

# **LOCAL RULES TO IMPLEMENT THE TEXAS FAIR DEFENSE ACT**

## **2016 PLAN STANDARDS AND PROCEDURES RELATED TO APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN FELONY CASES IN COLLIN COUNTY**

To implement the Texas Fair Defense Act (FDA, Acts. 2001, 77<sup>th</sup> Leg.), the following Local Rules of Administration are adopted under Texas Local Government Code Sec. 74.093, effective January 22, 2016.

### **SECTION ONE APPOINTING COUNSEL**

#### **1.01 Procedures for Timely Appointment of Counsel**

##### **A. Magistration**

All persons confined in state custody in Collin County shall be magistrated as soon as practicable after their arrest, but no later than 48 hours after arrest. The magistrate shall deliver the warnings and admonishments and comply with all requirements contained in Article 15.17, Texas Code of Criminal Procedure, including making a record of:

1. Informing the accused of the accused's right to request appointment of counsel;
2. Whether the accused wants to request appointment of counsel; and
3. Whether the person requested court-appointed counsel.

As soon as possible following arrest, and in any event not later than the Article 15.17 hearing, each arrested person who wants to request appointment of counsel shall be provided with a form on which the arrested person will provide under oath the necessary information concerning the person's financial resources and will indicate that the person requests appointment of counsel. The arrested person will be provided reasonable assistance in completing the form. A copy of the form is attached hereto as Affidavit of Indigency.

The form requesting appointment of counsel and containing the information concerning the arrested person's financial resources will be transmitted to the appointing authority within 24 hours of the request being made.

If a person has been identified as a person suffering from mental illness or mental defect, the magistrate shall promptly notify the Office of Collin County Mental Health Managed Counsel Program.

For persons arrested on out-of-county warrants, the magistrate will ask the defendant if he/she would like to request appointed counsel. The magistrate will record the response, and if counsel is requested, the magistrate will provide the arrestee with the

appropriate forms for requesting counsel. The magistrate will ensure assistance in completing the forms at the same time. The forms will be transmitted to the appointing authority in the county issuing the warrant within 24 hours of the request being made. Regarding the appointment of counsel, persons arrested in other counties on local warrants must be appointed counsel in the county that issued the warrant within one working day of receipt of the request. Persons arrested on out-of-county warrants must be appointed counsel in the county of arrest if the person has not been transferred or released to the custody of the county issuing the warrant before the 11<sup>th</sup> day after the date of arrest. [Art. 1.051(c-1), CCP].

## **B. Appointing Authorities**

The district courts trying criminal cases hereby designate the following individuals or offices as having authority to appoint counsel for indigent defendants charged with a criminal matter within the jurisdiction of the district courts:

1. The Office of the Indigent Defense Coordinator.
2. Any magistrate performing the duties under 1.01 (A) above that has authorized access to the county's electronic appointment system.
3. In cases where the defendant may be suffering from a mental illness or mental defect, the Office of Mental Health Managed Counsel Program.

## **C. Prompt Appointment of Counsel**

Counsel shall be appointed as soon as possible to indigent defendants but no later than the end of the first working day after the date on which the appointing authority receives the defendant's request for appointed counsel.

If an indigent defendant is arrested in another county based on this county's warrant, counsel will be appointed within one working day of this county's receipt of the request for counsel.

If a defendant is arrested in this county based on another county's warrant, counsel will be appointed for the defendant if, on the eleventh day after the arrest, the defendant is still in this county's custody.

If a defendant wishes to request counsel prior to the initial appearance, the forms required to request counsel may be obtained at the Collin County website at [http://www.collincountytx.gov/indigent\\_defense/Pages/default.aspx](http://www.collincountytx.gov/indigent_defense/Pages/default.aspx) or at the Office of the Indigent Defense Coordinator. The defendant may submit these forms to the Indigent Defense Coordinator or email to: [cclndigentDefense@co.collin.tx.us](mailto:cclndigentDefense@co.collin.tx.us). The court will rule on all requests for counsel submitted in this manner.

