



**TEXAS INDIGENT DEFENSE COMMISSION**

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Executive Director:  
James D. Bethke

November 5, 2012

The Honorable Diana J. Bautista  
Constitutional County Court Judge  
Atascosa County Courthouse  
1 Courthouse Circle Drive, Suite 101  
Jourdanton, TX 78026

Re: Atascosa County Fiscal Monitoring

Dear Judge Bautista:

A monitoring visit of your county was conducted on July 9-10, 2012. The financial aspects of the county were monitored to adequately review fiscal records and documentation to ensure compliance with the Texas Indigent Defense Commission grant.

A copy of the final monitoring report including your county response is enclosed. The Texas Indigent Defense Commission would like to thank county officials and employees for their assistance and courtesy during the course of the monitoring visit. We greatly appreciated the time and cooperation of Atascosa County's staff.

If you have any questions or need further clarification, please do not hesitate to contact me at 512.936.7561.

Sincerely,

Carol Conner  
Fiscal Monitor

cc: The Honorable Donna S. Rayes, Local Administrative District Court  
The Honorable Stella Saxon, Chairman of the Juvenile Board  
Mr. Ray Samson, County Auditor  
Mr. James D. Bethke, Executive Director, Texas Indigent Defense Commission  
Mr. Wesley Shackelford, Deputy Director, Texas Indigent Defense Commission  
Mr. Bryan Wilson, Grants Administrator, Texas Indigent Defense Commission

**TEXAS INDIGENT DEFENSE COMMISSION**

**Fiscal Monitoring of Indigent Defense Expenses**

**Atascosa County, Texas**

**on**

**July 9-10, 2012**

**Final**

**November 5, 2012**

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## I. INTRODUCTION

Atascosa County on-site fiscal monitoring visit was conducted on July 9-10, 2012. The fiscal monitor reviewed financial records to determine whether grant funds were spent in accordance with the terms and conditions of the Texas Indigent Defense Commission grant. Edwin Colfax, project manager, accompanied the fiscal monitor on July 10, 2012.

Atascosa County is located south of San Antonio on Interstate Highway 37 in the Rio Grande Plain region of south central Texas. The county's estimated population is 44,911 as of the 2010 census. Jourdanton, the county seat, is located on state highways 16 and 97 in central Atascosa County thirty-three miles south of San Antonio.

Atascosa County's court system is comprised of a county court and two district courts (81st and 218th District Courts) with criminal jurisdiction. In 2011, the county received \$28,149 in formula grant funds. In addition, the county received \$27,206 in equalization disbursement for the increased cost of indigent defense services.

<b>Atascosa County Indigent Defense Expenditures</b>			
<b>Expenditures</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>
Population Estimate	44,189	44,911	44,911
Juvenile Attorney Fees	\$43,100	\$40,700	\$32,000
Capital Murder	\$28,637	\$28,668	\$9,264
Adult Felony Non-Capital	\$159,529	\$166,044	\$163,977
Adult Misdemeanor Attorney Fees	\$97,400	\$119,181	\$108,505
Adult Felony Appeals	0	0	0
<b>Total Attorney Fees</b>	<b>\$328,666</b>	<b>\$354,593</b>	<b>\$313,746</b>
Investigation Expenses	\$4,374	\$3,035	\$2,931
Expert Witness Expenses	\$21,078	\$7,700	\$3,150
Other Direct Litigation Expenses	\$2,208	\$1,515	\$8,563
<b>Total Indigent Defense Expenses</b>	<b>\$356,327</b>	<b>\$366,843</b>	<b>\$328,390</b>
Commission Formula Grant Disbursement	\$24,205	\$24,324	\$28,149
Commission Equalization Disbursement	\$30,108	\$29,287	\$27,206
<b>Total Assigned Cases</b>	<b>435</b>	<b>687</b>	<b>629</b>

Source: Texas Indigent Defense Commission records

## **Commission Background**

In January 2002, the 77<sup>th</sup> Texas Legislature established the Texas Task Force on Indigent Defense. In May 2011, the 82<sup>nd</sup> Texas Legislature changed the name of the Texas Task Force on Indigent Defense to the Texas Indigent Defense Commission (Commission) effective September 1, 2011. The Commission remains a permanent standing committee of the Texas Judicial Council and administratively attached to the Office of Court Administration (OCA). The 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. The purpose of the Commission is to promote justice and fairness to all indigent persons accused of criminal conduct, including juvenile respondents, as provided by the laws and constitutions of the United States and Texas. As a result of the legislative requirement, the promulgated Section 173.401(a), Texas Administrative Code, which provides, “the Commission or its designees will monitor the activities of grantees as necessary to ensure that grant funds are used for authorized purposes in compliance with laws, regulations, and the provisions of the grant.”

