



# **Review of Tarrant County Indigent Defense System**

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# **Review of Tarrant County Indigent Defense System**

## **Goal:**

Review current practices in the criminal courts related to attorney selection and indigency screening and provide technical assistance to improve them. Tarrant County was selected because it has an effective indigent defense system utilizing an assigned counsel program.

## **Five Core Requirements of the Fair Defense Act:**

1. Prompt Appointment of Counsel
2. Attorney Qualifications and Appointment List
3. Attorney Selection Process
4. Standards and Process for Determining Indigency
5. Payment for Indigent Defense Services

## **Main Areas of Review:**

1. Document the indigency screening process for defendants who are on bond and in custody, especially those who appear in court without attorneys.
2. Document the reasons courts make appointments of attorneys who are not currently on the approved appointment list.
3. Document the reasons that courts themselves, rather than the Office of Attorney Appointments, make attorney appointments. Document how the appointment practices comport with the indigent defense plans for the county and the extent to which the practices and plans comport with the Fair Defense Act.

## **Overview of Indigent Defense System used by Criminal Courts**

The 19 district and statutory county courts with criminal jurisdiction manage the criminal indigent defense system in Tarrant County. The system used in juvenile court is managed separately and was not reviewed on this site visit. Early after the passage of the Fair Defense Act (FDA), the judges recognized the need for staff assistance to manage the program. Late in 2001 they hired Holly Webb to staff the newly created Office of Attorney Appointments (OAA) to administer the program at the direction of the judges. The OAA manages the attorney appointment lists and makes attorney appointments when directed to do so by a judge or county magistrate. The OAA makes appointments using a rotation system that is maintained on the computer system. This system automatically produces the name of the next attorney on the appropriate attorney list, which are graduated according to severity of offense charged. The original computer system was designed by the Tarrant County personnel at the implementation of the FDA. A new, upgraded system called Indigent Defense On-Line or IDOL is being funded by an FY2004 discretionary grant in the amount of \$350,840 from the Task Force on Indigent Defense (Task Force). IDOL will provide better tracking and statistical capabilities than the existing system and is estimated to be fully functional by June 2006.

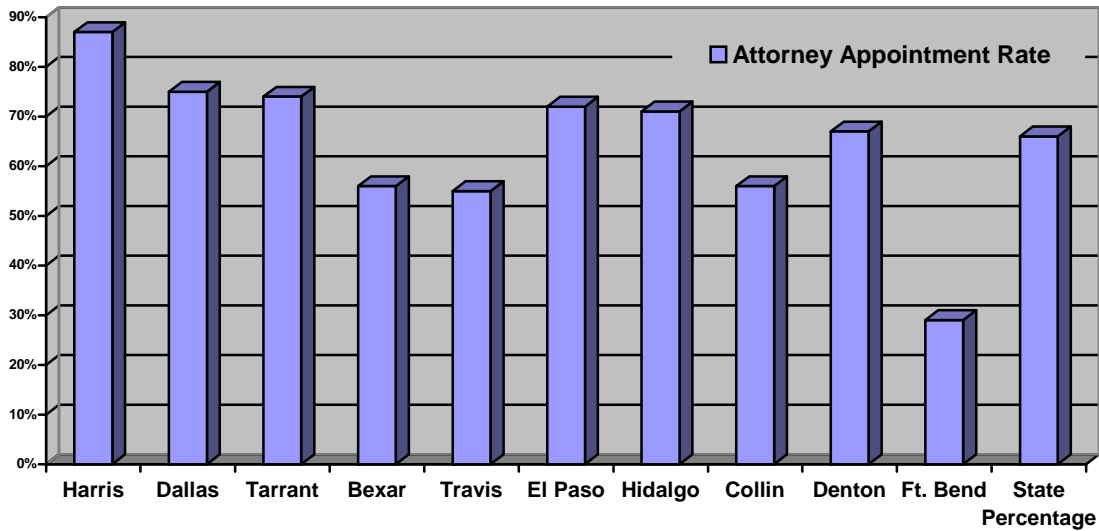
In the last year, Tarrant County has retooled its front end process to better process requests for counsel for those arrested. The previous process called for those arrested by one of the 41 municipalities in the county to be brought to the municipal jail for the Art. 15.17 magistration hearing. The municipal judge would advise them of their constitutional rights, set bond, and accept requests for appointment of counsel. Arrested persons would typically be given the affidavit of indigence form to be completed by jailers or by the inmates themselves. The municipal judge would then review the form and make a decision as to whether the person qualified for counsel. If approved, the order to appoint would be sent to the OAA that would then make the appointment. This decentralized system involved numerous municipal judges making indigence determinations that often resulted in disparate application of the standard of indigency adopted by the county.

In FY 2005, Tarrant County was awarded a discretionary grant for \$229,312 from the Task Force to implement a new centralized indigency determination process. The project involves four new financial information officers (FIOs) who interview arrested people in each of the municipal jails where they collect detailed financial information from each person who requests the appointment of counsel. The completed forms are then transmitted to the OAA. The OAA then determines if the person has been released from custody. If so, then the request for counsel is not considered and is filed in clerk's file or maintained in the computer system for future reference. The person will then have an opportunity to request counsel at the initial appearance before a magistrate or court. If a person requesting counsel is still in custody when the request is received, then the OAA checks to see if the charge has been accepted by the district attorney and a case number assigned. If not, the request for counsel is held until either the charges are accepted or three working days have elapsed since the request is received, whichever is earlier. The OAA then sends these and all other requests to Judge Matt King to consider. Along with the four FIOs, Judge King was hired as a part-time county magistrate primarily responsible for reviewing requests for counsel and determining which defendants are eligible. If he determines a person to be eligible, he notifies the OAA that then makes an appointment of the next attorney on the appointment list for the offense level charged.

