



Review of Hidalgo County's Indigent Defense Systems

June 3, 2014



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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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Purpose of Review

The Texas Indigent Defense Commission (Commission) is required to monitor local jurisdictions' compliance with the Fair Defense Act (FDA).¹ This review is made as a follow-up to verify that recommendations from previous reports have been implemented.

Background

In 2009 Commission staff conducted a policy monitoring review of Hidalgo County's indigent defense practices. The report made recommendations to the County, and Hidalgo County responded to each recommendation. See Table 1 for a summary of these recommendations and County action plans.

Table 1: Recommendations and County Action Plans from 2009 Policy Monitoring Review

Recommendation Summary	County Action Plan
The County utilized a contract defender for juvenile detention hearings, but this system did not follow the Commission's Contract Defender Rules.	The County switched from using a contract defender for juvenile detention hearings to using a rotational system of appointing counsel for juveniles at detention hearings.
The time to appointment of counsel listed in the indigent defense plan for juveniles did not conform to statute.	The County amended its indigent defense plan for juveniles.
The record documenting juvenile detention hearings did not list the name of the attorney present.	The board of judges reviewed the procedure for tracking detention hearings.
Appointed attorneys did not represent their clients at juvenile detention hearings.	With the move to a rotational system for juvenile detention hearings, this was no longer an issue.
Appointments of counsel in felony, misdemeanor, and juvenile cases were unevenly distributed.	The board of judges would annually review the distribution of attorney appointments.

Hidalgo County successfully addressed the first four issues of the 2009 report. The last issue required verification as to whether the County had successfully addressed the issue. To determine whether appointment distributions had improved from the 2009 report, the monitor analyzed 2010 data from the County.

The examination of appointments from the 2010 data indicated that the proportion of appointments made to the most frequently appointed attorneys in felony, misdemeanor, and juvenile proceedings all exceeded the Commission's threshold for presuming that a jurisdiction's appointment system is fair, neutral, and nondiscriminatory. Under the Commission's administrative rules, if the top ten percent of appointed attorneys receive less than three times their representative share of appointments, the appointment system is presumed to be fair, neutral, and nondiscriminatory. In this examination of 2010 data, the top ten percent of recipient attorneys fell outside of the Commission's presumed thresholds in felony, misdemeanor, and juvenile cases (see Table 2). The examination did not break out felony appointments according to each felony appointment list, but rather combined all felony appointments together. Commission staff presented these findings to a February 2011 board of judges meeting in Hidalgo County.

¹ Tex. Gov't Code § 79.037(a)-(b).

Table 2: Distribution of 2010 Attorney Appointments

Appointment Level	Top 10% Receive X Times Their Share of Appointments	Total Attorneys	Total Cases
Felony	3.7	186	5,722
Misdemeanor	3.7	179	8,520
Juvenile	5.3	79	1,315
Commission Threshold	3.0		

Hidalgo County responded to these findings by setting out a three phase plan to ensure that appointments would be more evenly distributed. The first phase involved a review of attorneys accepting court appointments (some judges were concerned that an attorney might have strong qualifications on paper but lack necessary skills and ability). The second phase involved a consolidation of appointment lists so that attorneys who received a large number appointments on one list would not also receive a large number of appointments on the other lists. The third phase involved the pre-assignment of counsel for in-court appointments.² Judges often made in-court appointments based on attorneys present in the courtroom. This new method would allow for in-court appointments to rotate among a more diverse group of attorneys.

Some judges took exception to the Commission’s findings because the findings were based on distributions by court level (i.e., all felony appointments) and not on distributions by particular appointment wheels for the different levels of felony offenses. The matter was discussed at the Commission’s June 6, 2011 Policies and Standards Committee meeting. After some discussion, the Committee directed staff to work with Hidalgo County personnel to track the distribution of attorney appointments by appointment wheel.

Current Review

As was previously noted, the Commission’s administrative rules set a presumptive threshold in which a jurisdiction is presumed to have a fair, neutral, and nondiscriminatory appointment system if the top ten percent of appointed attorneys in each level of proceedings (felony, misdemeanor, and juvenile) receive less than three times their representative share of appointments. If the jurisdiction can track appointments by appointment wheel, the monitor examines this distribution according to the appointment wheel.

