

TEXAS INDIGENT DEFENSE COMMISSION

205 West 14th Street, Suite 700 Tom C. Clark Building (512) 936-6994

P.O. Box 12066, Austin, Texas 78711-2066

CHAIR:
THE HONORABLE SHARON KELLER
Presiding Judge, Court of Criminal Appeals

DIRECTOR:
MR. JAMES D. BETHKE

VICE CHAIR:
THE HONORABLE OLEN UNDERWOOD
Presiding Judge, 2nd Administrative Judicial Region

September 22, 2011

The Honorable Joe English
Constitutional County Court Judge
Nacogdoches County Courthouse
101 W. Main Street, Ste 170
Nacogdoches, TX 75961

Re: Nacogdoches County Fiscal Monitoring Visit

Dear Judge English:

A monitoring visit of your county was conducted on June 28-29, 2011. The financial aspects of the county were monitored to adequately review fiscal records and documentation to ensure compliance with the Texas Indigent Defense Commission grant.

A copy of the final monitoring report including your county response is enclosed. The Texas Indigent Defense Commission would like to thank county officials and employees for their assistance and courtesy during the course of the monitoring visit. We greatly appreciated the time and cooperation of Nacogdoches County's staff.

If you have any questions or need further clarification, do not hesitate to contact me at (512) 936-7561.

Sincerely,



Carol Conner
Fiscal Monitor

cc: The Honorable Campbell Cox, II, Local Administrative District Court Judge
The Honorable John A. (Jack) Sinz, Local Administrative Statutory County Court Judge
The Honorable Edwin Klein, 420th Judicial District Court Judge
Ms. Carol T. Smith, County Auditor
Ms. Jessica Corley, Assistant Auditor
Mr. James D. Bethke, Executive Director, Texas Indigent Defense Commission
Mr. Wesley Shackelford, Deputy Director, Texas Indigent Defense Commission
Mr. Bryan Wilson, Grants Administrator, Texas Indigent Defense Commission

TEXAS INDIGENT DEFENSE COMMISSION

(formerly Texas Task Force on Indigent Defense)

Fiscal Monitoring of Indigent Defense Expenses

Nacogdoches County, Texas

on

June 28-29, 2011

FINAL

September 22, 2011

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I. INTRODUCTION

Nacogdoches County on-site fiscal monitoring visit was conducted on June 28-29, 2011. The fiscal monitor reviewed financial records to determine whether grant funds were spent in accordance with the terms and conditions of the Texas Indigent Defense Commission grant.

Nacogdoches County is located in the center of the pine belt of East Texas. The county seat and largest town is Nacogdoches, which is 140 miles northeast of Houston and 58 miles southeast of Tyler. The county has an estimated population of 64,524.

Nacogdoches County's court system is comprised of a statutory county court and two district courts with criminal jurisdiction. In 2010, the county received \$32,897 in formula grant funds. The county also received \$22,260 in equalization disbursement for the increased cost of indigent defense services. Additionally, the county collected \$9,963 for reimbursement of attorney fees from defendants.

Nacogdoches County Indigent Defense Expenditures			
Expenditures	2008	2009	2010
Population Estimate	62,671	62,671	64,524
Juvenile Assigned Counsel	\$17,245	\$18,058	\$12,260
Adult Misdemeanor Assigned Counsel	\$20,620	\$31,475	\$37,385
Adult Felony Assigned Counsel	\$189,568	\$168,826	\$197,299
Capital Murder	\$0	\$29,833	\$5,621
Adult Felony Assigned Counsel Appeals	\$2,525	\$2,383	\$3,221
Adult Misdemeanor Assigned Counsel Appeals	0	\$500	0
Juvenile Assigned Counsel Appeals	\$600	0	0
Licensed Investigation Expenses	\$52,921	\$34,485	\$32,014
Expert Witness Expenses	0	\$7,767	0
Other Direct Litigation Expenses	\$11,311	\$35,617	\$36,837
Total Court Expenditures	\$294,789	\$328,944	\$324,637
Formula Grant Disbursement	\$33,657	\$33,485	\$32,897
Equalization Disbursement	\$24,768	\$19,351	\$22,260
Reimbursement of Attorney Fees	\$22,696	\$14,074	\$9,963
Total Assigned Counsel Cases	1,044	1,111	1,095

