



Policy Monitoring Follow-up Review – Gaines County

May 2017



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.

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Background

Texas Indigent Defense Commission (Commission) staff visited Gaines County in 2013 to assess the county's indigent defense systems and to determine if the county was meeting Fair Defense Act (FDA) requirements. In June 2013, the Commission issued the initial policy monitoring report, which made several recommendations to assist Gaines County in meeting the core requirements of the FDA. Recommendation topics covered: 1) magistrate warning hearings; 2) timely appointment of counsel in felony cases; 3) timely appointment of counsel in misdemeanor cases; 4) waivers of counsel in misdemeanor cases; and 5) compliance with felony defense contract terms. The report found the county's procedures met the presumed thresholds for the other core requirements of the FDA.

May 2017 Follow-up Review

Staff members Joel Lieurance and Brandon Bellows conducted the follow-up review with a visit to Gaines County between March 20th and 22nd, 2017.¹ The purpose of this review was to examine whether Gaines County successfully addressed the recommendations from the June 2013 report. The monitor observed a misdemeanor docket and examined several documents including: felony and misdemeanor case files; data reported to the Commission as part of the annual Indigent Defense Expense Report; vouchers paid to the contract defense attorney; and documents submitted to the Commission as part of the local indigent defense plan. The monitor's report follows, and the county must respond to the May 2017 report recommendations.

Conduct Prompt and Accurate Magistration Proceedings

Article 15.17(a) of the Code of Criminal Procedure requires magistrates to ensure reasonable assistance in completing financial forms for requesting counsel at the time of the Article 15.17 hearing. Article 15.17(a) further requires the magistrate to transmit all requests for counsel to the appointing authority within 24 hours of the request being made.

The 2013 review found that, when arrestees requested counsel at the Article 15.17 hearing, arrestees could obtain forms for requesting counsel from jail staff. When financial forms were completed, they were put into a jail outbox. Felony requests for counsel were mailed via the US Postal Service to the district judge's office in Lamesa. Misdemeanor requests for counsel were walked across the street to the county judge's office. This request transfer process resulted in delays because the appointing authorities would often not receive a completed request for counsel until after the time the appointment of counsel or denial of indigence was due.

In the current review, procedures for transmitting requests to the appointing authority appear to have improved. Methods for transmitting requests to the courts,

¹ Throughout this report, references to Commission staff will use the term "monitor."

however, are not seamless. From the monitor's sample of felony cases, there were five requests for counsel that did not result in either an appointment of counsel or a denial of indigence. In the monitor's misdemeanor file sample, there were 26 cases in which the court did not rule on the defendant's Article 15.17 hearing request for counsel. These non-rulings appear to be instances where the courts did not receive a financial application from the defendant requesting counsel.

May 2017 Recommendation 1: Article 15.17(a) requires the magistrate to ensure that assistance in completing financial paperwork for counsel requests be provided at the time of the Article 15.17 hearing. Article 15.17(a) further requires that this paperwork be transmitted to the appointing authority within 24 hours of the request being made. Gaines County must implement procedures to ensure that all arrestees who request counsel have associated financial paperwork promptly completed and transmitted to the appointing authority within 24 hours of the request being made.

Appoint Counsel Promptly

Under Article 15.17(a) of the Code of Criminal Procedure, once a request for counsel is made, the magistrate must ensure the request is transmitted to the appointing authority within 24 hours. Under Article 1.051(c), the appointing authority then has three working days to appoint counsel for those deemed indigent (in counties with a population under 250,000).

Felony Cases

The 2013 report found that appointments of counsel in felony cases did not meet the Commission's threshold for presuming a jurisdiction has procedures in place to ensure timely appointment of counsel. The lack of timely appointments appeared to primarily be the result of problems in promptly transmitting requests for counsel to the appointing authority.

In the current review, the monitor examined 58 felony cases filed in FY2016 (October 2015 – September 2016) and found 49 instances where the defendant requested counsel. Counsel was appointed in a timely manner in 65% of sample cases. This timeliness rate falls below the Commission's threshold (90% timeliness) for presuming a jurisdiction has procedures in place for timely appointments of counsel. That said, the timeliness rate of the current sample was much greater than the timeliness rate of the 2013 sample. The monitor believes that non-rulings on requests for counsel stem from a disconnect between a defendant making a request for counsel and the court receiving the financial paperwork required for the request.

