



Policy Monitoring Review of Comanche County's Indigent Defense System

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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 Review

The passage of Texas Fair Defense Act (FDA) in 2001 created the Texas Indigent Defense Commission (“Commission”) and mandated that the Commission monitor local jurisdictions’ compliance with the FDA.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 where needed. The Commission has established policy and fiscal monitoring rules to assist in the review process and set benchmarks for meeting these requirements.² The review process also 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 mandates specific timeframes for taking, transmitting, and ruling upon requests for counsel. Jurisdictions retain latitude to develop the standard by which they determine indigence and their procedures for appointing counsel. In odd-numbered years, counties are responsible for submitting to the Commission their local formal and informal rules related to the appointment of counsel.³ This review assesses whether Comanche County’s local practices and procedures meet the FDA requirements and the Commission’s rules.

The monitor compared the FDA’s core requirements to the county’s practices in each of the following areas:⁴

- 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: Promulgate standard attorney fee schedule and payment process.
- 7: Statutory data reporting.

¹ TEX. GOV’T CODE § 79.037(a)–(b).

² 1 TEX. ADMIN. CODE §§ 173.401 & 174.26-.28.

³ TEX. GOV’T CODE § 79.036(a)(1).

⁴ This comparison is based upon the template used in the Commission’s biennial examination of indigent defense plans. *See* TEX. INDIGENT DEF. COMM’N, 2015 BIENNIAL INDIGENT DEFENSE COUNTYWIDE PLAN INSTRUCTIONS, at 9 – 13 (Sept. 4, 2015, as amended Oct. 5, 2015), http://tidc.texas.gov/media/41822/2015-biennial-idp-submission-instructions_amended.pdf. Comanche County’s local plans are found in the Bosque, Comanche and Hamilton District Court and County Court Plan, *available at* <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=505>, and the Bosque, Comanche and Hamilton Juvenile Board Plan, *available at* <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=564>.

Timeline and Methodology

On May 24 and 25, 2017 and again on August 29, 2017, Commission staff members Joel Lieurance and Brandon Bellows (collectively, “the monitor”) visited Comanche County to conduct a policy monitoring review of the county’s indigent defense practices. For this report, the monitor interviewed the district court judge, the statutory county court at law judge, the district court administrator, and the county auditor. The monitor examined:

- 50 felony and 100 misdemeanor case files;⁵
- Magistrate warning records maintained by the justice of the peace;
- Data reported to the Office of Court Administration (OCA) as part of its monthly Judicial Council Monthly Court Activity Reports;
- The local indigent defense plan; and
- Data reported to the Commission as part of its Indigent Defense Expense Report.

The resulting report includes a program assessment (including a comparison of local practices with statutory requirements) and a summary of findings and recommendations.

Program Assessment

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS

Once arrested, an accused must be brought before a magistrate within 48 hours to receive the warnings contained in Article 15.17 of the Code of Criminal Procedure. At the Article 15.17 hearing, the arrestee must be asked if he/she would like to request counsel, and the magistrate must ensure reasonable assistance in completing financial forms necessary to request counsel. The magistrate must then transmit the request to the appointing authority within 24 hours of the request.⁶

Timeliness of Warnings

A county is presumed to be in substantial compliance with the prompt magistration requirement if at least 98% of Article 15.17 hearings sampled are conducted within 48 hours of arrest.⁷ To determine the timeliness of Article 15.17 warnings in Comanche County, the monitor calculated the number of days between arrest and the Article 15.17 hearing for 125 cases. Magistrate warnings occurred within two days of arrest for all sample cases, indicating that Comanche County has processes in place to promptly bring arrestees before a magistrate.

⁵ The sample used FY2016 cases (filed between October 2015 and September 2016).

⁶ Tex. Code Crim. Proc. art. 15.17(a).

⁷ 1 Tex. Admin. Code § 174.28. If the hearing occurred within two days of arrest, the monitor presumed warnings were timely.

