

Texas Indigent Defense Commission

Appointment of counsel

Texas Justice Courts Training Center
Magistration Workshop

May 10, 2022

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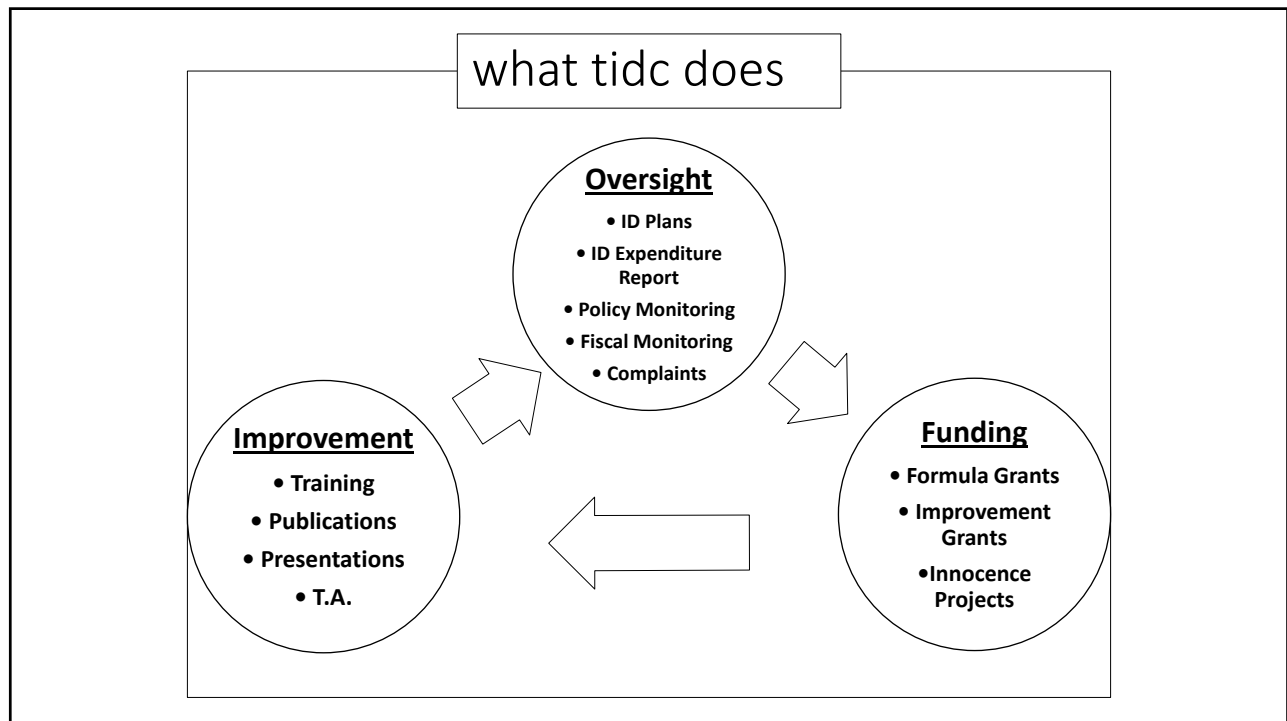
ROADMAP

About TIDC
The Fair Defense Act
Prompt and Accurate
Magistration Proceedings
Indigence Determinations
Prompt Appointment of
Counsel
Counsel at Magistration

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ABOUT TIDC

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63 of Texas' 254 counties are, or soon will be, served by a public defender and/or a managed assigned counsel office