Table 1: Times to Appointment in Felony Cases

Gaines Felony Appointment Sample Data	Sample Size	Number from sample	Percent
Number of case files examined	58		
Appointment / denial of indigence occurred in:	49		
0 work days		27	55.1%
1 work day + 24 hour transfer		1	2.0%
2 work days + 24 hour transfer		1	2.0%
3 work days + 24 hour transfer		3	6.1%
Total Timely appointments (0 – 3 work days)		32	65.3%
Late appointments (more than 3 work days)		12	24.5%
No ruling on request		5	10.2%

May 2017 Recommendation 2: Gaines County must implement procedures to ensure timely determinations of indigence in felony cases. Specifically, all requests for counsel must be promptly transmitted to the appointing authority so that the requests can be ruled upon.

Misdemeanor Cases

The 2013 report found that appointments of counsel in misdemeanor cases did not meet the Commission’s threshold for presuming a jurisdiction has procedures in place to ensure timely appointment of counsel. The lack of timely appointments appeared to be the result of: 1) a breakdown in the transmittal of misdemeanor requests for counsel to the courts and 2) no procedures to deny indigence for defendants who do not meet the local financial standard.

In the current review, the monitor examined 126 misdemeanor case files and found records indicating counsel had been requested in 52 case files. Counsel was appointed in a timely manner in 17% of sample cases, and so fell below the Commission’s threshold (90% timeliness) for presuming a jurisdiction has procedures in place for timely appointments of counsel. Half of the requests for counsel did not receive a ruling on the request. This is an indication that the court may not be receiving all requests for counsel.

Table 2: Times to Appointment in Misdemeanor Cases

Gaines Misdemeanor Appointment Sample Data	Sample Size	Number from sample	Percent
Number of case files examined	126		
Appointment / denial of indigence occurred in:	52		
0 work days		9	17.3%
1 work day + 24 hour transfer		0	0%
2 work days + 24 hour transfer		0	0%
3 work days + 24 hour transfer		0	0%
Total Timely appointments (0 – 3 work days)		9	17.3%
Late appointments (more than 3 work days)		17	32.7%
No ruling on request		26	50.0%

May 2017 Recommendation 3: Gaines County must implement procedures to ensure timely determinations of indigence in misdemeanor cases. Specifically, all requests for counsel must be promptly transmitted to the appointing authority so that all requests can be ruled upon.

Waivers of Counsel

Article 1.051 of the Code of Criminal Procedure addresses waivers of counsel and allows written waivers of counsel that are voluntarily and intelligently made.² Articles 1.051(f-1) and (f-2) require a waiver of the opportunity to retain counsel before the defendant can speak with the prosecutor. Article 1.051(g) requires a written waiver of the right to counsel so the defendant can enter an uncounseled guilty plea.

Under 1.051(f-1), the prosecutor may not initiate a waiver of counsel and may not communicate with a defendant until any pending request for counsel is ruled upon and the defendant waives the opportunity to retain private counsel. Under 1.051(f-2), the court must explain the procedures for requesting counsel and must give the defendant a reasonable opportunity to request counsel before encouraging the defendant to communicate with the attorney representing the state. All requests for counsel must be ruled upon prior to a waiver of counsel. Before a defendant enters an uncounseled plea, he or she must sign a written waiver, the language of which must substantially conform to the language of 1.051(g).³

² Article 1.051(f) states:

A defendant may voluntarily and intelligently waive in writing the right to counsel. A waiver obtained in violation of Subsection (f-1) or (f-2) is presumed invalid.

³ The waiver language of Article 1.051(g) states: "I have been advised this _____ day of _____, 2____, by the (name of court) Court of my right to representation by counsel in the case pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed

Observation of a Misdemeanor Docket

During the 2013 review, the monitor observed a misdemeanor docket during which the procedures for requesting counsel were not explained to defendants. In the current review, the monitor also observed a misdemeanor docket. At this docket the procedures for requesting counsel were clearly explained to defendants, and some defendants requested counsel. This issue from the 2013 review has now been addressed.

Issues Found in Case File Review

During the 2013 review, defendants entering an uncounseled plea did not sign a written waiver of counsel that substantially conformed to Article 1.051(g). That issue has been resolved, and uncounseled pleas now include written waivers with language tracking Article 1.051(g).

