

LOCAL RULES TO IMPLEMENT THE TEXAS FAIR DEFENSE ACT

**STANDARDS AND PROCEDURES RELATED
TO APPOINTMENT OF COUNSEL FOR INDIGENT
DEFENDANTS IN THE 21ST AND 335TH DISTRICT COURTS
OF BASTROP COUNTY**

To implement the Texas Fair Defense Act (FDA, Acts 2001, 77th Leg.), the following Local Rules of Administration are adopted under Texas Local Government Code § 74.093, effective September 1, 2005:

Rule 1. Applicability

1.01 The rules will govern criminal procedures in the district courts in Bastrop County, notwithstanding any other local rule to the contrary.

Rule 2. Procedures for Timely Appointment of Counsel

2.01 Prompt Appearance Before a Magistrate.

(a) The magistrates of this county will inform supervisory personnel of all law enforcement agencies operating within the county that each time a person is arrested, Texas law requires the officer making the arrest and any officer who later has custody to ensure that the person is taken before a magistrate without unnecessary delay, and never more than 48 hours after arrest.

(b) The judges of this county will work with the magistrates, prosecutors, and law enforcement agencies in the counties to devise appropriate procedures for meeting the time standards set forth in Rule 2.01(a).

2.02 Responsibilities of the Magistrate.

(a) Whenever an arrested person is first brought before a magistrate, the magistrate shall immediately perform the duties described in Article 15.17 of

the Code of Criminal Procedure, including:

- (1) The magistrate shall specifically inform the person arrested of the person's right to request appointment of counsel if the person cannot afford counsel.
- (2) The magistrate shall specifically ask the person arrested whether the person wants to request appointment of counsel.
- (3) The magistrate shall specifically inform the person of the procedures for requesting appointment of counsel.
- (4) The magistrate shall ensure that reasonable assistance in completing the necessary forms for requesting appointment of counsel is provided to the person at the time of the Article 15.17 hearing.
- (5) The magistrate shall ensure that the above information and assistance are provided in a manner and using terminology and language that the arrested person can understand.
- (6) If the arrested person does not speak and understand the English language or is deaf, the magistrate shall ensure that the information and assistance are provided with the assistance of an interpreter consistent with Articles 38.30 and 38.31 of the Code of Criminal Procedure.
- (7) If a magistrate has cause to believe that a person is not mentally competent to decide whether to request counsel, the magistrate will enter a request for counsel on the person's behalf.

(b) In each case in which an arrested person is taken before a magistrate for an Article 15.17 hearing, the magistrate will make an electronic or written record documenting:

- (1) that the magistrate informed the person of the person's right to request appointment of counsel;

(2) that the magistrate asked the person whether the person wanted to request appointment of counsel; and

(3) whether the person requested appointment of counsel.

(c) The record required under Rule 2.02 may be combined on the same form used to record the arrested person's request for appointment of counsel and to transmit that request to the person making the appointment.

(d) The records required under this Rule shall be maintained for the same period required for all official records of criminal court proceedings.

2.03 Transmittal of Request for Appointed Counsel.

If the person arrested requests appointment of counsel and has completed the necessary forms, the magistrate shall transmit or cause to be transmitted to the appointing judge or person(s) designated by the judges to appoint counsel the forms requesting appointment of counsel. The forms requesting appointment of counsel shall be transmitted without unnecessary delay and so that the person making the appointment receives the forms no later than 24 hours after the request is made.

2.04 Prompt Appointment of Counsel.

Counsel shall be appointed in the manner specified in Rule 4 below, as soon as possible, but not later than the end of the third working day after the date on which the appointing judge or person(s) designated by the judges to appoint counsel receives the defendant's request for counsel. "Working day" means Monday through Friday, except for official state holidays.

Rule 3. Procedures and Financial Standards for Determining Whether a Defendant is Indigent

3.01 Definitions. As used in this rule:

(a) "Net household income" means all income of the defendant and spousal income actually available to the defendant. Such income shall include

take-home wages and salary (gross income earned minus those deductions required by law or as a condition of employment); net self employment income (gross income minus business expenses, and those deductions required by law or as a condition of operating the business); regular payments from a governmental income maintenance program, alimony, child support, public or private pensions, or annuities; and income from dividends, interest, rents, royalties, or periodic receipts from estates or trusts. Seasonal or temporary income shall be considered on an annualized basis, averaged together with periods in which the defendant has no income or lesser income.

(b) “Non-exempt assets and property” means cash in hand, stocks and bonds, accounts at financial institutions, and equity in real or personal property that can be readily converted to cash, other than assets and property exempt from attachment under state law.

(c) “Household” means all individuals who are actually dependent on the defendant for financial support.

(d) “The cost of obtaining competent private legal representation” includes the reasonable cost of support services such as investigators and expert witnesses as necessary and appropriate given the nature of the case.

