

Supplement to Gaines County Monitoring Report (2020): Additional Observations on Attorney Qualifications

TIDC has historically monitored how counties admit attorneys to lists, but not how counties review their performance.¹ TIDC is piloting key performance indicators related to attorney representation—caseloads, investigation, and client contact—to assess counties’ procedures for ensuring ethical attorney performance. It is collecting data from counties’ regular reports to TIDC, interviews and surveys, and additional sources as available.

For this pilot period, TIDC is collecting information. The following observations about attorney qualifications are not findings and do not affect TIDC funding. No response is required, though TIDC welcomes feedback.

Since its inception, the Fair Defense Act has required local jurisdictions to review qualifications for attorneys on the appointment list. Under Article 26.04(b) of the Code of Criminal Procedure, counties must adopt procedures that

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.

Performance Review

TIDC reviewed Gaines County’s indigent defense plans and interviewed local officials to learn about procedures for performance review. The District and County Court Indigent Defense Plans require attorneys to perform enumerated duties to clients and follow ethical rules.

The County Court plan does not provide for performance review. The District Court plan provides that the district judge shall annually review the felony appointment list and may remove an attorney for not fulfilling duties of counsel. For most felonies, Gaines County (and three other counties in the 106th Judicial District) have an annual contract with an attorney to provide representation in all but conflict-of-interest cases.

¹ Attorney qualifications for appointment lists are one of six core Fair Defense Act requirements that TIDC monitors. 1 TEX. ADMIN. CODE § 174.28(c)(3).

Caseloads

Attorneys need to spend enough time on each case to perform their basic duties to defendants.² TIDC, in partnership with the Public Policy Research Institute at Texas A&M University, studied the maximum number of cases an attorney could carry in a year while providing ethical representation.³ The study found that, in Texas, an attorney should carry no more than 226 misdemeanors, 128 felonies, or 31 appeals, or a weighted combination of these cases.

The County Court requires that attorneys “manage [their] workload to allow for the provision of quality representation,” but does not have a system for tracking caseloads; instead, according to the court coordinator, she may informally skip attorneys on the list who seem overburdened. The District Court plan does not address caseloads. The felony contract sets a limit of 500 felonies per year (3.9 times TIDC’s guidelines) and states that the District Judge will monitor the attorney’s caseload to ensure the quality of representation. TIDC addressed felony caseloads in previous reviews and below are updated figures for 2020:

Table 3: TIDC Findings on Gaines County Contract Caseloads

Year of Review	Contract Felony Caseload Limit	Actual Felony Caseload	Contract Compliance	Felony Caseload Guideline	Total Caseload, % Guidelines
2013	150	254	No	150 (ABA)	278%
2017	400	275	Yes	128 (TIDC)	240%
2020	500	319	Yes	128 (TIDC)	283%

In 2013, TIDC found that the County was not following its contract, which used the American Bar Association’s recommended caseload limits of 150 felonies or 400 misdemeanors. In 2015, TIDC published caseload guidelines of 128 felonies or 226 misdemeanors. In 2017, the County had raised the contract’s caseload limits so that the attorney fell within its limits, while exceeding national and Texas guidelines. The contract limit and attorney’s caseload limit have since increased; they now remain in compliance with contract rules but far exceed caseload guidelines.

According to data reported by the County and local attorneys, In Gaines County, in FY2019:

² TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 1.01. (see commentary: “A lawyer’s workload should be controlled so that each matter can be handled with diligence and competence.”)

³ <http://tidc.texas.gov/caseloads>

- The six attorneys appointed to misdemeanor cases and two attorneys appointed to felony cases from appointment lists had statewide indigent defense caseloads below the Texas guidelines.⁴
- The felony contract attorney's indigent defense caseload was close to three times the guidelines (283%).⁵
- Including non-indigent-defense cases, four appointed attorneys and the contract attorney had total caseloads above the guidelines.⁶
- One attorney did not file practice time reports for Gaines County.⁷

