




NELSON W. WOLFF
COUNTY JUDGE
BEXAR COUNTY COURTHOUSE
SAN ANTONIO, TX 78205-3042
(210) 335-2626 OFFICE • (210) 335-2926 FAX

MEMORANDUM

Date: October 22, 2010

To: The Honorable Sharon Keller, Presiding Judge Court of Criminal Appeals, Chair
The Honorable Olen Underwood, Vice Chair
Mr. James Bethke, Director, Texas Task Force on Indigent Defense

From: Nelson W. Wolff, Bexar County Judge 

Subject: Bexar County's Response to the Task Force on Indigent Defense's Review of
Bexar County's Indigent Defense System

On behalf of Bexar County, I would like to thank the staff of the Task Force on Indigent Defense and the Office of Court Administration for the thorough review of Bexar County's indigent defense system and plans. We are proud to have received so many commendations in this review and we also welcome the feedback on areas in which we might improve. The judges of the felony, misdemeanor and juvenile courts remain committed to ensuring the rights of those accused are protected and that they are timely provided with qualified counsel.

The judges of the three court groups covered by this review have submitted the enclosed memorandum to me with their responses to the issues identified in the report. In general, their responses will serve as Bexar County's response to the review findings.

Given the Bexar County Commissioners Court's responsibility to the taxpayers over fiscal matters, I wanted to share with you the following points about the County's indigent defense system.

First, since its inception in the spring of 2002, the County's overall spending for indigent defense has more than doubled. We know that increase has occurred because we can measure it. However, we as of yet have no metric to measure whether or not that increased spending has resulted in any measurable difference. In other words we have no metric to measure success. I

understand and support the Task Force's effort to develop such a metric as part of their strategic planning process. Having this metric will provide Texas counties the necessary information to ensure that local resources directed toward indigent defense are properly allocated.

Second, the implementation of SB 7 has resulted in one of the most significant unfunded mandates passed on to Texas counties in decades. And, while we are appreciative of the state funding received, that funding represents only a fraction of the total cost of satisfying SB 7's requirements. State funding for indigent defense represented 7% of Bexar County's indigent defense expenditures in FY '04. Last year, state funding represented 9%. The state should do more to fund a program that it made a priority.

As previously mentioned, the report comments made by the respective district, juvenile and county court at law judges will serve as the general county response. I wish to make the following additions to their responses on behalf of Commissioners Court.

Although the review found the overall attorney selection process works well and is fair and neutral, it noted issues on the county court level with in court appointments. The County Court at Law's response points out how voluminous dockets make compliance with appointing from the next five names on the appointment list difficult to accomplish. I agree, but offer to work with the county courts to explore ways in which compliance can be achieved without delaying case resolution.

Possible solutions might include establishing a formal attorney of the day program with assignments made by the wheel far enough in advance so that calendars can be accommodated. Perhaps the wheel can be made accessible to the coordinators so they can see if attorneys present are among the next five names on the list. I am confident that the courts, working with pre trial will be able to find a workable solution. I also am confident that a solution could resolve any problems with appointments in Motion to Revoke Probation cases and could reduce the number of appointments received by the top 10 attorneys.

I also hope to see the county courts adopt two practices that are working well for the district courts as noted in the review: the voucher review committee and the coordinators 7 day review of jailed defendants without counsel. The task force found the review committee to be an exemplary practice that it plans to recommend to other jurisdictions. We can start here. The district court policy of reviewing jailed defendants without counsel at the 7 day mark makes sure that people do not sit needlessly in jail. I expect similar results to be achieved should the county courts instituted this process, too.

The county courts characterized the fee schedule as "low". I would characterize it as "reasonable". The out of court hourly rate, if annualized, equates to a misdemeanor prosecutor's annual salary. It is true that the \$100 flat rate has not been changed since the early 90's, but it

should be noted that the average cost per plea has risen to over \$140 due to increased itemization. Additionally, the fee schedule meets all the requirements of Article 26 of the Code of Criminal Procedure as demonstrated by the large numbers of qualified attorneys who seek the work.

Again, with the exception of the forgoing comments the responses enclosed represent the view of Bexar County as a whole. And, I again want to thank the Task Force for both this review and for their assistance to Bexar County. We look forward to working with you to find ways to improve our processes.

MEMORANDUM

TO: COUNTY JUDGE NELSON WOLFF

FROM: *JN* JUDGE JOHNNY D. GABRIEL, JR., LOCAL ADMINISTRATIVE DISTRICT JUDGE, JUDGE AL ALONSO, LOCAL ADMINISTRATIVE STATUTORY COUNTY COURTS JUDGE, AND JUDGE LAURA PARKER, JUVENILE BOARD CHAIR

SUBJECT: *JN* BEXAR COUNTY COURTS' RESPONSE TO THE TASK FORCE ON INDIGENT DEFENSE'S REVIEW OF BEXAR COUNTY'S INDIGENT DEFENSE SYSTEMS

In December 2009, Senator Jeff Wentworth asked the Task Force on Indigent Defense to conduct a full assessment of Bexar County's indigent defense processes. The Task Force monitor reviewed documentation for Fiscal Year 2009, which covered the period of October 1, 2008-September 30, 2009. The Task Force submitted their report on August 16, 2010. The report contains an analysis of our indigent defense system and includes **many commendations** as well as some recommendations for improvements in various areas of our processes. The Task Force has requested that we respond to each recommendation with written comments by October 22, 2010. They have also requested that we respond in a single report. Therefore, we are submitting this memorandum to you, containing the courts' responses to the recommendations, so that you may include them in your transmission of the County's response to the Task Force.

