

**HARRIS COUNTY CRIMINAL COURTS AT LAW  
ALTERNATIVE PLAN  
IMPLEMENTING  
THE TEXAS FAIR DEFENSE ACT**

**STANDARDS AND PROCEDURES  
RELATED TO APPOINTMENT OF COUNSEL  
FOR  
INDIGENT DEFENDANTS**

Approved May 29, 2003  
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**PREPARED BY  
OFFICE OF COURT MANAGEMENT  
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## **RULE 23. STANDARDS AND PROCEDURES RELATED TO APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS**

### **A. Definitions**

As used herein, the following terms and phrases shall have the following meanings:

1. *Criminal Law Hearing Officer* means a judicial officer created by Chapter 54, Subchapter L of the Texas Government Code (§§ 54.851 et seq.).
2. *Defendant* means a person detained, arrested, or otherwise in the custody of a law enforcement agency.<sup>1</sup>
3. *First-chair counsel* means the attorney in charge of the case.
4. *He* or *him* refers to a male or female.
5. *Judge* means a Judge of a Harris County Criminal Court at Law.
6. *Judicial Officer* means either a Judge of a Harris County Criminal Court at Law, or a Harris County Criminal Law Hearing Officer.
7. *Plan* means the Alternative Plan adopted by the Judges of the County Criminal Courts at Law of Harris County, Texas, on May 29, 2003.
8. *Majority of judges*, means not less than 8 of the duly elected and qualified judges of the County Criminal Courts at Law of Harris County, Texas.
9. *Probable cause* means a reasonable ground, based upon the facts and circumstances, sufficient to warrant a prudent man to believe that the accused has committed each element of the offense charged and the accused is culpable, it being understood that if there is a sufficient defense established by testimony or documentation of the arresting agency, then there is no “probable cause”.<sup>2</sup>
10. *Second-chair counsel* means an attorney who is not eligible to be appointed as first-chair counsel, who volunteers for the purpose of gaining experience, knowledge, and competency in the representation of a defendant.
11. *Taken before a magistrate* shall mean either physically bringing the defendant before the judicial officer in person or by the use of high speed two way audio/video transmission technology as provided by TEX CODE CRIM PROC. ART. 15.17(a).
12. *Working day* means Monday through Friday, except official federal, state, and county holidays.

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<sup>1</sup> TEX. GOV'T CODE §71.001.

<sup>2</sup> *Roberson v. Richardson*, Civil Action No. H084-3659, In The United States District Court For The Southern District of Texas, Houston Division (1987).

## **B. Procedure For Timely Filing and Docketing of Cases**

### **1. Continuous Screening and Filing of Cases**

As provided by Rule 2(A) and (B), and Rule 4(A), all misdemeanor proceedings in these courts shall be filed through the Central Intake Division of the offices of the Harris County District Clerk, and Harris County District Attorney to maintain a system of continuous screening and processing of Class “A” and “B” misdemeanor cases.

### **2. Appearance Before a Judicial Officer**

- (a) A person arrested pursuant to a warrant, or a person arrested without a warrant, shall immediately be taken before a judicial officer.
- (b) A person released from custody after a case is filed and prior to appearing before a judicial officer shall appear for arraignment seven days from the date the person was arrested.<sup>3</sup>

## **C. Right To Appointment of Counsel**

An indigent defendant is entitled to have an attorney appointed to represent him in:

- (a) any adversarial judicial proceeding that may result in punishment by confinement; and
- (b) any other criminal proceeding if the judge concludes that the interests of justice require representation.<sup>4</sup>

## **D. Standard for Determining If a Defendant is Indigent**

### **1. Standard**

For purposes of appointing counsel, a person is indigent if the person is not financially able to employ counsel.<sup>5</sup>

### **2. Applicability of Standard**

The indigency standards shall apply to each defendant equally, regardless of whether the defendant is in custody or is released on bail.

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<sup>3</sup> See Rule 4A, Local Rules Of Administration of the County Criminal Courts at Law of Harris County, Texas.

