



# **Policy Monitoring Review of Hays County's Indigent Defense Systems**

**September 2018**



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## **Purpose of the Policy Monitoring Review**

The Texas Indigent Defense Commission (“Commission”) monitors local jurisdictions’ compliance with the Fair Defense Act (“FDA”) through on-site reviews.<sup>1</sup> These reviews seek to promote local compliance and accountability with the requirements of the FDA and to provide technical assistance to improve county indigent defense processes where needed. Additionally, the review process aims to assist local jurisdictions in developing procedures to monitor their own compliance with their indigent defense plans and the FDA.

## **Overview**

The FDA provides a statutory framework for the appointment of counsel and mandates specific timeframes for taking, transmitting, and ruling upon requests for counsel. Jurisdictions retain latitude to develop the standard by which they determine indigence and their procedures for appointing counsel. In odd-numbered years, counties are responsible for submitting to the Commission their local formal and informal rules related to the appointment of counsel.<sup>2</sup> This review assesses whether Hays County’s local practices and procedures meet the FDA requirements and the Commission’s rules. The monitor compared the FDA’s core requirements to the county’s practices in the following five areas:<sup>3</sup>

- 1: Conduct prompt and accurate Article 15.17 proceedings.
- 2: Determine indigence according to standards directed by the indigent defense plan.
- 3: Establish minimum attorney qualifications.
- 4: Appoint counsel promptly.
- 5: Institute a fair, neutral, and nondiscriminatory attorney selection process.

Commission staff, Morgan Shell and Joel Lieurance, made an on-site review from March 20 – 22, 2018 and on April 6, 2018. Throughout this report, Commission staff will be referenced as “monitor.” The primary source of information for this report came from sample felony, misdemeanor and juvenile cases filed during FY2017 (October 2016 – September 2017).<sup>4</sup> The monitor also observed a pro se misdemeanor docket and magistrate warnings. Other useful information included the Indigent Defense Expense Report, local indigent defense plans, monthly reports submitted to the Office of Court Administration (OCA), and data maintained by court coordinators (including attorney appointment lists and proof of eligibility for those lists). The report follows with accompanying findings and recommendations.

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<sup>1</sup> TEX. GOV’T CODE § 79.037(a)–(b).

<sup>2</sup> TEX. GOV’T CODE § 79.036(a)(1).

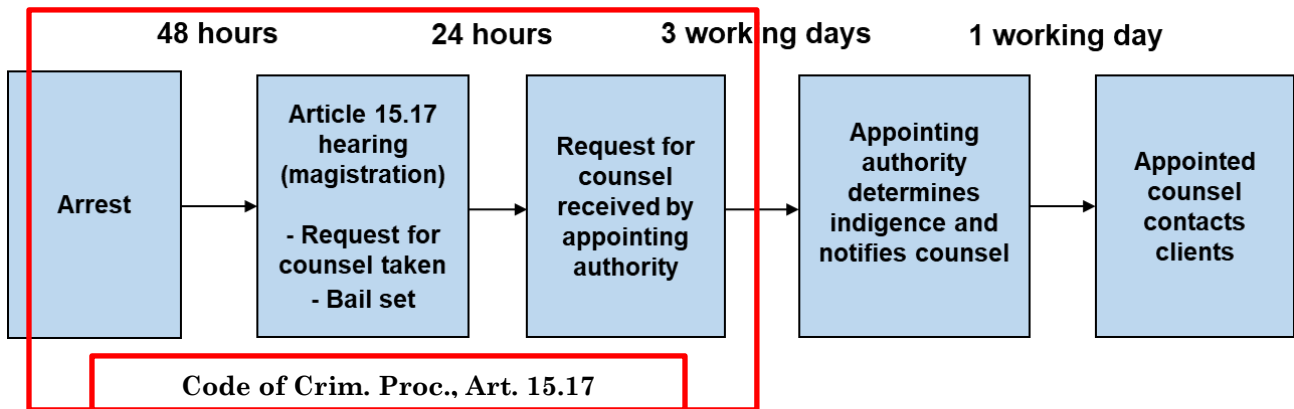
<sup>3</sup> The fiscal monitor issued a report covering indigent payment processes and statutory data reporting.

<sup>4</sup> The monitor randomly selected 110 felony case files and 150 misdemeanor case files. The monitor sequentially selected 49 juvenile case files. These samples were used for analyzing timeliness of magistrate warnings and the timeliness of attorney appointments.

## Program Assessment

### **REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS**

Once arrested, an accused must be brought before a magistrate within 48 hours.<sup>5</sup> At this hearing, the magistrate must inform the accused of his or her right to counsel; inform the accused of the procedures for requesting counsel; and ensure that the accused has reasonable assistance in completing the necessary forms for requesting assistance of counsel.<sup>6</sup> Finally, within 24 hours of receiving a request for counsel, the magistrate must transmit this request to the entity authorized to appoint counsel.<sup>7</sup>



#### ***Hays County's Article 15.17 Procedures***

Following arrest, officers bring arrestees to the Hays County Jail for booking and processing. On each day of the week (usually by videoconference), a magistrate determines probable cause, sets bail, and informs arrestees of their rights. Magistrate duties rotate among the county's six justices of the peace and municipal judges in Buda and San Marcos.

The monitor observed Article 15.17 hearings at the Hays County Jail on April 6. The justice of the peace for Precinct 1, Place 1 presided over the hearings conducted via a videoconference system. The judge gave the required admonishments, made probable cause determinations, set bail, and asked every defendant if he or she wanted to request counsel. Eleven arrestees were charged with a felony offense, and eight of these persons requested counsel. Eleven additional arrestees were charged with a misdemeanor offense as their highest charge, and seven of these persons requested counsel. The judge explained to the monitor that she ensures there are no gaps in transmitting paperwork to the courts by marking whether each person requested counsel, and later reviewing the jail roster to check that paperwork has been submitted to the courts.