Source: Texas Indigent Defense Commission records

Commission Background

In January 2002, the 77th Texas Legislature established the Task Force on Indigent Defense (Task Force). In May 2011, the 82nd Legislature changed the name of the Task Force on Indigent Defense to the Texas Indigent Defense Commission (Commission) effective September 1, 2011. The Commission remains a permanent standing committee of the Texas Judicial Council and administratively attached to the Office of Court Administration (OCA). The mission of the Commission is to improve the delivery of indigent defense services through fiscal assistance and professional support to State, local judicial, county, and municipal officials. The purpose of the Commission is to promote justice and fairness to all indigent persons accused of criminal conduct, including juvenile respondents, as provided by the laws and constitutions of the United States and Texas. As a result of the legislative requirement, the Commission promulgated Section 173.401(a), Texas Administrative Code, which provides, “the Commission or its designees will monitor the activities of grantees as necessary to ensure that grant funds are used for authorized purposes in compliance with laws, regulations, and the provisions of the grant.”

Objectives

The objectives of this review were to:

- validate the indigent defense expenditure report.
- determine whether grant funds were used for authorized purposes in compliance with laws, regulations, and the provisions of the grant.
- review policies and procedures relating to indigent defense services.
- provide recommendations pertaining to operational efficiency.
- assist with any questions or concerns on the indigent defense program requirements.

Scope

The county’s indigent defense expenditures were monitored to ensure compliance with applicable laws, regulations and the provisions of the grant during fiscal year 2010. The fiscal monitor reviewed records located in the Nacogdoches County Courthouse.

Methodology

To accomplish the objectives, the fiscal monitor met with the county judge, auditor, assistant auditors, and court administrative assistants. The fiscal monitor reviewed:

- random samples of paid attorney fee vouchers, licensed investigations, expert witnesses, other direct litigation for verification of expenses;
- attorney fee schedule, general ledger transactions, and invoices;
- indigent defense expenditure report;
- public appointment list, attorney applications, and attorneys’ criminal continuing legal education training; and
- county’s local indigent defense plan.

The expenditure period of October 1, 2009 to September 30, 2010 (FY 2010) was reviewed during the fiscal monitoring visit.

Nacogdoches County's Criminal Courts			
Courts	Courts		Percent Sampled
	Total	Reviewed	
County Court-at-Law	1	1	100%
District Court	2	2	100%

Percent Sampled: courts reviewed / courts total

Summary of Findings

- The county incorrectly placed 12 expert witness expenses (\$7,772) in the other direct litigation category of services.

II. INDIGENT DEFENSE GRANT

A. Formula Grant

The county submitted the FY 2010 indigent defense on-line grant application to assist in the implementation of the provisions of the Fair Defense Act. Nacogdoches County met the formula grant eligibility requirements.

B. Indigent Defense Expenditure Reporting

Under Section 79.036 of the Texas Government Code, counties are required to annually submit data showing the cases and respective expenses expended to provide indigent defense services. For FY 2010, Nacogdoches County reported spending: \$197,299 on 738 felony cases; \$5,620 on 2 capital murder cases; \$37,385 on 300 misdemeanor cases; \$12,260 on 51 juvenile cases; and \$3,221 on 4 felony appeals cases.

Monitor Comment

The county maintains fiscal accountability and support documents of the formula grant and indigent defense expenditures. The annual indigent expenditure report is critical in establishing grant eligibility.

III. ACCOUNTING OPERATIONS

Accounting Procedures

An attorney appointed to represent an indigent defendant submits an itemized attorney fee voucher with court services performed to the judge with dispositive jurisdiction over the case. The submission must occur within 60 days of the judgment. Article of 26.05(c), Code of Criminal Procedure, provides in part that "No payment shall be made under this article until the form for itemizing the services performed is submitted to the judge presiding over the proceedings and the judge approves the payment. If the judge disapproves the requested amount of payment, the judge shall make written findings stating the amount of payment that the judge approves and each reason for approving an amount different from the requested amount."

The approved attorney fee voucher is routed to the accounts payable clerk in the auditor's office via inter-office mail or delivered personally. The clerk verifies and enters the submitted

attorney fee voucher and amount of payment for the total itemized services with each case into the general ledger/accounts payable system.

The first assistant auditor reviews and verifies attorney fee vouchers, vendor, general ledger codes, and approved itemized voucher for completeness. The attorney fee vouchers are submitted to commissioner's court for approval. After commissioner's court approval, the auditor's office prepares the checks. Checks are disbursed by the treasurer's office. An assistant auditor prints and verifies attorney fee postings to the general ledger.