## **Objectives**

The objectives of this review were to:

- determine whether grant funds were used for authorized purposes in compliance with laws, regulations, and the provisions of the grant.
- validate policies and procedures relating to indigent defense services.
- provide recommendations pertaining to operational efficiency.
- assist with any questions or concerns on the indigent defense program requirements.

## **Scope**

The county’s indigent defense expenditures were monitored to ensure compliance with applicable laws, regulations, and the provisions of the grant during fiscal year 2011. The fiscal monitor reviewed records located in the Atascosa County Courthouse.

## **Methodology**

To accomplish the objectives, the fiscal monitor met with county judge, district court judge, county auditor, first assistant auditor, and district court coordinator. The fiscal monitor reviewed:

- random samples of paid attorney fees, expert witnesses, licensed investigations, and other direct litigation for verification of expenses;
- general ledger transactions and invoices;
- indigent defense expenditure report and attorney fee schedule;
- public appointment list, attorney applications, and attorneys’ continuing legal education training; and
- county’s local indigent defense plan.

The expenditure period of October 1, 2010 to September 30, 2011 (FY 2011) was reviewed during the fiscal monitoring visit.

<b>Atascosa County's Courts</b>			
<b>Courts</b>	<b>Courts</b>		<b>Sampled</b>
	<b>Total</b>	<b>Reviewed</b>	
County Court	1	1	100%
District Court	2	2	100%

Percent Sampled: courts reviewed / courts total

### **Summary of Findings**

- The county did not report indigent defense expenditures and case information associated with those expenditures in the manner prescribed by Section 79.036, Government Code.
- The attorney applications were not documented for 5 of the 50 court appointed attorneys on the public appointment list.
- The continuing legal education requirements were not documented for 17 of the 50 court appointed attorneys on the public appointment list.

## **II. INDIGENT DEFENSE GRANT**

### **A. Formula Grant**

The county submitted the FY 2011 indigent defense on-line grant application to assist in the provisions of the Fair Defense Act. Atascosa County met the formula grant eligibility requirements.

### **B. Indigent Defense Expenditure Report (IDER)**

The county did not report indigent defense expenditures and case information associated with those expenditures on the indigent defense expenditure report (IDER) in the form and manner prescribed by Section 79.036(e), Texas Government Code. Section 79.036 requires that the county annually report case and expense data to the Commission itemized by court.

In reviewing attorney fee vouchers, the monitor found that vouchers did not consistently identify the specific court for each case and associated expenses. For example, several attorney fee vouchers indicated case disposition in both the 81st District Court and 218th District Court, but were signed by the 81st District Court Judge. The attorney fee vouchers captured the defendant name, case/cause numbers, offense, amount paid, attorney signature, and presiding judge signature.

A Commission staff member called the auditor's office during a desk review of the indigent defense expenditure report (IDER) regarding the cases reported in each court. The 81st and 218th District Courts' total number of cases and associated expenses were predominantly reported under the 81st District Court on the IDER. The first assistant auditor stated the FY 2011 District Courts' indigent defense expenditures were originally reported on the 81st District Court on the IDER. The first assistant auditor also stated that she contacted the court coordinator and was informed that attorney fee vouchers with cause numbers with odd numbers are reported under 81st District Court and even numbers are

reported under 218th District Court. Furthermore, the first assistant auditor stated that the county immediately revised indigent defense procedures to correctly attribute cases to the court in which the cases were assigned rather than placing all under the 81st District Court. The county began correcting the issue based upon the desk review but did not accurately capture all of the court assignments.

### **Recommendation**

The Commission recommends that county develop and implement procedures to record cases disposed in each district court and associated expenses on the indigent defense expenditure report.

Additionally, the county is statutorily required to accurately report the amount paid, cases disposed associated with the amount paid for each adult felony court in accordance with Section 79.036(e), Texas Government Code. Please refer to the Procedure Manual for the Indigent Defense Expenditure Report FY 2012, page 6 at:  
[http://www.txcourts.gov/tidc/pdf/FY2012\\_IDER\\_Manual.pdf](http://www.txcourts.gov/tidc/pdf/FY2012_IDER_Manual.pdf)

### **Atascosa County Action Plan**

The Auditor has identified the reason for the inaccurate reporting by court number. The reason that cases were not being accurately reported by court numbers is that the judges of the 81st and 218th district courts have concurrent jurisdiction. Cases with odd numbered cause numbers are filed with the 81st district court and cases with even numbered cases numbers are filed in the 218th district court. Each judge may act upon any cases without regard to whether it is an even numbered or odd numbered cause.

