

TITLE 1. ADMINISTRATION

Part 8. TEXAS JUDICIAL COUNCIL

Chapter 174. INDIGENT DEFENSE POLICIES AND STANDARDS

SUBCHAPTER C. POLICY MONITORING REQUIREMENTS

Rules adopted by the Texas Indigent Defense Commission on August 21, 2015 to be effective on September 23, 2015.

DIVISION 1. DEFINITIONS.

Sec. 174.26. SUBCHAPTER DEFINITIONS.

The following words and terms when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise.

(2) Executive Director--The executive director of the Commission.

(1) Authorized Official--The county judge or other designee authorized to apply for, accept, decline, modify, or cancel a grant designated under §173.301 of this title.

(3) Period of review--The 12 months preceding the date of the monitoring visit.

(4) Policies and Standards Committee--A committee of the Commission charged with developing policies and standards related to improving indigent defense services.

(5) Policy Monitor--The employee of the Commission who monitors the effectiveness of a county's indigent defense policies, standards, and procedures.

(6) Risk Assessment--A tool to rank each county's potential risk of not being in compliance with indigent defense laws.

(7) Commission--Commission means the Texas Indigent Defense Commission.

DIVISION 2. POLICY MONITORING PROCESS AND BENCHMARKS.

Sec. 174.27. RISK ASSESSMENT.

(a) A risk assessment of each county shall be conducted by the policy monitor each fiscal year as the primary means of determining which counties will be selected for on-site policy monitoring. On-site monitoring visits to counties shall then be apportioned by administrative judicial region, county size, risk assessment scores, past visits and other documented factors. The risk assessment shall use a variety of factors related to the provision of indigent defense services, including but not limited to the following:

(1) Whether a county reported investigation and expert witness expenses;

(2) Whether a county reported reimbursements for attorney fees;

(3) Amount of per capita indigent defense expenses;

(4) Felony, misdemeanor, and juvenile attorney appointment rates;

(5) Population of a county;

(6) Whether complaints about a county have been received by the Commission;

(7) Whether a county received a multi-year discretionary grant;

(8) Whether the justices of the peace or municipal judges reported requests for counsel in their Texas Judicial Council Monthly Court Activity Reports;

(9) the ratio of misdemeanor requests for counsel from Article 15.17 hearings as reported in Texas Judicial Council Monthly Activity Reports to the number of misdemeanor cases paid reported by the county; and

(10) Whether a county reported appeals cases.

(b) Counties may receive monitoring visits as a result of factors outside of the risk assessment. An elected state or local official may request a monitoring visit. If Commission staff make a drop-in visit, fiscal monitoring review, or grant program review, and determines that violations of the Fair Defense Act may be present in a county, the monitor may conduct a limited-scope review of the county's procedures.

Sec. 174.28. ON-SITE MONITORING PROCESS.

(a) Purpose. The process promotes local compliance with the requirements of the Fair Defense Act and Commission rules and provides technical assistance to improve processes where needed.

(b) Monitoring Process. The policy monitor examines the local indigent defense plans and local procedures and processes to determine if the jurisdiction meets the statutory requirements and rules adopted by the Commission. The policy monitor also attempts to randomly select samples of actual cases from the period of review by using a 15% confidence interval for a population at a 95% confidence level.

(c) Core Requirements. On-site policy monitoring focuses on the six core requirements of the Fair Defense Act and related rules. Policy monitoring may also include a review of statutorily required reports to the Office of Court Administration and Commission. This rule establishes the process for evaluating policy compliance with a requirement and sets benchmarks for determining whether a county is in substantial policy compliance with the requirement. For each of these elements, the policy monitor shall review the local indigent defense plans and determine if the plans are in compliance with each element.

(1) Prompt and Accurate Magistration.

(A) The policy monitor shall check for documentation indicating that the magistrate or county has:

(i) Informed and explained to an arrestee the rights listed in Article 15.17(a), Code of Criminal Procedure, including the right to counsel;

(ii) Maintained a process to magistrate arrestees within 48 hours of arrest;

(iii) Maintained a process for magistrates not authorized to appoint counsel to transmit requests for counsel to the appointing authority within 24 hours of the request; and

(iv) Maintained magistrate processing records required by Article 15.17(a), (e), and (f), Code of Criminal Procedure, and records documenting the time of arrest, time of magistration, whether the person requested counsel, and time for transferring requests for counsel to the appointing authority.

(B) A county is presumed to be in substantial compliance with the prompt magistration requirement if magistration in at least 98% of the policy monitor's sample is conducted within 48 hours of arrest.

(2) Indigence Determination. The policy monitor checks to see if procedures are in place that comply with the indigent defense plan and the Fair Defense Act.

(3) Minimum Attorney Qualifications. The policy monitor shall check that attorney appointment lists are maintained according to the requirements set in the indigent defense plans.

(4) Prompt Appointment of Counsel.

(A) The policy monitor shall check for documentation of timely appointment of counsel in criminal and juvenile cases.

(i) Criminal Cases. The policy monitor shall determine if counsel was appointed or denied for arrestees within one working day of receipt of the request for counsel in counties with a population of 250,000 or more, or three working days in other counties. If the policy monitor cannot determine the date the appointing authority received a request for counsel, then the timeliness of appointment will be based upon the date the request for counsel was made plus 24 hours for the transmittal of the request to the appointing authority plus the time allowed to make the appointment of counsel.