In Hidalgo County, attorney appointments in adult criminal matters are made by the Indigent Defense Services Department when an arrestee requests counsel at the Article 15.17 hearing. This office appoints the next attorney available from the appointment list on a rotating basis. However, when attorneys are appointed in court, individual courts have control over appointment methods. Since there are two different sources of appointments in the County, and one of those sources, Indigent Defense Services, appoints the next attorney on the list, the uneven appointment distributions appear to be the result of in-court appointments.

For this current review, Hidalgo County’s Indigent Defense Services Department made multiple attempts to track appointments by wheel. In January 2013, the policy monitor requested the Indigent Defense Services Department to provide wheel-level appointment data for the last six months of FY12

² This pre-assignment method would allow only specific attorneys to receive in-court appointments at a court docket. The list of attorneys eligible to receive in-court appointments would rotate.

(April 2012 through September 2012). The Department was able to provide offense level data for this period, but the cases included both retained and appointed counsel. The policy monitor compared this data with FY12 and FY13 data from the auditor’s office showing cases in which attorneys were paid by the County. The monitor deduced that those cases provided by the Indigent Defense Services Department were cases with appointed counsel if the same attorney later received a County payment for the case.³

For non-capital, trial-level criminal cases, Hidalgo County uses four different appointment wheels: a first degree felony wheel; a second degree felony wheel; a combined third degree and state jail felony wheel; and a misdemeanor wheel. The proportion of available cases for each wheel assigned to the top ten percent of appointed attorneys is shown on Table 3. Under this analysis, appointments to attorneys on the first degree felony wheel and on the second degree felony wheel met the Commission’s threshold. However, appointments to attorneys on the combined third degree and state jail felony wheel and on the misdemeanor wheel did not meet the Commission’s threshold.

For juvenile cases, Hidalgo County uses three different wheels: a CINS-level wheel (including delinquent conduct cases where commitment to a TJJD facility is not an option); a delinquent conduct wheel (where commitment to a TJJD facility without a determinative sentence is an option); and a determinate sentence wheel (including cases in which there is a discretionary transfer to a criminal court). The data provided by Hidalgo County did not separate cases by juvenile appointment wheel. The top ten percent of attorneys receiving appointments in juvenile cases is shown in Table 3. Appointments on these lists did not meet the Commission’s threshold.

Table 3: Distribution of Attorney Appointments (April – September 2012 Appointments)⁴

Appointment Wheel	Top 10% Receive X Times Their Share of Appointments	Total Attorneys From Wheel Receiving Appointments	Total Cases
First Degree Felony	2.7	62	133
Second Degree Felony	2.7	127	397
Third Degree / State Jail Felony	3.7	145	960
Misdemeanor	3.9	157	2,400
Juvenile (all juvenile wheels combined)	3.9	37	278
Commission Threshold	3.0		

Based on the data that Hidalgo County was able to provide, attorney appointments fell outside of the Commission’s presumed thresholds for the combined third degree and state jail felony wheel, the misdemeanor wheel, and the combined juvenile wheels. The County’s efforts to respond to the 2011 findings have not successfully addressed the appointment distribution finding. Hidalgo County still

³ In 2012, Hidalgo County reported 11,138 cases were paid to assigned counsel attorneys. Since the monitor was examining appointments for the last half of the fiscal year, the monitor expected that a comparison of the two data sets would yield matching cases corresponding to about one half of the 2012 total cases paid. However, after the comparison of the two data sets, the monitor found 4,180 cases matched (or about three-eighths of the 2012 cases paid total). Two reasons for the lower than expected number of matching cases are (1) some cases in which attorneys were appointed in 2012 were still pending at the end of 2013 and (2) some cases involved the replacement of counsel. The monitor did not count those cases in which it appeared that one attorney started a case but a different attorney was later paid for the case.

⁴ This analysis does not consider twelve felony cases that did not list a specific wheel.

needs to implement methods that demonstrate appointments are made in a fair, neutral, and nondiscriminatory manner.

Recommendations Regarding Distributions of Attorney Appointments

Recommendation: Based on data provided by Hidalgo County, distributions of attorney appointments fell outside of the Commission's thresholds for presuming a fair, neutral, and nondiscriminatory appointment system in the following wheels:

- (1) the combined third degree and state jail felony wheel;
- (2) the misdemeanor wheel; and
- (3) the combined juvenile wheels.

