



# **Policy Monitoring and Fiscal Follow-up Review – Wharton County**

**October 2017**



Texas Indigent Defense Commission  
209 W. 14th Street, Room 202 (Price Daniel Building)  
Austin, Texas 78701  
Direct: 512.463.8015 Fax: 512.463.5724  
Main line: 512.936.6994 Toll free in Texas: 866.499.0656  
On the web: <http://www.courts.state.tx.us/tidc>

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**Staff:**

Jim Bethke	Executive Director	512-936-6994	<a href="mailto:Jbethke@tidc.texas.gov">Jbethke@tidc.texas.gov</a>
Brandon Bellows	Policy Analyst	512-936-6996	<a href="mailto:Bbellows@tidc.texas.gov">Bbellows@tidc.texas.gov</a>
Edwin Colfax	Grant Program Manager	512-463-2573	<a href="mailto:Ecolfax@tidc.texas.gov">Ecolfax@tidc.texas.gov</a>
Marissa Kubinski	Executive Assistant	512-936-6994	<a href="mailto:Mkubinski@tidc.texas.gov">Mkubinski@tidc.texas.gov</a>
Joel Lieurance	Senior Policy Analyst	512-936-7560	<a href="mailto:Jlieurance@tidc.texas.gov">Jlieurance@tidc.texas.gov</a>
Wesley Shackelford	Deputy Director/Special Counsel	512-936-6997	<a href="mailto:Wshackelford@tidc.texas.gov">Wshackelford@tidc.texas.gov</a>
Debra Stewart	Fiscal Monitor	512-936-7561	<a href="mailto:Dstewart@tidc.texas.gov">Dstewart@tidc.texas.gov</a>
Doriana Torres	Grant Specialist	512-463-8015	<a href="mailto:DTorres@tidc.texas.gov">DTorres@tidc.texas.gov</a>
Sharon Whitfield	Budget & Accounting Analyst	512-936-6998	<a href="mailto:Swhitfield@tidc.texas.gov">Swhitfield@tidc.texas.gov</a>

**MISSION**

The Texas Indigent Defense Commission provides financial and technical support to counties to develop and maintain quality, cost-effective indigent defense systems that meet the needs of local communities and the requirements of the Constitution and state law.

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## **Background**

Texas Indigent Defense Commission (Commission) staff visited Wharton County in 2014 to make a limited scope review of Wharton County’s indigent defense practices. In July 2014, the Commission issued the initial policy and fiscal monitoring report, which made several recommendations to assist Wharton County in meeting the core requirements of the Fair Defense Act. Recommendation topics covered: magistrate warning hearings; waivers of counsel in misdemeanor cases; payment procedures; and data reporting procedures.

## **October 2017 Follow-up Review**

Staff members Debra Stewart, Joel Lieurance and Brandon Bellows conducted the follow-up review with visits to Wharton County between March 13<sup>th</sup> and 15<sup>nd</sup>, 2017 and between April 26<sup>th</sup> and 27<sup>th</sup>, 2017.<sup>1</sup> The purpose of this review was to examine whether Wharton County successfully addressed the findings and recommendations from the July 2014 report. On this review, the monitor observed magistrate warnings and a misdemeanor docket. The monitor examined several documents including: misdemeanor case files; data reported to the Commission as part of the annual Indigent Defense Expense Report (IDER); and financial records supporting the IDER. The monitor’s report is broken into two sections: 1) an analysis of policy issues and 2) an analysis of fiscal issues.

A status summary of monitoring findings is shown in the following table. The county must respond to the report’s findings that have not been satisfied. A list of pending findings is shown at the end of the report.

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<sup>1</sup> Throughout this report, references to Commission staff will use the term “monitor.”