<sup>5</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>6</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>7</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

**1.a. Timeliness of Warnings**

The accused must be brought before a magistrate within 48 hours of arrest.<sup>8</sup> The monitor presumes that a county is in substantial compliance with the prompt magistration requirement if at least 98% of Article 15.17 hearings are conducted within 48 hours.<sup>9</sup> To determine the timeliness of Article 15.17 warnings in Hays County, the monitor took a sample of 183 cases and calculated the number of days between arrest and the Article 15.17 hearing for each case. All 183 sample cases had Article 15.17 hearings occurring within two days of arrest, indicating that Hays County is in substantial compliance with this requirement.

**Table 1: Timeliness of Article 15.17 Hearings**

	<b>Sample Size</b>	<b>Percent</b>
Article 15.17 hearing occurs x days after arrest:	—	—
0 days	73	39.9%
1 day	110	60.1%
2 days	0	0%
More than 2 days	0	0%
<b>Timely Hearings</b>	<b>183</b>	<b>100%</b>

**1.b. Ability of Arrestees to Request Counsel**

At the Article 15.17 hearing, the magistrate must inform the accused of his or her right to counsel, ask whether the accused wants to request counsel, and receive the accused’s request for counsel.<sup>10</sup> The magistrate must make a record of each step of this exchange.<sup>11</sup> The monitor uses these records to determine if arrestees are informed of their right to counsel and invoke that right.<sup>12</sup> Each of the justices of the peace and municipal courts in Buda and San Marcos reported receiving a significant number of requests for counsel from arrestees, detailed in Table 2. This indicates that arrestees are being informed of the right to appointed counsel and are able to request counsel at the Article 15.17 hearing.

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<sup>8</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>9</sup> 1 TEX. ADMIN. CODE § 174.28.

<sup>10</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>11</sup> TEX. CODE CRIM. PROC. art. 15.17(e).

<sup>12</sup> The monitor received these records from the Office of Court Administration, where the judges submit them each month.

**Table 2: Texas Judicial Council Monthly Activity Reports (Oct. 2016 – Sept. 2017)**

<b>Article 15.17 Warnings and Requests for Counsel Reported by Magistrates</b>	JP1-1	JP1-2	JP2	JP3	JP4	JP5	Buda	San Marcos
Misdemeanor Warnings (A & B)	909	486	628	613	377	536	129	374
Misdemeanor Counsel Requests	312	223	270	298	163	240	40	195
% Misdemeanor Requests	34%	46%	43%	49%	43%	45%	31%	52%
Felony Warnings	457	243	340	308	152	290	48	170
Felony Counsel Requests	157	119	203	163	95	145	23	99
% Felony Requests	34%	49%	60%	53%	63%	50%	48%	58%

***1.c. Reasonable Assistance in Completing Forms for Requesting Counsel***

At the Article 15.17 hearing, magistrates must ensure that the accused has reasonable assistance in completing the necessary forms for requesting counsel.<sup>13</sup> In Hays County, jail staff assist with the completion of affidavits of indigence. According to interviews, jail staff give affidavits of indigence to arrestees requesting counsel and provide assistance filling them out if needed. Jail staff reported that they collect the affidavits prior to returning arrestees to their cells.

The monitor’s case sample showed several instances in which arrestees requested counsel at the Article 15.17 hearing (as indicated by magistrate warning forms), but the court had no record of those requests. The courts do not appear to receive financial paperwork from all persons requesting counsel, particularly when defendants make bail.<sup>14</sup>

***1.d. Transmitting Forms to the Appointing Authority***

Within 24 hours of a defendant requesting counsel, the magistrate must transmit this request to the entity authorized to appoint counsel.<sup>15</sup> In Hays County, only the courts of dispositive jurisdiction are authorized to appoint counsel. Jail staff scan affidavits of indigence into the Odyssey case management system and deliver the originals to the courts each day. However, court staff indicated they may not always promptly receive affidavits of indigence from the jail. The case sample showed several instances in which arrestees requested counsel at the Article 15.17 hearing, but the court had no record of the requests, indicating that not all requests for counsel are transmitted to the appointing authority within 24 hours.

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<sup>13</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>14</sup> Issues with completing or transmitting indigency paperwork may cause the court to not appoint counsel in a timely manner (discussed below).

<sup>15</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

## FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1

### **Conduct prompt and accurate magistration proceedings.**

**FINDING 1:** Article 15.17(a) requires reasonable assistance in completing financial paperwork be provided to persons requesting counsel at the time of the 15.17 hearing. Hays County must put in place a system in which all persons requesting counsel receive assistance in completing financial affidavits.

**FINDING 2:** Article 15.17(a) requires requests for counsel to be transmitted to the courts within 24 hours of the requests being made. Hays County must ensure that whenever a request for counsel is made at the 15.17 hearing, the associated paperwork is sent to the courts within 24 hours of the request being made.

## **REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS DIRECTED BY THE INDIGENT DEFENSE PLAN.**

Under Article 26.04(l) of the Code of Criminal Procedure, counties must adopt procedures and financial standards for determining whether a defendant is indigent. Article 26.04(m) lists the factors courts may consider in determining indigence. Article 26.04(m) states:

*In determining whether a defendant is indigent, the court or the courts' designee may consider the defendant's income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, and spousal income that is available to the defendant. The court or the courts' designee may not consider whether the defendant has posted or is capable of posting bail, except to the extent that it reflects the defendant's financial circumstances as measured by the considerations listed in this subsection.*

The local standards for determining indigence are set in each county's indigent defense plans.<sup>16</sup> For felony cases in Hays County, defendants with an income below 100% of the Federal Poverty Guidelines are presumed indigent. In misdemeanor cases, a person is presumed indigent if

- (1) The accused is eligible for food stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, or public housing;
- (2) The accused's net household income does not exceed 125% of the Federal Poverty Guidelines; or
- (3) The accused is currently serving a sentence in a correctional institution, is residing in a public mental health facility, or is subject to a proceeding in which admission or commitment to such mental health facility is sought.