Table 1: Timeliness of Article 15.17 Hearings

	Sample Size	Percent
Article 15.17 hearing occurs x days after arrest:	125	—
0 days	47	37.6%
1 day	77	61.6%
2 days	1	0.8%
Timely Hearings	125	100%
More than 2 days	0	0%

Texas Judicial Council Monthly Court Activity Reports and the Ability of Arrestees to Request Counsel

Under Articles 15.17 (a) and (e) of the Code of Criminal Procedure, the magistrate must ask the arrestee whether he/she would like to request counsel and make a record of the request. Justices of the peace and municipal court judges are required to make monthly reports to OCA of the number of Article 15.17 hearings conducted and the number of requests for counsel from these hearings.⁸ Based on these reports, Table 2 shows that about 29% of misdemeanor arrestees and about 39% of felony arrestees request counsel at the Article 15.17 hearing.

Table 2: Judicial Council Monthly Activity Reports (Sept. 2015 – Aug. 2016)

Article 15.17 Warnings and Requests for Counsel Reported by Justices of the Peace	JP1	City of Comanche	City of De Leon	Total
Misdemeanor Warnings (A & B)	302	30	9	341
Misdemeanor Requests for Counsel (A & B)	87	11	1	99
% Misdemeanor Requests	28.8%	36.7%	11.1%	29.0%
Felony Warnings	330	16	14	360
Felony Requests for Counsel	137	3	2	142
% Felony Requests	41.5%	18.8%	14.3%	39.4%

Assistance with Counsel Requests and Their Transmission to the Courts

If an arrestee requests counsel, Article 15.17(a) requires the magistrate ensure reasonable assistance in completing the paperwork necessary to request counsel. The request must then be transmitted to the appointing authority within 24 hours of it being made. Article 15.17(a) does not require the magistrate to provide assistance with financial forms, but puts responsibility on the magistrate to ensure the assistance is provided. The monitor’s review of case files revealed that several requests for counsel made at the Article 15.17 hearing either were not ruled upon or were ruled upon more than seven workdays after the request was made (see Requirement 4 later in the report).

⁸ 1 Tex. Admin. Code § 171.7 – 8.

This is likely an indication of either a gap in assistance with forms or in the transmission of forms to the courts.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1

Conduct prompt and accurate magistration proceedings.

FINDING and RECOMMENDATION 1: Article 15.17(a) requires that magistrates ensure reasonable assistance in completing forms necessary to obtain appointed. These forms must then be transmitted to the appointing authority within 24 hours. Comanche County magistrates must ensure arrestees receive this assistance and financial forms are promptly transmitted to the courts.

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. The standards adopted by Comanche County for felony and misdemeanor cases presume a person accused of a crime is indigent if:

- (1) At the time of requesting appointed counsel, the accused or accused's dependents are eligible to receive food stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, or public housing;
- (2) The accused's net household income does not exceed 125% of the Poverty Guidelines as revised annually by the United States Department of Health and Human Services and published in the Federal Register; or
- (3) The accused is currently serving a sentence in a correctional institution, is currently residing in a public mental health facility, or is subject to a proceeding in which admission or commitment to such a mental health facility is sought.

For juvenile cases, this same standard is present, except indigence is based upon the person responsible for the child's support. From the monitor's file review, the district and county courts appear to follow the standard of indigence set in the indigent defense plan.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 2

Determination of Indigence.

Requirement satisfied. No findings.

REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS.

The combined Bosque, Comanche, and Hamilton County Adult Criminal Indigent Defense Plan creates four different appointment lists: appeals; first and second degree felonies; third degree and state jail felony as well as motions to revoke probation; and misdemeanor cases. The combined juvenile plan creates three different appointment lists: CINS and delinquent conduct cases in which commitment to TJJD is not an

authorized disposition; delinquent conduct cases in which commitment to TJJD is an authorized disposition; and determinate sentencing proceedings. Among other requirements, attorneys on each list must be approved by a majority of judges trying relevant cases and must obtain at least six hours of continuing legal education (CLE) training in criminal / juvenile law each year. This minimum CLE standard meets the six hour minimum required by the Commission’s administrative rules.⁹ The monitor found the county has procedures for managing the attorney appointment lists and for ensuring that all attorneys on the lists met their annual CLE requirement as described in the indigent defense plan.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 3

Establish Minimum Attorney Qualifications.

Requirement satisfied. No findings.

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.

