



# **Initial Monitoring Review of Rusk County's Indigent Defense Systems**

**September 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.<sup>1</sup> 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.

This review covered all six core requirements of the FDA:<sup>2</sup>

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS

REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS DIRECTED BY THE INDIGENT DEFENSE PLAN

REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY

REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS

REQUIREMENT 6: REPORT DATA REQUIRED BY STATUTE

TIDC staff, Claire Buetow and Joel Lieurance, conducted the site visit on June 24-27, and on July 19, 2019. For this review, TIDC examined data from FY2018, including misdemeanor, felony, and juvenile case files; appointment lists; and records of attorney CLE hours. TIDC interviewed judges and court staff and observed misdemeanor first appearance and magistration hearings.

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

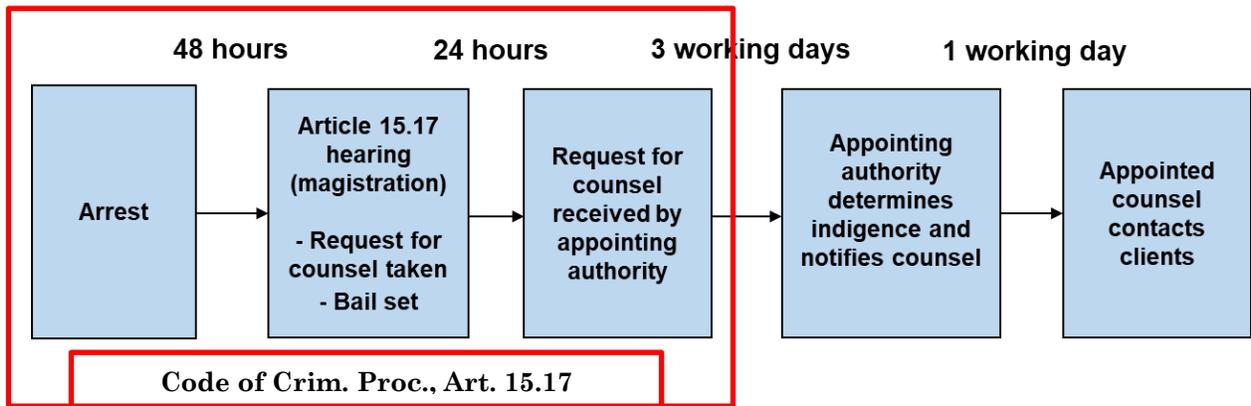
<sup>2</sup> 1 TEX. ADMIN. CODE § 174.28.

## Program Assessment

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

Under Article 15.17 of the Code of Criminal Procedure, an arrested person must be brought before a magistrate within 48 hours.<sup>3</sup> At this hearing, the magistrate must inform the accused of his or her right to counsel; inform the accused of the procedures for requesting counsel; and ensure the accused has reasonable assistance in completing the necessary forms for requesting assistance of counsel.<sup>4</sup> Within 24 hours of receiving a request for counsel, the magistrate must transmit this request to the appointing authority.<sup>5</sup> If an arrestee is arrested on an out-of-county warrant, the magistrate must perform the same duties as if the arrestee were an arrested on an in-county warrant.<sup>6</sup>

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



#### 1.a. Timeliness of Warnings

An arrested person must be brought before a magistrate within 48 hours of arrest.<sup>7</sup> TIDC presumes a county is in substantial compliance with the prompt magistration requirement if at least 98% of Article 15.17 hearings are conducted within

<sup>3</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>4</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>5</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>6</sup> TEX. CODE CRIM. PROC. art. 15.18(a). A list of contacts to send counsel requests made by arrestees from out-of-county warrants is available at:

<http://tidc.tamu.edu/public.net/Reports/OutOfCountyArrestContacts.aspx>.

<sup>7</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

48 hours.<sup>8</sup> To determine the timeliness of Article 15.17 warnings in Rusk County, TIDC staff examined 31 sample case files in which staff could determine the time from arrest until the Article 15.17 hearing. All sample cases had Article 15.17 hearings occurring within two days of arrest, indicating Rusk County is providing warnings in a timely manner (see Table 2).

