



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

**September 16, 2016**



Texas Indigent Defense Commission  
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**MISSION**

The Texas Indigent Defense Commission provides financial and technical support to counties to develop and maintain quality, cost-effective indigent defense systems that meet the needs of local communities and the requirements of the Constitution and state law.

## Background

The passage of Texas Fair Defense Act (FDA) in 2001 created the Texas Indigent Defense Commission (“Commission”) and mandated that the Commission monitor local jurisdictions’ compliance with the FDA through on-site reviews.<sup>1</sup> These reviews seek to promote local compliance and accountability with the requirements of the FDA and to provide technical assistance to improve county indigent defense processes where needed. The Commission has established policy and fiscal monitoring rules to assist in the review process and set benchmarks for meeting these requirements.<sup>2</sup> The review process also aims to assist local jurisdictions in developing procedures to monitor their own compliance with their indigent defense plans and the FDA.

In August 2011, Texas Indigent Defense Commission staff conducted an initial monitoring review in Fort Bend County and made fourteen recommendations covering eleven topics. In December 2011, the county responded with an action plan to address each of the recommendations. After an initial review, the Commission conducts follow-up reviews to verify that report recommendations have been successfully addressed. In August 2015 and July 2016, staff made on site visits to determine whether Fort Bend County successfully addressed the recommendations from the 2011 report.<sup>3</sup> The monitor observed juvenile detention hearings and misdemeanor dockets and analyzed felony, misdemeanor, and juvenile case files for FY2014.<sup>4</sup> A summary of the status of the 2011 recommendations based on the monitor’s observations and case analysis follows.

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<sup>1</sup> TEX. GOV’T CODE § 79.037(a)–(b).

<sup>2</sup> 1 TEX. ADMIN. CODE §§ 173.401, 174.26–.28.

<sup>3</sup> Staff made onsite visits to Fort Bend County between August 24 and 25, 2015 and on July 19, 2016.

<sup>4</sup> Throughout this report, references to Commission staff will use the term “monitor.”

## Overview of 2011 Recommendations as of September 2016

Recommendation Type	Court Level	Status as of the September 2016 Review	Satisfied	Pending
Timely Magistrate Warnings	Felony and Misdemeanor	Magistrate warnings occur within the time frames set by Article 15.17.	√	
Determination of Indigence	Felony and Misdemeanor	Courts are examining statutory factors when determining indigence.	√	
Appoint Counsel from Approved List	All	Several payments were made to attorneys not on the approved appointment list.		√
Attorneys on List Must Meet CLE Requirements	Juvenile	A process is not in place to ensure all attorneys on the juvenile appointment lists had met their annual juvenile CLE requirements.		√
Attorney-of-the-Day Issues (continuity of counsel; ability to consult with counsel in advance of the hearing; description in the indigent defense plan)	Misdemeanor	The attorney-of-the-day is still used in misdemeanor cases but is not described in the indigent defense plan. The monitor observed a docket where the attorney entered a guilty plea for a client. If the attorney-of-the-day represents clients, there is no assurance that (1) clients have sufficient ability to consult with his/her attorney in advance of a proceeding or (2) attorney-client relationship can last beyond the time of the hearing.		√
Appoint Counsel Promptly	Felony	Sample appointments in felony cases fell below the Commission's threshold for presuming a jurisdiction's processes ensure timely appointments.		√
Appoint Counsel Promptly	Misdemeanor	Sample appointments in misdemeanor cases met the Commission's threshold for presuming a jurisdiction's processes ensure timely appointments.	√	
Juvenile Detention Hearings	Juvenile	The parent is informed of the juvenile's right to counsel (and to appointed counsel if indigent) prior to the hearing.	√	
Appoint Counsel Promptly at Detention Hearing	Juvenile	Sample appointments at juvenile detention hearings fell below the Commission's threshold for presuming a jurisdiction's processes ensure timely appointments.		√
Appoint Counsel Promptly when Petition Served	Juvenile	Sample appointments for juveniles served with a petition met the Commission's threshold for presuming a jurisdiction's processes ensure timely appointments.	√	
Statutory Data Reporting	All	Appeals cases were accurately reported on the Indigent Defense Expense Report.	√	