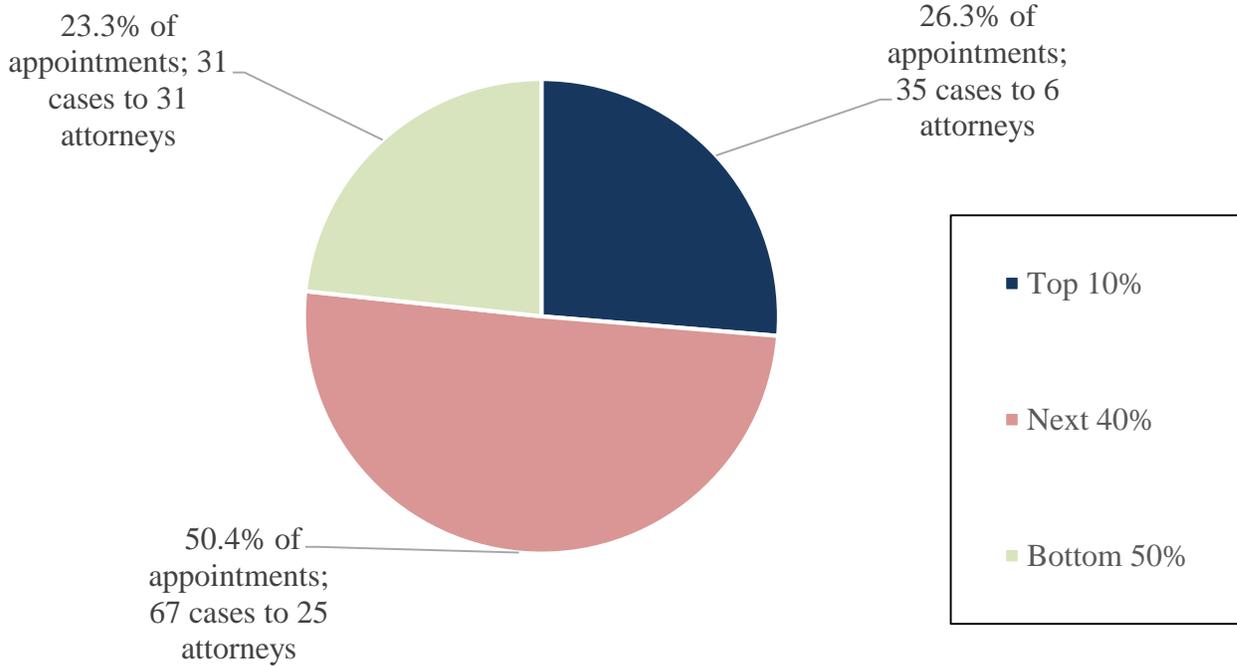
Hidalgo County must examine its appointment methods and implement a system that demonstrates that appointments of counsel are made in a fair, neutral, and nondiscriminatory manner.

Conclusion

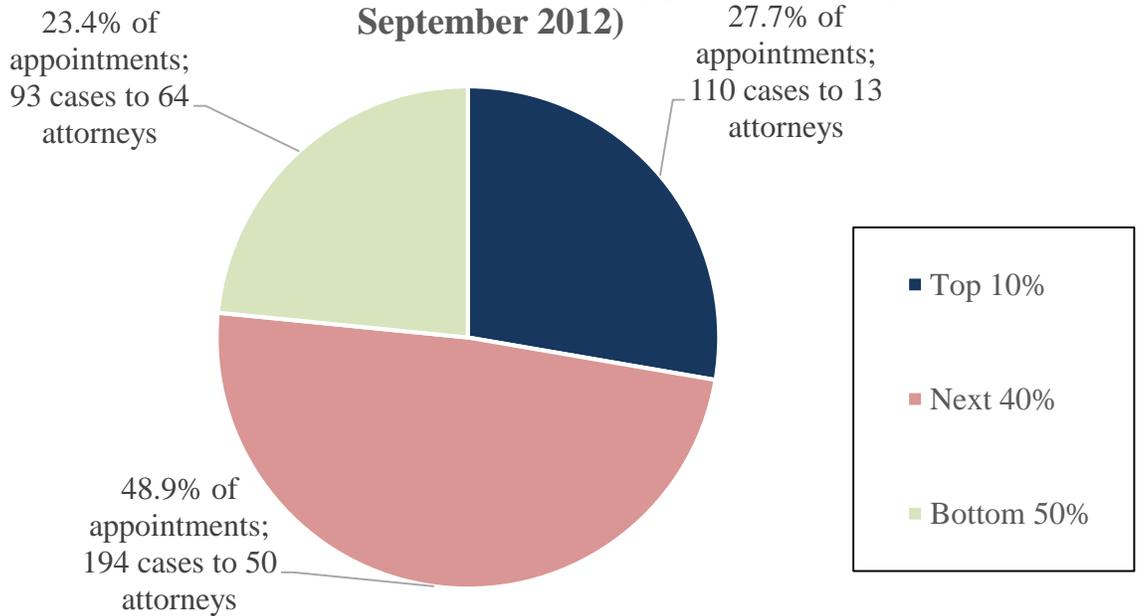
The monitor appreciated the professionalism and assistance provided by Hidalgo County officials and staff during this review. Hidalgo County officials are clearly committed to operating an effective justice system and appear willing to make necessary changes to improve the indigent defense system. As mandated by statute, the Commission will monitor the County's transition and process improvements regarding the report's findings.

