



Harris County Public Defender

Preliminary Report on Operations and Outcomes

October 19, 2012

Dr. Tony Fabelo
Carl Reynolds
Jessica Tyler

*Prepared by the Council of State Governments Justice Center,
with the support of the Harris County Public Defender*

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Executive Summary

On September 29, 2010, after an inclusive and deliberative process, and recommendations from the Administrative Office of the District Courts and the Harris County Court Manager's Office, the Harris County Commissioners Court created the Harris County Public Defender Office (HCPD) by unanimous vote. Harris County received a \$4.2 million grant from the former Texas Task Force on Indigent Defense [known since September 1, 2011, as the Texas Indigent Defense Commission (TIDC)]. The final installment of the state grant will take place in FY 2014 and the county should assume annual funding of \$8.1 million the following year.

HCPD started operating on January 31, 2011 and on February 1st began receiving misdemeanor mental health cases and misdemeanor and felony appeals. HCPD began representing indigent clients charged with non-capital felony offenses in October 2011, and in December 2011 the office began accepting indigent juvenile clients and became fully operational. HCPD is currently designed and funded to handle about seven percent of all the indigent criminal and juvenile cases in Harris County: 4 percent of indigent misdemeanor cases, 6 percent of felony indigent defense cases, 23 percent of indigent juvenile cases, and 100 percent of indigent appeals; the office's annual capacity is 1,400 misdemeanor mental health cases, 1,700 felonies, 1,700 juvenile cases, and 275 appeals.

In April 2012, Harris County contracted with the Justice Center to work with HCPD by reviewing their operations, analyzing several sources of data and extracting workload information from their case management system, and studying case outcomes. The effort is intended to support the office in becoming a model for similar operations in Texas and around the country. This preliminary report puts the new office in context, describing the professional and systemic challenges of indigent criminal defense and the overall Harris County criminal justice and indigent defense systems. Then the report evaluates the set-up and operations of the two longer-running HCPD divisions, Mental Health and Appellate. Two other divisions representing felony and juvenile cases started at a later time and will be evaluated in a subsequent report.

The principle findings and recommendations of this report are:

1. Establishing a public defender office was an appropriate decision for Harris County and the Texas Indigent Defense Commission. Public defender offices are common, the field of public defense is well developed (but with room for improvement), and there is obvious potential for raising the local quality of indigent defense in any given locality. National standards suggest a public/private mix, and the local system benefits from the institutional presence of the defense. Criminal justice must be practiced in collaborative meetings as

- well as adversarial courtrooms, and the defense presence should include both public and private representation. (See Parts I-II.)
2. The Harris County assigned counsel system is designed primarily for consistency and low cost for a high volume of indigent defendants. In comparison with other Texas urban jurisdictions, cost-per-case is low, plea bargaining more prevalent, and sentencing outcomes more costly because they are more tilted toward confinement. The assigned counsel system is run by professional court administrators but allows significant deference to individual judicial preference. (See Parts III-IV.)
 3. HCPD has a supportive advisory board and a well-qualified Chief Defender, suitable county office space and county support, qualified employees, and appropriate operational policy. The office has demonstrated due diligence in its initial 18 months of existence, and willingness to help solve systemic issues in Harris County criminal case processing, while preserving proper independence. HCPD operations satisfy the Ten Principles of a Public Defense Delivery System, where applicable. (See Parts V-VI.)
 4. HCPD's Mental Health Division represents more challenging clients than the norm, and achieves significantly better dismissal and guilty plea results (determined in a matched sample compared with assigned counsel). (See Part VII.) The Appellate Division has qualitative support and quantitative success in case outcomes, and plays a significant role in HCPD's added value to the defense bar and criminal justice community. (See Part VIII.)
 5. The Justice Center makes several recommendations for further action:
 - The Chief Defender position should be defined by a specified term, subject to a recommendation for renewal by the Board of the Harris County Public Defender's Office; the Board's composition could be revisited to provide for greater independence from the local judiciary, but is in compliance with state law.
 - HCPD management should enhance the use of their case management system by: defining case data fields to ensure the productive recording of workload and outcome information; gather non-case-specific information that would benefit management; and explore the further use of workload data, typified by the information provided in this report, to generate meaningful management reports. The Appellate Division should monitor the number of extensions requested, and adopt a written policy on the filing of *Anders* briefs.
 - Harris County should continue to support HCPD's controlled caseload, while also examining caseload and workload for the assigned and contract counsel systems, to ensure that they avoid excessive caseloads and adequately compensate all counsel for zealous representation.
 - The Indigent Defense Commission should revisit the grant reporting requirements imposed on the HCPD, for greater clarity and utility. (This recommendation is already in the process of implementation by the TIDC and the HCPD.)

I. Introduction

A. Overview

On September 29, 2010, after an inclusive and deliberative process, and recommendations from the Administrative Office of the District Courts and the Harris County Court Manager's Office, the Harris County Commissioners Court created the Harris County Public Defender Office (HCPD) by unanimous vote received a \$4.2 million grant from the former Texas Task Force on Indigent Defense [known since September 1, 2011, as the Texas Indigent Defense Commission (TIDC)]. The final installment of the state grant will take place in FY 2014 and the county should assume annual funding of \$8.1 million the following year.

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Part I of this report reviews the national challenge faced by indigent defense systems in the country, in order to provide a national perspective underlying the policies in Texas. Part II reviews the indigent defense governance structure and policies in Texas. Parts III and IV review the Harris County criminal justice and indigent defense systems, respectively. Part V

describes the operations of the HCPD, and Part VI evaluates the operational set-up of the office. Parts VII and VIII present the assessment of the Mental Health and Appellate Divisions, respectively, including the measurement of case outcomes, and Part IX identifies lessons learned and next steps for the project.

B. The National Challenge of Indigent Defense

The right to counsel as guaranteed by the Sixth Amendment applies in serious cases, those in which the State's power to incarcerate is at stake. The right is understood to mean a right to *reasonably effective* assistance to the accused.¹ In an adversarial system of justice, fairness and accuracy are served, and even depend upon, the opposition of attorneys with comparable and sufficient resources and time to discharge their duties. All attorneys are required to provide "competent and diligent" representation,² to "zealously assert their client's position" in their role as advocates, and to hold "special responsibility for the quality of justice."³ The Texas Lawyer's Creed tells lawyers that they cannot "be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest."⁴ Lawyers who cannot meet their professional responsibility in an individual case are subject to discipline, and may also fall short as participants in a system that routinely prevents them from meeting these responsibilities.⁵

Indigent criminal defense historically and repeatedly presents a challenge to these ethical demands. Criminal justice services are expensive for counties and states to provide, and indigent defense is a perennially unpopular component of that outlay. Regardless of the model, systems struggle to provide sufficient resources so lawyers and their staffs can meet caseload demands while satisfying their professional responsibility to each client.⁶

In a recent publication from the ABA Standing Committee on Legal Aid and Indigent Defendants, Professor Norman Lefstein articulates every angle of the problem of excessive

¹ *Strickland v. Washington*, 466 U.S. 668 (1984).

² See, e.g., Texas Disciplinary Rules of Professional Responsibility, sec. 1.01. Available at: <http://www.legalethictexas.com/Ethics-Resources/Rules/Texas-Disciplinary-Rules-of-Professional-Conduct.aspx>.

³ Id. Preamble.

⁴ Texas Lawyer's Creed – A Mandate for Professionalism, adopted by the Supreme Court of Texas and the Texas Court of Criminal Appeals (1989), available at: <http://www.texasbar.com/Content/NavigationMenu/ForThePublic/FreeLegalInformation/Ethics/TheTexasLawyer'sCreed-English.pdf>.

⁵ See ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-441 (2006).

⁶ See Lefstein, FN 8, and "Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel," National Right to Counsel Committee, The Constitution Project (2009).

indigent defense caseloads.⁷ While pointing out that most of the public discourse has been about overloaded public defender offices, a situation that Harris County has prevented in the design of HCPD, Professor Lefstein also discusses the problem of overloaded assigned counsel:

While the most frequent and worst examples of out-of-control caseloads are among public defenders, private lawyers who provide indigent defense services sometimes take on way too much work as well. When adequate oversight of assigned counsel programs is lacking, the lawyers, in an effort to maximize their incomes, sometimes accept too many cases, because they are poorly compensated on a per case basis for their services. . . .

A conflict of interest arises when part-time defenders, assigned counsel, or contract lawyers have retained clients as well. While rules of professional conduct require that all clients be “competently” and “diligently” represented and that neither the source nor amount of a lawyer’s payment should make any difference in the quality of often severely eroding the Sixth Amendment’s guarantee of the right to counsel, a conflict of interest is created when a third party (i.e., the government) is paying a relatively meager sum to represent indigent persons, whereas the lawyer is simultaneously being far better compensated to represent retained clients. The conflict of interest is exacerbated if the lawyer has a heavy caseload, because lawyers are tempted to devote even less time to their appointed cases.

The State Bar of Texas has provided a new tool to guide the actions and evaluate the performance of individual criminal defense attorneys, “Guidelines for Counsel in Non-Capital Cases.”⁸ It provides a comprehensive road map for Texas criminal defense counsel. *Guideline 1.1* underscores the ethical obligation that criminal defense lawyers face:

The primary and most fundamental obligation of defense counsel is to provide zealous and effective representation for the client at all stages of the criminal process. Counsel’s role in the criminal justice system is to fully protect and advance the client’s interests and rights. If personal matters make it impossible for counsel to fulfill the duty of zealous representation, counsel has a duty to refrain from representing the client. Counsel’s personal opinion of the client’s guilt is totally irrelevant. The client’s financial status is of no significance. Indigent clients are entitled to the same zealous representation as clients capable of paying an attorney.

Competent and diligent representation demands more effort than minimal per-case payment tends to support. Anecdotally, in many court-appointed cases, particularly

⁷ “Securing Reasonable Caseloads: Ethics and Law in Public Defense,” Lefstein (2011) pp. 14-15, available at: http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.athcheckdam.pdf ; pp. 14-15. Accessed June 20, 2012.

⁸ See <http://www.texasbar.com/Content/NavigationMenu/ForLawyers/Committees/PerformanceGuidelinesforNon-CapitalCriminalDefenseRepresentationJanuary2011.pdf> . There are also national guidelines, promulgated by the National Legal Aid and Defender Association in 1995), available at: http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines .

misdemeanors, the assigned counsel reads the offense report and takes a plea offer back to the client. Absent some glaring defect in the state's case, the attorney recommends, and the client accepts, the prosecutor's offer. But offense reports are written in the light most favorable to the State and may not provide any insight to a minimally involved reader. Simply calling a witness, or doing some basic legal research, are often the difference between the typical result described above and a dismissal, further proceedings, or a better plea offer. Small acts of due diligence can dramatically change results.

The indigent defense system in each jurisdiction must ensure that individual acts of due diligence, small or large, are not the exception but the rule. Several well-established national guidelines, and newer ones in Texas, are designed to help jurisdictions achieve that goal. In particular, the American Bar Association has generated two useful sets of standards for the implementation and evaluation of indigent defense. Their 2002 "Ten Principles of a Public Defense Delivery System" is a set of brief but powerful concepts.⁹ In the words of the ABA Standing Committee on Legal Aid and Indigent Defendants, the Ten Principles "constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney." They are:

- 1. The public defense function, including the selection, funding, and payment of defense counsel is independent.*
- 2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.*
- 3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.*
- 4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.*
- 5. Workload is controlled to permit the rendering of quality representation.*
- 6. Defense counsel's ability, training, and experience match the complexity of the case.*
- 7. The same attorney continuously represents the client until completion of the case.*
- 8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.*
- 9. Defense counsel is provided with and required to attend continuing legal education.*

⁹ At: <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf> .

10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

The ABA's 1990 "Standards for Providing Defense Services" provide a more detailed framework for constructing and assessing indigent defense systems.¹⁰ As an example of the Standards, Standard 5.13(a), Professional independence, states:

*The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-service programs.*¹¹

The National Legal Aid and Defender Association also promulgates standards in many of the key operational areas of indigent defense.¹² Indigent defense is a profession replete with suggested standards, perhaps a reflection of the perpetual challenge of striving for systemic, quality representation of criminal defendants within the constraints of public funding.

While this report was being written the American Council of Chief Defenders Executive Committee made public their comments to the National Institute of Corrections Advisory Committee to the U.S. Department of Justice, which included the following endorsement of the value of public defense:

Public defenders who are competent, who have manageable workloads, and who have professional independence can ensure that the rights guaranteed by our Constitution are protected and can ensure that no one's liberty is taken unless and until they are proven guilty. Public defenders lower costly incarceration rates for counties and states by

- being present at first appearances and advocating for pretrial release;

¹⁰ American Bar Association, Standards for Providing Defense Services, (1990), at:

http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_toc.html

¹¹ The importance of independence is also explicated in the commentary to Principle One of the Ten Principles: The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safe-guard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.

¹² "Standards and Evaluation Design for Appellate Defender Offices" (1989); "Administration of Assigned Counsel Systems" (1984); "Guidelines for Negotiating and Awarding Contract Counsel Systems" (1985); "Performance Guidelines for Criminal Defense Representation" (1995). Also see "Guidelines for Legal Defense Systems in the United States," promulgated by the National Study Commission on Defense Services. See http://www.nlada.org/Defender/Defender_Standards/Defender_Standards_Home.