<sup>4</sup> TEX. CODE CRIM. PROC. ART. 1.051(c).

<sup>5</sup> TEX. CODE CRIM. P. ART. 1.051(b).

3. Bail Not a Defining Factor

The judge shall not consider whether the defendant posted bail, except to the extent that it reflects the defendant's financial circumstances.

4. Factors For Consideration

A judge shall consider the following factors in determining whether a defendant is indigent:

- (a) the defendant's income;
- (b) the income of defendant's spouse;
- (c) property owned by defendant, or in which the defendant has an interest;
- (d) asset owned by the defendant, or in which the defendant has an interest;
- (e) financial resources of the defendant;
- (f) necessary expenses;
- (g) outstanding obligations;
- (h) the number of dependents supported by the defendant; and
- (i) an estimate of a reasonable fee set by an area lawyer qualified to represent the defendant.

**E. Procedure For The Timely Appointment of Counsel**

A person arrested without a warrant shall be taken before a judicial officer not later than 48 hours after arrest.<sup>6</sup>

1. Mental Health Screening

A representative of the Harris County Mental Health and Mental Retardation Authority is present to screen an arrestee to determine if he or she may be mentally ill, mentally retarded, or has previously received locally provided treatment.

2. Interview For Personal Bond

A member of the Office of Court Services is present to interview an arrestee to determine the arrestee's suitability for release on personal bond.

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<sup>6</sup> TEX. CODE CRIM. PROC. ART. 14.06.

3. Interpreters For The Hearing Impaired

Qualified interpreters for the deaf and hearing impaired are available 24 hours a day.<sup>7</sup>

4. Foreign Language Interpreters

Licensed court interpreters are available 24 hours a day.<sup>8</sup>

5. Hearing to Determine Probable Cause for Further Detention

- (a) A criminal law hearing officer shall be continuously available to perform the duties and exercise the power provided by law for that office including those of a magistrate.<sup>9</sup>
- (b) When an arrestee is brought before a judicial officer, the officer shall inform the person arrested, in clear language and either in person or by closed circuit television, of:
- i. the accusation against him and of any affidavit filed therewith;
  - ii. his right to retain counsel;
  - iii. his right to remain silent, and that any statement made by him may be used against him;
  - iv. his right to have an attorney present during any interview with peace officers or attorneys representing the state;
  - v. his right to terminate the interview at any time;
  - vi. the person's right to request the appointment of counsel if the person cannot afford counsel; and
  - vii. the procedures for requesting appointment of counsel.<sup>10</sup>
- (c) If the person does not speak and understand the English language or is deaf, the magistrate shall inform the person in a manner consistent with Articles 38.30 and 38.31, as appropriate.
- (d) The magistrate shall ensure that reasonable assistance in completing the necessary forms for requesting appointment of counsel is provided to the person at the same time.
- (e) The magistrate shall without unnecessary delay, but not later than 24 hours after the person arrested requests appointment of counsel, transmit, or cause to be transmitted to the court or to the court's designee authorized under Article 26.04 to appoint counsel in the county, the forms requesting the appointment of counsel.

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<sup>7</sup> TEX. CODE CRIM PROC. ART. 38.31.

<sup>8</sup> TEX. CODE CRIM PROC. ART. 38.30.

<sup>9</sup> TEX. GOV'T CODE CHAPTER 54, SUBCHAPTER L.

<sup>10</sup> TEX. CODE CRIM. PROC. ART. 15.17, and Rule 4B2.

- (f) In each case in which a person arrested is taken before a magistrate as required by Subsection (a), a record shall be made of:
  - i. the magistrate informing the person of the person's right to request appointment of counsel, if qualified;
  - ii. the magistrate asking the person whether the person wants to request appointment of counsel; and
  - iii. whether the person requested appointment of counsel.

6. Mandatory Release<sup>11</sup>

- (a) A person who is arrested without a warrant and who is detained in jail must be released on bond, in an amount not to exceed \$5,000.00, not later than the 24<sup>th</sup> hour after the person's arrest.
- (b) If the person is unable to post a cash or surety bond, the person must be released on a personal bond.
- (c) If a prosecutor files an application, a judicial officer may postpone the release of a defendant for not more than 72 hours after arrest.

