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Subject:

Texas Indigent Defense Commission
Wednesday, April 01, 2015 5:07 PM
2015 Spring Edition Newsletter



Indigent Defense Newsletter 2015 Spring Edition

Upcoming Meetings

Policies and Standards Committee Meeting

Thursday, April 9, 2015, 2:30 p.m. to 4:30 p.m.
Texas Association of Counties, 4th floor boardroom
1210 San Antonio Street, Austin, Texas

Grants and Reporting Committee Meeting

Thursday, June 4, 2015, 8:30 a.m. to 9:30 a.m.
Court of Criminal Appeals Courtroom
201 W. 14th Street, Supreme Court Building, Austin, Texas

Next Commission Meeting

Thursday, June 4, 2015, 10:00 a.m. to 12:30 p.m.
Court of Criminal Appeals Courtroom
201 W. 14th Street, Supreme Court Building, Austin, Texas

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Message from Chair

The Commission thanks the Governor's Criminal Justice Division (CJD) for its award of a \$100,000 grant to develop a model mentoring program for court appointed attorneys. The grant funds will be used to contract with an expert to develop the model plan and curriculum that can be used by any county and to fund a pilot project in Travis County. The program will build on what has been learned through the few private defense counsel mentoring programs in Texas, including those in Harris, Comal, and Bell Counties.

At our Commission meeting on March 6, the Commission presented Bob Wessels with the 2014 Robert O. Dawson Indigent Defense Distinguished Service Award. This award honors the late Professor Dawson for his outstanding contributions and symbolizes his lasting impact on the Texas Fair Defense Act and the Commission. The award recognizes outstanding service by a group or an individual to improve the way Texas provides counsel for its poorest citizens accused of crimes. Mr. Wessels has worked with the Commission on many projects to improve indigent defense systems - as a presenter at Indigent Defense Workshops, as a member of the fiscal year 2014 Discretionary Grant Review Team, and as the facilitator for the Technology Strategic Plan meeting held last August. Mr. Wessels also took the lead in assisting the Commission staff in developing the [Functionality and Data Guidelines for Indigent Defense Technology Projects](#).



*Chair Sharon Keller
with Bob Wessels, recipient of the
2014 Robert O. Dawson Indigent
Defense Distinguished Service Award*

Next, I was delighted to acknowledge Lubbock County, Dickens County, and the Texas Tech University School of Law upon receiving Gideon Recognition from the full Commission at its March meeting. The Commission established the Texas [Gideon Recognition Program](#) to commend local governments and others across Texas that seek to meet a high standard for indigent defense. The program was inspired by the 50th anniversary of the landmark U.S. Supreme Court case *Gideon v. Wainwright*. Counties may receive recognition for programs or achievements that demonstrate a significant level of innovation, such as a new solution to a problem, significantly streamlining a process, a measurable and significant increase in productivity, or improved service quality to indigent defendants or other stakeholders. For more information, click on [Lubbock County Gideon](#)

[Recognition](#) or on [Dickens County and the Texas Tech University School of Law Gideon Recognition](#).



Honorable Bill McKay, Honorable Les Hatch, and Honorable Patti Jones from Lubbock County with Chair Sharon Keller



Dickens County Treasurer Sandy Vickrey with Chair Sharon Keller



Chair Sharon Keller with Chief Public Defender Donnie Yandell of the Caprock Regional Public Defender Office, Texas Tech University School of Law students Brian Livingston and Kaelan Henze, and Dickens County Treasurer Sandy Vickrey

Sharon Keller

Message from Director

March madness is about over and the 84th Legislature has just over 60 days to complete its work for the FY16/17 biennium. The main budget bills, [HB 1](#) and [SB 2](#), were filed early in the session and contain identical provisions for indigent defense. These include an estimated appropriation of \$33,520,990 in FY16 and \$33,520,989 + Unexpended Balances in FY17. The 84th Texas Legislature then quickly began budget hearings to consider agency requests. **The House Appropriations Committee (HAC) voted to recommend \$15 million in General Revenue be provided for indigent defense over the upcoming FY16/17 biennium.** A copy of the written materials submitted and presented by Presiding Judge Keller is available [here](#). A special thanks is owed to Representative John Otto, Chair, HAC, and Representative Sylvester Turner, Chair, HAC Subcommittee on Articles I, IV, and V, where the Commission appropriation was heard. The House appropriation includes \$6.2 million to support the Regional Public Defender Office for Capital Cases, including \$1 million for capital defense services in Cameron and Hidalgo Counties. The House committee also approved \$8.8 million towards closing the Fair Defense Act funding gap. The HAC also approved just over \$700,000 additional funding for the Office of Capital Writs. On the Senate side, the Senate Finance Committee also considered the Commission budget request, but did not recommend approval of any of its three exceptional items that would impact its grant program to counties. HB 1 was passed on second reading by the full House in the early morning hours of April 1st with no changes to the HAC adopted budget for indigent defense. The Senate passed SB 1, their tax cut bill, and sent it to the House. The Senate is expected to vote SB 2, their budget bill, out of Senate Finance next week. After each chamber has voted out its budget, a conference committee will be appointed to work out the differences between the House and Senate versions of the budget. Chief Justice Nathan Hecht emphasized the need to strengthen funding for indigent defense in his [2015 State of the Judiciary Address](#) to a joint session of the Legislature on February 18th. For information on indigent defense related bills, see the [Legislative Update section](#) of the newsletter below.