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

	Sample Size	Percent
Article 15.17 hearing occurs x days after arrest:	31	
0 days	8	26%
1 day	22	71%
2 days	1	3%
<b>Timely Hearings</b>	<b>31</b>	<b>100%</b>
More than 2 days	0	0%

***1.b. Ability of Arrestees to Request Counsel***

At the Article 15.17 hearing, the magistrate must inform an arrested person of their right to counsel, ask whether they want to request counsel, and receive their request for counsel.<sup>9</sup> The magistrate must make a record of each step of this exchange.<sup>10</sup> This data is reported to OCA by justices of the peace and municipal judges as part of their Judicial Council Monthly Court Activity Reports. TIDC uses these reports, as well as court observations and case file records, to determine if magistrates inform arrestees of their right to counsel and if arrestees are able to invoke that right.

TIDC reviewed 32 magistrations forms and found that, on all but one, there was no mark as to whether arrestees requested counsel. Data reported to OCA and interviews with local officials and staff confirmed that arrestees were rarely given the opportunity to request counsel (See Table 3). TIDC concludes that arrestees did not have an opportunity to request counsel during FY 2018 and procedures must be put into place to take and record requests.

In 2018, a new Justice of the Peace for Precinct 5 was elected. TIDC interviewed her during its visits, and she described her process for informing arrestees of their right

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<sup>8</sup> 1 TEX. ADMIN. CODE § 174.28(e)(1). Article 15.17(a) requires magistrate warnings occur within 48 hours of arrest. To simplify time measurement, TIDC assumes warnings are timely if they occur within 2 days of arrest.

<sup>9</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>10</sup> TEX. CODE CRIM. PROC. art. 15.17(e).

to counsel and taking and recording requests. TIDC observed magistration on July 19, but no arrestees with a right to counsel were magistrated at that time. TIDC reviewed magistration forms from FY 2019 and noted that JP5 had marked whether arrestees requested counsel (though in some cases, only when the arrestees did request counsel); there have also been more requests reported by JP5 in FY 2019, though request rates are still significantly below historical state averages.<sup>11</sup> TIDC will continue to track Rusk County’s progress in follow-up visits.

**Table 3: Texas Judicial Council Monthly Court Activity Reports for Rusk County (Oct. 2017 – Sept. 2018)**

<b>Court</b>	<b>Misd. Requests</b>	<b>Misd. Warnings</b>	<b>Misd. Req. Rate</b>	<b>Felony Requests</b>	<b>Felony Warnings</b>	<b>Fel. Req. Rate</b>
JP1	0	0	--	0	0	--
JP2	0	0	--	0	0	--
JP3	0	0	--	0	0	--
JP4	0	0	--	0	0	--
JP5	1,024	5	0.5%	860	3	0.4%
Justice Courts Statewide	46,487	144,242	32.2%	47,174	123,909	38.0%

***1.c. Reasonable Assistance in Completing Forms for Requesting Counsel***

At Article 15.17 hearings, magistrates must ensure the arrestee has reasonable assistance in completing the necessary forms for requesting counsel.<sup>12</sup> TIDC did not observe requests for counsel, and so does not make a finding on this requirement.

***1.d. Transmitting Forms to the Appointing Authority***

Within 24 hours of a defendant requesting counsel, the magistrate must transmit this request to the entity authorized to appoint counsel.<sup>13</sup> For persons arrested on out-of-county warrants, the magistrate must transmit the request to the warrant issuing county.<sup>14</sup> TIDC did not observe requests for counsel, and so does not make a finding on this requirement.

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<sup>11</sup> From January to June 2019, 1.4% of misdemeanor arrestees have requested counsel and 9.8% of felony arrestees have requested counsel. Statewide, in FY 2018, 32.2% of misdemeanor arrestees requested counsel and 38.0% of felony arrestees requested counsel.

<sup>12</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>13</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>14</sup> TEX. CODE CRIM. PROC. art. 15.18 (a-1).

## FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1

### **Conduct prompt and accurate magistration proceedings.**

**FINDING 1:** Article 15.17(a) requires the magistrate to inform the accused of his or her right to counsel, ask whether the accused wants to request counsel, and receive the accused's request for counsel. The magistrate must make a record of each step of this exchange. The Rusk County magistrate was not providing arrestees with an opportunity to request to counsel. Rusk County magistrates must inform arrestees of their right to counsel, ask whether they want to request counsel, and receive requests.

**FINDING 2:** Article 15.17(e) requires a record to be made of the magistrate asking whether the person wants to request appointment of counsel and whether the person requested appointment of counsel. The Rusk County magistrate was not marking whether arrestees requested counsel. Rusk County magistrates must mark whether arrestees are requesting counsel.