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THE FAIR DEFENSE ACT

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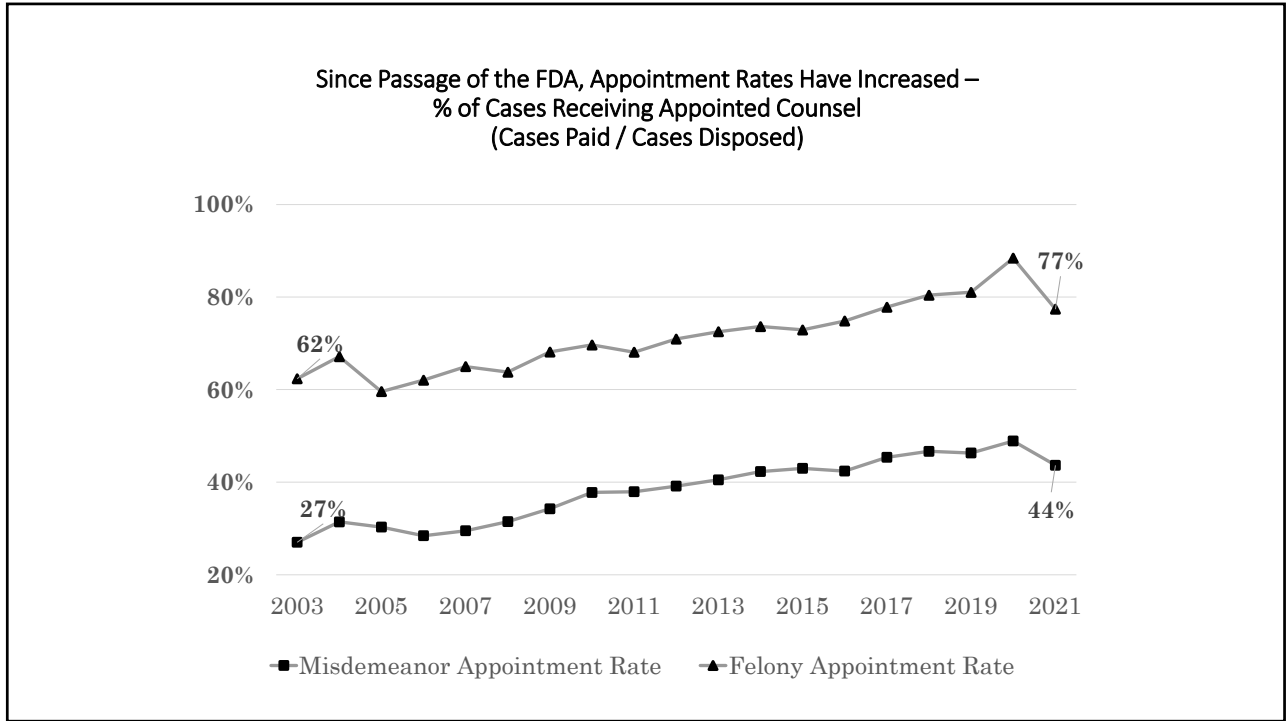
How we got here

- 1791 – Bill of Rights + 6th Amendment
- 1876 – Art. 1, Sec. 10-Tx Constitution's Bill of Rights
- 1963 – *Gideon v. Wainwright*
- 1999 – Study of TX Indigent Defense
- **2001 – Fair Defense Act and Task Force**
- 2011 – Texas Indigent Defense Commission

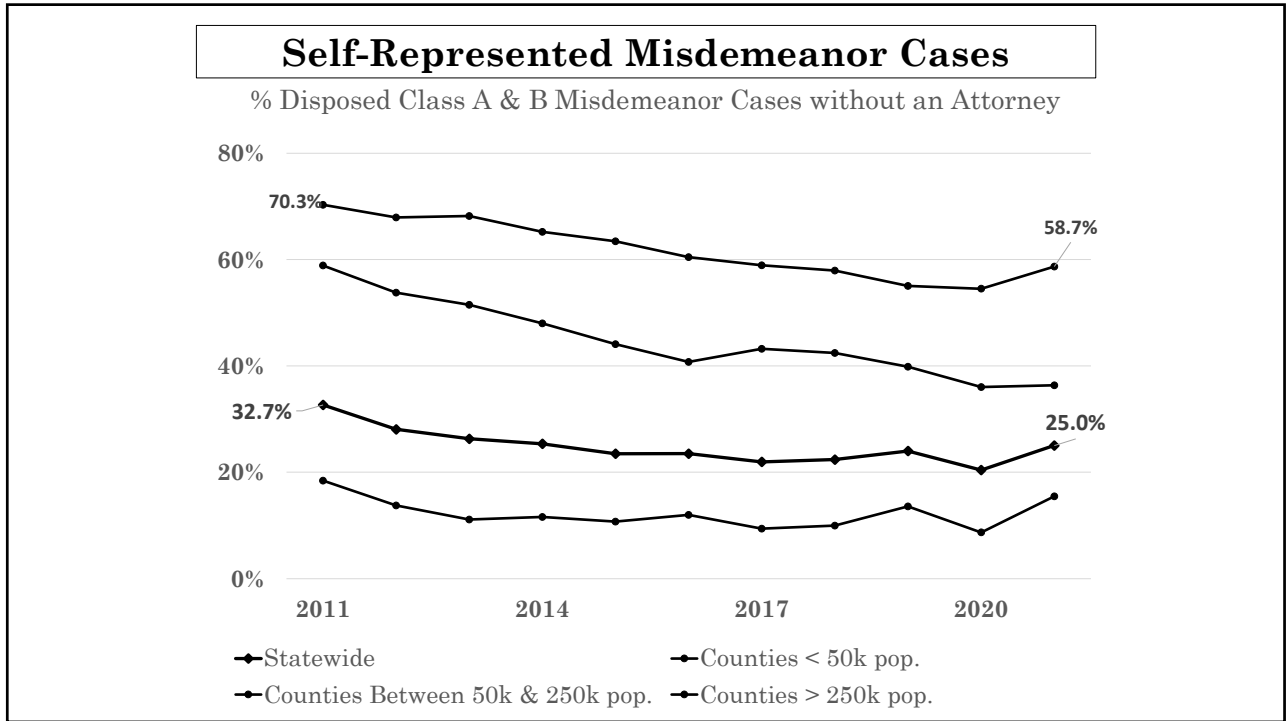
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THE FAIR DEFENSE ACT: THE IMPACT

