



Policy Monitoring Review of Travis County's Indigent Defense Systems

March 2019



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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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Purpose of the Policy Monitoring Review

The Texas Indigent Defense Commission (TIDC) conducts on-site reviews to promote local compliance with the Fair Defense Act (FDA) and to provide technical assistance for improving county indigent defense processes.¹ 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.

Overview

The FDA provides a statutory framework for the appointment of counsel and sets forth timeframes for receiving, transmitting, and ruling upon requests for counsel. Jurisdictions retain latitude to develop the standards by which they determine indigence and appoint counsel. In odd-numbered years, counties are responsible for submitting to TIDC their local formal and informal rules related to the appointment of counsel.² This review assesses whether Travis County's local practices and procedures meet the FDA's requirements and TIDC's rules. TIDC compares the FDA's core requirements³ to the county's practices in the following areas:

- 1: Conduct prompt and accurate Article 15.17 proceedings
- 2: Determine indigence according to standards directed by the indigent defense plan
- 3: Establish minimum attorney qualifications
- 4: Appoint counsel promptly
- 5: Institute a fair, neutral, and nondiscriminatory attorney selection process
- 6: Report data required by statute

TIDC staff, Wesley Shackelford, Claire Buetow, Scott Ehlers, Joel Lieurance, and Morgan Shell, made an on-site review of Travis County in August 2018. The primary source of information for this report came from sample felony, misdemeanor and juvenile cases filed during FY2017 (October 2016 – September 2017). Staff observed felony, misdemeanor, and juvenile dockets, as well as magistrate warnings. Staff interviewed the Pretrial Services department, the Court Administration department, the Juvenile Public Defender Office, the Mental Health Public Defender Office, and Capital Area Private Defender Service (CAPDS) staff. Other useful information included the Indigent Defense Expense Report (IDER), appointment data queried by Travis County staff, Travis County indigent defense plans, monthly reports submitted to the Office of Court Administration (OCA), and data maintained by CAPDS, including attorney appointment lists and proof of eligibility for those lists.

¹ TEX. GOV'T CODE § 79.037(a)–(b); Title 1 TEX. ADMIN. CODE § 174.28.

² TEX. GOV'T CODE § 79.036(a)(1).

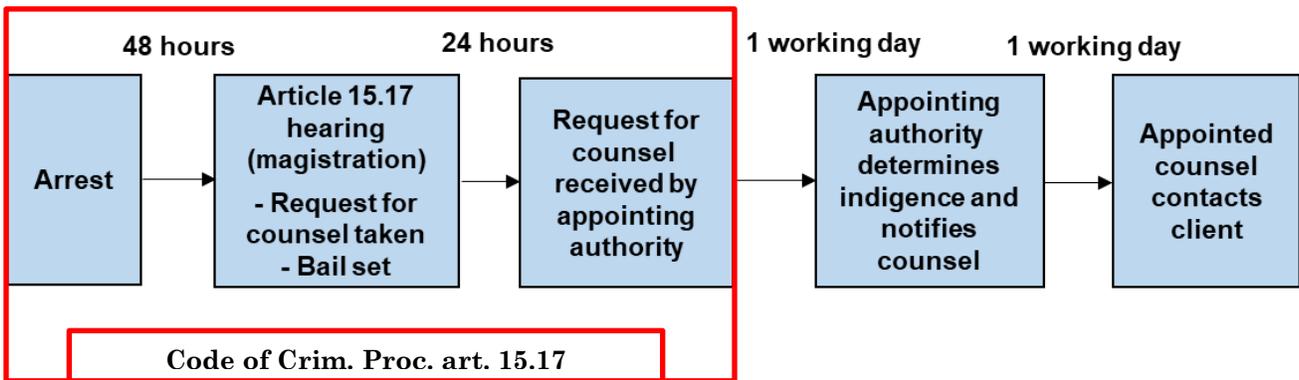
³ Title 1 TEX. ADMIN. CODE § 174.28(c).

Program Assessment

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS

Once arrested, an arrestee must be brought before a magistrate within 48 hours.⁴ At this hearing, the magistrate must inform the arrestee of his or her right to counsel; inform the arrestee of the procedures for requesting counsel; and ensure the arrestee has reasonable assistance in completing the necessary forms for requesting assistance of counsel.⁵ Within 24 hours of receiving a request for counsel, the magistrate must transmit this request to the appointing authority.⁶

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



Travis County's Article 15.17 Procedures

Travis County arrestees may follow multiple paths through the criminal justice system. Most arrestees in felony and serious misdemeanor offenses are booked at the Travis County Central Booking facility. Arrestees meet with Pretrial Services and appear before a magistrate for an Article 15.17 hearing. At this hearing, the magistrate makes a probable cause determination, sets bail, and asks each arrestee whether he or she wants to request appointed counsel.

Certain misdemeanor arrestees may be eligible for cite and release. Police officers do not bring cite and release arrestees into custody, but rather order them to:

- 1) Report to Pretrial Services;
- 2) Return to Justice of the Peace Precinct 5 with a completed personal bond form;
- 3) Attend Magistration Court for statutory warnings and bond approval; and
- 4) Report to the Bond Desk of the Travis County Booking facility.⁷

In Travis County, all arrestees are supposed to report to Pretrial Services, where staff ask them if they want to request counsel. However, when cite and release arrestees report

⁴ TEX. CODE CRIM. PROC. art. 15.17(a).

⁵ *Id.*

⁶ *Id.*

⁷ Failure to follow these steps results in the issuance of an arrest warrant.

to the magistrate for Article 15.17 hearings, the magistrate makes a probable cause determination and sets bail, but the magistrate warning form (used in cite and release cases) contains no space to mark whether the arrestee requests the appointment of counsel. Article 15.17(g) requires the magistrate to “perform the duties imposed by [Article 15.17] in the same manner as if the person had been arrested and brought before the magistrate by a peace officer.” Article 15.17(e) requires the magistrate to make a record of asking whether the arrestee wants to request appointment of counsel and the person’s response.

1.a. Timeliness of Warnings

Arrestees must be brought before a magistrate within 48 hours of arrest.⁸ 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 48 hours.⁹ To determine the timeliness of Article 15.17 warnings in Travis County, TIDC sampled 238 cases and calculated the number of days between arrest and the Article 15.17 hearing for each case.¹⁰ All 238 sample cases had Article 15.17 hearings occurring within two days of arrest, indicating Travis County is in substantial compliance with this requirement.

Table 1: Timeliness of Article 15.17 Hearings

	Sample Size	Percent
Article 15.17 hearing occurs x days after arrest:	—	—
0 days	149	63%
1 day	89	37%
2 days	0	0%
More than 2 days	0	0%
Timely Hearings	238	100%

1.b. Ability of Arrestees to Request Counsel

At the Article 15.17 hearing, the magistrate must inform the arrestee of his or her right to counsel, ask whether the arrestee wants to request counsel, and receive the arrestee’s request for counsel.¹¹ The magistrate must make a record of each step in this exchange.¹² 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 arrestees are informed of their right to counsel, and if they invoke that right.

⁸ TEX. CODE CRIM. PROC. art. 15.17(a).

⁹ Title 1 TEX. ADMIN. CODE § 174.28(c)(1).

¹⁰ 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.

¹¹ TEX. CODE CRIM. PROC. art. 15.17(a).

¹² TEX. CODE CRIM. PROC. art. 15.17(e).

TIDC observed Article 15.17 hearings on August 29, at which several arrestees requested counsel. TIDC also examined 193 sample case files having requests made at the Article 15.17 hearing. TIDC found that non-cite-and-release arrestees are informed of the right to appointed counsel and can request counsel at the Article 15.17 hearing.

