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July 2012

indigent defense news in Texas

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GOVERNOR APPOINTS MEMBERS TO INDIGENT DEFENSE COMMISSION

Governor Rick Perry issued a [press release](#) formally announcing appointments to the Texas Indigent Defense Commission on June 21st. A law passed during the 82nd Legislative Session, HB 1754, granted the Commission new autonomy and renamed the organization, which was formerly known as the Task Force on Indigent Defense. These actions required the Board to be reconstituted to create the initial governing body of the Commission. The appointments by the Governor herald the official move from Task Force to Commission. The first official meeting of the Texas Indigent Defense Commission was held June 21st in Austin. The Board selected Judge Sharon Keller to serve as the Chair and Jim Bethke was appointed to serve as Executive Director. State Senator Rodney Ellis said, "Congratulations to the newly appointed board on its achievements over the last ten years. I look forward to continue working with new commission as we face the serious challenges ahead." Senator Ellis was the principal author of SB 7 creating the Task Force on Indigent Defense in 2001 and a co-sponsor of HB 1754 this past session that created the Texas Indigent Defense Commission.

Message from the Chair

The Board looks forward to continuing the improvements in indigent defense initiated by the Task Force. We have ten years of experience behind us, and the continuity in Board membership made possible by Governor Perry's appointments allows us to immediately address the needs of Texas counties through the implementation of evidence-based practices and targeted funding. There is one new appointment to the Commission I'd like to welcome-- Judge Laura Weiser, Victoria County Court at Law #1. At its meeting on June 21st, the Texas Indigent Defense Commission discussed its Legislative Appropriations Request or LAR, which is due to be submitted by August 9th. Under HB 1754, the commission is now directed to submit its LAR separately from the Office of Court Administration. The commission directed staff to submit the following requests as "exceptional items" or requests over and above its baseline budget:

- Restore estimated appropriation authority for indigent defense funding in the Fair Defense Account.
- Restore unexpended balance (UB) authority for indigent defense funding in the Fair Defense Account.
- Increase funding \$160 million over the biennium for increased indigent defense costs since passage of the Fair Defense Act in 2001.

For more information on the LAR, please see page 6.

Sharon Keller, Chair, Texas Indigent Defense Commission, Presiding Judge, Court of Criminal Appeals

Members of the Texas Indigent Defense Commission

Chair:

The Honorable **Sharon Keller**
Presiding Judge, Court
of Criminal Appeals

Vice Chair:

The Honorable **Olen Underwood**,
Presiding Judge, 2nd Administrative
Judicial Region of Texas

Ex Officio Members:

Honorable **Sharon Keller**

Honorable **Wallace B. Jefferson**,
Chief Justice, Supreme Court

Honorable **Roberto Alonzo**,
State Representative

Honorable **Pete Gallego**,
State Representative

Honorable **Laura Weiser**, Victoria
County Court at Law #1

Honorable **Jeff Wentworth**,
State Senator

Honorable **John Whitmire**,
State Senator

Members Appointed by Governor:

Honorable **Jon Burrows**,
Bell County Judge

Mr. **Knox Fitzpatrick**, Dallas
Attorney, Fitzpatrick, Hagood,
Smith & Uhl, L.L. P.

Mr. **Anthony Odiorne**,
Public Defender, Regional
Capital Defender Office

Honorable **Sherry Radack**, Chief
Justice, First Court of Appeals

Honorable **Olen Underwood**

Honorable **Laura Weiser**

Honorable B. **Glen Whitley**,
Tarrant County Judge

Message from the Executive Director

I echo Judge Keller's sentiments that much of the progress made by the Commission has centered on data, implementation of new programs, and distribution of state funds for indigent defense. Although not always a pleasurable task for auditors, clerks, and coordinators, the indigent defense data reported by the counties to the Commission brings transparency and substantial information about indigent defense practices. Armed with this information, local and state officials can make informed policy decisions regarding indigent defense initiatives. This level of access and openness is not common elsewhere. If you have not explored the wealth of information that you report along with Texas's other 253 counties, I encourage you to do so at: <http://tidc.tamu.edu/public.net>.