**F. Hearing On Request For Appointment of Counsel**

1. Authority To Conduct Hearing

Only the judge presiding shall conduct a hearing and determine the financial ability of a defendant to employ counsel.

2. When The Hearing Shall Be Held

- (a) A hearing shall be held not later than the end of the first working day after the date on which the judge receives the defendant's request for counsel.
- (b) If an indigent defendant is released from custody prior to the hearing, appointment of counsel is not required until the defendant's first court appearance or when adversarial judicial proceedings are initiated, whichever comes first.<sup>12</sup>
- (c) A hearing shall be held prior to the arraignment of the defendant.

3. Procedure For Determining Indigency<sup>13</sup>

To determine whether a defendant is indigent, a judge shall:

- (a) review any information provided by the defendant in writing under oath;
- (b) take oral testimony from the defendant under oath;
- (c) conduct an evidentiary hearing; or

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<sup>11</sup> TEX. CODE CRIM PROC. ART. 17.033.

<sup>12</sup> TEX. CODE CRIM. PROC. ART. 1.051(j).

<sup>13</sup> TEX. CODE CRIM. PROC. ART. 26.04(n).

(d) a combination of the above.

4. Finding of Indigency

(a) The judge shall find the defendant indigent and appoint counsel to represent defendant:

- (i) if the judge finds the defendant's financial liabilities are more than his assets; and
- (ii) if the judge finds the defendant is financially unable to pay for an attorney qualified to represent the defendant in the charged offense.

(b) A judge that finds a criminal defendant has financial resources to offset, in part or in whole, the costs of legal services provided under this plan may order the defendant to pay the county that portion of the costs of legal services, provided it makes a written finding of the defendant's ability to pay.

5. Finding of No Indigency

The judge, upon finding the defendant is not indigent, shall make a written entry.

6. Presumption of Indigency.

A defendant who has been found indigent is presumed indigent for the duration of the proceedings unless there is a material change in the defendant's financial circumstances.

7. Review of Indigency Status

A defendant's status as indigent or not indigent may be reviewed in a formal hearing at any stage of court proceedings.

**G. Standard For Qualified Counsel**

1. General Qualifications

To be considered qualified, an attorney must submit a completed application form and meet the following criteria:

- (a) Licensed and in good standing with the State Bar of Texas for three consecutive years prior to submitting an application;
- (b) Consistently exhibited proficiency and commitment to providing quality representation to clients charged with criminal offenses;
- (c) Consistently exhibited professionalism and reliability while zealously representing clients;
- (d) Represented, as first-chair, not less than 50 cases punishable as Class "A" or Class "B" misdemeanors;

- (e) Possess the following litigation experience in cases punishable as Class “A” or Class “B” misdemeanors;
  - i. tried to verdict, as first-chair, not less than five (5) trials before a judge or jury;
  - ii. acted as second-chair in not less than ten (10) trials before a judge or jury; or
  - iii. a combination of first-chair and second-chair experience equal to five (5) trials.<sup>14</sup>
- (f) Possess a telephone number, fax number, and a physical location, other than a public building, in which the attorney can confer with a client, witness, investigator, or others to ensure the confidences of the defendant will be preserved;
- (g) Average 10 hours a year of continuing legal education, including one hour of ethics in criminal law matters, for the three consecutive years prior to filing an application;
- (h) Attend continuing legal education programs as directed by the Presiding Judge of these Courts; and
- (i) sign the attorney acknowledgment.

2. Qualifications For Special Assignments

In addition to the general qualifications, an attorney must have tried as first-chair:

- (a) an additional ten (10) jury trials; and
- (b) not less than five (5) competency hearings.

3. Qualifications For Appellate, Habeas Corpus, And Extraordinary Writs

In addition to the general qualifications, an attorney must have personally authored at least five (5) criminal appellate briefs and two (2) post conviction writs.