- advocating for reduced sentences based on the facts of the case;
- developing alternative sentencing options that avoid incarceration and provide individually based treatment;
- assisting clients upon adjudication with reentry needs including, employment and housing; and
- preventing expensive wrongful convictions.¹³

For further national perspective, Thomas Cohen at the Bureau of Justice Statistics recently published an important analysis of outcomes for public defenders versus assigned counsel.¹⁴ Cohen summarizes some of the literature preceding his work and then presents his own analysis of extensive national data. He uses data from the State Court Processing Statistics (SCPS) series, which covers a processed sample of the nation's 75 most populous counties, to examine approximately 15,000 to 16,000 felonies filed in May 2004 and May 2006 and concludes that:

In general, defendants represented by assigned counsel received the least favorable outcomes in that they were convicted and sentenced to state prison at higher rates compared to defendants with public defenders. These defendants also received longer sentences than those who had public defender representation. . .¹⁵ The fact that defendants with assigned counsel receive less favorable outcomes raises the possibility that these attorneys are being assigned cases that are more likely to result in a conviction and longer sentence compared to their public defender counterparts. An alternative explanation would be that the assigned counsel system may be seriously impaired by funding and other organizational issues in its ability to utilize competent attorneys with sufficient expertise in criminal defense.¹⁶

His overview continues, and is summarized below:

➤ *The major types of publicly financed defense counsel representation provided by the states include some combination of public defender systems, assigned counsel programs, or contract attorneys. These systems of indigent defense are applied in a blended format throughout the states, with some statewide public defender systems that still utilize contract or assigned counsel in conflict cases or as a means of alleviating heavy caseloads. Other states have no centralized mechanism of public defense and employ differing methods of indigent representation at the local level with some counties using public defenders and others employing contract attorneys or assigned counsel.*

¹³ "For Presentation at a Public Hearing of the National Institute of Corrections Advisory Board: Balancing Fiscal Challenges, Performance-based Budgeting and Public Safety," NLADA, American Council of Chief Defenders, August 22, 2012; on file with the authors of this report.

¹⁴ Cohen, Thomas H., Who's Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes (2011). Available at SSRN: <http://ssrn.com/abstract=1876474> or <http://dx.doi.org/10.2139/ssrn.1876474>

¹⁵ Ibid, p. 45.

¹⁶ Ibid, p. 49.

- *The system of assigned counsel is perhaps the oldest, with appointment by the court of private attorneys under either an ad hoc structure where private attorneys are appointed by judges on a case by case basis, or coordinated systems in which an administrator oversees the appointment of counsel. Assigned counsel systems have been criticized for appointing attorneys with inadequate skills, experience, and qualifications to represent indigent defendants. This problem is especially acute in counties with ad-hoc assignment systems where recent law school graduates or attorneys of marginal capabilities will sometimes take clients as a means of gaining trial experience or supplementing income; these weaknesses can be overcome with administrative oversight to ensure that appointed counsel have the requisite skills, qualifications and experience to provide adequate defense.*
- *Contract attorneys, a more recent approach, involve governmental units reaching agreements with private attorneys, bar associations, or law firms to provide indigent defense services for a specific dollar amount and time period; this can limit the cost but could reduce the quality of representation as law firms underbid each other in an effort to secure competitive contracts. Contract systems also may fail to reduce the costs of indigent defense and in some jurisdictions have actually resulted in higher defense costs.*
- *The most popular approach is a public defender program, in which salaried staff attorneys render criminal indigent defense services through a public or private nonprofit organization or as direct government employees, like their prosecutorial counterparts. Public defender programs have a variety of strengths: access to professional legal staff with the training, experience, and skills to provide adequate legal defense; investigative and other support services that might not be available through assigned counsel or contract programs; and sustained interactions that forge close relationships with key members of the courtroom workgroup, ensuring that these attorneys are well positioned to strike favorable bargains for their clients. Criticisms of public defender programs center on issues related to funding and co-optation. In many jurisdictions, public defender programs are not allocated enough resources to keep up with expanding caseloads, which could prevent them from adequately representing their clients; this reinforces the co-optation of public defenders being pressured by members of the courtroom workgroup to emphasize rapid case processing over vigorous criminal defense.¹⁷*

¹⁷ Ibid, pp. 3-6.

II. Indigent Defense in Texas

A. Texas Fair Defense Act and Indigent Defense Commission

Texas has 254 counties (by far the most in the country), 456 district courts with felony jurisdiction, and 236 county courts at law, with misdemeanor (and sometimes felony) jurisdiction. Texas operates with a highly complex, decentralized, county-based government and justice system, designed to discourage the accumulation of power. The numerous elected officials at every level, for every branch, has driven the state's approach to indigent defense until recent times. While prosecution was organized and funded under one or two elected officials, criminal defense was scattered and ad hoc. Each county, even each judge, could have their own method for determining indigence, appointing counsel, setting expectations (spoken and unspoken) about the system, and paying counsel. In a state with partisan elections for the bench, and little or no accountability for handling indigent defense appointments, this created a risk of cronyism and its corollary, a lack of sufficient independence from the judge by defense counsel.¹⁸

Thirteen years ago, the Texas legislature began to consider providing some degree of state support and guidance on the localized implementation of indigent defense. In 1999, the 76th legislature passed the first version of a Fair Defense Act (FDA), which then Governor George W. Bush vetoed.¹⁹ In December of 2000, Texas Appleseed released the results of their research into the provision of indigent defense, finding, among other things:

- Texas counties are not accountable for the quality or structure of their indigent defense systems.
- In most of Texas's indigent defense systems, there are few mechanisms to guarantee that defense lawyers are consistently held accountable for the quality of representation they provide to indigent defendants.

¹⁸ It is worth noting that the Supreme Court of Texas addressed a similar problem on the civil side of the docket in 1994, in the context of court appointments of guardians ad litem to protect the interests of minors, by requiring reporting to the court of appointment fees of \$500 or more. The disclosure regimen was apparently prompted by a 1991 article in Texas Lawyer that described how an inexperienced lawyer in Houston earned nearly \$100,000 from appointments by a single judge. (See "Making \$93,650 the Easy Way: Connections with Judge Enrich Houston Ad Litem," Robert Elder Jr. and Mark Ballard, Texas Lawyer, March 4, 1991; Supreme Court Order No. 94-9014, not available online.) The reporting system continues and has been automated so that one can see, for example, that Harris County courts paid about 31 percent of all fees reported statewide in state FY 2011, about \$16.6 million of \$53.8 million. (Appointments and Fees Report, Texas Courts Online, available at http://www.txcourts.gov/oca/apptfees_reports.asp.)

¹⁹ Senate Bill 247, 76th Legislature, available at: <http://www.lrl.state.tx.us/legis/BillSearch/BillDetails.cfm?legSession=76-0&billTypeDetail=SB&billNumberDetail=247&billSuffix=&startRow=1&IDlist=&unClicklist=&number=100>

- Lack of consistency and accountability result in wide and unjustifiable disparities in the treatment received by indigent defendants and their defense counsel, from county to county and court to court.
- The wide and uncontrolled discretion given to judges over attorney selection and compensation at the very least creates the potential for conflicts of interest and the appearance of conflicts of interest.
- The majority of judges firmly believe that judges should have the exclusive authority to select attorneys for appointment to individual cases and to determine their compensation.²⁰

A revised version of the FDA passed in 2001, was signed by Governor Rick Perry, and became effective in January, 2002. The legislation provided a blueprint for meaningful interaction between state and local government through the creation of a state body to administer statewide appropriations and policies.

In addition to the national standards and principles promulgated by the ABA, Texas imposes statutory requirements for indigent defense systems. The 10 key components of the FDA are:

1. Magistrate responsibilities. Admonish the accused of his constitutional rights and set bail; inform the accused of the right to appointed counsel if the person cannot afford counsel and the procedures for requesting appointment of counsel; inquire as to whether accused is requesting that counsel be appointed; provide accused persons requesting appointed counsel with necessary forms for requesting appointment of counsel; and ensure that reasonable assistance in completing required forms is provided to the accused at the time of the magistrate's hearing.

The magistrate must also record the date and time the accused was arrested and brought before the magistrate, whether the magistrate informed the accused of the right to request appointment of counsel and asked the accused whether he/she wants to request counsel, and whether the accused requested appointment of counsel.

2. Indigence determination and consideration of bail. The defendant's ability to post bail may not be considered apart from the defendant's actual financial circumstances (i.e., the defendant's income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, and spousal income that is available to the defendant). A court may not threaten to arrest or incarcerate a person solely because the person requests the assistance of counsel. The local indigent defense plan must include financial standards for determining whether a defendant is eligible to receive appointed counsel. "Indigent" means a person who is not financially able to employ counsel. Every effort should be made to follow the indigence standard in the applicable local plan.

²⁰ Texas Appleseed, "The Fair Defense Report – Analysis of Indigent Defense Practices in Texas," (2000), available at: http://www.texasappleseed.net/pdf/projects_fairDefense_fairref.pdf

3. Waiver of counsel. State law provides procedures for obtaining waivers of the right to counsel from defendants and imposes limits on when prosecutors may speak with unrepresented defendants and when judges may direct such defendants to speak with prosecutors. A judge or magistrate may not order a defendant rearrested or require another, higher bond because a defendant withdraws a waiver of counsel or requests the assistance of counsel.

4. Time-frames for appointment of counsel. The judge (or designee) must rule on requests for counsel and appoint counsel to indigent defendants within one working day of receiving requests in counties with a population of 250,000 or more or three working days in counties with a population less than 250,000. For persons out of custody, counsel must be appointed at defendant's first court appearance or when adversarial judicial proceedings are initiated, whichever comes first.²¹

5. Attorney Selection Methodology. The local indigent defense plan must include the method by which attorneys on the appointment list(s) are assigned to cases.

6. Attorney Fees. All court-appointed attorney fees must be paid in accordance with a schedule of fees adopted by formal action of the local judges. If a judge disapproves an attorney's fee request, the judge must make written findings stating the amount approved and the reason for disapproving the requested amount. The attorney may appeal to the presiding judge of the administrative judicial region.

7. Experts and Investigators. Reimbursement of expert and investigative expenses with and without prior court approval is required, if they are reasonably necessary and reasonably incurred.

8. Indigent Defense Expenditure Report (IDER). All Texas counties are required to report amounts spent on attorney fees, licensed investigators, expert witnesses, and other direct litigation costs.

9. Adult Local Plan Report. The criminal court judges and juvenile board in each county must adopt, publish, and submit to TIDC a countywide indigent defense plan, procedures and forms on how it will provide court appointed counsel to eligible persons.²²

10. Juvenile Appointment of Counsel Plan Report. The juvenile board in each county must adopt, publish, and submit a plan to TIDC that specifies the qualifications necessary for an attorney to be included on the appointment list to represent children in proceedings under Title III of the Family Code (the Juvenile Justice Code).²³

The FDA established the Texas Task Force on Indigent Defense (TFID) as a permanent standing committee of the Texas Judicial Council, staffed as a component of the Office of Court Administration. The legislature charged the Task Force with providing grant funding, technical assistance, and online resources to assist counties to develop and maintain

²¹ Texas Code of Criminal Procedure, Article 1.051(j), and *Rothgery v. Gillespie County* 128 S. Ct. 2578 (2008).

²² Plans are available online at: <http://tfid.tamu.edu/Public.net/>.

²³ "Fair Defense Law: A Primer for Texas Officials," TFID, 2011), available at: <http://www.courts.state.tx.us/tidc/pdf/FairDefenseLawAPrimerforTexasOfficialsJan2011.pdf>

cost-effective indigent defense systems. In 2011, the Texas Indigent Defense Commission (TIDC) succeeded TFID as a more independent and permanent body.²⁴

During FY 2011, TIDC awarded over \$28 million in grants to counties through two funding strategies. One strategy distributes funds based upon a formula calculation (Formula Grants) and the other is a competitive program (Discretionary Grants). Counties create Indigent Defense Plans, which must meet TIDC-determined requirements to attain and maintain eligibility for Formula Grants, which rely on population and expenditure formulas to distribute funds.

The Discretionary Grants program operates as an annual competitive system, requiring each applying county to explain the program proposed and its potential effect on local indigent defense practices. TIDC also has the discretion to provide funds to a local jurisdiction to remedy a specific violation of the Fair Defense Act, dispense technical support, and assist counties demonstrating overwhelming economic hardships that are having an impact on indigent defense.

B. TIDC Monitoring and Research on Public Defenders

Texas law requires TIDC to monitor county grant recipients to ensure state money is accounted for and spent properly. TIDC enforces county compliance with grant conditions, as well as state and local rules and regulations. The Texas A&M Public Policy Research Institute houses information on each county's indigent defense plan and expenditures, as well as TIDC grant awards and funding, in an excellent website, at <http://tfid.tamu.edu/Public.net/>.

The Texas Indigent Defense Commission staff members synthesize the ten components above into six core requirements when reviewing a county's indigent defense processes, as they did recently for Harris County's Indigent Defense System for Juveniles.²⁵ The Commission's staff asks whether the system and its participants:

1. *Conduct prompt magistration hearings (detention hearings in juvenile cases);*
2. *Determine indigence according to standards directed by the indigent defense plan;*
3. *Establish minimum attorney qualifications;*
4. *Appoint counsel promptly;*
5. *Institute a fair, neutral, and non-discriminatory attorney selection process; and*

²⁴ HB 1754, 82nd Texas Legislature, R.S. See Chapter 79, Texas Government Code.

²⁵ On file with author, no report is published as of August 30, 2012, while the staff verifies the county's response.

