

Supplement to Bastrop County Monitoring Report (2022): Additional Observations on Attorney Qualifications

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Part I. Performance Indicators

TIDC has historically monitored how counties admit attorneys to lists, but not how counties review their performance.¹ TIDC is piloting key performance indicators related to attorney representation—caseloads, investigation, and client contact—to assess counties’ procedures for ensuring effective and ethical representation. For this supplemental report, TIDC is relying on counties’ expenditure reports and indigent defense plans, interviews and surveys, and additional sources as available.

During this pilot period, the following observations about attorney performance are not policy monitoring findings and do not affect TIDC funding. No response is required, though TIDC welcomes feedback.

Since its passage, the Fair Defense Act has required local jurisdictions to review qualifications for attorneys on the appointment list. Under Article 26.04(b)(5) of the Code of Criminal Procedure, counties must adopt procedures that

ensure that each attorney appointed from a public appointment list to represent an indigent defendant perform the attorney’s duty owed to the

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

defendant in accordance with the adopted procedures, the requirements of this code, and applicable rules of ethics.

Performance Review

TIDC reviewed Bastrop County's County² and District Court³ indigent defense plans to learn about procedures for reviewing attorney performance. The plans list the minimum attorney qualifications, which include exhibiting "proficiency and commitment to providing quality representation to criminal defendants" and "professionalism and reliability when providing representation to criminal defendants." An attorney may be removed from the list if the judge determines the attorney "no longer meets the objective qualifications for appointment or is not fully competent to adequately handle the cases assigned;" however, there is no annual review of the list.

Caseloads

Attorneys need to spend enough time on each case to perform their basic duties.⁴ TIDC, in partnership with the Public Policy Research Institute at Texas A&M University, studied the maximum number of cases an attorney could handle in a year while providing ethical representation.⁵ The study found that, in Texas, a private attorney should dispose no more than 226 misdemeanors, 128 felonies, 31 appeals, or a weighted combination of these cases.

In FY2020:

- About 14% of attorneys (4 out of 29) who were paid for felony, misdemeanor, or appellate cases in Bastrop County had **statewide** indigent defense caseloads above the Texas caseload guidelines.⁶
- Their median **statewide** indigent defense caseload was 24% of the guidelines.

² Bastrop County Court, *Bastrop County Court Plan*, <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=516> (last modified July 28, 2016).

³ Bastrop Burleson Lee Washington District Court, *Bastrop, Burleson, Lee and Washington District Court Plan*, <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=487> (last modified Sept. 21, 2020).

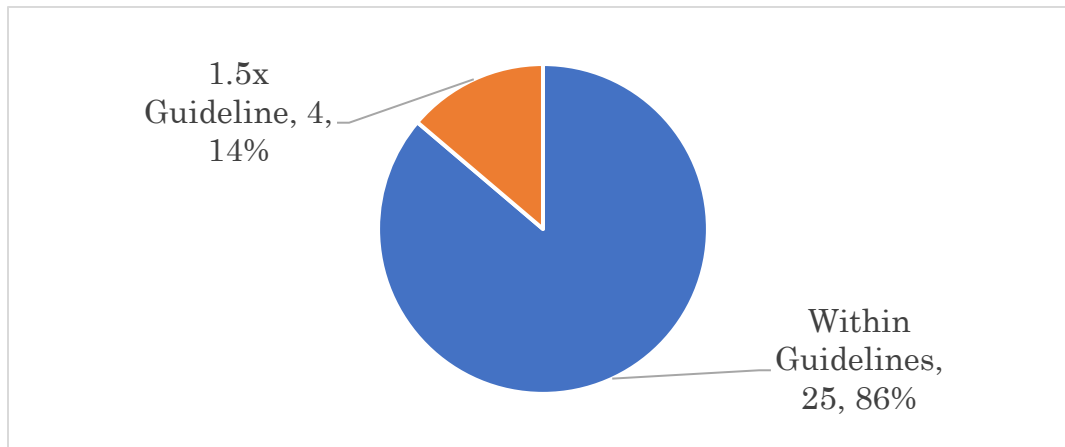
⁴ TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01. (see commentary: "A lawyer's workload should be controlled so that each matter can be handled with diligence and competence.")