Therefore, each judge signs the orders approving payment of attorney's fees for representation of indigent defendants without regard as to whether it shows to be a case in the 81st district court or the 218th district court. The Auditor's Office was reporting the cases for which an order was signed by Judge Rayes, who is the judge of the 81st District Court as an order of the 81st District court regardless of whether it was an even numbered case, or an odd numbered case. Likewise, the Auditor's office was reporting all orders signed by Judge Saxon, who is the judge of the 218th District Court, as an order of the 218th District Court, regardless of whether it was an odd numbered case, or an even numbered case.

This office reviewed and implemented procedures to record criminal cases for each district court and their associated expenses on the indigent defense expenditure report. If a case has an odd number, it will be reported as an 81st District Court order. If a case has an even cause number, it will be reported as a 218th District Court order. This is to be regardless of which judge signed the order approving attorney fee vouchers. This change in procedure will result in compliance with Section 79.036(e) of the Texas Government Code.

Note: On October 22, 2012, the Commission staff held a conference call with Atascosa County stakeholders to discuss accurate reporting of indigent defense expenses and case information. Atascosa County stakeholders included Judge Donna Rayes, Judge Stella

Saxon, Mr. Ray Samson, and Ms. De'Ann Belicek. The Commission stakeholders included Mr. Wesley Shackelford, Mr. Bryan Wilson, and Ms. Carol Conner.

**Atascosa County Action Plan (Amended Response on 10-22-12)**

After conference call with the Indigent Defense Commission, it is now realized that the Commission desires that each voucher be attributed to the court of the judge who signs the voucher. The Auditor is to pay based upon the voucher itself. This is implemented immediately.

**Date Implemented:** October 22, 2012.

**Contact Person:** Hon. Donna S. Rayes and Hon. Stella Saxon (830) 769-3750

### **III. ACCOUNTING OPERATIONS**

#### **Accounting Procedures**

A copy of the accounting procedures relating to indigent defense expenditures was provided to the fiscal monitor. The first assistant auditor stated that the indigent defense accounting procedures were written prior to the fiscal monitor visit.

#### **Monitor Comment**

Written procedures provide instruction and guidance; uniformity and completeness; and ensure correct and secure processing of fiscal information. The Uniform Grants Management Standards (UGMS) requires grantees financial systems to provide an "effective control and accountability of funds, property and assets..." (para 20, page 68).

### **IV. INDIGENT DEFENSE PAID VOUCHERS**

#### **A. Summary of Attorney Fee Payments**

##### **1. Fee Schedule**

The attorney fee vouchers reviewed were paid in accordance with the fee schedule adopted by the formal action of the judges hearing criminal cases.

##### **2. Reviewed Assigned Attorney Fee Vouchers**

A total of 175 paid attorney fee vouchers were reviewed for the period of October 1, 2010 to September 30, 2011. In FY 2011, the attorney fee annual payments ranged from \$300 to \$27,500 per attorney with an average of \$6,083 and a median of \$3,800.



<b>Atascosa County Courts</b>				
<b>20 Different Paid Attorneys</b>				
<b>Courts</b>	<b>Total</b>			
	<b>Paid Vouchers</b>	<b>Attorney Fee Vouchers</b>		
		<b>Fees</b>	<b>Reviewed</b>	<b>Reviewed Value</b>
County Court (includes juvenile)	373	\$140,505	100	\$45,085
81 <sup>st</sup> District Court	155	\$97,346	50	\$23,657
218 <sup>th</sup> District Court	101	\$75,895	25	\$11,316
<b>Total</b>	<b>629</b>	<b>\$313,746</b>	<b>175</b>	<b>\$80,058</b>

<b>Court Expenses</b>						
<b>Court</b>	<b>Juvenile</b>	<b>Adult Misdemeanor</b>	<b>Capital Murder</b>	<b>Adult Felony</b>	<b>Felony Appeals</b>	<b>Total</b>
County Court	\$32,000	\$108,505				\$140,505
81 <sup>st</sup> District Court			\$9,263.75	\$88,082.72		\$97,346.47
218 <sup>th</sup> District Court				\$75,894.57		\$75,894.57
<b>Total</b>						<b>\$313,746.04</b>

Note: As reported to the Commission on the FY 2011 Indigent Defense Expenditure Report

### 3. Summary of Investigations, Experts, and Other Direct Litigation Expenses

<b>FY 2011 Licensed Investigations, Experts, and Other Direct Litigation Expenditures</b>				
<b>Expenditures</b>	<b>Total Vouchers</b>			
	<b>Reported</b>		<b>Reviewed</b>	<b>Reviewed Value</b>
	<b>Paid</b>	<b>FY 2011</b>		
Investigation	5	\$2,931	5	\$2,931
Expert Witness	6	\$3,150	6	\$3,150
Other Direct Litigation	4	\$8,563	4	\$8,563

#### Monitor Comment

The licensed investigations, expert witnesses, and other direct litigation expenses were classified the appropriate category of services. The correct classification of expenses is the precursor to accurate reporting under the Fair Defense Act.