3.02 Financial Standards for Determining Indigence.

The financial standards set forth below shall be used to determine whether a defendant is indigent and shall be applied equally to each defendant in the county.

(a) A defendant is considered indigent if:

(1) The defendant’s net household income does not exceed 125% of the Poverty Guidelines as established and revised annually by the United States Department of Health and Human Services and published in the Federal Register; and

(2) The value of the non-exempt assets and property owned by the defendant:

(i) does not exceed \$2,500.00;

(ii) does not exceed \$5,000.00 in the case of a defendant whose household includes a person who is age 60 or over, disabled, or institutionalized; or

(iii) does not exceed double the estimated cost of obtaining competent private legal representation on the offense(s) with which the defendant is charged.

(b) A defendant is considered indigent if, at the time of requesting appointed counsel, the defendant or the defendant's dependents have been determined to be eligible to receive food stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, or public housing.

(c) A defendant is considered indigent if the defendant:

(1) Is currently serving a sentence in a correctional institution, is currently held in custody, is currently residing in a public mental health facility, or is the subject of a proceeding in which admission or commitment to such a mental health facility is sought; and

(2) Has no non-exempt assets or property in excess of the amounts specified in Rule 3.02(a)(2).

(d) A defendant who does not meet any of the financial standards above shall nevertheless be determined indigent if the defendant is otherwise unable to retain private counsel without substantial hardship to the defendant or the defendant's dependents, taking into account the nature of the criminal charge(s), the anticipated complexity of the defense, the estimated cost of obtaining competent private legal representation for the matter charged, and the amount needed for the support of the defendant and the defendant's dependents.

3.03 *Factors Not to be Considered.*

(a) A defendant's posting of bail or ability to post bail may not be considered in determining whether the defendant is indigent. Even when a defendant has posted bail, the defendant's financial circumstances are measured by the financial standards stated in this rule.

(b) The resources available to friends or relatives of the defendant may not be considered in determining whether the defendant is indigent. Only the defendant's financial circumstances as measured by the financial standards stated in this rule shall be used as the basis for determining indigence.

3.04 *Procedures for Determining Indigence.*

(a) As soon as possible following arrest, and in any event not later than the Article 15.17 hearing, [the person or agency designated in this rule by the judges] shall provide each arrested person who wants to request appointment of counsel with a form approved by the judges on which the arrested person will provide under oath the necessary information concerning the person's financial resources and will indicate that the person requests appointment of counsel. The magistrate shall provide the arrested person reasonable assistance in completing the form.

(b) The form requesting appointment of counsel and containing the information concerning the arrested person's financial resources will be transmitted to the appointing judge or person(s) designated by the judges to appoint counsel in accordance with Rules 2.03 and 4.06.

(c) The appointing judge or person(s) designated by the judges to appoint counsel will determine whether the person meets the financial standards for indigence in Rule 3.02. The determination will be recorded on the form requesting appointment of counsel and the form will be filed with the other orders in the case.

(d) The arrested person may be required by the magistrate, the appointing judge, or the judge presiding over the case to respond to examination regarding the person's financial resources.

(e) 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 indigence or to impeach the direct testimony of the defendant regarding the defendant's indigence.

(f) A defendant determined to be indigent is presumed to remain indigent for the remainder of the case unless a material change in the defendant's financial circumstances occurs.

(g) A defendant's status as indigent or not indigent may be reviewed in a formal hearing at any stage of a court proceeding based on evidence of a material change in the defendant's financial circumstances. A defendant's status as indigent or not indigent also may be reviewed in a formal hearing at any stage of a court proceeding based on additional information regarding financial circumstances, subject to the presumption. If a defendant previously determined to be indigent subsequently is determined not to be indigent, the attorney shall be compensated by the county in accordance with these Rules for time reasonably expended on the case.

3.05 Payment by Defendant.

A court that finds that a criminal defendant has financial resources to offset, in part or in whole, the costs of legal services provided under these Rules may order the defendant to pay the county that portion of the costs of legal services provided that it finds on the record that the defendant is able to pay.

Rule 4. Selection and Appointment of Counsel

4.01 Method of Appointment.

Attorneys shall be appointed to represent indigent defendants using a "Term Assignment Method" or an "Individual Case Appointment Method" as further described in this rule.

4.02 *Term Assignment Method.*

All attorneys who desire to be appointed to represent criminal defendants must apply to the judges of the district courts for consideration to be listed as a Term Assignment Attorney. The number of names to be maintained on the Term Assignment Attorney list will be determined by the district judges based on the need for appointed counsel. A "Term Assignment Attorney" is a private attorney and/or attorneys, compensated with public funds in an amount to be set by the district judges (such amount to be a flat fee for a specified period of time), assigned to provide legal representation and services to all indigent defendants who appear before a district court, except those charged with a capital offense, during a specified period of time.