6. *Promulgate a standard attorney fee schedule and payment process.*²⁶

Over time the Task Force, the TIDC and their staff have been mindful of and involved in the national conversation on indigent defense, and demonstrably interested in more fully developing the public defender concept in Texas. When the FDA was enacted, Texas had five public defender offices.²⁷ By 2012, following discretionary grant support from the TFID/TIDC, Harris County's was one of 19 public defender offices and 2 managed assigned counsel systems in the state.²⁸

In 2008, the TFID issued a Blueprint for Creating a Public Defender Office in Texas, which articulated the case for the public defender model:

Public defenders offer quality, cost, and administrative advantages. Public defender offices (PDOs) operate for the defense in the same way that district and county attorney offices operate in every Texas county for the prosecution, and they do so for the same reason: proficiency. This proficiency explains why most civil lawyers work in law firms rather than operate individual offices. Group law practice not only allows attorneys to share office and library space and administrative functions like billing, but it also improves their ability to learn from one another, match staff experience to work demands, develop and preserve institutional methods of performing work, and avoid "reinventing the wheel" for each new case.

*As institutions, public defenders can attract additional resources that private attorneys cannot, including grants, fellowships, and law-student assistance. Some non-profit public defenders can also offer indigent defendants civil legal services, particularly on mental health issues, that can minimize the costs of involvement in the criminal justice system. PDOs also enable judges, county executives, law enforcement officers, and the bar to access a single point of contact to secure the cooperation and input of defense counsel when improvements to operation of the criminal justice system are considered, making improvements easier to identify and implement. Finally, public defender budgeting is simpler and more predictable than budgeting for payment of private attorneys whose identity, work practices, billing practices, and caseloads fluctuate every month of every year. All of this is equally true of prosecution offices in Texas counties. It is so true that a move from centralized prosecution offices to hiring individual private attorneys to prosecute cases would be unthinkable.*²⁹

²⁶ See, e.g., "Review of Harris County's Indigent Defense System for Juveniles," TIDC, April 25, 2012.

²⁷ "Evidence for the Feasibility of Public Defender Offices in Texas, TFID 2006, available at: http://www.courts.state.tx.us/tidc/pdf/PDpercent20Feasibility_Final.pdf .

²⁸ Texas Indigent Defense Commission website, updated February 23, 2012, at: <http://www.txcourts.gov/tidc/pdf/webpagepdomac.pdf>

²⁹ Available at: <http://www.courts.state.tx.us/tidc/pdf/2008revisedblueprintfinal.pdf> .

In their 2009 evaluation of public defender offices in Bexar and Hidalgo counties, the Spangenberg Group³⁰ reported to the TFID:

*[A]fter nearly three years of operations both public defender offices have made significant improvements to their respective indigent defense systems. TSG believes the offices will continue to improve the systems over time. Not only has the quality of indigent defense services improved in each county, data indicate that more people are being represented, appeals in Bexar County take less time, and in-custody misdemeanor defendants in Hidalgo County spend less time in jail pretrial. Creating a more efficient indigent defense system translates into cost savings over time.*³¹

The 2009 report by the Spangenberg Group included findings on the Bexar County appellate public defender office, which were summarized by the Task Force on Indigent Defense staff:

In the year prior to the Office, the Spangenberg Group found that indigent appeals averaged 1.8 attorneys per appeal. This was problematic for the County because re-assigning cases adds significant time to appeal dispositions while disrupting the fact gathering processes of defense counsel.

After the Office began operations, appellate court justices found that indigent appeals briefs tended to be of much higher quality than when only private attorneys submitted them, and this largely due to the high standards set by the Chief Public Defender. . . .

As of the last review by the Spangenberg Group in 2009, the Office was filing extensions in about half of their cases. The timeliness of filings is still superior to the previous system, however, and the Fourth Court of Appeals has not had to send reminder letters to appellate defender attorneys, as it previously had done in the private system.

The Office's efforts to provide high quality briefs in a timely fashion have financial implications for Bexar County. Inmates sentenced to less than ten years for a felony offense may be incarcerated at the local county jail until disposition of their appeal is complete, and extensions or poor briefs mean that the inmate may remain incarcerated for lengthy periods of time. The average time that defendants spent in the Bexar County Jail waiting for an appellate disposition before the Office was 180 days. Since the Office has begun taking cases, this time has shrunk to an average of 55 days. The Spangenberg Group estimated that this reduced jail time results in an annual savings over \$500,000. This more than offsets the annual budget of the Office, which is less than \$500,000. In other words, high quality briefs filed in a timely

³⁰ The Spangenberg Group is a national consulting firm (which has been associated with different higher education partners over time) with particular expertise in indigent defense, under the leadership of Robert Spangenberg. See generally, http://www.spangenberggroup.com/work_indig.html.

³¹ "An Evaluation of the Bexar and Hidalgo County Public Defender Offices: Final Report," TSG 2009, p. ii; available at: <http://www.courts.state.tx.us/tidc/pdf/Bexarpercent20&percent20Hidalgopercent20Finalpercent20Reportpercent205-27-09.pdf>.

*manner reduce the time to appellate disposition for all cases and improve the throughput of the appellate court.*³²

TIDC has supported specialized programmatic options to address the needs of defendants with mental illnesses, leading to the development of a variety of programs throughout the state and the issuance of a report, *Representing the Mentally Ill Offender: An Evaluation of Advocacy Alternatives*.³³ “Mental health public defender” offices have been established in Dallas and Travis Counties in order to combine specially trained defense attorneys with social workers or other support staff qualified to link defendants with appropriate community supports, such as mental health treatment and housing. In 2010, the Texas A&M Public Policy Research Institute (PPRI) reviewed the mental health public defender model in Dallas, Tarrant, and Travis counties, concluding that:

Mental health public defenders provide legal defense services for the most challenging cases involving people with mental illness. They accept cases that are referred by the courts or by the regular PD's office because of their complexity. Their cases have more serious prior offenses and current charges compared to mental health courts. . . .

The evaluation is unable to demonstrate definitively that the MHPD reduces the number of days people spend in jail. However, there is strong anecdotal evidence that many clients have already been detained for an extended period of time before they are referred to the office. Data supports this explanation. It appears to be primarily through the work of the MH public defender that these individuals are ultimately released from custody.

*Regardless of diagnosis, MHPD clients are significantly less likely to have a guilty verdict or, if convicted, more likely to receive a probationary disposition. Over the long term, people represented by the MH public defender are also more likely to remain engaged in mental health treatment and less likely to recidivate.*³⁴

While this report was being written, the Texas A&M Public Policy Research Institute (PPRI) completed an analysis of the Public Defender’s Office in Wichita County, Texas.³⁵ PPRI’s research compares case processing and outcomes for the four types of legal representation available in Wichita County: public defender, private assigned counsel, retained counsel, and unspecified counsel. In analyzing data between 2005 and 2010, PPRI made a range of findings that are important for those interested in issues surrounding indigent defense and public defender’s offices in Texas.

³² TFD Staff Policy Monitoring Report, Appendix I, on file with the author but not yet published on the Internet.

³³ Texas Task Force on Indigent Defense, *Representing the Mentally Ill Offender* (2010), available online at: www.courts.state.tx.us/tfid/resourcesresearchstudies.asp.

³⁴ *Ibid.*, pp. 55-56.

³⁵ “Wichita County Public Defender’s Office Evaluation Report (Draft),” Texas A&M Public Policy Research Institute, September, 2012.

PPRI found that, other factors being equal, public defender clients in Wichita County were 23 percent more likely to have all charges dismissed and 10 percent less likely to be found guilty than defendants represented by private assigned attorneys. Public defender clients also had 30 percent longer sentences than comparable prisoners who had private assigned counsel. Potential explanations for this finding include:

- the Public Defender's Office has higher dismissal rates for clients with weaker evidence of guilt;
- the Public Defender's Office takes on more challenging cases, including cases with multiple defendants and cases in which a private assigned attorney filed a motion to withdraw;
- Public Defender's Office attorneys' skill in securing reduced charges, such as a 1st degree felony that is reduced to a 2nd degree felony at the higher end of the punishment range; and
- Public Defender's Office attorneys have much less work experience than private assigned attorneys, on average.³⁶

PPRI found that the public defender's office in Wichita County is a relatively cost effective operation. Salaried public defenders in Wichita County devote a greater amount of time to each case and, on a cost per hour basis, provide a superior value than private assigned attorneys who are typically paid a flat rate per case for their services.³⁷ This finding led researchers to posit, "Instead of focusing discussion on whether costs of public defender counsel are too high, it is worth considering whether the cost of private assigned counsel may be too low to provide a level of service to clients needed to meet acceptable standards of defense."³⁸

PPRI also identified opportunities to improve indigent defense and the operations of the Public Defender's Office Wichita County: annual performance evaluations for attorneys; eliminating salary discrepancies between the public defender's office and prosecutor's office; close monitoring of public defender caseloads; adopting reliable systems to identify individuals who remained in jail with no attorney; and providing improved meeting space in the jail for confidential attorney-client consultation.³⁹ Although the specific challenges and successes of indigent defense in Wichita County may be unique to that community, many of PPRI's findings

³⁶ Ibid., pp. 62-63.

³⁷ Ibid., p. 70.

³⁸ Ibid., p. 71.

³⁹ Ibid.

are likely to be useful to practitioners and analysts of indigent defense throughout Texas and the rest of the country.

III. Harris County Criminal Justice System

A. Size and Cost

In 2011, Harris County had a population of 4,092,459,⁴⁰ which makes it larger than 24 states. It is the largest county in Texas, is home to about 16 percent of the state's population, and is the third largest county in the nation.

Table 1 below shows the most populous counties in Texas. Like New York, Chicago, Los Angeles, Philadelphia, and other major metropolitan areas, the criminal justice system in Houston/Harris County is a significant driver of the criminal justice system in the state. Although Texas has a number of major cities, three in the top ten by population nationally, it has only two of the top ten counties by population, Harris and Dallas. Harris is almost twice the size of the next largest county, which is Dallas.⁴¹

Table 1: Population of Texas's Top Five Counties, 2011

County	2011 Population	Share of State Population
Harris	4,092,459	16%
Dallas	2,368,139	9%
Tarrant	1,809,034	7%
Bexar	1,714,773	7%
Travis	1,024,266	4%
Statewide	25,674,681	

Figure 1 below shows the average daily population of the Harris County jail between 2006 and 2010. It is the third largest jail in the country, with a population that fluctuates in

⁴⁰ U.S. Census Bureau: State and County QuickFacts. Data derived from Population Estimates, American Community Survey, Census of Population and Housing, State and County Housing Unit Estimates, County Business Patterns, Nonemployer Statistics, Economic Census, Survey of Business Owners, Building Permits, Consolidated Federal Funds Report. <http://quickfacts.census.gov/qfd/states/48000.html>

⁴¹ Ibid.

excess of 10,000 inmates, and the jail's staff books in 350 defendants every day. Twenty-four percent of inmates in the average daily population are on psychotropic medication.⁴²

Figure 1: Harris County Jail Average Daily Population

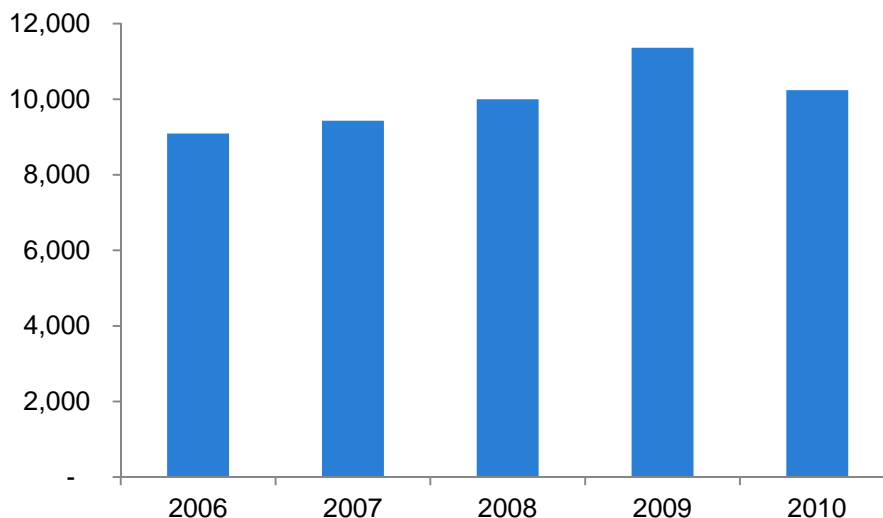


Table 2 shows Harris County felony sentences to prison, state jail, and probation as reported by the Texas Department of Criminal Justice. With 16 percent of the state's population, Harris County is disproportionately represented in prison and state jail commitments; conversely, the county is under-represented in probation commitments. The county's criminal justice policies and outputs have historically had a disproportionate impact on state criminal justice, with the highest proportion among large counties of offenders sent to prison.⁴³

Table 2: Texas Department of Criminal Justice Reception, 2011⁴⁴

Reporting Agency		Prison	State Jail	Probation
TDCJ	Harris County	7,980	5,608	7,985
	State of Texas	44,386	23,231	56,758

⁴² Average daily population and percentage of capacity occupied in the 50 largest jail jurisdictions: <http://www.albany.edu/sourcebook/pdf/t600192010.pdf> ; Harris County Sheriff's Office. *Facts About the HCSO*. <http://www.hcso.hctx.net/documents/PressKits/HCSO%20Fact%20Sheet.pdf>

⁴³ "Sentencing Dynamics Study," Texas Criminal Justice Policy Council (1993), available at: http://www.lbb.state.tx.us/PubSafety_CrimJustice/6_Links/Sentencing_Dynamics_Study_0193.pdf ; Appendix f, "Offenders With No Prior Felony Convictions by Number and Percentage Sentenced to Prison: Offense Categories by County,"

⁴⁴ TDCJ. Statistical Report, FY 2011. http://www.tdcj.state.tx.us/documents/Statistical_Report_FY2011.pdf. Accessed September 9, 2012.