The Criminal and Juvenile District Court Judges and the Criminal Statutory County Court-at-Law Judges of Bexar County thank the staff of the Task Force on Indigent Defense and the Office of Court Administration for the thorough review of our indigent defense system and plans. The professional manner in which the staff conducted themselves during the review and upon release of the report is much appreciated. The Criminal and Juvenile District Court Judges and the Criminal Statutory County Court-at-Law Judges have set up procedures that we hope reflect our sincere efforts to comply with the letter and the spirit of the Fair Defense Act since inception. The judges remain committed to ensuring that indigent defendants and juvenile respondents are timely provided with qualified counsel.

The Task Force report is divided into seven areas of evaluation and analysis. There is a summary of findings; an introduction, describing the request for the review as well as a description of the areas of review; a case flow analysis for adults; a case flow analysis for juveniles; a section dealing with selecting qualified counsel and establishing standard payment methods; an analysis of case outcomes; and finally, a section entitled "opportunity for further study". The report includes commendations from the Task Force monitor for those things we are doing well, as well as some recommendations for improvements. Our responses are organized according to court group, and are divided into the areas upon which the monitoring review focused, as enumerated on page 7 of the report. Those areas are: 1) conduct prompt and accurate magistration 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 non-discriminatory attorney selection process; and 6) promulgate a standard attorney fee schedule and payment process. We have also included some responses that are more global in nature and will refer to those as miscellaneous responses.

1) **Magistration**- This is an area of the Fair Defense laws in which Bexar County excels. Bexar County uses centralized magistrate warnings. All persons arrested in Bexar County are brought before a magistrate at the San Antonio Central Magistration Facility. The magistrate warnings are conducted around the clock every day of the year. The magistrate sets bond and asks arrestees if they would like to request appointed counsel. If an arrestee tells the magistrate that he/she would like to request counsel, the arrestee is interviewed by Pre-Trial Services to see if the arrestee qualifies for a court appointed attorney.

Commendation: (p. 10) Bexar County created and implemented a solid process to quickly bring arrestees before a magistrate.

Commendation: (p. 10) Sample data indicates that Bexar County provides adequate, clear and comprehensive information regarding the right to court appointed counsel.

2) **Standards and Determination of Indigence**- After a person has requested counsel, there must be a determination of indigence. Each jurisdiction must establish procedures and financial standards for determining indigence.

Commendation: (p.11) Bexar County is consistent with state law when it determines indigence according to standards directed by the indigent defense plan.

3) **Minimum Attorney Qualifications**- Bexar County judges generate and maintain a list of qualifications to determine eligibility to take assigned cases. They created nine appointment lists (five levels of appointment lists to represent arrestees in felony cases, one for misdemeanors, and three for juvenile). The monitor found:

- Bexar County maintained records for all attorneys on the appointment lists that included each attorney's CLE hours; and
- Bexar County meets and exceeds the minimum attorney CLE requirements set by the Task Force.

Commendation: (p.18) Bexar County's requirements for participation on a public appointment list meet and exceed the minimum attorney CLE requirements set by the Task Force.

Commendation: (p. 18) Bexar County maintained records for all attorneys on the appointment lists that included each attorney's CLE hours

4) **Timely Appointment of Counsel**- Articles 1.051(c) and 1.051(j) of the Code of Criminal Procedure require timely appointment of counsel for adults determined to be indigent. The county's procedures appear to provide for timely appointment of counsel; however, a review of case files revealed several instances where appointments of counsel were made in court and were made at a time much later than the request.

In Bexar County, if the arrestee requests counsel from the magistrate, the arrestee is interviewed by Pre-Trial Services to see if the arrestee qualifies for a court appointed attorney. If the arrestee is considered too poor to hire counsel by the county's financial standards, Pre-Trial Services appoints counsel. If the arrestee does not meet the financial standard, indigence is denied, and the arrestee is expected to retain counsel. Bexar County appoints counsel in the same manner whether or not an arrestee makes bond. This practice comports with the findings in *Rothgery v Gillespie County*. If a defendant comes to court without counsel, he/she may apply for counsel in court.

Often, a defendant may not have qualified for appointed counsel under Bexar County's financial standard, but the defendant is unable to afford counsel. Many of these defendants who were initially determined not to be indigent by Pre-Trial Services will be appointed counsel by the court of dispositive jurisdiction.

Recommendation: (p. 13) Bexar County must examine the appointment process to ensure persons requesting counsel receive application assistance and timely assignments.