## **REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS DIRECTED BY THE INDIGENT DEFENSE PLAN**

Under Article 26.04(l) of the Code of Criminal Procedure, counties must adopt procedures and financial standards for determining whether a defendant is indigent. Article 26.04(m) lists the factors courts may consider in determining indigence. The local standards for determining indigence are set in each county's indigent defense plans.

For adult criminal cases in Rusk County,<sup>15</sup> a person is presumed indigent if:

- 1) The defendant or his or her dependents are eligible to receive food stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, or public housing;
- 2) The defendant's net household income does not exceed 125% of the Federal Poverty Guidelines;
- 3) The defendant is currently serving a sentence in a correctional institution or public mental health institution, or is subject to a proceeding in which admission or commitment to a public mental health institution is sought.

An adult that does not meet these standards is nevertheless considered indigent if he or she is unable to retain private counsel without substantial hardship.

For juveniles,<sup>16</sup> indigence is based upon the income and assets of the person having custody over the juvenile. The juvenile plan presumes indigence if:

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<sup>15</sup> Rusk County District and County Court Indigent Defense Plan, available at <http://tfdc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=453>.

<sup>16</sup> Rusk County Juvenile Board Plan, available at <http://tfdc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=449>.

- 1) At the time of requesting appointment of counsel, the child or persons determined responsible or him or her receive Food Stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, or public housing; or
- 2) The net household income does not exceed 175% of the Poverty Guidelines;
- 3) Persons responsible for the child are currently serving a sentence in a correctional institution or public mental health institution, or is subject to a proceeding in which admission or commitment to a public mental health institution is sought.

A child that does not meet these standards is nevertheless considered indigent if persons responsible for him or her are unable to retain private counsel without substantial hardship.

TIDC found that Rusk County’s procedures for determining indigence were consistent with these standards and the FDA,<sup>17</sup> and that Rusk County is in substantial compliance with Requirement 2.

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 2**

**Determination of Indigence.**

Requirement satisfied. No findings.

**REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS**

Under Article 15.17 of the Code of Criminal Procedure, counties using a rotational system of appointment must establish public appointment lists with objective qualifications necessary for attorneys to be included on the list. Rusk County’s indigent defense plans set minimum qualifications for attorneys to be included on appointment lists for different levels of misdemeanors, felonies, and juvenile cases. To qualify for adult misdemeanor and felony lists, attorneys must complete a minimum of six hours of criminal law continuing legal education (CLE) per year. To qualify for the juvenile list, attorneys must complete a minimum of six hours of juvenile law CLE per year. TIDC reviewed appointment lists and CLE records, and found that Rusk County has procedures for managing appointment lists and for ensuring that all attorneys on the lists meet their annual CLE requirement. TIDC found that Rusk County is in substantial compliance with Requirement 3.

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 3**

**Establish Minimum Attorney Qualifications.**

Requirement satisfied. No findings.

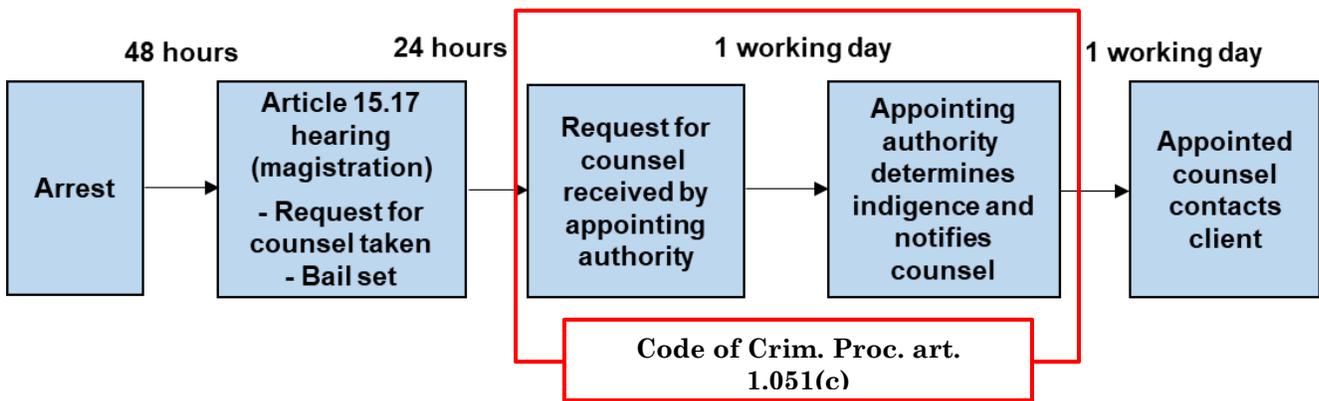
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<sup>17</sup> Title 1 TEX. ADMIN. CODE § 174.28(c)(2).

