony Cases



### ***Description of Local Counsel Appointment Procedures in Misdemeanor Cases***

Upon book-in at the Galveston County Jail, defendants' cases are assigned to an individual court. While assigned to an individual court, misdemeanor defendants who cannot make bail appear at the misdemeanor jail docket. The timing of when defendants are brought to the docket is set by the prosecutor. Almost all defendants who remain in jail are determined by the jail docket judge to be indigent.

Two attorneys are scheduled on a weekly basis to be jail docket attorneys. Jail docket attorneys communicate the plea offer to the client, and the client may choose to accept or reject it. The attorneys receive the limited discovery that is available. If the defendant rejects the offer, the defendant remains on the jail docket until he/she makes bail or there is a decision to move the defendant to the trial docket. Throughout this process, the defendant may receive different attorneys, although, in some instances, one attorney will continue with the case beyond the scheduled week of jail docket appearances.

Persons interviewed by the monitor stated the jail docket attorney may in some instances stay with the case beyond the scheduled week, but will typically be replaced by other counsel. Article 26.04(j)(2) of the Code of Criminal Procedure requires attorneys who are appointed to a case continue with the case through disposition unless the attorney is permitted or ordered by the court to withdraw after a finding of good cause is entered on the record.

Misdemeanor defendants who make bail are put on the bonded docket at their assigned court. Defendants may request counsel at this docket, and determinations of indigence (as well as selection of appointed counsel) are made by the assigned court. According to court coordinator interviews, defendants who had initially received a jail docket attorney may need to re-qualify as indigent at the bonded docket. Under Article 26.04(p) of the Code of Criminal Procedure, once a defendant is determined by the court to be indigent, the defendant is presumed remain indigent unless there is a material change in the defendant's financial circumstances.<sup>15</sup>

### ***Timeliness of Appointments in Misdemeanor Cases***

To assess the timeliness of Galveston County's appointment procedures in misdemeanor cases, the monitor examined the time from request for counsel until appointment or denial of indigence. Under the Commission's monitoring rules, a county is presumed to be in compliance with the prompt appointment of counsel requirement if at least 90% of indigence determinations in the monitor's sample are

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<sup>15</sup> Article 26.04(p) states:

*(p) 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 indigency or nonindigency is made, the defendant, the defendant's counsel, or the attorney representing the state may move for reconsideration of the determination.*

timely.<sup>16</sup> The monitor examined 375 cases filed in FY2015 and found 235 requests for counsel. Counsel was appointed in a timely manner in 60% of cases. This falls below the Commission’s threshold for presuming a jurisdiction’s practices ensure timely appointment of counsel.<sup>17</sup>

In order to meet the 90% timeliness threshold in misdemeanor cases, a system must be developed to promptly rule upon all requests for counsel made at the Article 15.17 hearing. Such a system will need to address the root causes for late determinations of indigence. The monitor found three possible categories for late appointments in misdemeanor cases.

- 1) Some defendants requested counsel, and then made bail. The appointment or denial of indigence did not occur until the initial appearance in the court of dispositive jurisdiction (often several workdays after the request).
- 2) Some defendants are not promptly brought to the jail docket because the prosecutor is not prepared to make an offer. There is no order appointing counsel prior to the jail docket appearance.
- 3) Most orders appointing counsel for misdemeanor defendants at the jail docket typically came on the date of the case disposition. It is possible that some incarcerated defendants received appointed counsel prior to the date of disposition, but no order appointing counsel was generated until the case was disposed.

**Table 4: Times to Appointment in Misdemeanor Cases<sup>18</sup>**

	Number from Sample	Percent of Sample
Total cases in which defendants requested counsel	235	
Request for counsel ruled upon in ‘x’ workdays		
0 workdays	99	42.1%
1 workday + 24 hours allowed to transmit a request	43	18.3%
<b>Timely Rulings on Requests</b>	<b>142</b>	<b>60.4%</b>
2 – 4 workdays + 24 hours allowed to transmit a request	24	10.2%
More than 4 workdays	37	15.7%
No ruling on request	32	13.6%
<b>Total Untimely / No Rulings on Requests</b>	<b>93</b>	<b>39.6%</b>

<sup>16</sup> 1 TEX. ADMIN. CODE § 174.28.

<sup>17</sup> The monitor’s conclusion is based on the quality of records examined. If an appointment of counsel or denial of indigence was not contained in a case file, the lack of a record affected the monitor’s finding.

<sup>18</sup> For those instances in which misdemeanor defendants have an accompanying felony case, the general practice has been to appoint the felony attorney to the case. Because of this practice, the monitor looked to see if sample misdemeanor defendants had an accompanying felony, and considered the time to appointment or denial of indigence to be the time of the felony appointment or denial of indigence.

### ***Waivers of Counsel in Misdemeanor Cases***

Article 1.051 of the Code of Criminal Procedure addresses waivers of counsel and allows waivers of counsel that are voluntarily and intelligently made.<sup>19</sup> Article 1.051(f-1) requires the defendant waive the right to retain counsel prior to speaking with the prosecutor. If a plea agreement is reached, Article 1.051(g) then requires a waiver for the purpose of entering an uncounseled guilty plea.

Under Article 1.051(f-1), the prosecutor may not initiate a waiver and may not communicate with a defendant until any pending request for counsel is ruled upon, and the defendant waives the opportunity to retain private counsel. Under 1.051(f-2), the court must explain the procedures for requesting counsel and must give the defendant a reasonable opportunity to request counsel before encouraging the defendant to communicate with the prosecutor. If a defendant wishes to enter an uncounseled plea, he or she must voluntarily and intelligently sign a written waiver, and the language must substantially conform to 1.051(g).<sup>20</sup>

Several cases from the monitor's misdemeanor sample included a request for counsel but contained neither an appointment nor a denial of the request. Under Article 1.051(f-1), there can be no communication between the unrepresented defendant and the prosecutor until the request for counsel has been denied, and the defendant has waived the right to retain counsel. Seven sample cases included requests for counsel that were not ruled upon but which resulted in guilty pleas. Two additional cases did not result in a conviction for one of the monitor's sample cases but in dismissals made in exchange for guilty pleas in cases not included in the monitor's sample.