Response:

Felony District Courts: First, we take issue with appointments being designated as untimely when a defendant, at magistration, requested a court appointed attorney, but did not qualify per indigence criteria. On page 12 of the report, it states that "All persons whose indigence status was re-evaluated and who received appointed counsel appeared as late appointments in the monitor's sample." After reviewing procedures, it appears that the monitor was not given access to initial denials of indigence because these records are stored off-site. The monitor could not verify if and when indigence was initially denied.

Secondly, if the monitor had reviewed the records of the initial denial of indigence at magistration, the monitor would have seen that denial is immediate upon completion of the interview. After this initial contact with the defendant, Pre-Trial Services staff does not re-interview defendants unless it is requested by a judge. Every week, the district court coordinators are given a computer generated list of defendants in jail for 7 days who do not have an attorney. Coordinators may re-initiate the appointment procedure or update the system to include the appointment or retention of an attorney.

This procedure has been in place for several years. The TFID report caused a re-examination of procedures and we learned that the list generated by Bexar County Information Technology was not being forwarded to district court coordinators starting this past summer. As of October 11th, the list is being forwarded weekly as originally implemented. Coordinators have been instructed to review the list and to ensure that defendants have court appointed counsel as soon as possible.

The bottom line remains the same. As soon as the court is aware that the defendant is in need of an attorney and requests one, the defendant is re-interviewed and if indigent, receives a court appointed attorney immediately. As noted in the report, the court may appoint counsel even if the defendant is not indigent but still cannot afford to retain counsel.

We believe that the statement in the summary on page 4, which states that a "review of case files revealed several instances where appointments of counsel were made in court and were made at a time much later than the request" is not an accurate reflection of the process. Even though the statement explains that this is likely due to initial denials of indigence, it infers that the judges ignore requests for counsel for indigent defendants until a much later date. Not so.

On page 14 of the report, it is suggested that a solution may be to revise the county's financial standard of indigence or perform weekly follow-ups of incarcerated individuals. The judges believe that the financial standard does not need to be revised. The policy, today, is to appoint counsel to defendants

who do not meet the indigency requirements but still cannot afford to retain counsel. Please note that these are felony cases and defendants must be represented by counsel.

Misdemeanor County Courts-at-Law: As mentioned in the Task Force report on pages 10-11, we rely on pre-trial services to interview all defendants who have requested a court appointed attorney at magistration. When a defendant is magistrated and makes a request to be interviewed for a court appointed attorney, that defendant is interviewed by pre-trial services at the County Central Magistration Office or after being booked into the Bexar County Jail. Once this interview is completed, and they are found eligible for a court appointed attorney, the attorney rotation “wheel” assigns an attorney. We have seen instances where there are delays in this process, and a defendant is not interviewed by pre-trial services for several days. This delay in interviewing does not follow the plan that the County has put in place, thereby resulting in untimely attorney appointments. There are also instances where defendants do not request to be interviewed for a court-appointed attorney at magistration, but only request an appointed attorney when they come to court. Other defendants are denied a court-appointed attorney, after a determination is made by pre-trial services, and come to court indicating that they cannot hire an attorney. The Judges can then make in-court appointments based on indigence (screened by coordinator) or in the “interest of justice.” Currently, our courts aim to be in compliance with Code of Criminal Procedure 1.051(j) by screening defendants in-court and appointing counsel at a defendant’s first arraignment setting.

For juveniles, Section 51.10(c) of the Family Code requires that if a juvenile does not have counsel at a detention hearing, counsel be immediately appointed if there is a decision to detain the juvenile. If a petition is filed by the prosecutor, counsel must be appointed within five working days of the petition being served on the juvenile.

Recommendation: (p. 16) Bexar County must set up a process to appoint an attorney for unrepresented juveniles regardless of the meeting status between parents and Pre-Trial Services.

Response:

Juvenile District Courts: The juvenile courts have a process requiring pre-trial services to appoint counsel immediately after the judge has made a decision to detain the child, which we believe complies with Texas Family Code Section 51.10(c); however, based on the observations of the monitor, we will re-examine the actual court procedures to ensure that this process is followed in all cases. We would like to note that our practice does delay the appointment of counsel until the families come in to qualify. An attorney is appointed for the detained child regardless of whether the parents have had an indigence interview. Because of a deficiency in our computer system, we make a notation that the attorney has been appointed for “DH only”. We do this because our system does not allow us to note which appointments were made without the families coming in to qualify. Even if we provide counsel immediately upon detaining the child after the initial detention hearing before the judge, we still want the families to come in to qualify for court-appointed counsel prior to the actual court date. We believe the Family Code authorizes this practice because the Code provides as follows:

Section 51.10...*(c)* If the child was not represented by an attorney at the detention hearing required by Section 54.01 of this code and a determination was made to detain the child, the child shall immediately be entitled to representation by an attorney. The court

shall order the retention of an attorney according to Subsection (d) or appoint an attorney according to Subsection (f).

(d) The court shall order a child's parent or other person responsible for support of the child to employ an attorney to represent the child, if:

- (1) the child is not represented by an attorney;
- (2) after giving the appropriate parties an opportunity to be heard, the court determines that the parent or other person responsible for support of the child is financially able to employ an attorney to represent the child; and

(3) the child's right to representation by an attorney:

- (A) has not been waived under Section 51.09 of this code; or
- (B) may not be waived under Subsection (b) of this section.