Plans are underway for a three indigent defense training events. The first will be offered late November/early December. This program will focus on new indigent defense developments and a preview of the upcoming legislative session. Then, in January we will offer a primer on indigent defense for newly elected judges, legislators, and their staffs at the Capitol. On March 18th, 2013, the 50th Anniversary of *Gideon v. Wainwright*, we will take stock of what has been accomplished and what lies ahead to realize the promise of *Gideon*. Stay tuned for more information on all of these events.

Good news: The State Bar Committee on Legal Services to the Poor in Criminal Matters will honor Michael Moore on July 23rd as its first recipient of an award created in his honor by the State Bar of Texas. As the dean of undergraduate students and senior vice provost at the University of Texas at Arlington, Dean Moore has provided over 15 years of service to the committee. His survey issued by the committee to examine the state of indigent defense played a critical role in the passage of the Fair Defense Act of 2001. His subsequent work has also been influential and instructional. (See, [Examining the Impact of Criminal Defense Reform in Texas: Has the Fair Defense Act Been Effective?](#) Michael K. Moore, Allan K. Butcher, Catherine Greene Burnett (March 2005); [Giving Timbre to Gideon's Trumpet: Evaluating the Administration and Effectiveness of Legal Representation for Texas' Indigent Criminal Defendants](#), Michael K. Moore and Allan K. Butcher (May 2007), or read the [Executive Summary](#).) **The Michael K. Moore Award for Research and Writing in the Area of Indigent Defense** will be presented in San Antonio during the State Bar of Texas' annual Advanced Criminal Law Course. I can think of no one more deserving and appreciate the guidance he has provided me. To Dean Moore, I send my thanks to you for all you have done to improve the delivery of indigent defense services in Texas.

In closing, we've added a new section in the newsletter called **Around the Nation** that highlights other noteworthy indigent defense developments.

Best,

Jim Bethke
Executive Director

GRANTS AND REPORTING UPDATE

Commission Awards Over \$12 Million in Grants



At its first official meeting, the Texas Indigent Defense Commission awarded more than \$12 million in grants to Texas counties. Approximately 60 counties were awarded a total of \$2.1 million to offset increased indigent defense costs. In addition, 19 county programs were awarded discretionary grants. Highlights include:

Lubbock County will expand the Regional Public Defender Office for Capital Cases to include to counties in north central and northeast Texas. “As a poor rural county we are looking forward to having the opportunity to join a program to defray the potential cost of a capital murder case,” said Red River County Judge Morris Harville. “One case would destroy the budget of Red River County. We are a destitute county with no ability to pay for the level of expenses that could be connected to a capital case. This program is a life saver.” (See the [new website for the Regional Capital Public Defender](#).)

Collin County was awarded a grant for a new managed assigned counsel program to provide defense services to mentally ill defendants. The program will be modeled on programs previously created and funded in Lubbock and Montgomery Counties. “We are looking forward to collaborate with the various departments on the persistent problems and issues that defendants with mental illness pose,” said Judge John Roach, Jr. of the 296th District Court. “Our job in the courts is to ensure effective counsel and processes with just result.”

The Commission also presented **El Paso County** a grant for a specialty court attorney in the El Paso County Public Defender’s Office to work with the drug court and other specialty court dockets. Judge Patrick Garcia of the 384th District Court attended the Commission meeting. “The role of a well-informed defense attorney is vital for the court to address the special needs of people going into the problem solving courts,” he said. “The only way that courts can effectively identify and consider mitigation issues, trauma impact, and other defendant needs is to have the defendant well represented. The strong defense attorney role helps the court to treat defendants as humans and not just to move a case.”

The Commission also continued grants to public defenders’ offices in **Bee, Burnet, Dickens, Fort Bend, and Harris Counties** as well as a managed assigned counsel programs in **Lubbock and Montgomery Counties**.

The Commission also approved funding for additional improvements to indigent defense programs in **Harrison, Kaufman, McLennan, Wichita, and Williamson Counties**. The Commission (formerly the Task Force on Indigent Defense) has distributed funds since 2002 to help counties meet the statutory and constitutional requirements to provide access to counsel for the poor. The new programs are set to begin on October 1, 2012.