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<sup>16</sup> Hays County has three indigent defense plans:

- a district court plan (<http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=555>);
- a county court plan (<http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=558>); and
- a juvenile board plan (<http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=557>)



For juveniles, the same financial standards used in misdemeanor cases apply, except indigence is based upon the person having custody over the juvenile.

The monitor found one instance in which a defendant over the age of 30 was denied indigence with the statement, “Denied: Father makes \$2000 per month.” The income of the accused’s parent is not a relevant factor for determining indigency under either Article 26.04(m) or Hays County’s indigent defense plan, indicating that judges do not always follow required indigency standards.

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 2**

**Determination of Indigence.**

**FINDING 3:** Not all determinations of indigence follow the financial standard set by the indigent defense plan and Article 26.04(m). The courts must follow this standard in determining indigence.

**REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS.**

The Hays County indigent defense plans create separate attorney appointment lists for felony cases, misdemeanor cases, and juvenile cases. Attorneys on the felony and misdemeanor appointment lists must obtain a minimum of six hours of continuing legal education (CLE) training in criminal law. Attorneys on the juvenile appointment list must obtain a minimum of six hours of CLE training in juvenile law. The monitor found the county has procedures for managing the attorney appointment lists and for ensuring that all attorneys on the lists meet their annual CLE requirement as described in the indigent defense plans.

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 3**

**Establish Minimum Attorney Qualifications.**

Requirement satisfied. No findings.

**REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.**

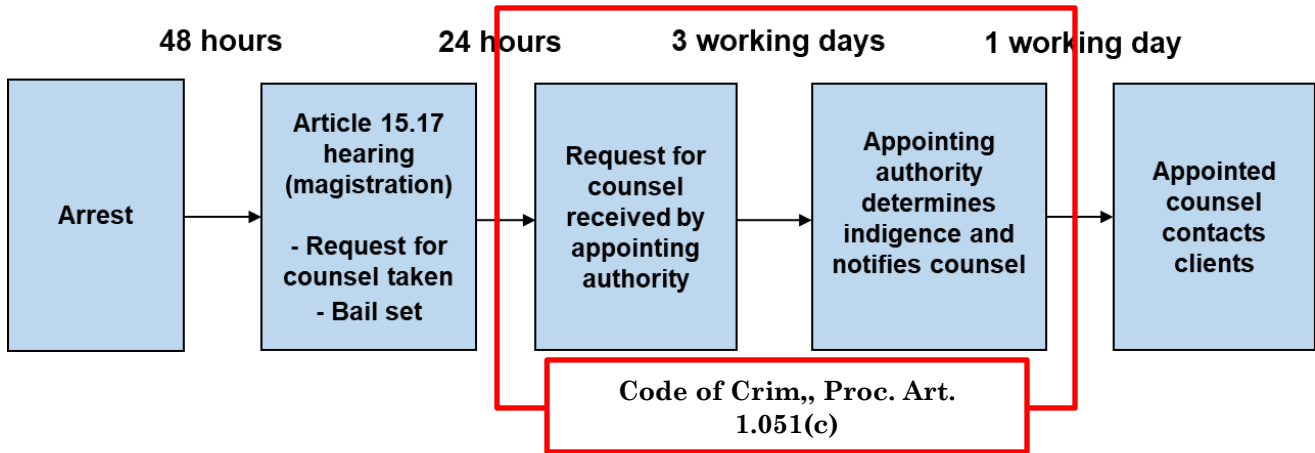
Article 1.051(c) of the Code of Criminal Procedure requires the court or its designee to appoint counsel by the end of the third working day following receipt of the request for counsel made at the Article 15.17 hearing.<sup>17</sup> To assess the timeliness of Hays County’s appointment procedures in felony and misdemeanor cases, the monitor examined the time from request for counsel to appointment or denial of indigence. Under the Commission’s monitoring rules, a county is presumed in compliance with the prompt

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<sup>17</sup> *Rothgery v. Gillespie County* clarified that the initiation of adversarial judicial proceedings occurs at the Article 15.17 hearing. 554 U.S. at 212 – 13.

appointment of counsel requirement if at least 90% of indigence determinations in the monitor’s sample are timely.<sup>18</sup>

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



***Timeliness of Appointments in Felony Cases***

To assess the timeliness of Hays County’s current appointment procedures in felony cases, the monitor examined 110 sample felony cases filed in FY17 (October 2016 – September 2017). Counsel was appointed in a timely manner in 56 of 77 sample cases containing a request for counsel (**73% timely**), which does not meet the 90% timeliness threshold.<sup>19</sup> The monitor therefore presumes that Hays County is not in substantial compliance with this requirement.<sup>20</sup>

**Table 3: Times from Request to Appointment in Felony Cases**

	Sample Size	Number from sample	Percent
Number of case files examined	110		
Total cases with a counsel request		77	
<b>Appointment / denial of indigence occurred in:</b>			
0 work days		19	
1 – 3 work days + 24 hour transfer		37	
<b>Total timely appointments / denials</b>		<b>56</b>	<b>73%</b>
4 to 10 work days + 24 hour transfer		15	
More than 10 work days + 24 hour transfer		3	
No ruling on request		3	
Total untimely appointments / denials		21	27%

<sup>18</sup> 1 TEX. ADMIN. CODE § 174.28.

<sup>19</sup> The monitor found counsel was requested (either at the Article 15.17 hearing or later) in 78 sample cases (or 71% of the felony sample). However, the monitor excluded one of those cases from the analysis of timely appointments because the defendant retained counsel shortly after requesting counsel.

<sup>20</sup> Appointments may be late due to issues with completing indigency paperwork or transmitting it from the jail to the court (discussed above).