(e) The court may enforce orders under Subsection (d) by proceedings under Section 54.07 or by appointing counsel and ordering the parent or other person responsible for support of the child to pay a reasonable attorney's fee set by the court. The order may be enforced under Section 54.07.

(f) The court shall appoint an attorney to represent the interest of a child entitled to representation by an attorney, if:

- (1) the child is not represented by an attorney;
- (2) the court determines that the child's parent or other person responsible for support of the child is financially unable to employ an attorney to represent the child; and

(3) the child's right to representation by an attorney:

- (A) has not been waived under Section 51.09 of this code; or
- (B) may not be waived under Subsection (b) of this section.

If the courts must appoint, even in at large cases, as recommended by the monitor, then the provisions of the code allowing the court to order the parent to retain counsel or the court to appoint and order the parents to pay, or the court to determine that the child's parent is financially unable to employ an attorney to represent the child, would have no effect.

Recommendation: (p. 16) If no parent or guardian appears for the juvenile's detention hearing, the court must appoint a guardian ad litem per Texas Family Code § 54.01(d). An attorney appointed for the detention hearing may act as a guardian ad litem.

Response:

Juvenile District Courts: The court can appoint a guardian ad litem or an attorney. If we appoint a guardian ad litem in the situation when there is no parent present, we would still like to be able to require the parents to come in to qualify for counsel, so that we can be sure that County funds are being used to pay for indigent defense, not to pay for attorneys for children whose parents simply choose not to appear for a determination of indigence.

Recommendation: (p. 16) Bexar County must ensure that there is proper documentation regarding attorney appointments for detention hearings. Ideally, detention hearing forms would always list when attorneys appeared on behalf of juveniles.

Response:

Juvenile District Courts: The juvenile court judges will make a notation on the orders of detention and/or orders of release if there was an attorney present at the detention hearing. We would like to note that the Family Code does not require an attorney's presence at the detention hearing; only that the child shall be entitled to counsel. Since detention hearings are not evidentiary in nature, the attorney's presence is not always practicable. Also, the detention hearing must be conducted every ten days, according to statute, and if counsel is not present at a detention hearing, they can always request another hearing, if they so desire.

5) **Attorney Selection Process-** Attorney appointments are to be allocated among qualified attorneys in a fair, neutral, and non-discriminatory manner. According to the Code of Criminal Procedure, when a rotational system is used for appointments, "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." The Task Force has established rules regarding fair, neutral, and non-discriminatory appointment processes. Under these rules, a county is presumed to be in substantial compliance with the requirement if, in each level of proceedings (felony, misdemeanor, and juvenile cases), the percentage of appointments received by the top 10 percent of recipient attorneys does not exceed three times their respective share.

Recommendation: (p. 22) The statutory county courts must review their misdemeanor appointment procedures to ensure that appointments are made in a fair, neutral, and non-discriminatory manner.

Response:

Misdemeanor County Courts-at-Law: The County Courts have used a system of in-court appointments based on the requirement under Senate Bill 7 that "if an indigent defendant is released from custody prior to the appointment of counsel, appointment of counsel is not required until the defendant's first court appearance or when adversarial judicial proceedings are initiated, whichever comes first." *See Code of Criminal Procedure 1.051(j)*. In County Courts, the first arraignment setting is 25 days from the date of arrest. When the defendants come to court for that first arraignment setting, an "information" has already been filed in their case. Many defendants do not request to be interviewed by pre-trial services at magistration (i.e., date of arrest) for various reasons (e.g., perception of delay in getting out of jail, perception that they can easily hire an attorney), but then request a court-appointed

attorney when they come to court for that first setting. Other defendants are denied a court-appointed attorney after a determination is made by pre-trial services after magistration. These defendants then come to court indicating that they actually cannot afford to hire an attorney. The Judges can then make in-court appointments based on indigence (defendant is screened by court coordinator for indigency) or an appointment is made in the “interest of justice”. Due to the hectic pace of the courts and the usually large number of defendants requesting court-appointed counsel, the court coordinators then can appoint attorneys who are available and willing to accept court appointed clients in court that morning. This has resulted in many defendants receiving “in-court” appointments, thus resulting in a small amount of attorneys receiving more than 30% of the total appointments.

The feasibility of using a rotational system that appoints from the “next five names on the appointment list in the order in which the attorney’s names appear on the list” is a very difficult process to follow when courts have large daily court dockets with various defendants needing to be interviewed for court-appointed attorneys. There are always several attorneys who are eligible to practice, well-versed in criminal law, and who are willing and able to take court appointments each morning, but who will not be on the “next five names on the appointment list.” To follow this practice in the courtroom would obstruct orderly procedures in the court and result in further delay of indigent defendants receiving court-appointed counsel.