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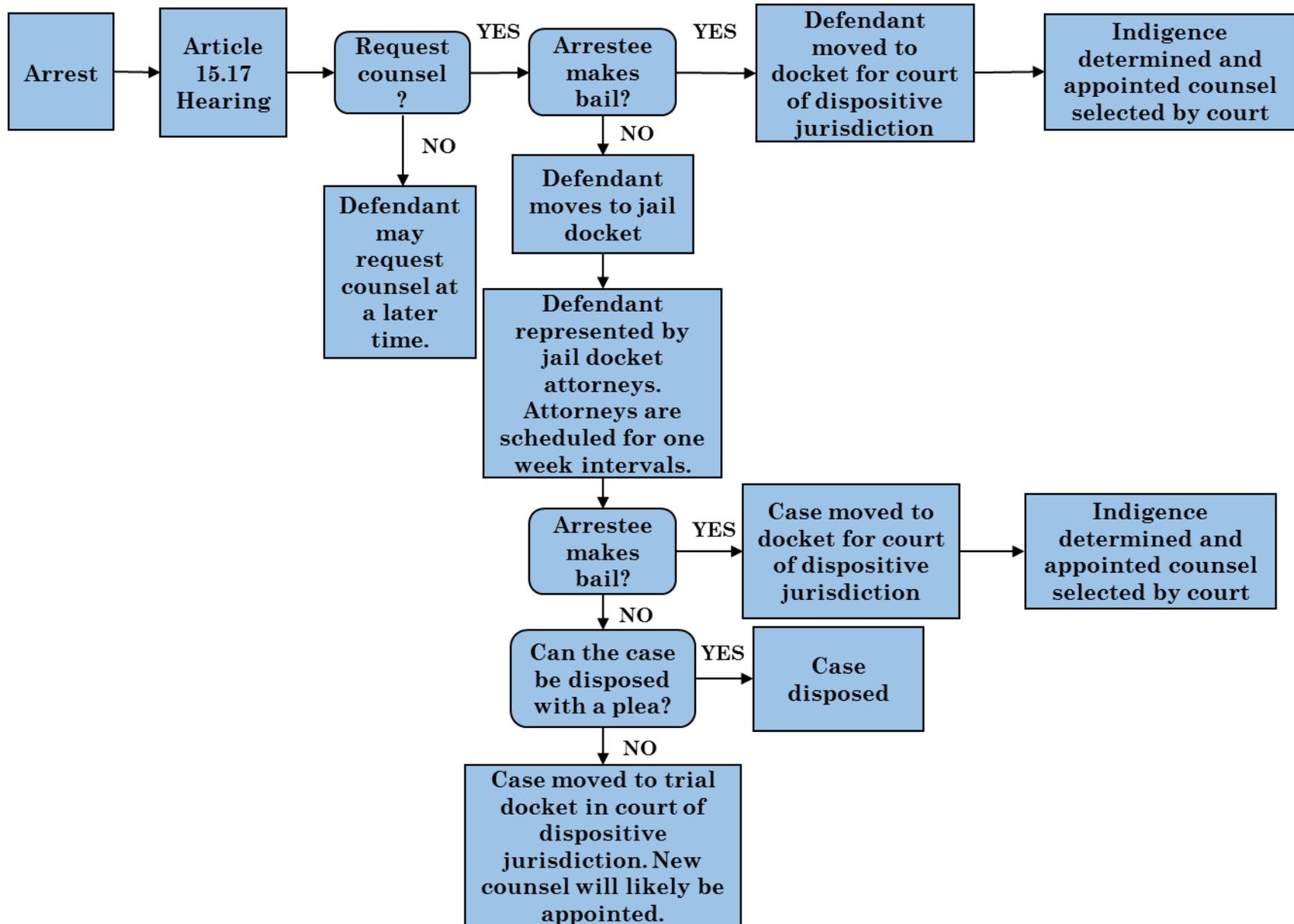
<sup>19</sup> Article 1.051(f) states:

*A defendant may voluntarily and intelligently waive in writing the right to counsel. A waiver obtained in violation of Subsection (f-1) or (f-2) is presumed invalid.*

<sup>20</sup> The waiver language of Article 1.051(g) states:

*I have been advised this \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_, by the (name of court) Court of my right to representation by counsel in the case pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge. Understanding my right to have counsel appointed for me free of charge if I am not financially able to employ counsel, I wish to waive that right and request the court to proceed with my case without an attorney being appointed for me. I hereby waive my right to counsel. (signature of defendant)*

Figure 2: Counsel Appointment Procedures in Misdemeanor Cases



## FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4

### **Appoint Counsel Promptly.**

**FINDING 1 AND RECOMMENDATION (felony cases):** Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within one working day (plus 24 hours for transferring requests to the courts) of the request being made. The monitor's sample of attorney appointments in felony cases fell below the Commission's 90% timely threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel. The county must implement practices that satisfy Article 1.051(c)(1)'s timeline in felony cases.

**FINDING 2 AND RECOMMENDATION (misdemeanor cases):** Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within one working day (plus 24 hours for transferring requests to the courts) of the request being made. The monitor's sample of attorney appointments in misdemeanor cases fell below the Commission's 90% timely threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel. The county must implement practices that satisfy Article 1.051(c)(1)'s appointment timeline in misdemeanor cases.

**FINDING 3 AND RECOMMENDATION (misdemeanor cases):** The county does not have processes in place to ensure all misdemeanor requests for counsel are ruled upon prior to a defendant's waiver of counsel. As required by Article 1.051(f-2), the court must rule upon a request for counsel prior to a defendant's waiver of the right to retain counsel.

**FINDING 4 AND RECOMMENDATION (felony and misdemeanor cases):** Article 26.04(j)(2) requires that once counsel has been appointed, counsel continue with a case through disposition unless permitted or ordered by the court to withdraw after a finding of good cause has been entered on the record. Jail docket attorneys do not typically continue with a case through disposition, but are regularly replaced after their scheduled docket(s) have been completed. Appointed counsel must continue representing the defendant through case disposition unless permitted or ordered to withdraw after a finding of good cause has been entered on the record.

**FINDING 5 AND RECOMMENDATION (misdemeanor cases):** Under Article 26.04(p), once a defendant has been determined to be indigent, the defendant is presumed to remain indigent unless a material change in the defendant's financial circumstances occurs. Under current practice, defendants found to be indigent at the jail docket must re-qualify as indigent at later bonded dockets. The courts must put in place a system to ensure that all persons found to be indigent are presumed to remain indigent unless a material change in the defendant's financial circumstances occurs.

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

### **Jurisdiction's Process**

In order to receive payment for an indigent case, Article 26.05(c) of the Code of Criminal Procedure requires a defense attorney to submit an itemized voucher to the judge presiding over the case. The judge may sign off on the voucher and approve payment or may approve a different amount. If a different amount is approved, the judge must make written findings for disapproving the requested amount. No payment may be made to the attorney without a signed order to pay the attorney.

If an attorney is paid to represent an unspecified group of indigent defendants, Title 1, Rule 174.10 of the Texas Administrative Code states that the itemized fee voucher "shall include at a minimum all the information necessary for the county auditor or other designated official to complete the expenditure report." The minimum itemization needed for the auditor includes the payee, the court, the level and type of case disposed, the dates and services rendered and a requested amount of payment. In Galveston County, attorneys may be paid for representation on an individual case or may be paid a flat rate for representation of an unspecified group of indigent defendants at a jail docket. Jail docket vouchers are submitted by the attorney at the end of each week. Attorneys are paid according to the number of days in attendance at the jail docket.

### **Voucher Review**

The monitor examined 72 FY2015 attorney fee vouchers to determine if payments comported with the requirements of Article 26.05 and the local fee schedule. Vouchers were selected by use of a random calculator. Individual case vouchers listed the case(s) for which payment was requested and were approved by the judge over the case. Three of the 72 fee vouchers were for jail dockets. All three jail docket vouchers listed multiple cases and were approved by the judge presiding over the dockets.

### **FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 6**

#### **Promulgate standard attorney fee schedule and payment process.**

No findings. Issues with accurate reporting of this information are covered in the next requirement.