When misdemeanor arrestees request counsel, the courts must have a system in place to rule on all requests and either appoint counsel or determine the person is not indigent. In 11 cases from the current sample, the defendant made a request for counsel at the Article 15.17 hearing, but there was no documentation that the request had been denied. Later, these defendants entered uncounseled pleas.⁴ Additional cases involved requests for counsel that were not ruled upon and appeared to involve communication between the defendant and the prosecutor. These cases, however, did not result in uncounseled pleas. Article 1.051(f-2) states:

... If the defendant has requested appointed counsel, the court may not direct or encourage the defendant to communicate with the attorney representing the state unless the court or the court's designee authorized under Article 26.04 to appoint counsel for indigent defendants in the county has denied the request and, subsequent to the denial, the defendant:

- (1) has been given a reasonable opportunity to retain and has failed to retain private counsel; or*
- (2) waives or has waived the opportunity to retain private counsel.*

May 2017 Recommendation 4: As required by Article 1.051(f-2), Gaines County must rule upon all requests for counsel prior to procuring a waiver of counsel for the purpose of speaking with the prosecutor. In order to rule upon all requests for counsel, the courts must ensure procedures are in place to: (1) receive all requests and (2) appoint counsel or document the denial of indigence.

*for me free of charge. Understanding my right to have counsel appointed for me free of charge if I am not financially able to employ counsel, I wish to waive that right and request the court to proceed with my case without an attorney being appointed for me. I hereby waive my right to counsel.
(signature of defendant)"*

⁴ In these 11 cases, Article 1.051(f) may be implicated, since issues with (f-1) and (f-2) may impact the validity of the 1.051(g) waiver.

Compliance with Felony Defense Contract Terms

Contract Caseloads

The 2013 report found that the attorney who contracted to represent defendants in felony cases exceeded the caseload limitations set in the contract. At the time of the review, the defense contract referred to the ABA's recommended caseload limitations. Under this limitation, the contract attorney could not exceed a combination of cases equivalent to 150 felony cases, 400 misdemeanor cases, 200 juvenile cases, or 25 appeals cases. His contract work exceeded these totals, and he handled additional cases beyond those covered by the contract.⁵

Since that review, the caseload limitations set in contract have been revised upward to 400 cases and only covers the four counties of the 106th Judicial District. The contract no longer limits the attorney's full workload, but only the workload from contract cases. The contract now states:

DISTRICT JUDGE will monitor ATTORNEY's caseload under this contract to ensure that the quality and effectiveness of ATTORNEY's representation of defendants is not compromised and that each defendant is being provided effective representation. If DISTRICT JUDGE finds that ATTORNEY's representation is being compromised or is falling below that which is expected by the Court, DISTRICT JUDGE will make adjustments to ATTORNEY's caseload. ATTORNEY's caseload under this contract shall not exceed 400 actual cases over the entire four counties of the 106th Judicial District.

To provide effective assistance of counsel, an attorney must ensure a meaningful adversarial testing of the prosecution's case, which often requires a significant time investment.⁶ One method of ensuring attorneys have adequate time to devote to individual clients is by controlling caseloads. Following passage of HB 1318 in 2013, the Texas Legislature instructed the Commission to publish a study determining reasonable caseloads in Texas.⁷

⁵ For the 2013 review, the contract attorney reported that he had been appointed to 254 felony cases and two appeals cases across the four counties involved in the contract. The attorney noted that the contract represented about 60% of his total work. Based on the caseload limitations set in the contract, if the contract attorney did no extra work outside of the contract, he would have been limited to 150 felony appointments per year. The 254 felony appointments and two appeals appointments were equivalent to 1.77 times the threshold set in the contract. If one took his outside work into account, and if the contract attorney's assessment that the contract comprised about 60% of his annual workload was accurate, his caseload exceeded the contract threshold by 2.95 times.

⁶ See *United States v. Cronin*, 466 U.S. 648, 656–57 (1984).

⁷ The bill required the Commission to:

[C]onduct and publish a study for the purpose of determining guidelines for establishing a maximum allowable caseload for a criminal defense attorney that ... allows the attorney to give each indigent defendant the time and effort necessary to ensure effective representation.

Act of May 17, 2013, Tex. H.B. 1318, 83rd Leg., R.S., ch. 912, § 8, 2013 TEX. GEN. LAWS 2268, available at <http://www.legis.state.tx.us/tlodocs/83R/billtext/html/HB01318F.HTM>.