## Status of Monitoring Findings

Year Identified	Topic	Description and Status as of the October 2017 Review	Satisfied	Pending
<b>Policy Issues</b>				
2014	Magistrate Warnings	Magistrates did not ask all arrestees if they wanted to request counsel. Observations indicated that magistrates now ask all arrestees if they want to request counsel.	√	
2014	Magistrate Warnings	Magistrates inquired into an arrestee's ability to make bail before asking if the arrestee wants to request counsel. Observations indicated that magistrates no longer inquire into the ability to make bail before asking if the defendant wants to request counsel.	√	
2017	Magistrate Warnings	Magistrates must ensure there is reasonable assistance in completing financial paperwork needed to request counsel. The paperwork must be transmitted to the appointing authority within 24 hours of the request being made.		√
2017	Prompt Appointment of Counsel	Once a request for counsel is invoked, the request must be transmitted to the appointing authority within 24 hours of the request being made, and the court must rule upon the request within 3 working days.		√
2014	Waivers of Counsel	The court must rule upon all pending requests before the defendant may waive counsel. The 2017 review found multiple requests for counsel (made at the Article 15.17 hearing) which were not ruled upon prior to the defendant's waiver of counsel.		√
2014	Waivers of Counsel	Before entering an uncounseled plea, the defendant must waive the right to counsel, and the written waiver must conform to Article 1.051(g). Written waivers tracking the language of Article 1.051(g) are now used for defendants entering uncounseled pleas.	√	
<b>Fiscal Issues</b>				
2014	Data Reporting	Civil matters were reported on the IDER. Civil matters are no longer reported on the IDER.	√	
2014	Payment Procedures	Payments were made to attorneys who submitted vouchers that did not have required itemization.		√
2014	Payment Procedures	Identifiable cause numbers were not included on invoices. Cause numbers are now included on invoices.	√	
2014	Payment Procedures	Attorneys not qualified for the appointment list received indigent payments. Only qualified attorneys from an appointment list now receive appointments.	√	

## *Policy Monitoring Issues*

### **Conduct Prompt and Accurate Magistration Proceedings**

Article 15.17(e) of the Code of Criminal Procedure requires the magistrate to make a record of asking whether the arrestee wants to request counsel and to record whether the arrestee requests counsel. The 2014 review found that arrestees who made bail did not have the ability to request counsel at the Article 15.17 hearing.

In the current review, the monitor observed Article 15.17 hearings on March 14<sup>th</sup> and March 15<sup>th</sup>, 2017. The monitor observed that procedures for requesting counsel were explained to all arrestees, and all arrestees had an opportunity to request counsel. Wharton County has addressed the 2014 report findings relating to the Article 15.17 hearing by putting in place procedures to allow for all arrestees (on class B misdemeanor offenses and higher) to request counsel. However, once a request is invoked, the invocation of the right is useless unless the request is ruled upon.

Article 15.17(a) requires the magistrate to ensure reasonable assistance in completing financial forms for requesting counsel at the time of the Article 15.17 hearing. Article 15.17(a) further requires the magistrate to transmit all requests for counsel to the appointing authority within 24 hours of the request being made. The monitor did not inspect each step in this process, but examined 125 misdemeanor case files to determine whether requests made at the Article 15.17 hearing were later ruled upon.

From the monitor's sample of 125 misdemeanor cases, the monitor obtained corresponding magistrate warning forms for 99 cases. The magistrate warning forms indicated that 13 of the 99 arrestees requested counsel at the Article 15.17 hearing. The monitor could find no ruling on the counsel request in 10 of those cases. The monitor cannot specify at which point local procedures are breaking down, but the county does not have methods to ensure the following three steps are completed:

- 1) necessary financial information is obtained from the requesting arrestee;
- 2) the financial information is transmitted to the appointing authority within 24 hours of the request being made; and
- 3) the request is promptly ruled upon.

**October 2017 Policy Finding 1 and Recommendation:** Article 15.17(a) requires the magistrate to ensure that assistance in completing financial paperwork for counsel requests is provided at the time of the Article 15.17 hearing. Article 15.17(a) further requires this paperwork to be transmitted to the appointing authority within 24 hours of the request being made. Wharton County must implement procedures to ensure that all arrestees who request counsel have associated financial paperwork promptly completed and transmitted to the appointing authority within 24 hours of the request being made.

## Appoint Counsel Promptly

Under Article 15.17(a) of the Code of Criminal Procedure, once a request for counsel is made, the magistrate must ensure the request is transmitted to the appointing authority within 24 hours. Under Article 1.051(c), the appointing authority then has three working days to appoint counsel for those deemed indigent (in counties with a population under 250,000).

The 2014 review did not contain a sample of sufficient size to make an assessment as to whether counsel was appointed timely. In the current review, the monitor examined 125 misdemeanor case files and found records indicating counsel had been requested in 38 cases. Counsel was appointed in a timely manner in 53% of sample cases, and so fell below the Commission’s threshold (90% timeliness) for presuming a jurisdiction has procedures in place for timely appointments of counsel. Eleven cases from the sample did not receive a ruling on the request.<sup>2</sup> This is an indication that the court may not be receiving all requests for counsel.