#### B. Public Appointment List

##### 1. Approval of Qualified Attorneys by the Judges

The documents on file indicated that the judges approved the attorneys on the public appointment list in accordance with Article 26.04(d)-(e), Code of Criminal Procedure.

**2. Applied for Public Appointment List**

The county did not maintain applications or support documents for 5 of the 50 court appointed attorneys on the public appointment list. Under Texas Code of Criminal Procedure, Art. 26.04(d), the court appointed attorneys are required to apply to be included on the list; meet the objective qualifications specified by the judges; and meet applicable qualifications specified by the Commission; and are approved by a majority of the judges. The county must maintain documents of the attorney selection and appointment process and the auditor can determine proper payments.

Courts	Number of Attorneys			
	public appointment list	Attorney Applications on file		
		reviewed	Yes	No
County Court and District Court	50	50	45	5

**Recommendation**

The Commission recommends that the county implement a process that only attorneys who apply and meet the judges' qualifications are on the public appointment. The county must maintain attorney application or support documents for all court appointed attorneys on the public appointment list as indicated in the county's local indigent defense plan.

Furthermore, the attorney application or support documents would substantiate that all court appointed attorneys were selected and approved to receive payments.

**Atascosa County Action Plan**

All of the attorney applications have been reviewed. Any attorneys not meeting the qualifications have been removed. A procedure of review of qualifications has been implemented.

**Date Implemented:** Aug. 6, 2012

**Contact Person:** District Court Judge's Office (830) 769-3750

**3. Continuing Legal Education (CLE) Requirements**

The continuing legal education hours were not documented for 17 of the 50 attorneys on the public appointment list. According to the court coordinator, with the increasing number of court appointed attorneys from San Antonio and high volume of court administration work as well as indigent defense duties, it is difficult to maintain all the CLE requirements for each attorney.

As stated in Title I, Sections 174.1 and 174.2 of the Texas Administrative Code require that attorneys appointed in criminal and juvenile cases receive at least six continuing legal education (CLE) hours in criminal / juvenile law annually. The

county's local indigent defense plans exceed the Commission's administrative rules and require attorneys to receive at least twelve hours annually.

Courts	Number of Attorneys			
	public appointment list	reviewed	criminal/juvenile CLE documents	
			met minimum hours	
			Yes	No
County Court and District Court	50	50	33	17

Without the CLE documents for court appointed attorneys, the county auditor may not make proper payments consistent with Sections 174.1 and 174.2 of the Texas Administrative Code. In FY2011, the county made payments totaling \$85,608 to 17 court appointed attorneys without documented CLE hours. Attorneys accepting appointments are required to obtain 12 hours of criminal and/or juvenile law during each 12-month reporting period as indicated in Atascosa County's local indigent defense plan.

**Recommendation**

The Commission recommends that the county develop a system to document the continuing legal education hours for all court appointed attorneys on the public appointment list who meet the county's qualification.

**Note:** Failure to maintain adequate documents upon request may result in disallowed costs of the activity or action that is not in compliance and the Commission may seek a return of all or part of the cost as specified in Section 173.307, Chapter 173, Texas Administrative Code.

**Atascosa County Action Plan**

The audit was for counties of Atascosa and Wilson. The files audited included all five of our counties, so some that non-compliant were from counties that were not being audited. However all files, including those from the other three counties have been reviewed. Two of the attorneys cited as non-compliant were actually current on their CLE's when the files were audited. A procedure for monitoring the continuing legal education of the attorneys has been implemented. Letters will be sent each January requiring a response by a certain date to remain on the list. Any attorney not complying will be removed from the list.

**Date Implemented:** Aug. 6, 2012

**Contact Person:** District Court Judge's Office (830) 769-3750

## V. SUMMARY

### **General Comments**

The Commission wishes to express its appreciation to local county officials and employees of Atascosa County for the time and courtesy extended during the fiscal monitoring visit. In particular, my gratitude extends to Judge Diana J. Bautista, Constitutional County Court; Judge Donna S. Rayes, Local Administrative District Court; Judge Stella Saxon, Chairman of the Juvenile Board; Mr. Ray Samson, County Auditor; Ms. Cyndee Galindo, First Assistant Auditor; and Ms. De'Ann Belicek, District Court Coordinator, for accommodating the fiscal monitor activities. These activities included providing workspace, allocating employee time, and exercising flexibility in meeting the schedule of the fiscal monitor. Thank you for your time and cooperation during the monitoring visit.