Monitor Comment

The county has written accounting procedures relating to criminal indigent defense expenses. A copy of the accounting procedures was provided to the fiscal monitor. A formal documentation of accounting policies and procedures provides an effective framework for internal control over accounting and financial reporting.

IV. INDIGENT DEFENSE PAID VOUCHERS

A. Summary of Attorney Fee Payments

1. Fee Schedule

The attorney fee vouchers reviewed were paid in accordance with the fee schedule adopted by the formal action of the judges hearing criminal cases.

2. Reviewed Assigned Counsel Fee Vouchers

A total of 350 paid attorney fee vouchers (100 county court-at-law and 250 district courts) were reviewed for the period of October 1, 2009 to September 30, 2010. In FY 2010, the attorney fee payments ranged from \$100 to \$47,570 per attorney with an average of \$15,046 and a median of \$4,225.

County Court-at-Law				
10 Different Paid Attorneys				
Courts	Total			
	Paid Vouchers	Attorney Fee Vouchers		
		Fees	Reviewed	Reviewed Value
County Court-at-Law	190	\$37,385	100	\$19,923

County Court-at-Law = adult misdemeanor expenses
 \$37,385 = \$37,385

District Courts				
9 Different Paid Attorneys				
Courts	Total			
	Paid Vouchers	Attorney Fee Vouchers		
		Fees	Reviewed	Reviewed Value
145 th District Court	356	\$110,061	130	\$43,591
420 th District Court	284	\$108,339	120	\$50,166
Total	640	\$218,400	250	\$93,757

District Courts = felony assigned counsel + capital murder + felony assigned counsel appeals + juvenile
 \$218,400 = \$197,299 + \$5,620 + \$3,221 + \$12,260

Monitor Comment

All attorney fee vouchers reviewed met the statutory requirements for payment, which states, “no payment shall be made until the form for itemizing the services performed is submitted to the judge presiding over the proceedings and approves the payment” in accordance with Article 26.05(c), Code of Criminal Procedure.

The attorney fee vouchers reviewed captured the specific data elements (defendant name, case/cause numbers, court number, offense, amount paid, attorney signature, and presiding judge signature).

3. Summary of Investigations, Experts, and Other Direct Litigation Expenses

As a result of reviewing expenses, the county incorrectly placed 12 expert witness expenses (\$7,772) in the other direct litigation category of services. Expert witness expenses include “money paid by the county to a person/entity qualified by the court in a field of study or *expertise* to provide assistance to a licensed attorney in preparing or presenting a defense for an indigent defendant” (Procedure Manual for the Indigent Defense Expenditure Report FY 2010).

Investigations, Experts, and Other Direct Litigation Expenditures				
Expenditures	Total Vouchers			
	Paid	FY 2010	Reviewed	Reviewed Value
Investigation	76	\$32,014	58	\$26,153
Expert Witness	0	0	12	\$7,772
Other Direct Litigation	48	\$36,837	28	\$12,705

Placed in Other Direct Litigation Category Of Services

Examination	Date	Court	Expense
Dr. James Buckingham, MD, Psychiatry assessments and evaluation	11/24/2009	County Court-at-Law	\$1,000
Dr. James Buckingham, MD, Psychiatry assessments and evaluation	3/9/2010	County Court-at-Law	\$1,000
Dr. James Buckingham, MD, Psychiatry assessments and evaluation	3/23/2010	County Court-at-Law	\$1,000
Dr. James Buckingham, MD, Psychiatry assessments and evaluation	3/30/2010	County Court-at-Law	\$500
Dr. James Buckingham, MD, Psychiatry assessments and evaluation	5/11/2010	County Court-at-Law	\$1,000
Dr. Joseph Kartye, Ph.D., Psychological evaluation	10/27/2009	145 th District Court	\$385
Dr. Joseph Kartye, Ph.D., Psychological evaluation	7/27/2010	145 th District Court	\$385
Dr. Joseph Kartye, Ph.D., Psychological evaluation	8/17/2010	145 th District Court	\$420
Dr. Joseph Kartye, Ph.D., Psychological evaluation	12/22/2009	420 th District Court	\$735
Dr. Joseph Kartye, Ph.D., Psychological evaluation	3/23/2010	420 th District Court	\$385
Dr. Joseph Kartye, Ph.D., Psychological evaluation	5/25/2010	420 th District Court	\$385
Dr. Joseph Kartye, Ph.D., Psychological evaluation	8/17/2010	420 th District Court	\$577
		Total	\$7,772

Recommendation

The Commission recommends that the county correctly place expert witness expenses in the appropriate category of services in accordance with Section 79.036, Texas Government Code. The correct classification of expenses is the precursor to accurate reporting under the Fair Defense Act. Please refer to Procedure Manual for the Indigent Defense Expenditure Report FY 2010, page 3-7 at: <http://www.courts.state.tx.us/tfid/pdf/FY10IDERManualFinal.pdf> and Uniform Grant

Management Standards: www.governor.state.tx.us/files/state-grants/UGMS062004.doc.