If adversarial judicial proceedings have been initiated, Article 1.051(c) of the Code of Criminal Procedure requires the court or its designee to appoint counsel by the end of the third working day following receipt of the request for counsel.¹⁰ To assess the timeliness of Comanche County’s appointment procedures in misdemeanor and felony cases, the monitor examined time from request for counsel until appointment or denial of indigence. Under the Commission’s monitoring rules, a county is presumed to be in compliance with the prompt appointment of counsel requirement if at least 90% of indigence determinations in the monitor’s sample are timely.¹¹

Timeliness of Appointments in Felony Cases

The monitor examined 50 felony cases filed in FY2016 (October 2015 – September 2016) to determine the timeliness of felony appointments. From this sample, the monitor found 34 requests for counsel.¹² Counsel was appointed in a timely manner in just under 60% of cases with a request for counsel.¹³ This falls below the monitor’s threshold for presuming a jurisdiction’s procedures ensure timely appointment of counsel. Ten of the sample requests either did not receive a ruling or received a ruling more than seven workdays after the request. This is an indication that the court may

⁹ 1 TEX. ADMIN. CODE §§ 174.1 –.2.

¹⁰ *Rothgery v. Gillespie County* clarified that the initiation of adversarial judicial proceedings occurs at the Article 15.17 hearing. 554 U.S. at 212 – 13.

¹¹ 1 TEX. ADMIN. CODE § 174.28.

¹² Magistrate warning forms were not typically found in case files. To determine whether the defendant requested counsel at the Article 15.17 hearing, the monitor gathered forms from magistrates, and matched 34 magistrate warning forms with the 50 case files examined.

¹³ In some cases, the monitor found an appointment of counsel but did not obtain a magistrate warning form. In these instances, the monitor considered the time of the request to be the earlier of the date marked on the affidavit of indigence or the date of the appointment.

not be receiving all requests in a timely fashion. In order to meet the 90% timeliness threshold in felony cases, a system must be developed to promptly rule upon all counsel requests made at the Article 15.17 hearing.

Table 3: Times from Request to Appointment in Felony Cases

	Number from Sample	Percent of Sample
Total records examined	50	
Requests for counsel ¹⁴	34	
Request for counsel ruled upon in 'x' workdays		
0 workdays	14	41.2%
1 workday + 24 hours allowed to transmit a request	3	8.8%
2 workdays + 24 hours allowed to transmit a request	1	2.9%
3 workdays + 24 hours allowed to transmit a request	2	5.9%
Timely Rulings on Requests	20	58.8%
Between 4 and 7 workdays	4	11.8%
More than 7 workdays	7	20.6%
No ruling on request	3	8.8%
Untimely / No Rulings on Requests	14	41.2%

Timeliness of Appointments in Misdemeanor Cases

To assess the timeliness of Comanche County’s current appointment procedures in misdemeanor cases, the monitor examined 100 misdemeanor cases filed in FY16 (October 2015 – September 2016). From this sample, the monitor found 39 requests for counsel.¹⁵ Counsel was appointed in a timely manner in approximately 15% of cases with a request for counsel.¹⁶ This falls below the monitor’s threshold for presuming a jurisdiction’s procedures ensure timely appointment of counsel. A total of 24 sample requests did not receive a determination as to whether the defendant was indigent.¹⁷ In order to meet the 90% timeliness threshold in misdemeanor cases, a system must be

¹⁴ The monitor actually found 35 requests from the sample, but one request was made by an out-of-county arrestee. The monitor currently discards these cases in measuring the timeliness of counsel appointments.

¹⁵ Magistrate warning forms were not typically found in case files. To determine whether the defendant requested counsel at the Article 15.17 hearing, the monitor gathered forms from magistrates, and matched 68 magistrate warning forms with the 100 case files examined.

¹⁶ In some cases, the monitor found an appointment of counsel but did not obtain a magistrate warning form. In these instances, the monitor considered the time of the request to be the earlier of the date marked on the affidavit of indigence or the date of the appointment.

¹⁷ The monitor found the court noted on the affidavits of indigence that it had received 16 of the 24 cases in which it did not make an indigence determination. The court appears to be receiving a majority but not all requests for counsel.

developed to promptly rule upon all counsel requests, whether made at the Article 15.17 hearing or later.