⁵ Texas Indigent Defense Commission, *Caseload Guidelines*, <http://tidc.texas.gov/caseloads> (last visited Sept. 28, 2021).

⁶ This estimate is from county auditor data, available at <http://tidc.tamu.edu/public.net/Reports/AttorneyCaseLoad.aspx>. This estimate does not include capital or juvenile indigent defense cases, civil appointments, or retained cases.

- Including non-indigent-defense cases, three attorneys had total caseloads more than twice the guidelines.⁷

Bastrop County FY20 Attorney Statewide Caseloads vs. Texas Guidelines



- Seven attorneys, or 24%, who were paid for Bastrop County appointments did not file practice time reports for Bastrop County.⁸

Not all attorneys appeared to understand the required duties to clients as stated in the District Courts' plan. One attorney wrote to his client that he was limiting his time on the case to match his budgeted hourly rate (\$400 for 2.67 hours of pre-trial time). In doing so, he did not take account of the duties the indigent defense plan requires each attorney to meet. For instance, the District Courts' plan requires attorneys to meet specific duties to clients, including performance of the following actions:

- To contact the defendant by the end of the first working day after the date on which the attorney is appointed;
- To interview the defendant as soon as practicable;
- To maintain reasonable communication and contact with the client at all times and keep the client informed of the status of the case;
- To investigate, either by self or through an investigator, the facts of the case and be prepared to present any factual defense(s) that may be reasonably and arguably available to the defendant;
- To advise the client on all matters involving the case and such collateral matters as may reasonably be required to aid the client in making appropriate decisions about the case;

⁷ This estimate combines county auditor data with data from attorneys on the percent of their practice time dedicated to indigent defense. For this estimate, TIDC divides attorneys' statewide indigent defense caseload (excluding juvenile and capital cases) by their reported percent of practice time devoted to appointed criminal cases.

⁸ The local plan requires attorneys to file these reports to stay on appointment lists. CODE OF CRIM. PROC. ART. 26.04(j)(4) also requires attorneys to file these reports. Attorneys may not have filed reports if they finished work in FY18 and were paid in FY19.

- To perform the attorney's duty owed to the defendant in accordance with these procedures, the requirements of the Code of Criminal Procedure, and applicable rules of ethics.
- To manage the attorney's workload to allow for the provision of quality representation and the execution of the responsibilities listed in these rules in every case.

Bastrop County may benefit from additional training regarding ethical and constitutional duties.

Use of Investigators

Attorneys have a duty to investigate the facts of each case.⁹ That duty, regardless of the client's wish to admit guilt, includes determining whether the charges and sentence are factually and legally correct, and informing the client of potential defenses to the charges.¹⁰ Some investigation can be performed by attorneys. Other investigation requires an investigator, because, for instance, attorneys cannot testify to facts that the attorney has investigated, or because of the need for added capacity or specialization.¹¹ TIDC's caseload guidelines recommend that 5.3% of case time (28.5 minutes) on average should be spent on misdemeanor investigation and 7.7% (85.3 minutes) of case time for felonies.¹²

The Bastrop County Plan lists investigation by the attorney or investigator as a duty of assigned counsel.¹³ It also puts forth the process of how to be reimbursed for these expenses; however, it does not indicate how much time should be spent on this duty. In FY2020:¹⁴

- There were no reported investigative expenditures on misdemeanor cases (\$0 of \$146,885).
- Around five percent of total non-capital felony expenditures (4.7%, \$14,187 of \$302,239) was for investigators.

⁹ TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01.

¹⁰ State Bar of Texas Performance Guidelines for Non-Capital Criminal Defense Representation Guideline 4.1(A).

¹¹ TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.08.

¹² These recommendations are for cases that do not go to trial. More investigation time is recommended for cases that go to trial.

¹³ In some sample felony case files, defense counsel waived both pending discovery requests and Article 39.14(k)'s mandatory future disclosures. Article 39.14(k) of the Code of Criminal Procedure states:

If at any time before, during, or after trial the state discovers any additional document, item, or information required to be disclosed under Subsection (h), the state shall promptly disclose the existence of the document, item, or information to the defendant or the court.

¹⁴ Texas Indigent Defense Commission, *Bastrop Cnty. Expenditure Report Summary Fiscal Year 2020*, <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=11&fy=2020> (last visited Sept. 28, 2021).