Harris County Percentage of Sentences	18%	24%	14%
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Figure 2 below depicts Harris County's budget for FY 2013 and the portion of the budget that is allocated to law enforcement and administration of justice. Criminal justice is a major cost driver in Harris County, which allocated two-thirds (\$763 million) of their total general revenue budget for FY 2013 to law enforcement and the administration of justice.

As reported recently by the Harris County Office of Criminal Justice Coordination, law enforcement and justice expenditures are up 72 percent in the last decade, while other expenditures are up 18 percent.⁴⁵

Figure 2: Harris County Budget Overview, FY 2013

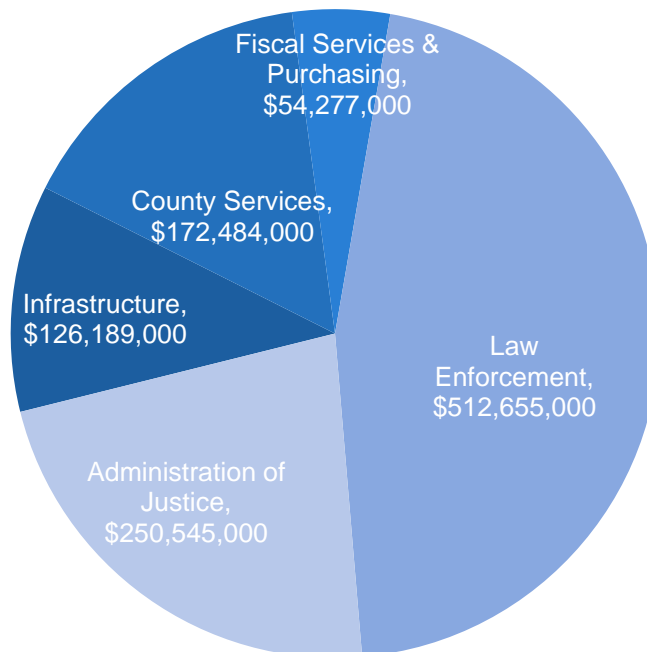


Table 3 shows the amount budgeted in Harris County for district courts, the District Attorney's Office, public defender and indigent representation, totaling \$250.5 million. The District Attorney's Office consumes about one-quarter, while the indigent defense function accounts for about 12 percent (just over half of the district attorney's office budget).⁴⁶

⁴⁵ September 12, 2012 presentation by the Harris County Office of Criminal Justice Coordination, slide 10.

⁴⁶ See <http://www.hctx.net/CmpDocuments/74/Budget/FY%202012-13%20Budget.pdf>

Table 3: Harris County Administration of Justice Budget, FY 2012

Expenditure Area	Amount	Percentage
District Courts ⁴⁷	\$47,126,000	19%
District Attorney	\$57,500,000	23%
Public Defender	\$8,101,256	3%
Court Appointed Representation ⁴⁸	\$23,474,918	9%
Remainder	\$112,319,000	45%
Administration of Justice	\$250,545,000	

B. Volume of Cases and Efficiency in Processing

Table 4 shows the number of case filings by crime classification from 2007 to 2011. Both misdemeanor and felony filings declined from 2007 to 2011, while juvenile filings peaked in FY 2009 and declined over the subsequent two years. This is consistent with national trends observed in the Court Statistics Project of the National Center for State Courts, which noted declines in court caseloads nationally, a reflection of the decline in crime in many jurisdictions.⁴⁹

Table 4: Case Filings in Harris County by Type, FY 2007 to FY 2011⁵⁰

	Felony	Misdemeanor	Juvenile
FY 2007	50,680	80,142	6,105
FY 2008	51,764	73,005	9,655
FY 2009	52,911	79,601	10,535
FY 2010	48,133	80,170	8,609
FY 2011	46,028	77,912	7,521
07-11 Change	-9%	-3%	+23%

Figure 3 shows the time to disposition for cases disposed in the Harris County Criminal Courts for the month of September 2012 (the latest month for which this information is provided on the Harris County Criminal Courts website). The 15 criminal county courts

⁴⁷ Not all District Court expenses are related to criminal justice; more than half the judges hear family and civil matters.

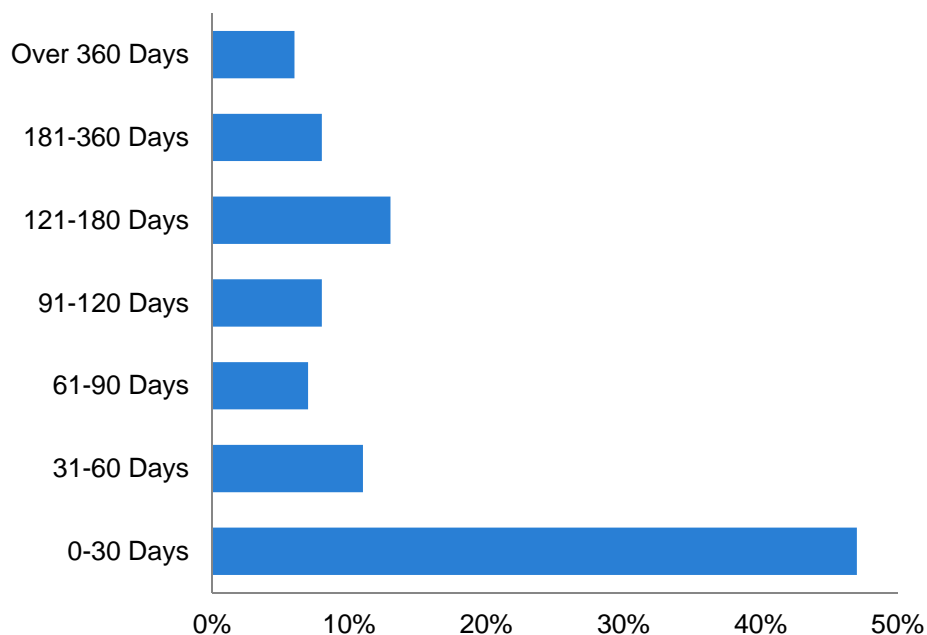
⁴⁸ Harris County puts indigent criminal and indigent civil defense as the same budget item. This is disaggregated based on the report FY 2011 expenditure on the TIDC county dashboard.

⁴⁹ Court Statistics Project, criminal section, available at: <http://www.courtstatistics.org/Criminal/CriminalAbate.aspx>

⁵⁰ "Harris County Data Sheet," <http://tidc.tamu.edu/public.net/>, Texas Indigent Defense Commission, accessed May 2, 2012.

disposed of 47 percent of filings within 30 days and 65 percent within 90 days in September 2012.

Figure 3: Time to Disposition for Cases Disposed in the Harris County Criminal Courts, September 2012⁵¹



In a report developed for the Harris County Commissioners Court in 2009, the county's criminal justice system was described thus: "Highly efficient front-end case processing. . . . We know of no other urban criminal justice system that handles the early stages of cases more efficiently."⁵² In a 2005 report, the same experts had previously stated: "Overall case processing in the District Courts and the County Courts is relatively expeditious by comparison to case processing times in other large urban criminal courts."⁵³ The system has been under development for decades and was also highlighted in a "Closing the Paper Trap," a 2006 report on electronic filing of criminal cases, made to the TFID by the PPRI at Texas A&M University:

Since the late 1970s Harris County has incrementally developed one of the most advanced and fully integrated justice processing systems in Texas and possibly the nation. The Justice Information Management System (JIMS)

⁵¹ Harris County Criminal Courts webpage: <http://www.ccl.hctx.net/criminal/examine/default.htm>.

⁵² "Harris County Criminal Justice Improvement Project – Preliminary Report," Memorandum from Justice Management Institute to Harris County Commissioners Court, June 17, 2009.

⁵³ "Pretrial Release and Detention in Harris County: Assessment and Recommendations," Mahoney and Smith, Justice Management Institute, 2005 (p. 2). Available at: <http://www.pretrial.org/Docs/Documents/site%20submissions/reportfinalharriscountypretrial2.pdf>

*enables case-related information to be shared between county and municipal law enforcement officers, jail personnel, the district attorney's office, the county clerk, magistrate courts, county and district courts, pre-trial services, and the public.*⁵⁴

At the district court level, the efficiency of the system was cause for comment in a Texas district court workload study conducted statewide in 2007, in which a need for 27 new district judges in Harris County was identified statistically, but not anecdotally by the practitioners in the system. Having seen reports such as "Closing the Paper Trap," the study authors at the National Center for State Courts posited that this disconnect between data and reality might have to do with "economies of scale, more efficient case management practices, and the well-integrated use of technology."⁵⁵

C. Mental Health Focus

Along with a focus on efficiency, Harris County has worked for years to develop several programs and partnerships that serve the needs of the substantial number of individuals with mental health issues who come into contact with the county's criminal justice system. As noted above, 24 percent of Harris County jail inmates are on psychotropic medications, and the jail is "the largest mental health facility in the state."⁵⁶ A critical piece of this effort has been the involvement of the county's public mental health authority, the Mental Health Mental Retardation Authority of Harris County (MHMRA). MHMRA is embedded into the jail intake process, and provides mental health services in the jail; this deep connection between systems is not seen in any other Texas county and draws praise for Harris County.⁵⁷


The Harris County Sheriff's Department collaborates with the Houston Police Department (HPD) and the MHMRA through the Crisis Intervention Response Team (CIRT). This program partners police officers with licensed mental health professionals in order to respond to situations involving persons with mental health issues. Officers and counselors also provide follow-up investigations on individuals with mental health issues who continually

⁵⁴ "Evaluating the Impact of Direct Electronic Filing in Criminal Cases: Closing the Paper Trap," Carmichael et al., PPRI, TAMU (2006), p. 11. Available at: <http://www.txcourts.gov/tidc/pdf/FinalReport7-12-06wackn.pdf>.

⁵⁵ "Measuring Current District Court Workload in Texas, 2007," National Center for State Courts, 2008, available at: <http://www.txcourts.gov/oca/jnas/pdf/WeightedCaseloadStudy.pdf>.

⁵⁶ 12th Annual Greater Houston Area Social Work Awards Breakfast, Sheriff Adrian Garcia Keynote Address, "The Harris County Jail: The Largest Mental Health Provider in Texas." March 2, 2102. Reported at: <http://www.news-medical.net/news/20120301/The-Harris-County-Jail-The-Largest-Mental-Health-Provider-in-Texas-to-take-place-on-March-2.aspx>.

⁵⁷ Interview with Dee Wilson, Director, Texas Correctional Office on Offenders with Medical or Mental Impairments, July 17, 2012.



come into contact with the criminal justice system in Harris County. CIRT was established as a partnership between HPD and MHMRA in 2008 and the Harris County Sheriff's Office began participating in the program in October 2011. The program has seen a great deal of success and has expanded since its inception. According to the City of Houston, of the 14,000 calls for service that CIRT has responded to since 2008, less than 1 percent has resulted in arrest.⁵⁸ In FY 2011 CIRT responded to 6,348 calls for service and executed 2,259 emergency detention orders, while making just 63 arrests and 88 jail assessments.⁵⁹


Additional procedures are incorporated at the county jail to ensure accurate and timely identification of detainees with mental health issues. Specifically, the Mental Health Unit uses data from MHMRA to identify any mental health services that each detainee has received in the community. Data from MHMRA is combined with internal jail data on each detainee's mental health history to provide a profile of the mental health history for each detainee. Data from the jail's mental health tracking system is also matched with the jail's pharmacy data in order to create an orange "special needs" sheet for any detainee on the each court's docket, each day. The report includes the detainee's mental health history in the jail and in the community, information on known diagnoses and prescribed medication, and whether the person is a ward of the county or has ever been committed to a state hospital.

The county has also trained its nurses to identify mental health issues and prioritized the diversion of detainees with mental health issues to the county's clinic before those detainees are sent to jail. The county's mental health tracking system allows nurses to know where detainees with mental health issues and prescriptions are housed, so detainees are less likely to undergo a disruption in their medication.

In spite of these successes, Harris County faces several challenges in serving detainees with mental health issues. First, many detainees have aliases and false Social Security numbers, making it difficult to create a full history for those individuals. Further, much of the information requires manual input and matching. For example, the jail receives spreadsheets on wards of the county and on state hospital admissions and discharges, and jail staff must manually enter this information into the appropriate databases. Finally, county staff has expressed a desire to more effectively analyze its data in order to identify trends

⁵⁸ "Houston, Harris County, MHMRA Announce Joint Crisis Intervention Response Team," Houston Police Department, October 27, 2011, <http://www.houstontx.gov/police/nr/2011/oct/nr102711-1.htm> Accessed on July 14, 2012

⁵⁹ "Annual Report 2011: 2011 Statistics", Sgt. P.J. Plourde, Harris County Crisis Intervention Response Team (February 1, 2012).



among its population of detainees. Specifically, staff would like to identify individuals with mental health issues who are exiting the system. This could allow the county to provide community-based services in order to reduce the likelihood that those individuals are rearrested. Staff has also identified broader challenges such as a lack of affordable housing, limited public transportation resources, and underfunded mental health services as factors that lead to individuals with mental health issues coming into repeated contact with the criminal justice system in Harris County.⁶⁰

To summarize, Harris County is a mega-jurisdiction with significant expenditures devoted to public safety in general and to the large but slightly declining volume in their criminal courts. The \$763 million budget for the system is overseen by Commissioners Court, and an impressive number of cases are processed, with an emphasis on efficiency. Harris County has historically paid close attention to the problem of the mentally ill population in the criminal justice system, in particular the identification of that population coming into the jail.