FY12 Indigent Defense Expenditure Report due Nov. 1

Government Code §79.036(e) requires county auditors (or treasurers, if there is no county auditor) to provide information to the Texas Indigent Defense Commission (Commission) regarding the expenditures related to legal services provided to indigent criminal defendants during each fiscal year. This statutory report must be completed regardless of whether a county receives grant funds. Here are links to the [FY12 Indigent Defense Expenditure Report \(IDER\) Manual, Supplement for PDOs and Cover Letter](#).

Contact Bryan Wilson
Grants Administrator

POLICIES AND STANDARDS UPDATE

Improving the Process – Determine Indigence According to Standards Directed by the Local Indigent Defense Plan

The Fair Defense Act requires that each jurisdiction adopt and publish countywide procedures for timely and fairly appointing counsel for indigent defendants. These procedures must include financial standards for determining whether a defendant is indigent. In making the determination of indigence, the court may examine many factors including the defendant's income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependants, and spousal income that is available to the defendant. The court 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.

Countywide Procedures - Article 26.04(a), Texas Code of Criminal Procedure

(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.

Financial Standard for Determining Indigence - Article 26.04(a), Texas Code of Criminal Procedure

(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.

Factors for Determining Indigence - Article 26.04(m), Texas Code of Criminal Procedure

(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.

The Challenge

Jurisdictions must set an appropriate financial standard for determining indigence. Under Article 1.051(b) of the Code of Criminal Procedure, "indigent" means a person who is not able to employ counsel. Courts are to determine indigence according to the standards set in the indigent defense plan, and this standard must relate to the ability of one to employ counsel.



Mission Statement:

The Texas Indigent Defense Commission provides financial and technical support to counties to develop and maintain quality, cost-effective indigent defense systems that meet the needs of local communities and the requirements of the Constitution and state law.

Commission's next meeting date:

August 20th, 2:00 p.m.

The Solution

The Commission maintains each county's indigent defense plan on its website. Jurisdictions can view other [indigent defense plans](#) and can examine the financial indigence standards used by other similarly-situated jurisdictions. The Commission recently reviewed the financial methods for determining indigence as listed in indigent defense plans and found the following:

Financial Standard	Number of Indigent Defense Plans
Percentage of Federal Poverty Guidelines	352
Qualification for a Means-Tested Public Benefit	317
Resides in Correctional/Mental Health Facility	297
Assets= <\$2500 OR <\$5000 if over 60 years old, Disabled, Resides in Institution OR Twice Cost to Hire Counsel	78
Income less necessary Expenses Amount per Month*	54
Other	35

*\$500 was the most common amount established as a maximum threshold below which a defendant would be presumed indigent.

Contact Joel Lieurance
Policy Monitor



Improving the Process – Handling Mentally Ill Defendants

Article 16.22 and Article 17.032 of the Code of Criminal Procedure set out certain methods of operation for the identification of mentally ill arrestees and for providing treatment and bonding options to these arrestees. These statutes are quite detailed, and in an effort to simplify the stream of events, the Commission has created [flowcharts](#) describing these statutes that are now available on our website.

Article 16.22 Summary

Article 16.22 sets procedures for the identification of arrestees with MH/MR issues. Under Article 16.22, the magistrate orders the local MH/MR authority to make a written assessment as to: whether the arrestee is a person with mental illness or mental retardation; whether there is clinical evidence to support a belief that the arrestee may be incompetent to stand trial; and as to recommended treatment. The magistrate must provide copies of this assessment to defense counsel, the prosecutor, and to the trial court.

Article 17.032 Summary

Article 17.032 follows on the written MH/MR assessment from Article 16.22. Article 17.032 lists certain situations in which a personal recognizance bond (PR bond) is presumed for arrestees with MH/MR issues and other situations in which a PR bond is allowed for these persons.

Contact Joel Lieurance
Policy Monitor

First Steps Again -- Innovation in Indigent Defense Systems

Article written by Mark Erwin, Technology Manager, Travis County Criminal Courts



Pictured above L-R: Criminal Courts Director Debra Hale, Criminal Courts Judge Julie Kocurek, Mark Erwin, Technology Manager

In 2005, Travis County pioneered a web based application that facilitated criminal attorney appointments and captured attorney contacts with indigent clients. This past year, Travis County Criminal Court Presiding Judge Julie Kocurek felt it was time for a system overhaul and so the Courts IT group embarked on a complete system replacement of their electronic indigent appointment, management and fee processing applications. An equalization disbursement from the Task Force allowed for a small staff augmentation in the form of a contracted programmer and the team got to work. The new application is actually a collaborative effort of three departments in the Travis County justice system: Criminal Courts, Civil Courts and Justice and Public Safety. This innovative new system will provide appointed attorneys additional access to pertinent case information such as docket and setting information as well as access to electronic case files. The attorneys will also have the ability to submit and view the status of electronic invoices and even schedule on-line videoconferencing sessions with clients in the County Jail. The routing and electronic approval of invoices between departments, and notification of jail transportation are integrated into the new system.

