



TEXAS JUDICIAL COUNCIL

2022

CIVIL JUSTICE COMMITTEE

REPORT
AND
RECOMMENDATIONS



Background

In August 2021, the Texas Judicial Council charged the Civil Justice Committee with:

- Monitoring remote proceedings within the state judiciary and recommending any necessary reforms (joint charge with the Civil Justice Committee).
- Monitoring the Texas Eviction Diversion Program and recommending any necessary reforms.
- Considering Best Practices for the Judiciary and compile lessons learned from the COVID-19 Pandemic.
- Continuing to study the landscape of the Texas Civil Justice System and recommending any necessary reforms to improve access to justice in Texas Courts.

Members of the Committee are:

Honorable Emily Miskel, Chair

Ms. Zina Bash

Mr. Kevin Bryant

Ms. Jenn Caughey

Honorable Jon Gimble

Honorable Claudia Laird

Representative Jeff Leach

Honorable Valencia Nash

Ms. Rachel Racz

Honorable Ken Wise

Senator Judith Zaffirini

The Texas Judicial Council's Civil Justice Committee met on March 30, 2022, April 15, 2022, August 30, 2022, and September 20, 2022.



Recommendations in Brief

Remote Proceedings

Recommendation: The Legislature, where appropriate, should remove statutory barriers to allow remote proceedings to continue to increase access to justice and enhance court efficiency.

Texas Eviction Diversion Program

Recommendation: The Judicial Council should continue to monitor the Texas Eviction Diversion Program and the availability of rental assistance in the state.

Improving Access to Justice in Texas Courts

Recommendation 1: The Legislature should establish a Family Protection Legal Representation Program within the Texas Indigent Defense Commission (TIDC).

1A) For TIDC to officially take on family protection work, its enabling statutes need to be amended to include the work.

1B) TIDC should continue with data collection and if enabling statutes are amended, add functions for:

- i.) Funding: grant management authority
- ii.) Oversight: policy and fiscal monitoring, including collecting and monitoring attorney reporting
- iii.) Standards setting authority

1C) Staff Title IV-E administration with TIDC. Work with DFPS to enhance IV-E draw-down of these federal funds.

1D) Provide TIDC with funding to support grants for counties and staff to support a Family Protection Legal Representation Program.

Recommendation 2: The Texas Judicial Council should continue to work with the Office of Court Administration to study the best way to collect data related to the use of language assistance services within Texas courts.

Recommendation 3: The Texas Judicial Council should continue to monitor court case backlogs and work

with the Office of Court Administration to provide resources and training to address backlogs.

Recommendation 4: The Texas Judicial Council should continue to work with the Texas Children's Commission on the Commission's legislative recommendations

Business Courts

Recommendation 1: The Supreme Court should create by rule a pilot business court for complex litigation.¹

1A) The Supreme Court should establish a pilot business court program to permit consideration of implementation details prior to statewide implementation.

1B) This pilot business court should be a part of or parallel to the existing court structure, and the Supreme Court should establish qualifications to determine who can be designated as a business court judge.

1C) The business court should hold proceedings regionally to ensure that parties throughout the state with complex litigation have access to the court.

1D) Parties to complex litigation should be given the opportunity to opt-in to the business court.

1E) The business court should be provided sufficient resources to handle the complex litigation, including technology and staff attorneys.

Juvenile NICS Reporting

Recommendation: The Legislature should clarify Juvenile NICS reporting requirements.

¹ Civil Justice Committee member Senator Judith Zaffirini enters a vote of "No" on this recommendation.

Recommendations in Detail

Remote Proceedings

Background

Courts are institutionally cautious creatures, unhurried in introducing new processes and technologies that may disrupt the business of courts.² By the end of 2019, court futurists envisioned a justice system that contained online courts while conceding that it might take years for widespread use of such courts to become a reality.³ And prior to 2020, many – if not most – court users needed to enter the courthouse to carry out court business. The arrival of the COVID-19 pandemic abruptly changed all of this. No longer would court users merely be observers of remote proceedings; the pandemic would thrust court users into remote participation in court proceedings. The future became the present far ahead of schedule.