Nacogdoches County Action Plan

On July 11, 2011, the Auditor’s Office recommended to Court staff to code future expenses for psychological evaluations the Expert Witness account. A revised Indigent Defense Accounting Codes form was also distributed. A copy is attached. On July 29, 2011, Nacogdoches County reclassified year-to-date psychological evaluation expenses for FY 2011 from the Other Direct Litigation expense account to the Expert Witness expense account. Expenditures for psychological exams will be reported in the Expert Witness Expenditure category on the FY 2011 Indigent Defense Expenditure Report.

Contact person(s): Carol Smith, County Auditor; Jessica Corley, Assistant Auditor

Completion date: July 11, 2011

B. Public Appointment List

1. Approval of Qualified Attorneys by the Judges

A majority of the judges approved the attorneys on the public appointment list.

Monitor Comment

Nacogdoches County criminal courts maintained support documents that indicated a majority of the judges approved the attorneys on the public appointment list pursuant to Article 26.04(d), Code of Criminal Procedure.

2. Applied for Public Appointment List

Courts	Number of Attorneys		Percent Sampled
	public appointment list	applications reviewed	
County Court-at-Law	10	10	100%
District Court	9	9	100%
Juvenile Court	6	6	100%

Percent Sampled: applications reviewed / number on public appointment list

Monitor Comment

Nacogdoches County criminal courts maintained attorney applications for placement on the public appointment list in accordance with Article 26.04(d)-(e), Code of Criminal Procedure.

3. Continuing Legal Education (CLE) Requirements

Courts	Number of Attorneys		
	public appointment list	criminal/juvenile CLE documents	
		reviewed	met minimum hours
County Court-at-Law	10	10	10
District Courts	9	9	9
Juvenile Court	6	6	6

Nacogdoches County Response

In order to continue to ensure that attorneys obtain the CLE hours required, the Auditor's Office will send an email to court staff each April and September which will include the attorneys paid during the current fiscal year. The Auditor's Office recommended on July 11, 2011, that each court verify that CLE hours are on file

V. SUMMARY

General Comments

The Commission wishes to express its appreciation to local county officials and employees of Nacogdoches County for the time and courtesy extended during the fiscal monitoring visit. In particular, my gratitude extends to Judge Joe English, Constitutional County Court; Judge Campbell Cox II, Local Administrative District Court; Judge Edwin Klein, 420th Judicial District Court; Judge John A. (Jack) Sinz, Local Administrative Statutory County Court; Ms. Carol T. Smith, County Auditor; and Ms. Jessica Corley, Assistant Auditor, for accommodating the fiscal monitor activities. These activities included providing workspace, allocating employee time, and exercising flexibility in meeting the schedule of the fiscal monitor. Thank you for your time and cooperation during the monitoring visit.

Nacogdoches County Response

Nacogdoches County appreciates the Task Force for this opportunity to improve indigent defense expenditure reporting through this monitoring process. The County further appreciates that the Task Force's assigned monitor was knowledgeable, organized and helpful through the entire monitoring process.

Appendix A

Texas Government Code, Section 79.036. Indigent Defense Information

(a) In each county, not later than November 1 of each odd-numbered year and in the form and manner prescribed by the commission, the following information shall be prepared and provided to the commission:

(1) a copy of all formal and informal rules and forms that describe the procedures used in the county to provide indigent defendants with counsel in accordance with the Code of Criminal Procedure, including the schedule of fees required under Article 26.05 of that code;

(2) any revisions to rules or forms previously submitted under this section; or

(3) verification that rules and forms previously submitted under this section still remain in effect.

(b) Except as provided by Subsection (c):

(1) the local administrative district judge in each county, or the person designated by the judge, shall perform the action required by Subsection (a) with respect to all rules and forms adopted by the judges of the district courts trying felony cases in the county; and

(2) the local administrative statutory county court judge in each county, or the person designated by the judge, shall perform the action required by Subsection (a) with respect to all rules and forms adopted by the judges of the county courts and statutory county courts trying misdemeanor cases in the county.

