



EFFECTIVE INDIGENCE SCREENING

September 2015



209 W. 14th Street, Room 202
Austin, Texas 78701
Phone: 512-936-6994; Fax: 512-463-5724
www.tidc.texas.gov

Chair:

Honorable Sharon Keller Chair – Presiding Judge, Court of Criminal Appeals

Vice Chair:

Honorable Olen Underwood Vice-Chair – Presiding Judge, 2nd Administrative Judicial Region of Texas

Ex Officio Members:

Honorable Sharon Keller	Austin, Presiding Judge, Court of Criminal Appeals
Honorable Nathan L. Hecht	Austin, Chief Justice, Supreme Court of Texas
Honorable John Whitmire	Houston, State Senator
Honorable Royce West	Dallas, State Senator
Honorable Roberto Alonzo	Dallas, State Representative
Honorable Abel Herrero	Robstown, State Representative

Members Appointed by the Governor:

Honorable Olen Underwood	Conroe, Presiding Judge, 2 nd Administrative Judicial Region of Texas
Honorable Sherry Radack	Houston, Chief Justice, First Court of Appeals
Honorable Jon Burrows	Temple, Bell County Judge
Honorable Linda Rodriguez	Hays County
Mr. Anthony Odiorne	Burnet, Assistant Public Defender, Regional Public Defender Office for Capital Cases
Mr. Don Hase	Arlington, Attorney, Ball & Hase

STAFF:

Jim Bethke	Executive Director	512-936-6994	Jbethke@tidc.texas.gov
Sharon Calcote	Project Manager	512-936-0990	sharon.calcote@txcourts.gov
Edwin Colfax	Grant Program Manager	512-463-2573	Ecolfax@tidc.texas.gov
Traci Cruz	Grant Coordinator	512-936-7551	Tacruz@tidc.texas.gov
Jamie Dickson	Policy Analyst	512-463-2573	Jdickson@tidc.texas.gov
Marissa Kubinski	Executive Assistant	512-936-6994	Mkubinski@tidc.texas.gov
Joel Lieurance	Senior Policy Monitor	512-936-7560	Jlieurance@tidc.texas.gov
Wesley Shackelford	Deputy Director/Special Counsel	512-936-6997	Wshackelford@tidc.texas.gov
Debra Stewart	Fiscal Monitor	512-936-7561	Dstewart@tidc.texas.gov
Joan Thomas	Publications Manager/Analyst	512-463-8015	Jthomas@tidc.texas.gov
Sharon Whitfield	Budget & Accounting Analyst	512-936-6998	Swhitfield@tidc.texas.gov

MISSION

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.

ACKNOWLEDGEMENTS

We are grateful for the assistance of Tarrant, Travis, and Lubbock County officials and staff, who allowed us to examine their processes and discussed local methods of appointing counsel with us. We would also like to thank Barbara Murphy, Tarrant County Criminal Court Support Manager, for her assistance with multiple phases of this project. We are especially grateful for UT Law Clerk Jaret Kanarek's help in finalizing the report. The Commission extends special thanks to the **Honorable Sharon Keller**, whose careful attention to detail was crucial to the final editing process.

I. Introduction

The Sixth Amendment to the U.S. Constitution guarantees the accused the right to assistance of counsel in a criminal prosecution, including the right to have counsel appointed if the accused cannot afford to hire counsel.¹ Under Texas law, when a person is arrested, the arrestee must be brought before a magistrate to be notified of the charges, have bond set, and asked whether he or she would like to request counsel.² Once a request for counsel is taken, jurisdictions must determine whether an arrestee has the ability to hire counsel.

Although Texas has enacted a statutory framework for providing court-appointed counsel to indigent defendants, the power to determine how and when to make such appointments is vested in the judges of each county. The local judges, through their indigent defense plans, set financial standards to determine indigence, describe how counsel is selected, and outline payment methods for court-appointed counsel.

The effective implementation of these countywide indigent defense plans requires that local officials establish a way to obtain information about a defendant's financial status and then compare this information with the local standard of indigence.³ Screening—obtaining information about a defendant's financial status for the purpose of determining whether he or she is indigent—is the primary means by which counties carry out this function.