The pandemic required judges, court administrators, judicial branch agencies, and court users to think of courts not just as locations, but as services⁴ – services that could be, in the digital era, accessed inside of and away from the courthouse. In the pandemic, court services innovation arose out of necessity. In March 2020, less than one week after Texas Governor Greg Abbott issued a disaster declaration and a public health emergency declaration for Texas, District Judge Emily Miskel held the first fully remote hearing in Texas. Only a week later Judge Miskel conducted the first fully remote contested bench trial in Texas. Then, in early April 2020, the Texas Supreme Court held the first fully remote oral argument of any nine-member court in the country. On August 11, 2020, Justice Court Judge Nicholas Chu made history when he conducted the first fully remote criminal jury trial in the nation. And later that same month, District Judge

² See TEX. R. CIV. P. 18c. Rule 18c, adopted in 1990, authorizes a trial court to permit the broadcasting, televising, recording, or photographing of courtroom proceedings in certain circumstances. Television, as live broadcast media, had existed for approximately 50 years before Rule 18c was adopted. See also *Interim Procedures Governing Video Recording and Webcasting of Proceedings Before the Supreme Court of Texas*, Misc. Docket No. 07-9033 (Feb. 27, 2007), available at https://www.txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/07/07903300.pdf. Finally, see Lysette Romero Córdova, *Will SCOTUS Continue to Livestream Oral Arguments and are Cameras Next? Let's Hope So*. (August 24, 2021), available at: https://www.americanbar.org/groups/judicial/publications/appellate_issues/2021/summer/will-scotus-continue-to-livestream-oral-arguments-and-are-cameras-next/ (discussing the adoption of livestream audio, but not video, of oral arguments present to the Supreme Court of the United States).

³ Richard Susskind, *The Future of Courts*, THE PRACTICE, July–Aug. 2020, <https://thepractice.law.harvard.edu/article/the-future-of-courts/>.

⁴ Hon. Samuel A. Thumma, *A Virtual Step Forward: Remote Court Hearings in Response to the COVID-19 Pandemic, State of Our State 2021*, ARIZ. ST. UNIV. MORRISON INST. FOR PUB. POLY, <https://morrisoninstitute.asu.edu/sites/default/files/thumma-sparked-2021.pdf>.

Antonia Arteaga conducted the first fully remote jury selection in a civil case in Texas.⁵

Texas courts swiftly adapted to remote proceedings, and the use of remote proceedings continues to grow. Through the end of August 2022, 2,438 Texas judges have held 2,573,608 remote hearings, and a staggering 9,719,672 participants have been involved in a remote hearing since March 2020. Texas judges report that, although remote hearings tend to take longer than in-person hearings, remote hearings expand access to justice to many litigants. Court participant rates are up, schedules are less disrupted, travel is reduced, and default judgments are down. Remote participation also appears to benefit witnesses, victims, and others who fear for their safety when appearing in court, those who live in more remote locations, those with transportation constraints, and those with family care responsibilities. And public trust and confidence in the court are improved in part because court users perceive an improved court experience.⁶ Still, challenges remain. The “digital divide” hampers remote hearing participation for certain court users; technology challenges, whether at the court or with the user, slow down proceedings; not all court users are technologically savvy, which poses problems when trying to submit materials to the court during the proceeding; and remote proceedings need to become more efficient to preserve judicial officer time.⁷ Nonetheless, the future of remote proceedings is here. The Legislature should remove barriers to remote proceedings and enact necessary changes to ensure remote and hybrid hearings can continue in Texas.

Recommendations

Recommendation: The Legislature, where appropriate, should remove statutory barriers to allow remote proceedings to continue to increase access to justice and enhance court efficiency.

⁵ TEX. OFFICE OF CT. ADMIN., JURY TRIALS DURING THE PANDEMIC: OBSERVATIONS AND RECOMMENDATIONS 5, 7, 12 (Aug. 28, 2020), <https://www.txcourts.gov/media/1449660/jury-report-to-scotx-final.pdf>.