The magistrate warning form for cite and release arrestees does not contain a space to record whether the arrestee requests appointed counsel (as required by Article 15.17(e)). Cite-and-release arrestees are directed to report to Pretrial Services, who receive counsel requests, but there is no process for the magistrate to receive a counsel request. Article 15.17(e) requires a record be made of the magistrate asking whether the person wants to request appointment of counsel and whether the person requested appointment of counsel.

While TIDC found many instances of arrestees requesting counsel at the Article 15.17 hearing, Judicial Council Monthly Court Activity Reports did not include any counsel requests occurring at the Article 15.17 hearing. This data is required to be reported by justice courts and municipal courts per Title 1 Tex. Admin. Code § 171.7 – 8. See Table 2 below.

Table 2: Texas Judicial Council Monthly Court Activity Reports (Oct. 2016 – Sept. 2017)

Article 15.17 Warnings and Requests for Counsel Reported by Magistrates	JP5	City of Austin
Misdemeanor Warnings (A & B)	3,152	32,910
Misdemeanor Counsel Requests	0	0
% Misdemeanor Requests	0%	0%
Felony Warnings	1,582	21,063
Felony Counsel Requests	0	0
% Felony Requests	0%	0%

Travis County must create procedures to ensure that all persons appearing before a magistrate forailable offenses are able to request counsel. When arrestees request counsel, justices of the peace and municipal court judges must report those requests as part of their Judicial Council Monthly Court Activity Reports.

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.¹³ In Travis County, Pretrial Services interviews persons requesting counsel. The screening often occurs before the Article 15.17 hearing, but sometimes after the hearing. The interview typically lasts a few minutes and tracks whether each individual meets the local indigence standard. At the end of the interview, Pretrial Services marks whether the requesting

¹³ TEX. CODE CRIM. PROC. art. 15.17(a).

person qualifies as indigent. This interview process is an exemplary method for gathering financial information from defendants.

1.d. Transmitting Forms to the Appointing Authority

Within 24 hours of a request for counsel, the magistrate must transmit, or cause to be transmitted, the request to the appointing authority.¹⁴ When Pretrial Services determines that an individual meets the local indigence standard, the information is entered into the local case management system, and is instantly available for the appointing authority to use.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1

Conduct prompt and accurate magistration proceedings.

FINDING 1: 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 magistrate warning form used for cite and release arrestees does not contain a space to mark a request for counsel. Travis County must adjust its procedures to include requests for counsel at the Article 15.17 hearing for cite and release arrestees.

FINDING 2: Per Title 1 Tex. Admin. Code § 171.7 – 8, justices of the peace and municipal court judges are required to report requests for counsel as part of their Judicial Council Monthly Court Activity Reports. Neither Travis County justices of the peace nor City of Austin municipal judges enter the number of persons requesting counsel at the Article 15.17 hearing. These courts must create procedures to report this data.

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:

In determining whether a defendant is indigent, the court or the courts' designee may consider the defendant's income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, and spousal income that is available to the defendant. The court or the courts' designee may not consider whether the defendant has posted or is capable of posting bail, except to the extent that it reflects the defendant's financial circumstances as measured by the considerations listed in this subsection.

The local standards for determining indigence are set in each county's indigent defense plans.¹⁵ For adult criminal cases in Travis County, a person is presumed indigent if:

¹⁴ *Id.*

¹⁵ Travis County has two indigent defense plans:

- 1) The defendant's current household income does not exceed 125% of the current Federal Poverty Guidelines;
- 2) The defendant is currently receiving food stamps, Medicaid, temporary assistance for needy families, social security assistance or public housing; or
- 3) The defendant is currently serving a sentence in a correctional facility, mental health institution or other sentence.

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

- 1) The household income does not exceed 150% of the Poverty Guidelines as established and revised annually by the U.S. Department of Health and Human Services in the Federal Register;
- 2) The difference between the family's monthly net income and reasonable necessary expenditures is less than \$500.00;
- 3) At the time of requesting appointment of counsel, the family has been determined to be eligible to receive Food Stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, or public housing; or
- 4) The child is in the temporary or permanent managing conservatorship of the Texas Department of Family and Protective Services.

A family that does not meet any of these standards may nevertheless be determined eligible for court appointed counsel if the family is otherwise unable to retain private counsel without substantial financial hardship or for other good cause determined by the judge.

TIDC reviewed whether indigence determination procedures in Travis County comply with their indigent defense plans and the FDA.¹⁶ TIDC found the 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 the Article 26.04(d) of the Code of Criminal Procedure, private attorneys wishing to take court appointments must apply to be on an appointment list. The list must contain objective qualifications, including a minimum annual continuing legal education (CLE) requirement of at least six hours per year in criminal or juvenile law.¹⁷

- An adult plan (<http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=31>) and
- A juvenile board plan (<http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=173>)

¹⁶ Title 1 TEX. ADMIN. CODE § 174.28(c)(2). *See also* section 1.c, above.

¹⁷ Title 1 TEX. ADMIN. CODE §§ 174.1 – 4. Attorneys may be Board Certified in criminal or juvenile law in lieu of the annual CLE requirement.

Assigned counsel attorneys must be approved by a majority of judges presiding over criminal and juvenile matters. Managed assigned counsel attorneys must be approved by the managed assigned counsel program.¹⁸ TIDC reviewed whether Travis County's appointment lists are maintained according to the requirements of their indigent defense plans.¹⁹

Criminal Cases

The Travis County adult indigent defense plan creates eight separate appointment list panels for criminal cases:

- Misdemeanor Appointment Panel
- Misdemeanor Mental Health Appointment Panel
- Felony A Appointment Panel
- Felony B Appointment Panel
- Felony C Appointment Panel
- Felony Mental Health Appointment Panel
- Felony Appellate A Panel
- Felony Appellate B Panel (also utilized to appoint misdemeanor appeals)

The qualifications for each are set and maintained by CAPDS.²⁰ Every year, attorneys must apply to remain on a panel and may request to be added to panels.²¹ CAPDS may also remove an attorney from the appointment list if the CAPDS Review Committee finds credible evidence indicating the attorney is not meeting the program's standards. Attorneys new to criminal defense will not likely meet the qualifications for any of the panels. CAPDS provides professional development opportunities for new attorneys, most notably through trainings and an individual mentoring program, in which inexperienced attorneys follow a six-month initiation curriculum and are paired with seasoned criminal defense attorneys.²²

Attorneys on any appointment panel must obtain at least 10 CLE hours per year in criminal law. Attorneys on a mental health panel must obtain an additional 3 CLE hours in mental health criminal issues. TIDC found CAPDS has procedures for managing the criminal attorney appointment lists and for ensuring all attorneys on the lists meet their annual CLE requirement as described in the indigent defense plan.

Juvenile Cases

The Travis County juvenile indigent defense plan creates three separate appointment list levels for assigned counsel attorneys and sets qualifications for each:

¹⁸ TEX. CODE CRIM. PROC. art. 26.047(f).

¹⁹ Title 1 TEX. ADMIN. CODE § 174.28(c)(3).

²⁰ The qualifications for each panel are described in Appendix B.

²¹ Between 2016 and 2018, about 98% of retention applicants were annually retained, and about 60% of new applicants were placed on a panel.

²² Between 2015 and 2017, CAPDS annually offered between 50 and 70 CLE hours of training.

- Level 1: CINS cases or Delinquent Conduct for which commitment to TJJD or to the Travis County Post-Adjudication Secure Facility is not an authorized disposition: Licensed to practice law in Texas and the annual minimum of six hours of CLE credit in juvenile law.
- Level 2: Delinquent Conduct for which commitment to TJJD or to the Travis County Post-Adjudication Secure Correctional Facility without a Determinate Sentence is an authorized disposition: Licensed to practice law in Texas, two years juvenile or criminal law experience, the annual minimum of six hours of CLE credit in juvenile law, plus four hours of additional CLE credit in juvenile or criminal law.
- Level 3: Determinate Sentence or Discretionary Transfer to Criminal Court proceedings have been initiated: Licensed to practice law in Texas, four years juvenile or criminal law experience, the annual minimum of six hours of CLE credit in juvenile law, plus nine hours of additional CLE credit in juvenile or criminal law.