Client Contact

Attorneys have a duty to communicate with defendants about their case.¹⁵ Attorneys should be in regular contact with their clients, especially those in custody.¹⁶ They should also attempt to contact out-of-custody clients and discuss their cases out-of-court to ensure confidentiality¹⁷ and time to prepare.¹⁸ TIDC's caseload guidelines recommend that, on average, 13.9% (75 minutes) of misdemeanor case time and 16.1% (168.8 minutes) of felony case time be spent on client communication.¹⁹

The Bastrop County Court Plan requires attorneys to contact their clients "within one working day of receiving notice of appointment to notify said client of representation" or they may be removed from the appointment list for failure to contact or interview clients in a timely manner two or more times.²⁰ The Bastrop District Court Plan similarly requires contact by the end of the first working day and requires the attorney to "interview the defendant as soon as practicable" as well as maintain reasonable communications with client at all times.²¹

TIDC has received ten complaints about Bastrop County since 2018, alleging issues with access to and quality of counsel. Six of those complaints alleged that attorneys failed to regularly communicate with their clients. As previously noted, one attorney responded to his client by stating that based on the fee schedule, he budgets 2.67 hours of time per felony case. This budgeted time to dispose a felony case is less than the 2.8 hours of client communication time and 16.25 hours of total time recommended by TIDC's caseload guidelines.

Summary

Bastrop County requires attorneys to meet their ethical duties to clients. The District Courts' indigent defense plan enunciates specific actions attorneys must perform. However, the County does not have a method to systematically review total

¹⁵ TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.03. *See also* TEX. CODE CRIM. PROC. art. 26.04(j)(1) (requiring appointed attorneys to "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").

¹⁶ *Id.*

¹⁷ TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05.

¹⁸ TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01.

¹⁹ These recommendations are for cases that do not go to trial. More communication time is recommended for cases that go to trial.

²⁰ Bastrop County Court, Bastrop County Court Plan, <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=516> (last modified July 28, 2016).

²¹ Bastrop Burleson Lee Washington District Court, Bastrop, Burleson, Lee and Washington District Court Plan, <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=487> (last modified Sept. 21, 2020).

caseloads, investigation, or client communications. While all but one attorney had appointed Bastrop County caseloads within the Texas guidelines, four attorneys had statewide appointed caseloads that exceeded the Texas guidelines. If one accounts for non-indigent cases, three attorneys had caseloads that were more than twice the guidelines. The County should consider tracking annual statewide caseloads, use of investigators, and client communication.

Part II. Indigent Defense Attorney Survey and Interview Results

In July 2021, with assistance from local courts, TIDC distributed an online survey to Bastrop County indigent defense attorneys and received 10 responses. Respondents were self-selected and may not be representative of all local views. Full responses are below, alphabetized and numbered. Notable observations included:

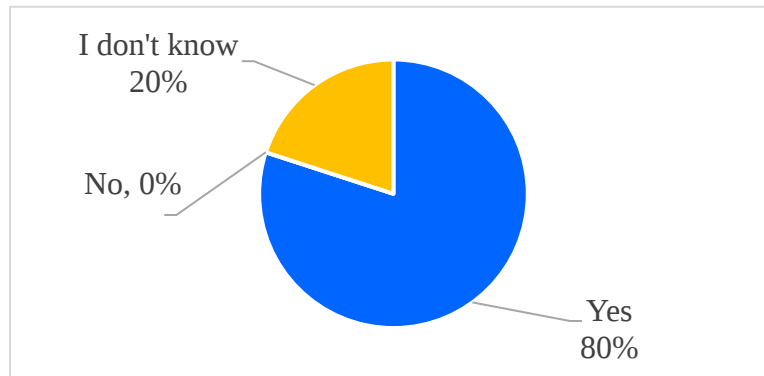
- **Oversight.** Most attorneys said there is adequate oversight over them.
- **Caseloads.** Most attorneys said caseloads are manageable.
- **Investigation.**
 - Half of the attorneys reported that, in the past year, they requested an investigator 1-10 times for misdemeanor cases.
 - For felony cases, 40% of attorneys said requesting an investigator was not applicable.
 - Seventy percent of the attorneys said they do not have difficulties receiving funding for investigators.
- **Client Communication.** Attorneys most often said they can “always” communicate effectively with clients (40%) and most reported communicating with clients online or on the phone (8 of 10 respondents).
- **COVID-19 and Online Courts.** Half of the respondents reported that online courts are in some ways better and in some ways worse for clients.
- **Payment Vouchers.** Over half of attorneys (55.6%) said they do not bill for out-of-court time on misdemeanors. Some stated that they are not compensated for out-of-court time because of court policy (“Policy is that we don’t bill out-of-court fees unless we go to trial. Most cases are pleas.”).
- **Bastrop County.** Attorneys complained that the fee schedule has not been updated in over 15 years; however, they feel clients are “well represented” and cases are “resolved fairly.”