If the defendant is released from custody prior to the appointment of counsel, appointment of counsel is not required until the defendant's first court appearance or when adversarial judicial proceedings are initiated, whichever comes first.

#### **D. Defendants Appearing Without Counsel**

1. A defendant may voluntarily and intelligently waive the right to counsel. A waiver obtained in violation of Subsection D (2) or D (3) is presumed invalid.
2. In any adversary judicial proceeding that may result in punishment by confinement, the attorney representing the state may not:
  - a. Initiate or encourage an attempt to obtain from a defendant who is not represented by counsel a waiver of the right to counsel; or
  - b. Communicate with a defendant who has requested the appointment of counsel, unless the appointing authority has denied the request and subsequent to the denial, the defendant:
    - i. Has been given a reasonable opportunity to retain and has failed to retain private counsel; or
    - ii. Waives or has waived the opportunity to retain private counsel.
3. In any adversary judicial proceeding that may result in punishment by confinement, the court may not direct or encourage the defendant to communicate with the attorney representing the state until the court advises the defendant of the right to counsel and the procedure for requesting appointed counsel and the defendant has been given a reasonable opportunity to request appointed counsel. If the defendant has requested appointed counsel, the court may not direct or encourage the defendant to communicate with the attorney representing the state unless the appointing authority has denied the request and, subsequent to the denial, the defendant:
  - a. Has been given a reasonable opportunity to retain and has failed to retain private counsel; or
  - b. Waives or has waived the opportunity to retain private counsel.

#### **E. Waiver of the Right to Counsel**

1. If a defendant wishes to waive the right to counsel for purposes of entering a guilty plea or proceeding to trial, the court shall advise the defendant of the nature of the charges against the defendant and, if the defendant is proceeding to trial, the dangers and disadvantages of self-representation. If the court determines that the waiver is voluntarily and intelligently made, the court shall provide the defendant with a statement substantially in the following form, which, if signed by the defendant, shall be filed with and become part of the record of the proceedings.

"I have been advised this \_\_\_ day of \_\_\_\_, 2\_\_\_, by the (name of court) Court of my right to representation by counsel in the case

pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge. Understanding my right to have counsel appointed for me free of charge if I am not financially able to employ counsel, I wish to waive that right and request the court to proceed with my case without an attorney being appointed for me. I hereby waive my right to counsel." (signature of defendant).

2. A defendant may withdraw a waiver of the right to counsel at any time but is not entitled to repeat a proceeding previously held or waived solely on the grounds of the subsequent appointment or retention of counsel. If the defendant withdraws a waiver, the trial court shall provide the appointed or retained counsel 10 days to prepare.

### **1.02 Computerized Attorney Listing System**

**A.** The District Judges direct that each appointing authority shall utilize the electronic appointment system and all appointments shall be made from the list as published within Collin County's Odyssey system. If the Odyssey system is unavailable, the appointing authority shall appoint an attorney from the written list of approved attorneys. The appointing authority shall select an attorney from among the list of the next five attorneys whose names are listed on the Odyssey system. If this procedure is not followed, the appointing authority must state in writing the good cause found for deviating from this requirement.

**B.** The computerized attorney listing system shall contain identifying information to indicate those attorneys who have been specially approved for appointment in cases involving mental illness or mental defect.

### **1.03 Admonishments Form**

All magistrates shall use the approved Admonishment Form (Exhibit A) or a substantially similar form.

## **SECTION TWO ATTORNEY QUALIFICATIONS**

### **2.01 Procedures for the Fair Allocation of Attorneys**

The appointing authority shall at all times comply with the Texas Fair Defense Act, and Article 26.04, Texas Code of Criminal Procedure.