The levels require between 6 and 15 CLE hours in juvenile law per year. TIDC found the juvenile court has procedures for managing the juvenile attorney appointment list and for ensuring all attorneys on the list meet their annual CLE requirement as described in the indigent defense plan.

TIDC therefore found the County in substantial compliance with Requirement 3 for both its adult and juvenile indigent defense plans.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 3

Minimum Attorney Qualifications.

Requirement satisfied. No findings.

ADDITIONAL NOTES CONCERNING MINIMUM ATTORNEY QUALIFICATIONS

Article 26.04(b)(5) of the Code of Criminal Procedure requires that local procedures established by the courts for appointing counsel

(5) ensure that each attorney appointed from a public appointment list to represent an indigent defendant perform the attorney's duty owed to the defendant in accordance with the adopted procedures, the requirements of this code, and applicable rules of ethics

In the majority of Travis County's indigent criminal cases, CAPDS acts as the supervising agent to ensure each attorney performs the required duties to clients.

Use of Support Services

To provide effective representation, criminal defense attorneys may require the use of support services, such as an investigator or mental health specialist. These services are often necessary to provide a zealous defense and to properly inform the client of available options. CAPDS has made provisions for certain services so that attorneys may efficiently meet their ethical obligations. The support services include:

- Licensed investigators contracted through CAPDS;
- Consultation resource for criminal cases having collateral immigration issues;
- In-house social workers; and
- Text alerts (to alert attorneys of significant events, such as a client being released from jail, the issuance of a warrant, or a case being enhanced).

Attorneys use of support services has increased significantly since CAPDS began operations in 2015. Prior to 2015, there was no full-time immigration consultant for criminal defense. Attorneys needing investigators had to petition the courts for their use. CAPDS leadership has strongly encouraged the use of support services and has taken on the oversight for such services.

Table 3: Attorney Utilization of Support Services Under CAPDS (by Approved Consultations per Year)²³

Year	Immigration Consultant	Licensed Investigator	Social Worker
2015	193	234	n/a
2016	314	578	n/a
2017	335	860	171

Client Communication

Attorney communication is a basic duty owed to the client.²⁴ While observing misdemeanor dockets, TIDC noted that several defendants asserted they were unable to contact their attorneys. In some cases, these defendants had come to court, not having been told by their attorney that their case had been reset. Travis County should establish procedures to ensure that appointed attorneys are effectively communicating with their clients.

Manageable Caseloads

Criminal defense attorneys need to spend enough time on each case to fulfill their basic duties to defendants. TIDC, in partnership with the Public Policy Research Institute at Texas A&M University, conducted a study to determine the maximum number of cases an attorney could carry in a year while providing ethical representation.²⁵ The study found that, in Texas, an attorney should carry no more than 226 misdemeanors or 128 felonies.

²³ Data showing utilization of these services provided by the Capital Area Private Defender Service Annual Reports for 2015, 2016, and 2017 (available at <http://www.capds.org/annual-report.html>).

²⁴ As previously noted, TEX. CODE CRIM. PROC. art. 26.04(b)(5) requires local procedures ensure each attorney appointed from a list perform the attorney’s duty owed to the defendant in accordance with applicable rules of ethics. TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 1.03(a) requires:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

²⁵ *Guidelines for Indigent Defense Caseloads* (2015), available at http://www.tidc.texas.gov/media/31818/150122_weightedcl_final.pdf.

Travis County's indigent defense plan precludes attorneys from carrying more than 90 open felony cases or 100 open misdemeanors. Some attorney caseloads, however, exceed TIDC's recommended annual limits (see Table 4 on the next page). Mental health case appointments appear to be a major driver of high caseloads.²⁶ Travis County, through CAPDS, would likely benefit from establishing annual caseload limits for attorneys.

²⁶ See also Requirement 5, below. Although distribution of appointments for each list are within TIDC's thresholds, appointments for felony mental health cases were the least evenly distributed, and most closely approached TIDC's threshold.

Table 4: Top Attorney Caseloads (FY2017)²⁷

Att’y Rank	Fel.	Fel. MH	Total Fel.	Misd.	Misd. MH	Total Misd.	Abs.	Total	Span.	% TIDC Guidelines
1	53	186	239	82	156	238		477		292%
2	47	125	172	73	107	180	26	378		226%
3	55	99	154	68	95	163		* 319		192%
4	45	136	181	50	86	136		317		202%
5	46	103	149	64	65	129		278		173%
6	42	109	151	4	122	126		277	1	174%
7	40	106	146	48	82	130		276		172%
8	151	5	156	117		117		273	33	174%
9	49	1	50	77	108	185	32	267	45	135%
10	0	0	0	0	264	264		264		n/a
11	23	60	83	70	97	167		250		139%
12	88	2	90	155	1	156		246	1	139%
13	66	128	194	15	27	42		* 237	29	170%
14	51	180	231	1	1	2		233		181%
15	69	37	106	42	57	99	20	225		135%
16	29	97	126	33	58	91		217		139%
17	59	1	60	140	2	142		* 203	28	110%
18	106	1	107	66		66	26	199		124%
19	61	0	61	104	2	106	27	194		107%
20	39	60	99	25	62	87		186		116%

All private attorneys on this list (every line, except line 10) exceeded TIDC guidelines for a maximum annual workload of 128 felonies or 226 misdemeanors. This table does not include retained cases or civil practice.

Fel. = Felony | Misd. = Misdemeanor | MH = Mental Health | Abs. = In Absentia | Span. = Spanish

* Total includes 1-2 additional appeals or capital cases.

Line 10 represents all cases assigned to the Mental Health Public Defender Office, which was staffed by a chief defender, 2 full-time attorneys, 2 social workers, and 3 caseworkers. All other lines represent single CAPDS attorneys with lesser access to support services and, generally, additional private retained caseloads or appointed caseloads in other counties.

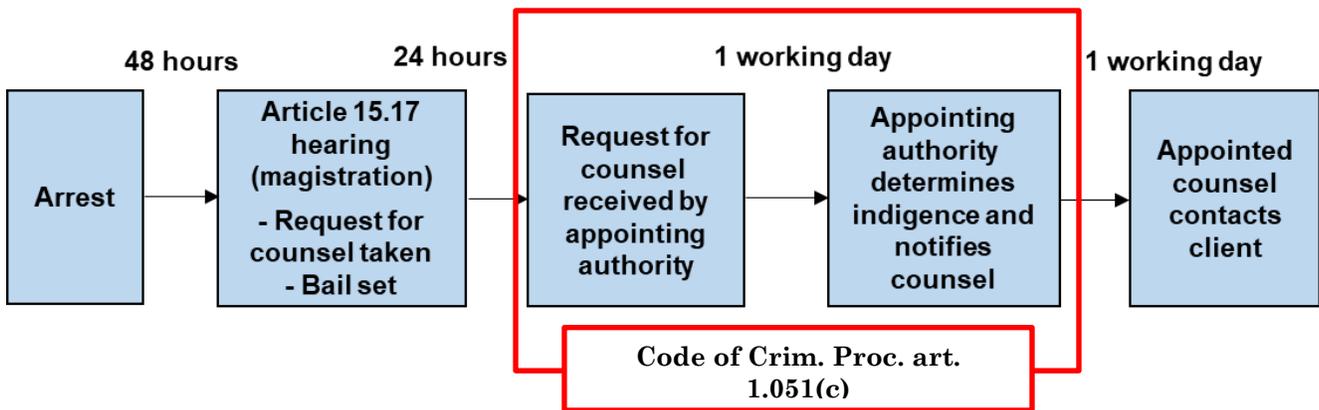
²⁷ Table 4 shows attorney appointment data by case type as provided by Travis County Courts. This report counts multiple cases filed against a single defendant as one case. The workload measure (% TIDC Guidelines) was calculated by considering all ‘in absentia’ appointments as misdemeanor cases and by considering all mental health cases as requiring only the same amount of time as a non-mental health case for the level of offense charged. Data reported by the auditor’s office to TIDC lists higher caseloads as each case filed against a defendant is counted separately. For data reported to TIDC, see <http://tidc.tamu.edu/public.net/Reports/AttorneyCaseLoad.aspx>.