⁶⁰ Interview and email with Clarissa Stephens, Deputy Director, Harris County Office of Criminal Justice Coordination, July 12, 2012.

IV. Harris County Indigent Defense System

A. Volume of Indigent Cases

Table 5 below shows the total cases docketed and the percentage receiving appointed counsel in FY 2011. During FY 2011 approximately 134,000 cases were added to court dockets, including 46,028 felonies, 77,912 misdemeanors, and 9,991 juvenile cases.⁶¹ Almost 75,000 cases involved the appointment of counsel to indigent defendants. Most Harris County defendants (56 percent overall) are indigent and require appointed counsel.

Table 5: Total Cases Docketed and Receiving Appointed Counsel in Harris County, FY 2011

	Felony	Misdemeanor	Juvenile	Total
State Total	283,994	559,435	24,235	867,664
Harris County	46,028	77,912	9,991	133,931
Appointed Counsel	28,674	38,406	7,521	74,601
Proportion Indigent	62%	49%	75%	56%

Table 6 below shows the proportion of criminal cases with indigent defendants from 2007 to 2011. Although filings have decreased in all case types, the proportion of cases with appointed counsel has grown over time in the misdemeanor and juvenile systems. The juvenile case proportion increased dramatically after 2007 and has remained the highest, while the felony case proportion increased from 2007 to 2010 and then dropped in 2011.

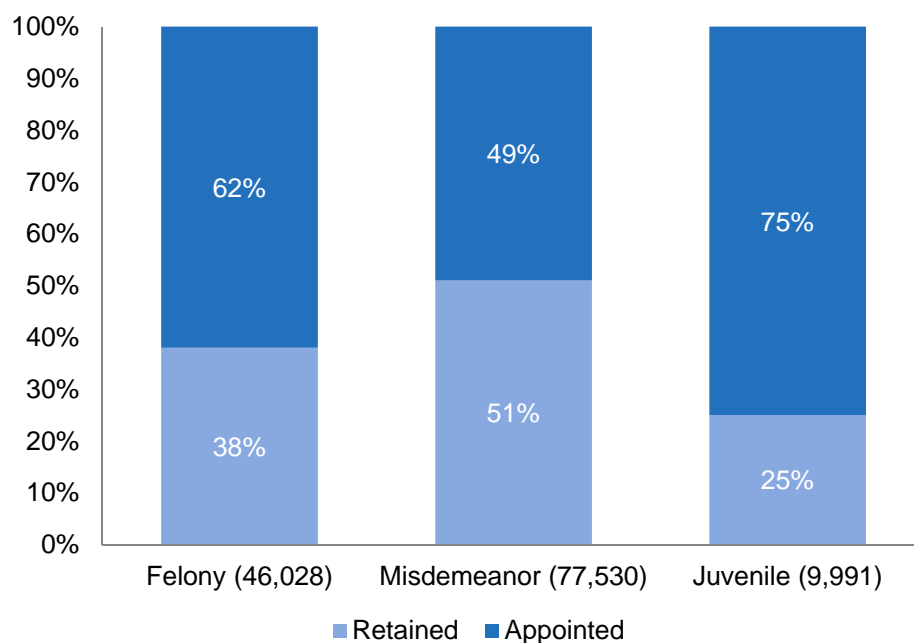
Table 6: Proportion of Criminal Cases with Indigent Defendants

FY	Felony	Misdemeanor	Juvenile
2007	66%	41%	39%
2008	55%	44%	69%
2009	76%	48%	89%
2010	76%	52%	81%
2011	62%	49%	75%

Figure 4 below shows the proportion of cases with appointed counsel by case type in 2011, illustrating Table 5. Misdemeanor defendants are the least likely (49 percent) to have appointed counsel while persons with juvenile cases are the most likely (75 percent).

⁶¹ "Harris County Data Sheet," <http://tidc.tamu.edu/public.net/> Accessed May 2, 2012.

Figure 4: Proportion of Cases with Appointed Counsel by Case Type, FY 2011



B. Expenditures for Indigent Defense

Harris County relies primarily on appointments from the “wheel” of eligible attorneys to provide counsel for indigents. Figure 5 shows the amount of money spent on assigned, contract, and public defender lawyers from 2006 to 2011. Expenditures have fluctuated during this period based due to the fluctuation of the number of cases needing indigent defense. Most of the expenditures have been directed at supporting the assigned counsel system. In 2011 a total of \$26,706,584 was paid for indigent defense, with 12 percent of that cost, or \$3,231,666, supporting HCPD.

Also out of the total \$26.7 million expenditure in 2011, \$14.7 million went for felony attorney payments and another \$2.6 million for investigation and experts in felony cases. Misdemeanor attorney payments totaled about \$3.1 million, with only about \$3,000 spent for investigation in misdemeanor cases, one-tenth of 1 percent of the total.⁶²

⁶² Harris County Data Sheet, Texas Indigent Defense Commission, available at: <http://tfid.tamu.edu/public.net/Reports/DataSheet.aspx?cid=101>.

Figure 5: Harris County Payments to Counsel for Indigent Defendants by Delivery Mechanism, FY 2007-2011

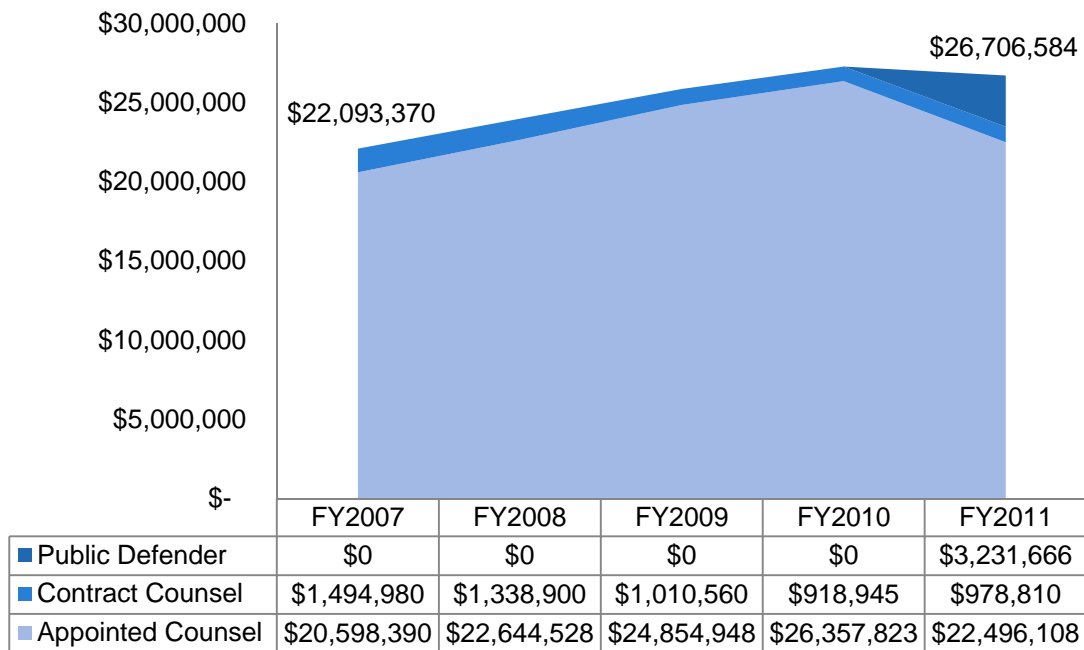


Table 7 below shows the indigent defense cost per case for the five largest counties in Texas in 2011. Harris County pays considerably less per case than other urban counties in the state, particularly for misdemeanors, where the payout per case is about two-thirds of the large county average. This is not a new observation: in 2006, the TFID reported that the per-case payment range for felonies among the top ten counties was a low of \$394 in Harris County up to \$1,170 in Collin County; misdemeanor pay per case ranged from \$63 in Harris County up to \$407 in Collin County.⁶³ Note that Dallas County and Travis County (for juvenile cases) also have public defender offices, but this table only reports cost per case for the wheel attorneys.

Table 7: Per Case Indigent Defense Payouts, FY2011

	Felony	Misdemeanor	Juvenile	Population
Harris	\$606	\$82	\$281	4,092,459
Dallas	\$744	\$153	\$545	2,368,139
Tarrant	\$750	\$85	\$526	1,809,034
Bexar	\$687	\$123	\$258	1,714,773
Travis	\$468	\$154	\$1,081	1,024,266
Average	\$653	\$120	\$333	

⁶³ Shackelford, "Review of Tarrant County Indigent Defense System," (TFID 2006).
<http://www.courts.state.tx.us/tidc/pdf/Tarrant%20County%20Report.pdf>.

Table 7 above depicts the *total* cost per case across the five largest counties, while Table 8 below depicts the payments *just to attorneys*, excluding any additional costs for investigators or experts, for the same counties, in 2011. Misdemeanor costs in Harris County remained at approximately \$82 per case, because such a small proportion (.4 percent) is spent on investigation and experts.

Table 8: Per Case Indigent Defense Attorney Payouts, FY2011

	Felony	Misdemeanor	Juvenile	Population
Harris	\$514	\$82	\$270	4,092,459
Dallas	\$655	\$140	\$536	2,368,139
Tarrant	\$664	\$179	\$375	1,809,034
Bexar	\$597	\$119	\$238	1,714,773
Travis	\$398	\$150	\$1,081	1,024,266
Average	\$565	\$119	\$308	

Table 9 below shows the proportion of total misdemeanor indigent defense expenditures that goes to investigation and experts in the five largest counties. Harris County's 0.4 percent is a much lower proportion of expenditures than the other large counties in Texas, which range from 2.9 percent in Tarrant and Travis to 8.3 percent in Dallas.

Table 9: Proportion of Total Expenditures Not Spent on Attorney Fees, FY2011

	Investigation, Experts, and Other Litigation Expenditures	Percent of Expenditures Not Spent on Attorney Fees
Harris	\$3,097,980	0.4percent
Dallas	\$707,676	8.3percent
Tarrant	\$2,637,810	2.9percent
Bexar	\$3,140,572	3.6percent
Travis	\$2,891,967	2.9percent

Table 10 shows, for the five largest counties in Texas in 2011, the proportion of cases paid for appointed counsel out of total cases added. Harris County has a low proportion of cases, compared to the other urban areas in Texas, in which counsel is appointed. This is particularly the case for felonies, where Harris pays indigent counsel in 62 percent of the cases while three other large counties are at 76 percent or higher.

Table 10: Proportion of Cases Paid of Cases Added in FY 2011

	Felony		Misdemeanor		Juvenile	
	Added	Appointed	Added	Appointed	Added	Appointed
Harris	46,028	28,674 (62%)	77,912	38,406 (49%)	9,991	7,521 (75%)
Dallas	36,772	27,854 (76%)	63,690	28,000 (44%)	NA	13,167 (NA)
Tarrant	15,551	12,323 (79%)	29,456	14,266 (48%)	1,798	1,255 (70%)
Bexar	16,327	12,401 (76%)	38,045	25,512 (67%)	3,892	3,947 (NA)
Travis	13,057	8,614 (66%)	35,997	18,736 (52%)	1,797	2,552 (NA)

C. Assigned Counsel Process and Participation

In the misdemeanor courts, the assigned counsel system operates with relative uniformity among judges. The judge decides whether he/she wants to offer one-month, three-month, or six-month terms of assignment. Each quarter, four attorneys who are open to the chosen assignment duration (two of whom speak Spanish) are randomly assigned to a court. The judge may strike a lawyer, and receive the next name on the list. A lawyer may decline an assignment, but a lawyer declining a second assignment is no longer eligible for that quarter. Each court has 15 "appointment days" each week, to allot among the lawyers. On days when dockets are historically heavy all four lawyers may be assigned; light days may only have two or three lawyers. Lawyers are responsible for cases assigned during their time in court for the duration of the case.

A lawyer is paid a flat fee of \$250 for the morning docket, and for any resets also scheduled on that day. A lawyer is also eligible to be paid for work performed on the same day as provided in the fee schedule. A lawyer makes reimbursement requests, typically, for a day's docket, with cases listed on the voucher (rather than "per case"). If the case life stretches beyond the assignment period (as only a few do) the attorney can seek reimbursement using a different form for various amounts by task (in court, out of court, research, etc.). The Harris County Court Indigent Defense Plan caps cases per day at seven, but court managers do not track the number of cases assigned to each lawyer by date of assignment, and there is no additional compensation for additional cases beyond seven (nor reduced compensation if a lawyer is assigned fewer than seven cases).⁶⁴ Court managers also cannot track the total caseload or workload of assigned counsel, or take into account

⁶⁴ Harris County Courts Plan. Prompt Magistration. 10 June 2012.
<http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=442>. Last visited September 12, 2012.

retained cases, the attorney's appointment in felony or juvenile cases, or their involvement in cases in other counties or federal court.