The county fully addressed six of the original topic areas: (1) timely magistrate warnings, (2) determinations of indigence according to standards set in the indigent defense plan, (3) prompt appointment of counsel in misdemeanor cases, (4) prompt appointment of counsel when the juvenile has been served with a petition, (5) notice of right to counsel at juvenile detention hearings, and (6) accurate data reports to the Commission. Five issues remain related to minimum attorney qualifications and the prompt appointment of counsel, which are addressed in the recommendations below. The Commission plans to conduct another follow-up review within the next year to ensure that these remaining recommendations have been addressed.

## **September 2016 Recommendations (Unresolved from 2011 Review)**

### **Core Requirement 3: Establish minimum attorney qualifications.**

**Recommendation 1:** The courts must make all appointments of counsel from an approved appointment list in accordance with the local indigent defense plan and with Article 26.04(b)(5).

**Recommendation 2:** Fort Bend County must ensure that all attorneys on the juvenile list have met annual CLE requirements set in the juvenile indigent defense plan.

### **Core Requirement 4: Appoint counsel promptly.**

**Recommendation 3:** Fort Bend County must implement processes to ensure timely appointment of counsel in felony cases.

**Recommendation 4:** The courts handling misdemeanor cases must ensure that all persons who require appointment of counsel have the ability to consult with their attorney in private in advance of a proceeding.

Under Article 26.04(j)(2), if a court determines a defendant is indigent, counsel must represent the defendant until the case is disposed unless permitted or ordered by the court to withdraw after a finding of good cause is entered on the record.

**Recommendation 5:** Fort Bend County must implement processes that ensure timely appointment of counsel for juveniles facing detention hearings.

## Program Assessment

### Core Requirement 1: Conduct Prompt and Accurate Magistration Proceedings

Article 15.17(a) of the Code of Criminal Procedure requires that magistrate warnings occur within 48 hours of arrest. In Fort Bend County, Article 15.17 hearings are conducted daily by two associate judges at the county jail. The 2011 monitoring review examined the timeliness of magistrate warnings, and the sample warnings fell below the Commission's threshold for presuming local procedures ensure timely Article 15.17 hearings.<sup>5</sup> In the current review, the monitor's sample of case files was 100% timely, and meets the monitor's threshold for presuming warnings are timely.

**Table 1: Sample Times from Arrest until the Article 15.17 Hearing**

Fort Bend County Time to Magistration Data	Sample Size	Percent
Warnings where time to Art. 15.17 hearing could be determined	179	
Magistration Occurs x days after arrest:		
0 days	2	1.1%
1 day	127	70.9%
2 days	50	27.9%
<b>Timely Magistration</b>	<b>179</b>	<b>100.0%</b>

### Core Requirement 2: Determine indigence according to standards directed by the indigent defense plan.

Article 26.04(l) requires the local indigent defense plan to set procedures and a financial standard for determining indigence. The adult indigent defense plan sets a standard of indigence in which a person is considered indigent if his/her income does not exceed 125% of the federal poverty guidelines. In accordance with Article 26.04(l) of the Code of Criminal Procedure, these standards do not differentiate between bonded and detained persons.

In 2011, the monitor observed a hearing where an adult defendant requested counsel and was asked to provide data showing the income of his/her parents. The monitor also observed a misdemeanor docket where persons who posted bond were deemed not to be indigent and to be able to afford retained counsel. The indigence determinations did not take into account whether the bond reflected the defendant's financial circumstances, as required by Article 26.04(m).

In 2016, the monitor observed the previous practice of denying right to court appointed counsel because the person posted bail has changed. Under the revised practice, several courts send all requests for counsel to the indigent defense coordinator's office. The indigent defense coordinator interviews defendants and

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<sup>5</sup> The threshold requires at least 98% of sample hearings to have occurred within 48 hours of arrest. The monitor examined whether Article 15.17 hearings occurred within 2 days rather than 48 hours.

determines indigence according to the standards set by the indigent defense plan. In those instances when courts conduct their own indigence screening, they collect the same information and follow the same standard of indigence set in the indigent defense plan. Based on the monitor's observations, Fort Bend County appears to follow the standard of indigence set in its indigent defense plan, and does not use a defendant's bond status as a factor in determining indigence.