This report briefly outlines: (1) the importance of effective screening, (2) variances in the screening methods between Texas counties, (3) approaches to using the information from screening in determining indigence, and (4) statutory guidance for effective screening methods and indigence determinations.⁴

II. The Importance of Screening

Effective screening methods and the resulting accuracy in indigence determinations ensure compliance with the constitutional right to counsel and may provide cost-savings for counties. Ineffective screening results in inaccurate indigence determinations that may be under- or over-inclusive. If under-inclusive, counties run the risk of infringing on indigent defendants' right to counsel, possibly resulting in uncounseled plea deals. If over-inclusive, defendants with the ability to retain an attorney may be provided with appointed counsel and may further strain overextended county resources.

¹ U.S. CONST. amend. VI; *Alabama v. Shelton*, 535 U.S. 654, 662 (2002); *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

² TEX. CODE CRIM. PROC. ANN. Art. 15.17 (West 2014).

³ TEX. CODE CRIM. PROC. ANN. art. 26.04(a) (West 2014) (requiring county courts, statutory county courts, and district courts to “adopt and publish written countywide procedures for timely and fairly appointing counsel for an indigent defendant. . .”).

⁴ This report is a continuation of the Commission's publications on screening and indigence determinations. Prior publications include: Richard Scotch and Charles McConnel, *Costs & Benefits of an Indigent Defendant Verification Program* (2007), <http://www.tidc.texas.gov/resources/publications/reports/special-reports/indigencedeterminationreport.aspx> and the Commission's supplemental publication (Nov. 2007), <http://tidc.texas.gov/media/27395/supplement-to-verification-study-final.pdf>.

III. Variances in Texas Counties' Screening Methods

Screening processes vary by jurisdiction and may differ between in-custody and bonded defendants. After an arrestee requests counsel from a magistrate, the magistrate must ensure reasonable assistance in completing the financial forms (at the time of the hearing) and must ensure that the request is transmitted to the appointing authority within 24 hours of the request being made.⁵ Once the appointing authority receives the request, counsel must be appointed for those persons determined to be indigent within three working days of the request (one working day for counties with a population of 250,000 or greater).⁶

For arrestees in jail, a county can obtain financial information by interviewing arrestees but is unlikely to obtain actual documentation of an arrestee's financial status. In order to obtain financial information from an arrestee, some counties do not conduct an interview but rely on the arrestee's ability to complete a financial affidavit without assistance.⁷ In other counties, jail staff take on an intake capacity to gather the financial data.

However, these approaches have significant issues. When arrestees are tasked with filling out the financial affidavits, the information gathered is often missing or inaccurate. Arrestees may not understand the questions, could have difficulty reading or writing, or may fail to devote the time necessary to document useful information. Jail staff who are responsible for interviewing defendants have various competing demands and may not possess the time or training to accurately complete the screening process. This may result in incomplete or inaccurate information, or in a failure to transmit forms from the jail to the appointing authority within 24 hours of the request being made. In Lubbock County, for example, where jailors conduct short interviews with defendants regarding financial resources, the quality of information received from defendants varied according to who was conducting the interview.⁸ Most intake forms appeared to be completed as fast as possible, as opposed to accurately and consistently.⁹ In other counties, Texas Indigent Defense Commission staff observed that financial affidavits sit in jail outboxes for several weeks before being sent to the appointing authority.

⁵ TEX. CODE CRIM. PROC. ANN. Art. 15.17(a) (West 2014).

⁶ TEX. CODE CRIM. PROC. ANN. Art. 1.051(c) (West 2014). Specific requirements for bonded defendants are set in TEX. CODE CRIM. PROC. ANN. Art. 1.051(j) and *Rothgery v. Gillespie Cnty.*, 554 U.S. 191 (2008).

⁷ Financial affidavits should use clear, common language, not technical terms that may confuse defendants such as AFDC, social security supplemental income, and house equity.

⁸ Data from recent examination of 93 sample affidavits in Lubbock County. Net income was reported in differing ways. Some applicants appeared to claim all of their salary as net income, while others seemed to take account of expenses. A large majority of forms (57 percent) contained no listed income, assets, or government benefits. Only 3 percent of applicants for appointed counsel claimed to have any assets (all were automobiles), and 33 percent claimed to be employed. Lubbock County secured a 2016 discretionary grant from the Commission to fund an indigent defense coordinator to address this issue and increase the accuracy of arrestees' financial questionnaires.