**Table: Times to Appointment in Misdemeanor Cases**

<b>Wharton Misdemeanor Appointment Sample Data</b>	<b>Sample Size</b>	<b>Number from sample</b>	<b>Percent</b>
Number of case files examined	125		
Appointment / denial of indigence occurred in:	38		
0 work days		16	42.1%
1 work day + 24 hour transfer		0	0%
2 work days + 24 hour transfer		3	7.9%
3 work days + 24 hour transfer		1	2.6%
<b>Total Timely appointments (0 – 3 work days)</b>		<b>20</b>	<b>52.6%</b>
Late appointments (more than 3 work days)		7	18.4%
No ruling on request		11	28.9%
<b>Total Late Determinations of Indigence</b>		<b>18</b>	<b>47.3%</b>

**October 2017 Policy Finding 2 and Recommendation:** Wharton County must put in place procedures to ensure timely determinations of indigence in misdemeanor cases. Specifically, all requests for counsel must be promptly transmitted to the appointing authority so that all requests can be ruled upon.

<sup>2</sup> One of these requests was initially made after the Article 15.17 hearing.

## Waivers of Counsel

Article 1.051 of the Code of Criminal Procedure addresses waivers of counsel and allows written waivers of counsel that are voluntarily and intelligently made.<sup>3</sup> Articles 1.051(f-1) and (f-2) require a waiver of the opportunity to retain counsel before the defendant can speak with the prosecutor. Article 1.051(g) requires a written waiver of the right to counsel so the defendant can enter an uncounseled guilty plea.

Under 1.051(f-1), the prosecutor may not initiate a waiver of counsel and may not communicate with a defendant until any pending request for counsel is ruled upon and the defendant waives the opportunity to retain private counsel. Under 1.051(f-2), the court must explain the procedures for requesting counsel and must give the defendant a reasonable opportunity to request counsel before encouraging the defendant to communicate with the attorney representing the state. All requests for counsel must be ruled upon prior to a waiver of counsel. Before a defendant enters an uncounseled plea, he or she must sign a written waiver, the language of which must substantially conform to the language of 1.051(g).<sup>4</sup>

During the 2014 review, the monitor observed a misdemeanor docket for which no Article 1.051(g) waiver of counsel was entered prior to a guilty plea. That issue has been resolved, and uncounseled pleas now include written waivers with language tracking Article 1.051(g).

When misdemeanor arrestees request counsel, the courts must have a system in place to rule on all requests and either appoint counsel or determine the person is not indigent. In 11 cases from the current sample, the defendant made a request for counsel at the Article 15.17 hearing, but there was no documentation that the request had been denied. Later, four of these defendants entered uncounseled pleas.<sup>5</sup> Additional cases involved requests for counsel that were not ruled upon and appeared to involve communication between the defendant and the prosecutor. These additional cases, however, did not result in uncounseled pleas. Article 1.051(f-2) states:

*... 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*

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<sup>3</sup> Article 1.051(f) states:

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

<sup>4</sup> The waiver language of Article 1.051(g) states: "*I have been advised this \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_, by the (name of court) Court of my right to representation by counsel in the case pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge. Understanding my right to have counsel appointed for me free of charge if I am not financially able to employ counsel, I wish to waive that right and request the court to proceed with my case without an attorney being appointed for me. I hereby waive my right to counsel. (signature of defendant)*"

<sup>5</sup> In these four cases, Article 1.051(f) may be implicated, since issues with (f-1) and (f-2) may impact the validity of the 1.051(g) waiver.

*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.*

**October 2017 Policy Finding 3 and Recommendation:** As required by Article 1.051(f-2), Wharton County must rule upon all requests for counsel prior to a defendant's waiver of the right to retain counsel. In order to rule upon all requests for counsel, the courts must ensure procedures are in place to: (1) receive all requests and (2) appoint counsel or document the denial of indigence.

## **Additional Policy Observations**

This report has previously mentioned there were 38 requests for counsel from the monitor's misdemeanor case sample. That total did not include 5 requests which were withdrawn by defendants. Under constitutional standards, a withdrawal of a counsel request is permissible, but it must be voluntarily, knowingly, and intelligently made.<sup>6</sup> Statutorily, Article 1.051(f-2) states the trial court may not direct or encourage the defendant to talk to the prosecutor while the defendant's request is pending. A court would be advised not to direct or encourage a defendant to withdraw a request for counsel.

## ***Fiscal Monitoring Issues***

The 2014 fiscal report made four findings, and each will now be examined to determine whether relevant issues have been addressed.

**2014 Finding 1:** Wharton County reported expenses in civil matters as criminal indigent defense expenses and civil cases in the Indigent Defense Expense Report.