## 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.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup>

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



### *Timeliness of Appointment in Felony Cases*

To assess the timeliness of Rusk County’s current appointment procedures in felony cases, TIDC staff examined 54 sample felony cases filed in FY2018 (October 2017 – September 2018). Counsel was appointed timely in 33 of 33 cases having a request for counsel (**100% timely**) (see Table 2), which exceeds TIDC’s 90% timely threshold for presuming a jurisdiction’s procedures ensure prompt appointment of counsel in felony cases. It appears that counsel is appointed immediately in felony cases when defendants make in-court requests.

<sup>18</sup> The time frame is three working days for counties with a population under 250,000.

<sup>19</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, 212 – 13 (2008).

<sup>20</sup> 1 Tex. Admin Code § 174.51.

**Table 4: Times to Appointment in Felony Cases in Rusk County in FY 2018**

	Sample Size	Number from sample	Percent
Number of case files examined	54		
Total cases with a counsel request <sup>21</sup>		33	
Appointment / denial of indigence occurred in:			
0 work days		33	
1 work day + 24 hour transfer		0	
<b>Total timely appointments / denials</b>		<b>33</b>	<b>100%</b>
2 - 4 work days + 24 hour transfer		0	
More than 4 work days + 24 hour transfer		0	
No ruling on request		0	
Total untimely appointments / denials		0	0%

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

To assess the timeliness of Rusk County’s current appointment procedures in misdemeanor cases, TIDC staff examined 100 sample misdemeanor cases filed in FY2018 (October 2017 – September 2018). Counsel was appointed in a timely manner in 15 of 15 cases having a request for counsel (**100% timely**), which exceeds TIDC’s 90% timely threshold for presuming a jurisdiction’s procedures ensure prompt appointment of counsel in misdemeanor cases. It appears that counsel is appointed immediately in misdemeanor cases when defendants make in-court requests.

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<sup>21</sup> One additional felony case including an appointment of counsel was excluded from this analysis for lack of a request date.

**Table 5: Times to Appointment in Misdemeanor Cases in Rusk County in FY 2018**

	Sample Size	Number from sample	Percent
Number of case files examined	100		
Total cases with a counsel request <sup>22</sup>		15	
<b>Appointment / denial of indigence occurred in:</b>			
0 work days		15	
1 work day + 24 hour transfer		0	
<b>Total timely appointments / denials</b>		<b>15</b>	<b>100%</b>
2 to 4 work days + 24 hour transfer		0	
More than 4 work days + 24 hour transfer		0	
No ruling on request		0	
Total untimely appointments / denials		0	0%

***Additional Observations on Waivers of Counsel in Misdemeanor Cases***

Article 1.051(f-2) requires the court to advise the defendant of the right to counsel and the procedure for requesting appointed counsel (and give the defendant a reasonable opportunity to request appointed counsel) before the court directs or encourages the defendant to communicate with the attorney representing the state.<sup>23</sup>

On July 19, TIDC observed a misdemeanor trial docket. The judge informed everyone in the courtroom that they would be given the option to ask for attorneys or to speak with the District Attorney down the hall; if defendants wanted to avoid coming to court the next month, they would need to enter pleas that day or set a plea hearing before the end of the month. He first addressed attorneys, then called up unrepresented defendants in groups and asked them individually if they needed an attorney or if they wanted to speak to the DA. The judge indicated they could work out their cases with the DA that day to avoid future court settings, or have their indigence determined at the end of the docket and return to court next month to continue their case. In some instances, the judge indicated that defendants should request an attorney only if they wanted to go to trial. In other instances, defendants who requested attorneys were told to first try to hire an attorney before completing an indigence application. Of approximately 70 defendants who were present, six requested counsel. At the end of the docket, the judge spoke to each defendant who had made a request, found them indigent, and appointed counsel for all six.

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<sup>22</sup> One additional misdemeanor case including a request for counsel was excluded from this analysis for lack of an appointment date.

<sup>23</sup> TEX. CODE CRIM. PROC. art. 1.051(f-2).