⁹ The impact of this breadth-over-depth approach is illustrated by the experience in McLennan County, where many defendants complete their affidavits without assistance. The indigent defense coordinator is simply unable to interview all jailed arrestees requesting counsel. Resultantly, according to the findings of a 2014 review of the County's indigent defense screening process, more persons were denied indigence for having incomplete or inaccurate forms than for income exceeding local indigence standards.

Some counties, such as Travis and Tarrant, use dedicated indigent defense screeners who are focused on gathering accurate financial data from arrestees. This allows jail staff to focus on their core responsibilities.

Bell, Coryell, and Tarrant Counties have implemented the streamlined Fair Indigent Defense Online (FIDO) system, a computerized indigent defense process management tool that allows screeners to input income and asset information into the system.¹⁰ The screeners then enter any comments the appointing authority might find useful in making a determination, such as the last time the defendant worked. The system automatically makes a determination whether a defendant qualifies for court-appointed counsel based on the locally developed standards and transmits the request, as needed, to the appointing authority.

In the absence of screeners, a county must have systems in place to ensure reasonable assistance in completing the indigence determination forms, to promptly transmit these forms to the appointing authority, and to keep a record of whether the arrestee has requested counsel. Without each of these components, courts may not be able to rule on all requests for counsel within statutorily required time frames.¹¹

For arrestees who bond out of jail prior to screening and taking of requests for counsel, counties must have a method to promptly take requests and appoint counsel within three working days of the request (one working day for counties with a population of 250,000 or greater).¹² Tarrant County gives bonded arrestees and defendants several “bites at the apple” for requesting counsel. If arrestees bond before a screener is able to complete an intake, they are given instructions by jail staff to return the same or next business day to complete an intake.¹³ When bonded defendants report to be interviewed, they will be interviewed and appointed an attorney, if they qualify. If the defendants do not report, their cases will be set for an initial appearance. At initial appearance dockets, screeners from pre-trial services, court coordinators, or judges may screen and appoint counsel. The flowchart below documents this process.

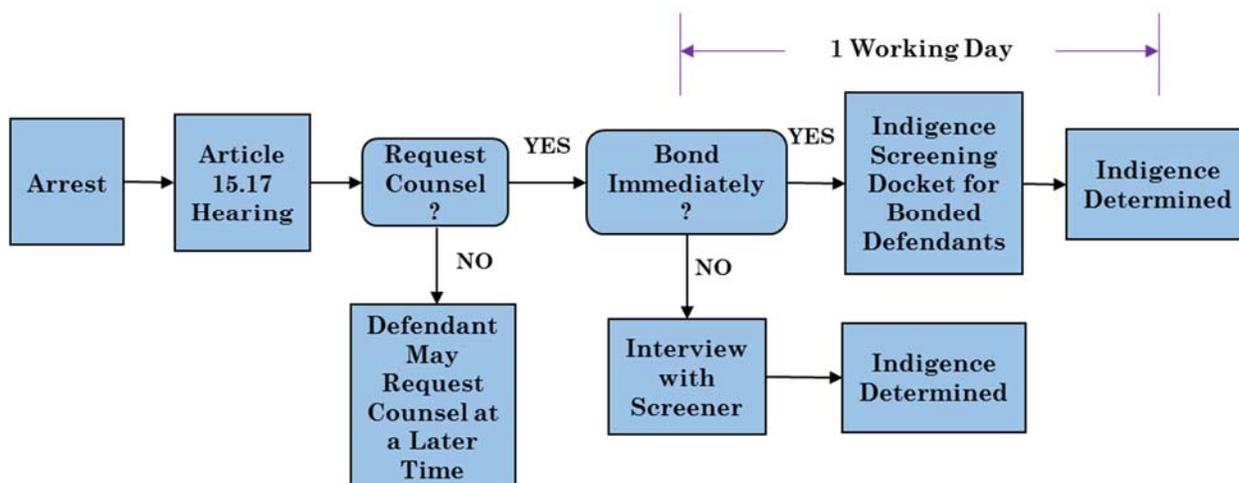
¹⁰ Including employment, bank account, home or land ownership, and car value. Money spent on rent, utilities, food, medical bills, clothing, gas, car payment(s), insurance, and other necessary expense information is also included. FIDO was created with the support of a discretionary grant from the Commission.