#### Number of Attorney Appointments and Appointment Rate

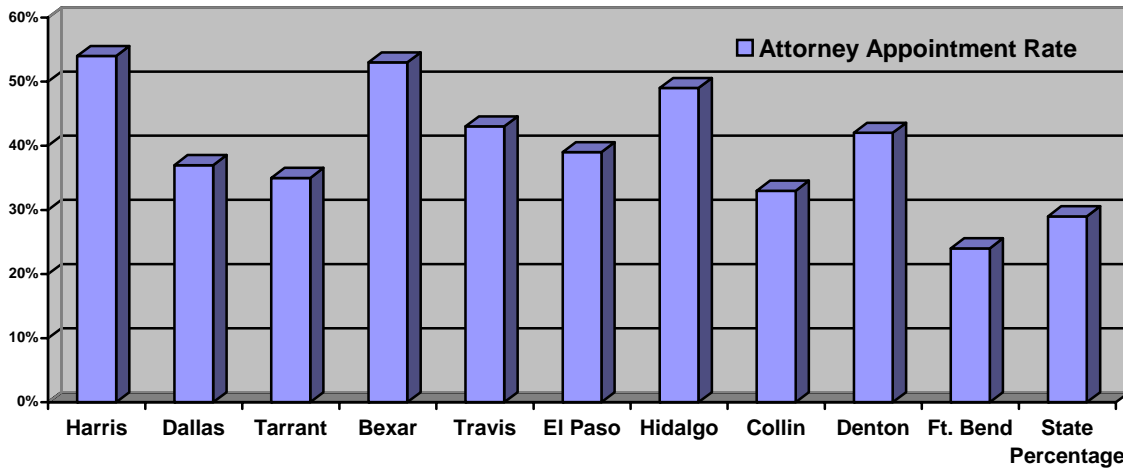
In FY2005, Tarrant County appointed and paid attorneys in 25,468 criminal cases, out of the 53,013 cases added to their courts' dockets. The number of cases paid has remained relatively level since FY2003. Overall this leads to an attorney appointment rate of 48% (35% in county courts and 74% in district courts). This rate is higher than the statewide totals showing an overall criminal case appointment rate of 41% (29% in county courts and 66% in district courts). The chart below shows this information for the ten largest Texas counties for FY2005, as well as the statewide percentages.

### Felony Cases - Attorney Appointment Rate



\*Percentage figure is the number of cases with court appointed counsel divided by the number of new felony cases

### Misdemeanor Cases - Attorney Appointment Rate

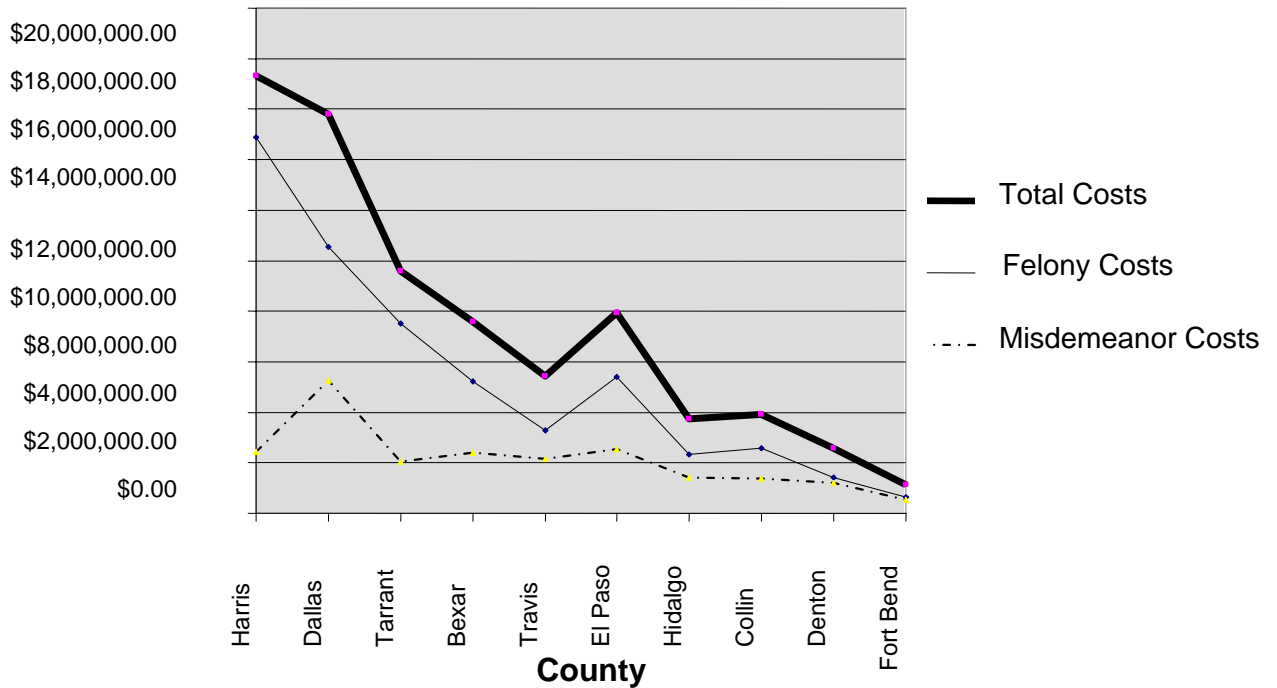


\*Percentage figure is the number of cases with court appointed counsel divided by the number of new misdemeanor cases