### **Atascosa County Response**

The 81st and 218th District Courts and staff are appreciative of the assistance provided to us by the Indigent Defense Commission. The monitoring visit was helpful in bringing to our attention some improvements needed to our system. We are especially appreciative of the recognition by Commission staff that our system of five counties with two judges poses certain challenges that require a specialized delivery of Indigent Defense Services. We look forward to a continued good relationship.

**Contact Person:** Donna S. Rayes, Administrative Judge

## Appendix A

### **Texas Government Code, Section 79.036. Indigent Defense Information**

- (a) In each county, not later than November 1 of each odd-numbered year and in the form and manner prescribed by the commission, the following information shall be prepared and provided to the commission:
- (1) a copy of all formal and informal rules and forms that describe the procedures used in the county to provide indigent defendants with counsel in accordance with the Code of Criminal Procedure, including the schedule of fees required under Article 26.05 of that code;
  - (2) any revisions to rules or forms previously submitted under this section; or
  - (3) verification that rules and forms previously submitted under this section still remain in effect.
- (b) Except as provided by Subsection (c):
- (1) the local administrative district judge in each county, or the person designated by the judge, shall perform the action required by Subsection (a) with respect to all rules and forms adopted by the judges of the district courts trying felony cases in the county; and
  - (2) the local administrative statutory county court judge in each county, or the person designated by the judge, shall perform the action required by Subsection (a) with respect to all rules and forms adopted by the judges of the county courts and statutory county courts trying misdemeanor cases in the county.
- (c) If the judges of two or more levels of courts described by Subsection (b) adopt the same formal and informal rules and forms, the local administrative judge serving the courts having jurisdiction over offenses with the highest classification of punishment, or the person designated by the judge, shall perform the action required by Subsection (a).
- (d) The chair of the juvenile board in each county, or the person designated by the chair, shall perform the action required by Subsection (a) with respect to all rules and forms adopted by the juvenile board.
- (e) In each county, the county auditor, or the person designated by the commissioners court if the county does not have a county auditor, shall prepare and send to the commission in the form and manner prescribed by the commission and on a monthly, quarterly, or annual basis, with respect to legal services provided in the county to indigent defendants during each fiscal year, information showing the total amount expended by the county to provide indigent defense services and an analysis of the amount expended by the county:
- (1) in each district, county, statutory county, and appellate court;
  - (2) in cases for which a private attorney is appointed for an indigent defendant;
  - (3) in cases for which a public defender is appointed for an indigent defendant;
  - (4) in cases for which counsel is appointed for an indigent juvenile under Section 51.10(f), Family Code; and
  - (5) for investigation expenses, expert witness expenses, or other litigation expenses.
- (f) As a duty of office, each district and county clerk shall cooperate with the county auditor or the person designated by the commissioners court and the commissioners court in retrieving information required to be sent to the commission under this section.

This section replaced Sec. 71.0351 *effective Sept. 1, 2011 (HB 1754, §20)*.

## Appendix B

### **Texas Government Code, Section 79.037. Technical Support; Grants**

- (a) The commission shall:
- (1) provide technical support to:
    - (A) assist counties in improving their indigent defense systems; and
    - (B) promote compliance by counties with the requirements of state law relating to indigent defense;
  - (2) to assist counties in providing indigent defense services in the county, distribute in the form of grants any funds appropriated for the purposes of this section; and
  - (3) monitor each county that receives a grant and enforce compliance by the county with the conditions of the grant, including enforcement by:
    - (A) withdrawing grant funds; or
    - (B) requiring reimbursement of grant funds by the county.
- (b) The commission shall distribute funds as required by Subsection (a)(2) based on a county's compliance with standards adopted by the board and the county's demonstrated commitment to compliance with the requirements of state law relating to indigent defense.
- (c) The board shall adopt policies to ensure that funds under Subsection (a)(2) are allocated and distributed to counties in a fair manner.
- (d) A county may not reduce the amount of funds provided for indigent defense services in the county because of funds provided by the commission under this section.

*Addition of this Section effective Sept. 1, 2011 (HB 1754, §20).*

## Appendix C

### Uniform Grant Management Standards (As adopted June 2004)

paragraph 20, page 68. Standards for Financial Management Systems *[This section does not apply to procurement contracts.]*

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

- (1) Financial reporting. Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.
- (2) Accounting records. Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.
- (3) Internal control. Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.
- (4) Budget control. Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.
- (5) Allowable cost. Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability, and allocability of costs.
- (6) Source documentation. Accounting records must be supported by such source documentation as canceled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

## Appendix D

### Art. 26.04. Procedures for Appointing Counsel

(a) The judges of the county courts, statutory county courts, and district courts trying criminal cases in each county, by local rule, shall adopt and publish written countywide procedures for timely and fairly appointing counsel for an indigent defendant in the county arrested for charged with, or taking an appeal from a conviction of a misdemeanor punishable by confinement or a felony. The procedures must be consistent with this article and Articles 1.051, 15.17, 26.05, and 26.052. A court shall appoint an attorney from a public appointment list using a system of rotation, unless the court appoints an attorney under Subsection (f), (f-1), (h), or (i). The court shall appoint attorneys 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. An attorney who is not appointed in the order in which the attorney's name appears on the list shall remain next in order on the list.