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Seven core requirements of the fair defense act

1. Prompt and accurate magstration hearings
2. Develop a standard of indigence and process to determine eligibility
3. Timely appointment of counsel
4. Minimum attorney qualifications
5. Fair, neutral, and non-discriminatory attorney selection process
6. Standard attorney fee schedule and payment process
7. State reporting

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Today's focus

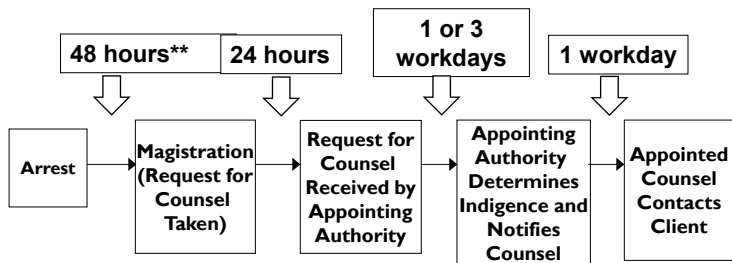


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REMINDER: TIMELINESS IS critical in magistration and appointment of counsel

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PROCESS + TIMELINES

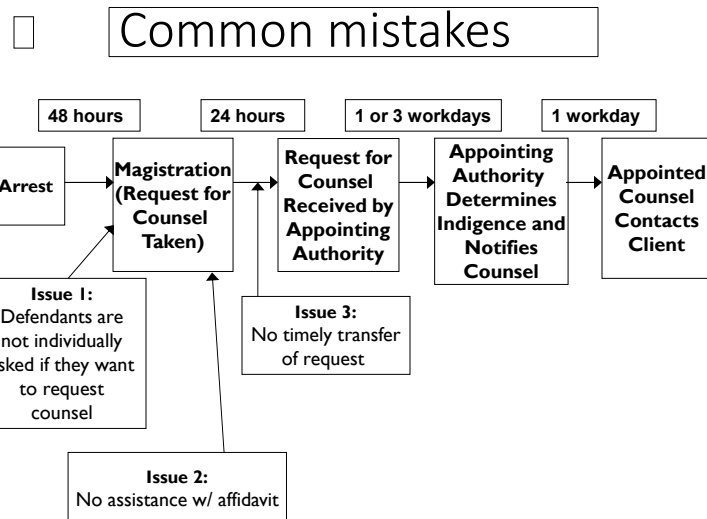


****But note CCP 17.033**-Requires detained person arrested on a misdemeanor w/o warrant to be released not later than 24 hrs. after arrest if probable cause not determined. Release on bond not exceeding \$5,000 or personal bond required.

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PROMPT AND ACCURATE MAGISTRATION PROCEEDINGS

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PROMPT AND ACCURATE MAGISTRATION PROCEEDINGS

Texas Code Crim. Proc. Article 15.17

- ✓ Hearing within 48 hours of arrest
- ✓ Must inform arrestee of right to appointed counsel
- ✓ Record of informing arrestee of right to counsel and whether arrestee requested counsel must be made
- ✓ Magistrate must ensure reasonable assistance
- ✓ Must transmit forms to appointing authority within 24 hours of request (unless authorized to appoint counsel)

