



Second Follow-up Review of Waller County's Indigent Defense Systems

June 2024



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Mr. Jim Bethke San Antonio, Executive Director, Bexar County Managed Assigned Counsel Program
Mr. Jay Blass Cohen Houston, Attorney, Blass Law PLLC
Honorable Valerie Covey Georgetown, Williamson County Commissioner
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Mission: Protecting the right to counsel, improving public defense.

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Executive Summary

The Texas Indigent Defense Commission (TIDC) monitors local compliance with the Fair Defense Act (“FDA”) through policy reviews.¹ In this second follow-up review, TIDC interviewed local officials and staff, observed Article 15.17 hearings, and examined FY2023 case file records. TIDC found that Waller County successfully addressed two pending findings, regarding methods for transmitting counsel requests to the courts and the timely appointment of counsel in juvenile cases. Findings covering the timely appointment of counsel in felony and misdemeanor cases were not successfully addressed, nor was the finding addressing Article 15.17 counsel request data reports to the Office of Court Administration (OCA).

TIDC thanks Waller County officials and staff for their assistance in completing this review. TIDC staff stand ready to provide technical and financial assistance to remedy these outstanding issues. TIDC will conduct a third follow-up review within two years.²

Background

In 2015 after the Sandra Bland tragedy, Senator Rodney Ellis, Representative Senfronia Thompson, Representative Ron Reynolds and Waller County Commissioner Jeron Barnett submitted requests for TIDC to conduct an assessment of Waller County’s indigent defense systems. TIDC issued a joint fiscal and policy monitoring report in August 2016. The report made eight findings covering procedures related to magistrate warnings, timely appointments of counsel, waivers of counsel, and the inclusion of general court expenses in TIDC’s Indigent Defense Expense Report.

Waller County responded to the report’s criminal findings by clarifying which judges have appointing authority and by streamlining procedures for sending counsel requests to the courts. In juvenile cases, the County noted that many sample youths did not have an appointment order in the sample case, but there was a sample order in another pending case. The County made plans to ensure all juvenile cases with appointed counsel include appointment orders. Waller County officials and staff felt outdated jail facilities were an impediment to their ability to meet the FDA requirements.

In November 2019, TIDC issued a follow-up report that examined whether the 2016 report findings had been addressed. The report found Waller County had addressed three of the original report’s original findings, but issues related to transmission of counsel requests to the courts, data reporting, and the timely appointment of counsel remained. Waller County responded by stating that justices of the peace had been informed of the need to promptly send counsel requests to the courts.

¹ TEX. GOV’T CODE § 79.037(a)–(b).

² 1 TEX. ADMIN. CODE § 174.28(c)(2).

The courts stated they would rule on all counsel requests within three working days of receiving them. In juvenile cases, financial affidavits were to be gathered at intake and immediately forwarded to the courts.

Table 1: History of Monitoring Findings for Waller County

FDA Core Requirement	Description and Initial Year of Finding	Status after 2024 Review	
		Satisfied	Pending
1. Prompt Magistration	Waller County’s designation as to who had authority to appoint counsel was unclear. (2016)	✓ (2019)	
1. Prompt Magistration	Arrestees were not receiving assistance in completing affidavits of indigence. Requests for counsel were not promptly transmitted to the courts. (2016)	✓ (2024)	
1. Prompt Magistration	Some justices of the peace were not submitting requests for counsel in their Texas Judicial Council Monthly Activity Reports. (2016)		✓
4. Prompt Appointment	In felony cases, timeliness in sample cases did not meet TIDC’s threshold for presuming a jurisdiction’s processes ensure timely appointments. (2016)		✓
4. Prompt Appointment	In misdemeanor cases, timeliness in sample cases did not meet TIDC’s threshold for presuming a jurisdiction’s processes ensure timely appointments. (2016)		✓
4. Prompt Appointment	In misdemeanor cases, procedures did not ensure requests for counsel were ruled upon prior to waivers of counsel. (2016)	✓ (2019)	
4. Prompt Appointment	In juvenile cases, timeliness in sample cases (when a petition is served on the juvenile) did not meet TIDC’s threshold for presuming a jurisdiction’s processes ensure timely appointments. (2016)	✓ (2024)	
6. Data Reporting	Waller County included general court expenditures in its Indigent Defense Expense Report. (2016)	✓ (2019)	