***Timeliness of Appointments in Misdemeanor Cases***

To assess the timeliness of Hays County’s current appointment procedures in misdemeanor cases, the monitor examined 150 sample misdemeanor cases filed in FY17 (October 2016 – September 2017). Counsel was appointed in a timely manner in 16 of 69 cases having a request for counsel (**23% timely**), which does not meet the Commission’s 90% threshold.<sup>21</sup> The monitor therefore presumes that Hays County is not in substantial compliance with this requirement.<sup>22</sup>

**Table 4: Times to Appointment in Misdemeanor Cases**

	Sample Size	Number from sample	Percent
Number of case files examined	150		
Total cases with a counsel request		69	
<b>Appointment / denial of indigence occurred in:</b>			
0 work days		13	
1 – 3 work days + 24 hour transfer		3	
<b>Total timely appointments / denials</b>		<b>16</b>	<b>23%</b>
4 to 10 work days + 24 hour transfer		5	
More than 10 work days + 24 hour transfer		18	
No ruling on request		30	
Total untimely appointments / denials		53	77%

***Waivers of Counsel in Misdemeanor Cases***

Article 1.051 of the Code of Criminal Procedure addresses waivers of counsel and allows waivers that are voluntarily and intelligently made. Articles 1.051(f-1) and (f-2) require a waiver of counsel in order for an unrepresented defendant to speak with the prosecutor. Article 1.051(g) requires a waiver for the purpose of entering an uncounseled guilty plea.

Under 1.051(f-1), the prosecutor may not initiate a waiver and may not communicate with a defendant until any pending request for counsel is ruled upon, and the defendant waives the opportunity to retain private counsel. Under 1.051(f-2), the court must explain the procedures for requesting counsel and must give the defendant a reasonable opportunity to request counsel before encouraging the defendant to communicate with the attorney representing the state. A pending request for counsel must be ruled upon before a waiver of counsel is allowed. Before a defendant enters an

<sup>21</sup> The monitor found counsel was requested (either at the Article 15.17 hearing or later) in 71 sample cases (or 47% of the misdemeanor sample). However, the monitor excluded two cases from the analysis of timely appointments because the defendant retained counsel shortly after requesting counsel.

<sup>22</sup> Again, appointments may be late due to issues with completing indigency paperwork or transmitting it from the jail to the court (discussed above). In misdemeanor cases, the monitor observed that late determinations of indigence occurred primarily in cases in which defendants requested counsel at the Article 15.17 hearing but made bail shortly afterwards. Even when someone makes bail, the jail must transmit requests for counsel to the court within 24 hours.

uncounseled plea, he or she must sign a written waiver, the language of which must substantially conform to the language of 1.051(g).<sup>23</sup>

Thirty cases from the monitor's misdemeanor sample included a request for counsel, but there was no appointment of counsel or denial of the request. Six of these cases included a waiver of counsel (with no corresponding documentation showing the request for counsel had been denied) and an uncounseled plea. Article 1.051(f-2) requires all requests for counsel be ruled upon prior to any waiver of counsel.

### ***Observation of a Pro Se Misdemeanor Docket***

On March 20, 2018, the monitor observed a pro se misdemeanor docket. Prior to the judge's appearance, the bailiff spoke to defendants and asked if anyone intended to hire counsel. Five persons raised their hands. One person then asked to apply for court appointed counsel. The bailiff responded that the judge would explain the procedures for requesting appointed counsel later. An additional defendant then entered the courtroom, and the bailiff asked, "Are you going to hire an attorney or talk to the State?" The bailiff concluded with a question as to whether anyone did not want to speak with the prosecutor. One person raised his/her hand.

Next, the judge entered the courtroom. One defendant did not speak English, and, through an interpreter, the judge explained the defendant's rights, including the procedures for requesting counsel and for waiving counsel. The judge spoke to all defendants in the courtroom and gave admonitions concerning the right to counsel. The judge explained that to qualify for appointed counsel, defendants would need to fill out an affidavit completely. The judge stated that not everyone would qualify as indigent, and some cases would not require the presence of an attorney.

The judge then inquired about each defendant's choice of counsel type. The judge began by asking if anyone wanted to speak with the prosecutor about their case, and eight persons raised their hands. Each was given a temporary waiver of counsel form. The judge asked if anyone was charged with a driving while intoxicated offense (DWI). Under local practice, DWI cases are strongly discouraged from going pro se. Two persons had been charged with DWIs. They were given the option either to apply for appointed counsel or retain counsel. One asked for time to retain counsel, and the other requested counsel. Based on the monitor's observations, six persons requested appointed counsel at the docket. Four of those persons received appointed counsel, and two were denied indigence.

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<sup>23</sup> The waiver language of Article 1.051(g) states:

*I have been advised this \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_, by the (name of court) Court of my right to representation by counsel in the case pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge. Understanding my right to have counsel appointed for me free of charge if I am not financially able to employ counsel, I wish to waive that right and request the court to proceed with my case without an attorney being appointed for me. I hereby waive my right to counsel. (signature of defendant)*

The monitor makes no findings about local practices for handling the pro se misdemeanor docket. However, the monitor offers one of the Commission’s model forms as an example of a different methodology (see Appendix B).<sup>24</sup> This form lists the available representation options for defendants and directs defendants to choose one of the available options. Additionally, it notes the potential dangers of self-representation including loss of employment opportunities or public benefits. At the docket, the monitor observed unrepresented defendants posing these questions, but there was no person with a duty to answer them.