In addition, our judges’ primary concern is to be in compliance with the 6th and 14th amendments regarding the appointment of counsel for indigent defendants. According to the United States Supreme Court in *Rothgery v Gillespie County Tex.*, 128 SCT 2578, 2583 (2008), the Court held that the “commencement of criminal defendant's right to counsel is pegged to initiation of adversary judicial criminal proceedings, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” Although the Rothgery court found that the initiation of adversary proceedings occurs at the Article 15.17 hearing at magistration, oftentimes, in Bexar County, the defendant does not request to be interviewed for court-appointed counsel at magistration or does not qualify for court-appointed counsel after their pre-trial interview. Furthermore, the right of indigent defendants to receive attorney representation in a timely manner is essential. In *Hawkins v Wakrood*, 25 SW3d 882, 890 (Tex. App. 2000), the El Paso Court of Appeals held that it was a “judicial act” pursuant to Code of Criminal Procedure for a Judge to appoint counsel to indigent defendants and the good that was accomplished by protecting the rights of an indigent population of the general public outweighed any wrong or injury that may arguably have resulted to the attorney. The Court further held that judicial immunity may follow when judges delegate their authority or appoint persons to perform services for the court. *Id at 891*. Our County Court judges believe that their current in-court appointment process has been the most constitutional, timely and efficient way for defendants to receive counsel, although it has resulted in a disproportionate share going to a few attorneys.

However, the County Court judges are looking at ways to revise their in-court practices to prevent the top 10 attorneys from receiving more than 30% of their share. One option would be to have pre-trial services come to court and interview the defendants requesting court-appointed attorneys and have them appointed off the appointment rotation wheel. However, such an additional measure in the courtrooms could potentially delay the ability of the defendant to receive an attorney in a timely manner and impede the daily operations of the courts. The use of the misdemeanor rotation “wheel” for MTRs will also hopefully reduce the number of in-court appointments.

Recommendation: (p. 22) The county courts must follow the standard method for appointing counsel as set in the local indigent defense plan.

Response:

Misdemeanor County Courts-at-Law: The County Court Judges have met to discuss the issue of pre-trial appointments not including motions to revoke probation, and have agreed to include Motions to Revoke (MTR) probation on the misdemeanor appointment rotation list (i.e., “wheel”) in an effort to reduce some of the in-court appointments currently taking place. Pursuant to their meeting, a request has been made to Bexar County Information Services (BCIS) to include Motion to Revoke Probation (MTR’s) cases on the wheel. Currently, the wheel only assigns court-appointed attorneys to individuals who have been arrested for new offenses, and not MTRs. This will require some re-programming by BCIS of the existing misdemeanor wheel to include individuals who are arrested on MTRs. Regarding the issue of using an Attorney of the Day: Only a few of the judges use the “attorney of the day” appointment process. The Judges need to discuss whether they will uniformly use the appointment rotation wheel instead of attorney of the day appointment procedures.

Recommendation: (p. 22) Article 26.04(a) of the Code of Criminal Procedure requires the courts to appoint attorneys from a public appointment list. The misdemeanor courts must ensure that all misdemeanor appointments are made from a public appointment list.

Response:

Misdemeanor County Courts-at-Law: The County Court judges have met and agreed to make it a requirement for all attorneys who receive in-court appointments to be on the misdemeanor appointment “wheel.” The Judges still need to meet to decide whether they will allow attorneys who are on the District Court “felony appointment wheel,” but not on the misdemeanor list, to receive misdemeanor appointments when there is a felony companion case. This will potentially improve efficiency for all parties when a defendant has misdemeanor and felony cases pending at the same time.

Recommendation: (p. 25) Bexar County must review its felony appointment procedures to ensure that appointments are made in a fair, neutral, and non-discriminatory manner. Specifically, standard operating procedures for making in-court appointments should be reviewed, or created, to ensure that courts coordinate to provide a fair method of allocating appointments that is consistent with its indigent defense plan.

Response:

Felony District Courts: In measuring whether a county is in substantial compliance with the fair, neutral, and non-discriminatory requirement of attorney appointments, the report refers to a “Task Force Rule.” This rule presumes substantial compliance, if the percentage of appointments received by the top 10 percent of recipient attorneys does not exceed three times their representative share.

We question the basis for this “rule” as the standard. What evidence forms the basis for this standard? Do other jurisdictions use this standard as their rule? On page 28 of the report, it is stated that NAC caseload standards should not be accepted as universal standards, but are a good starting point. Is this “Task Force Rule” a universal standard by which every jurisdiction is measured?

Nonetheless, based on the recommendations stated in the report, the judges met and implemented standard operating procedures for in-court appointments. The procedure now provides that if a defendant appears in court without a retained or appointed attorney, the defendant will be interviewed, and if indigent, the next attorney on the felony wheel will be appointed. The judge may forego the interview and request that Pre-Trial Services appoint the next attorney utilizing the public appointment list. In extraordinary circumstances and upon a finding of good cause on the record, a judge may appoint any qualified attorney.

Another change implemented as a result of this report, involves court appointments made in felony jail court. In the past, defendants who needed representation were appointed attorneys who were in jail court with a client or attorneys who were specifically looking for jail court appointments. Now, all felony jail court appointments will be made rotationally from the appointment wheel.