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY

Adult Criminal Cases

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.²⁸ 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.²⁹ 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.³⁰

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



TIDC staff interviewed Pretrial Services and Court Administration staff to understand how Travis County defendants are screened for indigence and appointed counsel. Pretrial Services screens defendants who request counsel and determines indigence. If Pretrial Services determines that a person is indigent, it records this finding in Travis County's case management system, and typically, Court Administration appoints counsel.³¹ Court Administration makes prompt appointments for incarcerated defendants. However, if a defendant makes bail or has not ever been in custody, and no case has been filed with the Travis County Clerk, Court Administration delays the appointment of counsel until a case is set for docket. Defendants will usually have their first appearance in court about two weeks after arrest, and will have their case set for docket another two weeks (for misdemeanors) to 30 days (for felonies) later. This practice can therefore delay appointment beyond the one working day timeframe set by Article 1.051 and clarified by *Rothgery v. Gillespie County*.

²⁸ The time frame is three working days for counties with a population under 250,000.

²⁹ *Rothgery v. Gillespie County*, 554 U.S. 191, 212 – 13 (2008).

³⁰ 1 Tex. Admin Code § 174.51.

³¹ Occasionally a judge or CAPDS will make an appointment.

The indigent defense plan must provide a method to allow defendants to request counsel and have those requests ruled upon at any time after the initiation of adversarial judicial proceedings (typically the Article 15.17 hearing).³² According to TIDC interviews, at least one district court only directs defendants seeking appointed counsel to meet with Pretrial Services if their cases have been indicted. TIDC received a report that one district court coordinator was telling unindicted defendants that they were not entitled to appointed counsel until they were indicted. All persons for whom adversarial judicial proceedings have been initiated have a right to request counsel and to have their requests ruled upon. Court coordinators should provide accurate information to defendants regarding their right to counsel and direct persons wishing to request counsel to Pretrial Services for an indigency screening.

Timeliness of Appointments in Felony Cases

To assess the timeliness of Travis County's appointment procedures in felony cases, TIDC staff examined the time from request for counsel to appointment or denial of indigence in 151 sample felony cases filed in FY2017 (October 2016 – September 2017). Under TIDC's monitoring rules, a county is presumed to be in compliance with the prompt appointment of counsel requirement if at least 90% of sample indigence determinations are timely.³³ Counsel was appointed in a timely manner in 80 of 117 sample cases containing a request for counsel (**68% timely**), which does not meet the 90% timeliness threshold.³⁴ TIDC therefore presumes that Travis County is not in substantial compliance with this requirement. The felony courts must put in place procedures to ensure timely appointment of counsel, especially for defendants who are not in custody.

³² *Id.* The current indigent defense plan does not fully address the ability of persons to request counsel after the initiation of adversarial judicial proceedings. Court Administration staff noted that the plan would soon be amended to cover this provision.

³³ Title 1 TEX. ADMIN. CODE § 174.28(c)(4).

³⁴ These cases only include *known* requests for counsel. As noted above, it appears that some defendants may wish to request counsel but are told they are not entitled to counsel pre-indictment. In these cases, defendants are discouraged from availing themselves of their right to counsel, even though adversarial judicial proceedings have been initiated.

Table 5: Times from Request to Appointment in Felony Cases

	Sample Size	Number from sample	Percent
Number of case files examined	151		
Total cases with a counsel request ³⁵		117	
Appointment / denial of indigence occurred in:			
0 work days		31	
1 work day + 24 hour transfer		49	
Total timely appointments / denials		80	68%
2 - 4 work days + 24 hour transfer		20	
More than 4 work days + 24 hour transfer		11	
No ruling on request ³⁶		6	
Total untimely appointments / denials		37	32%

Timeliness of Appointments in Misdemeanor Cases

To assess the timeliness of Travis County's current appointment procedures in misdemeanor cases, TIDC staff examined 209 sample misdemeanor cases filed in FY2017 (October 2016 – September 2017). Counsel was appointed in a timely manner in 68 of 124 cases having a request for counsel (**55% timely**), which does not meet the TIDC's 90% threshold. In 17 sample cases, defendants were appointed counsel, but the appointment occurred at least two weeks after the request was made. The misdemeanor courts must put in place procedures to ensure timely appointment of counsel, especially for defendants who are not in custody.

Table 6: Times to Appointment in Misdemeanor Cases

	Sample Size	Number from sample	Percent
Number of case files examined	209		
Total cases with a counsel request ³⁷		124	
Appointment / denial of indigence occurred in:			
0 work days		44	
1 work day + 24 hour transfer		24	
Total timely appointments / denials		68	55%
2 to 4 work days + 24 hour transfer		13	
More than 4 work days + 24 hour transfer		25	
No ruling on request		18	
Total untimely appointments / denials		56	45%

³⁵ Five additional cases contained requests for counsel, but these cases were excluded from the analysis.

³⁶ These six cases contained a determination that the defendant was indigent, but no appointment of counsel. Defendants in these cases all obtained retained counsel at some point before case disposition.

³⁷ Nine additional cases contained requests for counsel, but these cases were excluded from the analysis.

Waivers of Counsel in Misdemeanor Cases

In five cases that TIDC reviewed, defendants qualified for counsel but never received an appointment and ultimately waived counsel. For these five sample defendants, the waivers occurred approximately two months after the initial counsel request.³⁸

TIDC was copied on a complaint sent to Travis County Judge Eckhardt (see Appendix C), alleging that misdemeanor defendants charged with possession of marijuana or driving while license invalid who requested counsel (but who did not receive an appointment) are routinely told by court staff they do not need an attorney. TIDC observed misdemeanor court dockets confirming this process. In one docket, TIDC observed the judge calling up defendants charged with driving while license invalid and directing those who had obtained a valid license to sign a waiver of counsel and speak to the prosecutor to get their cases dismissed.

In pertinent part, Article 1.051(f-2) states the following:

If the defendant has requested appointed counsel, the court may not direct or encourage the defendant to communicate with the attorney representing the state unless the court or the court's designee authorized under Article 26.04 to appoint counsel for indigent defendants in the county has denied the request and, subsequent to the denial, the defendant:

- (1) Has been given a reasonable opportunity to retain and has failed to retain private counsel; or*
- (2) Waives or has waived the opportunity to retain private counsel.*

