

## **TITLE 1. ADMINISTRATION**

### **Part 8. TEXAS JUDICIAL COUNCIL**

#### **Chapter 174. INDIGENT DEFENSE POLICIES AND STANDARDS**

##### **Subchapter C. POLICY MONITORING REQUIREMENTS**

###### **1 TAC §174.28**

The Task Force on Indigent Defense (Task Force) is a permanent Standing Committee of the Texas Judicial Council. The Task Force adopts amendments to §174.28 concerning policy monitoring program benchmarks and processes. The amended section is adopted with changes to the proposed text as published in the February 19, 2010, issue of the *Texas Register* (35 TexReg 1395). Changes in the adopted amendment respond to public comments or otherwise reflect nonsubstantive variations from the proposed amendments. Legal counsel has advised that the changes affect no new persons, entities, or subjects other than those given notice and that compliance with the adopted amendments will be less burdensome than under the proposed amendments. Accordingly, republication of the adopted sections as proposed amendments is not required.

The amendments to §174.28(c) are adopted to establish benchmarks for when a jurisdiction is in substantial compliance with each of three core requirements. The amendment to §174.28(c)(1)(C) establishes a presumption of substantial compliance if magistration in at least 98% of the monitor's sample occurs within 48 hours of arrest. The amendment to §174.28(c)(4)(C) establishes a presumption of substantial compliance with the prompt appointment requirements if indigence determinations are timely in at least 90% of the monitor's sample for each level of proceedings (felony, misdemeanor, juvenile cases). The amendment to §174.28(c)(5)(C) establishes a presumption of substantial compliance with the fair attorney selection process if the top 10% of appointed attorneys do not receive more than three times their respective share of appointments at each level of proceedings (felony, misdemeanor, juvenile cases).

The amendment adopted to §174.28(d)(3) would set a 30 day time limit for a county to respond to a follow-up monitoring report with the opportunity to request an extension of up to 30 more days. The amendment adopted in §174.28(d)(4) would establish a procedure to address a county's failure to timely respond to a policy monitoring report by directing staff to send a certified letter to several local officials notifying them that all further payments will be withheld if no response to the report is received by the Task Force within 10 days of receipt of the letter. If funds are withheld under the section, then the funds will not be reinstated until the Task Force or the Policies and Standards Committee approves the release of the funds.

The following furnished written comments on the proposed amendments: Bob Parks, Presiding Judge, 143<sup>rd</sup> Judicial District encompassing Loving, Reeves and Ward Counties.

Judge Parks commented against §174.28(c)(5)(C) because the benchmark would not allow counties with very small attorney appointment lists to meet the rule’s definition of “substantial compliance.” Judge Parks notes that in the case of a three attorney appointment list, even if the distribution of appointments is evenly divided among the three attorneys (33 1/3% each), they would not be in compliance with the 30% maximum in the proposed rule. The Task Force agrees. The Task Force amended the proposed language to allow counties with very small attorney appointment lists to meet the “substantial compliance” definition.

The amendments to the rules are adopted under Texas Government Code §71.060, which directs the Task Force to develop policies and standards governing the provision of the indigent defense services. The amended rules are also adopted under the §71.062, which directs the Task Force to distribute funds based on a county's policy compliance with standards developed by the task force and the county's demonstrated commitment to the requirements of state law relating to indigent defense. The section also directs the Task Force to monitor grants and enforce policy with grant terms. The amended rules are also adopted under §71.061(a), which requires the Task Force to monitor the effectiveness of the county's indigent defense policies, standards, and procedures and to ensure compliance by the county with the requirements of state law relating to indigent defense.

No other statutes, articles, or codes are affected by the adopted new rules.

*174.28. On-Site Monitoring Process.*

(a) Purpose. The process promotes local compliance with the requirements of the Fair Defense Act and Task Force 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 Task Force. 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. 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.

(1) Prompt and Accurate Magistration.