4. Continuing Obligation To Report Changes In Qualifications

- (a) A qualified attorney shall notify the Presiding Judge of these courts not later than 48 hours after any of the following events:
  - i. arrest for any state or federal offense punishable by confinement;
  - ii. placement on community supervision or intervention;
  - iii. disciplinary action by the State Bar of Texas including active or probated suspension; or

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<sup>14</sup> Two trials as second-chair are the equivalent of one trial as first-chair.

- iv. entering a plea of guilty or no contest to an offense punishable by confinement.

## H. Approval of Attorneys

In addition to meeting the objective qualifications described in section 23G, an attorney must be approved by a majority of the judges.

### 1. Consideration of Qualified Attorneys

- (a) At each monthly meeting beginning in August, 2003, following submission of attorney applications, the judges shall consider new applicants for the approved list.
- (b) The judges may approve, by majority vote, those attorneys:
  - i. who have met the objective qualifications; and
  - ii. whom the judges consider to be competent to adequately handle misdemeanor cases.

### 2. Consideration of Approved Attorneys

- (a) An attorney may be removed from the approved list by a majority of the judges if the judges determine the attorney:
  - i. no longer meets the objective qualifications;
  - ii. is not fully competent to properly represent indigent defendants in the county criminal courts at law; or
  - iii. intentionally or repeatedly fails to make every reasonable effort to contact a defendant not later than the end of the first working day after the date on which the attorney is appointed and to interview the defendant as soon as practicable after the attorney is appointed.<sup>15</sup>
- (b) An attorney may request to be removed from the list of approved attorneys for a limited or indefinite period by making such request in writing, addressed to the Presiding Judge of the County Criminal Courts at Law.
- (c) An attorney may request reinstatement in the same manner as a request for removal.

### 3. Minimum Continuing Legal Education

An attorney approved to represent indigent defendants shall complete a minimum of ten (10) hours of continuing legal education pertaining to criminal law annually.

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<sup>15</sup> TEX. CODE CRIM. PROC. ART. 26.04(k).

## I. Duties of Appointed Counsel

### 1. Initial Contact

An attorney appointed to represent an indigent defendant shall make every reasonable effort to contact the defendant not later than the end of the first working day and to interview the defendant as soon as practicable.

### 2. Duration of Appointment

Appointed counsel shall zealously represent a defendant until the case is dismissed, the defendant is acquitted, all direct state appeals are exhausted, or the court, after entering a finding of good cause on the record, relieves the attorney or replaces the attorney with other counsel.

### 3. Conduct of Counsel

Appointed counsel shall perform the attorney's duty owed to the defendant in accordance with the adopted procedures of this Plan, the requirements of law, and the Texas Disciplinary Rules of Professional Conduct.

### 4. Timely Appearance In Court

- (a) An attorney assigned to a court shall appear at 8:30 a.m. unless otherwise instructed by the judge presiding.
- (b) An attorney assigned to a court is subject to temporary reassignment to another court.
- (c) An attorney shall remain in an assigned court until expressly released by the judge presiding.
- (d) An attorney who fails to appear on time as directed is subject to immediate replacement.

### 5. Absence, Conflicts, Work Load

Appointed counsel shall inform the judge presiding when any of the following occurs:

- (a) counsel is unable to appear to discharge his or her duties according to the published schedule; or
- (b) counsel cannot represent an indigent defendant because of a legal or ethical conflict.

### 6. First- and Second-Chair Counsel

An attorney appointed to represent a defendant shall not formally or informally associate second-chair counsel without the written approval of the judge presiding. An attorney who provides legal services to an indigent defendant to whom the attorney has not been appointed is presumed to do so *pro bono*.

(a) *First-Chair Counsel*

- i. All motions filed in the case shall be filed in the name of first-chair counsel.
- ii. First-chair counsel shall appear on all matters before the Court and speaks for the defendant.
- iii. First-chair counsel may associate another attorney only with the written approval of the judge presiding.
- iv. First-chair counsel may assign tasks to second-chair counsel on behalf of the defendant.