## **Requirement 7: Statutory data reporting.**

Under 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 for its Indigent Defense Expense Report (IDER). 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. Since FY2014, the financial data

reports have been expanded to include attorney-level information. Section 79.036(a-1) of the Texas Government Code states:

*(a-1) Not later than November 1 of each year and in the form and manner prescribed by the commission, each county shall prepare and provide to the commission information that describes for the preceding fiscal year the number of appointments under Article 26.04, Code of Criminal Procedure, and Title 3, Family Code, made to each attorney accepting appointments in the county, and information provided to the county by those attorneys under Article 26.04(j) (4), Code of Criminal Procedure.*

Attorneys are also required to submit annual data reports. Article 26.04(j)(4) of the Code of Criminal Procedure requires attorneys to who accept indigent defense appointments to report the percentage of their practice time devoted to indigent defense in adult criminal and juvenile cases.<sup>21</sup>

### **Jurisdiction's Process**

The Galveston County Auditor's Office maintains a general ledger of expenses to be captured on the IDER using a fund cost center. Within this fund center, the office categorizes expenses through object codes. These object codes identify expense types such as attorney fees, investigative expenses, and expert witness expenses by offense level and by court. The information contained in the object codes can be exported to a format which provides the necessary information needed to prepare the IDER (including the new requirement to report attorney level detail).

### **Monitor's Review**

To better understand local reporting procedures, the monitor interviewed personnel in the Galveston County Auditor's Office and reviewed supporting documents for fiscal data submitted to the Commission. For FY2015, some data was coded incorrectly, requiring a manual review and adjustments. Adjustments made as a result of the manual review were not maintained. Therefore, some of the amounts reported on the IDER were not fully supported by the data provided.

### **Unallowable Expenses Reported on the Indigent Defense Expense Report**

The monitor found that the county included some general court expenditures in the FY2015 IDER, which were claimed as indigent defense support services (expenses other than attorney fees). The general court expenditures included: (1) psychological evaluations not requested for exclusive use by the defense and (2) court reporter expenditures that were not made on behalf of the defense. Because it appears general court expenses were included in the IDER, the county may have overstated indigent

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<sup>21</sup> TEX. CODE CRIM. PROC. ART. 26.04(j)(4) states:

*(j) An attorney appointed under this article shall:*

*(4) not later than October 15 of each year and on a form prescribed by the Texas Indigent Defense Commission, submit to the county information, for the preceding fiscal year, that describes the percentage of the attorney's practice time that was dedicated to work based on appointments accepted in the county under this article and Title 3, Family Code.*

defense expenditures for FY2015. This could have resulted in a FY2016 formula grant award greater than if the IDER were submitted without ineligible expenses.

A request for a mental health evaluation to determine competency to stand trial is typically a general court expense. The only mental health examinations that are considered indigent defense expenses are those requested by the defense counsel where the results are shared exclusively with the defense team. No mental health evaluations requested by the judge or prosecuting attorney should be reported as indigent defense expenses. Support that the expense is requested by the defense attorney for exclusive use of the results by the defense team should be documented in order to include the expenses on the IDER.

The monitor reviewed 10 vouchers claiming support service expenses, and four vouchers claimed competency/psychological evaluation expenses (three for evaluations of competency to stand trial and one to determine the state of mind at the time of the alleged offense). Motions requesting mental health services were readily available for only one of the vouchers. This motion stated: “[T]he Court considered the suggestion of incompetency to stand in this cause with respect to [NAME OMITTED], Defendant, and the Court is of the opinion that there is evidence to support a finding of incompetency ... .” This language identifies the court as the requestor of the evaluation and not defense counsel. This cost is considered a general court expenditure. The three vouchers for competency to stand trial appear to be general court expenses. The voucher listed to determine state of mind at the time of alleged offense appears to be an allowable expense for the defense.

The monitor also found a claimed expenditure for a court reporter. This expenditure was for general court reporting and not for the creation of an appellate transcript for purposes of a defendant’s appeal. Court reporter expenses to cover the cost of defense transcripts for appeals are allowable, but court reporter expenses incurred in the court room are considered general court expenses.

### **Incorrect Expense Reporting on the IDER**

Amounts paid to regional programs such as the Regional Public Defender Office for Capital Cases (RPDO) are to be reported on the IDER as payments to regional programs. The county reported the annual payment to the RPDO in the amount of \$158,376.00 twice on the IDER. This amount was included as a payment to a regional program and as a cost for the 122<sup>nd</sup> District court. The county appears to have overstated indigent defense expenditures due to this error.

### **Incorrect Case Reporting on the IDER**

The auditor’s method for tracking jail docket cases does not appear to match the actual number of cases disposed. The auditor generally recorded an attorney’s payment for representation at a jail docket as a single case. Jail dockets (especially the misdemeanor dockets) often entail representation in and disposition of many cases. This

lack of accurate reporting significantly underreports the number of cases disposed with appointed counsel.

According to data submitted to the Commission and to the Office of Court Administration (OCA), there were 1,471 misdemeanor cases in which attorneys were paid for appointments and a total of 9,327 misdemeanor cases disposed in FY2015 (October 2014 – September 2015). In other words, just under 16% of misdemeanor cases were disposed with appointed counsel. However, the auditor's office was not able to report the number of appointed cases disposed at the misdemeanor jail dockets, so the percentage of cases disposed with appointed counsel is higher, but to what extent is unknown.<sup>22</sup>

### **Veteran's Court Contract Defender**

The auditor's office noted that Galveston County has made payments for indigent defendants at a veteran's court docket. For this docket, one attorney is paid on a monthly basis to represent indigent veterans. Section 79.036(e) of the Texas Government Code requires all indigent defense expenses and associated cases be submitted to the Texas Indigent Defense Commission.<sup>23</sup> Information regarding the veteran's court was not reported on the IDER. Galveston County must report all indigent defense cases and expenses on the IDER to comply with Section 79.036.

Section 79.001(4) of the Texas Government Code defines a contract defender system as:

*(4) "Contract defender program" means a system under which private attorneys, acting as independent contractors and compensated with public funds, are engaged to provide legal representation and services to a group of unspecified indigent defendants who appear before a particular court or group of courts.*

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<sup>22</sup> See the Additional Observations section of this report for more details.

<sup>23</sup> TEX. GOV'T CODE § 79.036(e) states:

*In each county, the county auditor, or the person designated by the commissioners court if the county does not have a county auditor, shall prepare and send to the commission in the form and manner prescribed by the commission and on a monthly, quarterly, or annual basis, with respect to legal services provided in the county to indigent defendants during each fiscal year, information showing the total amount expended by the county to provide indigent defense services and an analysis of the amount expended by the county:*

- (1) in each district, county, statutory county, and appellate court;*
- (2) in cases for which a private attorney is appointed for an indigent defendant;*
- (3) in cases for which a public defender is appointed for an indigent defendant;*
- (4) in cases for which counsel is appointed for an indigent juvenile under Section 51.10(f), Family Code; and*
- (5) for investigation expenses, expert witness expenses, or other litigation expenses.*

The use of a specific attorney to represent all indigent defendants at a particular docket meets the definition of a contract defender.<sup>24</sup> However, Galveston County does not have a contract in place for this representation.

Payments for indigent defense services in a contract defender system are governed by the Contract Defender Rules.<sup>25</sup> The Contract Defender Rules require each contract to have an open application process, including a notification of the opportunity to apply, an opportunity to respond, and written applications. Following the review of all applications, the appointing authority selects the contractors (who have met the requisite qualifications), and the contracting authority may approve the recommended contractor(s). The contract shall not be awarded solely on the basis of cost. The contract must contain various terms including the compensation to be paid, the duration of representation, standards of representation, and caseload or workload limitations. If Galveston County continues to use a contract defender for its veteran's court docket, it must utilize a written contract that conforms to the Contract Defender Rules.