Recommendation: (p. 25) Article 26.04(a) of the Code of Criminal Procedure requires the courts to appoint attorneys from a public appointment list. The felony courts must ensure all felony appointments are made from a public appointment list.

Response:

Felony District Courts: When the Fair Defense Act was enacted, Bexar County district judges, like many other Texas judges, did not believe that the law applied to motions to revoke or motions to adjudicate guilt. Routinely, attorneys were appointed to these cases, without consideration as to whether they were on the public appointment list. A rotational appointment system for these cases may create a backlog. Bexar County Commissioners Court and judges are very concerned about jail population and the resolution of these cases is needed as soon as possible.

It is anticipated that the law will be amended in the next legislative session and the Fair Defense Act will apply to all cases including motions to revoke or motions to adjudicate guilt. Until the law is amended, the judges do not want to place these cases on the rotational appointment wheel. However, the judges agreed that all court appointments for motions to revoke or motions to adjudicate guilt will be made from the public appointment list.

On page 25, the report notes that a factor which may account for the high number of appointments not made from the public appointment list, is that felonies take over a year to resolve. The monitor measured these appointments from the time of payment, not the time of appointment. The judges are diligent about removing attorneys from the public appointment list who do not currently meet qualifications. For example, 20 plus attorneys are removed from the list for lack of CLE compliance every year. If removed, attorneys are not eligible to receive new appointments. These attorneys, however, may continue representing defendants if the appointment was made prior to the date of removal. The judges revisited this issue and agreed for constitutional reasons as well as continuity of representation, that it is not in the best interest of the defendant to remove their attorney even if the attorney is ineligible to receive new appointments.

Recommendation: (p. 26) Bexar County must review its juvenile appointment procedures to ensure that appointments are made in a fair, neutral, and non-discriminatory manner that is consistent with its indigent defense plan.

Response:

Juvenile District Courts: While we recognize the Task Force has adopted a standard to determine a presumptive level for fair, neutral and non-discriminatory appointment systems, this standard was not adopted until April 2009. The period of this review was Fiscal Year 2009 which was from October 1, 2008-September 30, 2009. Without knowing what standard by which we would be evaluated, it would be difficult to monitor our appointment processes and to adjust them if necessary. Additionally, our automated appointment system does not have appointment counters in place, so we would have to make manual adjustments to the system to compensate for in-court appointments. More importantly, in juvenile, we place an emphasis on continuity of representation; therefore, our appointments will not always be evenly distributed to all attorneys on the wheel. Finally, the reality of the situation in juvenile court is that, since we are required to determine indigence based on the ability of the parents or other responsible person to pay for counsel, many times the families do not come in to qualify until the day of court, and the judge is likely to appoint counsel from the attorneys who are already in court, so as to provide the child with counsel as soon as is practicable. Once the attorney is on the case, they can begin working on a resolution for the child.

6) **Attorney Fee Schedule and Payment Process-** Attorneys are to be paid a reasonable fee for the following: time spent in court making an appearance; reasonable and necessary time spent out of court on the case, supported by documentation that the court requires; preparation of an appellate brief and preparation and presentation of oral argument to an appellate court; and preparation of a motion for rehearing. A fee schedule is to govern these payments, taking into account reasonable and necessary overhead rates. No payment is to be made to the attorney unless the judge approves the payment.

Recommendation: (p. 31) When considering attorney requests for expense reimbursements, the judges must comply with Article 26.05(d) that states attorneys shall be reimbursed for reasonable and necessary expenses.

Response:

Felony District Courts: Regarding payment issues, the Criminal District Court judges recently updated their fee schedule. On page 30, the report refers to the previous policy where "investigators and experts can be paid directly by the auditor and do not have to be paid through the appointed attorney." In July, that rule was changed and the Fee Schedule Guideline states that defense attorneys "must submit pay vouchers to the court for experts and court appointed investigators. Investigators and experts may not approach a judge directly for payment."

On page 31, the report states that the interviewees complained that paper copies and VHS tapes are categorically disallowed. However, the monitor's review of the vouchers only confirmed that a request for \$2.60 for paper copies was not approved. The Fee Schedule Guideline states that according to Article 26.05(c), "this fee schedule takes into consideration reasonable and necessary overhead costs." It is the opinion of the judges that routine copy costs are covered by this provision and should be considered overhead. Any request for extraordinary expenses, whether for copies or anything else, will be reviewed on a case by case basis and approved if the judge believes that the requested payment is reasonable and necessary and beyond routine costs.

Although there is no specific recommendation in the report regarding payment of investigative expenses, several pages were devoted to this topic and we, too, address this issue. We realize that our total expenditures for investigators are well below NSC standards. However, it appears that no county in Texas approaches 50% of the investigative expenditures that the NSC standards recommend. Judges cannot force a defense attorney to request an investigator and generally, when requested, the request is approved. We take issue with the fact that the only data relied on in the report regarding the approval rate for investigator requests was derived from a survey of the criminal defense bar. For felony offenses, a more accurate approval rate would come from a review of felony case files and a count of the number of investigator requests denied.