### **2.02 Minimum Standards for Court Appointed Attorneys**

The minimum standards for placement in the electronic appointment system shall be:

- A.** Licensed and in good standing with the State Bar of Texas;
- B.** Must have at least two years of experience in the practice of criminal law;

- C. Must have completed at least ten hours of continuing legal education in the field of criminal law in the calendar year prior to application; and
- D. Must have at least three (3) letters of reference from members of the Collin County Bar Association.
- E. The applicant must either live in Collin County, maintain their principal office in Collin County, or have 80% of their practice in Collin County.

### **2.03 Graduated Lists**

Applications will be received for, and lists approved for, the following graduated lists. Each list details the qualifications required for placement on the list:

#### **A. SJF and Third Degree Felonies**

1. Meet minimum qualifications of Rule 2.02, and
2. Board Certified in Criminal Law; or
3. Provide proof of at least four criminal jury trials as lead counsel in a court of record.

#### **B. 1st and 2nd Degree Felonies**

1. Meet minimum qualifications of Rule 2.02, and
2. Board Certified in Criminal Law; or
3. Provide proof of at least eight jury trials, including at least four felony jury trials, as lead counsel in a court of record.

#### **C. Appeals and Non-Capital Writs**

1. Meet minimum qualifications of Rule 2.02, and
2. Board Certified in Criminal Law or Criminal Appellate Law; or
3. Demonstrate objective competence in the field of criminal appellate law.

#### **D. Mental Health Cases**

In addition to the foregoing requirements, attorneys requesting appointment in criminal cases where the defendant may be suffering from a mental illness or mental defect must apply for appointment to the mental health electronic appointment system. The Program Attorney will submit the list of qualified attorneys proposed for appointment to

the Mental Health Wheel to the Board of District Judges for approval by majority vote. Additional qualifications for appointment to the Mental Health Wheel include: Six hours of annual mental-health related CLE and at least eight felony jury trials.

#### **2.04 Selection and Appointment of Counsel in Death Penalty Cases**

**A.** Whenever a person is arrested for a capital offense, the appointing authority shall appoint one attorney qualified as lead counsel under Art. 26.052, Texas Code of Criminal Procedure, and on the approved list of attorneys maintained by the presiding judge of the First Administrative Judicial Region for capital cases.

**B.** If the State does not give notice in writing that they will not seek the death penalty as a sentencing option on or before the 60<sup>th</sup> day following the arrest of a person for a capital offense, or by the time charges are filed by indictment alleging a capital offense, the appointing authority shall appoint a second attorney from the approved list of attorneys maintained by the presiding judge of the First Administrative Judicial Region for capital cases, who is otherwise qualified under Art. 26.052, Texas Code of Criminal Procedure, or who is qualified on the electronic appointment system for first degree felony offenses.

**C.** At any time after being appointed to a capital offense, an attorney appointed under 2.04 (1) above may request, from the Local District Court Administrative Judge if no indictment has been presented or from the presiding judge of the court in which an indictment is pending, the appointment of a second chair attorney from the approved list of attorneys maintained by the presiding judge of the First Administrative Judicial Region for capital cases, who is otherwise qualified under Art. 26.052, Texas Code of Criminal Procedure, or who is qualified on the electronic appointment system for first degree felony offenses.

**D.** If the State gives notice that it will not seek the death penalty as a sentencing option after a second attorney has been appointed, the court shall remove the second appointed attorney, except for good cause shown by motion of the lead attorney.

#### **2.05 Mental Health Managed Counsel Program – Continuity of Care Court Cases**

**A.** All cases in which the defendant has been identified in the CARE match system and meet the other requirements for placement in Continuity of Care Court will be referred to the Managed Assigned Counsel Office for assignment of counsel to defendants who qualify for appointed counsel due to indigency. The court in which a criminal case is currently pending may also refer defendants to the Managed Assigned Counsel Office for assignment of counsel for defendants who may not be identified in CARE match or do not meet the other requirements for placement in Continuity of Care Court. The Managed Assigned Counsel may refuse to accept the case for assignment if:

1. A conflict of interest exists;
2. The Office has insufficient resources to provide adequate representation;

3. The Office is incapable of providing representation in accordance with the rules of professional conduct; or
4. The Office shows good cause for refusing appointment.