Current Review

TIDC staff member, Joel Lieurance, conducted the second follow-up review with on-site visits between January 16 and 18, 2024 and on February 7, 2024. This report addresses unresolved issues related to two core Fair Defense Act (FDA) requirements:³

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE MAGISTRATION PROCEEDINGS

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY

For this review, TIDC examined data from FY2023 (October 2022 – September 2023), including felony, misdemeanor, and juvenile case files. TIDC observed magistrate

³ 1 TEX. ADMIN. CODE § 174.28.

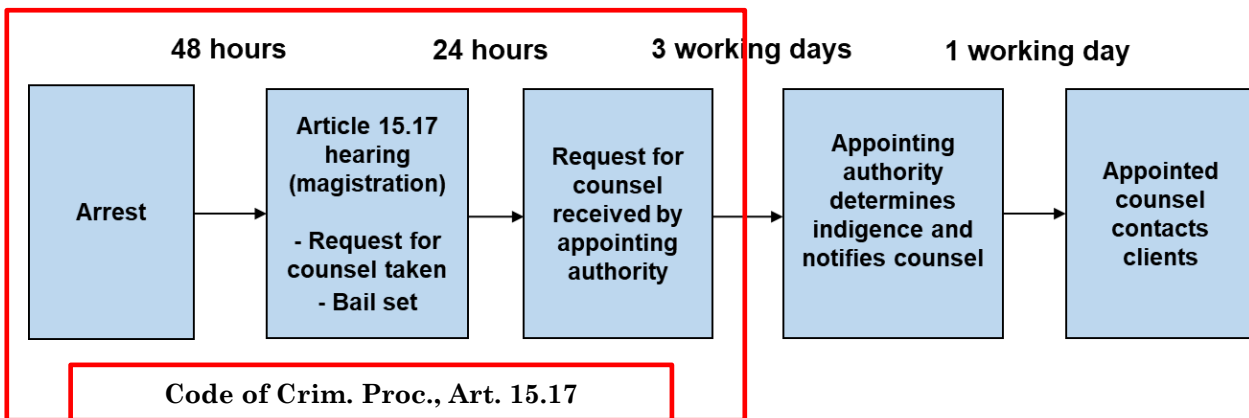
warnings and spoke with County officials and staff regarding procedures for taking counsel requests and transmitting those requests to the appointing judges.

Program Assessment

Requirement 1: Conduct Prompt and Accurate Article 15.17 Proceedings.

Under Article 15.17 of the Code of Criminal Procedure, an arrested person must be brought before a magistrate within 48 hours.⁴ At this hearing, the magistrate must inform the person of the right to counsel, inform the person of the procedures for requesting counsel, and ensure the person has reasonable assistance in completing the necessary forms for requesting counsel.⁵ Magistrates must transmit requests for counsel to the appointing authority within 24 hours.⁶ If a person is arrested on an out-of-county warrant, the magistrate must perform the same duties as if the person were arrested on an in-county warrant.⁷

Figure 1a: Timeline for Appointment of Counsel in Adult Criminal Cases



Waller County's Article 15.17 Procedures

After arrest in Waller County, defendants are booked in at the jail and go before a magistrate for the Article 15.17 hearing. The magistrates conducting these hearings include four justices of the peace and the county judge. Some judges conduct the hearings in person at the jail and others use videoconference. Each magistrate determines whether there is probable cause to detain the individual, sets bail, and asks whether the defendant would like to request counsel.

⁴ TEX. CODE CRIM. PROC. ART. 15.17(a).

⁵ TEX. CODE CRIM. PROC. ART. 15.17(a).

⁶ TEX. CODE CRIM. PROC. ART. 15.17(a).

⁷ TEX. CODE CRIM. PROC. ART. 15.18(a). A list of contacts to send out-of-county requests is available at: <http://tidc.tamu.edu/public.net/Reports/OutOfCountyArrestContacts.aspx>.