Other indigent defense related news includes that Texas Tech University School of Law will posthumously award an honorary degree in Law and Social Justice to Timothy Cole to be conferred

in May. Mr. Cole was a student at the university in 1985 when he was expelled after a student accused him of rape. He was convicted and died in prison in 1999, but another man's confession coupled with DNA evidence ten years later showed that Cole was innocent. In fact, Cole was the first Texan to be posthumously exonerated of a crime through DNA testing. In 2009 the 81st Texas Legislature honored Cole by naming [House Bill 1736](#), relating to compensation of persons wrongfully imprisoned, the Tim Cole Act. Governor Rick Perry posthumously pardoned Cole in 2010. Click on [Texas Tech Today](#) to read more about this story.

[The Fair Defense Act and the Role of the Magistrate](#), which I co-authored with Dr. Dottie Carmichael, was published in the February 2015 edition of *The Recorder, The Journal of Texas Municipal Courts*. The article is a refresher on the Fair Defense Act (FDA) passed in 2001, and it highlights key changes to the FDA since the last publication.

As Mark Twain once said, "in the Spring, I have counted 136 different kinds of weather inside of 24 hours." Yesterday and last night, watching "some" of the 18-hour House debate on the Texas budget, I too witnessed a breadth of different ideas. I think House Speaker Joe Straus summed it up best when he said, "while it may have taken longer than usual, I am proud of the way members worked together on this budget and stayed focused on the needs of their constituents." Only five of the 150 House members voted against the adoption of the budget.

Jim Bethke

Dates of Interest - 84th Legislature Regular Session

January 13, 2015	1st day - 84th Legislature convened
January 28, 2015	Senate Finance Committee hearing
February 6, 2015	House Appropriations Committee hearing
March 4, 2015	House Committee on Criminal Jurisprudence hearing
March 13, 2015	60th day of session Deadline for filing bills and joint resolutions other than local bills, emergency appropriations, and bills that have been declared an emergency by the governor
June 1, 2015	140th day - Last day of the 84th Regular Session Corrections only in house and Senate
June 21, 2015	20th day following final adjournment of Regular Session Last day governor can sign or veto bills passed during the regular session
August 31, 2015	91st day following final adjournment of Regular Session Date that bills without specific effective dates (that could not be effective immediately) become law

[Click here](#) to view a list of all dates of interest published at [Texas Legislature Online](#).

Legislative Update

Indigent Defense Related Bills

The TIDC board approved three legislative proposals related to indigent defense and all have now been filed in each chamber:

- [SB 544](#) and [HB 3633](#) would require attorney fee repayment orders issued as a condition of community supervision be subject to an "ability to pay" requirement as exists when they are ordered as court costs elsewhere in the Code of Criminal Procedure and would clearly limit the amount to be repaid to counties to the actual cost of the legal services provided. The bills would also clarify the appropriate amount for attorney fee repayment orders in those cases where the defendant is represented by a public defender's office.
- [SB 662](#) and [HB 1346](#) would expedite post-conviction relief to defendants who are not guilty or guilty of only a lesser offense or convicted and/or sentenced under a void statute.
- [SB 1057](#) and [HB 2969](#) would provide statutory authority for super-regional public defender programs for rural counties and authorize continuing state grant funding for such programs.

There are also a number of other indigent defense related bills. The most significant ones are below:

- [HB 48](#) and [SB 81](#) would each establish an exoneration review commission.
- [HB 1663](#) would permit a court to order a defendant who is at the time of sentence unable to pay the total cost of indigent defense services to pay the unpaid portion as money becomes available to the defendant, including any inmate trust account maintained by the prison.
- [HB 2525](#) and [SB 1517](#) would clarify the procedures for appointment of counsel when a person is arrested on an out-of-county arrest warrant.
- [SB 260](#) would require local judges to establish caseload caps in assigned counsel jurisdictions and require TIDC to establish a process for attorneys who provide indigent defense representation to annually report their caseloads, including non-appointed work.
- [SB 872](#) would require attorney fee schedules to be delivered to the commissioners court 90 days prior to the start of the county's fiscal year to become effective then.
- [HB 2825](#) and [SB 1353](#) would permit TIDC to directly participate with the Conference of Urban Counties Tech Share Indigent Defense Technology program.