Survey Responses

Oversight

1. Is there adequate oversight of appointed attorneys in Bastrop County?

[Provided answers: Yes; No; I don't know; Other]



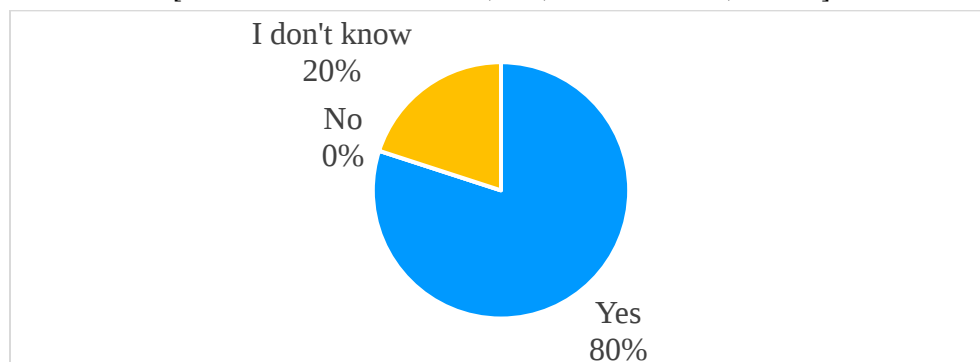
Caseloads

2. What types of work do you do beside indigent defense, if any?

	Responses listed alphabetically:
•	Criminal Appeals; retained criminal cases
•	Family Law
•	Family Law, Probate, Bankruptcy
•	general small-town civil
•	Private representation of clients in family law and criminal law matters.
•	retained criminal defense, probate
•	Retained defense
•	Retained Defense Work
•	Some civil

3. Do attorneys taking appointments in Bastrop County have manageable caseloads?

[Provided answers: Yes; No; I don't know; Other]

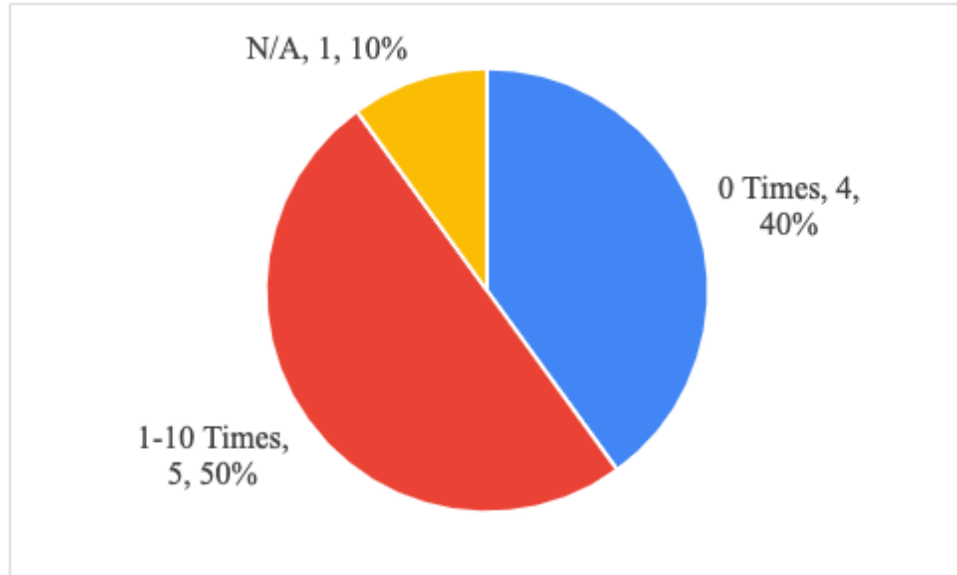


	“Other” responses listed alphabetically:
•	I can only answer for myself - yes, my caseloads are manageable.