(c) If the judges of two or more levels of courts described by Subsection (b) adopt the same formal and informal rules and forms, the local administrative judge serving the courts having jurisdiction over offenses with the highest classification of punishment, or the person designated by the judge, shall perform the action required by Subsection (a).

(d) The chair of the juvenile board in each county, or the person designated by the chair, shall perform the action required by Subsection (a) with respect to all rules and forms adopted by the juvenile board.

(e) In each county, the county auditor, or the person designated by the commissioners court if the county does not have a county auditor, shall prepare and send to the commission in the form and manner prescribed by the commission and on a monthly, quarterly, or annual basis, with respect to legal services provided in the county to indigent defendants during each fiscal year, information showing the total amount expended by the county to provide indigent defense services and an analysis of the amount expended by the county:

(1) in each district, county, statutory county, and appellate court;

(2) in cases for which a private attorney is appointed for an indigent defendant;

(3) in cases for which a public defender is appointed for an indigent defendant;

(4) in cases for which counsel is appointed for an indigent juvenile under Section 51.10(f), Family Code; and

(5) for investigation expenses, expert witness expenses, or other litigation expenses.

(f) As a duty of office, each district and county clerk shall cooperate with the county auditor or the person designated by the commissioners court and the commissioners court in retrieving information required to be sent to the commission under this section.

This section replaced Sec. 71.0351 *effective Sept. 1, 2011 (HB 1754, §20)*.

Appendix B

Texas Government Code, Section 79.037. Technical Support; Grants

- (a) The commission shall:
- (1) provide technical support to:
 - (A) assist counties in improving their indigent defense systems; and
 - (B) promote compliance by counties with the requirements of state law relating to indigent defense;
 - (2) to assist counties in providing indigent defense services in the county, distribute in the form of grants any funds appropriated for the purposes of this section; and
 - (3) monitor each county that receives a grant and enforce compliance by the county with the conditions of the grant, including enforcement by:
 - (A) withdrawing grant funds; or
 - (B) requiring reimbursement of grant funds by the county.
- (b) The commission shall distribute funds as required by Subsection (a)(2) based on a county's compliance with standards adopted by the board and the county's demonstrated commitment to compliance with the requirements of state law relating to indigent defense.
- (c) The board shall adopt policies to ensure that funds under Subsection (a)(2) are allocated and distributed to counties in a fair manner.
- (d) A county may not reduce the amount of funds provided for indigent defense services in the county because of funds provided by the commission under this section.

Appendix C

Uniform Grant Management Standards (As adopted June 2004)

paragraph 20, page 68. Standards for Financial Management Systems *[This section does not apply to procurement contracts.]*

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

- (1) Financial reporting. Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.
- (2) Accounting records. Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.
- (3) Internal control. Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.
- (4) Budget control. Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.
- (5) Allowable cost. Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability, and allocability of costs.
- (6) Source documentation. Accounting records must be supported by such source documentation as canceled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

Appendix D

Art. 26.04. Procedures for Appointing Counsel

(a) The judges of the county courts, statutory county courts, and district courts trying criminal cases in each county, by local rule, shall adopt and publish written countywide procedures for timely and fairly appointing counsel for an indigent defendant in the county arrested for charged with, or taking an appeal from a conviction of a misdemeanor punishable by confinement or a felony. The procedures must be consistent with this article and Articles 1.051, 15.17, 26.05, and 26.052. A court shall appoint an attorney from a public appointment list using a system of rotation, unless the court appoints an attorney under Subsection (f), (f-1), (h), or (i). The court shall appoint attorneys 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. An attorney who is not appointed in the order in which the attorney's name appears on the list shall remain next in order on the list.

(b) Procedures adopted under Subsection (a) shall:

(1) authorize only the judges of the county courts, statutory county courts, and district courts trying criminal cases in the county, or the judges' designee, to appoint counsel for indigent defendants in the county;

(2) apply to each appointment of counsel made by a judge or the judges' designee in the county;

(3) ensure that each indigent defendant in the county who is charged with a misdemeanor punishable by confinement or with a felony and who appears in court without counsel has an opportunity to confer with appointed counsel before the commencement of judicial proceedings;

(4) require appointments for defendants in capital cases in which the death penalty is sought to comply with any applicable requirements under Articles 11.071 and 26.052;

(5) ensure that each attorney appointed from a public appointment list to represent an indigent defendant perform the attorney's duty owed to the defendant in accordance with the adopted procedures, the requirements of this code, and applicable rules of ethics; and

(6) ensure that appointments are allocated among qualified attorneys in a manner that is fair, neutral, and nondiscriminatory.