### **Attorney Reporting of Practice Time Devoted to Indigent Defense**

The monitor found that of the 131 attorneys who received payment for indigent defense services in FY2015, 112 of them submitted statutorily required reports concerning the percent of their practice time devoted to indigent defendants in Galveston County. The monitor applauds the fact that the vast majority of attorneys submitted practice time reports, but reminds the remainder these reports are mandatory under Article 26.04(j)(4) of the Code of Criminal Procedure.

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<sup>24</sup> At the December 2015 Board meeting, the Texas Indigent Defense Commission directed monitors to limit the evaluation of contract defense systems to those with a duration longer than one week.

<sup>25</sup> 1 TEX. ADMIN. CODE §§ 174.10 – 174.25.

## FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 7

### **Statutory Data Reporting**

**Finding 6 and Recommendation:** The county overstated its expenses by including general court costs on the FY2015 IDER. To accurately capture indigent defense expenditures, the county should ensure supporting documents provide evidence that the expenses were requested by the defense attorney, where the results are shared exclusively with the defense team. The county should attach this supporting documentation to the related voucher so that only costs incurred for indigent defense are included on the IDER.

**Finding 7 and Recommendation:** The county overstated its expenses by including the annual payment to the RPDO program in both the court cost section and the payments to regional program section of the IDER. The RPDO payment should only be recorded in the funds paid to regional programs section of IDER.

**Finding 8 and Recommendation:** The county is underreporting the number of cases disposed by appointed attorneys. The county must put in place procedures to ensure the accurate reporting of disposed indigent defense cases. To accomplish this objective, jail docket attorneys must accurately document the number of cases they dispose, and the auditor must track and report these case totals on the IDER.

**Finding 9 and Recommendation:** The county did not report indigent defense cases and expenses handled through its veteran's court. As required by Section 79.036(e) of the Texas Government Code, the county must report these cases and expenses.

**Finding 10 and Recommendation:** If Galveston County continues to use a contract defender for its veteran's court docket, it must utilize a written contract that conforms to the Contract Defender Rules.

## **Additional Observations**

The monitor now makes additional observations and analysis based upon the information gathered for this review.

A defendant's ability to make bail can have a significant impact on his/her case outcome. Table 5 lists sample median bail amounts set at the Article 15.17 hearing and the percentage of cases in which defendants made bail.

**Table 5: Sample Bail Amounts**

Offense Level	Sample Cases	Median Bail	% Making Bail
F1	13	\$45,000	30.8%
F2	27	\$75,000	44.4%
F3	55	\$25,000	54.7%
SJF	98	\$20,000	46.3%
MA	151	\$2,250	66.7%
MB	223	\$1,500	77.9%

### ***Detained Misdemeanor Defendants***

If a defendant cannot pay the full bail amount set or obtain a surety to post the bail, in some circumstances, the defendant may be granted a personal recognizance bond (PR bond). A little under one-third of sample misdemeanor defendants who made bail were released on PR bonds. For an arrestee to receive a PR bond, he/she must be interviewed by a pre-trial investigator, be recommended for the bond, and must pay a pre-trial fee equivalent to 3% of the bail bond amount.<sup>26</sup> In our survey of misdemeanor defense attorneys, a few made comments stating that advocating for reduced bail or a PR bond is difficult if the defendant cannot pay the pre-trial fee.

When a misdemeanor defendant does not make bail, he/she is placed on the misdemeanor jail docket and remains on this docket until making bail or moving to the trial docket. An overwhelming percentage of defendants on the jail docket receive appointed counsel from a jail docket attorney. At this docket, indigent defendants are represented by one of two attorneys who act as counsel for all indigent defendants at the docket during a given week. The use of a jail docket attorney differs from an attorney appointed at a bonded docket in that: (1) the term of representation is typically only for the scheduled week and (2) each attorney receives many appointments rather than a single appointment. Jail docket attorneys are paid at a rate of \$200 per day. If the attorney continues with the case beyond the weekly appointment, the attorney will be paid on an hourly basis.

Jail docket attorneys receive a daily list of defendants to whom the prosecutor will give a plea offer. Attorneys have access to discovery items from the prosecutor's file, but this discovery is often limited. For instance, based on discovery compliance checklists from the monitor's sample of case files, 15% did not include the offense report.

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<sup>26</sup> While bail is set at the Article 15.17 hearing, PR bonds in Galveston County are granted independently of the Article 15.17 hearing.

The Galveston County District Attorney’s Office regularly makes a defendant’s criminal history information available, but this information is often not yet present for misdemeanor jail docket cases. If the defense attorney does not have access to a defendant’s criminal history, the client (and attorney) may not fully understand the consequences of a plea. If the offense report is not included in discovery, the defense may not be aware of the strength of the prosecutor’s case. A majority of misdemeanor defendants who did not make bail entered some form of guilty plea, typically to terms of confinement (see Table 6).

**Table 6: Counsel Type and Outcomes for Non-bonding Misdemeanor Defendants who did not Make Bail<sup>27</sup>**

Counsel type – Class A & B cases combined	number	%
Sample cases	98	
Appointed Counsel	93	95.9%
Retained Counsel	4	4.1%
Unclear	1	n/a
Outcomes - Class A & B cases combined	number	%
Sample cases	98	
Term of confinement	70	71.4%
Probation or deferred adjudication	5	5.1%
Class C plea	2	2.0%
Dismissal in exchange for a plea	17	17.3%
Full dismissal	4	4.1%

***Bonded Misdemeanor Defendants***

For cases in which misdemeanor defendants made bail, a larger portion of them either retained counsel or represented themselves than did detained defendants. Bonded defendants had more varied outcomes than detained defendants. While a clear majority of detained misdemeanor defendants entered pleas to terms of confinement, less than a quarter of bonded defendants did so. Instead, a larger percentage of bonded defendants received some form of probationary outcome or a full dismissal. Attorneys appointed for the bonded docket are paid at an hourly rate (\$66 per hour).

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<sup>27</sup> Data for items provided in discovery excluded cases in which these checklists were not available.

**Table 7: Counsel Type and Outcomes for Bonded Misdemeanor Defendants<sup>28</sup>**

Counsel type – Class A & B cases combined	number	%
Sample cases	257	
Appointed Counsel	97	39.4%
Retained Counsel	77	31.3%
Pro Se	72	29.3%
Unclear <sup>29</sup>	11	n/a
Outcomes – Class A & B cases combined	number	%
Sample cases	257	
Term of confinement	58	22.6%
Probation or deferred adjudication	34	13.2%
Pre-trial diversion	9	3.5%
Fines and fees	9	3.5%
Class C plea	24	9.3%
Dismissal in exchange for a plea	51	19.8%
Full dismissal	71	27.6%
Acquittal	1	0.4%

***Misdemeanor Attorney Fees per Case***

As previously mentioned in this report, Galveston County reported paying attorneys in 1,471 of 9,327 misdemeanor cases disposed in FY2015 (October 2014 – September 2015). In other words, just under 16% of misdemeanor cases were disposed with appointed counsel. However, the auditor’s office was not able to report the number of appointed cases disposed at the misdemeanor jail dockets, so the percentage of cases disposed with appointed counsel is higher, but to what extent is unknown.