Investigation

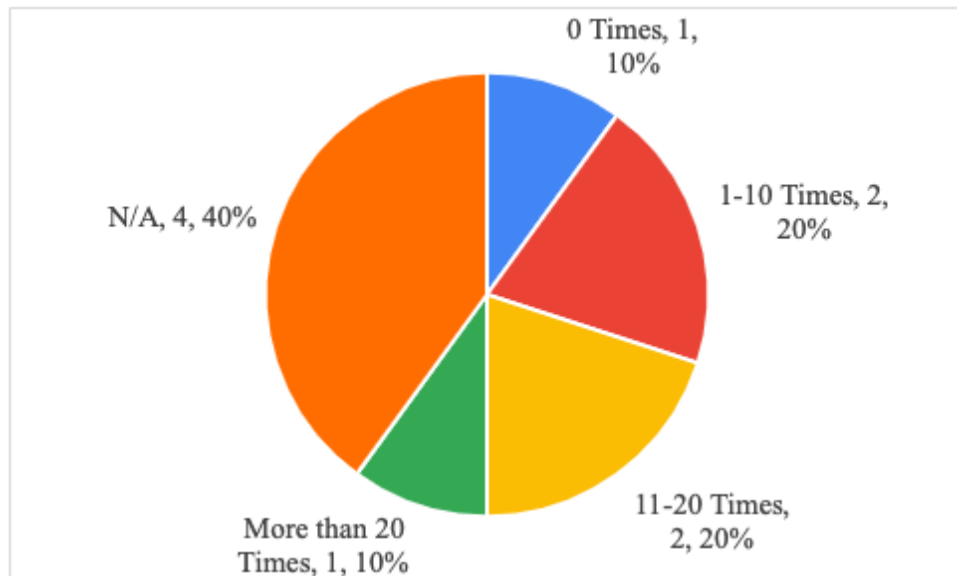
4. About how many times per year do you request an investigator for a misdemeanor case?

[Provided answers: 0 Times; 1-10 Times; More than 10 Times; Not Applicable]



5. About how many times per year do you request an investigator for a felony case?

[Provided answers: 0 Times; 1-10 Times; 11-20 Times; More than 20 Times; Not Applicable]



6. What types of cases almost always require an investigator?

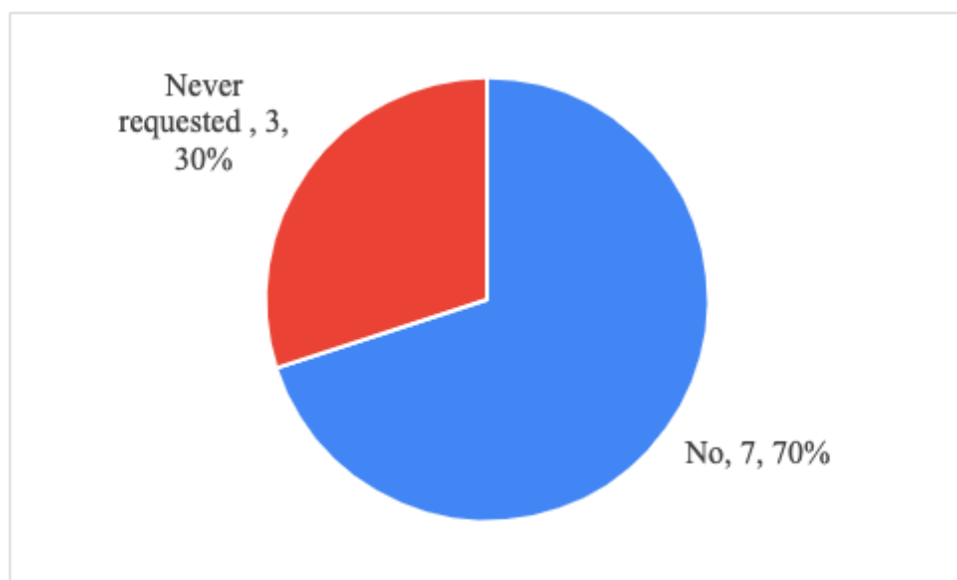
	Responses listed alphabetically:
•	Felony Cases
•	Murder, sexual assault, and aggravated cases
•	NA
•	none
•	Non-negotiable cases set for trial
•	Possibly if going to trial
•	sex assault, agg assault, murder
•	Violent felonies