### Indigent Defense Expenditures and Payments to Attorneys

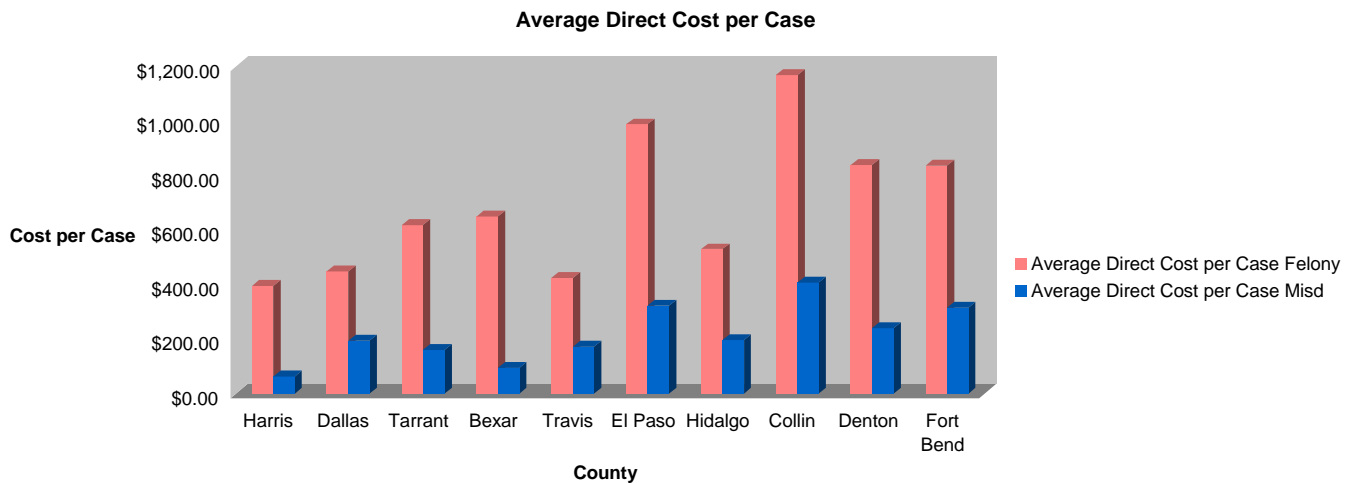
The total amount Tarrant County paid for indigent defense services in FY2005 was about \$9.6 million. Among the ten largest counties, this compares with about \$17.3 million in Harris County down to \$1.1 million in Ft. Bend County. The chart on the next page shows the total amount expended on indigent defense by the ten largest counties in FY2005, including a breakdown of expenditures for felony and misdemeanor representation.

### Cost Comparison of Ten Largest Counties



### Cost per Case

Tarrant County reported an average indigent defense cost per criminal case paid of \$381 in FY2005. The ten largest counties in the state ranged from \$225 to \$713, while the statewide average for all criminal cases was \$342. Breaking this down, Tarrant County spent an average of \$618 per felony case. The range among the top ten counties was \$394 in Harris County up to \$1170 in Collin County. Misdemeanor costs per case were \$159 in Tarrant County and ranged from \$63 in Harris County up to \$407 in Collin County. A chart below shows the average cost per case for appointed counsel in felony and misdemeanor criminal cases for the ten largest counties in FY2005.



Note: Figures for El Paso and Dallas are estimates based on percent of misdemeanor and felony cases handled by the public defender offices.

## **Site Visit Overview**

Reviewer met with six district court judges, seven statutory county court judges, two magistrates and a few court administration staff while in Tarrant County December 13-15, 2005. Reviewer also observed court settings during hearings before judges and magistrates in several courts. The focus of discussion and courtroom observation was the indigency determination process and attorney appointment process. The review considered the uniformity of application of the countywide local indigent defense plan, which is required by Art. 26.04(a), Code of Criminal Procedure, and how the plan comports with the FDA. A complete list of people interviewed is included as Appendix B.

## **Review of Indigency Screening Process**

### Procedural Requirements of Indigency Determination

The FDA sets out the general procedures that must be followed in the indigency determination process in Art. 26.04, Code of Criminal Procedure. It:

- Requires person sign under oath a statement that the person is without means to retain counsel and the person requests appointment of counsel;
- Requires person requesting counsel to complete under oath financial questionnaire or respond under oath to judge/magistrate or both;
- Lists the financial evidence that may be considered and noting that ability to make bail only be considered to extent it reflects the defendant's financial circumstances; and
- Prohibits the court from threatening to arrest or incarcerate a person solely because the person requests counsel.

### Overview of Indigency Screening Process

Tarrant County uses the federal poverty guidelines issued annually by the U.S. Department of Health and Human Services to determine whether or not someone qualifies for court appointed counsel. A person is considered indigent if household income is below 125% of the poverty guidelines, which in 2006 means less than \$25,000 for a family of four (\$20,000 is the poverty level for a family of four). According to the plan, a defendant whose household income exceeds 125% of the latest poverty guidelines may still qualify for a court-appointed attorney. The court or its designee "may consider unusual, excessive, or extraordinary medical expenses, the age or physical infirmity of household members, or other expenses. The court may also consider the complexity of the case, the estimated cost of presenting a legal defense, the fees charged by lawyers in the community for providing defense services in similar cases, whether the defendant has retained counsel in related legal matters (e.g. ALR, forfeiture), and any efforts the defendant has made to retain an attorney."

The overview of Tarrant County's indigent defense system at the beginning of this report describes the new process used to determine whether an arrested person who is in custody is indigent and appoint counsel. The originally submitted indigent defense plan generally describes the process, although it has not yet been updated to reflect the use of the new FIOs. In any event, all those involved in the new process report significant improvements in the quality of financial information available for review by the magistrate because it uses specially trained FIOs, rather than jail staff, to complete the affidavits of indigency. There is also a more consistent application of the indigency standards because one magistrate, Judge King, makes all the indigency determinations for those in custody rather than one of

the scores of municipal court judges under the prior system. All 13 judges and 2 magistrates interviewed indicated satisfaction with the new program.

In all cases where defendants request counsel, they are given a set of bond conditions related to the appointment of counsel. These include a requirement that the defendant bring to the initial appearance copies of a variety of financial information including pay stubs, income tax return, W-2 form, and proof of expenses such as rent and utilities. This information is intended to assist the judge or magistrate who will then be making a determination of indigency. Defendants who are not appointed counsel prior to release from custody will have another opportunity to request counsel at their initial appearance before a court or county magistrate. This initial appearance setting varies from court to court and is described in the sections below for district courts and county courts.

Reimbursement from defendants receiving court appointed counsel also occurs in many cases. Several judges in district and county courts, as well as county magistrates, reported that they often ordered defendants who had been appointed counsel to begin repaying that cost immediately. Defendants who remain in custody are usually not subject to such an order. Repayment is also ordered as a community supervision requirement for many defendants who are convicted of offenses. Tarrant County reported collecting \$175,672 in FY2005 out of a statewide total of nearly \$10.5 million. Amounts collected by the six largest counties in reimbursement for indigent defense services ranged from \$131,000 by Harris County up to nearly \$452,000 by Dallas County. The average amount collected by these counties was \$268,000.