⁶ NAT’L CNT. FOR ST. CTS, THE USE OF REMOTE HEARINGS IN TEXAS STATE COURTS: THE IMPACT ON JUDICIAL WORKLOAD (FINAL REPORT) ii-iii, 15-16 (Dec. 2021), https://www.ncsc.org/_media/ncsc/files/pdf/newsroom/TX-Remote-Hearing-Assessment-Report.pdf.

⁷ *Id.* at 12.

Texas Eviction Diversion Program

Background

The Supreme Court of Texas established the Texas Eviction Diversion Program (TEDP) through the Court's Twenty-Seventh Emergency Order Regarding the COVID-19 State of Disaster (which has been renewed through various subsequent orders). With funding allocated by Governor Greg Abbott through the Texas Department of Housing and Community Affairs (TDHCA) and later through Emergency Rental Assistance Program Funds from the U.S. Department of the Treasury, the program seeks to reduce the number of evictions by enabling landlords and tenants to agree upon a resolution to non-payment of rent issues. If certain program eligibility requirements are met, past due rent obligations and utility delinquencies may be eligible to be covered in full and the eviction case dismissed. Since its inception, more than 21,000 households have received nearly \$207 million dollars with the average assistance amount per household being \$9,562 dollars. In November 2021, TDHCA closed its rental assistance portal due to exhausting all rental assistance resources at the state level. Local rental assistance funds as well as reallocated funds from the U.S. Department of Treasury continue to be available, but the funds remaining in these resources are uncertain.

Recommendations

Recommendation: The Judicial Council should continue to monitor the Texas Eviction Diversion Program and the availability of rental assistance in the state.



Improving Access to Justice in Texas Courts

I. Court-Ordered Legal Representation in Child Protection Cases

Background

Every year, the Texas child protection system affects tens of thousands of families. The consequences in these cases can be severe, including permanent family separation. All children and many parents should receive court-appointed counsel.⁸ Funding, administration, and oversight of appointed counsel in CPS cases falls almost entirely upon Texas's 254 counties. Consequently, legal representation of parents and children in child protection cases varies widely across the State.

Prior to the 86th Texas Legislature's passage of SB 560, there was no statewide data collection for court-appointed legal representation of families. Now, for the first time, Texas counties must report information about their court-appointment systems in child protection cases.⁹ The Legislature directed the Texas Judicial Council (TJC) to gather this data, and the Council then tasked the Texas Indigent Defense Commission (TIDC) with data collection and reporting. Under Senate Bill 560, counties are required to report expenditures and local judicial processes for court-ordered legal representation of children and parents. Specifically, county auditors and treasurers must annually submit expenditures and appointment data, and local administrative district judges must biennially report judicial processes for court-ordered legal representation of families in child protection cases. TIDC collects indigent defense data from all 254 counties and from attorneys paid for court appointments. These data help TIDC track legal requirements for appointment of counsel and ensure accountability in public spending. Because TIDC's data collection infrastructure is well-suited to collect family protection data, the Committee believes TIDC should continue with family protection data collection, standards setting, and oversight, and that TIDC's enabling statutes be amended to allow it to do so."

This first round of data reporting shows substantial variation throughout the state in spending on court-ordered legal representation. Counties report over \$66.2 million dollars in total spending on court-appointed legal representation of children and parents in FY21, and over 230 counties are not accessing

⁸ See TEX. FAM. CODE §§ 107.012, 107.013, 161.003, and 264.203.

⁹ TEX. GOV'T CODE § 71.0355.

their federal Title IV-E reimbursement funds to support CPS legal representation – meaning in most counties legal representation for children and parents is paid for by county tax dollars.