The monitor attempted to calculate the number of appointed misdemeanor cases disposed at jail dockets by comparing clerk case data with auditor’s records. The monitor’s construction of this data revealed clear differences between jail docket representation and representation for bonded defendants (see Table 8). This construction indicates that bonded docket cases were paid at a rate more than three times the jail docket cases. The large difference in attorney fees paid may also reflect a different quality level of representation delivered to clients.

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<sup>28</sup> These statistics only include sample cases that had been disposed at the time of the case file review. Attorney type is the initial type obtained. For instance, if a defendant initially obtained appointed counsel, but later retained counsel, this would have been considered an appointed counsel case.

<sup>29</sup> Several cases were dismissed early, and a common listed reason was “interest of justice”. These cases did not have a record of an attorney acting on behalf of the defendant, but the monitor does not believe that a large percentage of cases dismissed in the interest of justice were for pro se defendants.

**Table 8: Misdemeanor Attorney Fees per Case Paid**

	number	Attorney Fees	Attorney Fees per Case
Total Misdemeanor Cases Paid	3,056	\$334,578	\$109.48
Jail Docket Cases Paid	1,700	\$94,850	\$55.79
Bonded Docket Cases Paid	1,356	\$239,728	\$176.79

### ***Sufficiency of Time Devoted to a Criminal Case***

To provide effective assistance of counsel, an attorney must ensure a meaningful adversarial testing of the prosecution's case, which may require a significant time investment.<sup>30</sup> Through the passage of HB 1318 in 2013, the Texas Legislature instructed the Commission to publish a study determining reasonable defense attorney caseloads in Texas.<sup>31</sup> The Texas study included an advisory panel of stakeholders who provided input into the study's methodology. The data used to determine reasonable caseloads included a timekeeping study, a time sufficiency survey, and feedback from experienced criminal defense attorneys.

The resulting study recommended an average of **8.6 hours** of time to provide reasonably effective counsel in a **non-trial Class B misdemeanor case and 9.4 hours in a non-trial Class A misdemeanor case.** For felonies, the study recommended between 11.4 hours and 25.7 hours to provide reasonably effective counsel in non-trials, depending on the level of the case.<sup>32</sup> The time devoted to Galveston County misdemeanor jail docket cases does not appear to meet the time recommended by the study. If one infers that attorneys are working at the same hourly rate for bonded cases as jail docket cases, **misdemeanor jail docket attorneys appear to spend less than one hour per case** (\$56 per jail docket case compared to an hourly fee schedule rate of \$66). This aligns with what the monitor observed at jail docket proceedings.

### ***Felony Defendants***

In felony cases, a majority of defendants never make bail, and many of these defendants receive appointed counsel. Some felony defendants who are charged with nonviolent third degree or state jail felony offenses may be brought to the felony jail docket. All indigent defendants on this docket are represented by a jail docket attorney. If the defendant chooses not to accept the prosecutor's offer, the defendant is moved

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<sup>30</sup> See *United States v. Cronin*, 466 U.S. 648, 656–57 (1984).

<sup>31</sup> The bill required the Commission to:  
*[C]onduct and publish a study for the purpose of determining guidelines for establishing a maximum allowable caseload for a criminal defense attorney that ... allows the attorney to give each indigent defendant the time and effort necessary to ensure effective representation.*  
Act of May 17, 2013, Tex. H.B. 1318, 83rd Leg., R.S., ch. 912, § 8, 2013 TEX. GEN. LAWS 2268, available at <http://www.legis.state.tx.us/tlodocs/83R/billtext/html/HB01318F.HTM>.

<sup>32</sup> PUB. POLICY RESEARCH INST. AT TEXAS A&M UNIV., GUIDELINES FOR INDIGENT DEFENSE CASELOADS: A REPORT TO THE TEXAS INDIGENT DEFENSE COMMISSION 25 (2015), available at [http://www.tidc.texas.gov/media/31818/150122\\_weightedcl\\_final.pdf](http://www.tidc.texas.gov/media/31818/150122_weightedcl_final.pdf).

from the jail docket to an individual court’s docket. After the case is moved to an individual court’s docket, the jail docket attorney may not stay with the case. Jail docket attorneys are paid at a rate of \$230 per docket.

Based on the discovery checklists from case files, felony cases tended to have more discovery turned over to defense attorneys than misdemeanor cases. Most files had several items turned over in discovery and none were disposed without an offense report being turned over to the defense.

As to felony outcomes, a large portion of bonded defendants received probation or deferred adjudication. When defendants did not make bail, a larger percentage of defendants pled to terms of confinement exceeding one year. Appointed attorneys (for all non-jail docket cases) are paid at an hourly rate (\$100 for capital murder cases, \$76 for first degree felonies, and \$66 for felony cases below first degree).

**Table 9: Counsel Type and Outcomes for Detained Felony Defendants<sup>33</sup>**

Detained Defendants -- All Felony Offense Levels	number	%
Sample Cases	104	
Appointed Counsel	93	89.4%
Retained Counsel	4	3.8%
Pro Se <sup>34</sup>	7	6.7%
Detained Defendants -- All Felony Offense Levels	number	%
Sample Cases	104	
Term of confinement – more than 1 year	21	20.2%
Term of confinement – 1 year or less	28	26.9%
Probation or deferred adjudication	26	25.0%
Dismissal in exchange for a plea	8	7.7%
Dismissed – to be re-filed	1	1.0%
Full dismissal	19	18.3%
Extradited	1	1.0%

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<sup>33</sup> These statistics only include sample cases that had been disposed at the time of the case file review.

<sup>34</sup> All pro se felony cases involved the dismissal of the case.

**Table 10: Counsel Type and Outcomes for Bonded Felony Defendants**

Bonded Defendants -- All Felony Offense Levels	number	%
Sample Cases	85	
Appointed Counsel	47	55.3%
Retained Counsel	35	41.2%
Pro Se	3	3.5%
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Bonded Defendants -- All Felony Offense Levels	number	%
Sample Cases	85	
Term of confinement – more than 1 year	4	4.7%
Term of confinement – 1 year or less	17	20.0%
Probation or deferred adjudication	38	44.7%
Dismissal in exchange for a plea	12	14.1%
Dismissed – to be re-filed	1	1.0%
Full dismissal	13	15.3%

***Felony Attorney Fees per Case***

According to data submitted to the Commission and to OCA by Galveston County, there were 2,933 felony cases in which attorneys were paid for appointments and a total of 3,384 felony cases disposed in FY2015 (October 2014 – September 2015). In other words, over 85% of felony cases were disposed with appointed counsel. However, the auditor’s office was not able to report the number of appointed cases disposed at felony jail dockets.

The monitor attempted to calculate the number of appointed felony cases disposed at jail dockets by comparing clerk data with auditor data. The monitor’s construction of this data indicated that most felony jail dockets did not involve large numbers of cases disposed, and in fact, the cost per case was only somewhat lower than fees paid for bonded docket cases (see Table 11).