Use of Investigators

Attorneys have a duty to defendants to investigate the facts of their case.⁸ Some investigation can be performed by attorneys. Other investigation requires an investigator, because, for instance, attorneys cannot testify to facts that the attorney has investigated, or because of the need for added capacity or specialization.⁹ TIDC's caseload guidelines recommend that, on average, for misdemeanors, 13.8% of case time (60 minutes) is spent on attorney investigation and 5.3% of case time (28.5 minutes) is spent on investigator investigation; for felonies, the guidelines are 12.3% (122.8 minutes) on attorney investigation and 7.7% (85.3 minutes) on investigator investigation.¹⁰

The County Court plan requires attorneys to “investigate, either by self or through an investigator, the facts of the case and be prepared to present any factual defense(s) that may be reasonably and arguably available to the defendant.” The District Court plan does not address investigation but requires attorneys to perform professional duties. Judges review individual fee vouchers, but do not appear to

⁴ This estimate is from county auditor data, available at <http://tidc.tamu.edu/public.net/>. This estimate includes felonies, misdemeanors, and appeals, and does not include capital or juvenile indigent defense cases, civil appointments, or retained cases.

⁵ *Id.*

⁶ This estimate combines county auditor data with data from attorneys on the percent of their practice time dedicated to indigent defense, also available at <http://tidc.tamu.edu/public.net/>. For this estimate, TIDC divides attorneys' statewide indigent defense caseload (excluding juvenile and capital cases) by their reported percent of practice time devoted to appointed criminal cases.

⁷ That attorney is now reportedly a prosecutor in a different county, and therefore no longer on an appointment list. Regardless, under Article 26.04(j)(4), attorneys who were appointed in the previous fiscal year are required to file practice time reports.

⁸ TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01.

⁹ TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.08.

¹⁰ These recommendations are for cases that do not go to trial. More investigation time is recommended for cases that go to trial.

systematically review attorneys' investigation of cases. The felony contract states that the attorney can request expenses for investigation.

TIDC has received ongoing complaints and public reports from attorneys and defendants who allege that the contract attorney does not investigate cases:

- 2014: In a complaint to TIDC from his pro bono counsel, defendant states that the contract attorney directed him to plead guilty despite evidence of his innocence
- 2016: According to report by news station KCBD,¹¹ local defense attorneys observe that the contract attorney's representation falls below professional standards, including, for example, not reviewing discovery
- 2018: In a complaint to TIDC from his girlfriend, defendant states that he has been in jail for months and has favorable evidence (such as notarized statements from probation officers confirming his innocence) and he cannot communicate with the contract attorney
- 2018: In a complaint to TIDC from the Texas Fair Defense Project, defendant states that he has been in jail for months and has favorable evidence (such as statements of non-prosecution) that the contract attorney will not review
- 2019: In a complaint to TIDC, defendant states that he has tried to have the contract attorney removed from his case because his caseload makes it impossible to provide proper representation

In Gaines County, in FY2019, there were no expenditures for investigators in misdemeanors or felonies.¹²

Client Contact

Attorneys have a duty to communicate with defendants about their case.¹³ Especially when clients are in custody, attorneys should be in regular contact.¹⁴ They should attempt to contact out-of-custody clients, and discuss their cases out-of-court to preserve confidentiality¹⁵ and have time to prepare.¹⁶ TIDC's caseload guidelines recommend that, on average, 13.9% (75 minutes) of misdemeanor case time and 16.1% (168.8 minutes) of felony case time is spent on client communication.¹⁷

¹¹ <https://www.kcbd.com/story/28887256/kcbd-investigates-justice-on-a-budget/>

¹² <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=83&fy=2019>

¹³ TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.03.

¹⁴ *Id.*

¹⁵ TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05.

¹⁶ TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01.

¹⁷ These recommendations are for cases that do not go to trial. More communication time is recommended for cases that go to trial.

The County Court plan requires attorneys to “maintain reasonable communication and contact with the client at all times and keep the client informed of the status of the case.” The District Court plan does not address ongoing client contact but requires attorneys to perform professional duties. Judges review individual fee vouchers, but do not appear to systematically review attorneys’ client contact. The felony contract does not address client contact.

Most of the complaints and reports about the contract attorney, described above, also referred to his lack of communication with clients, stating that he communicates with them only in court.

Summary

Gaines County requires attorneys to meet duties to clients, but does not have a method for oversight of caseloads, investigation, or client communication.