Appendix – Attorney Appointment Distributions

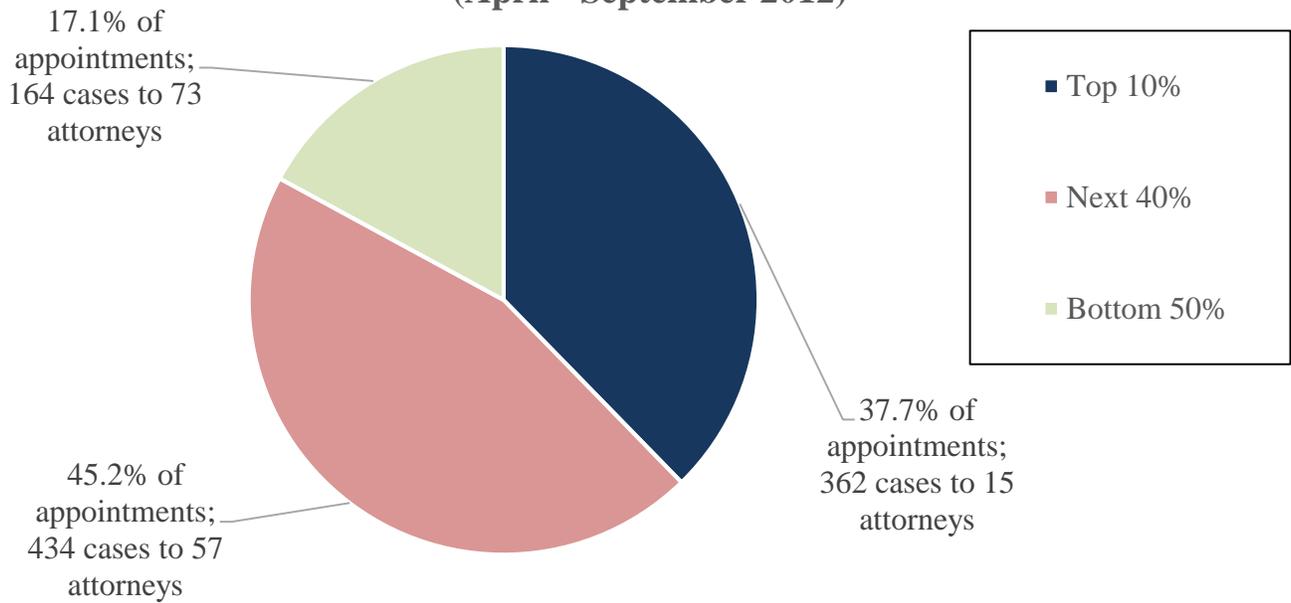
Distribution of First Degree Felony Appointments (April - September 2012)