Misdemeanor County Courts-at-Law: The County Court judges are aware of the low fee structure that has been in place for over 20 years in the County Courts. The Judges must meet to decide whether to amend their current fee schedule, which is currently at a flat fee rate of \$100 per case, \$75 per MTR, and \$25 per hour for out-of-court time. However, due to the fiscal pressure and budget constraints imposed by Bexar County over the last couple of years, the County Court judges have to discuss any fee changes with Bexar County Commissioners Court. The judges are mindful of the County's concerns over ever-increasing budgetary expenses paid to court-appointed counsel every fiscal year due to the increasing number of indigent defendants needing court-appointed counsel in this County.

Our judges are well aware that they must approve reasonable and necessary investigator expenses when requested by the court appointed attorney. However, it is the duty of the court appointed attorney to prepare a Motion Requesting the Appointment of an Investigator for the judge's approval.

Juvenile District Courts: We believe we are in compliance with Article 26.05(d) of the Code of Criminal Procedure. Our fee schedule takes overhead into consideration. We review vouchers on a case-by-case basis and pay for reasonable and necessary expenses that are not overhead. If we reduce a voucher, we note reasons for reducing vouchers on the reduction of payment form and place said form in the case file.

Although there is no specific recommendation in the report regarding payment of investigative expenses, we would like to note that, according to your data, our judges' approval for requests for investigators is at 96.4%.

Recommendation: (p. 32) If a judge reduces a request for payment, the judge must make written findings as to why the request is being reduced.

Response:

Felony District Courts: The judges have been reminded of this rule and will make a concerted effort to comply with the statute. Coordinators, who often review vouchers, have been reminded of the requirement as well.

Juvenile District Courts: We have a process in place regarding payment of vouchers which includes noting reasons for reducing vouchers on the reduction of payment form, which we will continue to follow.

In Bexar County, when the District Court judges believe that an attorney has overstated necessary expenses, the judges may submit the claim to a review committee.

Commendation: (p.32) The use of a review committee is an exemplary practice and can serve as a model program for other counties.

7) **Miscellaneous**

Response:

Felony District Courts: The Task Force conducted a very thorough review of Bexar County's indigent defense system and touched upon several issues of concern which we now address:

On page 9, the report mentions a "process change" implemented by Pre-Trial Services. This change involves a new requirement that all arrestees must either interview with a financial screener or sign an affidavit stating that they do not want to apply for appointed counsel at that time, thereby alleviating any perceived delay in being released from jail. We were not aware of this "process change" and consequently, the change is not addressed in our indigent defense plan.

Pre-Trial Services formerly reported to an oversight committee consisting of one district court judge, one county court judge, and one County Commissioner. This changed soon after our indigent defense plan was implemented. Today, Pre-Trial Services is under the direction of the Planning and Resource Management office, which reports to Commissioners Court. Pre-Trial Services is not accountable to the judges and judges have no authority over them.

Although we know that the only reason Pre-Trial Services appoints counsel in our county is because we have designated them to do so in our indigent defense plan, a change is not feasible at this time. We request that the Task Force assist with resolving this problem and welcome suggestions or legislative proposal recommendations.

The final issue we address is mentioned on page 40 and regards the inability to fully comply with procedures outlined in Article 16.22 CCP. In May of this year, a letter was sent to Commissioners Court and the authors of S.B. 1557 informing them of the lack of resources needed to comply with the new law. If we are to fully comply with this law, Bexar County needs additional medical personnel, mental health magistrates and administrative staff. Currently, Bexar County employs one magistrate who handles competency and sanity matters for the district and county courts and one associate judge who handles civil mental health commitments for probate courts. Magistrate duties referred to in Article 16.22 would be additional duties for the magistrate and the associate judge. Their current duties and responsibilities do not allow time to take on additional duties.

In response to the letter sent to commissioners and authors of S.B. 1557, one member of our legislative delegation called to state that he understood the problem and would help in any way he could. Bexar County recently submitted a grant application to the Hogg Foundation for Mental Health requesting funds for a Bexar County Mental Health Task Force. If Bexar County is awarded the grant, we will request that the Mental Health Task Force assist in resolving funding problems.

Juvenile District Courts: Our judges are all very interested in protecting the rights of the children who appear in our courts, particularly their right to counsel. Since the inception of the Fair Defense Act and all of the changes in the law following the passage of the act, we have made a concerted effort to establish policies and procedures to comply with the law. However, we note that there are several provisions of the Fair Defense laws that should be examined for possible legislative change. It is sometimes unworkable to establish procedures that will adequately protect the rights of the juvenile accused when one must also balance the desire of the County to hold down the costs for court-appointed representation and the goal of distributing cases equally among the attorneys on the appointment list. The provisions of the Fair Defense laws that try to hold an accused juvenile respondent to the same standard as an adult accused, for example, when making a determination of indigence, often result in the child not receiving the assistance of counsel as soon as they would have under the system we had in place prior to the passage of the Fair Defense Act. We are certain this was not part of the legislative intent when these laws were passed.

Once again, the Criminal and Juvenile District Court Judges and the Criminal Statutory County Court-at-Law Judges of Bexar County thank the monitor and staff of the Task Force on Indigent Defense and the Office of Court Administration. We are committed to working together to improve our indigent defense system in order to better serve defendants, respondents and this community.