TIDC makes no findings about the court's procedures for informing unrepresented defendants of their right to counsel, but notes that defendants were informed of the advantages of speaking with the prosecutor (namely, expedited resolution of their cases) but not the advantages of speaking with defense counsel. The court may benefit from using TIDC's model form for waiver of counsel to speak with the prosecutor, which explains the dangers of self-representation.<sup>24</sup> Distributing this form at the beginning of the docket may improve defendants' understanding of options for disposing their cases so that they are prepared when they speak to the judge.

### ***Juvenile Cases***

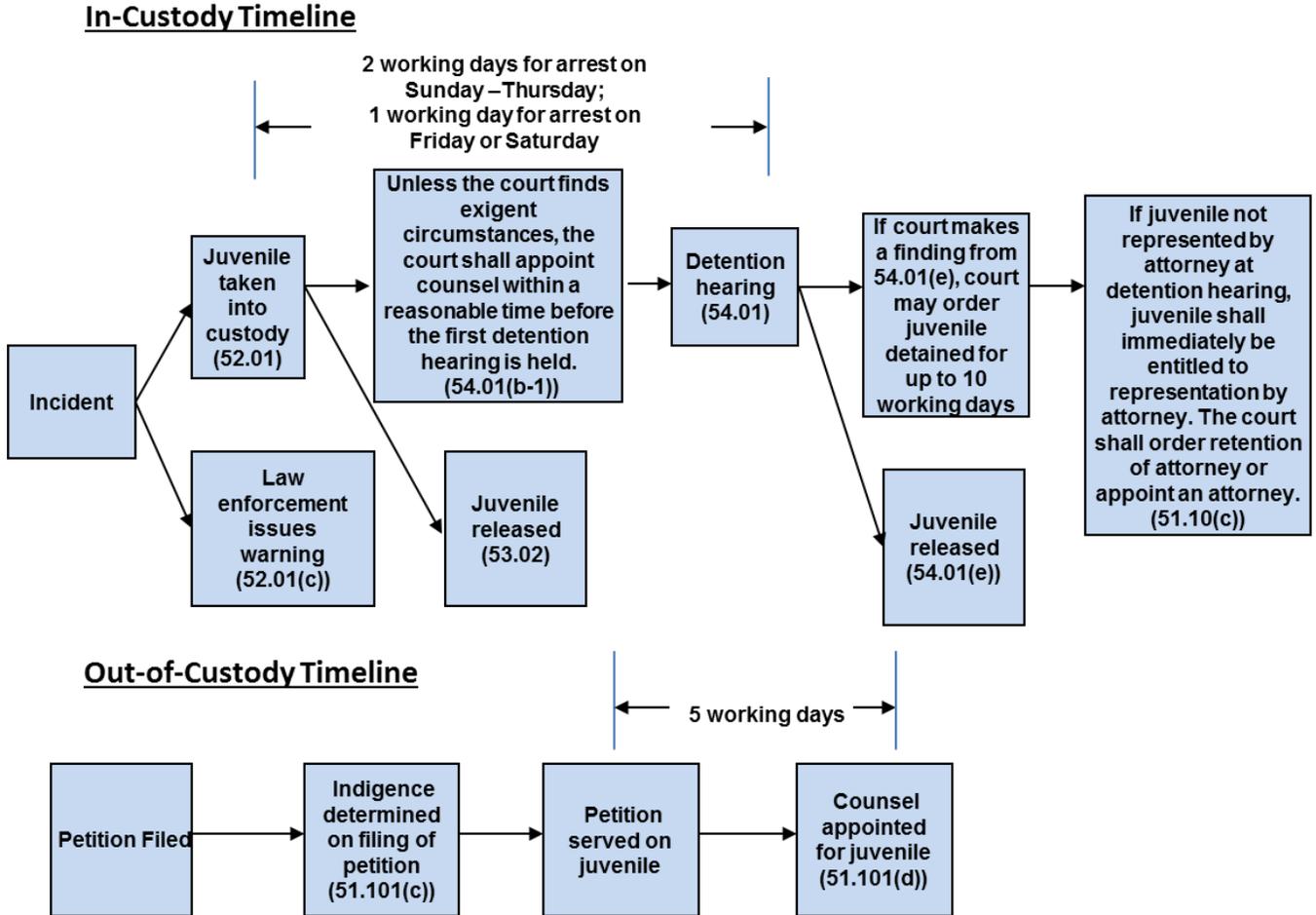
Counsel must be appointed for juveniles alleged to have engaged in delinquent conduct when the juvenile is brought to a detention hearing and when the juvenile is served with a copy of the petition alleging misconduct.<sup>25</sup> Under Section 54.01(b-1) of the Family Code, unless the court finds the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing. Under Subsections 51.101(c) and (d) of the Family Code, once a petition is served on the juvenile, the court has five working days to appoint counsel or order the retention of counsel for the juvenile.