### **Core Requirement 3: Establish minimum attorney qualifications**

#### **Attorney Appointment lists**

Article 26.04(a) requires courts following a rotational appointment system to appoint an attorney from a public appointment list. The requirement has been incorporated into Fort Bend's indigent defense plan. The local plan provides that the appointing authority must "us[e] a system of rotation from a list of approved counsel." The 2011 review found some in-court attorney assignments went to attorneys who were not on an adult or a juvenile appointment list. The courts responded to these recommendations by saying the courts would follow the requirements of Article 26.04 in making the necessary appointments. In the current review, the monitor identified 14 attorneys in felony cases, 11 attorneys in misdemeanor cases, and 17 attorneys in juvenile cases who received payment for cases in FY2014 but were not on an appointment list.<sup>6</sup> Interviews with court staff and others indicated that some courts appoint attorneys in court who are not on an appointment list. Based on file review and interviews, the county has not yet addressed this recommendation from the 2011 report.

**September 2016 Recommendation 1:** The courts must make all appointments of counsel from an approved appointment list in accordance with the local indigent defense plan and with Article 26.04(b)(5).

#### **Continuing Legal Education (CLE) Requirements**

Under the Commission's Administrative Rules and the local indigent defense plans, attorneys receiving appointments must annually obtain at least six CLE hours in criminal / juvenile matters.<sup>7</sup> The 2011 review found that the courts handling juvenile matters did not have procedures in place to ensure all attorneys on the juvenile lists met the annual CLE requirement. In the current review, interviews indicated that the task of overseeing whether all attorneys on the juvenile list met their annual CLE requirements has now been given to the indigent defense coordinator's office. The office indicated it has not begun tracking juvenile CLE hours but plans to going forward.

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<sup>6</sup> The monitor examined FY11 and 15 appointment lists, and considered any appointment made by the indigent defense coordinator as from the list.

<sup>7</sup> 1 TEX. ADMIN. CODE §§ 174.1-2.

**September 2016 Recommendation 2:** Fort Bend County must ensure that all attorneys on the juvenile list have met annual CLE requirements set in the juvenile indigent defense plan.

### **Core Requirement 4: Appoint Counsel Promptly**

Article 15.17(a) requires requests for counsel made at the Article 15.17 hearing be transmitted to the appointing authority within 24 hours. Under Article 1.051(c), the appointing authority then has one working day to appoint counsel for those deemed indigent (in counties with a population over 250,000).

#### **Felony Cases**

In order to determine the timeliness of Fort Bend County’s felony appointments, the monitor examined 162 felony cases filed in FY2014 (October 2013 – September 2014). From this sample, 108 cases involved requests for counsel. Of these 108 cases, 74 received either a timely appointment of counsel or denial of indigence, and 34 cases did not receive a timely determination of indigence (69% timely).<sup>8</sup> This percentage does not meet the Commission’s threshold for presuming a jurisdiction’s appointment procedures ensure timely appointment of counsel.<sup>9</sup> Based on the review of case files, the county has a process to identify all requests for counsel and rule on them, but some requests fell just beyond statutory time frames. Interviews indicated that additional staff have been added to the indigent defense coordinator’s office, likely improving the timeliness of appointments.

**Table 2: Times to Appointment in Felony Cases**

<b>Fort Bend Felony Appointment Sample Data</b>	<b>Sample Size</b>	<b>Number from sample</b>	<b>Percent</b>
Number of requests for counsel examined	108		
Appointment / denial of indigence occurred in:	108		
0 work days		29	26.9%
1 work day + 24 hour transfer		45	41.7%
2 work days + 24 hour transfer		21	19.4%
3 work days + 24 hour transfer		10	9.3%
More than 3 work days		3	2.8%
<b>Timely appointments (0 – 1 work days)</b>		<b>74</b>	<b>68.5%</b>
Late appointments (more than 1 work day)		34	31.5%

**September 2016 Recommendation 3:** Fort Bend County must implement processes to ensure timely appointment of counsel in felony cases.