**B.** Appointed attorneys who represent defendants assigned through the MHMC Program may utilize the services of the MHMC Office's case managers.

## **2.06 Annual Renewal and Review of Counsel**

**A.** Counsel on the court appointment list shall be required to complete at least six hours of continuing legal education in the field of criminal law annually. Failure to complete the required continuing legal education may result in removal from the electronic appointment system.

**B.** No later than the 15<sup>th</sup> day of October of each year, an attorney that was appointed to represent a defendant under this plan must submit, through the Texas Indigent Defense Commission attorney reporting portal, the percentage of the attorney's practice time that was dedicated to work based on appointments accepted in this county for adult criminal and juvenile delinquency cases for the prior 12 months that begins on October 1 and ends on September 30.

**C.** Counsel on the mental health appointment list shall be required to complete an additional six hours of continuing education in the field of mental health defense. Applicants must comply with MHMC program procedures.

## **2.07 Duties Of Court-Appointed Counsel**

In addition to all other duties, appointed counsel shall comply with Art. 26.04(j).

## **2.08 Removal and Review of Counsel**

**A.** Any District Judge trying criminal cases may remove an attorney from the electronic appointment system for:

1. failure to make reasonable efforts to contact the 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;
2. failure to provide effective representation to any person to whom they have been appointed; or
3. failure to comply with these rules, the Texas Disciplinary Rules of Professional Conduct or the Texas Code of Criminal Procedure.

B. Attorneys on the mental health appointment list may be removed in the best interests of the MHMC Program by request of the MHMC Program Director and approval of the designated judicial officer for the Mental Health Managed Counsel Program.

### **PART THREE PROCEDURES FOR INDIGENCY DETERMINATION**

#### **3.01 Definitions**

As used in this rule:

**A. "Total income"** shall include all income of the defendant and spousal income available to the defendant. Total income shall include wages, salaries, tips, taxable interest, dividends, capital gains, business income, IRA distributions, pensions and annuities, rental real estate, royalties, partnerships, S corporations, trusts, farm income, unemployment compensation, Social Security benefits, and all other income. Unless there has been a substantial change in income, total income will be determined from line 22 of the most recent U.S. Individual Income Tax Return or employment records accessible by the Office of the Indigent Defense Coordinator.

**B. "Household size"** shall be determined by the number of dependents claimed on the most recent U.S. Individual Income Tax Return or all individuals who are dependent on the defendant for financial support.

**C. "Liquid assets"** shall include but are not limited to cash, savings, checking accounts, stocks, bonds, certificates of deposit, and equity in real and personal property that can be readily converted to cash, other than assets and property exempt from attachment under state law.

#### **3.02 Financial Considerations**

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

**A.** their total income does not exceed 125% of the Federal Poverty Guidelines established and revised annually by the U.S. Department of Health and Human services and published in the Federal Register; or

**B.** the defendant and defendant's spouse were not required by law to file the most recent U.S. Individual Income Tax return (either 1040 or 1040EZ) due to gross income below the filing requirements; and

**C.** the defendant and defendant's spouse liquid assets do not exceed \$2,500;

**D.** liquid assets do not exceed double the estimated cost of obtaining competent private legal representation on the offense(s) with which the defendant is charged;

E. if defendant is currently serving a sentence in a correctional institution, is currently held in custody, is currently residing in a mental health facility, or is the subject of proceeding in which admission or commitment to such a mental health facility is sought; and does not have liquid assets in excess of 3.02(C); or

F. at the time of requesting appointed counsel, the defendant or defendant's dependents have been determined to be eligible to receive food stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, public housing or Collin County Indigent Health Care.

### **3.03 Factors Not to be Considered**

A. A defendant's posting of bail or ability to post bail may not be considered, except as provided by law, in determining whether the defendant is indigent. Even when a defendant has posted bail, the defendant's financial circumstances are measured by the financial standards stated in these rules.