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<sup>24</sup> The model waiver to speak with the prosecutor form is attached as Appendix B and is available at: <http://www.tidc.texas.gov/media/49941/model-waiver-to-speak-with-the-prosecutor.docx>.

<sup>25</sup> TEX. FAM. CODE § 51.10(f).

**Figure 2: Timeline for Appointment of Counsel in Juvenile Cases**



***Juvenile Detention Hearings***

To assess the timeliness of Rusk County’s appointment procedures in juvenile cases, TIDC staff examined 21 cases filed in FY2018 (October 2017 – September 2018). Section 54.01(b-1) of the Family Code requires counsel be appointed prior to the initial detention hearing, unless appointment is not feasible due to exigent circumstances.<sup>26</sup> Of the 21 sample cases, 19 involved detention hearings. Counsel was present for the initial detention hearing in all 19 cases (**100% timely**), which exceeds TIDC’s 90% threshold.

<sup>26</sup> TEX. FAM. CODE §54.01(b-1) states:

*Unless the court finds that 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 is held to represent the child at that hearing.*

***Appointment After Service of the Petition***

Under Subsections 51.101(c) and (d) of the Family Code, once a petition is served on the juvenile, the court has five working days to appoint counsel or order the retention of counsel for the juvenile. Of 21 sample cases, 18 involved service of the petition on the juvenile. Counsel was appointed timely for all 18 cases involving the service of a petition on a juvenile (**100% timely**), which exceeds TIDC’s 90% threshold. TIDC finds Rusk County to be in substantial compliance with Requirement 4 for felony, misdemeanor, and juvenile cases.

**Table 6: Times to Appointment in Juvenile Cases in Rusk County in FY 2018**

	Sample Size	Number from Sample	Percent
Total juvenile cases examined	21		
<b>TIMELINESS OF COUNSEL APPOINTMENTS FOR DETENTION HEARINGS</b>			
Case files with detention hearings		19	
<b>Cases with attorney present at initial hearing</b>		<b>19</b>	<b>100%</b>
<b>TIMELINESS OF COUNSEL APPOINTMENTS WHERE JUVENILE SERVED WITH A PETITION</b>			
Case files in which juvenile served with a petition	18		
Counsel appointed within 5 working days of service		18	
Counsel retained within 5 working days of service			
Indigence denied within 5 working days of service <sup>27</sup>			
<b>Total cases with timely presence of counsel</b>			<b>100%</b>
Cases where counsel not present in a timely fashion			0%

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4**

**Appoint Counsel Promptly.**

Requirement satisfied. No findings.

**REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS**

Article 26.04(b)(6) of the Code of Criminal Procedure requires that local procedures for appointing counsel ensure appointments are allocated among qualified attorneys in a fair, neutral, and nondiscriminatory manner. TIDC presumes a jurisdiction has a fair, neutral, and nondiscriminatory appointment system if (for assigned counsel and managed assigned counsel systems) the top 10% of attorneys receiving cases at a given level (felony, misdemeanor, and juvenile) receive no more than

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<sup>27</sup> TIDC considered a denial of indigence to be synonymous with an order to retain counsel.

three times their respective share of appointments. If a county can track appointments by appointment list, this analysis is made on each appointment list. A county can overcome the presumption by providing evidence as to why the system is fair, neutral, and nondiscriminatory.

Rusk County uses rotational systems of appointment for felony, misdemeanor, and juvenile appointments. Under the rotational system, the court appoints the attorney who is next on the appointment wheel, and once an appointment is received, the attorney moves to the bottom of the list.

TIDC analyzed the distribution of attorney appointments by case level during FY2018. TIDC attempts to consider only those attorneys who were on the appointment list for the entire year. Based on this analysis, all three court levels had distributions in which the top ten percent of attorneys received less than 3.0 times their respective share of cases paid, indicating that all three court comply with this requirement.