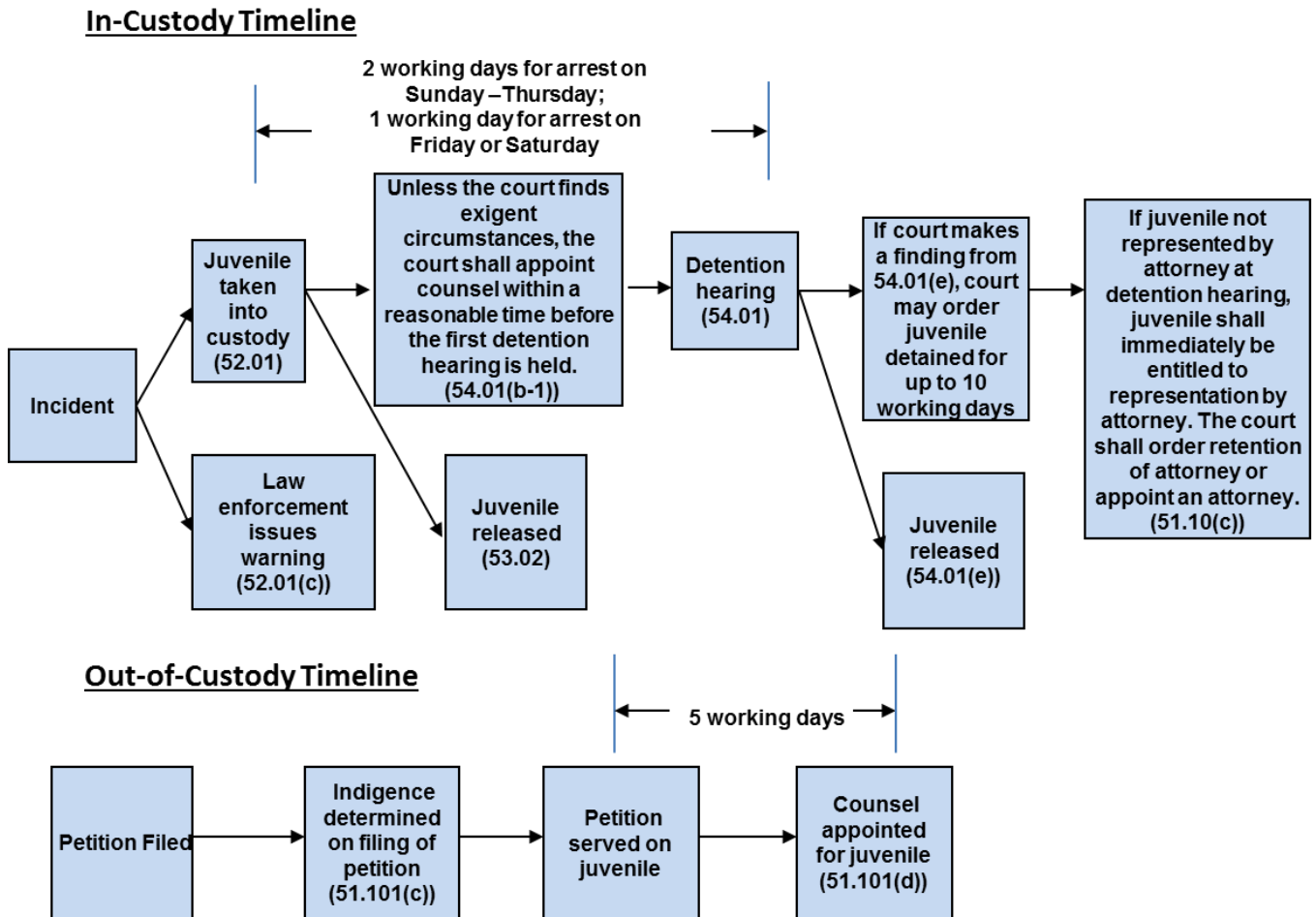
### ***Timeliness of Appointments in Juvenile Cases***

Counsel must be appointed for juveniles charged with a crime when the juvenile is brought to a detention hearing and when the juvenile 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. Under Subsections 51.101(c) and (d) of the Family Code, once a petition is served on the juvenile, the court has five working days to appoint counsel or order the retention of counsel for the juvenile. To assess the timeliness of Hays County’s appointment procedures in juvenile cases, the monitor examined 49 cases filed in FY17 (October 2016 – September 2017).

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<sup>24</sup> The form is also available at: <http://www.tidc.texas.gov/media/49941/model-waiver-to-speak-with-the-prosecutor.docx>.

**Figure 2: Timeline for Appointment of Counsel in Juvenile Cases**



***Juvenile Detention Hearings***

Section 54.01(h) of the Family Code prohibits waivers of the initial detention hearing.<sup>25</sup> Of the 49 sample juvenile cases, 11 involved instances in which a detained juvenile waived the initial detention hearing, indicating that Hays County is not in substantial compliance with this requirement.<sup>26</sup>

<sup>25</sup> Tex. Fam. Code §54.01(h) states:

*A detention order extends to the conclusion of the disposition hearing, if there is one, but in no event for more than 10 working days. Further detention orders may be made following subsequent detention hearings. **The initial detention hearing may not be waived** but subsequent detention hearings may be waived in accordance with the requirements of Section 51.09. Each subsequent detention order shall extend for no more than 10 working days, except that in a county that does not have a certified juvenile detention facility, as described by Section 51.12(a)(3), each subsequent detention order shall extend for no more than 15 working days.*

<sup>26</sup> Sample language for the waiver of the initial detention hearing follows:

*My attorney and I hereby join together in voluntarily waiving my right to have a detention hearing in this matter and we hereby agree that I may remain in the Hays County Juvenile Center until the conclusion of my disposition hearing, or until further order of the Court, but in no event for more than ten (10) working days without being entitled to another detention hearing.*

Section 54.01(b-1) of the Family Code requires counsel be appointed prior to the hearing unless appointment is not feasible due to exigent circumstances.<sup>27</sup> Of the 49 sample cases, six involved detention hearings. Counsel was not present for the initial detention hearing in three of those six cases. The three cases without counsel present did not include a finding of exigent circumstances in the case file. This level of timeliness (50% timely) falls below the Commission’s 90% threshold.

