



**Third Follow-up Policy Monitoring
Review of Fort Bend County's Indigent
Defense Systems**

December 2021

Background

The Texas Indigent Defense Commission (TIDC) monitors local jurisdictions' compliance with the Fair Defense Act (FDA) through on-site reviews.¹ These reviews seek to promote local compliance and accountability with the requirements of the FDA and to provide technical assistance to improve county indigent defense processes.

In 2011, at the request of Senator Rodney Ellis and Representative Ron Reynolds, TIDC conducted an initial monitoring review of Fort Bend County's indigent defense practices. This initial report made 14 recommendations, including five of the six FDA core requirements. (See Table 1 for a summary of findings from the initial and follow-up visits.)

TIDC's policy monitoring rules require follow-up reviews where the report included noncompliance findings.² TIDC conducted follow-up reviews in 2016 and 2019. Over the course of those reviews, TIDC found that Fort Bend County had addressed all but one of the original report's recommendations. The remaining recommendation concerns Fort Bend County's attorney-of-the-day program and the FDA's continuity of counsel requirements.

This third follow-up review examines whether local practices involving the attorney-of-the-day meet the FDA's requirements. TIDC staff member Lindsay Bellinger conducted visits on July 16 and July 30, 2021. For the review, TIDC observed misdemeanor dockets and conducted interviews.

¹ TEX. GOV'T CODE § 79.037(a)–(b).

² 1 TEX. ADMIN. CODE § 174.28(d)(3).

Table 1: History of Monitoring Findings

FDA Core Requirement	Description and Initial Year of Finding	Status before 2021 Review	
		Satisfied	Pending
1. Prompt Magistration	Article 15.17 hearings must occur within 48 hours of arrest. (2011)	✓ (2016)	
2. Indigence Determination	Determinations of indigence may only consider factors allowed by statute and the local indigent defense plan. (2011)	✓ (2016)	
3. Minimum Qualifications	Attorneys on an appointment list must obtain the CLE requirements set in the local indigent defense plan. (2011)	✓ (2019)	
3. Minimum Qualifications	Appointments of counsel must be made from an approved appointment list. (2011)	✓ (2019)	
4. Prompt Appointment	In felony cases, timeliness in sample cases must meet TIDC's threshold for presuming a jurisdiction's processes ensure timely appointments. (2011)	✓ (2019)	
4. Prompt Appointment	In misdemeanor cases, timeliness in sample cases must meet TIDC's threshold for presuming a jurisdiction's processes ensure timely appointments. (2011)	✓ (2016)	
4. Prompt Appointment	Fort Bend County uses an attorney-of-the-day for misdemeanor dockets. If not used purely for administrative purposes, appointments must allow for continuity of representation and ability to meet with clients sufficiently in advance of a proceeding to allow adequate preparation for the proceedings. (2011)		✓
4. Prompt Appointment	In juvenile cases, timeliness in sample cases (when a petition is served on the juvenile) must meet the Commission's threshold for presuming a jurisdiction's processes ensure timely appointments. (2011)	✓ (2016)	
4. Prompt Appointment	In juvenile cases, timeliness in sample cases (when a detention hearing is held) must meet TIDC's threshold for presuming a jurisdiction's processes ensure timely appointments. (2011)	✓ (2019)	
4. Prompt Appointment	The parent must be informed of the juvenile's right to counsel (and to appointed counsel if indigent) prior to a detention hearing. (2011)	✓ (2016)	
6. Data Reporting	Data for the Indigent Defense Expense Report must be accurately reported. (2011)	✓ (2016)	

Program Assessment

Attorney-of-the-day in Misdemeanor Cases

In 2011, the statutory county courts used attorneys-of-the-day, who would communicate with and advise defendants at misdemeanor dockets. The attorney-of-the-day assumed two roles: court administrator and legal counsel. As a court administrator, the attorney determined which defendants needed a reset to hire counsel and informed defendants of the procedures for requesting counsel. As legal counsel, the attorney reviewed the prosecutor's file, advised the defendant, and handled pleas. Some defendants would receive legal advice from the attorney, but if the defendant did not accept the plea, the attorney would not continue with the case. Instead, a new attorney-of-the-day would be available at the next docket.