4.03 *Individual Case Appointment Method.*

A private attorney, compensated with public funds, may be appointed to provide legal representation and services to an individual indigent defendant from a list of attorneys to be maintained by the district judges.

4.04 *Attorney Qualifications.*

Attorneys may apply to be placed on the list of Term Assignment Attorneys and/or the Individual Case Appointment Attorney list. Since the judges are thoroughly familiar with the attorneys currently providing legal services for indigent defendants, those attorneys are deemed to have met the qualifications.

(a) To be eligible to be placed on the list of Term Assignment Attorneys and/or the Individual Case Appointed Attorney list attorneys must have met the following minimum qualifications:

- (1) Currently Licensed and in good standing with the State Bar of Texas;
- (2) Practiced in the area of criminal law for at least three years, and in the Bastrop County District Courts for at least one year;
- (3) Exhibited proficiency and commitment to providing quality representation to criminal defendants;

(4) Exhibited professionalism and reliability when providing representation to criminal defendants;

(5) Maintain an average of 10 hours a year of continuing legal education courses relating to criminal law as recognized by the State Bar of Texas; and

(6) Have tried to verdict at least five criminal jury trials as lead counsel or as second chair counsel.

(b) To be eligible to be appointed to an appeal of a case, an attorney must:

(1) Have met the qualifications set forth in paragraphs (1) through (5) of the requirements for placement on the Term Assignment and Individual Case Appointment list; and

(2) Have met at least one of the following criteria:

(i) be currently board certified in criminal law by the Texas Board of Legal Specialization;

(ii) have personally authored and filed at least 2 criminal appellate briefs or post-conviction writs of *habeas corpus*.

4.05 *Removal of Attorneys by the Judges.*

An attorney may be removed by the district judges whenever the judges determine that the attorney no longer meets the objective qualifications for appointment or is not fully competent to adequately handle the cases assigned.

4.06 *Assignment of Attorneys.*

The following method shall be used to assign an attorney to represent individual defendants:

(a) At any given time, one of the district judges or their designee will appoint counsel for eligible defendants.

(b) The appointing judge or designee will:

- (1) receive all requests for appointment of counsel transmitted by the magistrate as provided in Rule 2;
- (2) determine whether each defendant requesting appointed counsel is indigent, as provided in Rule 3;
- (3) select and appoint the appropriate counsel to represent each indigent defendant as provided in these Rules; and
- (4) cause all interested parties to be notified of the appointment as provided in Rule 6.

(c) Each attorney appointed under these Rules to represent the defendant in the trial court is appointed to represent the defendant through trial and post-trial proceedings in the trial court.

(d) At the conclusion of all proceedings in the trial court, including post-trial motions, if an indigent defendant wishes to file an appeal, the appointing judge or person(s) designated by the judges to appoint counsel will appoint the lawyer whose name appears next in order on the Appellate List.

Rule 5. Selection and Appointment of Counsel in Death Penalty Cases

5.01 Whenever a capital felony case is filed, the presiding judge in the district court in which the case is filed shall appoint two attorneys at the time the initial appointment is made, unless and until the state gives notice in writing that the state will not seek the death penalty.

5.02 Qualifications of Lead Counsel.

To be assigned as lead counsel in a death penalty case an attorney must:

(a) Be on the list of attorneys approved by the local selection committee of the administrative judicial region for appointment in death penalty cases as provided in Article 26.052 of the Code of Criminal Procedure;

(b) Have tried to verdict at least 15 felony jury trials as lead counsel;

(c) Have tried to verdict two death penalty cases as first or second chair defense counsel.

5.03 Qualifications of Second Chair Counsel.

To be assigned as second chair counsel in a death penalty case an attorney must be on the list of attorneys approved by the local selection committee of the administrative judicial region for appointment in death penalty cases as provided in Article 26.052 of the Code of Criminal Procedure.

Rule 6. Notice of Appointment, Determination, and Contact with the Defendant

6.01 Notice of Determination that the Defendant is Not Indigent.

If the person making the appointment determines that a person who requests appointment of counsel is not indigent under the standards and procedures described in Rule 3, he or she will enter that finding on the person's counsel request form, cause it to be returned to the person, and cause a copy to be filed with the other orders in the case.

6.02 Notice of Determination that the Defendant is Indigent and Appointment of Counsel.

If the person making the appointment finds that a person who requests counsel is indigent, he or she will cause all information in the notice of appointment to be issued to the appointed counsel and to the indigent person, and to be filed with the orders in the case. Appointed counsel will be notified by at least one of the following methods: telephone, facsimile, electronic mail, in person, or other immediate means of communication.