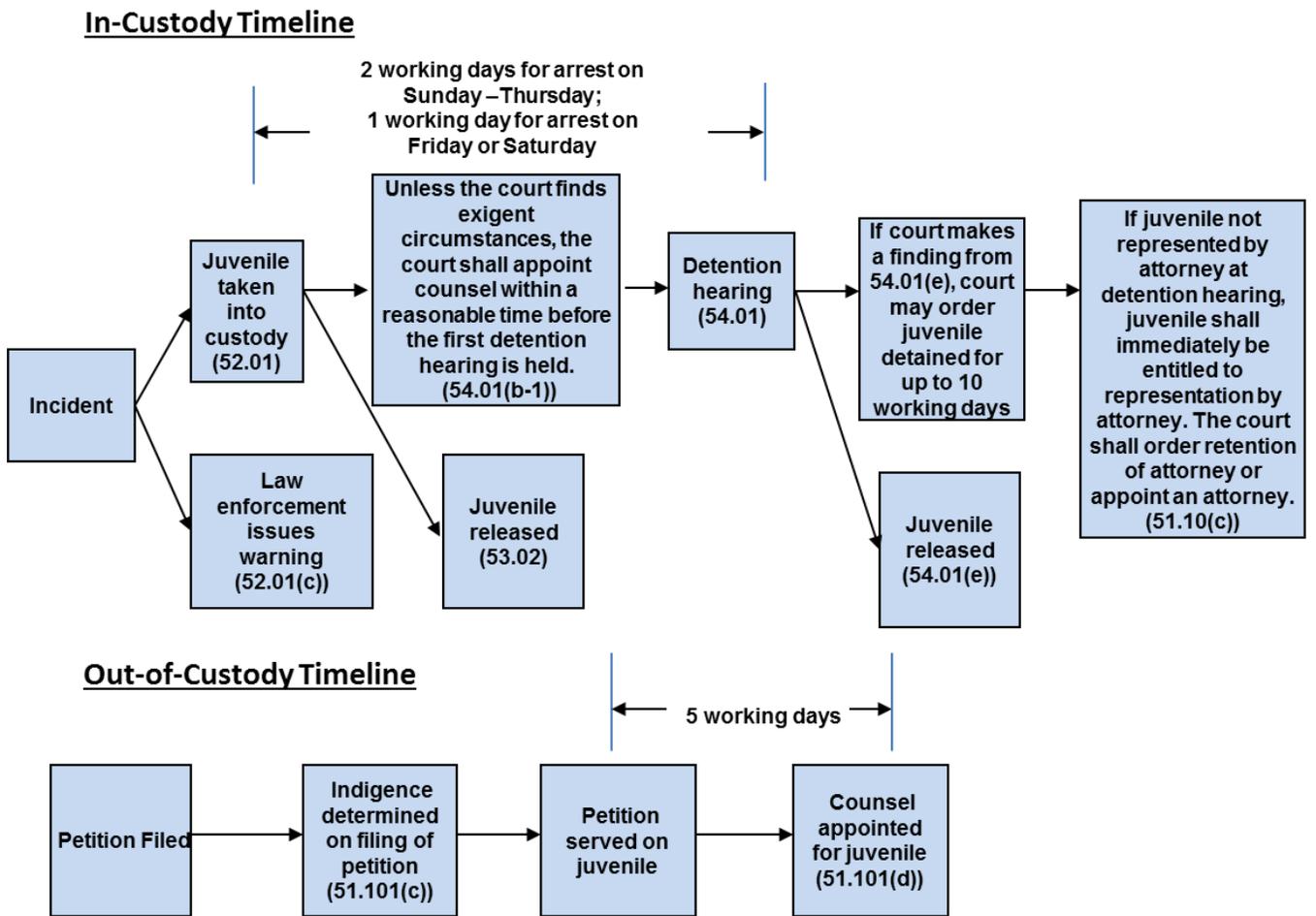
TIDC interviews, case file reviews, and court observation indicate that courts hearing misdemeanor cases may be directing or encouraging defendants to communicate with attorneys representing the state before denying requests for counsel. Travis County should clarify whether it has processes in place to ensure compliance with Article 1.051(f-2).

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. 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.

³⁸ Three of the charged offenses were for driving while license invalid, and two were for possession of marijuana. As to outcomes: two defendants received a dismissal after obtaining an occupational driver's license; one received a dismissal after showing proof for completing a class; one entered pretrial diversion; and one pled to two days confinement.

Figure 2: Timeline for Appointment of Counsel in Juvenile Cases



To assess the timeliness of Travis County’s appointment procedures in juvenile cases, TIDC staff examined 88 cases filed in FY2017 (October 2016 – September 2017). Because separate time frames exist for the appointment of counsel at detention hearings and when the child is served with a petition, TIDC makes two separate analyses.

Juvenile Detention Hearings

Section 54.01(b-1) of the Family Code requires counsel be appointed prior to the detention hearing, unless appointment is not feasible due to exigent circumstances.³⁹ Of the 88 sample cases, 62 involved detention hearings. Counsel was present for the initial detention hearing in all 62 cases. This level of timeliness (**100% timely**) meets TIDC’s 90% threshold.

³⁹ 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. In cases involving the service of a petition on a juvenile, counsel was present in a timely fashion for 92% of the sample. This level of timeliness (**92% timely**) meets TIDC’s 90% threshold.

Table 7: Times to Appointment in Juvenile Cases

	Sample Size	Number from Sample	Percent
Total juvenile cases examined	88		
TIMELINESS OF COUNSEL APPOINTMENTS FOR DETENTION HEARINGS			
Case files with detention hearings	62		
Cases with attorney present at initial hearing		62	100%
TIMELINESS OF COUNSEL APPOINTMENTS WHERE JUVENILE SERVED WITH A PETITION			
Case files in which juvenile served with a petition	84		
Counsel appointed within 5 working days of service		76	
Counsel retained within 5 working days of service		0	
Indigence denied within 5 working days of service ⁴⁰		1	
Total cases with timely presence of counsel		77	92%
Cases where counsel not present in a timely fashion		7	8%

⁴⁰ TIDC considered a denial of indigence to be synonymous with an order to retain counsel.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4

Prompt Appointment

FINDING 3 (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 allowed for transferring requests to the courts) of the request being made. The sample of attorney appointments in felony cases fell below TIDC'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 4 (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 allowed for transferring requests to the courts) of the request being made. The sample of attorney appointments in misdemeanor cases fell below TIDC'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 5 (misdemeanor cases): TIDC interviews, case file reviews, and court observation indicate that courts hearing misdemeanor cases may be directing or encouraging defendants to communicate with attorneys representing the state before denying requests for counsel. Travis County should clarify whether it has processes in place to ensure compliance with Article 1.051(f-2).

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.⁴¹ 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 three times their respective share of appointments.⁴² 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.

⁴¹ For managed assigned counsel programs, TEX. CODE CRIM. PROC. art. 26.047(c)(7) requires a policy from the entity's plan of operation to ensure that appointments are reasonably and impartially allocated among qualified attorneys.

⁴² "The top 10% of recipient attorneys is the whole attorney portion of the appointment list that is closest to 10% of the total list." 1 Tex. Admin Code § 174.28(c)(5). The target "respective share" of cases for the Top 10% of attorneys therefore may be more or less than 10%, and three times that share may be more or less than 30%.

Under the managed assigned counsel program, CAPDS creates panels of attorneys who are eligible to be appointed to each criminal case type.⁴³ When Court Administration receives a determination that a defendant is indigent from Pretrial Services, Court Administration selects an attorney for the case by picking the top attorney who is eligible to receive the appointment from the appropriate criminal case type panel created by CAPDS. In this manner, when Court Administration makes an appointment, it is done in a rotational fashion.

If a defendant comes to court without counsel, counsel is often assigned through the attorney-of-the-day program. In these instances, attorneys sign up to take in-court appointments which are made by CAPDS. The sign-up is made on a first-come, first-serve basis rather than in a rotational fashion.

TIDC analyzed the distribution of attorney appointments by panel list during FY2017.⁴⁴ Each panel designates whether an attorney is proficient in Spanish, and so the analysis separated Spanish speaking attorneys from English speaking attorneys.⁴⁵ Based on this analysis, all appointment panels had distributions in which the top ten percent of attorneys received less than three times their respective share of appointments, indicating that all panels comply with this requirement.

⁴³ Lists are adjusted throughout the year as attorneys may temporarily remove themselves from the list.

⁴⁴ For this analysis, TIDC compared appointments with the May 2017 appointment list.

⁴⁵ This analysis did not separate Spanish-speaking attorneys for the mental health panels, as the differentiation had little effect.