***Appointment After Service of the Petition***

In cases involving the service of a petition on a juvenile, counsel was present in a timely fashion for 76% of the monitor’s sample. This falls below the Commission’s 90% threshold for timeliness, indicating that the county is not in substantial compliance with this requirement. The late appointments may be due to the court not making contact with parents prior to the expiration of the five-working-day requirement set in Section 51.101(d). To address the issue, the County should ensure that juvenile probation is promptly conducting financial intakes and transmitting those affidavits to the appointing authority.

**Table 5: Times to Appointment in Juvenile Cases**

	Sample Size	Number from Sample	Percent
Total juvenile cases examined	49		
<b>TIMELINESS OF COUNSEL APPOINTMENTS FOR DETENTION HEARINGS</b>			
Case files with detention hearings	6		
<b>Cases with attorney present at initial hearing</b>		<b>3</b>	<b>50%</b>
<b>TIMELINESS OF COUNSEL APPOINTMENTS WHERE JUVENILE SERVED WITH A PETITION</b>			
Case files in which juvenile served with a petition	46		
Counsel appointed within 5 working days of service		23	
Counsel retained within 5 working days of service		4	
Indigence denied within 5 working days of service <sup>28</sup>		8	
<b>Total cases with timely presence of counsel</b>		<b>35</b>	<b>76%</b>
Cases where counsel not present in a timely fashion		11	24%

<sup>27</sup> Tex. Fam. Code §54.01(b-1) states:

*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 is held to represent the child at that hearing.*

<sup>28</sup> The monitor considered a denial of indigence to be synonymous with an order to retain counsel.

## FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4

### **Appoint Counsel Promptly.**

**FINDING 4 (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 appointment system ensures timely appointment of counsel. The county must implement practices that satisfy Article 1.051(c)(1)'s timeline in felony cases.

**FINDING 5 (misdemeanor cases):** Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working day (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 appointment system ensures timely appointment of counsel. The county must implement practices that satisfy Article 1.051(c)(1)'s appointment timeline in misdemeanor cases.

**FINDING 6 (misdemeanor cases):** The county does not have processes in place to ensure misdemeanor requests for counsel are ruled upon prior to a defendant's waiver of counsel. As required by Article 1.051(f-2), the court must rule upon requests for counsel prior to procuring a waiver of counsel for the purpose of speaking with the prosecutor.

**FINDING 7 (juvenile cases):** Initial detention hearings for juveniles are periodically waived. Hays County must ensure detention hearings follow the requirement set in Section 54.01(h), disallowing the waiver of the initial juvenile detention hearing.

**FINDING 8 (juvenile cases):** The monitor's sample of attorney appointments where a juvenile remained in custody and received a detention hearing fell below the Commission's 90% timeliness threshold. The county must implement practices to ensure counsel is present at the detention hearing as required by Section 54.01(b-1) of the Family Code.

**FINDING 9 (juvenile cases):** The timeliness of counsel appointments in cases involving service of a petition fell below the Commission's threshold of 90% timeliness. The county must implement practices that satisfy the time frames set in Section 51.101 of the Family Code (appointment of counsel or order to employ counsel occurring within five working days of petition service).

## **REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS.**

Article 26.04(b)(6) of the Code of Criminal Procedure requires courts to adopt procedures ensuring appointments are allocated among qualified attorneys in a manner that is fair, neutral, and nondiscriminatory. The monitor presumes that a jurisdiction has a fair, neutral, and nondiscriminatory appointment system if the top 10% of attorneys



receiving cases at a given level (felony, misdemeanor, and juvenile) receive no more than three times their respective share of appointments.<sup>29</sup> A county can overcome the presumption by providing evidence as to why the system is fair, neutral, and nondiscriminatory.

Hays County uses rotational systems of appointment for felony, misdemeanor, and juvenile appointments. Under the rotational system, the court appoints the attorney who is next on the appointment wheel, and once an appointment is received, the attorney moves to the bottom of the list. The courts modify the wheel by placing a special designation for Spanish-speaking attorneys. The courts over misdemeanor cases have modified their wheels further by adding sub-wheels according to: (1) whether the defendant has an accompanying felony; (2) whether the defendant has mental health issues; and (3) the resident city of the defendant.

The monitor analyzed cases paid to attorneys during FY2017. The monitor attempts to consider only those attorneys who were on the appointment list for the entire year. Based on the monitor’s analysis, all three court levels had distributions in which the top ten percent of attorneys received less than 3.0 times their respective share of cases paid, indicating that all three court comply with this requirement.

**Table 6: Share of Cases Paid to Top 10% of Attorneys**

Level	Attorneys on List for Entire Year	Top 10% Attorneys <sup>30</sup>	Respective Share of Cases <sup>31</sup> [Column A]	Actual Share of Cases [Column B]	Top 10% Received ‘x’ Times Their Respective Share [Col. B] / [ Col. A]
Felony	44	4	9.1%	21.4%	<b>2.4</b>
Misd.	32	3	9.4%	24.6%	<b>2.6</b>
Juvenile	6	1	16.7%	47.0%	<b>2.8</b>

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 5**

**Attorney Selection Process**

Requirement satisfied. No findings.

<sup>29</sup> “The top 10% of recipient attorneys is the whole attorney portion of the appointment list that is closest to 10% of the total list.” 1 Tex. Admin Code § 174.28(c)(5). The target “respective share” of cases for the Top 10% of attorneys therefore may be more or less than 10%, and three times that share maybe more or less than 30%.

<sup>30</sup> The number Top 10% Attorneys is equal to the number of Attorneys on List for Entire Year multiplied by 0.10, rounded to the nearest whole number.

<sup>31</sup> The percent Respective Share of Cases is equal to the number of Top 10% Attorneys divided by the number of Attorneys on List for Entire Year.

## **Conclusion**

The monitor appreciated the professionalism and assistance provided by Hays County officials and staff. Hays County officials appear willing to make necessary changes to improve the indigent defense system. As mandated by statute, the monitor will continue to review the county's transition and adjustments to the Commission's findings.