TIDC observed magistrate warnings in a new jail facility. If a defendant requests counsel, magistrates mark the request on the warning form, and jail staff assist the defendant with completing the affidavit. Each defendant must immediately complete the affidavit, and after completion, it is scanned and emailed to the district and county clerks offices. Jail staff, clerks, and court staff confirmed that the transmission of counsel requests occurs promptly. TIDC finds that Waller County has addressed this finding dealing with reasonable assistance and transmission of counsel requests.

Texas Judicial Council Monthly Court Activity Reports

Justices of the peace must report summary data of Article 15.17 hearings to the Office of Court Administration (OCA) as part of the Texas Judicial Council Monthly Court Activity Reports. These summary data points include the number of magistrate warnings given and the number of persons who request counsel at Article 15.17 hearings.⁸ One justice of the peace did not report any requests for counsel during FY2023, but TIDC found requests in our case file sample. Justices of the peace must report the number of persons requesting counsel to OCA in order to ensure complete and accurate Texas Judicial Council Monthly Court Activity Reports.

Table 2: Judicial Council Monthly Activity Reports (Oct. 2022 – Sept. 2023)

Article 15.17 Warnings and Requests for Counsel Reported by Justices of the Peace	JP1	JP2	JP3	JP4	Total
Misdemeanor Warnings (A & B)	357	181	48	172	758
Misdemeanor Requests for Counsel (A & B) ⁹	102	50	0	32	184
% Misdemeanor Requests	29%	28%	0%	19%	24%
Felony Warnings	348	160	34	140	682
Felony Requests for Counsel	147	53	0	47	247
% Felony Requests	42%	33%	0%	34%	36%

⁸ 1 TEX. ADMIN. CODE § 171.7. Additionally, 1 TEX. ADMIN. CODE § 171.28(c) states: “. . . Policy monitoring may also include a review of statutorily required reports to the Office of Court Administration and Commission. . . .”

⁹ These are reported totals and may differ from actual totals.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1

Conduct prompt and accurate magistration proceedings.

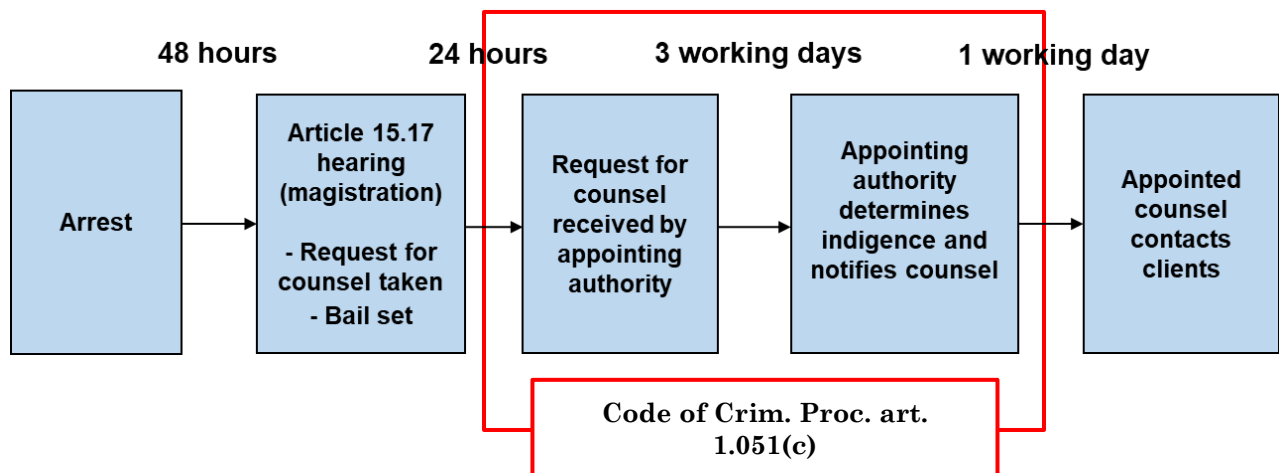
2019 Finding 1 and Recommendation: All arrestees are not receiving reasonable assistance in completing financial affidavits at the time of the Article 15.17 hearing. As a result, requests for counsel are not promptly transmitted to the appointing authority. Article 15.17(a) requires Waller County magistrates ensure reasonable assistance in completing forms necessary to obtain appointed counsel so that all arrestees who request counsel can have the request ruled upon within statutorily required timeframes. *Successfully Addressed.*