#### District Court Process

In addition to the new process involving Judge King and the FIOs for the initial processing of arrested persons' requests for counsel, the district courts have more recently adopted new procedures as part of the differentiated felony case management system. The differentiated felony case management system<sup>1</sup> is being implemented in Tarrant County as a result of recommendations from the National Center for State Courts. The initial appearance is the first stage of case processing and the docket includes both in and out of custody defendants. The system has been adopted as part of the indigent defense plan for the county and the portion of the plan describing this setting is attached as Appendix C. The magistrate reviews the financial affidavit, which is completed at the bailiff's request prior to the hearing. The magistrate may also question a defendant about financial status. If the magistrate approves the request, an email is sent to the OAA that then appoints the next attorney on the list and a notice is given to the defendant. Reviewer observed an initial appearance docket before the Honorable Gene Grant, one of three county magistrates who conduct routine hearings for the criminal courts. These magistrates conduct the initial appearance docket for all but one district court, as well as County Criminal Court No. 5.

Although most of the defendants charged with a felony offense first appear before a county magistrate who makes the indigency determination, a number of cases still come to the district court to determine indigency. Some cases are handled directly in the district court

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<sup>1</sup> The differentiated case management system is an innovative practice that was developed through collaborative effort of a task force of people representing all elements of the criminal justice system. The goal of this process is to create an efficient and fair system for the disposition of felony cases. The main theme of the system is that each court event should involve timely action and meaningful progress toward case disposition. The process also uses information technology to increase the efficient use of court time and resources and to standardize the practice among the criminal district courts.

as part of a “jail-run” of all defendants whose cases are pending in the court. In other cases, the defendant may have hired an attorney who then subsequently withdraws representation because the defendant failed to pay the attorney.

Interviews with judges and courtroom observation show that defendants who remain in custody at their first appearance before the judge are generally found indigent. When a defendant is out of custody, the judges will generally have the person complete a new affidavit of indigency, review it, and possibly question the defendant before determining indigency. Although required by bond conditions, few judges appear to require defendants to bring in financial documentation. In some cases, the judges will also reset the case to allow the defendant time to hire an attorney, if the defendant requests it.

### County Court Process

Since there is no corollary to the district court’s initial appearance docket, the indigent defense plan used by the statutory county courts does not specifically address the first setting and process for determining indigency. Although Judge King makes indigency determinations in many cases (primarily those defendants in custody), the statutory county court with jurisdiction over the case still makes the bulk of the determinations (especially for those defendants that have bonded out of jail). This is because defendants in all but one statutory county court appear before that court, rather than one of the county magistrates, at their initial appearance. This results in many defendants appearing in the county courts unrepresented by counsel. These cases include defendants who bond out prior to the appointment of counsel, defendants who initially did not request appointment of counsel, and defendants who were initially determined to not be indigent.

In making the determination, reviewer found that it is not uncommon for the statutory county court judges to automatically find people who remain in custody indigent. It is generally accepted that if a person has not been able to make bond and be released from custody the person will likely not have sufficient resources to hire counsel. Of course to receive counsel, a person would have to have requested counsel and filled out an affidavit of indigency.

If a defendant is on bond, most county court judges will typically order the person to attempt to hire an attorney and provide them with a form to document their attempts. The case then will be reset for a later date, usually two weeks. In some cases, the judge will question defendants and may determine that a person is unlikely to be able to afford counsel and will bypass the two-week period to attempt to hire counsel. The judge may determine who should be screened at this point by simply asking those defendants who are disabled or “truly indigent” to come forward. In another court, the judge will review indigency on all defendants and those found not indigent will be given two weeks to try and hire an attorney. This process for determining indigency for on-bond defendants does not appear to rely on any formal screening as compared to the process of gathering financial information used by the FIOs for in custody defendants.

If the defendant comes back without an attorney or documentation that he has contacted the requisite number of attorneys, then the court may hold the defendant’s bond insufficient and bring him back into custody. In the case where reviewer observed this practice, the judge held the defendant in the holding cell temporarily. Later in the docket the judge determined him to be indigent and appointed counsel. However, other judges said they would hold a defendant’s bond insufficient in this type of case and place the person in custody. The defendant’s next appearance would then likely be before a magistrate 48 hours later.



### Recommendations to Improve the Indigency Screening Process

The county should consider further centralization of their indigency screening process by transferring the primary responsibility for this function to the county magistrates. This could be accomplished through an expansion of Judge King's role or the role of the other three county magistrates. Expansion of the new program under Judge King would allow for the most consistent and thorough screening of defendants since this is already his primary responsibility. Alternatively, if the county were to expand the role of the other three county magistrates, the process used could also be improved by the use of FIOs, rather than bailiffs, to gather financial information from defendants. Or if the bailiffs continue to gather financial information from defendants, provide training to these officers on how best to do this. This would likely provide the magistrates more complete and accurate information and add to the certainty and accuracy of the procedure.

In either case, the magistrates could conduct initial appearance hearings on behalf of all the county courts, rather than just the district courts, for defendants who are not in custody. These hearings could be set for all unrepresented defendants to review indigency status, supervise defendant attempts to retain counsel, and appoint counsel to eligible defendants. The result of moving this process to the magistrates would be to minimize use of courts' valuable time while providing a meaningful review of the indigency status of defendants. As one county court coordinator said, if the indigency determination and appointment process were removed from their docket they would have a full extra day of court time to devote to the adjudication and disposition of cases. Implementation of this practice might also alleviate the concern of some judges and defense attorneys that some people are qualifying for counsel who could afford to hire their own. It would also provide more countywide uniformity, which is a key principle of the FDA. This process would also enhance public trust and confidence by assuring that only the indigent receive appointed counsel, whereas those that can afford it will be responsible for hiring his or her own counsel.

Tarrant County has made remarkable progress in enhancing its system by shifting the initial indigency determination from the municipal courts to the new county magistrate. Relying on more complete information gathered by the Financial Information Officers, Judge King is able to more accurately and consistently apply the indigency standards of the county. However, this process only accounts for a fraction of all indigency determinations in the county and only for those persons who are in custody. When an unrepresented defendant shows up in court for their initial appearance, precious court time is used to determine whether the person qualifies for counsel, directing people on the process of hiring counsel, and questioning defendants about their financial situation. With crowded dockets, many courts only have time to do a verbal cursory screening.