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

C. A defendant may not be denied indigent status merely because the person is employed.

### **3.04 Procedures for Determining Indigence**

A. As soon as possible following arrest, and in any event not later than the Article 15.17 hearing, each arrested person who wants to request appointment of counsel shall be provided with a form on which the arrested person will provide under oath the necessary information concerning the person's financial resources and will indicate that the person requests appointment of counsel. The arrested person will be provided reasonable assistance in completing the form. A copy of the form is attached hereto as Affidavit of Indigency.

B. The form requesting appointment of counsel and containing the information concerning the arrested person's financial resources will be transmitted to the appointing authority within 24 hours of the request being made.

C. The appointing authority will determine whether the person meets the financial standards for indigence in Rule 3.02. The determination will be recorded on the form requesting appointment of counsel and the form will be filed with the other orders in the case.

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

**E.** A written or oral statement elicited under this article or evidence derived from the statement may not be used for any purpose, except to determine the defendant's indigence or to impeach the direct testimony of the defendant regarding the defendant's indigence.

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

**G.** If there is a material change in the defendant's financial circumstances, the defendant or the defendant's counsel shall inform the court in which the indictment is pending of the change.

**H.** The District Judges hereby designate the Office of the Indigent Defense Coordinator to review and audit applications for court appointed attorneys in felony cases in accordance with these rules. A copy of the request form shall be transmitted to the Office of the Indigent Defense Coordinator for investigation and review. Income verification and determination will be completed no later than the end of the first working day after the date on which the Office of the Indigent Defense Coordinator receives the defendant's request for appointment of counsel. The Office of the Indigent Defense Coordinator shall notify the defendant and the Court of the results of the review and audit.

**I.** An unrepresented defendant remaining in custody for 14 days after it has been determined they are not indigent shall have his indigency status reviewed.

### **3.05 Partial Indigency**

**A.** The court may find a defendant to be partially indigent if the person is able to pay some part of the cost of legal representation and if the payment does not impose manifest hardship on the accused or the accused's household.

**B.** An accused person found to be partially indigent may be ordered by the court to pay, while the case is pending, monthly installments commensurate with the accused's ability to pay based upon his/her income and assets.

## **SECTION FOUR PROCEDURES FOR ATTORNEY COMPENSATION**

### **4.01. Attorney Fee Schedule**

**A.** The District Judges adopt, pursuant to Article 26.05 Tex. Code of Crim. Proc., a fee schedule for appointed attorneys, attached hereto as "Fee Schedule for Appointed Attorneys."

**B.** The judge presiding over a case may authorize payment to appointed counsel that varies from the fee schedule in unusual circumstances or where the fee would be manifestly inappropriate because of circumstances beyond the control of the appointed counsel.

#### **4.02 Payment Request Form**

In cases disposed of by a guilty plea or similar pre-trial disposition, Counsel shall submit their requests for payment on the auditor's approved Payment Request Form on the date of the disposition. If the case is disposed of by trial, the Payment Request Form shall be submitted within seven days of the date the trial is concluded. Payment requests not submitted within thirty days of the date of disposition shall not be approved by the Court, absent extenuating circumstances.

#### **4.03 Investigation Expenses**

**A.** Appointed counsel may file with the trial court a pretrial *ex parte* motion for advance payment of investigative and expert expenses. The request for expenses must state:

1. the type of investigation to be conducted or the type of expert to be retained;
2. specific facts that suggest the investigation will result in admissible evidence or that the services of an expert are reasonably necessary to assist in the preparation of a potential defense; and
3. an itemized list of anticipated expenses for each investigation or each expert.

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

1. state the reasons for the denial in writing;
2. attach the denial to the confidential request; and
3. submit the request and denial as a sealed exhibit to the record.