2019 Finding 2 and Recommendation: One justice of the peace is not submitting Article 15.17 requests for counsel in their Texas Judicial Council Monthly Court Activity Reports. The judges must report the number of persons requesting counsel to OCA to assure complete and accurate reports. *Issue Pending.*

Requirement 4: Appoint counsel promptly.

Under Article 1.051(c) of the Code of Criminal Procedure, courts in counties with a population under 250,000 must rule on a request for counsel within three working days of receiving the request.

Figure 1b: Timeline for Appointment of Counsel in Adult Criminal Cases



The first opportunity for most defendants to request counsel occurs at the Article 15.17 hearing when a defendant appears before a magistrate and is informed of the charges against him or her. If a defendant makes bail before the Article 15.17 hearing (or is never brought before a magistrate), the defendant has the first opportunity to request counsel at the initial appearance in the trial court.

To assess the timeliness of local appointment procedures, TIDC examines case files and measures the time from counsel request until appointment of counsel or denial

of indigence. Under TIDC’s monitoring rules, a county is presumed to promptly appoint counsel if at least 90% of indigence determinations in the monitor’s sample are timely.¹⁰

Timeliness of Appointments in Felony Cases

TIDC examined 136 felony cases filed in FY2023 (October 2022 – September 2023) to determine the timeliness of felony appointments. From this sample, TIDC found 96 cases with counsel requests. Counsel was **appointed in a timely manner in 53% of those cases**. This falls below TIDC’s 90% threshold for presuming a jurisdiction’s practices ensure timely appointment of counsel. Many untimely appointments occurred when the defendant made bail shortly after the Article 15.17 hearing. Waller County must implement practices that satisfy the three working day appointment timeline in felony cases.

Table 3: Times from Request to Appointment in Felony Cases

	Number from Sample	Percent of Sample
Total records examined	136	
Requests for counsel	96	
Request for counsel ruled upon in ‘x’ workdays		
0 workdays	34	
1 to 3 workdays + 24 hours allowed to transmit a request	17	
Timely Rulings on Requests	51	53%
Between 4 and 7 workdays	3	
More than 7 workdays	34	
No ruling on request	8	
Untimely / No Rulings on Requests	45	47%

Timeliness of Appointments in Misdemeanor Cases

TIDC examined 145 misdemeanor cases filed in FY2023 (October 2022 – September 2023) to determine the timeliness of misdemeanor appointments. From this sample, TIDC found 80 cases with counsel requests. Counsel was **appointed in a timely manner in 56% of those cases**. This falls below TIDC’s 90% threshold for presuming a jurisdiction’s practices ensure timely appointment of counsel. Many untimely appointments occurred when the defendant made bail shortly after the Article 15.17 hearing. Waller County must implement practices that satisfy the three working day appointment timeline in misdemeanor cases.

¹⁰ 1 TEX. ADMIN. CODE § 174.28.

Table 4: Times from Request to Appointment in Misdemeanor Cases

	Number from Sample	Percent of Sample
Total records examined	145	
Requests for counsel	80	
Request for counsel ruled upon in 'x' workdays		
0 workdays	32	
1 to 3 workdays + 24 hours allowed to transmit a request	13	
Timely Rulings on Requests	45	56%
Between 4 and 7 workdays	0	
More than 7 workdays	20	
No ruling on request ¹¹	15	
Untimely / No Rulings on Requests	35	44%