The process used in some courts where a defendant's bond may be held insufficient if they fail to bring in financial documentation or proof that they attempted to hire an attorney does not seem to comport with the purpose of bond law under the Code of Criminal Procedure. Although the strategy of requiring defendants to attempt to hire counsel may be useful in cases where a defendant may have enough money to hire counsel, it should not be structured as a condition of bond. It is not clear that these bond conditions insure the appearance of the defendant at court or provide for the safety of the community and/or victim as required by statute<sup>2</sup>. Instead, it is recommend that the process be required as a

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<sup>2</sup> Vernon's Ann. C. Cr. P. art. 17.40(a).

condition precedent to the appointment of counsel in cases where the defendant does not qualify as indigent under the indigent defense plan. Such a process is used in some other counties<sup>3</sup>.

One additional note with regards to indigence screening is that the Task Force has initiated a study on the costs and implementation strategies necessary for an effective determination process. We are working with two professors in the Dallas area and four counties: Collin, Denton, Tarrant, and Van Zandt. The study will provide guidance to local jurisdictions on what it costs to verify whether a person is indigent and how to structure a verification process that is cost effective to ensure money is not spent unnecessarily. It will evaluate the cost and effect of using secondary sources to verify financial information reported by persons requesting counsel and a personal interview screening process. Tarrant County is to be commended for trying new strategies to improve this process and to participate in a study that will examine its processes in more detail. The whole state should benefit with the results of the study, which we anticipate will be completed in the summer of 2006.

## **Review of Attorney Selection Process**

### Procedural Requirements of Attorney Selection Process

The FDA sets out the general procedures that must be followed in the attorney selection process in Art. 26.04, Code of Criminal Procedure. The standard rotation system is provided as the default appointment method if no other method is specified. Courts may also use a public defender office that exclusively represents indigent defendants. The third option is an alternative program that may include a contract defender system, a variation of the rotation system, or a combination of methods.

The key requirements, regardless of the type of appointment system adopted, are:

- Judge or designee must make each appointment;
- Plan must apply to all appointments of counsel; and
- Plan must “ensure that appointments are allocated among qualified attorneys in a manner that is fair, neutral, and nondiscriminatory.”

### Overview of Attorney Selection Process

As described in the section related to indigency screening, Judge King and the FIOs assess indigency in many cases where defendants who are in custody request counsel. If determined indigent, this finding is transmitted to the OAA that then appoints an attorney based on the most serious offense level charged. This system is based on a set of computerized attorney appointment lists for each of six case levels and appointments are allocated to the next attorney on the respective list. The Misdemeanor Appointment Plan provides for a rotation system with five defendants per rotation when a defendant is in custody at the time the case is filed, while the Felony Appointment Plan provides for a rotation system with one defendant per rotation. The plan provides that a judge may deviate from this system to appoint another qualifying attorney out of order, but only upon good cause specified by the judge on the form called “Finding on Appointment of Attorney.”

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<sup>3</sup> El Paso requires a defendant to bring certain financial documents when the defendant meets with a caseworker charged with verifying whether a person qualifies for appointed counsel.

The review of the attorney selection process began with a report prepared and distributed to the courts by Holly Webb. Beginning with August 2005, Ms. Webb began a monthly report detailing the attorney appointments made for each court. The report shows the number of attorneys appointed by the OAA, by the court itself, and the number of appointments made of attorneys that are not on the approved list maintained by the OAA. The report shows that while the OAA makes a majority of the attorney appointments overall, a significant number of appointments are made directly by the courts. This is especially true in the county courts where those courts make a majority of the appointments. The report also shows a small but consistent number of appointments of attorneys who are not on the approved attorney appointment list. This section will explore the reasons for each of these results and make recommendations on how the system might be improved. The attorney appointments made August-December 2005 are included as Appendix A.

An appointment made by a judge happens immediately after the judge makes a finding of indigency. A judge generally appoints an attorney who is present in the courtroom at the time of appointment, perhaps representing another defendant. These types of appointments provide the defendants immediate access to an attorney in the hope that the case might be disposed of that day. Although a few courts use the OAA even in these cases, the only significant use of the OAA for appointments following a determination of indigency by the judge appears to be when the case does not appear likely to be disposed of that day. Some judges also report use of the OAA for appointments when an attorney is needed for an appeal.

The OAA report in Appendix A also shows a small but consistent number of “unapproved appointments” where judges have appointed attorneys who are not on the approved attorney appointment list. This practice does not comport with the requirements of Article 26.04, Code of Criminal Procedure, that require only attorneys who meet objective qualifications set by the judges and approved by a majority vote of the judges. Judges report that some of those appointments were of a former assistant district attorney who had just gone into private practice. She met all the objective qualifications for the appointment list but had not yet been approved by a vote of the judges. Some judges also said they appointed highly capable attorneys who would accept an occasional appointment but did not want to be on the list to accept appointments on a regular basis. In both of these cases, it appears that the quality of counsel appointed was not compromised.

#### District Court Process

Felony Appointment Plan provides for a rotation system. The key provisions follow:

##### “C. Distribution of Cases

1. An attorney will receive one defendant per rotation on the felony public appointment list.
2. An attorney may receive an appointment for the highest level of offense he/she has chosen and for which he/she is qualified and for any lower level of offense in which he/she has elected to participate.
3. Appointments will be made from a rotating list of the names of eligible attorneys, arranged according to the chronological date of receipt of the approved application.
4. New attorneys will be added on a quarterly basis to the end of the chronological list as it exists at the time the names are added.”

Although most initial appearance dockets are held before the county magistrates, some district court judges reported using informal “jail runs” to speed up the processing of cases. Judges will sometimes pick defendants charged with low-level offenses that will likely be released from custody and placed on community supervision when their case is disposed. In other cases, defendants will appear before the judge unrepresented because the defendant did not request counsel initially or was found not indigent by the magistrate. In cases where the judge does make an indigency determination, most judges will appoint an attorney directly from the bench from among the attorneys available in the courtroom, rather than requesting an appointment from the OAA. Although most judges appoint directly from the bench, one judge said he used the OAA because the next attorney appointed from the wheel would typically be in the courthouse on Thursday, the day of his regular docket. Otherwise the judge said he would likely appoint from the bench more often (as the other judges do) to provide immediate attorney-client contact.