**Table 11: Felony Attorney Fees per Case Paid**

	Number	Attorney Fees	Attorney Fees / Case
Total Felony Cases Paid	3,003	\$1,524,134	\$507.54
Jail Docket Cases Paid	126	\$55,310	\$438.97
Bonded Docket Cases Paid	2,877	\$ 1,468,824	\$510.54

Based on the above observations, non-bonded defendants in custody are experiencing much worse case outcomes than defendants who are out-of-custody. This could be based on a variety of factors, including pressure to plea to get out of jail, inadequate time for defense counsel to investigate and negotiate a case, or unknown factors like different criminal histories of bonded versus detained defendants. The county might consider waiving pre-trial fees to make personal bonds more available to defendants who cannot afford them but otherwise would be eligible. This could improve representation for these defendants and ultimately case outcomes.

## **Conclusion**

The monitor enjoyed meeting with Galveston County officials and staff, and appreciates their cooperation during this review. Commission staff stand ready to provide any assistance the county may need in addressing the issues identified in this report.

## **Summary of Findings and Recommendations**

The County must respond in writing how it will address each of these recommendations.

### **REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS.**

No findings.

### **REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.**

**FINDING 1 AND RECOMMENDATION (felony cases):** Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within one working day (plus 24 hours for transferring requests to the courts) of the request being made. The monitor's sample of attorney appointments in felony cases fell below the Commission's 90% timely threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel. The county must implement practices that satisfy Article 1.051(c)(1)'s timeline in felony cases.

**FINDING 2 AND RECOMMENDATION (misdemeanor cases):** Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within one working day (plus 24 hours for transferring requests to the courts) of the request being made. The monitor's sample of attorney appointments in misdemeanor cases fell below the Commission's 90% timely threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel. The county must implement practices that satisfy Article 1.051(c)(1)'s appointment timeline in misdemeanor cases.

**FINDING 3 AND RECOMMENDATION (misdemeanor cases):** The county does not have processes in place to ensure all misdemeanor requests for counsel are ruled upon prior to a defendant's waiver of counsel. As required by Article 1.051(f-2), the court must rule upon a request for counsel prior to a defendant's waiver of the right to retain counsel.

**FINDING 4 AND RECOMMENDATION (felony and misdemeanor cases):** Article 26.04(j)(2) requires that once counsel has been appointed, counsel continue with a case through disposition unless permitted or ordered by the court to withdraw after a finding of good cause has been entered on the record. Jail docket attorneys do not typically continue with a case through disposition, but are regularly replaced after their scheduled docket(s) have been completed. Appointed counsel must continue representing the defendant through case disposition unless permitted or ordered to withdraw after a finding of good cause has been entered on the record.

**FINDING 5 AND RECOMMENDATION (misdemeanor cases):** Under Article 26.04(p), once a defendant has been determined to be indigent, the defendant is presumed to remain indigent unless a material change in the defendant's financial circumstances occurs. Under current practice, defendants found to be indigent at the jail docket must re-qualify as indigent at later bonded dockets. The courts must put in place a system to ensure that all persons found to be indigent are presumed to remain indigent unless a material change in the defendant's financial circumstances occurs.

**REQUIREMENT 6: PROMULGATE STANDARD ATTORNEY FEE SCHEDULE AND PAYMENT PROCESS.**

No findings.

**REQUIREMENT 7: STATUTORY DATA REPORTING**

**Finding 6 and Recommendation:** The county overstated its expenses by including general court costs on the FY2015 IDER. To accurately capture indigent defense expenditures, the county should ensure supporting documents provide evidence that the expenses were requested by the defense attorney, where the results are shared exclusively with the defense team. The county should attach this supporting documentation to the related voucher so that only costs incurred for indigent defense are included on the IDER.

**FINDING 7 and Recommendation:** The county overstated its expenses by including the annual payment to the RPDO program in both the court cost section and the payments to regional program section of the IDER. The RPDO payment should only be recorded in the funds paid to regional programs section of IDER.

**FINDING 8 and Recommendation:** The county is underreporting the number of cases disposed by appointed attorneys. The county must put in place procedures to ensure the accurate reporting of disposed indigent defense cases. To accomplish this objective, jail docket attorneys must accurately document the number of cases they dispose, and the auditor must track and report these case totals on the IDER.

**FINDING 9 and Recommendation:** The county did not report indigent defense cases and expenses handled through its veteran's court. As required by Section 79.036(e) of the Texas Government Code, the county must report these cases and expenses.

**Finding 10 and Recommendation:** If Galveston County continues to use a contract defender for its veteran's court docket, it must utilize a written contract that conforms to the Contract Defender Rules.

## **Appendix A – Monitoring Checklist**

The monitoring review of the FDA’s core requirements consisted of an examination of the items from the following checklist. If a box is marked, the specific requirement was met. If a box is not marked, the requirement either was not satisfied or is not applicable.

### **REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS**

- The accused must be brought before a magistrate within 48 hours of arrest.<sup>35</sup>
  - A person arrested for a misdemeanor without a warrant must be released on bond in an amount no more than \$5,000 not later than 24 hours after arrest if a magistrate has not determined probable cause by that time.<sup>36</sup>
- The magistrate must inform and explain the right to counsel and the right to appointed counsel to the accused.<sup>37</sup>
- The magistrate must ensure that reasonable assistance in completing forms necessary to request counsel is provided to the accused.<sup>38</sup>
- A record must be made of the following:
  - the magistrate informing the accused of the accused’s right to request appointment of counsel;
  - the magistrate asking whether accused wants to request appointment of counsel;
  - and whether the person requested court appointed counsel.<sup>39</sup>
- If authorized to appoint counsel, the magistrate must do so within one working day after receipt of request for counsel in counties with a population of 250,000 or more and within three working days in counties under 250,000.<sup>40</sup>

**NOT APPLICABLE:** The indigent defense plan authorizes the magistrate to appoint counsel.
- If not authorized to appoint counsel, the magistrate must transmit or cause to be transmitted to the appointing authority an accused’s request for counsel within 24 hours of the request being made.<sup>41</sup>

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<sup>35</sup> TEX. CODE CRIM. PROC. art. 14.06(a).

<sup>36</sup> TEX. CODE CRIM. PROC. art. 17.033.

<sup>37</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>38</sup> *Id.*

<sup>39</sup> TEX. CODE CRIM. PROC. art. 15.17(e).

<sup>40</sup> *See, e.g.*, TEX. CODE CRIM. PROC. art. 15.17(a) (requiring magistrate to appoint counsel according to the timeframes set in TEX. CODE CRIM. PROC. art. 1.051); TEX. CODE CRIM. PROC. art. 1.051(c) (spelling out timeframe for appointment of counsel by county population size).

<sup>41</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

#### **REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.**

- Incarcerated persons: After receipt of a request for counsel, counsel must be appointed within one working day in counties with a population of 250,000 or more and within three working days in counties under 250,000.<sup>42</sup>
- Persons out of custody: Counsel must be appointed at the defendant's first court appearance or when adversarial judicial proceedings are initiated, whichever comes first.<sup>43</sup>

**REQUIREMENT NOT SATISFIED:** The above boxes are not checked because the percent of timely appointments (in both felony and misdemeanor cases) did not meet the Commission's 90% threshold for presuming a jurisdiction's appointment system to be timely.