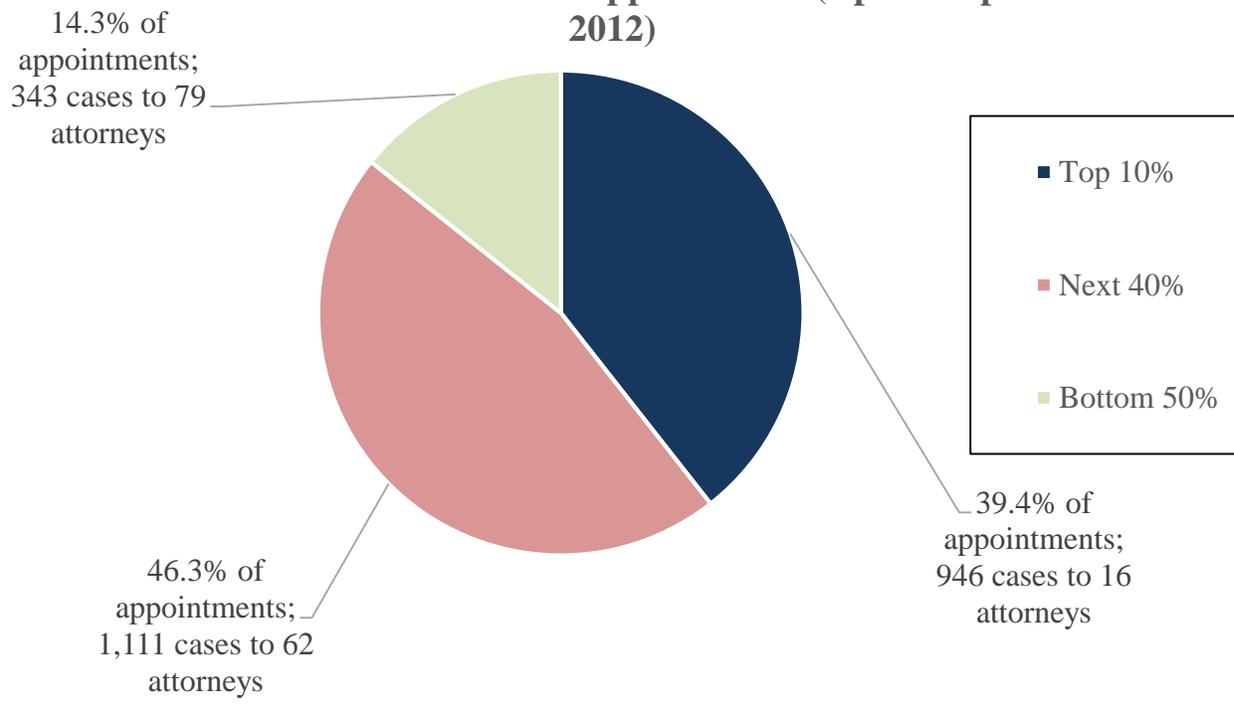
Distribution of Second Degree Felony Appointments (April - September 2012)



Distribution of Third Degree and State Jail Felony Appointments (April - September 2012)

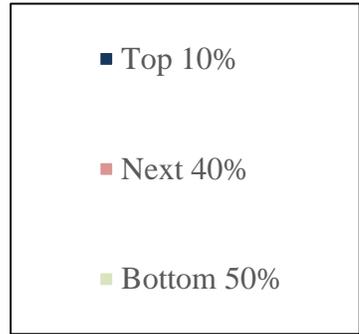
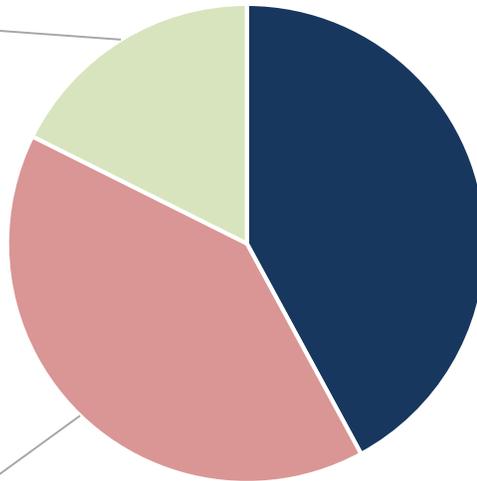


Distribution of Misdemeanor Appointments (April - September 2012)



Distribution of Juvenile Appointments (April - September 2012)

17.6% of appointments;
49 cases to 19 attorneys



42.1% of appointments;
117 cases to 4 attorneys

40.3% of appointments;
112 cases to 14 attorneys