Table 8: Share of Cases Paid to Top 10% of Attorneys

Level	Attorneys Eligible for Appointment from List	Top 10% Attorneys ⁴⁶	Respective Share of Cases ⁴⁷ [Column A]	Actual Share of Cases [Column B]	Top 10% Received 'x' Times Their Respective Share [Col. B] / [Col. A]
Felony A (Spanish)	7	1	14.3%	27.9%	2.0
Felony A (English)	30	3	10.0%	22.4%	2.2
Felony B (Spanish)	21	2	9.5%	15.9%	1.7
Felony B (English)	100	10	10.0%	16.9%	1.7
Felony C (Spanish)	26	3	11.5%	18.8%	1.6
Felony C (English)	119	12	10.1%	16.1%	1.6
Felony MH	24	2	8.3%	22.6%	2.7
Misd. MH	28	3	10.7%	23.8%	2.2
Misdemeanor (Spanish)	26	3	11.5%	20.5%	1.8
Misdemeanor (English)	123	12	9.8%	19.0%	1.9

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 5**Attorney Selection Process**

Requirement satisfied. No findings.

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.⁴⁸

Travis County's annual data report is a challenge to complete because indigent defense cases are appointed under multiple systems:

⁴⁶ 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.

⁴⁷ 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.

⁴⁸ TEX. GOV'T CODE § 79.036(a-1).

- Public defender offices handle most juvenile delinquency cases and several mental health cases;
- A managed assigned counsel program (CAPDS) handles most felony and misdemeanor cases;
- Assigned counsel handle a minority portion of felony, misdemeanor, and juvenile cases.

The Travis County Auditor’s Office must coordinate with all entities to obtain accurate indigent defense and expense totals.

According to the Indigent Defense Expense Report (IDER) submitted by the auditor to TIDC for FY2017, 243 attorneys received payment for indigent defense services (either through a payment voucher or through employment by Travis County) for: 1,630 juvenile cases; 8 capital murder cases; 10,188 non-capital felony cases; 15,303 misdemeanor cases; and 73 appeals (felony, misdemeanor, and juvenile combined). The Auditor’s Office completed the FY2017 annual indigent defense expense report in a timely manner. TIDC reviewed the Travis County’s process for submitting the IDER⁴⁹ and found it in substantial compliance with Requirement 6.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 6

Statutory Data Reporting

Requirement satisfied. No findings.

Conclusion

TIDC appreciated the professionalism and assistance provided by Travis County officials and staff. Travis County officials appear willing to make necessary changes to improve the indigent defense system. As mandated by statute, TIDC will continue to review the County’s transition and adjustments to the report’s findings.

⁴⁹ Title 1 TEX. ADMIN. CODE § 174.28(c)(6).

Summary of Findings and Recommendations

Travis County must respond in writing how it will address each of these findings and recommendations.

FINDING 1 AND RECOMMENDATION: 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 magistrate warning form used for cite and release arrestees does not contain a space to mark a request for counsel. Travis County must adjust its procedures to include requests for counsel at the Article 15.17 hearing for cite and release arrestees.

FINDING 2 AND RECOMMENDATION: Per Title 1 Tex. Admin. Code § 171.7–8, justices of the peace and municipal court judges are required to report requests for counsel as part of their Judicial Council Monthly Court Activity Reports. Neither Travis County justices of the peace nor City of Austin municipal judges enter the number of persons requesting counsel at the Article 15.17 hearing. These courts must create procedures to report this data.

FINDING 3 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 allowed for transferring requests to the courts) of the request being made. The sample of attorney appointments in felony cases fell below TIDC’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 4 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 allowed for transferring requests to the courts) of the request being made. The sample of attorney appointments in misdemeanor cases fell below TIDC’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 5 AND RECOMMENDATION (misdemeanor cases): TIDC interviews, case file reviews, and court observation indicate that courts hearing misdemeanor cases may be directing or encouraging defendants to communicate with attorneys representing the state before denying requests for counsel. Travis County should clarify whether it has processes in place to ensure compliance with Article 1.051(f-2).

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.⁵⁰
 - 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.⁵¹
- The magistrate must inform and explain the right to counsel and the right to appointed counsel to the accused.⁵²
- The magistrate must ensure that reasonable assistance in completing forms necessary to request counsel is provided to the accused.⁵³
- 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.⁵⁴

REQUIREMENT NOT SATISFIED: The magistrate warning form for cite and release defendants does not contain a space to record a counsel request.
- 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 250,000.⁵⁵

NOT APPLICABLE: The indigent defense plan does not authorize 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.⁵⁶

⁵⁰ TEX. CODE CRIM. PROC. art. 14.06(a).

⁵¹ TEX. CODE CRIM. PROC. art. 17.033.

⁵² TEX. CODE CRIM. PROC. art. 15.17(a).

⁵³ *Id.*

⁵⁴ TEX. CODE CRIM. PROC. art. 15.17(e).

⁵⁵ *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).

⁵⁶ TEX. CODE CRIM. PROC. art. 15.17(a).

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

- ☒ Provide detailed procedures used to determine whether a defendant is indigent.⁵⁷
- ☒ State the financial standard(s) to determine whether a defendant is indigent.⁵⁸
- ☒ List factors the court will consider when determining whether a defendant is indigent.⁵⁹

REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS.

- ☒ Establish objective qualification standards for attorneys to be on an appointment list.⁶⁰
 - 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.⁶¹
 - 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 30.⁶²

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 250,000.⁶³

REQUIREMENT NOT SATISFIED: The percent of timely appointments did not meet the TIDC's 90% threshold for presuming a jurisdiction's appointment system to be timely.

- ☐ 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.⁶⁴

REQUIREMENT NOT SATISFIED: The percent of timely appointments did not meet the TIDC'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.⁶⁵

REQUIREMENT NOT SATISFIED: The monitor's sample included misdemeanor defendants who waived their right to counsel without the court ruling on their counsel requests.

⁵⁷ TEX. CODE CRIM. PROC. art. 26.04(l)–(r).

⁵⁸ TEX. CODE CRIM. PROC. art. 26.04(l).

⁵⁹ TEX. CODE CRIM. PROC. art. 26.04(m).

⁶⁰ TEX. CODE CRIM. PROC. art. 26.04(d).

⁶¹ Title 1 TEX. ADMIN. CODE § 174.1–.4.

⁶² TEX. CODE CRIM. PROC. art. 26.04(j)(4).

⁶³ TEX. CODE CRIM. PROC. art. 1.051(c).

⁶⁴ 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.”).

⁶⁵ TEX. CODE CRIM. PROC. art. 1.051(f-1) - (f-2).

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.⁶⁶
- ☒ 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.⁶⁷

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.⁶⁸
- ☒ 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.⁶⁹
- ☐ Alternative appointment method:⁷⁰
 - 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.
 - The courts must allocate appointments reasonably and impartially among qualified attorneys.

NOT APPLICABLE: Travis County uses a rotational system of appointment (under the managed assigned counsel system) and a public defender system.

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.⁷¹

⁶⁶ Tex. Fam. Code § 54.01(b-1). Tex. Fam. Code § 51.10(c).

⁶⁷ Tex. Fam. Code § 51.101(d).

⁶⁸ TEX. CODE CRIM. PROC. art. 26.04(a).

⁶⁹ TEX. CODE CRIM. PROC. art. 26.044.

⁷⁰ TEX. CODE CRIM. PROC. art. 26.04(g)–(h).

⁷¹ TEX. GOV'T CODE § 79.036(a-1).