(b) Procedures adopted under Subsection (a) shall:

(1) authorize only the judges of the county courts, statutory county courts, and district courts trying criminal cases in the county, or the judges' designee, to appoint counsel for indigent defendants in the county;

(2) apply to each appointment of counsel made by a judge or the judges' designee in the county;

(3) ensure that each indigent defendant in the county who is charged with a misdemeanor punishable by confinement or with a felony and who appears in court without counsel has an opportunity to confer with appointed counsel before the commencement of judicial proceedings;

(4) require appointments for defendants in capital cases in which the death penalty is sought to comply with any applicable requirements under Articles 11.071 and 26.052;

(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; and

(6) ensure that appointments are allocated among qualified attorneys in a manner that is fair, neutral, and nondiscriminatory.

(c) Whenever a court or the courts' designee authorized under Subsection (b) to appoint counsel for indigent defendants in the county determines for purposes of a criminal proceeding that a defendant charged with or appealing a conviction of a felony or a misdemeanor punishable by confinement is indigent or that the interests of justice require representation of a defendant in the proceeding, the court or the courts' designee shall appoint one or more practicing attorneys to represent the defendant in accordance with this subsection and the procedures adopted under Subsection (a). If the court or the courts' designee determines that the defendant does not speak and understand the English language or that the defendant is deaf, the court or the courts' designee shall make an effort to appoint an attorney who is capable of communicating in a language understood by the defendant.

(d) A public appointment list from which an attorney is appointed as required by Subsection (a) shall contain the names of qualified attorneys, each of whom:

(1) applies to be included on the list;

(2) meets the objective qualifications specified by the judges under Subsection (e);



**Art. 26.04. Procedures for Appointing Counsel (Continued)**

- (3) meets any applicable qualifications specified by the Texas Indigent Defense Commission; and
- (4) is approved by a majority of the judges who established the appointment list under Subsection (e).
- (e) In a county in which a court is required under Subsection (a) to appoint an attorney from a public appointment list:
- (1) the judges of the county courts and statutory county courts trying misdemeanor cases in the county, by formal action:
    - (A) shall:
      - (i) establish a public appointment list of attorneys qualified to provide representation in the county in misdemeanor cases punishable by confinement; and
      - (ii) specify the objective qualifications necessary for an attorney to be included on the list; and
    - (B) may establish, if determined by the judges to be appropriate, more than one appointment list graduated according to the degree of seriousness of the offense, the attorneys' qualifications, and whether representation will be provided in trial court proceedings, appellate proceedings, or both; and
  - (2) the judges of the district courts trying felony cases in the county, by formal action:
    - (A) shall:
      - (i) establish a public appointment list of attorneys qualified to provide representation in felony cases in the county; and
      - (ii) specify the objective qualifications necessary for an attorney to be included on the list; and
    - (B) may establish, if determined by the judges to be appropriate, more than one appointment list graduated according to the degree of seriousness of the offense, the attorneys' qualifications, and whether representation will be provided in trial court proceedings, appellate proceedings, or both.
- (f) In a county in which a public defender's office is created or designated under Article 26.044, the court or the courts' designee may appoint that office to represent the defendant in accordance with guidelines established for the office.
- (f-1) In a county in which a managed assigned counsel program is operated in accordance with Article 26.047, the managed assigned counsel program may appoint counsel to represent the defendant in accordance with the guidelines established for the program.
- (g) A countywide alternative program for appointing counsel for indigent defendants in criminal cases is established by a formal action in which two-thirds of the judges of the courts designated under this subsection vote to establish the alternative program. An alternative program for appointing counsel in misdemeanor and felony cases may be established in the manner provided by this subsection by the judges of the county courts, statutory county courts, and district courts trying criminal cases in the county. An alternative program for appointing counsel in misdemeanor cases may be established in the manner provided by this subsection by the judges of the county courts and statutory county courts trying criminal cases in the county. An alternative program for appointing counsel in felony cases may be established in the manner provided by this subsection by the judges of the district courts trying criminal cases in the county. In a county in which an alternative program is established:
- (1) the alternative program may:

**Art. 26.04. Procedures for Appointing Counsel (Continued)**

- (A) use a single method for appointing counsel or a combination of methods; and
- (B) use a multicounty appointment list using a system of rotation; and
- (2) the procedures adopted under Subsection (a) must ensure that:
  - (A) attorneys appointed using the alternative program to represent defendants in misdemeanor cases punishable by confinement:
    - (i) meet specified objective qualifications for that representation, which may be graduated according to the degree of seriousness of the offense and whether representation will be provided in trial court proceedings, appellate proceedings, or both; and
    - (ii) are approved by a majority of the judges of the county courts and statutory county courts trying misdemeanor cases in the county;
  - (B) attorneys appointed using the alternative program to represent defendants in felony cases:
    - (i) meet specified objective qualifications for that representation, which may be graduated according to the degree of seriousness of the offense and whether representation will be provided in trial court proceedings, appellate proceedings, or both; and
    - (ii) are approved by a majority of the judges of the district courts trying felony cases in the county;
  - (C) appointments for defendants in capital cases in which the death penalty is sought comply with the requirements of Article 26.052; and
  - (D) appointments are reasonably and impartially allocated among qualified attorneys.
- (h) In a county in which an alternative program for appointing counsel is established as provided by Subsection (g) and is approved by the presiding judge of the administrative judicial region, a court or the courts' designee may appoint an attorney to represent an indigent defendant by using the alternative program. In establishing an alternative program under Subsection (g), the judges of the courts establishing the program may not, without the approval of the commissioners court, obligate the county by contract or by the creation of new positions that cause an increase in expenditure of county funds.
- (i) A court or the courts' designee required under Subsection (c) to appoint an attorney to represent a defendant accused or convicted of a felony may appoint an attorney from any county located in the court's administrative judicial region.
- (j) An attorney appointed under this article shall:
  - (1) make every reasonable effort to contact the defendant not later than the end of the first working day after the date on which the attorney is appointed and to interview the defendant as soon as practicable after the attorney is appointed;
  - (2) represent the defendant until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the attorney is permitted or ordered by the court to withdraw as counsel for the defendant after a finding of good cause is entered on the record; and
  - (3) with respect to a defendant not represented by other counsel, before withdrawing as counsel for the defendant after a trial or the entry of a plea of guilty:
    - (A) advise the defendant of the defendant's right to file a motion for new trial and a notice of appeal;
    - (B) if the defendant wishes to pursue either or both remedies described by Paragraph (a), assist the defendant in requesting the prompt appointment of replacement counsel; and

(C) if replacement counsel is not appointed promptly and the defendant wishes to pursue an appeal, file a timely notice of appeal.

(k) A court may replace an attorney who violates Subsection (j)(1) with other counsel. A majority of the judges of the county courts and statutory county courts or the district courts, as appropriate, trying criminal cases in the county may remove from consideration for appointment an attorney who intentionally or repeatedly violates Subsection (j)(1).

(l) Procedures adopted under Subsection (a) must include procedures and financial standards for determining whether a defendant is indigent. The procedures and standards shall apply to each defendant in the county equally, regardless of whether the defendant is in custody or has been released on bail.

(m) 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.

(n) A defendant who requests a determination of indigency and appointment of counsel shall:

(1) complete under oath a questionnaire concerning his financial resources;

(2) respond under oath to an examination regarding his financial resources by the judge or magistrate responsible for determining whether the defendant is indigent; or

(3) complete the questionnaire and respond to examination by the judge or magistrate.

(o) Before making a determination of whether a defendant is indigent, the court shall request the defendant to sign under oath a statement substantially in the following form: "On this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, I have been advised by the (name of the court) Court of my right to representation by counsel in connection with the charge pending against me. I certify that I am without means to employ counsel of my own choosing and I hereby request the court to appoint counsel for me. (signature of the defendant)"

(p) A defendant who is determined by the court to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occurs. If there is a material change in financial circumstances after a determination of indigency or non-indigency is made, the defendant, the defendant's counsel, or the attorney representing the state may move for reconsideration of the determination.

(q) A written or oral statement elicited under this article or evidence derived from the statement may not be used for any purpose, except to determine the defendant's indigency or to impeach the direct testimony of the defendant. This subsection does not prohibit prosecution of the defendant under Chapter 37, Penal Code.

(r) A court may not threaten to arrest or incarcerate a person solely because the person requests the assistance of counsel.