We hope this information is useful to you in your communications with the Task Force on Indigent Defense. Please let us know if we can be of any further assistance in this process.



Date: October 22, 2010

To: The Honorable Sharon Keller, Presiding Judge Court of Criminal Appeals, Chair

The Honorable Olen Underwood, Vice Chair

Mr. James Bethke, Director, Texas Task Force on Indigent Defense

Honorable Nelson Wolff, Bexar County Judge

From: Judge Al Alonso, Administrative Judge for County Courts at Law *AA*

Re: Bexar County's Response to the Task Force on Indigent Defense's Review of Bexar County's Indigent Defense System

We are in receipt of the memorandum from County Judge Nelson Wolff in response to your Review of the Bexar County's Indigent Defense System. I would first like to thank Judge Nelson Wolff for his suggestions and willingness to work with the County Courts.

The County Court judges are aware that there are problems with the court appointment system. Our next Judge's meeting is scheduled on November 9, 2010 where we plan to discuss and come up with ideas to change our current court appointment procedures.

The County Courts have been called the "workhorses" of the County and we receive 300-400 new case filings monthly, which results in very busy and hectic daily dockets. The Judges would like to find a workable method to appoint attorneys that saves the taxpayers money and which does not unduly burden the courts. The safety of the community is always paramount to the Judges and we are continuously looking for ways to improve the system.

Please do not hesitate to contact me if additional information is needed and I look forward to working with you in the future.



BEXAR COUNTY INFORMATION TECHNOLOGY
203 W. Nueva, Suite 200
San Antonio, Texas 78207-4507
(210) 335-0200

December 16, 2010

Dear Honorable Catherine Torres-Stahl, 144th Judicial District Court
Honorable Mary Roman, 175th Judicial District Court
Honorable Maria Teresa Herr, 186th Judicial District Court
Honorable Raymond Angelini, 187th Judicial District Court
Honorable Sid L. Harle, 226th Judicial District Court
Honorable Philip A. Kazen, Jr., 227th Judicial District Court
Honorable Sharon Macrae, 290th Judicial District Court
Honorable Ron Rangel, 379th Judicial District Court
Honorable Juanita A. Vasquez-Gardner, 399th Judicial District Court
Honorable Lori I. Valenzuela, 437th Judicial District Court:

Thank you for your letter dated November 18, 2010 regarding the Indigent Defense System. A meeting was scheduled on December 2, 2010 with Judge Tim Johnson, Pre-Trial Services, Melissa-Barlow Fischer, and additional administrative staff to discuss the issue as you all outlined in your memo about the lack of uniform procedures for in-court appointments when a defendant appears in court and needs to have an attorney appointed.

Each participant discussed his or her interaction with the system and recommended changes and enhancements to eliminate the inordinate amount of defendants appearing on your respective dockets with no attorney assigned. This has caused too many resets or which, in many cases, forces you to appoint an attorney during court proceedings.

Here is our two part plan to correct and then continue to enhance the Indigent Defense System to ensure that it will continue to meet the needs of the Court now and in the future. We will remain committed to enhance the processes and procedures to ensure compliance with the Fair Defense Act.

Part one of our plan is underway and Pre-Trial is currently testing the changes which will be placed in production as soon as BCIT receives the okay. These changes will alleviate the issues that you all described in your letter and extend the use of the system to your administrative staff which will allow you to run reports before an individual's court date and appoint a defense attorney as needed. In conjunction with these immediate changes, BCIT will also provide formal training and documentation to the Court Coordinators and additional staff as requested to ensure that all Bexar County personnel are uniformly trained on the changes to the system. This will ensure that the users understand how to utilize the system in a consistent manner.

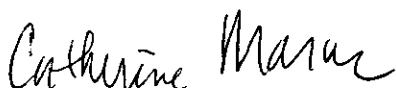
Accordingly, part two of the plan is focused on enhancements to the system which are also being addressed simultaneously with the above mentioned changes. These enhancements will expand the event codes, such as refused or not available to determine why a defense attorney was not initially appointed. Reports can be generated which will provide valuable information for future enhancements.

BCIT is committed to enhancing the Indigent Defense System, and I look forward to working on this important initiative and many other ones with you all in the future.

Thank you for your continuing support of my department.

If you would like to meet with me to discuss any additional issues, my number is 210 335-0207.

Sincerely,



Catherine Maras
Chief Information Officer

cc: Jim Bethke, Director of the Task Force on Indigent Defense
Honorable Judge Nelson Wolff, County Judge
Honorable Sergio "Chico" Rodriguez, Commissioner Precinct 1
Honorable Paul Elizondo, Commissioner Precinct 2
Honorable Kevin Wolff, Commissioner Precinct 3
Honorable Tommy Adkisson, Commissioner Precinct 4
Honorable Tim Johnson, Director of Judicial Support Services, Planning & Resource Management
David Smith, Executive Director/Budget Officer, Planning & Resource Management
Melissa Barlow-Fischer, General Administrative Counsel, Criminal District Courts
Linda Perez, Applications Development Manager