You can stay abreast of the progress of the TIDC budget request and all the indigent defense related bills on TIDC's legislative webpage [here](#).

Newly Formed Private Defender Program Making a Difference

The Travis County Capital Area Private Defender Service (CAPDS) began operations in January 2015. In March it was honored to be selected as one of six sites across the nation to host a complimentary training event by the National Association of Criminal Defense Lawyers (NACDL). A primary goal of the conference named "**Clients not Cases: Skills for Effective Representation**" was to enhance the skills of the attorneys that take court appointments. Some of the most renowned indigent defense trainers in the country, including Keith Belzer from Wisconsin, Professor Adele Bernhard from Pace Law School, and Colette Tvedt from NACDL, were among the eight trainers who traveled to Austin to conduct the conference. CAPDS lawyers learned high-level negotiation skills, investigation techniques, story-telling during trial, immigration consequences of convictions, handling the mentally ill client, the importance of connecting with clients, and creative sentencing. Some of the feedback CAPDS received about the conference included, "It provided a window onto a whole new level of practicing criminal defense. I am taking away a lot of new concepts, skills, and info I will use." Another attorney wrote in the evaluation, "Primary theme of this seminar is 'caring'. It has provided so many opportunities to represent our clients as the human beings they are which is too often overlooked or ignored. May it cause all of us to search out ways to be better. Thanks." CAPDS is looking forward to a continued partnership with NACDL and to providing support to help its lawyers provide the best possible representation to their indigent clients.



CAPDS Administrative Assistant Jeanette Frausto, Deputy Director Bradley Hargis, Executive Director Ira Davis, Deputy Director Trudy Strassburger, and Investigator Joe Ward

CAPDS has also begun improving the quality of indigent defense in Travis County through the use of its staff investigator, Joseph Ward. Joe brings to CAPDS over twenty years of criminal defense investigation experience and has been able to quickly adapt to working with CAPDS attorneys. Assigned counsel are able to refer their cases to Joe at any stage in the proceedings, regardless of whether or not it is known that a case will be going to trial.

As part of assigned counsel's obligation to provide affirmative immigration advice about the consequences of a criminal conviction (pursuant to *Padilla v. Kentucky*), CAPDS has partnered with local immigration attorney Stephanie Taylor to pilot whether having access to an immigration attorney will improve the quality of indigent defense. For the six-month program, Ms. Taylor will be present in the CAPDS office one day a week to meet with attorneys and provide guidance about what advice they need to give clients to satisfy *Padilla* and about how to create a disposition that will reduce or even alleviate harmful immigration consequences for their clients.

Although currently in Travis County attorneys can only be qualified to be on the misdemeanor panel if they have jury trial experience, CAPDS in collaboration with the Texas Indigent Defense Commission and support of a grant from the Governor's Criminal Justice Division is developing a mentorship program that will provide a path for attorneys to be placed on the panel even where they lack first-chair jury trial experience. The rigorous training and supervision the mentees will receive includes one week of substantive criminal law training, followed by one week of trial advocacy training. After completion of the two-week training, the mentees will begin a formal mentorship program for six months, using a curriculum to ensure that they receive instruction in appropriate areas. More information about the mentorship program and the application process can be found on the Capital Area Private Defender Service website www.capds.org.

Policies and Standards

At its March 6, 2015 meeting, the Commission approved publication of the new attorney caseload county reports mandated by [HB 1318](#) on its publicly accessible website. The legislative intent in HB 1318 appears to be to shed light on attorney caseloads, and the inclusion of this information on our public website will further that goal. The Commission is working with our partners at Texas A&M University's Public Policy Research Institute (PPRI) to program our existing website so that the information should be available to the public within approximately the next thirty days. Transparency and openness have been hallmarks of the Commission since its inception, and these reports shed light on how public money is being spent and for what purpose. Historically, all Indigent Defense Expenditure Report (IDER) information that counties are required to report to the Commission annually has been available on our public website, and the new attorney caseload county reports are part of the IDER. The data collected is public information that must be released under Rule 12, Texas Rules of Judicial Administration.