<sup>8</sup> Per the Policy Monitoring Rules, the monitor considers the time from request until appointment of counsel to also apply to the time from request to denial of indigence.

<sup>9</sup> The threshold requires at least 90% of the monitor’s sample to be timely.



### Misdemeanor Cases

In order to determine the timeliness of Fort Bend County’s misdemeanor appointments, the monitor examined 165 misdemeanor cases filed in FY2014 (October 2013 – September 2014). From this sample, 83 cases involved requests for counsel. Of these 83 cases, 75 received either a timely appointment of counsel or denial of indigence, and 8 cases did not receive a timely determination of indigence (90% timely).<sup>10</sup> This percentage meets the Commission’s threshold for presuming a jurisdiction’s appointment procedures result in timely appointment of counsel.

**Table 3: Times to Appointment in Misdemeanor Cases**

<b>Fort Bend Felony Appointment Sample Data</b>	<b>Sample Size</b>	<b>Number from sample</b>	<b>Percent</b>
Number of requests for counsel examined	83		
Appointment / denial of indigence occurred in:	83		
0 work days		48	57.8%
1 work day + 24 hour transfer		27	32.5%
2 work days + 24 hour transfer		4	4.8%
3 work days + 24 hour transfer		3	3.6%
More than 3 work days		1	1.2%
<b>Timely appointments (0 – 1 work days)</b>		<b>75</b>	<b>90.4%</b>
Late appointments (more than 1work day)		8	9.6%

### Attorney-of-the-day in Misdemeanor Cases

In 2011, the statutory county courts used attorneys-of-the-day who would communicate with and advise defendants at misdemeanor dockets. The attorney-of-the-day assumed two roles: court administrator and legal counsel. As a court administrator, the attorney determined which defendants needed a re-set to hire counsel and informed defendants of the procedures for requesting counsel. As legal counsel, the attorney reviewed the prosecutor’s file, advised the defendant, and handled pleas. This practice did not comport with Article 26.04(j)(2) of the Code of Criminal Procedure.

Once counsel is appointed, he or she must represent the defendant until the case is disposed, unless permitted or ordered by the court to withdraw after a finding of good cause is entered on the record.<sup>11</sup> Article 1.051(a) of the Code of Criminal Procedure requires that, once appointed, attorneys be given sufficient time to adequately prepare for a proceeding. The monitor’s initial review recommended that attorneys be given sufficient time to adequately prepare a case and continue to represent the client through case disposition.

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<sup>10</sup> The difference in the timeliness of appointments between misdemeanor and felony cases appears to be because many of the requests for counsel in misdemeanor cases occurred in the court of dispositive jurisdiction rather than at the Article 15.17 hearing.

<sup>11</sup> TEX. CODE CRIM. PROC. ART. 26.04(j)(2).

In response to the monitoring report, the statutory county courts said the procedure for appointing an attorney as attorney-of-the-day would be included in the indigent defense plan. The description of the attorney-of-the-day has not yet been included in the indigent defense plan. The statutory county courts also stated the attorney-of-the-day would only be used for administrative purposes. In the current review, the monitor observed misdemeanor dockets, and in one docket, an attorney-of-the-day entered a guilty plea for a client. In another docket, the attorney-of-the-day only performed administrative actions. The representation on the guilty plea is an indication that the attorney-of-the-day is still acting as counsel for defendants. When appointed to represent defendants, the attorney-of-the-day's representation must allow for adequate preparation and continuity of representation.

### **Juvenile Cases**

The monitor examined the timeliness of indigence determinations for juveniles (both for instances in which the juvenile was detained and for instances in which a petition was served on an out of custody juvenile). To ascertain the timeliness of local processes, the monitor examined 68 juvenile cases filed in FY2014 (October 2013 – September 2014). The juvenile probation department reviewed all case files and provided the data to the monitor.