With this system, developed over many years, the county criminal court managers achieve efficiency, high predictability in payments, and, they believe, just compensation to participating lawyers.⁶⁵

The felony district court appointment system is less unified than that used by the misdemeanor courts. Local Rule 6.13 states: "The appointment of counsel for indigent defendants is handled individually in each of the District Courts. The procedure for the appointments should be checked with each District Court Coordinator." The District Courts' Indigent Defense Plan similarly provides that "the judge of each court shall post in writing in the office of the Court Administrator, the method used by the court to appoint counsel to represent indigent defendants."⁶⁶ Appointments of the HCPD Felony Division ("Trial Bureau") reflect this phenomenon, depending on the propensity of each judge to appoint from the public defender. At the extremes, from inception to June 30, 2012, the 182nd District Court appointed the HCPD five times, while the 232nd District Court appointed the HCPD 529 times.⁶⁷ In addition to the 232nd, courts that use the HCPD extensively are the 337th, 184th, 178th, 180th, 248th, and 351st.

District courts using contract defenders in addition to "the wheel" (the random assigned counsel system) last year were the 178th, the 208th, 209th, 228th and 262nd.⁶⁸ In Texas, a "contract defender program" means "a system under which private attorneys, acting as independent contractors and compensated with public funds, are engaged to provide legal representation and services to a group of unspecified indigent defendants who appear before a particular court or group of courts."⁶⁹ This model is governed by rules of the Texas Indigent Defense Commission.⁷⁰ As noted in the Cohen study cited in Part I, the contract counsel model is not particularly favored among indigent defense advocates: "Although contract systems can limit the costs governments pay for indigent defense, critics argue that these

⁶⁵ Interview and email with Marshall Shelsey, Staff Attorney, Harris County Courts, c. July 27, 2012.

⁶⁶ Available at <http://tidc.tamu.edu/public.net/Reports/IDPlanNarrative.aspx?cid=101>

⁶⁷ Trial Bureau Appointments Through June 30, 2012, management report provided by HCPD Trial Bureau Chief Mark Hochglaube, July 26, 2012.

⁶⁸ County Financial Report, TIDC Indigent Defense Data for Texas, available at: <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=101&fy=2011>

⁶⁹ 1 Texas Administrative Code §174.10(b).

⁷⁰ 1 Texas Administrative Code §§174.10 - 174.25

systems could reduce the quality of representation as law firms underbid each other in an effort to secure competitive contracts.”⁷¹

The three juvenile district courts also participate in the wheel, and two courts assign cases to HCPD, but one (the 314th) has announced the intention not to use HCPD.⁷² This posture has been discussed by the Board, and reported to the Texas Indigent Defense Commission by HCPD as follows:

Only two of three Juvenile District Courts is participating in providing cases to the PDO. This has required the other two courts to attempt to proportionately increase their cases assigned to the PDO. The problem is further aggravated by a general decline in juvenile prosecutions since the Juvenile Division was planned. The PDO Board has agreed to make the Juvenile Board aware of the discrepancy. We hope to reach our anticipated caseload for Juvenile cases sometime this year.⁷³

The Justice Center took note that the appointed counsel system(s) in Harris County have been the subject of scrutiny and criticism in the media.⁷⁴ It appears that this scrutiny was part of the motivation by Harris County officials to adopt a public defender model. With some perspective on the judicial and media view, the Justice Center examined the assigned counsel system from the financial viewpoint of the attorneys involved.

D. Assigned Attorney Perspective

Figure 6 below shows the amount Harris County paid per misdemeanor case, and the number of cases of payment, from 2007 to 2011. As noted previously (see Table 8), the average payment to counsel, and per case, in the misdemeanor courts in 2011 was \$82. The average payment from 2007 to 2011 was \$88. Because the funding budgeted for appointed counsel is relatively inflexible, that average amount depends on the number of cases. In 2008,

⁷¹ Cohen, Thomas H., *Who's Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes* (2011). Available at SSRN: <http://ssrn.com/abstract=1876474> or <http://dx.doi.org/10.2139/ssrn.1876474>

⁷² Minutes, Harris County Public Defender Board of Directors Meeting, March 15, 2012; see also, “A Public Defender Needs No Cronies,” by Patricia Kilday Hart, *Houston Chronicle*, April 30, 2012; “It’s Hard to Keep Up with the Busy Foe of the Public Defender’s Office,” by Patricia Kilday Hart, *Houston Chronicle*, April 27, 2012.

⁷³ Jan. 2012-March 2012 Grant Progress Report from HCPD to TIDC.

⁷⁴ See “A Public Defender Needs No Cronies,” by Patricia Kilday Hart, *Houston Chronicle*, April 30, 2012; “It’s Hard to Keep Up with the Busy Foe of the Public Defender’s Office,” by Patricia Kilday Hart, *Houston Chronicle*, April 27, 2012; “Experts: Harris County Taking Risks with Lawyer Appointment System,” KHOU-TV, May 19, 2009. Online at: <http://www.khou.com/news/local/66161012.html> ; Adam Liptak, “A Lawyer Known Best for Losing Capital Cases,” *New York Times*, May 17, 2010. Online at: <http://www.nytimes.com/2010/05/18/us/18bar.html> ; Sarah Viren, “A Select Few Get the Cases, and the Cash,” *Houston Chronicle*, April 20, 2008. Online at: <http://www.chron.com/news/houston-texas/article/Lawyers-picked-for-juveniles-give-campaigns-cash-1759443.php>

the number of cases hit a low point, and the case payout peaked; in 2010, the reverse occurred.

Figure 6: Attorney Payout and Total Payout on Misdemeanor Cases, FY 2007 to FY 2011

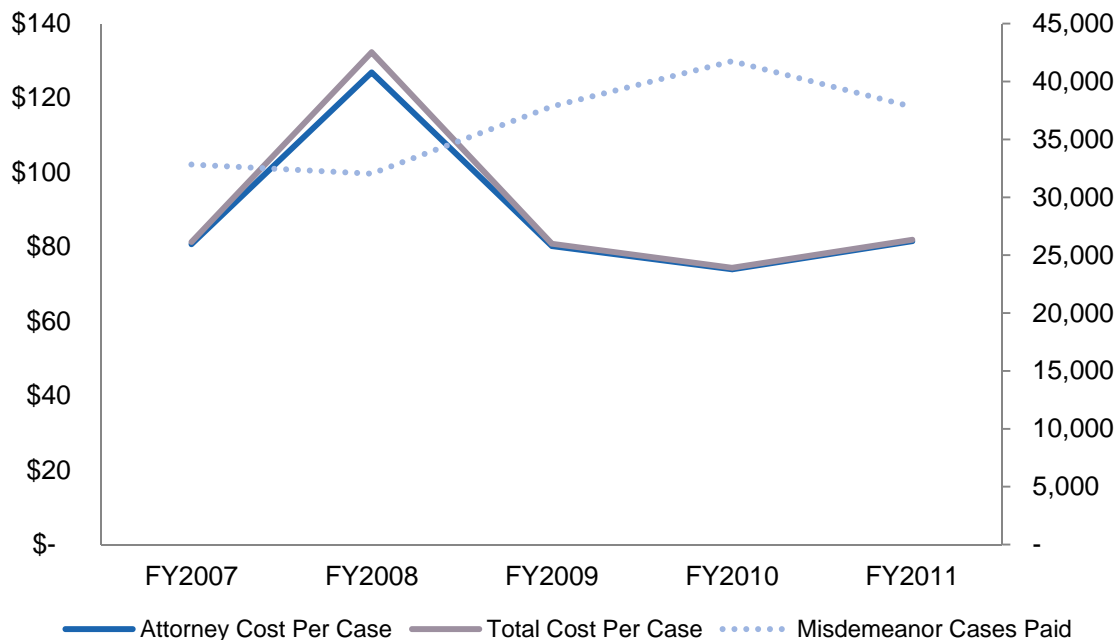
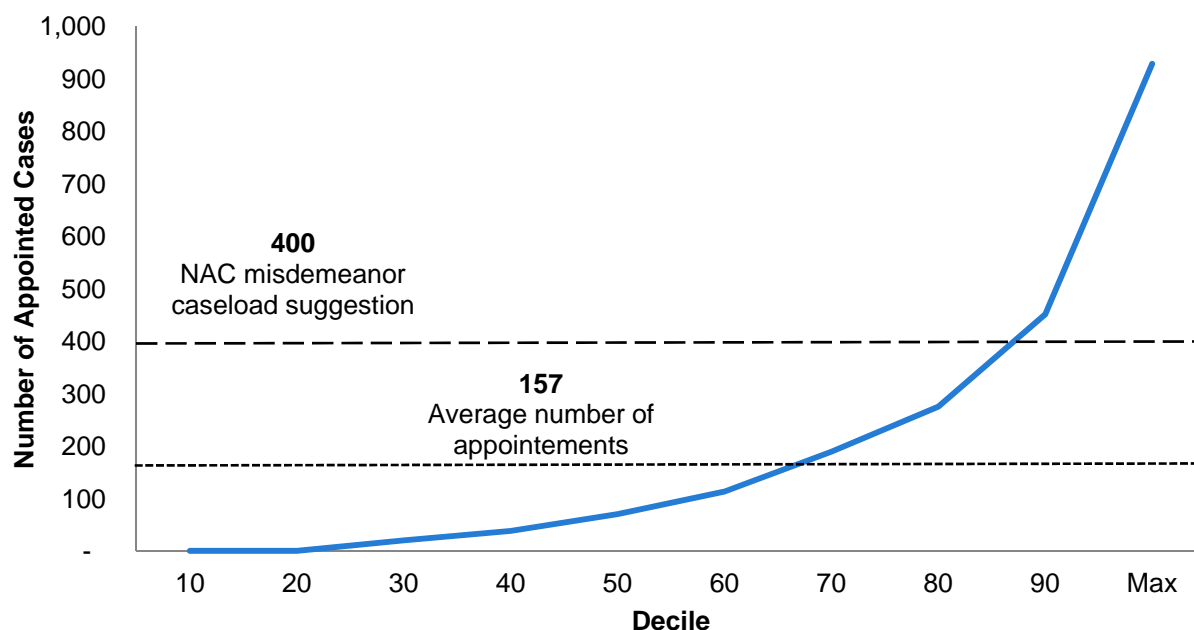


Figure 7 below shows the distribution of appointments in the misdemeanor system, with the top 10 percent of attorneys receiving over 452 cases annually (with an average of 632 and the highest at 952 cases), and the next decile receiving from 256 to 452 cases annually. Court administration officials plausibly suggest that many of the lawyers with high appointment numbers are bilingual, and much in demand. (The county is exploring the use of Berlitz for testing/qualifying attorneys who claim bilingual capacity.)⁷⁵ Nonetheless, these high numbers suggest the potential problem of excessive caseloads and raises questions about the quality of representation that could result.

⁷⁵ Interview with Marshall Shelsy and Ed Wells, Harris County Courts, c. July 27, 2012

Figure 7: Distribution of Number of Appointed Cases in Harris County by Decile in 2011



When the 255 attorneys are divided into deciles (26 attorneys each), eight of the deciles have attorneys with clearly manageable misdemeanor caseloads, without taking into consideration other workload such as felony appointments, or retained cases. The average number of assigned cases per year is 157 and occurs in the sixth decile, so over 60 percent of attorneys take less than the mean. The top quintile contains the majority of cases and includes attorneys (who may also have other workload) with 276 to 929 annual case assignments. There were 32 attorneys who received more than 400 cases – 6 of whom received more than 400 in one court - exceeding the National Advisory Commission (NAC) “standard” of 400 misdemeanors, and again, without accounting for other workload.⁷⁶

Table 11 below shows caseload, workload, and annual salary for attorneys appointed to misdemeanor cases in Harris County, based on the \$82 average per case payment. This depicts a simplified version of the income model for attorneys on the misdemeanor wheel, keeping in mind the other work that might occupy their time and affect their income. At \$82 per case in 2011, a ‘first quartile’ attorney who accepted five cases in a year would make \$410 total. Five cases in a *week* or 250 a year - well in excess of the actual average of 157 cases - yields annual attorney (gross) income of \$20,500. If the attorney had no other workload, she could spend 8 hours on each of those cases. An attorney at the NAC standard of 400 cases

⁷⁶National Advisory Commission on Criminal Justice Standards and Goals: Courts 276 (1973) (“NAC Standards”).

per year would earn \$32,800 from the wheel and could theoretically spend about 5 hours on each case. (Note that the workload study of HCPD Mental Health Division, discussed in Part VII.C, shows an average of 5.4 hours on each case in that division.) The attorney who received 929 appointments, the actual highest number in 2011, earned considerably less from those cases than the median salary for a criminal defense attorney in Texas, which is about \$94,000; the table shows that 1,000 appointments would yield \$82,000 in income. Finally, the misdemeanor wheel system theoretically allows an attorney to accept 1,750 appointments in a year, seven per work day, and earn just about the average for attorneys of all varieties in Houston, \$143,500.

Table 11: Caseload, Workload, and Annual Salary for Attorneys Appointed to Misdemeanors in Harris County

Cases per Week	Pay Per Week	Cases Per Year	Annual Salary	Hours Per Case
5	\$410	250	\$20,500	8
8	\$656	400	\$32,800	5
10	\$820	500	\$41,000	4
15	\$1,230	750	\$61,500	2.7
20	\$1,640	1,000	\$82,000	2
Median Salary for Criminal Defense Attorney in Texas ⁷⁷			\$94,062	
25	\$2,050	1,250	\$102,500	1.6
30	\$2,460	1,500	\$123,000	1.3
Average Salary for a Houston Attorney ⁷⁸			\$143,440	
35	\$2,870	1,750	\$143,500	1.1

To round out this view of the assigned counsel system and move beyond hypothetical workloads, the Justice Center conducted a survey of criminal defense practices in Harris County from Monday, July 23, 2012, to August 8, 2012. Harris County Criminal Lawyers Association (HCCLA) President Chris Tritico sent the survey link in an email to the 655 HCCLA members, and the Justice Center collected 38 responses, a usable response rate of 6 percent. The most salient points follow:

- No respondents reported receiving felony, misdemeanor, or juvenile appointments in a volume that would exceed the NAC guidelines.