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<p>No. _____ SPN: _____ THE STATE OF TEXAS Date/Time Of Arrest: _____ COUNTY OF _____</p> <p style="text-align: center;">MAGISTRATE WARNING</p> <p>Before me, the undersigned, magistrate of the State of Texas on this day personally appeared _____, who was given the following warning:</p> <p><input type="checkbox"/> You are charged with the offense of _____ a felony a misdemeanor.</p> <p><input type="checkbox"/> You have a right to hire an attorney to represent you.</p> <p><input type="checkbox"/> You have the right to have an attorney present prior to and during any interview and questioning by peace officers or attorneys representing the State.</p> <p><input type="checkbox"/> You have the right to remain silent.</p> <p><input type="checkbox"/> You are not required to make a statement, and any statement you make can and may be used against you in court.</p> <p><input type="checkbox"/> You have the right to stop any interview or questioning at any time.</p> <p><input type="checkbox"/> You have the right to have an examining trial (felonies only).</p> <p><input type="checkbox"/> You have the right to request appointment of counsel if you cannot afford counsel.</p> <p>Would you like to request the appointment of counsel? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input type="checkbox"/> I explained the local procedures for requesting appointment of counsel in a manner the accused could understand. I provided reasonable assistance in completing necessary paperwork for the appointment of counsel and forwarded the paperwork to the appropriate authority within 24 hours.</p> <p style="text-align: center;">Consular Notification</p> <p>You have the right to speak with your lawyer before answering any questions.</p> <p>If you are not a United States citizen, you may be entitled to have us notify your country's consular representative here in the United States.</p> <p>Do you want us to notify your country's consular officials? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>What Country? _____</p> <p>If you are a citizen of a country that requires us to notify your country's consular representative, we shall notify them as soon as possible.</p> <p><input type="checkbox"/> Mandatory Notification Clerk, notify: _____</p> <p>The State Department's list of foreign consulates can be found at: http://www.state.gov/cpr/cis/foi/</p> <p><input type="checkbox"/> 1. Accused was arrested as a result of a warrant. County: _____ Proceed to bail section below.</p> <p><input type="checkbox"/> 2. Accused was arrested without a warrant. Does the Court find probable cause exists for further detention? <input type="checkbox"/> Yes <input type="checkbox"/> No If NO, accused shall be immediately released. If YES, proceed to bail section below.</p> <p>Bail is set at \$ _____ Bond: <input type="checkbox"/> Personal <input type="checkbox"/> Cash/Surety</p> <p>Bond Conditions _____ Time: _____ Date: _____ Magistrate: _____</p> <p>I acknowledge that I was given the above warning and that I understand my rights as explained to me. Person Warned: _____ Hearing Interpreted by: _____</p>	<div style="border: 1px solid black; padding: 10px; margin: 0 auto; width: 80%;"> <p>MODEL MAGISTRATION FORM</p> <p>INCLUDES RIGHT TO COUNSEL WARNING</p> <p>INCLUDES REQUEST FOR APPOINTED COUNSEL</p> </div>
Available at: http://tidc.texas.gov/improvement/model-forms	

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No. _____ SPN: _____
 THE STATE OF TEXAS Date/Time Of Arrest: _____
 COUNTY OF _____

MAGISTRATE WARNING

Before me, the undersigned, magistrate of the State of Texas on this day personally appeared _____, who was given the following warning:

- You are charged with the offense of _____ a felony a misdemeanor.
- You have a right to hire an attorney to represent you.
- You have the right to have an attorney present prior to and during any interview and questioning by peace officers or attorneys representing the State.
- You have the right to remain silent.
- You are not required to make a statement, and any statement you make can and may be used against you in court.
- You have the right to stop any interview or questioning at any time.
- You have the right to have an examining trial (felonies only).
- You have the right to request appointment of counsel if you cannot afford counsel.

Would you like to request the appointment of counsel? Yes No

I explained the right to have an examining trial to the accused in a manner the accused could understand. I provided reasonable assistance in completing necessary paperwork for the appointment of counsel and forwarded the paperwork to the appropriate authority within 24 hours.