(c) Whenever a court or the courts' designee authorized under Subsection (b) to appoint counsel for indigent defendants in the county determines for purposes of a criminal proceeding that a defendant charged with or appealing a conviction of a felony or a misdemeanor punishable by confinement is indigent or that the interests of justice require representation of a defendant in the proceeding, the court or the courts' designee shall appoint one or more practicing attorneys to represent the defendant in accordance with this subsection and the procedures adopted under Subsection (a). If the court or the courts' designee determines that the defendant does not speak and understand the English language or that the defendant is deaf, the court or the courts' designee shall make an effort to appoint an attorney who is capable of communicating in a language understood by the defendant.

(d) A public appointment list from which an attorney is appointed as required by Subsection (a) shall contain the names of qualified attorneys, each of whom:

(1) applies to be included on the list;

(2) meets the objective qualifications specified by the judges under Subsection (e);

Art. 26.04. Procedures for Appointing Counsel (Continued)

- (3) meets any applicable qualifications specified by the Texas Indigent Defense Commission; and
- (4) is approved by a majority of the judges who established the appointment list under Subsection (e).
- (e) In a county in which a court is required under Subsection (a) to appoint an attorney from a public appointment list:
 - (1) the judges of the county courts and statutory county courts trying misdemeanor cases in the county, by formal action:
 - (A) shall:
 - (i) establish a public appointment list of attorneys qualified to provide representation in the county in misdemeanor cases punishable by confinement; and
 - (ii) specify the objective qualifications necessary for an attorney to be included on the list; and
 - (B) may establish, if determined by the judges to be appropriate, more than one appointment list graduated according to the degree of seriousness of the offense, the attorneys' qualifications, and whether representation will be provided in trial court proceedings, appellate proceedings, or both; and
 - (2) the judges of the district courts trying felony cases in the county, by formal action:
 - (A) shall:
 - (i) establish a public appointment list of attorneys qualified to provide representation in felony cases in the county; and
 - (ii) specify the objective qualifications necessary for an attorney to be included on the list; and
 - (B) may establish, if determined by the judges to be appropriate, more than one appointment list graduated according to the degree of seriousness of the offense, the attorneys' qualifications, and whether representation will be provided in trial court proceedings, appellate proceedings, or both.
- (f) In a county in which a public defender's office is created or designated under Article 26.044, the court or the courts' designee may appoint that office to represent the defendant in accordance with guidelines established for the office.
- (f-1) In a county in which a managed assigned counsel program is operated in accordance with Article 26.047, the managed assigned counsel program may appoint counsel to represent the defendant in accordance with the guidelines established for the program.
- (g) A countywide alternative program for appointing counsel for indigent defendants in criminal cases is established by a formal action in which two-thirds of the judges of the courts designated under this subsection vote to establish the alternative program. An alternative program for appointing counsel in misdemeanor and felony cases may be established in the manner provided by this subsection by the judges of the county courts, statutory county courts, and district courts trying criminal cases in the county. An alternative program for appointing counsel in misdemeanor cases may be established in the manner provided by this subsection by the judges of the county courts and statutory county courts trying criminal cases in the county. An alternative program for appointing counsel in felony cases may be established in the manner provided by this subsection by the judges of the district courts trying criminal cases in the county. In a county in which an alternative program is established:

Art. 26.04. Procedures for Appointing Counsel (Continued)