**September 2016 Recommendation 4:** The courts handling misdemeanor cases must ensure that all persons who require appointment of counsel have the ability to consult with their attorney in private in advance of a proceeding.

Under Article 26.04(j)(2), if a court determines a defendant is indigent, counsel must represent the defendant until the case is disposed unless permitted or ordered by the court to withdraw after a finding of good cause is entered on the record.

### **Juvenile Detention Hearings**

Under Section 54.01(b) of the Family Code, prior to a detention hearing, the court must inform the parents of the child's right to appointed counsel if they are indigent. Under Section 54.01(b-1), unless the court finds the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing.

At the time of the initial review, Texas law did not require appointment of counsel for juveniles prior to the initial detention hearing. Prior to the hearing, the court would inform juveniles and their parents that the juvenile was not entitled to appointed counsel at the initial detention hearing. Under local practice, counsel was not appointed until the second detention hearing.

In the current review, the monitor observed detention hearings and sampled case files to determine if counsel was appointed prior to detention hearings. The monitor observed detention hearings for four juveniles on August 24, 2015. This was the initial

hearing for three of the juveniles, and all of them had counsel appointed to them prior to the hearing. This is an indication that juveniles and their parents are informed of the right to appointed counsel prior to the hearing.

From the sample juvenile case files, 29 cases included a juvenile detention hearing, and the case file records indicated an attorney was present at the initial hearing in 22 of the cases. This level of timeliness (76% timely), falls short of the Commission’s threshold for presuming a jurisdiction has procedures in place for making timely appointments of counsel to juveniles who are facing detention hearings.

**Petitions Served on Juveniles**

Under Subsections 51.101(c) and (d) of the Family Code, once a petition is served on the juvenile, the court has five working days to appoint counsel for the juvenile. The court may also order the parents to retain counsel. From the sample juvenile cases, 63 involved a petition served on the juvenile. Counsel was present in a timely fashion in 57 of the 63 cases (91% timely).<sup>12</sup> This meets the Commission’s threshold for presuming a jurisdiction has procedures in place to ensure timely appointment of counsel when a juvenile is served with a petition.

**Table 4: Times to Appointment in Juvenile Cases**

<b>Fort Bend Juvenile Appointment Sample Data</b>	<b>Sample Size</b>	<b>Number from sample</b>	<b>Percent</b>
Number of juvenile case files examined	68		
<b>TIMELINESS OF COUNSEL APPOINTMENTS FOR DETENTION HEARINGS</b>			
Case files with detention hearings	29		
<b>Files indicating attorney was present at the hearing</b>		<b>22</b>	<b>75.9%</b>
<b>TIMELINESS OF COUNSEL APPOINTMENTS WHERE JUVENILE SERVED WITH A PETITION</b>			
Case files in which juvenile was served with a petition	63		
Counsel appointed within 5 working days of service		47	74.6%
Counsel retained within 5 working days of service		7	11.1%
Indigence denied within 5 working days of service		3	4.8%
<b>Cases in which counsel present in a timely fashion</b>		<b>57</b>	<b>90.5%</b>
Cases in which counsel not present in a timely fashion		6	9.5%

**September 2016 Recommendation 5:** Fort Bend County must implement processes that ensure timely appointment of counsel for juveniles facing detention hearings.

<sup>12</sup> The monitor presumed the case had a timely appointment of counsel if, within five working days of the petition being served on the juvenile: counsel was appointed; counsel was retained; or indigence was denied (an implied order to retain counsel).

## **Core Requirement 7: Statutory Data Reporting**

In 2011, the auditor's office was unable to separate appellate cases and expenses from trial-level cases and expenses. Since the last review, the office has successfully separated these expenses and reported them on the annual indigent defense expenditure report.

### **Conclusion**

The monitor appreciated the professionalism and cooperation of all Fort Bend County officials and staff during this review. Commission staff is ready to provide any assistance the county may need in addressing the issues identified in this report. Staff intends to conduct an additional follow-up review within one year of the issuance of the report.