Appendix B – Attorney Panel Qualifications

For Managed Assigned Counsel - The Program Administrator may establish additional criteria to determine which attorneys are qualified to represent persons charged with class A and B misdemeanors, 1st, 2nd, 3rd degree and state jail felonies as well as appeals. The qualifications adopted by the Program Administrator shall maintain or exceed the standards that are currently set forth below:

A. General Minimal Qualifications for CAPDS Attorney Panels

The following standards apply to each attorney who applies to be on the appointment list and wants to remain on that list:

1. An attorney must have on file with the Program Administrator a completed and sworn application, which is approved by the Review Committee. Attorneys must ensure all information on their application is correct and current by submission of an electronic oath or by an oath before a notary.
2. An attorney must be a licensed practicing attorney and a member in good standing with the State Bar of Texas.
3. An attorney must either live in Travis County, or live in an adjoining county and maintain an office within Travis County.
4. An attorney must attend any CLE course required by the Program Administrator. The program administrator will adopt a minimum number of CLE hours meeting or exceeding 10 hours in the area of criminal law and procedure each year plus one hour of ethics relating to the practice of criminal law. All attorneys on the appointment list must file a CLE report with the Program Administrator each year attesting to completion of this required CLE.
5. An attorney must have a secretary, receptionist, answering service, or a cell phone with texting capabilities. An attorney must have an active e-mail account to receive court appointments and notices regarding procedural changes. An attorney must register a phone number consistent with the requirement above with the Travis County Sheriff to receive calls from incarcerated clients. Attorneys are encouraged to enable the use of video-conferencing. In addition, an attorney must respond promptly to a phone call or text from the court or from the Program Administrator.
6. An attorney shall notify the Program Administrator promptly, in writing, of any matter that would disqualify the attorney by law, regulation, and rule or under these guidelines from receiving appointments to represent indigent defendants.
7. After approval by the Review Committee, attorneys must attend a general orientation conference regarding the operation of the appointment process and first setting procedures.

8. Pursuant to TCCP Article 26.04(j)(4), an attorney shall submit by October 15th of each year a statement that describes the percentage of the attorney's practice time that was dedicated to work based on appointments accepted in this county for adult criminal cases and juvenile delinquency cases for the prior 12 months that begins on October 1 and ends on September 30. The report must be submitted through the online form to the Texas Indigent Defense Commission.
9. An attorney must meet other standards adopted by the Program Administrator that do not fall below the standards set forth in this Plan.

B. Minimum Qualifications for CAPDS Misdemeanor Attorney Panels

1. Must meet the General Minimal Qualifications.
2. Must have a minimum of one-year work experience in practicing criminal law.
3. The evaluation of experience and competency is done when the applicant applies to be on the appointment list and on a periodic basis thereafter. Factors to be considered are:
 - a) Competence, diligence, and skill
 - b) Years actively engaged in the practice of criminal law
 - c) Certification as a criminal law specialist
 - d) Attendance at advanced criminal law courses
 - e) Any other special skills
4. Must have at least the experience of being lead counsel in 2 misdemeanor jury trials. Experience as 2nd chair in a felony case may substitute for 1 misdemeanor trial. The styles and cause numbers of these cases should be listed in the attorney's application.
5. Alternatively, attorneys will be qualified for the misdemeanor panel after successful completion of the Capital Area Private Defender Service mentoring program. Attorneys may be assigned misdemeanor cases while in the mentorship program.
6. Must have prior appellate experience to be assigned appeals.
7. Attorneys on the misdemeanor appointment list may qualify for one or more of the following panels based upon experience and competency:
 - a) Misdemeanor Appointment Panel
 - b) Misdemeanor Mental Health Appointment Panel
 - c) Misdemeanor Appeal Appointments will be made from the Felony Appellate B Appointment Panel.
8. An attorney must meet other experience and competency requirements as deemed appropriate by the Program Administrator that do not fall below the standards set forth in this Plan.

C. Minimum Qualifications for CAPDS Mental Health Attorney Panel

The following standards apply to each attorney who is appointed to represent a defendant on the specialized mental health dockets accused of a criminal offense.

1. An attorney must meet the general qualifications.
2. An attorney applying for mental health court appointments must have served as a prosecutor in a county or district attorney's office for at least two years or have practiced criminal defense law on a regular basis for a minimum of two years.
3. The evaluation of experience and competency is done when the applicant applies to be on the appointment list and on a periodic basis thereafter. Factors to be considered are:
 - a) Competence, diligence, and skill
 - b) Years actively engaged in the practice of criminal law
 - c) Certification as a criminal law specialist
 - d) Attendance at advanced criminal law courses
 - e) Any other special skills
4. An attorney must have been lead counsel in at least 3 mental health cases (whether misdemeanor or felony) with at least one of the following issues presented: competency, sanity or court ordered mental health treatment. The styles and cause numbers of these cases must be listed in the appointment application.
5. The Program Administrator will adopt minimum training standards in the area of mental health each year. An attorney must have received 3 hours of CLE in mental health criminal issues or received training within 3 months of placement on the mental health appointment list.
6. An attorney must be knowledgeable concerning criminal law related to defendants with mental health issues and the Texas Mental Health Code.
7. An attorney applying for the misdemeanor mental health court appointment list must meet requirements for placement on the misdemeanor list.
8. An attorney applying for the felony mental health court appointment list must meet requirements for placement on the Category B felony list.
9. An attorney must meet other experience, training, and competency requirements as deemed appropriate by the Program Administrator that do not fall below the standards set forth in this Plan.

D. Minimum Qualifications for Felony CAPDS Attorney Panel

The following standards apply to each attorney who is appointed to represent a defendant accused of a felony.

1. An attorney must meet the general qualifications.

2. An attorney must have served as a prosecutor in a county or district attorney's office for at least two years or have practiced criminal defense law on a regular basis for a minimum of two years.
3. An attorney must have been lead counsel in at least 3 misdemeanor jury trials or first or second chair in at least two felony jury trials. The styles and cause numbers of these cases must be listed in attorney's application.
4. Attorneys on the felony appointment list may qualify for one or more of the following panels based upon experience and competency:
 - a) Felony A Appointment Panel
 - b) Felony B Appointment Panel
 - c) Felony C Appointment Panel
 - d) Felony Mental Health Appointment Panel
 - e) Felony Appellate A Panel
 - f) Felony Appellate B Panel is also utilized to appoint misdemeanor appeals.
5. The evaluation of experience and competency is done when the applicant applies to be on the appointment list and on a periodic basis thereafter. Factors to be considered are:
 - a) Competence, diligence, and skill
 - b) Years actively engaged in the practice of criminal law
 - c) Certification as a criminal law specialist
 - d) Attendance at advanced criminal law courses
 - e) Any other special skills
6. Other experience and competency as deemed appropriate by the Program Administrator that do not fall below the standards set forth in this Plan
7. Alternatively, attorneys may qualify for a felony panel after successful completion of the Capital Area Private Defender Service felony mentoring program. While in the mentoring program attorneys may receive felony cases with the assistance of their mentor attorney and at the direction of the Program Administrator. Before admittance to any panel through the felony mentorship program, the felony mentoring program must be approved by the Travis County District Court Judges.

E. Types of Felony Panels:

1. Capital Cases: Attorneys will qualify and receive appointments pursuant to TCCP Article 26.052 and are subject to the Third Judicial Region's Capital Attorney Selection Committee's rules and procedures.
2. A Panel: Attorneys must have significant experience with all phases of a criminal practice including aggravated and first degree felony jury trials as lead counsel; very knowledgeable concerning criminal law and procedure, and capable trial attorney. Attorneys must meet general qualifications and have

completed, as lead counsel, at least two first degree felony jury trials to be considered for this panel.

3. B Panel: Attorneys must have experience trying misdemeanor and some felony trials to a jury and before the court and second-chairing serious felony cases; experience trying other contested matters such as felony pre-trials and probation revocations; capable and knowledgeable but lacking experience in serious/aggravated felony cases. Attorneys must meet general qualifications and have completed, as lead counsel, at least one felony jury trial.
4. C Panel: Knowledgeable concerning criminal law and procedure and possessing trial skills but lacking significant felony trial experience, some jury trial experience in misdemeanors and, at least as second chair, in felonies.