- (1) the alternative program may:
 - (A) use a single method for appointing counsel or a combination of methods; and
 - (B) use a multicounty appointment list using a system of rotation; and
- (2) the procedures adopted under Subsection (a) must ensure that:
 - (A) attorneys appointed using the alternative program to represent defendants in misdemeanor cases punishable by confinement:
 - (i) meet specified objective qualifications for that representation, which may be graduated according to the degree of seriousness of the offense and whether representation will be provided in trial court proceedings, appellate proceedings, or both; and
 - (ii) are approved by a majority of the judges of the county courts and statutory county courts trying misdemeanor cases in the county;
 - (B) attorneys appointed using the alternative program to represent defendants in felony cases:
 - (i) meet specified objective qualifications for that representation, which may be graduated according to the degree of seriousness of the offense and whether representation will be provided in trial court proceedings, appellate proceedings, or both; and
 - (ii) are approved by a majority of the judges of the district courts trying felony cases in the county;
 - (C) appointments for defendants in capital cases in which the death penalty is sought comply with the requirements of Article 26.052; and
 - (D) appointments are reasonably and impartially allocated among qualified attorneys.
- (h) In a county in which an alternative program for appointing counsel is established as provided by Subsection (g) and is approved by the presiding judge of the administrative judicial region, a court or the courts' designee may appoint an attorney to represent an indigent defendant by using the alternative program. In establishing an alternative program under Subsection (g), the judges of the courts establishing the program may not, without the approval of the commissioners court, obligate the county by contract or by the creation of new positions that cause an increase in expenditure of county funds.
- (i) A court or the courts' designee required under Subsection (c) to appoint an attorney to represent a defendant accused or convicted of a felony may appoint an attorney from any county located in the court's administrative judicial region.
- (j) An attorney appointed under this article shall:
 - (1) make every reasonable effort to contact the defendant not later than the end of the first working day after the date on which the attorney is appointed and to interview the defendant as soon as practicable after the attorney is appointed;
 - (2) represent the defendant until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the attorney is permitted or ordered by the court to withdraw as counsel for the defendant after a finding of good cause is entered on the record; and
 - (3) with respect to a defendant not represented by other counsel, before withdrawing as counsel for the defendant after a trial or the entry of a plea of guilty:
 - (A) advise the defendant of the defendant's right to file a motion for new trial and a notice of appeal;

(B) if the defendant wishes to pursue either or both remedies described by Paragraph (a), assist the defendant in requesting the prompt appointment of replacement counsel; and
(C) if replacement counsel is not appointed promptly and the defendant wishes to pursue an appeal, file a timely notice of appeal.

(k) A court may replace an attorney who violates Subsection (j)(1) with other counsel. A majority of the judges of the county courts and statutory county courts or the district courts, as appropriate, trying criminal cases in the county may remove from consideration for appointment an attorney who intentionally or repeatedly violates Subsection (j)(1).

(l) Procedures adopted under Subsection (a) must include procedures and financial standards for determining whether a defendant is indigent. The procedures and standards shall apply to each defendant in the county equally, regardless of whether the defendant is in custody or has been released on bail.

(m) 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.

(n) A defendant who requests a determination of indigency and appointment of counsel shall:

(1) complete under oath a questionnaire concerning his financial resources;

(2) respond under oath to an examination regarding his financial resources by the judge or magistrate responsible for determining whether the defendant is indigent; or

(3) complete the questionnaire and respond to examination by the judge or magistrate.

(o) Before making a determination of whether a defendant is indigent, the court shall request the defendant to sign under oath a statement substantially in the following form: "On this _____ day of _____, 20 ____, I have been advised by the (name of the court) Court of my right to representation by counsel in connection with the charge pending against me. I certify that I am without means to employ counsel of my own choosing and I hereby request the court to appoint counsel for me. (signature of the defendant)"

(p) A defendant who is determined by the court to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occurs. If there is a material change in financial circumstances after a determination of indigency or non-indigency is made, the defendant, the defendant's counsel, or the attorney representing the state may move for reconsideration of the determination.

(q) A written or oral statement elicited under this article or evidence derived from the statement may not be used for any purpose, except to determine the defendant's indigency or to impeach the direct testimony of the defendant. This subsection does not prohibit prosecution of the defendant under Chapter 37, Penal Code.

(r) A court may not threaten to arrest or incarcerate a person solely because the person requests the assistance of counsel.

Amendments to (a), (d), and (f) and addition of (f-1) effective Sept. 1, 2011 (HB 1754, §20).

Amendments to (a), (c), (e), (g), (i), (j), and (o) effective Sept. 1, 2011 (SB 1681, §4). Section 3 provides: "The change in law made by this Act applies only to a criminal proceeding that commences on or after the effective date of this Act. A criminal proceeding that commences before the effective date of this Act is governed by the law in effect when the proceeding commenced, and the former law is continued in effect for that purpose."

Appendix E

Art. 26.05. Compensation of Counsel Appointed to Defend

(a) A counsel, other than an attorney with a public defender's office or an attorney employed by the office of capital writs, appointed to represent a defendant in a criminal proceeding, including a habeas corpus hearing, shall be paid a reasonable attorney's fee for performing the following services, based on the time and labor required, the complexity of the case, and the experience and ability of the appointed counsel:

- (1) time spent in court making an appearance on behalf of the defendant as evidenced by a docket entry, time spent in trial, and time spent in a proceeding in which sworn oral testimony is elicited;
- (2) reasonable and necessary time spent out of court on the case, supported by any documentation that the court requires;
- (3) preparation of an appellate brief and preparation and presentation of oral argument to a court of appeals or the Court of Criminal Appeals; and
- (4) preparation of a motion for rehearing.