The data also reveal disparities in CPS attorney availability and in local practice in CPS attorney appointment system oversight and administration. Nearly 130 counties report 10 or fewer attorneys on their court-appointment list for child protection cases. Only 48 counties report 20 or more attorneys for CPS cases. Data show 36% of reporting counties do not require a formal application for an attorney to be added to the court-appointed list for child protection cases, and nearly half of reporting counties do not have a procedure to involuntarily remove attorneys from the list. A significant number of counties make various appointments past the timeframe set by statute, and few counties report caseload caps for CPS cases.

Finally, reported data show wide variation in compensation amount and structure for attorneys appointed to represent parents or children. Some Texas counties pay attorneys flat fees, some capped rates, and some hourly rates. Some counties use a combination of these payment types. And because there is no statewide standard for indigency for a parent to receive court-appointed counsel, data also show inconsistency throughout Texas in methods for determining the indigency of parents.

Recommendations

Recommendation 1: The Legislature should establish a Family Protection Legal Representation Program within the Texas Indigent Defense Commission.

1A) For TIDC to officially take on family protection work, its enabling statutes need to be amended to include the work.

1B) TIDC should continue with data collection and if enabling statutes are amended, add functions for:

- i.) Funding: grant management authority
- ii.) Oversight: policy and fiscal monitoring, including collecting and monitoring attorney reporting
- iii.) Standards setting authority

1C) Staff Title IV-E administration with TIDC. Work with DFPS to enhance enhance the draw-down of these federal funds.

1D) Provide TIDC with funding to support grants for counties and staff to support a Family Protection Legal Representation Program.

II. Language Services in Courts

Background

Individuals who do not speak English as their primary language and who have limited ability to read, speak, write, or understand English can be limited English proficient, or “LEP.” It is important to note that someone can be English proficient in certain contexts but not in others. For example, they may know enough English to accomplish basic tasks like small talk and grocery shopping, but not enough to understand what the teacher is saying at a parent conference or participate in a court proceeding. The English proficiency needed in legal settings is much higher than what most people need in typical daily encounters, which is why legal information and court proceedings can be difficult even for many native English speakers to understand, and why people who know some English often need language assistance services in court. Language assistance services (LAS) are an umbrella term encompassing the idea that people with LEP are entitled to meaningful access to programs and services. It implies the existence of laws and policies and the availability of services and supports to ensure that access is not significantly restricted, delayed, or inferior as compared to English-proficient individuals. Spoken language interpretation services, for example, are a common LAS provided to LEP court users.

Although various federal and state law requires or authorizes LAS for LEP court users, LAS data are not collected and reported by courts and/or clerks to OCA for publication. Without clear data on the provision of LAS to LEP court users, policymakers cannot empirically analyze LAS in Texas courts, nor spot and remedy deficiencies in court LAS.

Recommendations

Recommendation 2: The Texas Judicial Council should continue to work with the Office of Court Administration to study the best way to collect data related to the use of language assistance services within Texas courts.

III. Court Backlog

Background

Generally speaking, court backlogs occur when cases filed and added to a docket outpace a court's ability to dispose of cases from the docket. When a court disposes of the same number of cases as were added to its docket in a given timeframe, the court's "clearance rate" is 100%. Courts can suffer from case backlogs for a variety of reasons, and the challenges posed by court backlogs pre-date the pandemic, but COVID-19-fueled constraints on court operations throttled both court case filings and case disposal.

Prior to the pandemic, the number of pending cases in Texas district courts increased an average of 5% per year between 2015 and 2019. From March 2020 through the end of July 2022, the number of active pending civil cases grew by 9% and the number of active pending family cases by 16%. During this period, clearance rates (civil, family, juvenile, and criminal combined) were approximately 90%, with civil case clearance rates at 91% and family case clearance rates at 90%. From March 2022 to the end of July 2022, however, when courts started reopening at a large scale to in-person proceedings, the clearance rates jumped to 102%, with the civil case clearance rate at 108% and the family case clearance rate at 98%. The number of trials held in district courts in civil cases in FY 2022 through July 2022 increased by 1% from the number held in FY 2020; the number of trials held in family cases increased by 7%.