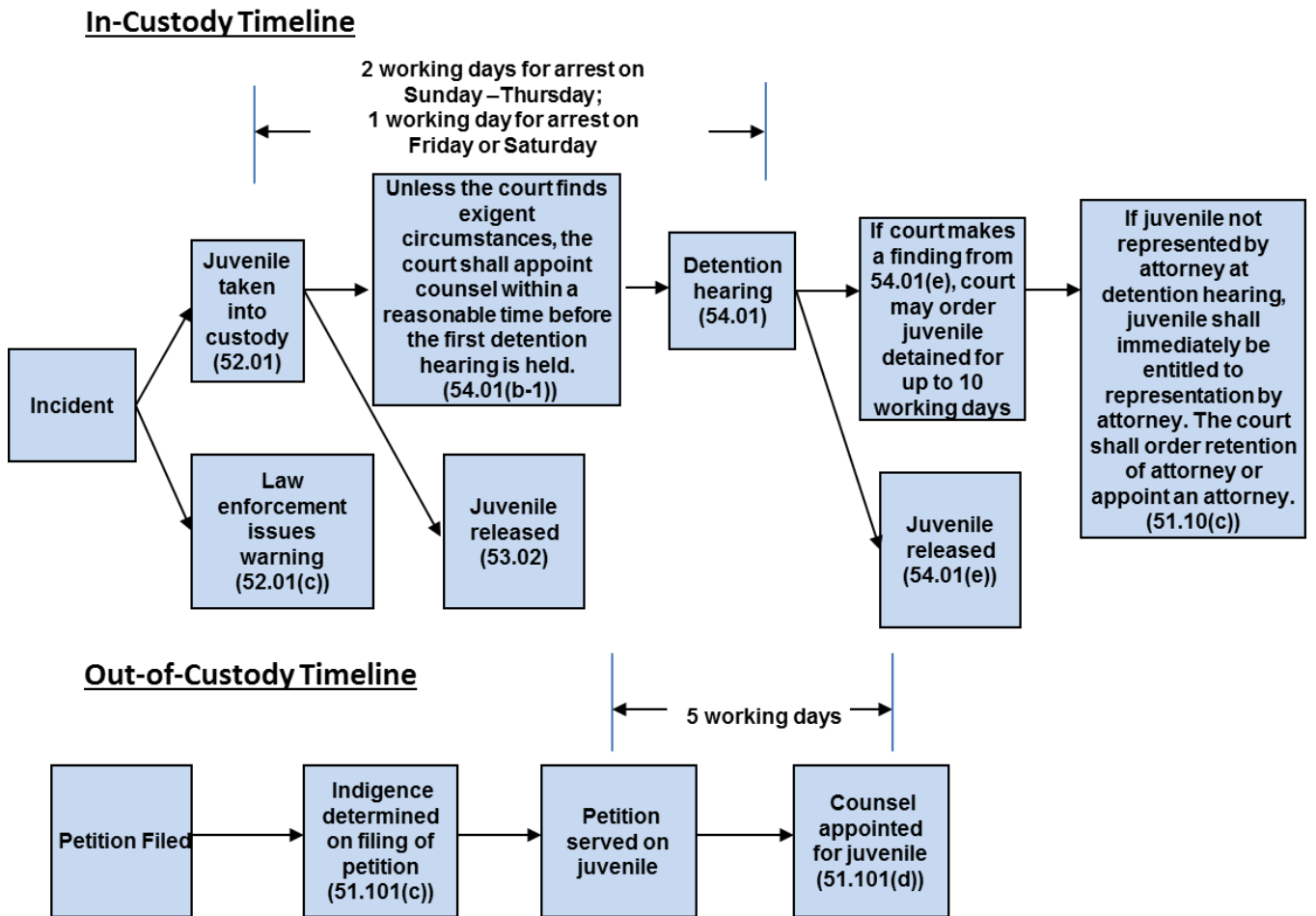
Timeliness of Appointments in Juvenile Cases

Counsel must be appointed for youth charged with delinquent conduct when the youth is brought to a detention hearing and when the youth is served with a copy of the petition alleging misconduct. Under Section 54.01(b-1) of the Family Code, unless the court finds that 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.