(b) All payments made under this article shall be paid in accordance with a schedule of fees adopted by formal action of the judges of the county courts, statutory county courts, and district courts trying criminal cases in each county. On adoption of a schedule of fees as provided by this subsection, a copy of the schedule shall be sent to the commissioners court of the county.

(c) Each fee schedule adopted shall state reasonable fixed rates or minimum and maximum hourly rates, taking into consideration reasonable and necessary overhead costs and the availability of qualified attorneys willing to accept the stated rates, and shall provide a form for the appointed counsel to itemize the types of services performed. No payment shall be made under this article until the form for itemizing the services performed is submitted to the judge presiding over the proceedings or, if the county operates a managed assigned counsel program under Article 26.047, to the director of the program, and until the judge or director, as applicable, approves the payment. If the judge or director disapproves the requested amount of payment, the judge or director shall make written findings stating the amount of payment that the judge or director approves and each reason for approving an amount different from the requested amount. An attorney whose request for payment is disapproved or is not otherwise acted on by the 60th day after the date the request for payment is submitted may appeal the disapproval or failure to act by filing a motion with the presiding judge of the administrative judicial region. On the filing of a motion, the presiding judge of the administrative judicial region shall review the disapproval of payment or failure to act and determine the appropriate amount of payment. In reviewing the disapproval or failure to act, the presiding judge of the administrative judicial region may conduct a hearing. Not later than the 45th day after the date an application for payment of a fee is submitted under this article, the commissioners court shall pay to the appointed counsel the amount that is approved by the presiding judge of the administrative judicial region and that is in accordance with the fee schedule for that county.

Art. 26.05. Compensation of Counsel Appointed to Defend (Continued)

(d) A counsel in a non-capital case, other than an attorney with a public defender's office, appointed to represent a defendant under this code shall be reimbursed for reasonable and necessary expenses, including expenses for investigation and for mental health and other experts. Expenses incurred with prior court approval shall be reimbursed in the same manner provided for capital cases by Articles 26.052(f) and (g), and expenses incurred without prior court approval shall be reimbursed in the manner provided for capital cases by Article 26.052(h).

(e) A majority of the judges of the county courts and statutory county courts or the district courts, as appropriate, trying criminal cases in the county may remove an attorney from consideration for appointment if, after a hearing, it is shown that the attorney submitted a claim for legal services not performed by the attorney.

(f) All payments made under this article shall be paid from the general fund of the county in which the prosecution was instituted or habeas corpus hearing held and may be included as costs of court.

(g) If the court determines that a defendant has financial resources that enable him to offset in part or in whole the costs of the legal services provided, including any expenses and costs, the court shall order the defendant to pay during the pendency of the charges or, if convicted, as court costs the amount that it finds the defendant is able to pay.

(h) Reimbursement of expenses incurred for purposes of investigation or expert testimony may be paid directly to a private investigator licensed under Chapter 1702, Occupations Code, or to an expert witness in the manner designated by appointed counsel and approved by the court.

Amendment to (a), (c), and (d) effective Sept. 1, 2011 (HB 1754 §20).

Appendix F

Texas Administrative Code

<u>Title 1</u>	Administration
<u>Part 8</u>	Texas Judicial Council
<u>Chapter 174</u>	Indigent Defense Policies And Standards
<u>Subchapter A</u>	Minimum Continuing Legal Education Requirements
<u>Rule §174.1</u>	Appointment In Criminal Cases

An Attorney who meets the requirements of this rule may be appointed to represent an indigent person arrested for or charged with a crime, if the attorney is otherwise eligible under the procedures developed under Article 26.04, Code of Criminal Procedure. Crime has the meaning assigned by §173.2(2). An attorney may be appointed under this rule only if an attorney:

- (1) Completes a minimum of six hours of continuing legal education pertaining to criminal law during each 12-month reporting period. The judges of criminal courts of the county shall set the 12-month reporting period applicable to the jurisdiction. Continuing legal education may include activities accredited under Section 4, Article XII, State Bar Rules, self-study, teaching at an accredited continuing legal education activity, attendance at a law school class or legal research-based writing. The judges may require attorneys to complete more than the minimum number of hours of continuing legal education in criminal law in the procedures developed under Article 26.04, Code of Criminal Procedure; or
- (2) Is currently certified in criminal law by the Texas Board of Legal Specialization.