- All unrepresented defendants must be advised of the right to counsel and the procedures for obtaining counsel.<sup>44</sup>

**ADDITIONAL NOTE:** While this box is checked, the county does not have processes in place to ensure all misdemeanor requests for counsel are ruled upon prior to a defendant's waiver of counsel.

#### **REQUIREMENT 6: PROMULGATE STANDARD ATTORNEY FEE SCHEDULE AND PAYMENT PROCESS.**

- Payments shall be in accordance with a schedule of fees adopted by the judges.<sup>45</sup>
- No payment shall be made until the judge approves payment after submission of the attorney fee voucher.<sup>46</sup>
- If the judge disapproves the requested amount of payment, the judge shall make written findings stating the amount that the judge approves and each reason for approving an amount different from the requested amount.<sup>47</sup>
- Expenses incurred without prior court approval shall be reimbursed if the expenses are reasonably necessary and reasonably incurred.<sup>48</sup>

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<sup>42</sup> TEX. CODE CRIM. PROC. art. 1.051(c).

<sup>43</sup> TEX. CODE CRIM. PROC. art. 1.051(j); *see also Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 – 13 (2008) (holding that “a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”).

<sup>44</sup> TEX. CODE CRIM. PROC. art. 1.051(f-2).

<sup>45</sup> TEX. CODE CRIM. PROC. art. 26.05(b).

<sup>46</sup> TEX. CODE CRIM. PROC. art. 26.05(c).

<sup>47</sup> *Id.*

<sup>48</sup> TEX. CODE CRIM. PROC. arts. 26.05(d), 26.052(h).

**REQUIREMENT 7: STATUTORY DATA REPORTING.**

- The county auditor shall prepare and send to OCA an annual report of legal services provided in the county to indigent defendants during the fiscal year and an analysis of the amount expended:
  - In each district, statutory county, and appellate court;
  - In cases for which a private attorney is appointed for an indigent defendant;
  - In cases for which a public defender is appointed for an indigent defendant;
  - In cases for which counsel is appointed for an indigent juvenile; and
  - For investigation expenses, expert witness expenses, or other litigation expenses.

**REQUIREMENT NOT SATISFIED:**

- (1) Unallowable expenses were reported to the Commission.
- (2) Incorrect expenses were reported to the Commission.
- (3) Jail docket case totals were not accurately reported to the Commission.
- (4) Contract cases and expenses through the veteran's court were not reported to the Commission.

## **Appendix B – Misdemeanor Defense Attorney Survey**

A survey of indigent defense practices in Galveston County was sent to attorneys on the misdemeanor appointment list. Fifteen attorneys responded. Several questions from the survey focused on the misdemeanor jail docket. Attorneys stated they were generally pleased with the rotation of the appointment wheel, but voiced concerns about attorney pay and the ability to successfully file motions for bond reduction. Attorneys also indicated that at jail dockets, they speak with many clients, and over the course of a week will often dispose more than half of the cases to which they were assigned. The survey questions and all responses follow.

<b>1. What is working well in the misdemeanor appointment system in Galveston County?</b>	
<b>Answer Options</b>	<b>Response Count</b>
	15
The wheel, I get appointed to different kinds of cases in different courts regularly.	
Indigent Coordinator office is very very responsive and helpful in answering any and all questions to make sure that we are up to date on everything.	
I have experienced no problems.	
N/A	
Not too much.	
Obtaining approval for placement on the appointment list	
The rotation schedule works well.	
Nothing that I know of.	
Random wheel is actually used for jail docket appointments. For bonded clients, they are receiving appointments, when requested, of individual attorneys.	
The appointment pay system is timely	
seems fair	
Court coordinators are efficient.	
everything	
It appears to being implemented fairly as far as the number of appointments per attorney.	
Prompt notice of appointments from the Court.	

<b>2. What are the biggest challenges that you face as appointed counsel in Galveston County?</b>	
<b>Answer Options</b>	<b>Response Count</b>
	15
As usual, clients.	
The biggest challenge that I face is getting a hold of some of my appointed clients. That is through no fault of the court, a lot of the indigent defendants have "month to month" telephones and if they cannot afford it one month, they will opt to allow the phone to lapse for the month.	
Dealing with multiple Assistant District Attorney's on one case as they move around the various Courts.	
None	
Judges who, not having actually worked up a particular case, nevertheless take it upon themselves to second guess how much work was done, whether that work was actually required to provide zealous and effective lawyer assistance, and then smugly reduce the already miserably low rates paid to appointed lawyers. And, of course, prosecutors who are restricted from actually exercising their professional evaluations in making reasonable plea offers; they too often are apparently required by DA	

office policy to check with office management before they can make offers. All this does is delay the resolution of many cases.
None yet. Only recently have I been placed on the appointment list
The amount of work that has to be done to effectively represent you client compared to the pay you actually receive.
Jail docket attorneys attempting to get my clients to plea.
The Plea Mill, no PR bonds, no investigations for jail dockets, no money for investigators, etc.
The pay is very low compared to other counties
connecting as soon as possible a misd when they also has a felony
Low pay
delays in getting booked in to visit inmates
Getting paid at a ridiculously low rate and then having to justify why so much time is needed to move a case with the District attorneys stiff criminal policies. The State is under no budget constraints when it comes to moving cases. The judges are not going to take a pay cut so Defense attorneys are EXPECTED to take a pay reduction while everyone else is untouched by so called budget constraints. We are not paid for travel and have difficulty getting paid for any expenses. The judges have spent a million dollars on legal fees because there is a control issue within this county between the judges and the commissioners. They spend a million dollars over petty differences and the Defense bar is the only sector being forced to take pay reductions while no others are. There has not been a pay raise for defense attorney's in this county for over 10 years...its ridiculous.
Initial contact information of appointed client may not necessarily be accurate. I have experienced some trouble being able to initial reach some new clients when I am first appointed.

**3. What suggestions do you have for improving indigent defense in Galveston County?**

Answer Options	Response Count
	15
More CLE opportunity.	
None at this time. It is very "user friendly," and I feel the judges are fair in their appointments and Bonnie Quiroga in the Indigent Coordinator's office is magnificent.	
Giving us our clients criminal record when we get the case file and obtaining evidence quicker so we can settle our cases quicker.	
Allow more money for investigative services and expert witnesses.	
Stripping trial judges from wearing their black robes; maybe they will recall that they are mere mortals, capable of making stupid decisions like the rest of us.	
None	
The hourly pay should be increased.	
Follow the plan for selection of attorneys that is set out by state law.	
On jail docket - each def. should get one appointed atty., like the system in Ft. Bend. And it should be conducted in open court. PR bonds should be given frequent and often, placing defendants pre-trial on the regular docket.	
The rate for appointed attorneys needs to increase	
Give more support for the attorneys	
we have to provide our own search of records, forms, internet THE STATE IS PROVIDED ALL THESE THINGS AND MORE	
CPS/ and Juvenile... we need access to county records, WE are lawyer of the court and cant access our clients files	
Emphasis on local attorneys who don't have to travel an hour or more to get here. Better pay.	
dont appoint attorneys from Houston that show up late to misdemeanor jail docket.	

dont allow appointed attorneys to visit clients in jail by using only the monitor (up front) without going back to the jail pods to visit inmate.

set a standard fee for misdemeanors court appearances - it varies widely as some houston attorneys try to tack on their travel time

Policy revisions in the DA offic e.

None.