7. What types of cases almost never require an investigator?

	Responses listed alphabetically:
•	all
•	Class C Misdemeanors
•	Defendant admits and desires quick resolution
•	Misdemeanor
•	NA
•	Negotiated pleas and dismissals
•	possession
•	possession of marijuana

8. Have you had any difficulties receiving adequate funding for investigation in Bastrop County?

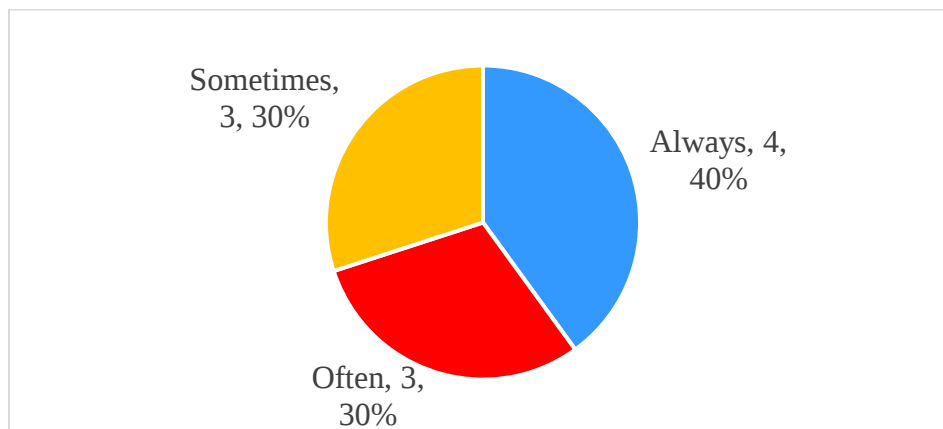
[Provided answers: Yes; No; Never requested; Other]



Client Communication

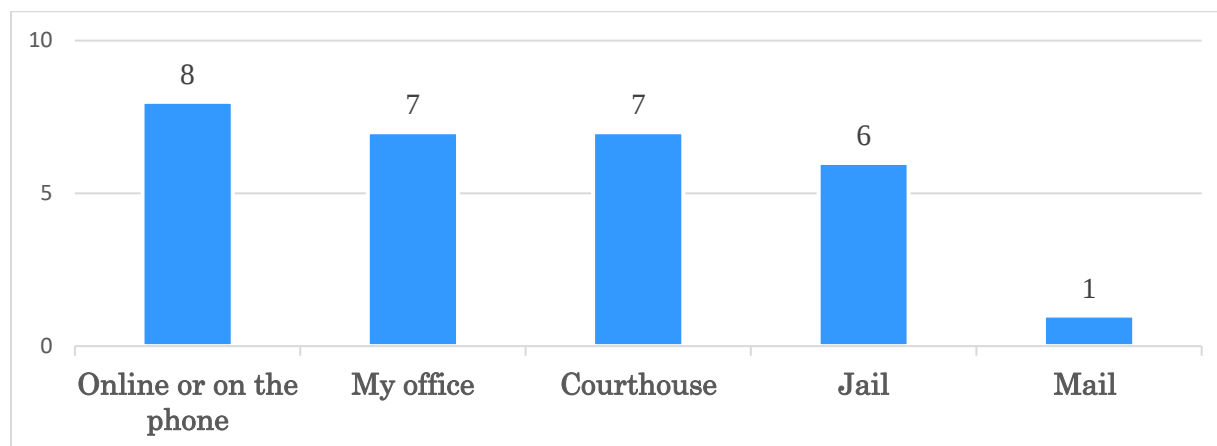
9. How often are you able to communicate effectively with clients?