(b) *Second-Chair Counsel*

- i. Under the direction and in the presence of lead counsel, second-chair counsel may prepare, present, or argue motions, examine witnesses, and participate in a hearing or trial.
- ii. Second-chair counsel shall complete and file an attorney of record form with the district clerk. The form shall state on its face that the attorney is second-chair counsel.
- iii. Second-chair counsel is not entitled to compensation from Harris County for work performed while acting in this capacity.
- iv. Second-chair counsel shall be present for the entire trial.
- v. Only one second-chair counsel is permitted on a case.

7. Substitution By Counsel Prohibited

- (a) An attorney assigned to a court or an individual case who cannot appear shall notify the judge or court coordinator as soon as possible.
- (b) *An attorney has no authority to assign a daily substitute or special assignment attorney.*

**J. Assignment of Approved Counsel**

1. Assignment of Counsel

- (a) The Court Manager's Office is responsible for making random weekly and daily assignments to these courts.
- (b) Assignments shall be made quarterly.

2. Notice of Assignment

The judge or the judge's staff is responsible for notifying an attorney of a weekly or daily assignment.

3. Appointment To Indigent Defendant

- (a) *Only the judge presiding may appoint counsel to an indigent defendant, or to another when the interests of justice require that counsel be appointed.*

- (b) If the judge determines that the defendant does not speak and understand the English language or that the defendant is deaf, the judge shall make an effort to appoint an attorney who is capable of communicating in a language understood by the defendant.

4. Method of Assignment

Each assignment shall be:

- (a) reasonably and impartially distributed among the approved attorneys in each category, and
- (b) in a manner that, as nearly as possible, assures each attorney an equal number of assignments,
- (c) based upon the needs of the courts and an individual attorney's willingness and availability to work during an assigned period.

5. Types of Assignments

(a) *Weekly Assignments*

An attorney is assigned to a court for a two-week period beginning on the first business day of a week and concluding on the last business day of the week, irrespective of holidays or other days when the court is not conducting its docket.

(b) *Daily Assignment*

An attorney is assigned to a court to appear on not more than two days during a specific week or weeks.

(b) *Emergency Assignments*

An attorney is assigned *ad hoc* from the list of approved attorneys by the judge presiding for the purpose of immediately:

- i. replacing an absent attorney; or
- ii. adding to the previously assigned attorneys to avoid exceeding the case limitations of this Plan.

(c) *Specialized Case Assignment, Appeals, and Extraordinary Writs*

An attorney is assigned to a specific case based upon the severity and complexity of the case.

(d) *Daily Case Limitations*

Each attorney may be assigned between three and seven cases daily, taking into consideration the complexity of the cases, or as directed by the judge presiding.

6. Substitution

- (a) After receiving a list, a judge may request one substitution from the list for each name appearing on the court's assignment list.
- (b) Upon notification that a judge has requested a substitution, the Court Manager's Office shall assign the next attorney on the list who has not been assigned.
- (c) The name of the attorney for whom the substitution was requested shall be returned to the list and shall remain next in order on the list. No additional substitutions are permitted, except as provided in this Plan.

7. Counsel Appointed In Pending Felony

The judge of the court in which the misdemeanor is pending may either appoint the attorney representing the defendant in the district court, or appoint an attorney as provided by this Plan.

**K. Replacement of Approved Counsel**

1. Attorney Request

- (a) A lawyer may request permission to withdraw from an appointed case by filing a written motion with the court.
- (b) The judge presiding may grant the motion for good cause only after finding that the client will not be prejudiced by the substitution.
- (c) After granting the motion, the judge shall immediately appoint another qualified lawyer as provided by these rules.

2. For Good Cause

The judge presiding may replace counsel after entering written findings in the record showing good cause and that no prejudice to the defendant will result from the removal, including without limitation:

- (a) current information about the defendant and charges indicating that counsel of different qualifications is appropriate for the defendant under these rules; or
- (b) a violation of the attorney's professional responsibilities; or
- (c) a principled reason.<sup>16</sup>

3. Defendant Request

The appointing judge may substitute counsel if:

- (a) at the conclusion of a trial, the defendant desires to prosecute a direct appeal and request that the court appoint different counsel; or

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<sup>16</sup> *Stotts v. Wiser*, 849 S.W.2d 366 (Tex. Crim. App. 1995).

