



Policy Monitoring Review of Deaf Smith County's Indigent Defense Systems

March 24, 2015

Purpose of the Limited Scope Policy Monitoring Review

The Texas Indigent Defense Commission (“Commission”) is required to monitor local jurisdictions’ compliance with the Fair Defense Act (“FDA”).¹ The policy monitor conducted a limited scope review in Deaf Smith County to analyze the procedures for appointing counsel to indigent defendants in misdemeanor cases.

Factors Causing the Limited Scope Policy Monitoring Review

In May 2013, Commission staff conducted an informal review of Deaf Smith County’s misdemeanor appointment procedures. During the review, staff reported to the county judge that 187 misdemeanor Article 15.17 requests for counsel had been reported to the Office of Court Administration (OCA) in FY12,² but the county only reported one misdemeanor case paid to the Commission. The county judge stated that he had not received these requests, and so had not ruled upon them. Staff informed county officials during their 2013 visit that the county needed to implement a process to send the request for counsel to the appointing authority and have the request ruled upon.

Based on observations from the 2013 visit and the low number of misdemeanor appointments in FY13 and FY14, policy monitoring staff conducted a Limited Scope Policy Monitoring Review in March 2015. See the table below showing misdemeanor appointment data in Deaf Smith County (as reported by the clerk and auditor) and statewide. The table shows that across Texas about 42% of misdemeanor defendants received appointed counsel in FY14. For counties with a population less than 50,000, about 25% of misdemeanor defendants received appointed counsel.

Table 1: Deaf Smith County Court Misdemeanor Appointment Data

Year	2011	2012	2013	2014	Texas 2014
Population (Non-Census years are estimates)	19,372	19,648	19,710		
Misdemeanor Charges Added (from OCA report)	488	555	615	571	530,335
Misdemeanor Cases Paid	3	1	2	6	223,043
% Misdemeanor Charges Defended with Appointed Counsel	.6%	.2%	.3%	1.1%	42.1%
Misdemeanor Trial Court Attorney Fees	\$535	\$305	\$755	\$2,030	\$38,291,611
Total Misdemeanor Court Expenditures	\$535	\$305	\$755	\$2,030	\$39,411,244

Timeline and Methodology

The limited scope policy monitoring review of Deaf Smith County was conducted by TIDC staff with a site visit on March 11, 2015. Throughout this report, all references to Commission staff use the term “monitor.” The monitor examined procedures for appointing counsel to indigent defendants in misdemeanor cases. For the documentation of these procedures, the monitor examined 33 misdemeanor case files and corresponding magistrate warning forms.³ Afterwards, the monitor met with the newly

¹ Tex. Gov’t Code § 79.037(a)-(b).

² These are reported as part of the justice court’s Texas Judicial Council Monthly Court Activity Reports.

³ The magistrate warning form is not part of the misdemeanor case file, and so the monitor matched misdemeanor case files maintained by the clerk with magistrate warning forms maintained by the justice of the peace.

elected county judge. The monitor also reviewed the local indigent defense plan and Texas Judicial Council Monthly Court Activity Reports (as reported to OCA) as part of this report.

Current Review

Methods to Conduct Article 15.17 Hearings

Article 15.17(a) of the Code of Criminal Procedure requires a magistrate to conduct a hearing within 48 hours of arrest, provide an arrestee with *Miranda*-like warnings, and ask whether the arrestee would like to request counsel. If an arrestee wants to request counsel, the magistrate is statutorily required to ensure reasonable assistance to the arrestee in completing the necessary paperwork for the purpose of determining indigence. The request and paperwork must be transmitted to the appointing authority within 24 hours of the request.

In Deaf Smith County, the justice of the peace performs these magistration duties. Of the 33 magistrate warning forms examined by the monitor, the justice of the peace documented 14 requests for counsel (42%). For FY14 (October 2013 – September 2014), the justice of the peace reported giving magistrate warnings to 462 misdemeanor arrestees, 181 of whom requested counsel (39%).⁴ The reported data and monitor's sample indicate that arrestees in Deaf Smith County are informed of their right to counsel and the assertion of that right is properly documented.