The district courts indigent defense plan also provides an exception to this system related to motions to revoke as follows:

“5. Alternative Program

As an alternative program to the wheel system for appointing counsel for indigent defendants, the Judge of a Criminal District Court or a District Court giving preference to criminal cases may appoint a specifically named attorney from the approved list of attorneys to those indigent defendants who are charged in a Motion to Revoke or Adjudicate Community Supervision in that court.”

The district courts also carve out in their indigent defense plan an exception to the standard wheel system for motions to revoke or adjudicate community supervision. The plan authorizes each judge to designate specific attorneys from the main appointment lists to handle revocations. The judges report that this is a specialized type of practice and they rely on attorneys that are experts in alternatives to incarceration. This system as applied appears to violate the provisions of Art. 26.04, Code of Criminal Procedure, because it does not specify how the attorneys are selected for such appointments. Because the system of selection varies by judge, this alternative system does not apply to all attorney appointments as required. The lack of definition also means that there is no way to “ensure that appointments are allocated among qualified attorneys in a manner that is fair, neutral, and nondiscriminatory” as the statute requires.

The current practice of judges directly appointing attorneys from the bench without following the rotation system appears to contradict the provisions of the indigent defense plan of the district courts. The plan envisions all appointments, except those related to revocations, going through the wheel system maintained by the OAA.

### County Court Process

Misdemeanor appointment plan provides for a rotation system with the following exception when a defendant is on bond:

“Ad Hoc Distribution of Cases When Defendant Not In Custody at the Time the Case is Filed: Each County Criminal Court shall be provided with a list of attorneys qualified to accept misdemeanor appointments. Except for the situations described in Section “C” above, the Court shall use an ad hoc system to appoint an attorney from the list of qualified attorneys for a defendant who appears in Court and is determined to be eligible for court-appointed counsel. The Court shall ensure

that appointments are allocated among qualified attorneys in a manner that is fair, neutral and nondiscriminatory.”

As described in the indigency determination process section, all but one of the county courts holds the first hearing of a case of out of custody (“on-bond”) defendants in their own court, rather than before one of the county magistrates. This results in a large number of instances where the county court judges determine indigency. In turn, many attorney appointments are made directly from the bench by the judges rather than through the OAA.

In the case of defendants who remain in jail, a number of courts use “jail runs” to check on the status of the case and review whether the person is represented. Some courts have set up an informal attorney for the day program whereby pre-selected attorneys appear in court and are appointed to represent the defendants who are found indigent that day. Attorneys are selected by the judges and may request to be on the list. The court coordinator will call the attorneys in advance to notify them of the day. Each attorney is limited to no more than 5 to 6 appointments in a day. Before an attorney for the day, a judge reported that many attorneys would appear in the courtroom during jail runs hoping for appointments.

The ad hoc attorney selection process that the plan provides does not adequately define the alternative appointment methodology. It merely recites the statutory requirements that applies to alternative appointment programs, namely that appointments be fair, neutral and nondiscriminatory. However, further elaboration of this process is needed to illuminate this process. The practice that is followed in many instances is described immediately above.

#### Recommendations to Improve the Attorney Selection Process

The rationale for making bench appointments of immediately available attorneys is that it fosters immediate attorney client contact. It is further posited that this will in turn lead to faster dispositions and ultimately reduced jail populations since cases will be settled more quickly. Although the process may be faster, the available data indicate that this practice is not necessary for an efficient processing of a court’s docket. For example, as the chart in Appendix A shows, Criminal District Court No. 1 (CDC 1) consistently makes the fewest appointments directly from the bench and conversely uses the OAA (and its computerized rotation system) the most. This data can then be compared with that of the February 15<sup>th</sup> version of the “Criminal District Courts Judicial Dashboard” showing the status of cases from the beginning of 2006, attached as Appendix D. Under the theory above, CDC 1 should have fewer dispositions, more pending cases, and more settable defendants in jail. In fact, the opposite is true as CDC 1 had the fewest pending cases, the fewest settable cases, and the fewest settable cases when defendants were in jail. This shows that bypassing the OAA for an immediate court appointment is not necessary to provide for proficient movement of a court’s docket.

In light of this analysis, one possible option for the county to consider in both the district and county courts is to notify the OAA of all indigence findings by the judge and request the office to make an appointment from the wheel. This solution would be in keeping with the current plan, but *may* result in a delay in the disposition of the case while the attorney contacts the client and the case is reset. Such a delay would facilitate advanced review of the case by the appointed attorney. The attorney could review the prosecutor’s file using the new internet based system and meet the client before appearing in court with them.

This would allow the attorney to hear the defendant's perspective on the case, check some of the facts of the case, and consider possible defenses to the charges.

Notwithstanding the analysis above, immediate access to counsel is generally considered desirable to a well functioning indigent defense system. Each of the possible solutions below will require changes to the courts' indigent defense plans. Another option the courts may wish to consider is the creation of an attorney for the day system in the criminal courts whereby attorneys are engaged to appear in courts with initial appearance or arraignment settings. The attorneys could be selected by the OAA using the wheel system (or by court accessing the electronic wheel system). Attorneys would receive up to five appointments in county courts or one appointment in district courts on the assigned day and would then be moved to the bottom of appointment list as provided in the current plan. This type of system would be to provide immediate access to counsel to qualifying defendants. It would also provide a transparent system of attorney appointments by using the established wheel. Of course, these recommendations may also be influenced by a recommended expansion of the county magistrates' role in conducting initial appearance hearings for all the criminal courts. When a magistrate finds a person qualifies for counsel, they always refer the case to the OAA to appoint the next attorney from the appropriate wheel. The defendant would then be able to meet with their client prior to the court appearance.