Table 4: Times to Appointment in Misdemeanor Cases

	Number from Sample	Percent of Sample
Total records examined	100	
Requests for counsel ¹⁸	39	
Request for counsel ruled upon in ‘x’ workdays		
0 workdays	3	7.7%
1 workday + 24 hours allowed to transmit a request	2	5.1%
2 workdays + 24 hours allowed to transmit a request	0	0%
3 workdays + 24 hours allowed to transmit a request	1	2.6%
Timely Rulings on Requests	6	15.4%
Between 4 and 7 workdays	2	5.1%
More than 7 workdays	7	17.9%
No ruling on request	24	61.5%
Untimely / No Rulings on Requests	33	84.6%

Waivers of Counsel in Misdemeanor Cases

Article 1.051 of the Code of Criminal Procedure addresses waivers of counsel and allows waivers of counsel that are voluntarily and intelligently made.¹⁹ Articles 1.051(f-1) and (f-2) require a waiver of counsel for the purpose of speaking with the prosecutor. Article 1.051(g) requires a waiver for the purpose of entering an uncounseled guilty plea.

Under 1.051(f-1), the prosecutor may not initiate a waiver 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. A pending request for counsel must be ruled upon before a waiver of counsel is allowed. If 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).²⁰

¹⁸ The monitor actually found 40 requests, but could not determine the date of one of the requests, and so discarded the case from the timeliness sample.

¹⁹ 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.

²⁰ 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

In Comanche County, the monitor found that defendants wishing to speak with the prosecutor signed a waiver of the right to counsel. This waiver corresponds to the Article 1.051(g) waiver language for entering a plea, and seems to serve joint purposes of (1) waiving the right to retain counsel in order to speak with the prosecutor and (2) waiving the right to counsel for purposes of entering an uncounseled plea. The county may wish to use a separate form for defendants wishing to waive the right to retain counsel in order to speak with the prosecutor. The Commission has model forms corresponding to both waivers:

- Waiver of counsel to speak with the prosecutor, available at <http://www.tidc.texas.gov/media/49941/model-waiver-to-speak-with-the-prosecutor.docx>
- Waiver of counsel to enter a plea or proceed to trial, available at <http://www.tidc.texas.gov/media/49932/Model-Waiver-to-Plea.docx>.

In 24 cases from the misdemeanor sample, the defendant made a request for counsel, but there was no documentation that the request had been denied. Later, 19 of these defendants entered uncounseled pleas.²¹ 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. 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. 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 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.*

Timeliness of Appointments in Juvenile Cases

When a juvenile is brought to a detention hearing, the court must appoint counsel within a reasonable time before the first detention hearing, unless the court finds the appointment of counsel is not feasible due to exigent circumstances.²² When the juvenile

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)

²¹ In these 19 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.

²² TEX. FAM. CODE § 54.01(b-1).

is served with a copy of the petition alleging misconduct, the court has five working days (from the service of the petition) to appoint counsel for the juvenile.²³

Very few petitions are filed against juveniles in Comanche County²⁴. To assess the timeliness of Comanche County's current appointment procedures in juvenile cases, the monitor examined four juvenile cases filed in FY2016 (October 2015 – September 2016). In three of the sample cases, petitions were served on the juvenile. Counsel was appointed for all juveniles within five working days of the petition being served on the juvenile. Procedures appear to be in place to make timely appointments of counsel when a juvenile is served with a petition.

In two cases, detention hearings were heard for juveniles. Counsel was appointed for the juvenile at the hearing in one of the two cases. In the case in which counsel was not present for the detention hearing, the juvenile was released. However, the monitor could find no record that the appointment of counsel was not feasible due to exigent circumstances.²⁵ If the appointment of counsel is not feasible for a detention hearing, the court must document these exigent circumstances.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4

Appoint Counsel Promptly.

FINDING and RECOMMENDATION 2 (felony cases): Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours allowed for transferring requests to the courts) of the request being made. The monitor's sample of attorney appointments in felony cases fell below the Commission'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 and RECOMMENDATION 3 (misdemeanor cases): Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working day (plus 24 hours allowed for transferring requests to the courts) of the request being made. The monitor's sample of attorney appointments in misdemeanor cases fell below the Commission'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

²³ TEX. FAM. CODE § 51.101(c)-(d).