(A) The policy monitor shall review the local indigent defense plans and determine if they require:

(i) Magistration within 48 hours of arrest;

(ii) That the right to counsel be communicated to the arrestee, the arrestee be provided an opportunity to request counsel, and both be recorded; and

(iii) Transmittal of the request for appointed counsel to the appointing authority within 24 hours of request.

(B) 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.

(C) 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 shall review the local indigent defense plans and determine if they:

(A) Specify procedures and standards for determining whether a defendant is indigent;

(B) Apply the procedures and standards to each defendant in the county equally, regardless of whether the defendant is in custody or has been released on bail; and

(C) In the case of juveniles, specify that the income and assets of the parent or other person responsible for the juvenile shall be considered in determining the indigence of the child.

(3) Minimum Attorney Qualifications. The policy monitor shall review the local indigent defense plans and documentation to determine if they:

(A) Specify objective qualifications that attorneys must meet to be eligible for appointment, including the continuing legal education (CLE) requirements set out in 174.1 - 174.4 of this title and annually track attorney CLE hours;

(B) Require each attorney applying to be on an appointment list be approved by a majority of the judges who try criminal cases at the felony or misdemeanor offense level, respectively, or by a majority vote of the juvenile board in juvenile cases; and

(C) In the case of juveniles, recognize the differences in qualifications and experience necessary for appointments for different offense levels as required by Texas Family Code 51.102(b)(2).

(4) Prompt Appointment of Counsel.

(A) The policy monitor shall review the local indigent defense plans and determine if they require:

(i) Counsel to be appointed for indigent defendants 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;

(ii) For juveniles not represented at the initial detention hearing, either immediate appointment of counsel or an order requiring the person having custody over the child to retain counsel if the person with custody is not found to be indigent;

(iii) For juveniles, that counsel to be appointed within five working days of the service on the child of the petition if the child's custodian is found indigent.

(B) The policy monitor shall check for documentation indicating that:

(i) Counsel was appointed 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; and

(ii) Counsel was appointed within one day of the detention hearing for in-custody juveniles and within five working days of service of the petition on the juvenile for out-of-custody juveniles.

(C) 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.

(A) The policy monitor shall review the local indigent defense plans and determine if they:

(i) Include an attorney selection method; and

(ii) Specify who is authorized to make appointments, what appointment lists are used, and a description of when an attorney on the list may be skipped, if applicable.

(B) The policy monitor shall check for documentation indicating:

(i) In the case of a contract defender program, that all requirements of 174.10 - 174.25 of this title are met;

(ii) That attorney selection process actually used matches what is stated in the indigent defense plans; and

(iii) 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, the percentage share of appointments represented by the top 10% of attorneys accepting appointments.

(C) 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.

(A) The policy monitor shall review the local indigent defense plans and determine if they include:

(i) An attorney fee schedule;

(ii) Procedures for paying attorneys, experts, and investigators in accordance with the fee schedule; and

(iii) Procedures to reimburse expert and investigative expenses incurred without prior court approval when the expenses are reasonable and necessary.

(B) 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 program director within 30 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 90 days from the on-site monitoring visit. The report shall contain each finding of noncompliance.

(2) County Response. Within 60 days of the date the report is issued by the policy monitor, the program director 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 Visits. The policy monitor shall conduct an additional on-site visit to counties where the report included significant noncompliance findings. The follow-up visit shall occur within 12 months 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 Task Force any remaining issues not corrected. Within 30 days of the date the follow-up report is issued by the policy monitor, the program director 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 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 program director, 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 Task Force within 10 days of receipt of the letter. If funds are withheld under this section, then the funds will not be reinstated until the Task Force or the Policies and Standards Committee approves the release of the funds.

~~(4)~~(5) Noncompliance. If a county fails to correct any noncompliance findings, the Task Force may impose a remedy under 173.307 of this title.

The Task Force hereby certifies that section as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.