In county courts statewide, pre-pandemic the number of pending cases in the county courts had grown due to significant increases in the number of civil cases filed in 2018 & 2019. While there was a large decrease in filings during the pandemic, dispositions exceeded filings in 2020. From March 2020 through the end of June, the number of active pending civil cases declined by 9% while the number of active pending family cases increased by 6%. During this period, clearance rates were 102% for civil cases and 91% for family cases. From March 2022, when the courts started reopening at a large scale to in person proceedings, the clearance rate for civil cases was 107% through the end of June 2022, and the clearance rate for family cases was 97%. Civil case filings have dropped by 9% since FY 2020 and family case filings by 8%. The number of trials held in civil cases in FY 2022 through June 2022 was close to the number held in FY 2020, and the number of trials held in family cases increased by 1%.

Despite the uptick in clearance rates in county and district courts, case backlogs remain across the

state. The Texas Judiciary has moved to address these backlogs from multiple directions. Following the Third Called Special Session of the 87th Legislature, the Texas Judiciary was appropriated Federal American Rescue Plan Act (ARPA) funds to assist courts with the court backlog caused by the COVID-19 pandemic. Part of this funding was used by the Office of Court Administration (OCA) to host a “backlog reduction summit” on September 14 and 15, 2022, on effective case management to help Texas counties address case backlogs. The summit, presented by the National Center for State Courts, welcomed local government officials from across the state to learn best practices on managing court dockets with an eye toward backlog reduction. A portion of ARPA funds is also being used to help counties with COVID-19 court backlogs, with a focus on reducing felony case backlogs and family violence case backlogs. In addition to financial resources, OCA is also working to make available caseload management training for jurisdictions across the state. OCA has also developed a best practices document for counties to use in addressing case backlogs.

Recommendations

Recommendation 3: The Texas Judicial Council should continue to monitor court case backlogs and work with the Office of Court Administration to provide resources and training to address backlogs.

IV. Texas Children’s Commission Legislative Recommendations

Background

The Supreme Court of Texas Children’s Commission is a statewide, multi-disciplinary, collaborative body that includes high-level membership from the executive, judicial, and legislative branches of Texas government, along with child welfare stakeholders in the public and private sectors. The Supreme Court established the Children’s Commission in 2007 with the overall goal of strengthening the child welfare system by increasing public awareness about the challenges facing children, youth, and families through encouraging judicial leadership, supporting best judicial and legal practices through training and education, and informing policy and practice affecting child welfare in Texas.

The Children’s Commission is a leading collaborative partner in almost every aspect of child welfare system improvement in Texas and is recognized nationally as a leader in establishing long-standing and

meaningful relationships with child welfare stakeholders to create a child welfare system that better supports and serves children, youth, and families.

Recommendations

Recommendation 4: The Texas Judicial Council should continue to work with the Texas Children’s Commission on the Commission’s legislative recommendations.

Business Courts

Background

The Judicial Council has advocated in the past for the Texas Supreme Court to create pilot business courts for complex litigation.¹⁰ Many businesses have indicated that tying their resources up in litigation for years, at a significant cost of resources and increased uncertainty, is untenable. This problem has led businesses to seek other forums to resolve disputes, including arbitration and other dispute resolution mechanisms. Many states have attempted to rectify this problem by providing specialized business courts. These courts have been praised by businesses and may serve as a model for Texas. Accordingly, the committee recommends that steps are taken to study and work towards the implementation of specialized business courts in Texas. In furtherance of that goal, the committee recommends that the Supreme Court create a pilot business court program.

Recommendations

Recommendation 1: The Supreme Court should create by rule a pilot business court for complex litigation.¹¹

1A) The Supreme Court should establish a pilot business court program to permit consideration of implementation details prior to statewide implementation.

¹⁰ Following the Council’s 2018 recommendation to create a pilot program, in January 2020, the Office of Court Administration contracted with the National Center for State Courts to fund a pilot program. A few weeks later the COVID-19 Pandemic began, and the project was put on hold.

¹¹ Civil Justice Committee member Senator Judith Zaffirini enters a vote of “No” on this recommendation.