⁷⁷

http://www.texasbar.com/AM/Template.cfm?Section=Research_and_Analysis&Template=/CM/ContentDisplay.cfm&ContentID=11241

⁷⁸ <http://blog.chron.com/houstonlegal/2011/02/how-much-money-do-lawyers-earn/>

- Many respondents were unaware of the maximum number of misdemeanor appointments per day (61 percent) or reported the maximum incorrectly (18 percent), while several reported receiving appointments in excess of the maximum (14 percent).
- Respondents reported that they spend considerably more time on retained cases than appointed cases. Misdemeanor cases had the largest differential – attorneys reported spending over three times as long on retained cases, 17 hours versus 5.4 hours. Accordingly, appearances, pretrial motions, and investigations were reportedly more frequent in retained cases. Average appearance rate for retained cases was almost double reported for appointed cases, pre-trial motions were filed in less than a third of appointed misdemeanors (31 percent) and more than half (54 percent) of retained cases, and investigators were used almost three times more often in retained misdemeanor cases (27 percent versus 11 percent of appointed cases).
- Respondents criticized judicial cronyism and over-involvement in the appointment process.
- Respondents rated HCPD favorably. Of the respondents who had experience with the Misdemeanor Mental Health Division, 93 percent rated it of adequate to high quality. The Felony (88 percent), Juvenile (86 percent), and Appellate Divisions (90 percent) were rated almost as high. Respondents provided positive feedback about the office's attorneys.

V. The Harris County Public Defender

A. Establishment and Purpose

In September, 2010, the Harris County Commissioners Court created the Harris County Public Defender's Office (HCPD) with a unanimous vote following recommendations from the District Courts Administrator and the County Courts Manager. Harris County received a \$4.2 million grant from the Texas Task Force on Indigent Defense (now TIDC) to establish the office. State grant funds covered 100 percent of the HCPD's operating budget in 2011.⁷⁹ These funds are reduced progressively each year, with Harris County covering the non-grant funded portion, until the county fully funds the office in 2015. In total, the office will receive \$14.3 million in grant funds over four years with a county match of \$15.2 million. The total yearly operational budget of the office, fully staffed, is estimated to be \$8.1 million for FY 2013.

The grant application from Harris County to the TIDC describes the quality-enhancing purpose of the new program:

A hybrid indigent defense system incorporating a public defender and assigned counsel would ensure predictability of costs, while ensuring quality representation, specialization of representation and the inclusion of the defense bar at policy discussions.⁸⁰

Table 12 below depicts the 12 objectives the grant application describes for the creation of the new office. Four objectives each are related to benefits to clients, the defense community, and the criminal justice community.

Table 12: Objectives Stated in HCPDO Grant Application

Clients	Defense Community	Criminal Justice Community
1. Trial and appellate defense in district court criminal cases	1. Provide Continuing Legal Education (CLE) for attorneys representing indigent clients	1. Create a Public Defender Office responsible for traditional core functions in coordination with an assigned counsel program to represent the indigent
2. Trial and appellate defense in district court juvenile cases	2. Act as a resource for attorneys representing indigent clients	2. Administer hybrid representation model in participating county criminal court, consistent with their alternative local plan

⁷⁹ Harris County funded the initial infrastructure of the office, including build-out and furniture.

⁸⁰ "2011 Harris County Discretionary Grant Application Narrative," Texas Indigent Defense Commission.

3. Trial and support services for mentally ill and mentally retarded in 15 county courts	3. Provide services to assigned counsel, indigent clients, and support services	3. Reduce the mentally ill/mentally retarded/ dual diagnosis population and length of stay for the county criminal court target population
4. Appellate representation for indigent county criminal court cases	4. Act as the defense bar's institutional representative and participate in systemic policy development and decision making.	4. Expand performance measures in Harris County Court Business Intelligence System to measure outcomes and program performance

While accepting the grant to start the HCPD in September 2010, the Commissioners Court appointed 15 members to serve on the Harris County Public Defender Board:

Two members of Commissioners Court
 Administrative Judge of the Criminal Trial Division of the District Courts
 One Judge of the Juvenile District Courts
 Presiding Judge of the County Criminal Courts
 Court Administrator of the Criminal Trial Division of the District Courts
 Court Manager of the County Criminal Courts
 Eight persons selected by the individual members of Commissioners Court representing the bar and the community of Harris County.⁸¹

This board was charged with recommending the selection of a Chief Defender, and monitoring the office's progress. The board has convened seven times since then, most recently in September 2012, when the Justice Center reported on this work. The minutes, reports provided by the staff, and interviews with board members reflect an engaged and supportive board.

On November 9, 2010, the Commissioners Court hired Alexander Bunin as the Chief Defender,⁸² on the recommendation of the Public Defender Board, and based on interviews conducted on October 19, 2010. On December 6, 2010, Chief Bunin started work.

Figure 8 below shows the divisions of the HCPD office, the staffing as of July 2012 and the targeted caseloads. On January 31, 2011, HCPD started operating and on February 1 began receiving misdemeanor mental health cases, and misdemeanor and felony appeals. HCPD began representing indigent clients charged with non-capital felony offenses in October 2011, and in December 2011, the office began accepting indigent juvenile clients and became fully operational. Current staffing is 58 people.

⁸¹ Harris County Public Defender Board, Procedural Guidelines, adopted June 23, 2011.

⁸² Harris County Commissioner's Court Order, Nov. 9, 2010, Recorded vol. 271, p. 277.

Figure 8: HCPD Divisions, Personnel and Targeted Caseloads

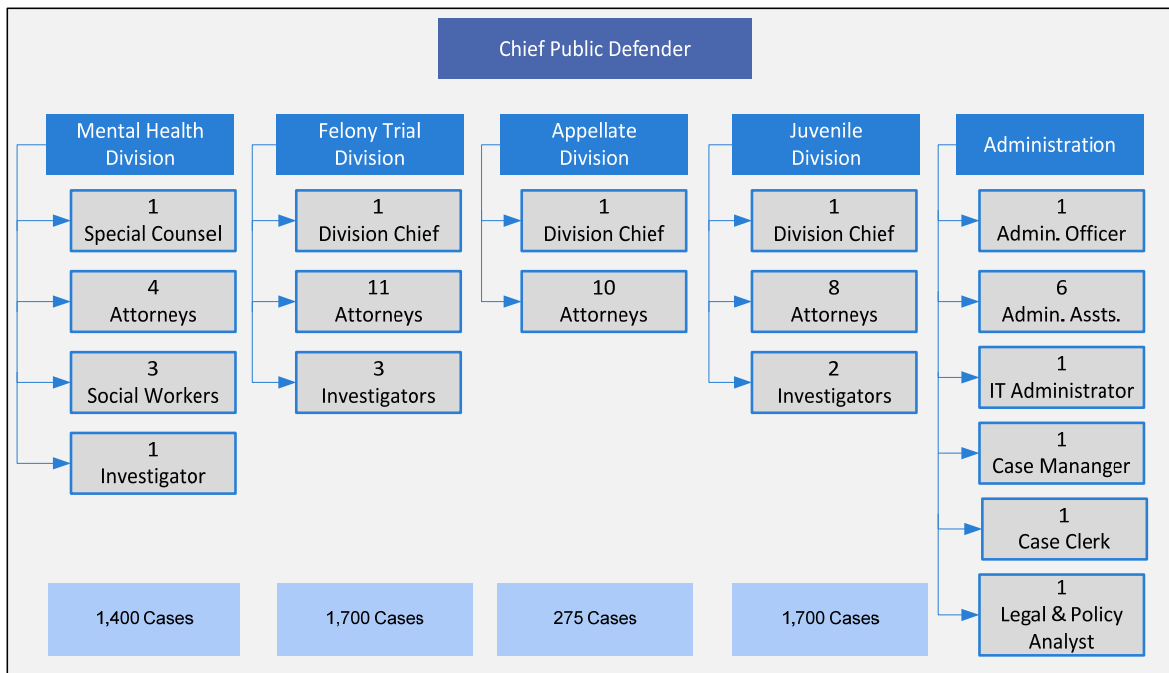
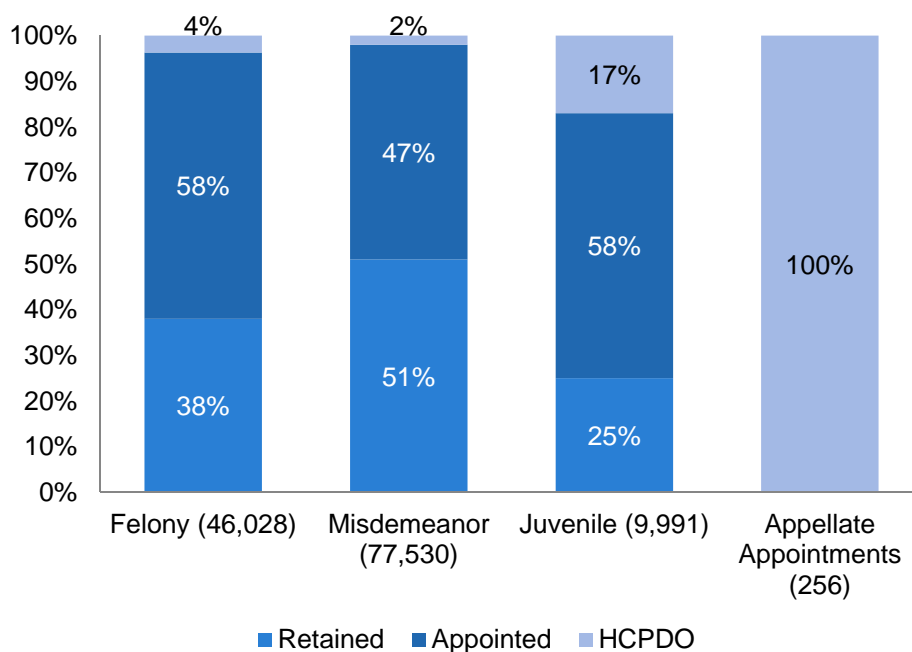


Figure 9 shows the proportion of felony, misdemeanor, juvenile and appellate cases that are projected to be handled by the office, by assigned counsel, and by retained counsel. Note that with the exception of the appellate appointments, Figure 9 shows the percentage of all cases, indigent and non-indigent, that HCPD can handle. As noted previously, HCPD is currently designed and funded to handle about 7 percent of all the *indigent* criminal and juvenile cases in Harris County: 4 percent of all the *indigent* misdemeanor cases, 6 percent of all the felony *indigent* defense cases, 23 percent of *indigent* juvenile cases, and 100 percent of *indigent* appeals. At full capacity, the office is expected to handle 1,700 felonies, 1,400 misdemeanor mental health cases, 1,700 juvenile cases, and 275 appeals, or, as shown in Figure 9, approximately four percent of all felonies, 2 percent of all misdemeanors, 17 percent of all juvenile cases, and all appellate cases that require appointed counsel in Harris County every year (other than conflict of interest cases with multiple defendants). The HCPD has caseload limits based on, but not identical to, the 1973 guidelines established by the National Advisory Commission on Criminal Justice Standards and Goals:⁸³ 150 felony, 200 juvenile, 400 non-traffic misdemeanors, and 25 non-capital appeals per attorney per year. HCPD has a limit of 350 mental health misdemeanor cases.

⁸³ National Advisory Commission on Criminal Justice Standards and Goals: Courts 276 (1973) ("NAC Standards").

Figure 9: Distribution of Cases Assuming Full Capacity, FY 2011



B. Description of Divisions

The HCPD has administrative staff and four operational divisions – Mental Health, Appellate, Felony, and Juvenile. (See Figure 8.)

The Mental Health Division (MHD) is designed to provide specialized defense services to mentally ill defendants, with attorneys supported by social workers who connect defendants with mental health services and can research their cases for mitigation purposes. MHD attorneys have specialized training in mental health law and have demonstrated aptitude and experience working with individuals with serious mental illnesses. The division has a chief (“Special Counsel”), four attorneys, three social workers and an investigator.

The Appellate Division expects to represent 275 indigent clients in misdemeanor and felony appeals per year, with referrals from county courts and law and district courts. The Division includes a chief and 10 attorneys.

The Felony (“Trial Bureau”) Division has 12 attorneys including the division chief, and three investigators. The caseload cap is 150 cases per attorney per year, with a goal of 30 cases open at any given time. With the Division Director carrying a caseload, the office can handle about 1,700 cases annually across as many of the criminal district courts that participate. As noted in Part IV.C., all of the felony courts have used the Felony Division in at

least a few cases, with wide variation among courts. The Felony Division is eligible for assignment from the wheel until each public defender is carrying a full caseload, at which point the HCPD can slow or stop its name from appearing on the wheel draw through a computerized process. The division accepts any non-capital felony assignment, unless there is a conflict or the office lacks the resources to accept the appointment.

The Juvenile Division represents indigent youth facing charges in juvenile court. The Juvenile Division has two investigators and nine attorneys including the division chief, each representing up to 200 youth annually for a total of 1,700 cases per year. The HCPD Board has been advised that one of the three juvenile judges is refusing to assign cases to HCPD, while the other two have attempted to double assignments to HCPD.⁸⁴ Thus, there is some question whether this division will achieve its targeted caseload, an issue that will be a subject of inquiry in future reports as part of this evaluation.