**Table 7: Share of Cases Paid to Top 10% of Attorneys in Rusk County in FY 2018**

Level	Attorneys on List <sup>28</sup>	Top 10% Attorneys <sup>29</sup>	Respective Share of Cases <sup>30</sup> [Column A]	Actual Share of Cases [Column B]	Top 10% Received 'x' Times Their Respective Share [Col. B] / [ Col. A]
Felony	8	1	12.5%	20.6%	<b>1.6</b>
Misd.	12	1	8.3%	24.3%	<b>2.9</b>
Juvenile	6	1	16.7%	43.8%	<b>2.6</b>

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 5**

**Attorney Selection Process**

Requirement satisfied. No findings.

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<sup>28</sup> TIDC considered an attorney had been on the list for the entire year if the attorney received payment for disposing a case in FY2018 and the attorney was also on the June 2019 appointment list.

<sup>29</sup> The number Top 10% Attorneys is equal to the number of Attorneys on List for Entire Year multiplied by 0.10, rounded to the nearest whole number.

<sup>30</sup> The percent Respective Share of Cases is equal to the number of Top 10% Attorneys divided by the number of Attorneys on List for Entire Year.

## **REQUIREMENT 6: REPORT DATA REQUIRED BY STATUTE**

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. This data must 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, financial data reports must include attorney-level information.<sup>31</sup>

TIDC conducted a fiscal audit of Rusk County's indigent defense expenses and shares its findings in a separate report.

### FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 6

#### **Statutory Data Reporting**

Requirement satisfied. No findings.

## **Conclusion**

TIDC thanks Rusk County officials and staff for their assistance in completing this review. TIDC will conduct a follow-up review regarding its noncompliance findings within two years.<sup>32</sup> Once defendants in Rusk County are able to request counsel at magistration, TIDC will review whether those requests are transmitted and ruled upon timely, among other requirements. TIDC staff stand ready to provide technical and financial assistance to remedy these issues and ensure full compliance with the Fair Defense Act.

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<sup>31</sup> TEX. GOV'T CODE § 79.036(a-1).

<sup>32</sup> Title 1 TEX. ADMIN. CODE § 174.28(c)(2).

## **Summary of Findings and Recommendations**

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

**FINDING 1:** Article 15.17(a) requires the magistrate to inform the accused of his or her right to counsel, ask whether the accused wants to request counsel, and receive the accused's request for counsel. The magistrate must make a record of each step of this exchange. The Rusk County magistrate was not providing arrestees with an opportunity to request to counsel. Rusk County magistrates must inform arrestees of their right to counsel, ask whether they want to request counsel, and receive requests.

**FINDING 2:** Article 15.17(e) requires a record to be made of the magistrate asking whether the person wants to request appointment of counsel and whether the person requested appointment of counsel. The Rusk County magistrate was not marking whether arrestees requested counsel. Rusk County magistrates must mark whether arrestees are requesting counsel.

## Appendix A - Monitoring Review 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>33</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>34</sup>
- The magistrate must inform and explain the right to counsel and the right to appointed counsel to the accused.<sup>35</sup>

**REQUIREMENT NOT SATISFIED:** The magistrate was not providing arrestees with an opportunity to request to counsel.
- The magistrate must ensure that reasonable assistance in completing forms necessary to request counsel is provided to the accused.<sup>36</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>37</sup>

**REQUIREMENT NOT SATISFIED:** The magistrate was not marking on magistration forms whether arrestees requested counsel.
- 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>38</sup>

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<sup>33</sup> TEX. CODE CRIM. PROC. art. 14.06(a).

<sup>34</sup> TEX. CODE CRIM. PROC. art. 17.033.

<sup>35</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>36</sup> *Id.*

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

<sup>38</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).

- 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>39</sup>

**NOT APPLICABLE:** The indigent defense plan authorizes the magistrate to appoint counsel.

**REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS  
DIRECTED BY THE INDIGENT DEFENSE PLAN.**

- Provide detailed procedures used to determine whether a defendant is indigent.<sup>40</sup>
- State the financial standard(s) to determine whether a defendant is indigent.<sup>41</sup>
- List factors the court will consider when determining whether a defendant is indigent.<sup>42</sup>

**REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS.**

- Establish objective qualification standards for attorneys to be on an appointment list.<sup>43</sup>
  - Standards must require attorneys to complete at least six hours of continuing legal education pertaining to criminal / juvenile law during each 12-month reporting period or be currently certified in criminal law by the Texas Board of Legal Specialization.<sup>44</sup>
  - Standards must require attorneys to submit by October 15 each year the percentage of the attorney's practice time dedicated to indigent defense based on criminal and juvenile appointments accepted in this county. The report must be made on a form prescribed by the Texas Indigent Defense Commission for the prior 12 months that begins on October 1 and ends on September 30.<sup>45</sup>

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

<sup>40</sup> TEX. CODE CRIM. PROC. art. 26.04(l)–(r).