Also at its March meeting, the Commission adopted a new rule under Texas Administrative Code, section 174.51, relating to requests for counsel after initiation of adversary judicial proceedings. The rule was proposed at the Commission's December 12, 2014 meeting and was published in the *Texas Register* for public comment, 40 Tex. Reg. 313 (Jan. 16, 2015). The Commission received no comments on the proposed rule, and it became eligible for adoption on or after February 15, 2015. The rule will be filed with the Secretary of State and will become effective twenty days after filing. The Commission's 2015 Indigent Defense Plan Instructions for Texas counties scheduled for publication in late August or early September will include a reference to the rule, which is stated below, and it will be included in the plan requirements section of the instructions.

§174.51. Indigent Defense Plan Requirements. The countywide procedures adopted under Art. 26.04(a), Code of Criminal Procedure, must provide a method to allow defendants to obtain the necessary forms for requesting appointment of counsel and to submit completed forms for requesting appointment of counsel at any time after the initiation of adversary judicial proceedings.

Around the Nation

By Geoff Burkhart, Guest Contributor

Geoff Burkhart is an Attorney and Project Director with the American Bar Association. He frequently writes on criminal law issues.



Hurrell-Harring v. New York

On March 16th, a settlement was finalized in [Hurrell-Harring v. New York](#), one of two notable public defense impact litigation cases in recent years. The settlement marks the end to seven years of litigation over the quality of public defense in that State and the beginning of a seven-year, multi-million dollar improvement plan.

The named plaintiff, Kimberly Hurrell-Harring, a nursing assistant and mother of two, had a sadly run-of-the-mill experience with public defense. In September of 2007, she was arrested while smuggling less than an ounce of marijuana into a prison where her husband was serving time. Kimberly had no prior criminal history. The judge set \$10,000 bail, and she languished in jail.

Kimberly had no attorney at arraignment. Once private counsel was appointed, she spoke with him for mere minutes before or after court appearances. Despite favorable case law, he never attempted to negotiate a misdemeanor plea. Ultimately, Kimberly pled guilty to promoting prison contraband and was sentenced to six months' imprisonment and five years' probation. She lost her job, her housing, and her nursing assistant license.

The New York Civil Liberties Union (NYCLU) and New York firm Schulte Roth & Zabel filed a complaint against the State of New York, focusing on five of its 62 counties. Plaintiffs asserted that "the State is now knowingly and systematically violating the fundamental rights of its poorest citizens to meaningful and effective legal representation in criminal cases . . ." The complaint explained that Kimberly and the other defendants were deprived representation at critical stages and, when counsel was provided, the attorneys failed to investigate, file critical motions, communicate with their clients, or generally advocate on their clients' behalf.

New York challenged the suit, arguing that the plaintiffs did not state ineffective assistance of counsel claims under *Strickland v. Washington*, 466 U.S. 668 (1984). The New York Court of Appeals held that the complaint stated a claim not under *Strickland v. Washington*, but under *Gideon v. Wainwright*. *Hurrell-Harring v. State of New York*, 15 NY3d 8 (2010), for "constructive denial of the right to counsel by reason of insufficient compliance with the constitutional mandate of *Gideon*." *Id.* at 23. The case was remanded for further proceedings.

The Court of Appeals' holding was noteworthy, but perhaps not as remarkable as what happened next. On September 25, 2014, the United States Department of Justice filed a [statement of interest](#), demonstrating its support for public defense in a state court proceeding for the first time. The 14-page statement highlighted our half-century struggle to meet *Gideon's* call, including the recent history of impact litigation. See, e.g., [Wilbur v. City of Mount Vernon](#), 989 F.Supp.2d 1122 (W.D. Wash. 2013).

On October 21, 2014, the parties settled. Now, New York must:

- Assume the responsibility to provide lawyers, rather than leaving that task to the counties
- Provide counsel at arraignment
- Establish public defense workload limits
- Create and implement eligibility standards
- Pay for counties to implement effective supervision and training; hire more lawyers, investigators, and experts; create confidential meeting spaces; require that attorney experience match the cases assigned
- Spend \$4 million over the next two years to improve attorney-client communication, promote the use of experts, and improve training
- Pay a combined \$5.5 million in attorneys' fees to Schulte Roth & Zabel and the NYCLU

The *Hurrell-Harring* settlement is a template for public defense provision in New York's remaining 57 counties. More importantly, the *Hurrell-Harring* action is a template for public defense litigation nationwide.

Commission Members

Ex Officio Members:

Honorable Sharon Keller, Chair
Honorable Nathan Hecht
Honorable John Whitmire
Honorable Royce West
Honorable Roberto Alonzo
Honorable Abel Herrero

Members Appointed by Governor:

Honorable Olen Underwood, Vice-Chair
Honorable Sherry Radack
Honorable Jon Burrows
Honorable B. Glen Whitley
Honorable Linda Rodriguez
Anthony Odiorne
Don Hase

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.

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