Consular Notification
You have the right to speak with your lawyer before answering any questions.
If you are not a United States citizen, you may be entitled to have us notify your country's consular representative here in the United States.
Do you want us to notify your country's consular officials? <input type="checkbox"/> Yes <input type="checkbox"/> No
What Country? _____
If you are a citizen of a country that requires us to notify your country's consular representative, we shall notify them as soon as possible.
<input type="checkbox"/> Mandatory Notification Clerk, notify: _____
The State Department's list of foreign consulates can be found at: http://www.state.gov/cpr/rle/foi
<input type="checkbox"/> 1. Accused was arrested as a result of a warrant. County: _____
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Bond Conditions _____
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Person Warned: _____ Hearing Interpreted by: _____

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COMPLETING THE AFFIDAVIT OF INDIGENCE

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Article 15.17 requires assistance in completing affidavit of indigence

“The magistrate shall ensure that reasonable assistance in completing the necessary forms for requesting appointment of counsel is provided to the person....”

The affidavit of indigence is a necessary form to request appointment of counsel.

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MODEL AFFIDAVIT OF INDIGENCY FORM

page 1

INCLUDES INCOME, ASSETS, EXPENSES, BENEFITS

Magistrate must ensure form is completed and sent to appointing authority

Available at:
<http://www.tidc.texas.gov/improvement/model-forms>

MONTHLY INCOME AND ASSETS		MONTHLY EXPENSES	
My take home pay	\$	Rent/Mortgage	\$
Spouse's take home pay	\$	Utilities (Elec., Gas, Water)	\$
Child Support (Received)	\$	Total Child Expenses (Including Child Support Paid)	\$
SNAP (Food Stamps)	\$	Total Food Expenses	\$
Social Security/Disability	\$	Transportation Costs	\$
Other Government Check	\$	Cellphone phone	\$
Other Income	\$	Religious fees	\$
Assets (car, home, etc.)	\$	Medical Expenses / Health Insurance	\$
TOTAL MONTHLY INCOME AND ASSETS	\$	Minimum Monthly Credit Card Payment	\$
		TOTAL MONTHLY EXPENSES	\$

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MODEL AFFIDAVIT OF INDIGENCY FORM

page 2

INCLUDES defendant's oath

includes option of using notary or unsworn declaration

includes eligibility determination

COUNTY _____	Cause No. _____
Defendant's Oath	
On this _____ day of _____, 20____, I have been advised of my right to representation by counsel in connection with the charge pending against me. I certify that I am without means to employ counsel of my own choosing and I hereby request the court to appoint counsel for me.	
Defendant's Signature _____	Date _____
ONLY ONE SECTION BELOW TO BE COMPLETED.	
Administered Oath (Clerk/Notary ONLY)	
SUBSCRIBED and SWORN to before me, the undersigned authority, this _____ day of _____, 20____.	
Clerk/Notary Public Signature _____	Date _____
Unsworn Declaration by Defendant (Defendant ONLY)	
My name is _____ my date of birth is _____ <small>(First Name) (Middle Name) (Last Name)</small>	
My address is _____ <small>(Street Number and Name) (City) (State) (Zip Code) (Country)</small>	
I declare under penalty of perjury that the foregoing is true and correct.	
Executed in _____ County, State of Texas, on the _____ day of _____, 20____. <small>(Month) (Year)</small>	
Defendant Currently Meets Eligibility Requirements?	
<input type="checkbox"/> YES <input type="checkbox"/> NO	
Date _____	

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Pop quiz

- How long does a magistrate have to transmit the forms requesting appointment of counsel?
 - A. Until the next business days
 - B. Three business days
 - C. 24 hours
 - D. As soon as reasonably practical

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Timely Transmittal of Requests for Counsel

- **This is one of the biggest problems TIDC still sees in policy monitoring visits!**
- Magistrate has 24 hours to transmit a request for counsel to the appointing authority (see CCP art. 15.17(a))

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What is your process for transmitting forms to the appointing authority?

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Out-of-County Requests for Counsel

- If a person is arrested in your county for another county's warrant:
 - The person must be asked if he/she would like to request counsel.
 - Requests for counsel must be sent to the county issuing the warrant.
- Where is the contact list to send these requests?
<http://tidc.tamu.edu/public.net/Reports/OutOfCountyArrestContacts.aspx>
- Art. 15.18(a-1): Magistrate has up to 24 hours to transmit the request for counsel form to the appointing authority in the county issuing the warrant.

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Out-of-County Appointments of Counsel Tex. Code Crim. Proc. art. 1.051(c-1)

- **If a person is arrested in another county for your county's warrant, appointing authority in your county must rule on:**
 - The request for counsel within the same 1 or 3 working day timeframe as in-county requests
- **If a person is in your jail on another county's warrant, your county's appointing authority must appoint counsel:**
 - On the 11th day after arrest if the person has not been transferred to the other county; and
 - If counsel has not been appointed by the county issuing the warrant.
 - Appointment limited to Article 11 or 17 matters (writs or bail bond issues).
 - Arresting county may seek reimbursement from the warrant issuing county.