[Provided answers: Always (Every Case); Often; Sometimes; Rarely; Never (No Cases); Not Applicable]



10. Where do you most often meet with clients? Select all that apply.

[Provided answers: Courthouse; My office; Jail; Mail; Online or on the phone; Other]



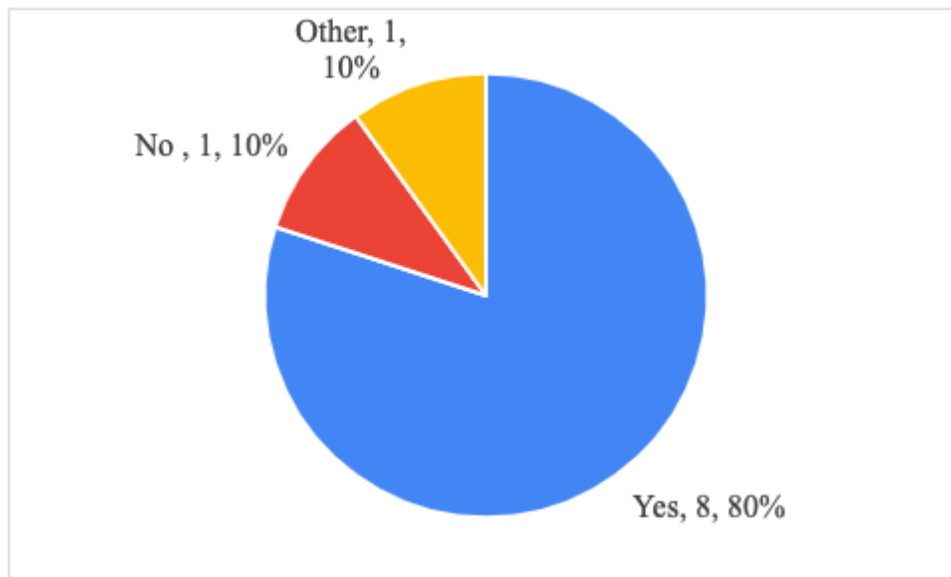
11. What are your biggest barriers to meeting with clients?

	Responses listed alphabetically:
•	By the time we receive an appointment the client's contact information is obsolete.
•	contact info
•	COVID
•	COVID
•	COVID-19
•	COVID-19
•	none

COVID-19 and Online Courts

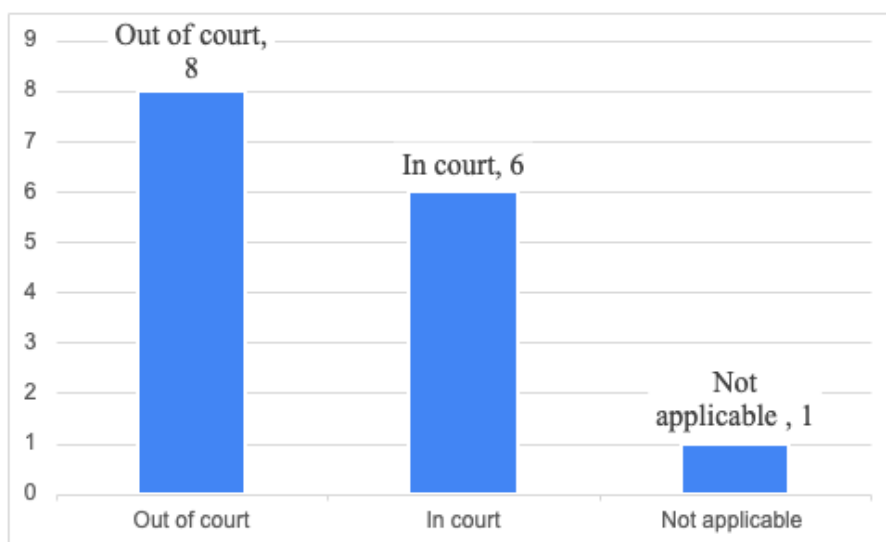
12. Have you appeared in online courts?