¹¹ Additionally, under Article 1.051(f-1) if a defendant requests counsel, the prosecutor may not communicate with the defendant unless the court has deemed the defendant non-indigent and given him a reasonable opportunity to obtain retained counsel. Courts will have great difficulty denying requests about which they are unaware.

¹² TEX. CODE CRIM. PROC. ANN. Art. 1.051(c) (West 2014), TEX. CODE CRIM. PROC. ANN. Art. 1.051(j), and *Rothgery v. Gillespie Cnty.*, 554 U.S. 191 (2008).

¹³ Appendix 1, TARRANT COUNTY NOTICE TO DEFENDANT RELEASED PRIOR TO APPOINTMENT OF LAWYER.

Figure: Procedure for Determining Indigence in Tarrant County



When arrestees are no longer confined, it may be possible for them to provide some form of documentation regarding their financial status. Some counties currently require out-of-custody defendants to bring in forms documenting their income and expenses.¹⁴ While requiring documentation of income and expenses is allowed by law, requirements should be clear, specific, and reasonably attainable.¹⁵ In addition, Article 26.04(l) of the Code of Criminal Procedure requires that the procedures and standards applied to defendants must apply equally to defendants released on bail and those who remain in custody.

IV. Using the Information from Screening in Indigence Determinations

The Texas Code of Criminal Procedure governs the appointment of counsel and provides guidance to counties in developing standards for indigence, while still allowing for local control. In particular, Chapter 26 provides guidance for developing screening processes. Local officials are required to detail the procedures, financial standards, and list of factors to be considered when determining indigence.¹⁶ While jurisdictions have flexibility in developing their local procedures for appointing counsel, procedures must apply to each appointment of counsel made by the judge or the judge’s designee in the county.¹⁷

Article 1.051(b) of the Code of Criminal Procedure defines indigence broadly, providing that indigent “means a person who is not financially able to employ counsel.”¹⁸ Counties have

¹⁴ Examples include rent receipt, taxes, paystub, electric and phone bill.

¹⁵ A trial court may require a defendant to verify his claim of indigence with supporting documentation and may disbelieve an allegation if there is a reasonable, articulable basis for doing so. *Whitehead v. State*, 130 S.W.3d 866, 875-76 (Tex. Crim. App. 2004).

¹⁶ TEX. CODE CRIM. PROC. ANN. Art. 26.04(a), (l), & (m) (West 2014).

¹⁷ TEX. CODE CRIM. PROC. ANN. Art. 26.04(a)(2) (West 2014).

¹⁸ Standard 5-7.1 of the relevant ABA standards states that counsel should be provided to those who are “financially unable to obtain adequate representation without substantial hardship.” *Providing Defense Services*, AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION,

developed various ways of narrowing and specifying the meaning of this broad definition with objective financial standards. In determining indigence, a majority of Texas counties use a multiple of the federal poverty guidelines to create a presumption of eligibility and presume eligibility when an individual receives need-based public benefits or resides in a mental health or correctional facility.¹⁹ The Federal Poverty Guidelines are issued annually by the U.S. Department of Health and Human Services and represent a federal government estimate of the point below which a household of a given size has pre-tax cash income insufficient to meet minimal food and other basic needs.²⁰ Of the 353 county plans using a multiple of the federal poverty guidelines, 125 percent is the most common percentage used (144 plans), followed by 100 percent (130 plans), and 150 percent (55 plans).²¹

A defendant making just above 125 percent of the Federal Poverty Guidelines is eligible for federal assistance to pay for food, heat, and medical care for his children, yet may not qualify for the appointment of counsel in some jurisdictions.²² Tarrant County has taken an innovative approach to this situation by utilizing the MIT Living Wage Calculation as the threshold for determining who qualifies for court-appointed counsel.²³ This measure is intended to estimate “an approximate income needed to meet a family’s basic needs [that] would enable the working poor to achieve financial independence while maintaining housing and food security.”²⁴ The Living Wage Calculator estimates the cost of living in a particular community by compiling geographically specific expenditure data for things like food, child care, health care, housing, and transportation.

http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_blk.html (last visited July 15, 2015). Furthermore, as Justice Goldberg wrote in *Hardy v. U.S.*:

Indigence “must be conceived as a relative concept. An impoverished accused is not necessarily one totally devoid of means.” An accused must be deemed indigent when “at any stage of the proceedings [his] lack of means...substantially inhibits or prevents the proper assertion of a [particular] right or claim of right.” 375 U.S. 277, 289 n.7 (1964)(citation omitted)

¹⁹ There are 370 indigent defense plans across 254 counties in Texas. A total of 353 plans use a percentage of the Federal Poverty Guidelines as the financial standard for determining eligibility. Other financial standards and tests for indigence include whether the accused (1) qualifies for a means-tested public benefit (321 plans), (2) resides in correctional/mental health facility (301 plans), (3) has assets worth less than \$2,500, or \$5,000 if over 60 years old, disabled, reside in institution (68 plans), (4) has an income that is less than their necessary expenses per month (60 plans).

²⁰ *2015 Poverty Guidelines*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://aspe.hhs.gov/poverty/15poverty.cfm> (last visited Mar. 12, 2015).

²¹ The State Bar of Texas’s Standing Committee on Legal Services to the Poor in Criminal Matters recommends using 150% of the poverty guidelines to create a presumption of indigence, an income threshold roughly equivalent to the income cut-offs for programs such as food stamps and civil legal services. *Proposed Commentary to Standard for Determining Financial Eligibility for Appointed Counsel*, STATE BAR OF TEXAS, STANDING COMMITTEE ON LEGAL SERVICES TO THE POOR IN CRIMINAL MATTERS, SUBCOMMITTEE ON INDIGENCE STANDARDS (Oct. 31, 2003).

²² *Gideon at 50: A Three-Part Examination of Indigent Defense in America-Part 2-Redefining Indigence: Financial Eligibility Guidelines for Assigned Counsel*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, 1, 14 (March 2014), <https://www.nacdl.org/gideonat50/> (last visited July 15, 2015).

²³ Appendix 2, TARRANT COUNTY LIVING WAGE DATA SHEET.

²⁴ Amy K. Glasmeier, *Update on 3/24/2014*, LIVING WAGE CALCULATOR, (Mar. 24, 2014), <http://livingwage.mit.edu/articles/1-update-on-3-24-2014>.

V. Statutory and Legal Guidance for Counties in Texas

Article 26.04(m) provides guidance to counties as to what they may consider in determining resources available to a defendant.²⁵ The defendant's income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, and spousal income available to the defendant may all be considered in determining whether a defendant is indigent. While family members' ability to pay for counsel does not factor into the indigence determination, spousal income available to the defendant may be considered.²⁶ Additionally, the defendant's ability to post bail may not be considered, except to the extent that it reflects the defendant's financial circumstances as measured by the above criteria.²⁷

Once the indigence determination is made, it is presumed for the remainder of the proceedings unless a "material change in the defendant's financial circumstances occurs."²⁸ When there is a material change in the defendant's circumstances, the defendant, the defendant's attorney, or the attorney representing the state may move for reconsideration of the determination.²⁹

VI. Recommendations for Effective Screening Methods and Indigence Determinations

While jurisdictions develop their own methods of gathering financial information and setting a standard of indigence, local judges and counties are ultimately tasked with providing counsel to those who are otherwise unable to afford it. An efficient and effective screening process results when jurisdictions invest sufficient resources to gather quality information from each defendant and set a reasonable financial standard for presuming indigence. This promotes equitable treatment of defendants and ensures access to justice and protection of constitutional rights for persons unable to afford counsel.

²⁵ TEX. CODE CRIM. PROC. ANN. Art. 26.04(m) (West 2014).

²⁶ In *Cardona v. Marshall*, the Texas Court of Criminal Appeals stated, "[A] defendant should not be denied appointment of counsel solely because other members of his family have assets and income . . ." 635 S.W.2d 741, 743 (Tex. Crim. App. 1982) (quoting *U.S. v. Rubinson*, 543 F.2d 951, 964 (2d Cir. 1976)).

²⁷ TEX. CODE CRIM. PROC. ANN. Art. 26.04(m) (West 2014).

²⁸ TEX. CODE CRIM. PROC. ANN. Art. 26.04(p) (West 2014).

²⁹ TEX. CODE CRIM. PROC. ANN. Art. 26.04(p) (West 2014).