Subsection 51.101(c) of the Family Code directs the court to determine whether a youth's family is indigent upon the filing of the petition, with Subsection 51.101(d), requiring the court to appoint counsel, for those found to be indigent, within five working days of service of the petition on the juvenile. If the court determines that the person responsible for the youth's support is financially able to employ an attorney, Subsection 51.10(d) allows the court to order the retention of counsel. To assess the timeliness of Waller County's appointment procedures in juvenile cases, TIDC staff examined 18 cases filed in FY2023 (October 2022 – September 2023).

¹¹ At the time of our file review, none of these 15 sample misdemeanor cases entered a guilty plea. All 15 sample cases were either still active, had been dismissed, or had retained counsel.

Figure 2: Timeline for Appointment of Counsel in Juvenile Cases



Appointment After Service of the Petition

In cases involving the service of a petition on a youth, counsel was **present in a timely fashion for 94% of the sample**. This exceeds TIDC’s 90% threshold for timeliness, indicating that the County has addressed this finding. TIDC congratulates Waller County for its focus on ensuring timely appointment of counsel in juvenile cases.

Table 5: Times to Appointment in Juvenile Cases

	Sample Size	Number from Sample	Percent
Total juvenile cases examined	18		
TIMELINESS OF COUNSEL APPOINTMENTS WHERE YOUTH SERVED WITH A PETITION			
Case files in which youth served with a petition	16		
Counsel appointed within 5 working days of service		14	
Indigence denied or counsel retained within 5 working days of service ¹²		1	
Total cases with timely presence of counsel		15	94%
Cases where counsel not present in a timely fashion		1	6%

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4

Appoint Counsel Promptly.

2019 Finding 3 and Recommendation (felony cases): Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours allowed for transferring requests to the courts) of the request being made. The monitor’s sample of attorney appointments in felony cases fell below the Commission’s 90% timely threshold for presuming a jurisdiction’s system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)’s appointment timeline in felony cases. *Issue Pending.*

2019 Finding 4 and Recommendation (misdemeanor cases): Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours allowed for transferring requests to the courts) of the request being made. The monitor’s sample of attorney appointments in misdemeanor cases fell below the Commission’s 90% timely threshold for presuming a jurisdiction’s system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)’s appointment timeline in misdemeanor cases. *Issue Pending.*

2019 Finding 5 and Recommendation (juvenile cases): The monitor’s sample of attorney appointments where a juvenile was released from custody and served with a petition fell below the Commission’s threshold for presuming a jurisdiction’s system ensures timely appointment of counsel. The County must implement practices that satisfy the time frames in Section 51.101 of the Family Code. *Successfully Addressed.*

¹² TIDC considered a denial of indigence to be synonymous with an order to retain counsel.

Conclusion

TIDC thanks Waller County officials and staff for their assistance in completing this review. TIDC will conduct a third follow-up review regarding its noncompliance findings within two years.¹³ TIDC stands ready to provide technical and financial assistance to remedy these issues and ensure full compliance with the Fair Defense Act.

Summary of Findings and Recommendations

Waller County must respond in writing how it will address the report's findings.

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE MAGISTRATION PROCEEDINGS.

2024 Finding 1 and Recommendation: One justice of the peace is not submitting Article 15.17 requests for counsel in their Texas Judicial Council Monthly Court Activity Reports. The judges must report the number of persons requesting counsel to OCA to assure complete and accurate reports. *Issue Pending.*

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.

2024 Finding 2 and Recommendation (felony cases): Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours allowed for transferring requests to the courts) of the request being made. The monitor's sample of attorney appointments in felony cases fell below the Commission's 90% timely threshold for presuming a jurisdiction's system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)'s appointment timeline in felony cases. *Issue Pending.*

2024 Finding 3 and Recommendation (misdemeanor cases): Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours allowed for transferring requests to the courts) of the request being made. The monitor's sample of attorney appointments in misdemeanor cases fell below the Commission's 90% timely threshold for presuming a jurisdiction's system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)'s appointment timeline in misdemeanor cases. *Issue Pending.*

¹³ 1 TEX. ADMIN. CODE § 174.28(c)(2).