Another alternative for consideration would be the creation of a public defender office to represent indigent defendants. In counties with such offices, public defenders appear at dockets for the courts to which they are assigned. This meets the judges desire to provide immediate attorney client contact and would alleviate any concerns about the use of the wheel system for appointments. Public defender offices are by far the most common approach to providing indigent defense representation in urban areas and in a 1999 survey were shown to handle about 82% of all indigent cases in urban counties.<sup>4</sup> They provide significant economies of scale for providing services in a manner similar to large law firms and district attorney offices. The Task Force also currently offers four year matching grants to counties on a competitive basis for the creation of such programs. More information is available in a Task Force publication "Blueprint for Creating a Public Defender Office in Texas" released in 2004 available at:

<http://www.courts.state.tx.us/oca/tfid/Blueprint.pdf>

As to the revocation appointment system in use by the district courts, it is recommended that the courts consider establishing a new wheel made of attorneys specifically qualified to handle revocations. This way the judges would collectively and by a majority vote approve the list of attorneys for these types of cases. It is also recommended that the method of appointing attorneys from this list be elaborated so that the appointment system can be readily understood. Of course, any type of system needs to allocate appointments in a method that is fair, neutral, and nondiscriminatory. These changes would require an amendment to the existing plan. A limited scale public defender office might also handle revocations. Revocations could be one part of an overall caseload or a specialized program could be developed for these types of cases. The latter would probably work best if revocation proceedings were centralized to a limited number of courts.

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<sup>4</sup> Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, Indigent Defense Services in Large Counties, 1999 (2000).

Lastly, to address the issue of court appointment of attorneys not on the appointment list, it is recommended that the judges more frequently consider attorneys for inclusion on the appointment list. Currently, the judges vote on a quarterly basis. This could be changed to monthly to eliminate the lag time experienced in the case of the former assistant district attorney and other highly qualified attorneys seeking court appointments. Additional appointments of attorneys who are not on the approved appointment list should not be made.

#### Quality of Court Appointed Counsel

Anecdotally, there is a perception among the judges that the quality of court appointed counsel has gone down since the passage of the Fair Defense Act. Under the FDA requirements, the judges set objective criteria for applying attorneys to meet for consideration. The judges interviewed perceive a decline in the quality of representation. They note that there are some attorneys who meet the objective criteria but do not provide high quality representation. No systemic study has been conducted since the passage of the Fair Defense Act to verify the accuracy of these perceptions. In addition to the objective criteria, the statute provides for a subjective review of their qualifications. This review is evidenced by the requirement that each attorney be approved by a majority of the judges. How to fairly and effectively implement this subjective review is an issue with which the judges in Tarrant and many other counties struggle. Some felt that attorneys had a right to be on the list if they met the objective criteria. The Task Force believes that a critical review of the quality of representation actually provided by attorneys applying to be on the list is a factor in providing high quality representation. While being mindful of the need for an open attorney appointment list, the judges have an obligation to closely monitor those seeking approval to be on the list and to carefully consider the removal of attorneys from the list who provide substandard representation to their appointed clients.

An additional consideration that could assist the judges to verify the accuracy of their perception would be to implement performance measures for the attorneys handling appointments. Such measures could set out minimum actions attorneys should take in each case and would provide an objective standard by which to measure the quality of work performed. A few jurisdictions have implemented such standards and there are additional national standards including: American Bar Association's "Standards for Criminal Justice: Prosecution Function and Defense Function" (1993) and National Legal Aid and Defender Association's "Performance Guidelines for Criminal Defense Representation" (1997).

The process of reviewing attorneys seeking to be included on the approved attorney list also differs between the district and county courts. The district court judges meet together quarterly to review the attorneys who have applied to be included on the list. On the other hand, the county court judges typically vote on the applicant attorneys by passing around a list of their names. Although the OAA may make comments related to the objective qualifications and each judge may also add comments, there is no forum for a free-flowing discussion of the quality of applicants. Such a meeting at the statutory county court level could provide meaningful discussion about attorneys' credentials to be included on the appointment list.

# Appendix A

	August			September			October			November			December		
	Unapproved Appts	Ct Appts	OAA Appts	Unapproved Appts	Ct Appts	OAA Appts	Unapproved Appts	Ct Appts	OAA Appts	Unapproved Appts	Ct Appts	OAA Appts	Unapproved Appts	Ct Appts	OAA Appts
CCC1	0	44	51	1 case/1 defendant	23	38	2 cases/2 defendants	60	40	0	37	38	0	30	43
CCC2	0	59	44	0	53	36	0	32	41	0	49	49	0	54	32
CCC3	0	60	56	0	43	24	1 case/1 defendant	58	31	0	66	39	0	35	37
CCC4	0	75	41	6 cases/4 defendants	73	40	2 cases/2 defendants	78	22	6 cases/4 defendants	77	43	0	83	25
CCC5	0	67	112	8 cases/6 defendants	71	128	1 case/1 defendant	62	98	1 case/1 defendant	39	93	1 case/1 defendant	62	86
CCC6	0	59	37	19 cases/15 defendants	72	41	2 cases/1 defendant (revocation issue)	53	50	0	60	41	0	44	35
CCC7	0	97	56	1 case/1 defendant	80	19	0	82	37	0	55	48	4 cases/4 defendants	45	47
CCC8	9 cases/5 defendants	68	48	13 cases/12 defendants	71	40	6 cases/5 defendants	65	29	2 cases/2 defendants	56	31	2 cases/2 defendants	29	30
CCC9	6 cases/6 defendants	61	35	1 case/1 defendant	55	33	1 case/1 defendant (revocation issue)	58	28	0	49	38	0	34	37
CCC10	14 cases/11 defendants	51	34	8 cases/8 defendants	70	17	2 cases/2 defendants	54	42	21 cases/16 defendants	44	45	0	44	32
CDC1	0	3	120	0	0	91	0	7	92	0	1	87	0	3	87
CDC2	0	56	71	0	24	59	0	32	66	0	26	60	1 case/1 defendant	10	45
CDC3	2 cases/1 defendant	17	97	0	8	97	0	19	84	2 cases/1 defendant	15	87	0	13	80
CDC4	0	35	96	0	2	90	0	15	81	0	42	90	0	29	70
213th	0	55	113	0	22	103	0	40	67	0	27	61	0	24	46
297th	0	67	67	0	57	48	0	74	80	0	36	72	0	41	80
371st	3 cases/3 defendants	84	66	1-1 Cap Murder?	44	52	5 cases/3 defendants	68	48	1 case/1 defendant	31	63	0	26	109
372nd	0	58	74	0	42	98	0	48	56	0	28	71	0	55	63
396th	0	39	91	4 cases/2 defendants	27	93	0	35	77	0	21	81	0	31	59