In the follow-up review, the monitor found that the auditor's office utilizes a spreadsheet to track case and expense data, and this spreadsheet separates the data for civil and criminal matters. This separation of expenses is an appropriate method to exclude civil expenses from the Indigent Defense Expense Report (IDER).

**2014 Finding 2:** The county made payments on invoices where attorneys had not fully completed the required itemized voucher.

Article 26.05(c) of the Code of Criminal Procedure requires an attorney to submit an itemized voucher requesting payment for services rendered and requires the court to approve or disapprove the requested amount.<sup>7</sup> Wharton County responded to this

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<sup>6</sup> A defendant's withdrawal of an invocation of the Sixth Amendment right to counsel is analyzed under rules governing the constitutional validity of waivers of the Sixth Amendment right to counsel. See, e.g., *Michigan v. Jackson*, 475 U.S. 625, 630 (1986); *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009).

<sup>7</sup> Article 26.05(c) states:

finding by stating its indigent defense plan requires attorneys to sign its adopted voucher to receive payment. The adopted voucher lists itemized services.

The monitor reviewed payments to attorneys and found two instances in which payments appear to have been made in juvenile cases, but the auditor's office could not produce a voucher in which the attorney requested payment.

The monitor's review also found vouchers submitted by attorneys which were not the voucher adopted by the courts.

**2014 Finding 3:** The county made payments on invoices where attorneys had not included all the cause numbers related to the cases disposed.

The monitor found that attorneys now submit a separate voucher for each disposed case, and so the auditor should receive information regarding each indigent defense case disposed by an attorney.

**2014 Finding 4:** The county paid attorneys that did not qualify for appointment under the county's indigent defense plan. The Auditor's office did not maintain records that these appointments were in accordance with Title 1 Texas Administrative Code Rule §174.4 Emergency Appointment.

The monitor verified that only attorneys on an appointment list were paid for appointed cases.

**October 2017 Fiscal Finding 1 and Recommendation:** The county made payments on invoices where attorneys had not fully completed the required itemized voucher. The county must put in place procedures so that payments are only made after vouchers with all required itemization have been approved by the judge.

## Conclusion

The monitor appreciated the professionalism and assistance provided by Wharton County officials and staff. Wharton County officials appear willing to make necessary changes to improve the indigent defense system. As mandated by statute, the Commission will monitor the county's transition and process improvements regarding the report's recommendations.

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*(c) Each fee schedule adopted shall state reasonable fixed rates or minimum and maximum hourly rates, taking into consideration reasonable and necessary overhead costs and the availability of qualified attorneys willing to accept the stated rates, and shall provide a form for the appointed counsel to itemize the types of services performed. No payment shall be made under this article until the form for itemizing the services performed is submitted to the judge presiding over the proceedings or, if the county operates a managed assigned counsel program under Article 26.047, to the director of the program, and until the judge or director, as applicable, approves the payment. If the judge or director disapproves the requested amount of payment, the judge or director shall make written findings stating the amount of payment that the judge or director approves and each reason for approving an amount different from the requested amount. ...*

## **Findings and Recommendations from the October 2017 Review**

The county must provide a written response to each of the October 2017 report findings.

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

**October 2017 Policy Finding 1 and Recommendation:** Article 15.17(a) requires the magistrate to ensure that assistance in completing financial paperwork for counsel requests is provided at the time of the Article 15.17 hearing. Article 15.17(a) further requires this paperwork to be transmitted to the appointing authority within 24 hours of the request being made. Wharton County must implement procedures to ensure that all arrestees who request counsel have associated financial paperwork promptly completed and transmitted to the appointing authority within 24 hours of the request being made.

### **Appoint counsel promptly.**

**October 2017 Policy Finding 2 and Recommendation:** Wharton County must put in place procedures to ensure timely determinations of indigence in misdemeanor cases. Specifically, all requests for counsel must be promptly transmitted to the appointing authority so that all requests can be ruled upon.

### **Waivers of Counsel**

**October 2017 Policy Finding 3 and Recommendation:** As required by Article 1.051(f-2), Wharton County must rule upon all requests for counsel prior to a defendant's waiver of the right to retain counsel. In order to rule upon all requests for counsel, the courts must ensure procedures are in place to: (1) receive all requests and (2) appoint counsel or document the denial of indigence.

### **Payment Procedures**

**October 2017 Fiscal Finding 1 and Recommendation:** The county made payments on invoices where attorneys had not fully completed the required itemized voucher. The county must put in place procedures so that payments are only made after vouchers with all required itemization have been approved by the judge.