<sup>41</sup> TEX. CODE CRIM. PROC. art. 26.04(l).

<sup>42</sup> TEX. CODE CRIM. PROC. art. 26.04(m).

<sup>43</sup> TEX. CODE CRIM. PROC. art. 26.04(d).

<sup>44</sup> 1 TEX. ADMIN. CODE § 174.1–.4.

<sup>45</sup> TEX. CODE CRIM. PROC. art. 26.04(j)(4).

**REQUIREMENT 4: APPOINT COUNSEL PROMPTLY (JUVENILES).**

- Unless the court finds that 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 is held to represent the child at that hearing.<sup>46</sup>
- If the child was not detained, an attorney must be appointed on or before the fifth working day after the date the petition for adjudication, motion to modify, or discretionary transfer hearing was served on the child.<sup>47</sup>

**REQUIREMENT 4: APPOINT COUNSEL PROMPTLY (ADULTS).**

- 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>48</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>49</sup>
- All unrepresented defendants must be advised of the right to counsel and the procedures for obtaining counsel.<sup>50</sup>

**REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS.**

- Rotational method: The court must appoint an attorney from among the next five names on the appointment list in the order in which the attorneys’ names appear on the list, unless the court makes a finding of good cause on the record for appointing an attorney out of order.<sup>51</sup>
- Public Defender: The system must meet the requirements set out in Article 26.044 of the Code of Criminal Procedure. The appointment process must be listed in the indigent defense plan.<sup>52</sup>  
**NOT APPLICABLE:** Rusk County uses a rotational system of appointment.
- Alternative appointment method:<sup>53</sup>
  - The local processes must be established by a vote of two-thirds of the judges.
  - The plan must be approved by the presiding judge of the administrative judicial region.

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<sup>46</sup> Tex. Fam. Code § 54.01(b-1). Tex. Fam. Code § 51.10(c).

<sup>47</sup> Tex. Fam. Code § 51.101(d).

<sup>48</sup> TEX. CODE CRIM. PROC. art. 1.051(c).

<sup>49</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>50</sup> TEX. CODE CRIM. PROC. art. 1.051(f-2).

<sup>51</sup> TEX. CODE CRIM. PROC. art. 26.04(a).

<sup>52</sup> TEX. CODE CRIM. PROC. art. 26.044.

<sup>53</sup> TEX. CODE CRIM. PROC. art. 26.04(g)–(h).

- The courts must allocate appointments reasonably and impartially among qualified attorneys.

**NOT APPLICABLE:** Rusk County uses a rotational system of appointment.

**REQUIREMENT 6: 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.<sup>54</sup>

**NOT APPLICABLE:** This requirement is addressed in the fiscal monitoring report.

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<sup>54</sup> TEX. GOV'T CODE § 79.036(a-1).

## Appendix B - Model Form: Waiver to Speak with the Prosecutor

Cause Number: \_\_\_\_\_

IN THE [INSERT COURT]  
[INSERT COUNTY] COUNTY, TEXAS

### JUDGE'S EXPLANATION OF RIGHTS TO DEFENDANTS WITHOUT ATTORNEY

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

1. You may hire an attorney;
2. If you do not have enough money to hire an attorney, you may request an attorney be appointed to represent you;
3. You may represent yourself.

If you want an attorney to represent you and have enough money to hire an attorney, the case will be reset 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 the prosecutor about your case unless you sign a written waiver of your right to be represented by an attorney.

Be aware that there are dangers to self-representation. Waiving your right to an attorney and representing yourself may result in a worse outcome for you and your case, including the loss of significant legal rights and opportunities relating to military service, possession of a firearm, housing and public benefits, child custody, immigration status for non-citizens, and employment.

If you choose to proceed without an attorney, you may change your mind at any time and may request counsel from the Court.

\_\_\_\_\_  
Judge Presiding

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#### DEFENDANT'S CHOICE [mark initials next to only ONE choice]

\_\_\_\_\_ I want to reset this case to hire my own attorney.

\_\_\_\_\_ I have hired an attorney, whose name is: \_\_\_\_\_

\_\_\_\_\_ I want to apply for court-appointed counsel.

\_\_\_\_\_ I have a court-appointed attorney, whose name is: \_\_\_\_\_

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

Defendant: \_\_\_\_\_ Date: \_\_\_\_\_