*Amendments to (a), (d), and (f) and addition of (f-1) effective Sept. 1, 2011 (HB 1754, §20).*

*Amendments to (a), (c), (e), (g), (i), (j), and (o) effective Sept. 1, 2011 (SB 1681, §4). Section 3 provides: "The change in law made by this Act applies only to a criminal proceeding that commences on or after the effective date of this Act. A criminal proceeding that commences before the effective date of this Act is governed by the law in effect when the proceeding commenced, and the former law is continued in effect for that purpose."*

## Appendix E

### **Art. 26.05. Compensation of Counsel Appointed to Defend**

(a) A counsel, other than an attorney with a public defender's office or an attorney employed by the office of capital writs, appointed to represent a defendant in a criminal proceeding, including a habeas corpus hearing, shall be paid a reasonable attorney's fee for performing the following services, based on the time and labor required, the complexity of the case, and the experience and ability of the appointed counsel:

(1) time spent in court making an appearance on behalf of the defendant as evidenced by a docket entry, time spent in trial, and time spent in a proceeding in which sworn oral testimony is elicited;

(2) reasonable and necessary time spent out of court on the case, supported by any documentation that the court requires;

(3) preparation of an appellate brief and preparation and presentation of oral argument to a court of appeals or the Court of Criminal Appeals; and

(4) preparation of a motion for rehearing.

(b) All payments made under this article shall be paid in accordance with a schedule of fees adopted by formal action of the judges of the county courts, statutory county courts, and district courts trying criminal cases in each county. On adoption of a schedule of fees as provided by this subsection, a copy of the schedule shall be sent to the commissioners court of the county.

(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. An attorney whose request for payment is disapproved or is not otherwise acted on by the 60th day after the date the request for payment is submitted may appeal the disapproval or failure to act by filing a motion with the presiding judge of the administrative judicial region. On the filing of a motion, the presiding judge of the administrative judicial region shall review the disapproval of payment or failure to act and determine the appropriate amount of payment. In reviewing the disapproval or failure to act, the presiding judge of the administrative judicial region may conduct a hearing. Not later than the 45th day after the date an application for payment of a fee is submitted under this article, the commissioners court shall pay to the appointed counsel the amount that is approved by the presiding judge of the administrative judicial region and that is in accordance with the fee schedule for that county.

**Art. 26.05. Compensation of Counsel Appointed to Defend (Continued)**

(d) A counsel in a non-capital case, other than an attorney with a public defender's office, appointed to represent a defendant under this code shall be reimbursed for reasonable and necessary expenses, including expenses for investigation and for mental health and other experts. Expenses incurred with prior court approval shall be reimbursed in the same manner provided for capital cases by Articles 26.052(f) and (g), and expenses incurred without prior court approval shall be reimbursed in the manner provided for capital cases by Article 26.052(h).

(e) A majority of the judges of the county courts and statutory county courts or the district courts, as appropriate, trying criminal cases in the county may remove an attorney from consideration for appointment if, after a hearing, it is shown that the attorney submitted a claim for legal services not performed by the attorney.

(f) All payments made under this article shall be paid from the general fund of the county in which the prosecution was instituted or habeas corpus hearing held and may be included as costs of court.

(g) If the court determines that a defendant has financial resources that enable him to offset in part or in whole the costs of the legal services provided, including any expenses and costs, the court shall order the defendant to pay during the pendency of the charges or, if convicted, as court costs the amount that it finds the defendant is able to pay.

(h) Reimbursement of expenses incurred for purposes of investigation or expert testimony may be paid directly to a private investigator licensed under Chapter 1702, Occupations Code, or to an expert witness in the manner designated by appointed counsel and approved by the court.

*Amendment to (a), (c), and (d) effective Sept. 1, 2011 (HB 1754 §20).*

## Appendix F

### **Texas Administrative Code**

<b><u>Title 1</u></b>	Administration
<b><u>Part 8</u></b>	Texas Judicial Council
<b><u>Chapter 174</u></b>	Indigent Defense Policies And Standards
<b><u>Subchapter A</u></b>	Minimum Continuing Legal Education Requirements
<b>Rule §174.1</b>	<b>Appointment In Criminal Cases</b>

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An Attorney who meets the requirements of this rule may be appointed to represent an indigent person arrested for or charged with a crime, if the attorney is otherwise eligible under the procedures developed under Article 26.04, Code of Criminal Procedure. Crime has the meaning assigned by §173.2(2). An attorney may be appointed under this rule only if an attorney:

- (1) Completes a minimum of six hours of continuing legal education pertaining to criminal law during each 12-month reporting period. The judges of criminal courts of the county shall set the 12-month reporting period applicable to the jurisdiction. Continuing legal education may include activities accredited under Section 4, Article XII, State Bar Rules, self-study, teaching at an accredited continuing legal education activity, attendance at a law school class or legal research-based writing. The judges may require attorneys to complete more than the minimum number of hours of continuing legal education in criminal law in the procedures developed under Article 26.04, Code of Criminal Procedure; or
- (2) Is currently certified in criminal law by the Texas Board of Legal Specialization.