The Texas study included an advisory panel of stakeholders who provided input into the study's methodology. The data used to determine reasonable caseloads included a timekeeping study, a time sufficiency survey, and feedback from experienced criminal defense attorneys. The resulting Weighted Caseload Guidelines determined that the maximum annual caseload under which an attorney could provide reasonably effective representation was **128 felony cases** of mixed offense levels or **226 misdemeanor cases** of mixed offense levels.⁸ An addendum to the Weighted Caseload Guidelines has been released, and this addendum determined the expected maximum annual appellate caseload for an attorney to be **31.2 felony appeals cases**.⁹

In FY2016, the felony contract attorney disposed 288 cases under the contract (275 felony cases, 4 misdemeanor cases, and 9 appeals cases). This caseload falls within the current contract limitations. While the contract attorney met the annual caseload limitations set by the contract, his contract workload (for FY2016) was 2.4 times the recommended total under the Weighted Caseload Guidelines. If one were to consider the percent of the attorney's time devoted to matters outside of the contract, one may get a better idea of the reasonableness of his caseload. However, the contract attorney did not report the percent of time devoted to indigent defense cases in each county as required by Article 26.04(j)(4).

Compensation for Contract Services

The 2013 review found that while the contract set a monthly basis for payments, there was no monthly voucher that was to be approved by the appointing authority (i.e. the district judge) prior to payment for services rendered.¹⁰ The current review found that this issue has been rectified, and monthly vouchers are now approved before being forwarded to the county financial officer prior to payment.

⁸ PUB. POLICY RESEARCH INST. AT TEXAS A&M UNIV., GUIDELINES FOR INDIGENT DEFENSE CASELOADS: A REPORT TO THE TEXAS INDIGENT DEFENSE COMMISSION 30–34 (2015), *available at* http://www.tidc.texas.gov/media/31818/150122_weightedcl_final.pdf.

⁹ PUB. POLICY RESEARCH INST. AT TEXAS A&M UNIV., APPELLATE ADDENDUM: GUIDELINES FOR INDIGENT DEFENSE CASELOADS, A REPORT TO THE TEXAS INDIGENT DEFENSE COMMISSION 15 (2016), *available at* http://www.tidc.texas.gov/media/50833/161214_wcl-appellate.pdf.

¹⁰ This requirement, specifically for contracts, is set in 1 Tex. Admin. Code § 174.25, and for all payments for defense services in Article 26.05(c) of the Code of Criminal Procedure. 1 Tex. Admin. Code § 174.25 states:

The contract shall state that the contractor shall be required to submit an itemized fee voucher. The voucher must be approved by a member of the appointing authority prior to being forwarded to the county financial officer for approval and payment.

Article 26.05(c) states:

No payment shall be made under this article until the form for itemizing the services performed is submitted to the judge presiding over the proceedings or, if the county operates a managed assigned counsel program under Article 26.047, to the director of the program, and until the judge or director, as applicable, approves the payment. If the judge or director disapproves the requested amount of payment, the judge or director shall make written findings stating the amount of payment that the judge or director approves and each reason for approving an amount different from the requested amount.

Conclusion

The monitor enjoyed meeting with Gaines County officials and staff, and appreciates their cooperation during this review. Commission staff stand ready to provide any assistance the county may need in addressing the issues identified in this report.

Status of Recommendations from the June 2013 Review

Core Requirement 1. Conduct prompt and accurate magistration proceedings.

Recommendation 1: Gaines County must implement procedures to ensure assistance in completing the necessary forms for requesting counsel at the time of the Article 15.17 hearing. *Issue still pending.*

Recommendation 2: Gaines County must implement procedures to transmit all requests for counsel to the appointing authority within 24 hours of the request. *Issue still pending.*

Core Requirement 4. Appoint counsel promptly.

Recommendation 3: Gaines County and the 106th District Court must implement procedures to ensure that determinations of indigence in felony cases fall within the time frames set by the FDA. *Issue still pending.*

Recommendation 4: Gaines County must implement procedures to ensure timely determinations of indigence in misdemeanor cases. In particular, the court must rule upon all requests for counsel. *Issue still pending.*

Recommendation 5: Gaines County must implement procedures to ensure that the court rules upon requests for counsel prior to granting any waiver of counsel. The procedure must provide that the court may not direct or encourage the defendant to communicate with the attorney representing the state until the court advises of the right to counsel and explains the process for requesting counsel. Article 1.051(f-1)(1), Code of Criminal Procedure prohibits an attorney representing the state from initiating or encouraging a waiver of counsel from an unrepresented defendant. *Issue still pending.*

Recommendation 6: Pro se pleas must include written waivers of counsel as required by Article 1.051(f), Code of Criminal Procedure. *Successfully Addressed.*

Recommendation 7: The county court must follow the procedures set in its indigent defense plan and in Article 1.051(f-2) and explain the procedures for requesting counsel to defendants appearing in court without counsel. *Successfully Addressed.*

Core Requirement 5. Institute a fair, neutral, and non-discriminatory attorney selection process.