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Pop Quiz

You magistrate a defendant who has been arrested on a felony warrant issued from Dallas County. (You are from a county other than Dallas County.)

What admonishments do you have to give the defendant and how long do you have to transmit a request for appointment of counsel?

- A. You give the defendant the usual admonishments and you have three working days to transmit the request to appoint counsel.
- B. You give the defendant the usual admonishments and you have 24 hours to transmit the request to appoint counsel.
- C. No admonishments are required (just tell the defendant he's been arrested on a Dallas County warrant) and you have three working days to transmit the request to appoint counsel.
- D. No admonishments are required (just tell the defendant he's been arrested on a Dallas County warrant) and you have eleven days to transmit the request to appoint counsel.

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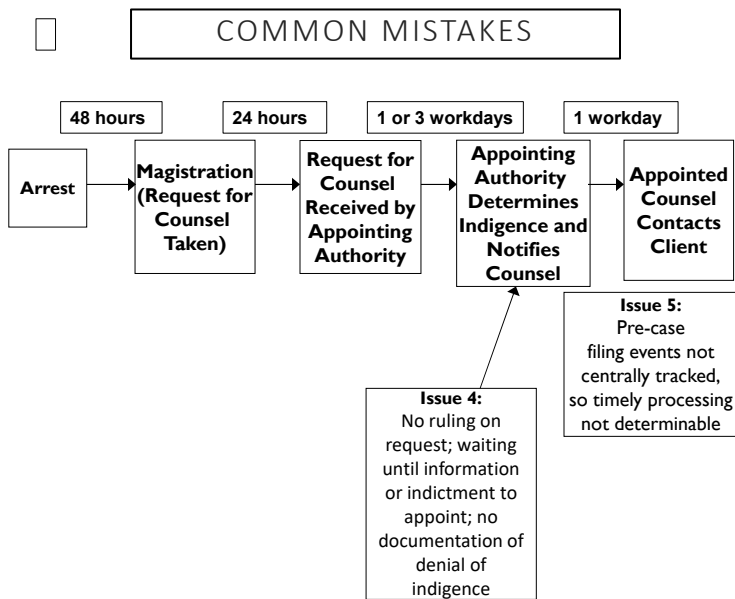
INDIGENCE DETERMINATIONS

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Survey

do You make indigence determinations and appoint counsel?

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“Indigent” defined

Texas Code Crim. Proc. Article 1.051(b)

“... a person who is not financially able to employ counsel.”

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STANDARD OF INDIGENCE

Texas Code Crim. Proc. Article 26.04(l)

- Indigent Defense Plan must include procedures, financial standards for determining indigence.
- Standard must apply equally to jailed or bailed defendants.

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STANDARD OF INDIGENCE

Texas Code Crim. Proc. Article 26.04(m) (Adults)

- Court may consider income, assets, property owned, spousal income, necessary expenses, and number/ages of dependents.
- Court can't consider bail or ability to post bail, "except to the extent that it measures the defendant's financial circumstances."

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Additional Requirements for INDIGENCE determination

Texas Code Crim. Proc. Article 26.04(n)-(o)

- Complete questionnaire under oath about financial resources and/or respond to examination by judge or magistrate
- Sign sworn statement similar to statement at CCP art. 26.04(o)

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MODEL AFFIDAVIT OF INDIGENCY FORM

page 2

INCLUDES defendant's oath

includes option of using notary or unsworn declaration

includes eligibility
determination

COUNTY _____	Cause No. _____
Defendant's Oath	
On this _____ day of _____, 20____, I have been advised of my right to representation by counsel in connection with the charge pending against me. I certify that I am without means to employ counsel of my own choosing and I hereby request the court to appoint counsel for me.	
Defendant's Signature _____	Date _____
ONLY ONE SECTION BELOW TO BE COMPLETED.	
Administered Oath (Clerk/Notary ONLY)	
SUBSCRIBED and SWORN to before me, the undersigned authority, this _____ day of _____, 20____.	
Clerk/Notary Public Signature _____	Date _____
Unsworn Declaration by Defendant (Defendant ONLY)	
My name is _____ my date of birth is _____	
(First Name) (Middle Name) (Last Name)	
My address is _____	
(Street Number and Name) (City) (State) (Zip Code) (Country)	
I declare under penalty of perjury that the foregoing is true and correct.	
Executed in _____ County, State of Texas, on the _____ day of _____	
(Month) (Year)	
Defendant Currently Meets Eligibility Requirements?	
<input type="checkbox"/> YES	<input type="checkbox"/> NO
Date _____	

Available at: <http://tidc.texas.gov/improvement/model-forms>

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Test your knowledge

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Where is your local standard of indigence listed?