APPENDIX 1

Revised: 5-22-09

Notice to Defendant Released Prior to Appointment of Lawyer **You must show up in person today or tomorrow**

Because you are being released before your request for appointment of a lawyer has been fully processed, **no attorney** has yet been appointed. You must qualify under the county financial guidelines to obtain a court appointed attorney.

If you believe you are too poor to afford an attorney you must complete a questionnaire about your financial circumstances. You may have to disclose you financial documents (paystub, W-2). The judge will rule on whether or not under the law you qualify for a court-appointed attorney. Defendants with court-appointed counsel may be ordered to repay Tarrant County for legal fees paid to the appointed attorney.

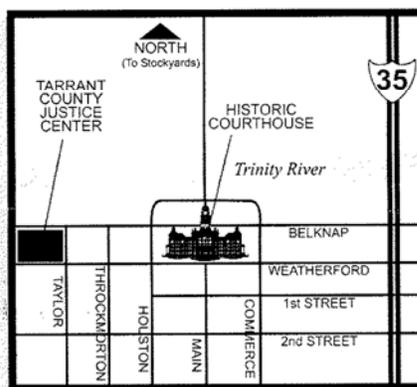
Attorneys are appointed by the end of the business day following your request; therefore you must report in person **today or the next business day (Monday through Friday) between the hours of 9:00 am - 11:30 am and 1:30 pm - 4:00 pm.** If you are released on a Saturday, Sunday, or courthouse holiday, report by the next business day.

Report to the following location only if you are asking for a court appointed attorney. If you are going to hire your own attorney, you DO NOT need to report.

Tarrant County Justice Center
Auxiliary Courtroom, 6th floor
401 West Belknap Street Fort Worth, Texas 76102
Telephone (817) 884-2369 Website: <http://www.tarrantcounty.com>
Hours: 9:00 am - 11:30 am and 1:30 pm - 4:00 pm

Parking – There is paid metered parking around the Justice Center and there are paid parking lots within walking distance. **THERE IS NO FREE PARKING AT THIS LOCATION.**

Directions to Justice Center



APPENDIX 2

MIT Living Wage Calculation for Tarrant County, Texas

Typical Expenses

These figures show the individual expenses used in the living wage estimate for Tarrant County. Values vary by county and take into account family size and composition.

Annual Expenses	1 Adult	1 Adult 1 Child	1 Adult 2 Children	1 Adult 3 Children	2 Adults (1 Working)	2 Adults (1 Working) 1 Child	2 Adults (1 Working) 2 Children	2 Adults (1 Working) 3 Children	2 Adults	2 Adults 1 Child	2 Adults 2 Children	2 Adults 3 Children
Food	\$3,022	\$4,457	\$6,704	\$8,887	\$5,540	\$6,898	\$8,903	\$10,835	\$5,540	\$6,898	\$8,903	\$10,835
Child Care	\$0	\$5,318	\$7,977	\$10,636	\$0	\$0	\$0	\$0	\$0	\$5,318	\$7,977	\$10,636
Medical	\$2,144	\$6,745	\$6,534	\$6,597	\$4,962	\$6,534	\$6,597	\$6,564	\$4,962	\$6,534	\$6,597	\$6,564
Housing	\$7,440	\$11,256	\$11,256	\$15,096	\$8,700	\$11,256	\$11,256	\$15,096	\$8,700	\$11,256	\$11,256	\$15,096
Transportation	\$4,697	\$8,554	\$9,859	\$11,553	\$8,554	\$9,859	\$11,553	\$11,037	\$8,554	\$9,859	\$11,553	\$11,037
Other	\$2,253	\$3,916	\$4,284	\$5,178	\$3,916	\$4,284	\$5,178	\$4,838	\$3,916	\$4,284	\$5,178	\$4,838
Required annual income after taxes	\$19,556	\$40,246	\$46,615	\$57,948	\$31,673	\$38,832	\$43,488	\$48,371	\$31,673	\$44,150	\$51,465	\$59,008
Annual taxes	\$2,253	\$4,636	\$5,370	\$6,676	\$3,649	\$4,473	\$5,010	\$5,572	\$3,649	\$5,086	\$5,929	\$6,798
Required annual income before taxes	\$21,809	\$44,883	\$51,985	\$64,624	\$35,322	\$43,305	\$48,498	\$53,944	\$35,322	\$49,236	\$57,394	\$65,80