(ii) Juvenile Cases. The policy monitor shall determine if counsel was appointed prior to the initial detention hearing for eligible in-custody juveniles. If counsel was not appointed, the policy monitor shall determine if the court made a finding that appointment of counsel was not feasible due to exigent circumstances. If exigent circumstances were found by the court and the court made a determination to detain the child, then the policy monitor shall determine if counsel was appointed for eligible juveniles immediately upon making this determination. For out-of-custody juveniles, the policy monitor shall determine if counsel was appointed within five working days of service of the petition on the juvenile.

(B) A county is presumed to be in substantial compliance with the prompt appointment of counsel requirement if, in each level of proceedings (felony,

misdemeanor, and juvenile cases), at least 90% of indigence determinations in the policy monitor's sample are timely.

(5) Attorney Selection Process. The policy monitor shall check for documentation indicating:

- (A) In the case of a contract defender program, that all requirements of §§174.10 - 174.25 of this title are met;
- (B) In the case of a managed assigned counsel program, that counsel is appointed according to the entity's plan of operation;
- (C) That attorney selection process actually used matches what is stated in the indigent defense plans; and
- (D) For assigned counsel and managed assigned counsel systems, the number of appointments in the policy monitor's sample per attorney at each level (felony, misdemeanor, juvenile, and appeals) during the period of review and the percentage share of appointments represented by the top 10% of attorneys accepting appointments. A county is presumed to be in substantial compliance with the fair, neutral, and non-discriminatory attorney appointment system requirement if, in each level of proceedings (felony, misdemeanor, and juvenile cases), the percentage of appointments received by the top 10% of recipient attorneys does not exceed three times their respective share. If the county can track attorney list changes, the monitor will only examine the distribution of cases for attorneys that were on the appointment list for the entire year. The top 10% of recipient attorneys is the whole attorney portion of the appointment list that is closest to 10% of the total list.

(6) Payment Process.

The policy monitor shall check for documentation indicating that the county has established a process for collecting and reporting itemized indigent defense expense and case information.

(d) Report.

(1) Report Issuance. The policy monitor shall issue a report to the authorized official within 60 days of the on-site monitoring visit to a county, unless a documented exception is provided by the director, with an alternative deadline

provided, not later than 120 days from the on-site monitoring visit. The report shall contain recommendations to address areas of noncompliance.

(2) County Response. Within 60 days of the date the report is issued by the policy monitor, the authorized official shall respond in writing to each finding of noncompliance, and shall describe the proposed corrective action to be taken by the county. The county may request the director to grant an extension of up to 60 days.

(3) Follow-up Reviews. The policy monitor shall conduct follow-up reviews of counties where the report included noncompliance findings. The follow-up review shall occur within a reasonable time but not more than two years following receipt of a county's response to the report. The policy monitor shall review a county's implementation of corrective actions and shall report to the county and to the Commission any remaining issues not corrected. Within 30 days of the date the follow-up report is issued by the policy monitor, the authorized official shall respond in writing to each recommendation, and shall describe the proposed corrective action to be taken by the county. The county may request the director to grant an extension of up to 30 days.

(4) Failure to Respond to Report. If a county fails to respond to a monitoring report or follow-up report within the required time, then a certified letter will be sent to the authorized official, financial officer, county judge, local administrative district court judge, local administrative statutory county court judge, and chair of the juvenile board notifying them that all further payments will be withheld if no response to the report is received by the Commission within 10 days of receipt of the letter. If funds are withheld under this section, then the funds will not be reinstated until the Commission or the Policies and Standards Committee approves the release of the funds.

(5) Noncompliance. If a county fails to correct any noncompliance findings, the Commission may impose a remedy under §173.307 of this title.

Commentary on the intended purpose of Section 174.28(c)(5)(A)(iv) dealing with Attorney Selection Process adopted by Texas Indigent Defense Commission:

Section 174.28(c)(5)(A)(iv) of the policy monitoring rules is adopted as a means to permit staff to effectively monitor the requirements of Art. 26.04, Code of Criminal Procedure. Article 26.04(b)(6) provides that each county's adopted procedures (i.e. local indigent defense plan) "ensure that appointments are allocated among qualified attorneys in a manner that is fair, neutral, and nondiscriminatory." A similar requirement is provided for alternative appointment systems. Article 26.04(g)(2)(D) provides that the procedures must

ensure that “appointments are reasonably and impartially allocated among qualified attorneys.”

This rule is intended to set a threshold for determining whether a policy monitoring recommendation is to be made to a level of court proceedings (felony, misdemeanor, or juvenile). If the distribution is below the established threshold there is a presumption that the courts of each level (district, county, and juvenile) within a county are meeting the distribution of appointments requirements of Article 26.04. Conversely, a distribution of appointments that falls outside the threshold for a court level will result in a recommendation in the policy monitoring report. The presumption of noncompliance may be rebutted by evidence provided by the jurisdiction. The rule is not intended as a measure of whether an individual court is meeting the appointment distribution requirements of Article 26.04, nor is it intended to form the basis for disciplinary action against a specific judge.