Recommendation 8: The parties to the contract for felony defense services must follow the terms of the contract according to the contract's caseload limitations. Excessive caseloads could compromise the quality of representation provided for indigent clients. *Successfully Addressed.*

Recommendation 9: The County must ensure that procedures are in place to meet the requirements of 1 TAC § 174.25 and Article 26.05(c) so that itemized fee vouchers are submitted and approved by the appointing authority prior to payment by the financial officer. *Successfully Addressed.*

Recommendations from the May 2017 Review

The county must provide a written response to each of the May 2017 report recommendations.

Core Requirement 1. Conduct prompt and accurate magistration proceedings.

May 2017 Recommendation 1: Article 15.17(a) requires the magistrate to ensure that assistance in completing financial paperwork for counsel requests be provided at the time of the Article 15.17 hearing. Article 15.17(a) further requires that this paperwork be transmitted to the appointing authority within 24 hours of the request being made. Gaines County must implement procedures to ensure that all arrestees who request counsel have associated financial paperwork promptly completed and transmitted to the appointing authority within 24 hours of the request being made.

Core Requirement 4. Appoint counsel promptly.

May 2017 Recommendation 2: Gaines County must implement procedures to ensure timely determinations of indigence in felony cases. Specifically, all requests for counsel must be promptly transmitted to the appointing authority so that the requests can be ruled upon.

May 2017 Recommendation 3: Gaines County must implement procedures to ensure timely determinations of indigence in misdemeanor cases. Specifically, all requests for counsel must be promptly transmitted to the appointing authority so that all requests can be ruled upon.

May 2017 Recommendation 4: As required by Article 1.051(f-2), Gaines County must rule upon all requests for counsel prior to procuring a waiver of counsel for the purpose of speaking with the prosecutor. In order to rule upon all requests for counsel, the courts must ensure procedures are in place to: (1) receive all requests and (2) appoint counsel or document the denial of indigence.

Appendix -- Gaines County Indigent Defense Statistics

Year	2001	2012	2013	2014	2015	2016	Texas 2016
Population (Non-Census years are estimates)	14,329	17,975	18,190	19,204	19,522	20,112	27,725,192
Felony Charges Added (from OCA report)			134	145	103	137	89
Felony Cases Paid		80	78	89	61	111	200,580
% Felony Charges Defended with Appointed Counsel			60%	54%	86%	45%	125%
Felony Trial Court-Attorney Fees		\$21,642	\$37,584	\$28,712	\$45,218	\$42,388	\$115,192,600
Total Felony Court Expenditures		\$25,967	\$40,134	\$30,962	\$60,837	\$50,976	\$131,727,198
Misdemeanor Charges Added (from OCA report)			442	214	362	393	389
Misdemeanor Cases Paid		64	69	85	73	61	214,674
% Misdemeanor Charges Defended with Appointed Counsel			14%	32%	23%	19%	16%
Misdemeanor Trial Court Attorney Fees		\$4,963	\$4,130	\$6,933	\$17,040	\$17,100	\$40,245,051
Total Misdemeanor Court Expenditures		\$4,963	\$4,130	\$6,933	\$18,047	\$17,100	\$41,003,480
Juvenile Charges Added (from OCA report)			12	33	13	8	20
Juvenile Cases Paid		25	31	18	22	24	41,989
Juvenile Attorney Fees		\$5,295	\$15,036	\$8,534	\$9,778	\$9,877	\$11,119,664
Total Juvenile Expenditures		\$5,295	\$15,036	\$8,534	\$10,783	\$9,877	\$11,424,425
Total Attorney Fees	\$18,324	\$33,494	\$56,750	\$47,099	\$72,036	\$70,365	\$172,232,454
Total ID Expenditures	\$27,984	\$50,719	\$92,110	\$86,522	\$102,567	\$91,471	\$247,730,647
Increase In Total Expenditures over 2001 Baseline			81%	229%	209%	267%	227%
Total ID Expenditures per Population	\$1.95	\$2.82	\$5.06	\$4.51	\$5.25	\$4.55	\$8.94
Commission Formula Grant Disbursement			\$12,517	\$14,012	\$25,370	\$17,368	\$18,328
Costs Recouped from Defendants		\$8,853	\$6,286	\$5,290	\$4,910	\$6,363	\$11,055,03