Methods to Determine Indigence and Assign Counsel

After an arrestee requests counsel, the magistrate has 24 hours to transmit the request to the appointing authority, and the appointing authority has 3 working days to rule on the request. As required by Article 15.17(a), once a request for counsel is received (whether the request was made at the Article 15.17 hearing or at a later time), the appointing authority must rule upon the request according to the standards set in its indigent defense plan.

The indigent defense plan for Deaf Smith County sets the following standard of indigence:

A defendant is considered indigent if the defendant is not financially able to employ counsel taking into account the nature of the criminal charges(s), the anticipated complexity of the defense, the estimated cost of obtaining competent private legal representation for the matter charged, and the amount needed for the support of the defendant and the defendant's dependents.

Additionally, the plan states:

Each accused requesting the appointment of counsel shall fully complete, under oath, the indigence affidavit.

If such affidavit reflects a net income for the accused which is below the latest available Federal Poverty Guidelines for one person, the accused shall be found to be indigent and counsel shall be appointed for the accused in accordance with the procedures set out herein.

Of the 33 cases reviewed by the monitor, 14 cases contained requests for counsel (from the Article 15.17 forms) but none contained appointments of counsel or denials of indigence. All 33 cases in the monitor's sample contained a guilty plea, 30 of which were uncounseled pleas. The remaining 3 cases had retained counsel. Because the monitor did not observe any requests for counsel in the case

⁴ As reported in the Texas Judicial Council Monthly Court Activity Report.

files (but rather in the Article 15.17 forms), it appears that Article 15.17 requests for counsel are not being transmitted to the appointing authority. As a result of the process in Deaf Smith County, arrestees charged with misdemeanor offenses are not appointed counsel in a timely manner. Based on this sample, no arrestees received court appointed counsel. The county must implement procedures that comport with statutory requirements so that qualifying arrestees receive court appointed counsel in a timely manner.

Methods to Accept Waivers of Counsel

Article 1.051(f) - (h) of the Code of Criminal Procedure governs waiver of counsel provisions and gives guidance regarding when an unrepresented defendant may discuss his/her case with the prosecutor. Article 1.051(f) states that waivers obtained in violation of (f-1) and (f-2) are presumed invalid. Under Article 1.051(f-1), the prosecutor may not initiate or attempt to obtain a waiver from an unrepresented defendant. The prosecutor may not communicate with the defendant until all requests for counsel have been denied, the defendant has been given a reasonable opportunity to retain private counsel, and the defendant waives the opportunity to retain private counsel.

Under Article 1.051(f-2), if the defendant has requested court appointed counsel, the court may not direct or encourage the defendant to communicate with the attorney representing the state unless the court (or its designee) has denied the defendant's request for counsel, and the defendant has subsequently been given a reasonable time opportunity to retain counsel (and failed to do so) or waives the opportunity to retain private counsel. In summary, both (f-1) and (f-2) require a denial of the request for counsel to precede the waiver of counsel.

In the review of sample case files, the monitor observed that each plea packet contained waivers of counsel. However, the monitor found 14 cases in which a defendant pled guilty while there was a pending request for counsel. Because none of these requests were denied, the requirements of (f-1) and (f-2) were not met. Deaf Smith County must implement procedures to ensure that Article 1.051(f-1) and (f-2) waiver of counsel provisions are met.

Policy Monitoring Recommendation 1: Deaf Smith County must implement procedures to make timely appointments of counsel. Under Article 1.051(c), the court has three working days from receipt of request to appoint counsel for those deemed indigent.

Policy Monitoring Recommendation 2: Deaf Smith County must implement procedures to ensure that the court rules upon requests for counsel prior to granting any waiver of 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.

Conclusion

The monitor appreciated the professionalism and assistance provided by Deaf Smith County officials and staff. Deaf Smith County officials 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 recommendations.