Under Article 26.04(j)(2) of the Code of Criminal Procedure, once counsel is appointed, the attorney must represent the defendant until the case is disposed, unless permitted or ordered by the court to withdraw after a finding of good cause is entered on the record. Article 1.051(a) requires that, once appointed, attorneys be given sufficient time to adequately prepare for a proceeding, and that defendants have the opportunity to consult in private with counsel sufficiently in advance of the proceeding. TIDC's initial review recommended that attorneys be given sufficient time to adequately prepare a case and continue to represent the client through case disposition. A follow-up review in 2016 made the same finding.

In the responses to both the 2011 and 2016 monitoring reports, the statutory county courts stated the attorney-of-the-day procedure would be included in the indigent defense plan. The statutory county courts also stated the attorney-of-the-day would only be used for administrative purposes, not for legal representation. In October 2017, the county courts added an addendum to the indigent defense plan, stating the attorney-of-the-day's role is "to assist with administrative functions during the dockets of the assigning court."

In 2019, TIDC observed attorneys-of-the-day in three statutory county courts. In two courts, the attorney acted as a court administrator, explaining unrepresented defendants' options for requesting or retaining counsel, or representing themselves. If defendants wanted to request counsel, the attorney-of-the-day would assist them in completing an indigence affidavit and direct them to the Indigent Defense Office. Once defendants returned from the Indigent Defense Office with appointed counsel, or, if they decided to proceed without appointed counsel, the attorney-of-the-day would assist them in resetting their cases. The processes in these two courts met the requirements of the FDA, followed the indigent defense plan, and helped defendants understand their options for representation.

In a third court, the attorney-of-the-day took on dual roles as court administrator and legal counsel. The attorney spoke to unrepresented defendants to discuss their options for representation, but did not appear to explain the procedures for requesting counsel. TIDC observed the attorney providing defendants with his business card to encourage them to retain him, but did not see him provide indigence affidavits or direct defendants to the Indigent Defense Office. The attorney also assisted a defendant in entering a guilty plea and negotiating the terms of probation. This dual role appeared to make the procedures for requesting counsel unclear to defendants. When one defendant asked, “What happens next? Do I need to hire an attorney? Can you represent me?” the attorney-of-the-day responded, “Yes to both of those.”

In response to the 2019 report, the County Court-at-Law judges confirmed that they would follow the indigent defense plan by using attorneys-of-the-day for only administrative functions.

Current Review

TIDC observed misdemeanor dockets on July 16 and July 30, 2021. For those individuals who were not represented by counsel, the bailiff asked whether they would like to request counsel. For those who indicated that they would like to request counsel, the attorney-of-the-day spoke with them and provided them with the form to fill out, ensured they filled it out completely and told them where to apply and what to do when they received an answer. For those who wanted to represent themselves, the attorney of the day advised them of the perils of doing so. Attorneys-of-the-day and court coordinators indicated that this rarely occurs and, particularly during the pandemic, pleas would not be taken on the same day because prosecutors were not present in the courtroom to make offers.

TIDC did not observe the attorney-of-the-day represent defendants in plea deals. This is an indication that the attorney-of-the-day is being used as a court administrator and not as legal counsel. The use of the attorney-of-the-day appears to match the role stated in the indigent defense plan. TIDC finds that Fort Bend County has successfully addressed this remaining recommendation.

Recommendation from the June 2019 Review

June 2019 Recommendation: If appointed to represent defendants, the attorney-of-the-day's representation must allow for adequate preparation and continuity of representation. If the attorney-of-the-day is used to represent defendants, this usage must be described in the indigent defense plan. *Successfully Addressed.*

Conclusion

TIDC finds that Fort Bend County has successfully addressed the recommendations made in our policy monitoring reports since 2011. The County does not need to respond to this report. TIDC commends Fort Bend County officials for their commitment to improving local indigent defense practices. TIDC would also like to thank officials and staff who assisted with our visits.