[Provided answers: Yes; No; Other]



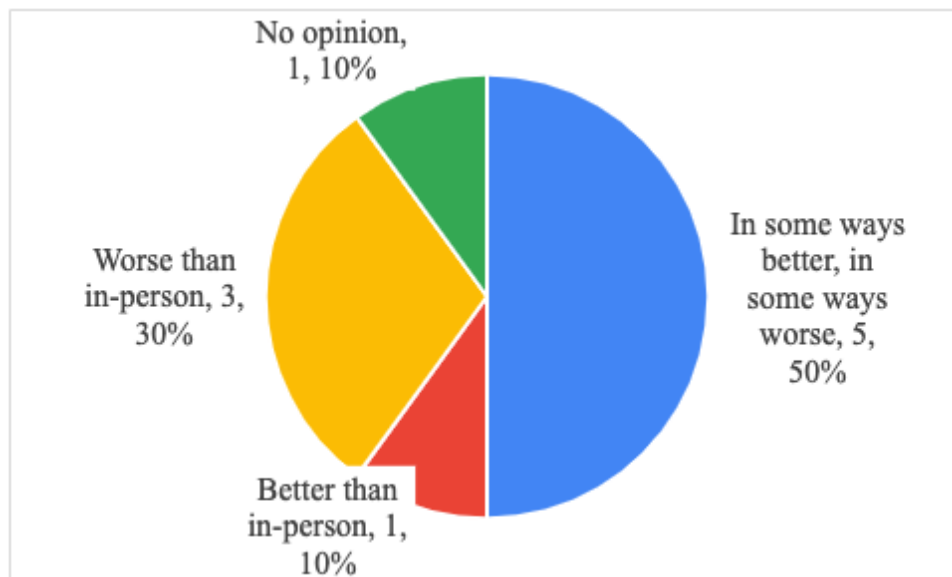
	“Other” responses listed alphabetically:
•	Not misdemeanor

13. When you have hearings online, at what times are you able to confidentially communicate with clients? Select all that apply.



14. Overall, do you think that online courts are better or worse for clients than in-person courts?

[Provided answers: Better than in-person; Worse than in-person; Neither better nor worse; No opinion; Not applicable; Other]



15. If you have other comments on COVID-19 and online courts, please share them here:

	Responses listed alphabetically:
•	For most cases, online court has worked well.

Payment Vouchers

16. When submitting payment vouchers for misdemeanor cases, do you typically include out-of-court time?

	Responses listed alphabetically:
•	Depends on case and circumstances
•	It depends on the case
•	No
•	No
•	No
•	No
•	No
•	Only in unusual or trial cases
•	Yes if the case requires prep for ttisl [sic]

17. When submitting payment vouchers for felony cases, do you typically include out-of-court time?

	Responses listed alphabetically:
•	Depends on case and circumstances
•	I do not take felony appointments.
•	It depends on the case
•	No
•	No
•	Usually Only when prepping for trial.
•	Yes
•	Yes

18. If you typically do not bill for out-of-court time, why not?

	Responses listed alphabetically:
•	easier, not worth it
•	Policy is that we don't bill out-of-court fees unless we go to trial. Most cases are pleas.
•	See if previous answer
•	The courts are generally not supportive to invoices for out-of-court, unless the attorney conducts a hearing or trial.
•	Usually not needed.

Bastrop County

19. What is working well in Bastrop County's indigent defense system?

	Responses listed alphabetically:
•	Assignment of cases by court coordinators and competent defense counsel
•	I believe it is an effective system, where clients are well represented
•	I'm satisfied with how the appointment d work.
•	me because I've been here for 35 years but also the relatively sweet and friendly local government offices with which one must work
•	N/A
•	People get representation.
•	The cases are resolved fairly
•	The judges

20. What is not working well in Bastrop County's indigent defense system?

	Responses listed alphabetically:
•	Defense counsel has not received a raise in flat fee schedule in more than 15 yrs.
•	Delay in movement of cases overall in Bastrop County
•	dispositions are slowing down but may be true of non-indigent cases too, maybe the pandemic
•	Don't know.
•	Fees have not been increased since the 1990's
•	I've been taking appointments since 2014 and the amount paid has never been increased.
•	N/A

21. How could TIDC help improve indigent defense in Bastrop County?

	Responses listed alphabetically:
•	N/A
•	Not sure.
•	Oversight over fees and consistency across counties
•	Require counties to give timely and incremental raises on flat fee schedule.

22. If you would like TIDC to follow up with you, please provide your name and contact information:

[Answers redacted.]