- “Unapproved Appts” are where judges have appointed attorneys who are not on the approved attorney appointment list
- “Ct Appts” are where judges appoint attorneys directly
- “OAA Appts” are appointments are made by the Office of Attorney Appointments using the computerized attorney rotation system



## **Appendix B**

### **List of Tarrant County Officials Interviewed**

Robert Gill, 213<sup>th</sup> District Court Judge

James Wilson, 371<sup>st</sup> District Court Judge

George Gallagher, 396<sup>th</sup> District Court Judge

Sharen Wilson, Criminal District Court No. 1 Judge

Elizabeth Berry, Criminal District Court No. 3 Judge

Michael Thomas, Criminal District Court No. 4 Judge

Michael Mitchell, County Criminal Court No. 2 Judge

Billy Mills, County Criminal Court No. 3 Judge

Debra Nekhom Harris, County Criminal Court No. 4 Judge

Jamie Cummings, County Criminal Court No. 5 Judge

Cheril Hardy, County Criminal Court No. 7 Judge

Daryl Coffey, County Criminal Court No. 8 Judge

Brent Carr, County Criminal Court No. 9 Judge

Gene Grant, County Magistrate

Matt King, County Magistrate

Clete McAlister, Criminal Courts Administrator

Holly Webb, Office of Attorney Appointments

## Appendix C

### THE INITIAL APPEARANCE SETTING

The first setting for each felony case is the Initial Appearance Setting (IAS). The purpose of the IAS is to ensure that each defendant has an attorney on all pending cases. A case will not progress to the next case setting until the defendant is represented on all cases.

All IAS will be conducted in the magistrate's court. In cases where the defendant is in custody, the IAS will be conducted within four days of the filing date.

Where the defendant is on bond, the IAS will be conducted within 15 days of the filing date.

If the assigned court or magistrate's court has received notification that a defendant is represented by retained counsel before the IAS, the defendant and counsel will be excused from the IAS. Notification may be delivered by fax, email or letter.

If an attorney is retained before a case is filed, the attorney is expected to notify the Office of Attorney Appointments so that the attorney's name can be coordinated with the case when filed.

If a defendant is not represented by counsel at the IAS, the magistrate will inquire into the reason for the lack of counsel and require the defendant to complete the "Election Of Counsel" form (see Attachment A). If the defendant requests court appointed counsel, the magistrate will require the defendant to complete the "Affidavit Of Indigency" (see Attachment B). After the defendant has completed this form, the magistrate will conduct a thorough indigency hearing. If the defendant is on bond, the magistrate will not complete the hearing until the defendant has produced the documents required by condition of bond (see Attachment C). The failure or refusal of the defendant to produce the required documents at the IAS may result in the re-arrest of the defendant.

If the magistrate finds that the defendant is indigent, the defendant will be appointed an attorney from the felony court appointment wheel. The magistrate will then enter an order requiring any defendant with appointed counsel to make payments toward appointed attorney fees through the District Clerk's office weekly (see Attachment D1), or bi-monthly (see Attachment D2) where it is determined that the defendant is financially able to make such payments.

If the magistrate finds that the defendant is not indigent, the magistrate will urge the defendant to hire an attorney and may reset the case for another IAS.

The magistrate will also review all cases for appropriate bond conditions and modify the conditions accordingly. If a defendant is in custody, the magistrate will also review the bond amount and may, based on individual case factors, reduce the bond to an amount consistent with the current bond schedule set by the criminal district judges.

## Appendix D

District Courts Summary										
	CDC1	CDC2	CDC3	CDC4	D213	D297	D371	D372	D396	Totals
<b>Filed Cases Year to Date</b>	<b>214</b>	<b>224</b>	<b>223</b>	<b>225</b>	<b>213</b>	<b>223</b>	<b>216</b>	<b>219</b>	<b>218</b>	<b>1975</b>
Transfer Cases Year to Date	-13	11	-2	-4	-6	6	-11	-8	3	
<b>Disposed Cases Year to Date</b>	<b>208</b>	<b>207</b>	<b>155</b>	<b>162</b>	<b>210</b>	<b>208</b>	<b>197</b>	<b>203</b>	<b>214</b>	<b>1764</b>
Filed Minus Disposed Year to Date	6	17	68	63	3	15	19	16	4	211
<b>Pending Cases</b>	<b>845</b>	<b>1246</b>	<b>1090</b>	<b>1158</b>	<b>877</b>	<b>1309</b>	<b>1181</b>	<b>1009</b>	<b>888</b>	<b>9603</b>
Pending Cases Pre Indictment	378	351	281	432	321	488	504	335	257	3347
Pending Cases Post Indictment	467	895	809	726	556	821	677	674	631	6256
Unapprehended Pending Cases	230	243	212	198	225	252	224	192	177	1953
Unapprehended Probation Revocations	105	77	144	197	173	220	177	197	78	1368
<b>Pending Cases No Warrants</b>	<b>615</b>	<b>1003</b>	<b>878</b>	<b>960</b>	<b>652</b>	<b>1057</b>	<b>957</b>	<b>817</b>	<b>711</b>	<b>7650</b>
Pending Cases No Warrant Pre Indictment	355	332	268	423	300	450	474	326	242	3170
Pending Cases No Warrant Post Indictment	260	671	610	537	352	607	483	491	469	4480
<b>Settable Cases</b>	<b>632</b>	<b>1032</b>	<b>916</b>	<b>998</b>	<b>694</b>	<b>1114</b>	<b>1020</b>	<b>867</b>	<b>751</b>	<b>8024</b>
Settable Cases With No Setting	288	388	206	384	263	622	476	278	156	3061
Settable Cases Pre Indictment	354	332	268	422	300	449	474	326	242	3167
Settable Cases Post Indictment	255	658	598	516	344	606	466	484	460	4387
Settable Defendants In Jail	131	255	226	216	156	228	258	242	185	1897
Settable Defendants In Jail Pre Indictment	67	81	66	80	58	85	122	84	72	715
Settable Defendants In Jail Post Indictment	54	169	151	128	85	139	113	145	115	1099
Settable Defendants In Jail Probation Revocation	15	23	28	27	24	26	48	40	21	252