²⁴ Data reported to OCA indicated that only 6 new petitions were filed against juveniles in FY2016.

²⁵ Two statutes address the appointment of counsel at detention hearings. Section 51.10(c) of the Family Code requires an immediate appointment of counsel for juveniles who were not represented by counsel at the detention hearing and in which there was a decision to continue to detain the juvenile. More recently (the 83rd Legislative Session through H.B. 1318), Section 54.01(b-1) of the Family Code now requires the appointment of counsel prior to a detention hearing unless the court finds the appointment of counsel is not feasible due to exigent circumstances. Section 54.01(b-1) of the Family Code 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.

misdemeanor cases.

FINDING and RECOMMENDATION 4 (misdemeanor cases): The county does not have processes in place to ensure misdemeanor requests for counsel are ruled upon prior to a defendant’s waiver of counsel. As required by Article 1.051(f-2), the court must rule upon requests for counsel prior to procuring a waiver of counsel for the purpose of speaking with the prosecutor.

FINDING and RECOMMENDATION 5 (juvenile cases): The county does not have processes in place to ensure appointment of counsel for all juvenile detention hearings. As required by Section 54.01(b-1) of the Family Code, the court must appoint counsel prior to a detention hearing or must find the appointment of counsel is not feasible due to exigent circumstances. If the appointment is not feasible due to exigent circumstance, Section 51.10(c) of the Family Code still applies (requiring an immediate appointment if there is a decision to detain the child).

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

Article 26.04(b)(6) of the Code of Criminal Procedure requires that procedures for requesting counsel shall, “ensure that appointments are allocated among qualified attorneys in a manner that is fair, neutral, and nondiscriminatory”. For assigned counsel systems, the monitor assesses whether a jurisdiction’s appointment system is fair, neutral, and nondiscriminatory by analyzing the distribution of appointments. If the top ten percent of recipient attorneys receive less than three times their representative share of appointed cases, the monitor presumes the appointment system is fair, neutral, and nondiscriminatory. The monitor analyzed the distribution of felony appointments, but did not analyze either misdemeanor or juvenile distributions of appointments, because very few appointments were made in those systems.

The monitor made an analysis of cases paid to attorneys receiving FY2016 non-capital felony appointments.²⁶ For this analysis, the monitor attempts to consider only those attorneys who were on the appointment list for the entire year.²⁷ Eight attorneys received FY2016 payments for felony appointments and were also on the latest appointment list. The top attorney received 33.8% of available appointments, or 2.7 times the attorney’s representative share. This distribution of appointments is within of the Commission’s threshold for presuming that a jurisdiction’s appointment system is fair, neutral, and non-discriminatory (maximum of 3.0 times the representative share obtained by the top ten percent of appointed attorneys).²⁸

²⁶ This data was submitted by the Comanche County Auditor for the 2016 Indigent Defense Expense Report.

²⁷ Comanche County was able to provide the latest attorney appointment list (updated on March 29, 2017), but did not keep archived versions of this list. For the distribution analysis, the monitor excluded all attorneys who were not on this list.

²⁸ Title I § 174.28(c)(5)(D) of the Texas Administrative Code states:

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 5

Attorney Selection Process

Requirement satisfied. No findings.

REQUIREMENT 6: PROMULGATE STANDARD ATTORNEY FEE SCHEDULE AND PAYMENT PROCESS.

Under Article 26.05(c), in order to receive payment for an indigent case, a defense attorney must submit a voucher to the judge presiding over the case. The voucher documents the services rendered and lists a requested amount of payment. The judge may sign off on the voucher and approve payment or may approve a different amount. Under Article 26.05(c) of the Code of Criminal Procedure, the judge must make written findings for disapproving a requested payment amount. No payment may be made to the attorney until the judge signs the voucher approving the payment.

The monitor interviewed the auditor's office, and the auditor's office appeared to have procedures for making proper indigent defense payments. Based on an examination of fee vouchers and interviews, payments are not made without a judge's signature. After a payment is made, cases are tracked so that multiple payments to the same case number do not result in the recording of multiple cases paid, and vouchers with multiple cases listed do not result in the recording of only a single case paid.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 6

Promulgate standard attorney fee schedule and payment process.