From a technical angle, the project has adopted many new approaches that aim to bring Travis County Court's software development team into a new age. Working in an AGILE development environment, the small team has taken great effort to incorporate technologies such as Service Oriented Architecture (SOA) and utilize modern design patterns into the new system. Several other statewide initiatives also follow this approach, including the Conference of Urban County's Adult Case Management System that Travis County is participating within. The Travis County Courts technology team, led by its technology manager, Mark Erwin, felt it was important to get a leg up on these new technologies so that when the CUC's effort is deployed, our staff would be able to fully participate in the delivery of future configuration and deployment. *Contact Mark Erwin, Technology Manager, Travis County Criminal Courts at email address: mark.erwin@co.travis.tx.us*

83rd Legislative Update - LAR

A restoration of estimated appropriation and unexpended balance authority will allow greater funding levels – in excess of the current sum certain – to be allocated towards indigent defense, which will reduce county burdens. Currently there is over \$7.2 million in the overage of juror pay court costs in the Fair Defense Account from FY2011 that may not be spent without permission to carry forward unexpended balances between biennia. Because the funding sources for the Fair Defense Account include court fees and other sources that fluctuate from year to year the sum certain appropriation means that any additional revenue deposited to the account above that amount is unavailable for grants to counties. Staff anticipates this amount will be approximately \$3-4 million in revenue for FY2012 above what is appropriated to the Commission and similar amounts for FY2013. Restoration of estimated appropriation authority rather than a sum certain amount would permit the Commission to spend the full amount of revenue flowing into the Fair Defense Account by increasing grant awards to counties. Since the money in the account is dedicated and can only be spent for indigent defense the extra unappropriated funds do not benefit any other program.

The appropriation of an additional \$160 million over the next biennium would allow the Commission to increase grant funding to counties in an amount that would make up the approximately \$80 million per year in increased indigent defense costs since passage of the Fair Defense Act (FDA). In an effort to safeguard constitutional rights under the FDA, the costs expended by local jurisdictions have increased almost 120% from \$91.4 million 2001 to \$198.4 million in 2011. Only a portion of this increased expense is covered through Texas Indigent Defense Commission's state formula/discretionary grant program. In FY2012 \$29.7 million and in FY2013 \$32.5 million in dedicated state funds were available to counties. If current spending levels remain at approximately \$200 million per year, counties must make up approximately \$80 million per year in increased cost.

Contact Wesley Shackelford
Deputy Director/Special Counsel



Around the Nation

The U.S. Government Accountability Office (GAO) released a report assessing the ways in which the federal government has provided funding and other support to the states for indigent defense. (GAO.gov, May 9, 2012) As we know,

Texans are safest when our criminal justice system works accurately and fairly, but this becomes more challenging when some segments of the justice system are favored over others. Although the U.S. Constitution guarantees a right to an attorney, defenders get the least amount of money of all services in the public safety system. On one hand, law enforcement receives 30 percent of all federal funding and prosecution and courts receive about 7 percent. On the other hand, public defense

receives less than 1 percent of federal funding. This imbalance is arguably more unfair in a jurisdiction like Texas where funding for indigent defense is shouldered in large part by counties. [A recent blog post](#) by U.S. Department of Justice highlights efforts it is taking to ameliorate this inequity through this year's Edward Byrne Memorial Justice Assistance Grant (JAG) solicitation. The post also includes a [link to a DOJ resource page](#) for courts and indigent defense providers.