F. **Minimum Qualifications of Appellate Attorneys**

The following standards apply to each attorney who is appointed to represent a defendant in an appeal.

1. Appellate A Panel: Attorneys placed on this list must have prior experience in felony level appellate work. At least two prior felony appellate briefs, along with any other requested data shall be submitted for review. The brief submission requirement contemplates the submission of a fully developed brief. An Anders brief alone will NOT satisfy the brief submission requirement. The complexity of the appellate work done will be a factor in determining eligibility and placement on the A level appellate list.
2. Appellate B Panel: Attorneys placed on this list must have experience in appellate work at the misdemeanor, class A or B levels. At the time of application, a brief evidencing prior appellate experience shall be submitted for review with any other relevant information.
3. Alternatively, attorneys may qualify for each appellate panel after successful completion of the Capital Area Private Defender Service mentoring program. While in the mentoring program attorneys may receive appellate cases with the assistance of their mentor attorney and at the direction of the Program Administrator. Before admittance to any panel through the mentorship program, the mentoring program must be approved by the Travis County District Court judges.

Appendix C – Complaint About Pretrial Misdemeanor Practices



March 29, 2018

Sarah Eckhardt
Travis County Judge
P.O. Box 1748
Austin, TX 78767

Fax #: (512) 854-9535

Dear Judge Eckhardt,

I write concerning the appointment of counsel for defendants in the Travis County Courts at Law who face Class B charges, specifically those accused of Possession of Marijuana (“POM”) and Driving While License Invalid (“DWLI”). I represent low-income individuals pro bono who have traffic tickets and other holds on their driver licenses. Many of these individuals also have Class B DWLI charges in the Travis County Courts at Law. Routinely, these indigent individuals inform me that although they have submitted an application and are qualified for a court-appointed attorney, the court has not yet appointed them an attorney. Rather my clients report that the court staff has told them, that “this is an easy charge” and that “you don’t need any attorney for this type of case.” The majority of my clients who are in this situation have charges pending in Travis County Court at Law #6. Although I do not currently have any clients with pending POM charges in the Travis County Courts at Law, TFDP attorneys conducting routine docket observations have observed the practice of non-appointment of counsel for qualified individuals facing Class B POM charges.

Texas and Federal law guarantee the right to counsel for persons accused of crime who face the possibility of jail because the assistance of counsel is essential to fair criminal proceedings. Without counsel, other constitutional rights are worthless because unrepresented defendants do not know what those other rights are or how to assert them. The right to counsel for those accused of a crime is enshrined the Sixth amendment to the U.S. Constitution and Article 1, Section 10 of the Texas Constitution. States must appoint counsel for those individuals who cannot afford to hire their own counsel. *Gideon v. Wainwright*, 372 U.S. 335 (1963). This right attaches to all criminal cases that may result in incarceration, regardless of how “easy” a charge might be to resolve.

This right to counsel has been further codified in the Texas Code of Criminal Procedure and the Travis County Fair Defense Plan. Article 1.051(c) of the Texas Code of Procedure states in relevant part, “An indigent defendant is entitled to have an attorney appointed to represent him in any adversary judicial proceeding that may result in punishment by confinement.” The Texas Code of Criminal Procedure is also clear about the court’s duty to appoint counsel for eligible individuals “as soon as possible”, which in Travis County, is “by the end of the first working day” after the request for appointment of counsel has been received. Art 1.051(c)(2). When a court receives a request for the appointment of counsel, the court must rule—either to approve the request and appoint an attorney or to deny the request—by the end of the first working day after the receipt of the request. The court cannot just leave the request open without a ruling.

Additionally, the Travis County Indigent Defense Plan states that counsel “will be appointed no later than the end of the first working day after the date on which TCCA receives

the defendant's request for counsel." Or, "[i]f a defendant is released from custody prior to the appointment of counsel, appointment of counsel is not required until the defendant's first court appearance or when adversarial judicial proceedings are initiated, whichever comes first."

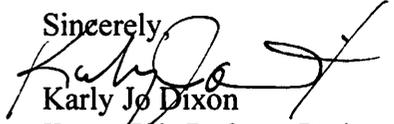
The failure to appoint an attorney to eligible defendants in Class B cases as required by state and federal law unfairly disadvantages these defendants and often sets them up for failure. Many of the individuals who I have spoken to were not aware that a Class B DWLI is different than a Class C DWLI. They did not understand the nature of the court proceedings against them or the consequences of a conviction in a Class B case. My clients often tell me that they appeared in Travis County Court at Law #6 on their scheduled court date, only to find that their court date has been rescheduled without them receiving any notice. For the working poor, taking a day off work from a job that does not have paid time off is a hardship, as is finding childcare and transportation for those who cannot legally drive. If these individuals were represented, by the attorneys they are entitled to under the law, they would not waste time attending court when their court dates have been rescheduled.

In addition to appearing in court when it is not necessary, these individuals also miss court appearances, often for valid reasons such as illness or the need for childcare. Yet, these pro se defendants do not know how to ask for a continuance or how to lift a warrant or bond forfeiture. Individuals with warrants are often re-arrested and then plead guilty with credit for time served to get out of jail and return to their lives. Pleading guilty on a Class B DWLI further suspends an individual's driver license and triggers driver responsibility surcharges, all repercussions that could be avoided if the individuals were represented in the initial proceedings, as required by law.

Furthermore, even with the help of the Travis County law library staff, many individuals cannot negotiate the process of resolving their Class B DWLI by obtaining an Occupational Driver License ("ODL") on their own. So, any assumption that a defendant does not merit the appointment of an attorney because all they need is an ODL is untrue and unconstitutional. The standard for appointment of counsel is not whether a person may be able to figure out their case on their own, but whether their personal liberty is at stake. In a Class B DWLI, a defendant's personal liberty is at stake. Eligible defendants charged with Class B offenses in Travis County Courts at Law must be appointed counsel, both to ensure the Court is acting Constitutionally, but also for issues of fundamental fairness and due process.

Accused persons may waive the right to counsel, but that waiver is not valid if it is not voluntary and intelligent or is obtained without an accurate explanation of the right being waived. Tex. Code Crim. Proc. Art. 1.051(f). Around half of my clients with DWLIs in Travis County Court at Law #6 who have not been appointed counsel do not have waivers of counsel on file. For those who do have a waiver on file, those waivers are not voluntary or intelligent. I have asked these individuals when and why they waived counsel. Every single one of them has told me that they did not waive counsel and when shown the form, said that court staff told them they had to sign it, so they did, fearing repercussions from the court if they did not. This signing of documents without full knowledge is understandable. As in an adversarial courtroom setting, court staff wields a lot of power over unrepresented defendants who often find this process intimidating and confusing. Also having court staff negotiate with defendants over the resolution of their cases confuses the role of court staff whom are effectively acting as the prosecutor in these cases.

For the reasons stated above, we request that the Travis County Courts at Law comply with Texas and Federal law, as well the Travis County Fair Defense Plan and immediately start appointing counsel for eligible defendants that appear in the Travis County Courts at Law, including for all Class B DWLI and POM cases.

Sincerely,

Karly Jo Dixon
Texas Fair Defense Project
512-637-5220 x101
kdixon@fairdefense.org

CC: Texas Indigent Defense Commission
The Honorable Judge John Lipscolm, Travis County Court at Law #3
The Honorable Judge Mike Denton, Travis County Court at Law #4
The Honorable Judge Nancy Hohengarten, County Court at Law #5
The Honorable Judge Brandy Mueller, County Court at Law #6
The Honorable Judge Elisabeth A. Earle, County Court at Law #7
The Honorable Judge Carlos H. Barerra, County Court at Law #8
The Honorable Judge Kim Williams, County Court at Law #9
Capital Area Private Defender Service