Rule 7. Replacement of Appointed Counsel

7.01 Attorney Request.

A lawyer may be relieved from an appointment upon satisfying the judge that the lawyer has good cause for being relieved and that the client will not be prejudiced.

7.02 Judicial Determination.

The judge presiding over a criminal case may replace appointed counsel after entering written findings in the record showing good cause for the replacement and no prejudice to the defendant, including, without limitation:

(a) current information about the defendant and charges indicates that counsel of different qualifications is appropriate for the defendant; or

(b) replacement of appointed counsel in a death penalty case is required under Article 26.052(e) of the Code of Criminal Procedure.

7.03 Defendant Request.

The judge presiding over the trial court proceedings in a criminal case will replace appointed counsel at the defendant's request if:

(a) the defendant requests an attorney other than trial defense counsel for appeal or post-conviction *habeas corpus* proceedings; or

(b) the defendant shows good cause for replacing appointed counsel, including counsel's persistent or prolonged failure to communicate with the defendant.

7.04 Appointing Replacement Counsel.

Whenever appointed counsel is replaced under this Rule, replacement counsel immediately shall be selected and appointed in accordance with these rules.

Rule 8. Attorney Fee Schedule and Compensation of Term Assignment Attorneys

8.01 Fee Schedule.

The county will pay term assignment attorneys according to the fee schedule approved by the judges as reflected in an order to be effective on January 1st of each year.

Rule 9. Attorney Fee Schedule and Compensation of Individual Case Appointed Attorneys

9.01 Fee Schedule.

The county will pay appointed counsel for all time reasonably necessary for adequate representation of the defendant, as approved by a judge, according to the following fee schedule adopted as provided under Article 26.05(b) of the Code of Criminal Procedure:

A minimum of \$75 an hour and a maximum of \$150 an hour, or a total fixed fee as set forth below:

- (1) Case which results in a plea of guilty: \$400;
- (2) Case which results in a trial: \$500 a day, plus up to \$1,000 pretrial.

9.02 Judicial Determination of Attorney Compensation.

The judge presiding over the case for which the appointed attorney seeks compensation will use the following procedures to review and approve the appropriate compensation:

- (a) The appointed counsel must submit to the presiding judge a form approved by the judges for itemizing the services performed.
- (b) The presiding judge hearing a motion under this Rule will either approve the amount requested or enter written findings stating the amount of payment that the judge approves and each reason for approving an amount different from the requested amount.

(c) An attorney whose request for payment is disapproved may appeal the disapproval by filing a motion with the presiding judge of the administrative judicial region, as provided under Article 26.05(c) of the Code of Criminal Procedure.

(d) Counsel appointed in a non-capital case shall be reimbursed for reasonable and necessary expenses, including expenses for investigation and for mental health and other experts. Expenses incurred with and without prior court approval shall be reimbursed, according to the procedures set forth below. When possible, prior court approval should be obtained before incurring expenses for investigation and for mental health and other experts.

(1) *Procedure With Prior Court Approval*: Appointed counsel may file with the trial court a pre-trial *ex parte* confidential request for advance payment of investigative and expert expenses. The request for expenses must state, as applicable:

(i) the type of investigation to be conducted or the type of expert to be retained;

(ii) specific facts that suggest the investigation will result in admissible evidence or that the services of an expert are reasonably necessary to assist in the preparation of a potential defense; and

(iii) an itemized list of anticipated expenses for each investigation or each expert.

The court shall grant the request for advance payment of expenses in whole or in part if the request is reasonable. If the court denies in whole or in part the request for expenses, the court shall:

(i) state the reasons for the denial in writing;

(ii) attach the denial to the confidential request; and

(iii) submit the request and denial as a sealed exhibit to the record.

(2) *Procedure Without Prior Court Approval*: Appointed counsel may incur investigative or expert expenses without prior approval of the court. On presentation of a claim for reimbursement, the court shall order reimbursement of counsel for the expenses, if the expenses are reasonably necessary and reasonably incurred. Unreasonable or unnecessary expenses will not be approved.

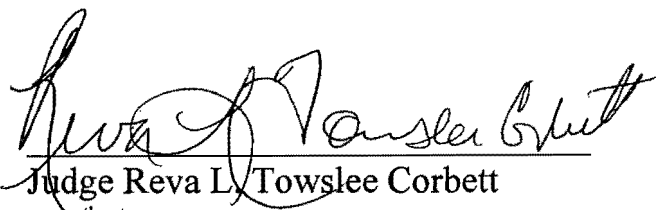
Articles 26.05(d), 26.052(f), (g) & (h), Code of Criminal Procedure.

This plan shall remain in effect until further order of the district judges.

SIGNED this 7 day of Dec, 2005.



Judge Terry L. Fleniken
21st Judicial District Judge



Judge Reva L. Towslee Corbett
335th Judicial District Judge