## **Summary of Findings and Recommendations**

Hays County must respond in writing how it will address each of these recommendations.

**FINDING 1 AND RECOMMENDATION:** Article 15.17(a) requires reasonable assistance in completing financial paperwork be provided to persons requesting counsel at the time of the 15.17 hearing. Hays County must put in place a system in which all persons requesting counsel receive assistance in completing financial affidavits.

**FINDING 2 AND RECOMMENDATION:** Article 15.17(a) requires requests for counsel to be transmitted to the courts within 24 hours of the requests being made. Hays County must ensure that whenever a request for counsel is made at the 15.17 hearing, the associated paperwork is sent to the courts within 24 hours of the request being made.

**FINDING 3 AND RECOMMENDATION:** Not all determinations of indigence follow the financial standard set by the indigent defense plan and Article 26.04(m). The courts must follow this standard in determining indigence.

**FINDING 4 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 appointment system ensures timely appointment of counsel. The county must implement practices that satisfy Article 1.051(c)(1)'s timeline in felony cases.

**FINDING 5 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 day (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 appointment system ensures timely appointment of counsel. The county must implement practices that satisfy Article 1.051(c)(1)'s appointment timeline in misdemeanor cases.

**FINDING 6 AND RECOMMENDATION (misdemeanor cases):** The county does not have processes in place to ensure misdemeanor requests for counsel are ruled upon prior to a defendant's waiver of counsel. As required by Article 1.051(f-2), the court must rule upon requests for counsel prior to procuring a waiver of counsel for the purpose of speaking with the prosecutor.

**FINDING 7 AND RECOMMENDATION (juvenile cases):** Initial detention hearings for juveniles are periodically waived. Hays County must ensure detention hearings follow the requirement set in Section 54.01(h), disallowing the waiver of the initial juvenile detention hearing.

**FINDING 8 AND RECOMMENDATION (juvenile cases):** The monitor's sample of attorney appointments where a juvenile remained in custody and received a detention hearing fell below the Commission's 90% timeliness threshold. The county must implement practices to ensure counsel is present at the detention hearing as required by Section 54.01(b-1) of the Family Code.

**FINDING 9 AND RECOMMENDATION (juvenile cases):** The timeliness of counsel appointments in cases involving service of a petition fell below the Commission's threshold of 90% timeliness. The county must implement practices that satisfy the time frames set in Section 51.101 of the Family Code (appointment of counsel or order to employ counsel occurring within five working days of petition service).

## Appendix A - Monitoring Review Checklist

The monitoring review of the FDA's core requirements consisted of an examination of the items from the following checklist. If a box is marked, the specific requirement was met. If a box is not marked, the requirement either was not satisfied or is not applicable.

### REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS

- The accused must be brought before a magistrate within 48 hours of arrest.<sup>32</sup>
  - A person arrested for a misdemeanor without a warrant must be released on bond in an amount no more than \$5,000 not later than 24 hours after arrest if a magistrate has not determined probable cause by that time.<sup>33</sup>
- The magistrate must inform and explain the right to counsel and the right to appointed counsel to the accused.<sup>34</sup>
- The magistrate must ensure that reasonable assistance in completing forms necessary to request counsel is provided to the accused.<sup>35</sup>

**REQUIREMENT NOT SATISFIED:** Gaps in the timely appointment of counsel indicate that assistance with affidavits of indigence may not be given for all cases in which counsel is requested.

- A record must be made of the following:
  - the magistrate informing the accused of the accused's right to request appointment of counsel;
  - the magistrate asking whether accused wants to request appointment of counsel;
  - and whether the person requested court appointed counsel.<sup>36</sup>
- If authorized to appoint counsel, the magistrate must do so within one working day after receipt of request for counsel in counties with a population of 250,000 or more and within three working days in counties under 250,000.<sup>37</sup>

**NOT APPLICABLE:** The indigent defense plan does not authorize the magistrate to appoint counsel.

- If not authorized to appoint counsel, the magistrate must transmit or cause to be transmitted to the appointing authority an accused's request for counsel within 24 hours of the request being made.<sup>38</sup>

**REQUIREMENT NOT SATISFIED:** Gaps in the timely appointment of counsel indicate that some requests for counsel may not be promptly transmitted to the courts.

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<sup>32</sup> TEX. CODE CRIM. PROC. art. 14.06(a).

<sup>33</sup> TEX. CODE CRIM. PROC. art. 17.033.

<sup>34</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>35</sup> *Id.*

<sup>36</sup> TEX. CODE CRIM. PROC. art. 15.17(e).

<sup>37</sup> *See, e.g.,* TEX. CODE CRIM. PROC. art. 15.17(a) (requiring magistrate to appoint counsel according to the timeframes set in TEX. CODE CRIM. PROC. art. 1.051); TEX. CODE CRIM. PROC. art. 1.051(c) (spelling out timeframe for appointment of counsel by county population size).

<sup>38</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

**REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS  
DIRECTED BY THE INDIGENT DEFENSE PLAN.**

- ☒ Provide detailed procedures used to determine whether a defendant is indigent.<sup>39</sup>
- ☒ State the financial standard(s) to determine whether a defendant is indigent.<sup>40</sup>
- ☐ List factors the court will consider when determining whether a defendant is indigent.<sup>41</sup>

**REQUIREMENT NOT SATISFIED:** While the plan clearly states the factors that may be considered in determining indigence, case file review indicated the plan is not always followed.

**REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS.**

- ☒ Establish objective qualification standards for attorneys to be on an appointment list.<sup>42</sup>
  - Standards must require attorneys to complete at least six hours of continuing legal education pertaining to criminal / juvenile law during each 12-month reporting period or be currently certified in criminal law by the Texas Board of Legal Specialization.<sup>43</sup>
  - Standards must require attorneys to submit by October 15 each year the percentage of the attorney's practice time dedicated to indigent defense based on criminal and juvenile appointments accepted in this county. The report must be made on a form prescribed by the Texas Indigent Defense Commission for the prior 12 months that begins on October 1 and ends on September 30.<sup>44</sup>

**REQUIREMENT 4: APPOINT COUNSEL PROMPTLY (JUVENILES).**

- ☐ 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 is held to represent the child at that hearing.<sup>45</sup>

**REQUIREMENT NOT SATISFIED:** The percent of timely appointments did not meet the Commission's 90% threshold for presuming a jurisdiction's appointment system to be timely.

- ☐ If the child was not detained, an attorney must be appointed on or before the fifth working day after the date the petition for adjudication, motion to modify, or discretionary transfer hearing was served on the child.<sup>46</sup>

**REQUIREMENT NOT SATISFIED:** The percent of timely appointments did not meet the Commission's 90% threshold for presuming a jurisdiction's appointment system to be timely.

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<sup>39</sup> TEX. CODE CRIM. PROC. art. 26.04(l)–(r).

<sup>40</sup> TEX. CODE CRIM. PROC. art. 26.04(l).

<sup>41</sup> TEX. CODE CRIM. PROC. art. 26.04(m).

<sup>42</sup> TEX. CODE CRIM. PROC. art. 26.04(d).

<sup>43</sup> 1 TEX. ADMIN. CODE § 174.1–.4.

<sup>44</sup> TEX. CODE CRIM. PROC. art. 26.04(j)(4).

<sup>45</sup> Tex. Fam. Code § 54.01(b-1). Tex. Fam. Code § 51.10(c).

<sup>46</sup> Tex. Fam. Code § 51.101(d).

#### **REQUIREMENT 4: APPOINT COUNSEL PROMPTLY (ADULTS).**

- Incarcerated persons: After receipt of a request for counsel, counsel must be appointed within one working day in counties with a population of 250,000 or more and within three working days in counties under 250,000.<sup>47</sup>

**REQUIREMENT NOT SATISFIED:** The percent of timely appointments did not meet the Commission’s 90% threshold for presuming a jurisdiction’s appointment system to be timely.

- Persons out of custody: Counsel must be appointed at the defendant’s first court appearance or when adversarial judicial proceedings are initiated, whichever comes first.<sup>48</sup>

**REQUIREMENT NOT SATISFIED:** The percent of timely appointments did not meet the Commission’s 90% threshold for presuming a jurisdiction’s appointment system to be timely.

- All unrepresented defendants must be advised of the right to counsel and the procedures for obtaining counsel.<sup>49</sup>

**REQUIREMENT NOT SATISFIED:** The monitor’s sample included misdemeanor defendants who waived their right to counsel without the court ruling on their counsel requests.

#### **REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS.**

- ☒ Rotational method: The court must appoint an attorney from among the next five names on the appointment list in the order in which the attorneys’ names appear on the list, unless the court makes a finding of good cause on the record for appointing an attorney out of order.<sup>50</sup>

- Public Defender: The system must meet the requirements set out in Article 26.044 of the Code of Criminal Procedure. The appointment process must be listed in the indigent defense plan.<sup>51</sup>

**NOT APPLICABLE:** Hays County does not have a public defender.

- Alternative appointment method:<sup>52</sup>

- The local processes must be established by a vote of two-thirds of the judges.
- The plan must be approved by the presiding judge of the administrative judicial region.
- The courts must allocate appointments reasonably and impartially among qualified attorneys.

**NOT APPLICABLE:** Hays County uses a rotational system of appointment.

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<sup>47</sup> TEX. CODE CRIM. PROC. art. 1.051(c).

<sup>48</sup> TEX. CODE CRIM. PROC. art. 1.051(j); *see also Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 – 13 (2008) (holding that “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”).

<sup>49</sup> TEX. CODE CRIM. PROC. art. 1.051(f-2).

<sup>50</sup> TEX. CODE CRIM. PROC. art. 26.04(a).

<sup>51</sup> TEX. CODE CRIM. PROC. art. 26.044.

<sup>52</sup> TEX. CODE CRIM. PROC. art. 26.04(g)–(h).

# Appendix B – Model Form: Explanation of Rights to Defendants Without an Attorney

Cause Number: \_\_\_\_\_

IN THE [INSERT COURT]  
[INSERT COUNTY] COUNTY, TEXAS

## JUDGE’S EXPLANATION OF RIGHTS TO DEFENDANTS WITHOUT ATTORNEY

As a defendant in a criminal case, you have three options:

1. You may hire an attorney;
2. If you do not have enough money to hire an attorney, you may request an attorney be appointed to represent you;
3. You may represent yourself.

If you want an attorney to represent you and have enough money to hire an attorney, the case will be reset to give you time to do so.

If you want an attorney and do not have the money to hire one, you will need to fill out a financial questionnaire so that the proper person can determine whether or not to appoint an attorney to represent you.

You may not speak to the prosecutor about your case unless you sign a written waiver of your right to be represented by an attorney.

Be aware that there are dangers to self-representation. Waiving your right to an attorney and representing yourself may result in a worse outcome for you and your case, including the loss of significant legal rights and opportunities relating to military service, possession of a firearm, housing and public benefits, child custody, immigration status for non-citizens, and employment.

If you choose to proceed without an attorney, you may change your mind at any time and may request counsel from the Court.

\_\_\_\_\_  
Judge Presiding

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### DEFENDANT’S CHOICE [mark initials next to only **ONE** choice]

\_\_\_\_\_ I want to reset this case to hire my own attorney.

\_\_\_\_\_ I have hired an attorney, whose name is: \_\_\_\_\_

\_\_\_\_\_ I want to apply for court-appointed counsel.

\_\_\_\_\_ I have a court-appointed attorney, whose name is: \_\_\_\_\_

\_\_\_\_\_ I want to waive my right to an attorney and represent myself.

Defendant: \_\_\_\_\_ Date: \_\_\_\_\_