Requirement satisfied. No findings.

REQUIREMENT 7: STATUTORY DATA REPORTING.

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

*For assigned counsel and managed assigned counsel systems, the number of appointments in the policy monitor's sample per attorney at each level (felony, misdemeanor, juvenile, and appeals) during the period of review and the percentage share of appointments represented by the top 10% of attorneys accepting appointments. A county is presumed to be in substantial compliance with the fair, neutral, and non-discriminatory attorney appointment system requirement if, in each level of proceedings (felony, misdemeanor, and juvenile cases), the percentage of appointments received by the top 10% of recipient attorneys **does not exceed three times their respective share**. If the county can track attorney list changes, the monitor will only examine the distribution of cases for attorneys that were on the appointment list for the entire year. The top 10% of recipient attorneys is the whole attorney portion of the appointment list that is closest to 10% of the total list.*

FY2014, financial data reports were to include attorney-level information.²⁹ According to the Indigent Defense Expense Report (IDER) submitted by the auditor to the Commission for FY2016, Comanche County made indigent defense payments to 13 attorneys for representation in 120 non-capital felony cases, 14 misdemeanor cases, 10 juvenile cases, and 3 appeals cases (felony, misdemeanor, and juvenile combined). The auditor's office completed the annual indigent defense expense report in a timely manner.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 7

Statutory Data Reporting.

Requirement satisfied. No findings.

Conclusion

The monitor appreciated the professionalism and assistance provided by Comanche County officials and staff. Comanche County officials appear willing to make necessary changes to improve the indigent defense system. As mandated by statute, we will monitor the county's transition and adjustments to the Commission's findings.

Summary of Findings and Recommendations

The county must respond in writing as to how it will address each of these findings.

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE MAGISTRATION PROCEEDINGS.

FINDING and RECOMMENDATION 1: Article 15.17(a) requires that magistrates ensure reasonable assistance in completing forms necessary to obtain appointed. These forms must then be transmitted to the appointing authority within 24 hours. Comanche County magistrates must ensure arrestees receive this assistance and financial forms are promptly transmitted to the courts.

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

No findings. County practices and procedures comport with statutory requirements.

REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS.

No findings. County practices and procedures comport with statutory requirements.

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.

²⁹ TEX. GOV'T CODE § 79.036(a-1).

FINDING and RECOMMENDATION 2 (felony cases): Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours allowed for transferring requests to the courts) of the request being made. The monitor’s sample of attorney appointments in felony cases fell below the Commission’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 and RECOMMENDATION 3 (misdemeanor cases): Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working day (plus 24 hours allowed for transferring requests to the courts) of the request being made. The monitor’s sample of attorney appointments in misdemeanor cases fell below the Commission’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 and RECOMMENDATION 4 (misdemeanor cases): The county does not have processes in place to ensure misdemeanor requests for counsel are ruled upon prior to a defendant’s waiver of counsel. As required by Article 1.051(f-2), the court must rule upon requests for counsel prior to procuring a waiver of counsel for the purpose of speaking with the prosecutor.

FINDING and RECOMMENDATION 5 (juvenile cases): The county does not have processes in place to ensure appointment of counsel for all juvenile detention hearings. As required by Section 54.01(b-1) of the Family Code, the court must appoint counsel prior to a detention hearing or must find the appointment of counsel is not feasible due to exigent circumstances. If the appointment is not feasible due to exigent circumstance, Section 51.10(c) of the Family Code still applies (requiring an immediate appointment if there is a decision to detain the child).

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

No findings. County practices and procedures comport with statutory requirements.

REQUIREMENT 6: PROMULGATE STANDARD ATTORNEY FEE SCHEDULE AND PAYMENT PROCESS.

No findings. County practices and procedures comport with statutory requirements.

REQUIREMENT 7: STATUTORY DATA REPORTING.

No findings. County practices and procedures comport with statutory requirements.