Answer: Your county's Indigent Defense Plan.

Found here:

<http://tidc.tamu.edu/public.net/Reports/IDPlanNarrative.aspx>

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What should appointing judge do if a defendant lists no income, assets, or expenses on the affidavit of indigence?

1

Ask for additional information;

2

Deny the request if you believe the information is inadequate to make an indigence determination; or

3

Appoint if you believe the information is true or if the person is incapable of giving accurate information.

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What would you do?

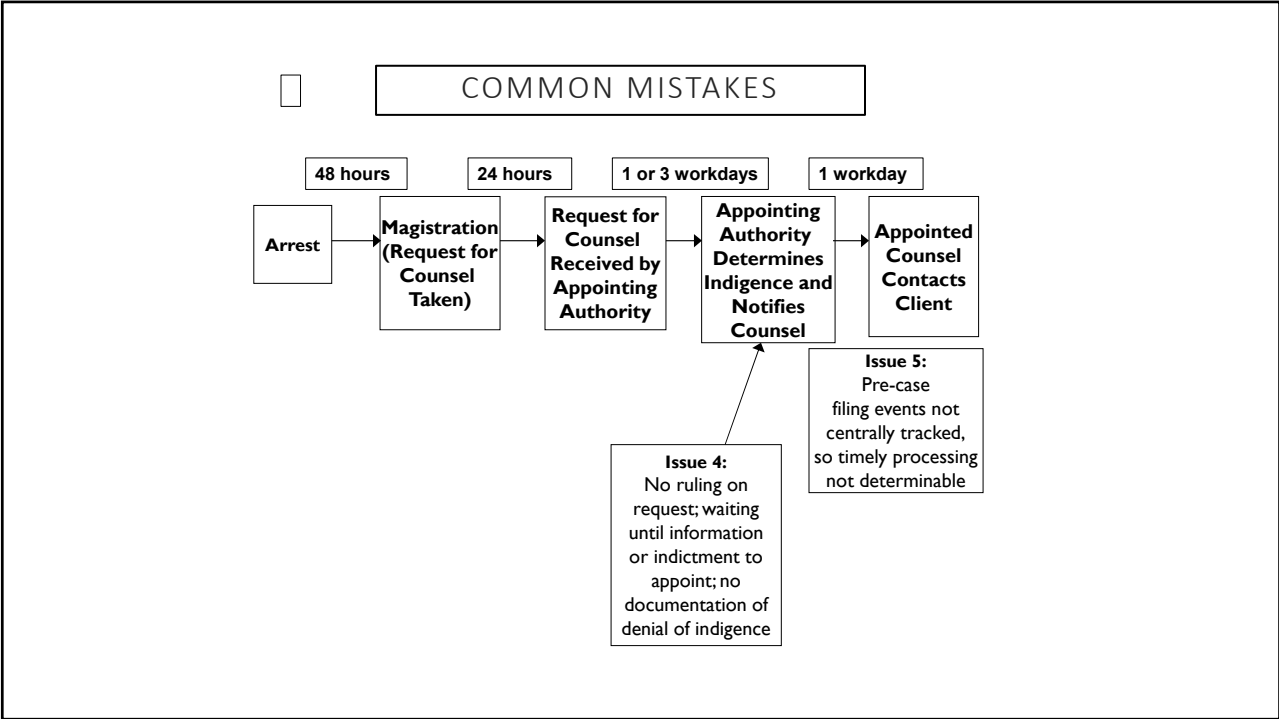
What should you do if last year a defendant made a little more income than is set by your local standard of indigence but has remained in jail for 2 weeks?

- May need to appoint per Indigent Defense Plan.
- Get more info to determine if now unemployed.

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PROMPT APPOINTMENT OF
COUNSEL

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unTimely appointment
is the number one issue
in tidc policy monitoring
visits

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How can prompt appointment of counsel help defendants and counties?