**B.** Appointed counsel may incur investigative or expert expenses without prior approval of the court. On presentation of a claim for reimbursement, the court shall order reimbursement of counsel for the expenses only if they are reasonably necessary and reasonably incurred. Unreasonable or unnecessary expenses will not be approved. See, Articles 26.05(d), 26.052(f), (g), & (h), Code of Criminal Procedure.

**SECTION FIVE**

**5.01 Amendments**

This plan is subject to amendment.

**5.02 Availability of Forms**

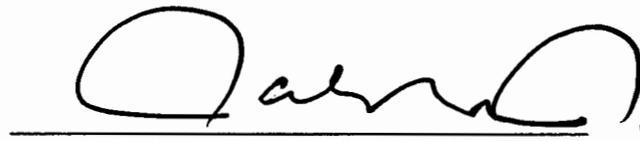
Forms provided for in this plan will be available on the county website.

**5.03 Effective Date**

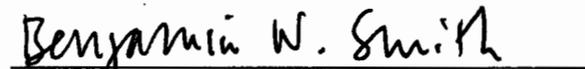
This plan is effective for all cases pending on or after the 22<sup>nd</sup> day of January, 2016, and shall remain in effect until further order of the district judges trying criminal cases.

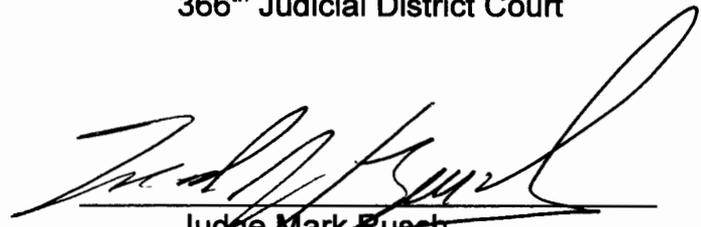
  
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Judge Angela Tucker  
199<sup>th</sup> Judicial District Court

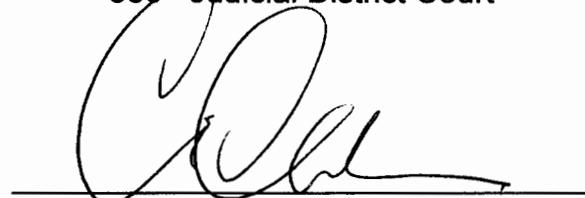
  
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Judge Scott Becker  
219<sup>th</sup> Judicial District Court

  
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Judge John R. Roach, Jr.  
296<sup>th</sup> Judicial District Court

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Judge Ray Wheless  
366<sup>th</sup> Judicial District Court

  
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Judge Benjamin Smith  
380<sup>th</sup> Judicial District Court

  
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Judge Mark Busch  
401<sup>st</sup> Judicial District Court

  
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Judge Chris Oldner  
416<sup>th</sup> Judicial District Court

## **Fee Schedule For Indigent Defense Court Appointed Attorneys**

In all felony cases, except as hereafter provided, counsel shall be paid according to the following fee schedule, without exception, except as provided for in Section 4.01(B):

### **PLEAS:**

Death Penalty:	\$150.00 per hour
Capital, non-death penalty:	\$100.00 per hour
First Degree Felony:	\$1,000.00
Second Degree Felony:	\$750.00
Third Degree & State Jail Felonies:	\$500.00
Additional cases:	\$250.00 (per case at discretion of the judge)

### **TRIALS:**

Pre-Trial preparation:	\$1000.00
Trial, per ½ day:	\$500.00

### **APPEALS:**

Appeal from trial:	\$3,500.00
Other appeal:	\$2,000.00

### **DISCRETIONARY ADJUSTMENT**

Per case adjustment, not to exceed:	\$1,000.00
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### **Child Advocacy Center cases and all cases with a minimum 15 year sentence:**

Per case adjustment, not to exceed:	\$3,000.00
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### **Cases involving serious mental illness, competency or mental defect under the direction of the mental health program managing attorney:**

Per case adjustment, not to exceed:	\$1,750.00
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