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.³⁰
 - 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.³¹
- The magistrate must inform and explain the right to counsel and the right to appointed counsel to the accused.³²
- The magistrate must ensure that reasonable assistance in completing forms necessary to request counsel is provided to the accused.³³

REQUIREMENT NOT SATISFIED: This box is not checked because several requests for counsel were not ruled upon. The root cause may be a lack of assistance with forms.
- 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.³⁴
- 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 250,000.³⁵

NOT APPLICABLE: The magistrate is not authorized 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.³⁶

REQUIREMENT NOT SATISFIED: This box is not checked because several requests for counsel were not ruled upon. The root cause may be untimely transmissions of requests to the courts.

³⁰ TEX. CODE CRIM. PROC. art. 14.06(a).

³¹ TEX. CODE CRIM. PROC. art. 17.033.

³² TEX. CODE CRIM. PROC. art. 15.17(a).

³³ *Id.*

³⁴ TEX. CODE CRIM. PROC. art. 15.17(e).

³⁵ *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).

³⁶ 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.³⁷
- ☒ State the financial standard(s) to determine whether a defendant is indigent.³⁸
- ☒ List factors the court will consider when determining whether a defendant is indigent.³⁹

REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS.

- ☒ Establish objective qualification standards for attorneys to be on an appointment list.⁴⁰
 - 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.⁴¹
 - 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 30.⁴²
- ☒ Attorneys must be approved by a majority of the judges who established the appointment list to be placed on the appointment list.⁴³

³⁷ TEX. CODE CRIM. PROC. art. 26.04(l)–(r).

³⁸ TEX. CODE CRIM. PROC. art. 26.04(l).

³⁹ TEX. CODE CRIM. PROC. art. 26.04(m).

⁴⁰ TEX. CODE CRIM. PROC. art. 26.04(d).

⁴¹ 1 TEX. ADMIN. CODE § 174.1–4.

⁴² TEX. CODE CRIM. PROC. art. 26.04(j)(4).

⁴³ TEX. CODE CRIM. PROC. art. 26.04(d).

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 250,000.⁴⁴

REQUIREMENT NOT SATISFIED: This box is not checked because the percent of timely appointments did not meet the Commission'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.⁴⁵

REQUIREMENT NOT SATISFIED: This box is not checked because the percent of timely appointments did not meet the Commission'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.⁴⁶

REQUIREMENT NOT SATISFIED: This box is not checked because several misdemeanor requests for counsel were not ruled upon prior to the defendant signing a waiver of counsel in order to speak with the prosecutor.

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.⁴⁷

REQUIREMENT NOT SATISFIED: This box is not checked because counsel was not appointed for a detention hearing (and there was no documentation of exigent circumstances)

- 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.⁴⁸

⁴⁴ TEX. CODE CRIM. PROC. art. 1.051(c).

⁴⁵ 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.”).

⁴⁶ TEX. CODE CRIM. PROC. art. 1.051(f-2).

⁴⁷ Tex. Fam. Code § 54.01(b-1). Tex. Fam. Code § 51.10(c).

⁴⁸ Tex. Fam. Code § 51.101(d).

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.⁴⁹
- 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.⁵⁰

NOT APPLICABLE: Comanche County does not currently have a public defender.

- Alternative appointment method:⁵¹
 - 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: Comanche County does not use an alternative appointment method.

REQUIREMENT 6: PROMULGATE STANDARD ATTORNEY FEE SCHEDULE AND PAYMENT PROCESS.

- Payments shall be in accordance with a schedule of fees adopted by the judges.⁵²
- No payment shall be made until the judge approves payment after submission of the attorney fee voucher.⁵³
- If the judge disapproves the requested amount of payment, the judge shall make written findings stating the amount that the judge approves and each reason for approving an amount different from the requested amount.⁵⁴
- Expenses incurred without prior court approval shall be reimbursed if the expenses are reasonably necessary and reasonably incurred.⁵⁵

⁴⁹ TEX. CODE CRIM. PROC. art. 26.04(a).

⁵⁰ TEX. CODE CRIM. PROC. art. 26.044.

⁵¹ TEX. CODE CRIM. PROC. art. 26.04(g)–(h).

⁵² TEX. CODE CRIM. PROC. art. 26.05(b).

⁵³ TEX. CODE CRIM. PROC. art. 26.05(c).

⁵⁴ *Id.*

⁵⁵ TEX. CODE CRIM. PROC. arts. 26.05(d), 26.052(h).

REQUIREMENT 7: 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.