1B) This pilot business court should be a part of or parallel to the existing court structure, and the Supreme Court should establish qualifications to determine who can be designated as a business court judge.

1C) The business court should hold proceedings regionally to ensure that parties throughout the state with complex litigation have access to the court.

1D) Parties to complex litigation should be given the opportunity to opt-in to the business court.

1E) The business court should be provided sufficient resources to handle the complex litigation, including technology and staff attorneys.

Juvenile NICS Reporting

Background

As required by law, the National Instant Criminal Background Check System (NICS) conducts background checks on people who want to own a firearm or explosive. When a person tries to buy a firearm, the seller, known as a Federal Firearms Licensee (FFL), contacts NICS electronically or by phone. The prospective buyer fills out a Bureau of Alcohol, Tobacco, Firearms and Explosives form, and the FFL relays that information to the NICS. The NICS staff performs a background check on the buyer. That background check verifies that the buyer does not have a criminal record or isn't otherwise ineligible to purchase or own a firearm under state or federal law. NICS has three business days to determine whether a gun transfer is prohibited. If a definitive determination within that timeframe is not accomplished, the FFL may lawfully transfer the firearm.

The Bipartisan Safer Communities Act of 2022 (Public Law 117-159) was signed into law on June 25, 2022 and requires additional steps for NICS background checks on persons under the age of 21 seeking to possess a firearm. NICS is required to immediately contact the criminal history repository or juvenile justice information system, *as well as the appropriate State custodian of mental health adjudication records*, for the state where the person resides. These reporting requirements apply to both criminal and juvenile cases. The additional check required by NICS Examiners under this law is meant to determine if the person has a possibly disqualifying juvenile record, including adjudication "as a mental defective" and commitment

to “any mental institution at 16 years of age or older,” under 18 U.S.C. 922(d). If so, NICS is allotted additional time to complete the review of that information and to complete the eligibility determination. To assist states with these new steps, the Bipartisan Safer Communities Act offers grant funding to help states upgrade criminal and mental health records in the NICs system.¹²

Texas does not have a centralized source for statewide mental health adjudication information in juvenile cases. To perform a thorough search, NICS would need to contact each of the more than 450 district clerks and county clerks in the state. Clerks currently report involuntary inpatient mental health and intellectual disability commitments of minors and adults, adult guardianships, and certain mental health adjudications in adult criminal cases through the Texas Department of Public Safety’s NICS Indices Entry portal in the Criminal Justice Information System (CJIS).

To address recent confusion about the need to report mental health or intellectual disability commitments in cases involving delinquent conduct or conduct indicating a need for supervision (juvenile cases), the NICS Reporting Manual has been updated to clarify that commitments for involuntary inpatient mental health services or long-term residential treatment under Chapter 55 of the Family Code should be included in the reporting of commitments to the NICS Indices Entry portal. Although commitment proceedings may be held under Chapter 55 of the Family Code, they must be done according to the requirements of Chapter 574 or 593 of the Health and Safety Code. Mental health adjudications in juvenile cases that are equivalent to those reported in criminal cases could potentially be reported to NICS. However, Texas law defines “federal prohibited person information” as acquittal by reason of insanity, lack of mental responsibility, and incompetence to stand trial in terms of criminal cases and not juvenile cases. Government Code §§ 411.052 and 411.0521 govern reporting to NICS.

Recommendations

Recommendation 1: The Legislature should clarify Juvenile NICS reporting requirements.

Recommendation 2: The Texas Judicial Council should direct the Office of Court Administration to assist Texas Counties in improving reporting compliance.

¹² Congressional Research Service, *Department of Justice Grant Funding in the Bipartisan Safer Communities Act* (July 12, 2022), available at: https://www.everycrsreport.com/files/2022-07-12_IN11968_c707e73a26930698b6929e6add365551c6c2184f.pdf.

Recommendation 3: The Texas Judicial Council should direct the Office of Court Administration to provide local governments with information on funding opportunities to improve NICS reporting.





www.txcourts.gov/tjc/committees/civil-justice-committee/

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