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

## L. Compensation and Reimbursement

The Harris County Auditor shall not pay compensation or reimbursement to an attorney who is not on the list of attorneys approved for appointment in the County Criminal Courts at Law.

### 1. Fee Schedule

Appointed counsel shall be compensated for all time reasonably necessary to adequately represent the defendant according to the following fee schedule:

(a) *Daily Flat Fee Rate.* To receive the daily rate, an attorney shall:

- (1) appear for docket call at the time and place designated by the judge of the assigned court; and
- (2) accept appointments in that court or any other county court to which the attorney may be assigned on that day;
- (3) remain available to the judges of the county criminal courts at law until the courts' morning docket call is concluded, or the attorney is released by the judge of the court to which the lawyer is assigned; and
- (4) provide professional services, including the resetting of cases, first to appointed cases in the county criminal courts at law.

(b) *Hourly Rate*

- i. Out-of-Court \$25/hr.  
to \$50/hr.
- ii. Motions, Hearings, and Competency Proceedings \$50/hr.  
to \$90/hr.
- iii. Trial \$60/hr.  
to \$90/hr.

Hourly rates shall be paid for performing the appropriate statutory service defined in TEX CODE CRIM PROC. ART. 26.05(a), based on the criteria in that section.

(c) *Flat Fee Schedule*

- i. Weekly & Substitute Daily Assignments (appointment not required) \$225/day
- ii. Non-Issue or Plea (two or more on unassigned day \$100 max) \$ 50.00
- iii. Non-Issue or Plea (concurrent with weekly or daily assignment) \$ 00.00
- iv. Appeal & Extraordinary Writs \$750.00
- v. Petition For Discretionary Review \$350.00
- vi. Oral Argument Before Court of Criminal Appeals \$250.00
- vii. (Travel expenses under county rates and policy, additional)

2. Concurrent Payments.

An attorney engaged in a weekly or daily assignment shall not be compensated for a non-issue or plea appearance that occurs on the same day the attorney is assigned to a court.

3. Additional Compensation

An attorney appointed to represent an indigent defendant shall not accept additional compensation for professional services performed on behalf of the defendant, as a result of the appointment, in any form from any source other than Harris County, Texas.

4. Judicial Determination of Attorney Compensation

The following procedures apply to the review and approval of attorney's fees:

- (a) Appointed counsel shall request payment on a form approved by the judges of the County Criminal Courts at Law and the County Auditor. Counsel shall submit the request for payment to the judge presiding over the proceedings of the court. The payment request shall list all services performed by the attorney on behalf of the defendant.
- (b) The judge shall either approve the amount requested or enter written findings stating the amount 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 Second Administrative Judicial Region.<sup>17</sup>
- (d) A judge may compensate an attorney at a rate exceeding a flat fee or hourly rate established by this Plan. Upon receipt, the auditor shall forward the order to the Court Manager's Office for review by the Presiding Judge or Court Manager.

5. Accounting of Attorney Hours

To be entitled to payment, appointed counsel shall provide the following information:

(a) *Hourly Rate*

i. Standard

Time must be itemized in quarter hour (15 minute) increments on a form approved under the Plan.

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<sup>17</sup> TEX. CODE CRIM. PROC. ART. 26.05(c).

ii. Itemization

Counsel must prepare and maintain time records for each appointed client showing the date of service, nature of service rendered, and hours worked.

*(b) Flat Fee Rate*

The date and type of service performed.

6. Expenses

*(a) Reasonable and Necessary Expenses*

The County will reimburse appointed attorneys for reasonable and necessary expenses including investigation and mental health and expert witnesses incurred on behalf of an indigent client as provided under TEX. CODE CRIM. PROC. ARTS. 26.05(d) and 26.052(f), (g), and (h).

*(b) Documentation*

Counsel shall submit the original invoice or receipt along with any request for reimbursement.