**4. In the last three years, how many misdemeanor trials in appointed cases have you had?**

Answer Options	Response Percent	Response Count
0	60.0%	9
1	20.0%	3
2 +	20.0%	3

**5. In the last three years, in how many misdemeanor cases have you requested an investigator?**

Answer Options	Response Percent	Response Count
0	86.7%	13
1	0.0%	0
2+	13.3%	2

**5a. Were any of your requests granted?**

Answer Options	Response Percent	Response Count
Yes	50.0%	1
No	50.0%	1
Comments		1

Only the first with significant pushback, and the second was denied, and it was expressed it was dened because of the first request

**6. Do you handle the misdemeanor jail docket?**

Answer Options	Response Percent	Response Count
Yes	60.0%	9
No	40.0%	6

**6a. Please tell us why you do not participate as a jail docket attorney.**

Answer Options	Response Count
	6
Not qualified yet	
I have applied to accept jail docket appointments, but to date have not received an appointment to a jail docket, therefore, I am not in a position to comment on my experience as a jail docket attorney. I have observed numerous jail dockets, however, have not been actually lead counsel on appointment.	
N/A	
Because its a chicken-shit rigged system against defendants.	
Haven't been asked	
My experience level does not qualify me for that level of appointments.	

**6b. Why did you choose to accept jail docket appointments?**

Answer Options	Response Count
	9
I enjoy the work.	
To provide representation to those who cannot afford a private attorney.	
Opportunity to face the challenge of defending a person who is truly disadvantaged by virtue of the fact that they are unable to post a small bond to obtain release.	
because indigent defendants deserve better representation.	
The cases are in the afternoon and the prosecutors are reasonable to work with	
Because the appointment is rotated and that seems the most fair way	
Better pay, not difficult	
I am competent and I consider it a duty for local counsel	
It is a duty in my opinion and these indigent people have a right to competent experienced representation which will not allow the State to imprison a person and leave them in jail until they finally plea to time served.	

**6c. On average, how many weeks out of a given year do you participate as a jail docket attorney?**

Answer Options	Response Percent	Response Count
1 to 2 weeks	77.8%	7
3 to 4 weeks	22.2%	2
5+ weeks	0.0%	0

**6d. On average, how many defendants do you discuss his/her case with during a single docket?**

Answer Options	Response Percent	Response Count
1 to 3	11.1%	1
4 to 7	22.2%	2
8 to 10	22.2%	2
11+	44.4%	4

6e. How do you receive and review discovery?	
Answer Options	Response Count
	9
We are given the files each day for that days jail Docket inmates.	
Either electronically or I go to the DA's office and review the file.	
Frequently depend on the probable cause affidavit. Clients may want to plea when there is an issue or competency or sanity. I rely on client interview as well as information from the prosecutor and justice administration to make this determination.	
On jail docket, they never give any more discovery than the OR.	
From the prosecutor in court or at their office	
on the spot prior to talking to the person in jail docket	
In person with hard copy, or it is sent electronically	
requesting it from DAs office and they are extremely prompt in providing discovery on misdemeanors file motions. Have to wait until the State decides to give it to you. No standards for time enforced by the Courts.	

6f. In your opinion, do you have adequate time and confidential space to communicate with clients? Please explain.	
Answer Options	Response Count
	9
Yes. We meet each client individually in a glass cubby.	
No. We have to meet with jail docket clients via a window where anyone in the hallway can hear our conversations.	
Yes. There is adequate time. I frequently visit the clients requiring additional consultation after the scheduled docket and early the next day. The space can be confidential if it is managed properly.	
No. Guard offices are right behind where we meet, and they keep their doors open and can listen. Bailiffs in the room over can hear all the conversations and often comment on them, often discussions with clients occur while another defendant is sitting right next to my client. When asked for more confidential space, the bailiffs deny and push back and act like they do not understand atty.-client confidentiality.	
yes I do. there are conference rooms in the courthouse	
no not really	
Yes, jail docket has separate booths for misdemeanors. Felony jail docket has no confidential space, you have to discuss the case and offer in front of other inmates and lawyers.	
absolutely yes	
time is a problem. limited to one attorney per POD and often have to wait to see client. The jail has no way to review any recordings with client within the jail either audio or video.	

6g. Do you receive a formal appointment for each case you discuss with a defendant?		
Answer Options	Response Percent	Response Count
Yes	88.9%	8
No	11.1%	1

**6h. On average, what percentage of newly assigned cases are disposed in the same week?**

Answer Options	Response Percent	Response Count
0 to 20%	22.2%	2
21 to 50%	0.0%	0
51 to 75%	11.1%	1
76 to 100%	66.7%	6

**6i. If a client decides not to take a plea bargain, what happens to the defendant and his or her case?**

Answer Options	Response Count
	9
We are assigned their case and follow it through whether that be to a plea or trial.	
The jail docket attorney keeps the case until it is finalized.	
If the client decides not to take the plea bargain I schedule the case for a jury trial. I present a motion for competency or sanity evaluation, if there are these kinds of issues.	
it gets pushed to another date, and it is encouraged to allow the next jail docket attorney handle the case from that point on. So, pretty much you are then off the case.	
It is either reset or set for trial	
I am appointed even if I just talk to them	
It is set for trial and an attorney is appointed.	
discovery and further discussions with client	
They are shuffled eventually to the junior prosecutor and discovery takes an unreasonable amount of time to get, especially when waiting drug lab results.	

**6j. Do you file motions for personal recognizance bonds or bond reductions for clients at the jail docket?**

Answer Options	Response Percent	Response Count
Yes	33.3%	3
No	66.7%	6

**6k. How often are those motions granted?**

Answer Options	Response Percent	Response Count
Always	0.0%	0
Sometimes	33.3%	1
Never	66.7%	2
Comments		3
Frequently, clients are eligible for pre-trial release bond, but I need to address the judge about waiving or deferring the pre-trial fee.		
I am laughed at as if they are never considered; even when extra work is put forth to show indigency and the need for the PR bond.		
Galveston county is lacking in judgement on bond amounts. Is set by a "schedule" approved by the judges and is almost never varied from.		

**7. Please provide any additional comments that you would like to share with us about the misdemeanor jail docket and/or misdemeanor appointments in Galveston County.**

Answer Options	Response Count
	10
Please stay the course.	
Not worth my time.	
Kudos to Bonnie Q for her professionalism	
Same attorneys are appointed to the misdemeanor jail docket over and over again, and those are frequently the attorneys who present the client with the plea bargain offer and plea the client without reviewing the case thoroughly.	
Thank you for your work.	
The pay needs to be increased	
although it gets folks out of jail quickly	
justice is not always accomplished	
Frivolous to do bond reductions at jail docket.	
The wheel systems of appointments does not work as several less experienced lawyers are assigned and too many attorneys apponted from out of county. There should be greater emphasis on attorneys having actual offices in Galveston County and not virtual offices.	
The pay standard is criminal. attorneys make less an hour than plumbers or mechanics even though our overhead is higher. County does not pay for travel in a case , they can at least pay a just hourly rate. Da's office has received budget increases and the Judiciary is paid extremely well. Why not Defense attorneys..my bar card appears to be something less than those individuals card..I can't figure out why. Judges have not figured out that they are elected to protect the Defendant from the State not to defend the State to insure re-election.	
None.	