The Supreme Court of Washington has adopted new Standards for Indigent Defense Services. (Supreme Court of Washington, June 15, 2012) The new standards take effect September 1, 2012, except Standard 3.4 regulating caseload limit guidelines which will take effect September 1, 2013. The new standards include guidelines for caseload limits and types of cases; administrative costs, limitations on private practice, qualifications of attorneys, appellate representation and use of legal interns. The rule was approved by a majority of the Court, with Justices Charles W. Johnson and Mary E. Fairhurst dissenting. Recognizing the fiscal impact new caseload guidelines will have on local governments, Chief Justice Barbara Madsen said, "We understand the delicate balance in providing a constitutional right to an attorney and the monetary impact on local governments. By delaying implementation of the caseload limits until 2013, our goal is to move towards the promise of the landmark U.S. Supreme Court case of *Gideon v. Wainwright*."

The United States Supreme Court ruled 5-4 that mandatory life sentences for juveniles violate the Eighth Amendment to the United States Constitution. (CNN.com, June 25, 2012) "Children are constitutionally different from adults for purposes of sentencing," said Justice Elena Kagan in her majority opinion. Texas legislators banned life without parole of juvenile defendants in 2009, but they did not make the prohibition retroactive. Because of this ruling, [27 juveniles in Texas may be eligible to have a new hearing on their punishment.](#) (Austin American Statesman, June 25, 2012)

The Michigan Advisory Commission on Indigent Defense completed its analysis of the state's indigent defense system, reported its findings and made recommendations for improving indigent defense in Michigan. (Report of the Michigan Advisory Commission on Indigent Defense, June 22, 2012) The Commission recommended the creation of a "new and independent State agency [...] to promulgate and enforce standards applicable statewide for providing trial-level indigent defense services consistent with the ABA Ten Principles." Finding "a lack of quality, consistent data collection for indigent defense across the state," the Commission also recommended that the new agency "serve as the centralized data collector" and "ensure that standardized data from each county is collected."

Contact Jim Bethke
Executive Director

Commission Legal Intern Program News



Andrew Bluebond



Brad Estes

The Commission has two outstanding interns this summer from The University of Texas School of Law: Andrew Bluebond and Brad Estes. Andrew is a rising 2L. Before working at the Commission, Andrew completed his bachelor's degree in the Philosophy, Politics and Economics program at Claremont McKenna College. Andrew is a native of Akron, Ohio, making him a loyal but perpetually disappointed fan of the Cleveland Indians, Browns and Cavaliers. He is also a life-long creator and consumer of spicy food. Brad is a rising 2L. He received his B.A. in history from the University of Michigan in 2011, and wrote his colloquium paper on the intersection of technology, law, and the War on Drugs. He is interested in criminal law, sports law, and litigation, and tweets from @bradestes88 on these topics. Both have been working on several projects this summer including assisting the Executive Director with prepping for the Legislative Appropriation Request, assisting with a study underway in Harris County, a publication regarding managed assigned counsel systems and a law review article relating to representing the mentally ill offender.

Online Resources Available to Texas Counties

These are just a few of the most recent publications available on the [Commission website](#).

- [Flowcharts](#) describing Articles 16.22 and 17.032 of the Code of Criminal Procedure to aid jurisdictions in improving defense processes related to mental health issues
- [FY12 Indigent Defense Expenditure Report \(IDER\) Manual, Supplement for PDOs and Cover Letter](#) due November 1, 2012
- [Veterans Defender Resource](#), Published March 28th, 2012
- [Presentation](#) to TMCEC's Regional Judges' Seminar, February 27, 2012, Galveston
- [Improved, Increased Access to Texas Indigent Defense Data Online](#)
- [Presentation](#) to Texas Association of Counties 2012 County Court Assistants Training Conference, February 23, 2012, San Marcos
- [Presentation](#) to V.G. Young Institute School for County Officials on February 9, 2012, College Station
- [2011 Fair Defense Law](#)
- [Securing Reasonable Caseloads: Ethics and Law in Public Defense](#), Norman Lefstein, American Bar Association Standing Committee on Legal Aid and Indigent Defendants (November 2011)
- [Video downloads of presentations from Symposium on Indigent Defense, October 27, 2011](#)



Interactive Features:

If you're viewing this as a PDF, be sure to take advantage of many of this newsletter's interactive features. Many of the stories feature hyperlinks to additional material, including videos, reports, national news items.

Please contact any of the following staff members for assistance:

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