Benefits to Defendants

- Reduce bail or get a personal bond and get out of jail
- Out of jail = keep job, pay rent, avoid homelessness
- Early investigation, client interview, witness interviews, evidence preservation
- Early access to treatment, services
- Better case outcomes
- Prevent wrongful convictions and collateral consequences of a conviction

Benefits to Counties

- Reduced jail costs
- Fewer failures to appear
- Better case outcomes for defendants = reduced costs to society at large

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Timely Appointment of Counsel or Denial of Indigence

#1 PROBLEM IDENTIFIED IN TIDC POLICY MONITORING VISITS

Texas Code Crim. Proc. Article 1.051

- Must appoint counsel /deny indigence within 1 or 3 working days of receiving the request for counsel (counties under 250k pop. = 3 days)
- If defendant released before appointed counsel, then appointment not required until first court appearance “or when adversarial judicial proceedings are initiated, whichever comes first.” CCP 1.051(j)

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When is the Initiation of Adversarial
Judicial Proceedings? Supreme Court Says...

Gillespie Co. refused to appoint
Walter Rothgery an attorney until
after indictment.

He sued the county for violating
his 6th Amendment right to
counsel.

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Magistration = Initiation of Adversarial
Judicial Proceedings

Rothgery v. Gillespie County, 554 US 191 (2008).

A criminal defendant's initial appearance before a magistrate judge, where he learns the charge against him and his liberty is subject to restriction, marks the initiation of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.

Supreme Court did not address whether counsel had to be present at magistration.

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COUNSEL AT MAGISTRATION

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Counsel at Magistration: The Basics

- Attorneys at magistration help ensure that
 - bail amounts are fair
 - there was probable cause for an arrest
 - there is no discussion about the merits of the case.
- **Harris, Dallas, Bexar, Fort Bend, Potter, Hays, Montgomery, Cameron, and Galveston** are providing an attorney at magistration.

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Limited scope representation for all defendants

- Typically, every defendant who consents to representation is represented at magistration.
- The attorneys who provide counsel at representation normally do so on a **limited-scope basis**, meaning they will not continue to represent the defendant after magistration.

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Before the hearing

Interview. Attorneys must have time to talk to defendants before the hearing. For most defendants, a short interview can cover basic financial and personal information and what to expect at the hearing.

Coordinate. In Harris County, if a defendant is already represented by other counsel, the magistration attorney will contact them to notify them of the new arrest. A defense attorney can also contact the defendants' families to verify they have a place to stay if released.

Negotiate. In Bexar County, prosecutors screen cases before they are magistrated, and the defense can argue for dismissal.

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During the hearing

Announce. At the beginning, a defense attorney can help explain the limited purpose of the hearing and of their representation and can advise defendants not to reveal prejudicial information by discussing the facts of their cases.

Advocate. Bexar and Montgomery County defense attorneys may dispute probable cause, while Harris County defense attorneys do not for felonies. In all counties, defense attorneys argue for bond amounts that account for community safety, the defendant's likelihood of returning to court, and ability to post bail.

Advise. Defendants often have questions about magistration (like how to post a bond or if they need to request counsel) and what is next in their case. Their magistration attorney can give them some advice on these issues, while encouraging them to get an attorney who can answer more specific questions about their cases.

Alert. The defense attorney can alert the magistrate if a defendant has shown signs of mental illness or intellectual disability that may require an assessment or release on personal bond.

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After the hearing

Withdraw. Magistration attorneys generally do not stay with the case.

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How much does it cost?

Hays and Potter Counties pay attorneys \$75 per hour for magistration, similar to their other hourly rates.

Montgomery County pays attorneys \$1,000 for four days of magistration.

Harris County pays public defenders' salaries and spends about \$27 per person magistrated.

Fort Bend County has contract attorneys.

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How does it change the docket?



Magistration with counsel present usually requires a little more time and coordination.



Judges can expect defense (and, possibly, prosecution) arguments to add a few minutes to the hearing for each defendant on the docket.



At the same time, because the defense has prepared defendants ahead of time, they have fewer questions for the judge during the docket.

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Want
counsel at magistrature?

Grants. TIDC has funded counsel at magistrature in Bexar, Hays, and Potter Counties.

Rules. TIDC advises counties about adding counsel at magistrature to their indigent defense plans and annual expenditure reports.

Technical Assistance. TIDC helps counties plan staffing and scheduling.

Training. TIDC connects judges and attorneys to training and resources from local and national experts.

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Questions?

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