Figure 10 shows the opening dates for the divisions. The first two divisions to become operational were the Mental Health and Appellate Divisions, in January 2011. The Felony Division and the Juvenile Division became operational in October 2011 and December 2011, respectively.

Figure 10: Harris County Public Defender Office Ramp Up

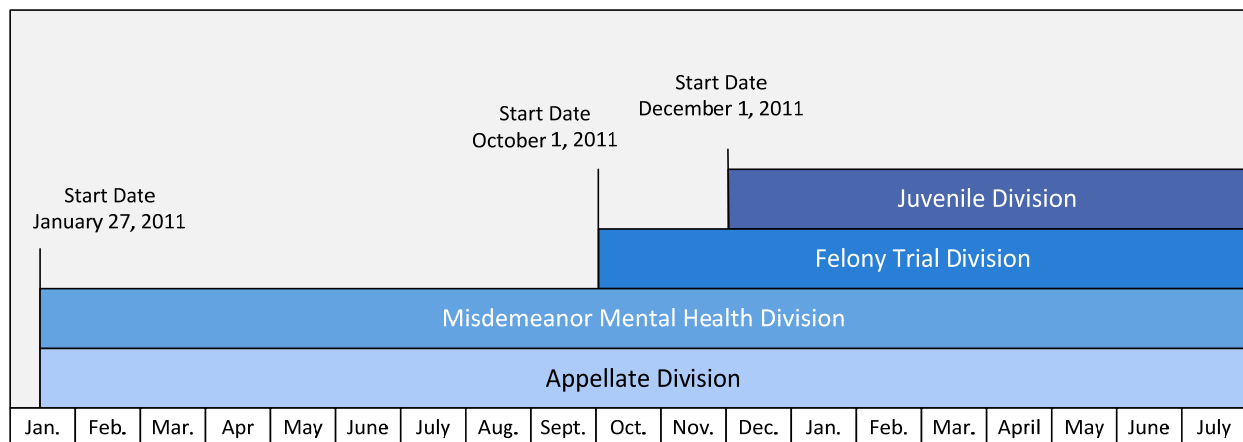
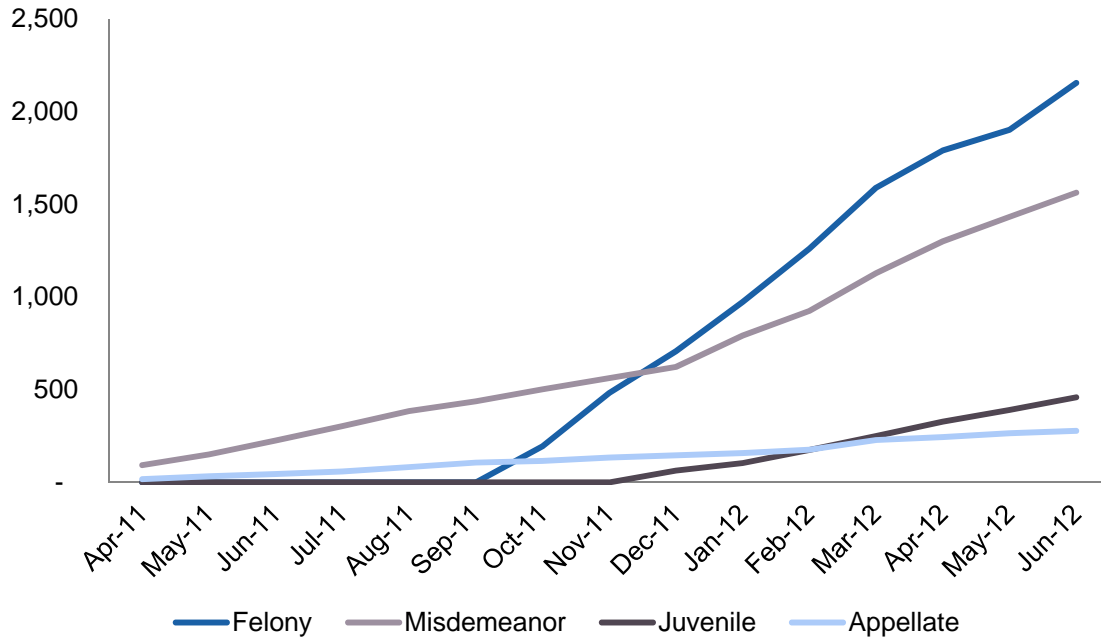


Figure 11 shows the cumulative number of cases, month over month, assigned to the Public Defender Office by division, from April 2011 to June 2012. Note the October 2011 and December 2011 start dates for the Felony and Juvenile Divisions.

⁸⁴ Minutes, Harris County Public Defender Board of Directors Meeting, March 15, 2012.

Figure 11: Total Cumulative Number of Cases Assigned, April 2011 to June 2012⁸⁵



⁸⁵ Harris County Public Defender Progress Reports, April 2011 through June 2012.

VI. Assessment of Start-Up and Operations

A. Overview

The Justice Center assessed the start-up and operations of the HCPD by interviewing attorneys, judges, court administrators and others, and analyzing several sources of data bearing on the operation of the operations of the HCPD. The assessment compared HCPD against the American Bar Association's "Ten Principles," the TIDC grant application, and other selected standards. Because HCPD has been in operation for 18 months, with juvenile and felony divisions operating only a few of those months, there has not been sufficient time to analyze those divisions or the outcomes of their cases. The narrower goals of this preliminary assessment were to determine if the HCPD was appropriately established and if they have incorporated best practices for the field of indigent defense, as well as to learn what we can about workload for one of the divisions (Mental Health), and outcomes for two divisions (Mental Health and Appellate).

A caveat: the measuring of outcomes at this point is exploratory. While global outcomes such as disposition type can be measured, more nuanced outcomes are harder to measure and there is no agreement on what these outcomes may be and how to measure them. For example, a case may have been pled guilty to a lower offense than charged, or the defendant placed on probation with conditions that are more favorable, due to better defense representation, but this nuance is not captured in data systems or is difficult to extract. Comparisons between public defender cases and cases in the assigned counsel system are particularly challenging.

The Justice Center evaluation of the HCPD shows that the Chief Defender has demonstrated the ability to manage the start-up of the office, establish a credible, independent presence in a vast and complex system, add value to the practice of criminal defense and to the criminal justice process, and execute on a vision of holistic defense. In the first 18 months of existence, HCPD has several accomplishments:

➤ *adopted the State Bar's Performance Guidelines for Non-Capital Criminal Defense Representation as part of its employee performance standards and basis for evaluation;*⁸⁶

⁸⁶ See §§XIV-XXII of the HCPD, which bears a strong, but tailored resemblance to the State Bar guidelines, available at <http://www.texasbar.com/Content/NavigationMenu/ForLawyers/Committees/PerformanceGuidelinesforNon-CapitalCriminalDefenseRepresentationJanuary2011.pdf>.

- *implemented workload standards that are consistent with national recommendations in an effort to safeguard defendants' constitutional rights;*
- *employed quality legal staff and provided them with necessary resources and support;*
- *employed staff investigators, social workers, and administrative assistants to be sure that adequate resources were available to attorneys, and launched four separate divisions;*
- *hired attorneys and support staff at wages fairly comparable with those paid by the District Attorney's Office to attract experienced and talented individuals to the positions;*
- *conducted 10 community outreach presentations;*
- *visited 21 facilities and programs that affect their clients;*
- *conducted 54 CLE events;*
- *supported the private bar with criminal, mental health and immigration legal advice, as well as forms, briefs, and even a defendant clothing supply for court appearances (much of it donated from outside HCPD);*
- *launched a website (<http://harriscountypublicdefender.org/>);*
- *received approximately a dozen cards and voicemails from grateful clients; and*
- *enjoyed a number of individual case successes across the divisions.⁸⁷*

B. Review of Operational Standards

To provide additional framing to this evaluation, the Justice Center reviewed HCPD against the applicable ABA Ten Principles of a Public Defense Delivery System, the ABA Standards for Providing Defense Services ("SPDF")⁸⁸ that are specifically aimed at public defender operations, and the 12 TIDC grant objectives noted in Part V. Below are the relevant standards with observations from the evaluators.⁸⁹

⁸⁷ Interviews with Chief Defender Alex Bunin; Minutes and staff report, Harris County Public Defender Board of Directors Meeting, March 15, 2012.

⁸⁸ Available at:

http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_toc.html.

⁸⁹ The numbering of the Ten Principles is rearranged based upon the useful grouping of principles in a 2008 NLADA review of the Washington D.C. Public Defender Office (an acknowledged leader in the field of indigent defense). "Halting Assembly Line Justice: A Model of Client Centered Defense," National Legal Aid and Defender Association, 2008, available at: http://www.nlada.net/sites/default/files/dc_haltingassemblylinejusticejeri08-2008_report.pdf

Standard - Independence

The public defense function, including the selection, funding, and payment of defense counsel, is independent. (Principle 1)

Evaluation

The point of this principle, stated briefly, is to counteract “the phenomena of public defenders being pressured by members of the courtroom workgroup to emphasize rapid case processing over vigorous criminal defense,” as described in the Cohen analysis quoted in Part I.⁹⁰ As stated by Barry Mahoney of the Justice Management Institute, in a memo to the Harris County Criminal Justice Coordinating Council: “Defense attorneys who must keep watch over their shoulder, worried that their zealous advocacy may affect funding for their cases or the likelihood of future appointments, cannot be considered independent.”⁹¹

Interviews and minutes of meetings clearly suggest that the Harris County Public Defender Board and Chief Defender Bunin understand this principle and are willing to assert the independence of the office. In a small but significant example, Chief Bunin described adoption of appropriate legal and staff job descriptions outside of the routine Harris County process, which he needed to do and the county accepted. The perceptions of opposing appellate counsel in the District Attorney’s Office (see Part II.D.) also confirm that the HCPD lawyers are not timid about asserting strong and even novel positions on behalf of their clients. HCPD case successes, such as those listed in the March 2012 report from Chief Bunin to the Board, and as suggested by the outcome data for the Mental Health Division, also speak to independence, as well as competence. On the other hand, as a public official the Chief Defender must strive to maintain the delicate balance between necessary independence, and openness to inquiry and criticism.

One concern regarding independence is that the Chief Defender’s appointment was not for a fixed term and subject to renewal, discussed further below.

Standard - Workload

Workload is controlled to permit the rendering of quality representation. (Principle 5)

As discussed in Part V.B., HCPD has established caseload caps in their Personnel Manual (p. 8). Caseload per attorney is consistent with those recommended by the National Advisory Commission on Criminal Justice Standards and Goals. The maximum annual caseloads are 150 felonies per attorney, or 200 juvenile cases per attorney, or 25 appeals per attorney. Misdemeanor mental health cases are not to exceed 350 per attorney. The protocol for assigning misdemeanor cases to the MHD may be altered to control the inflow, supporting the caseload standard.

⁹⁰ Cohen, Thomas H., *Who’s Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes* (2011). Available at SSRN: <http://ssrn.com/abstract=1876474> or <http://dx.doi.org/10.2139/ssrn.1876474>.

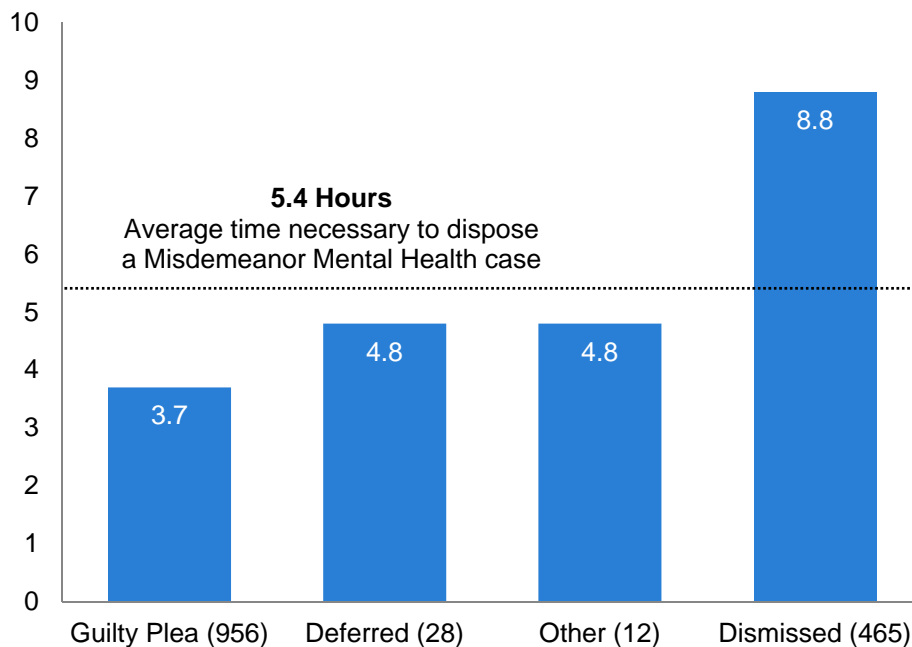
⁹¹ Unpublished memorandum, available from the authors of this report.

Evaluation

This report begins the process of refining caseload caps with actual workload information: the amount of time it takes for the office or a division to handle different case types. Much more information on the workload of the Mental Health Division is provided in Part VII.C. As an illustration, Figure 12 shows the number of hours necessary, or the “case weight,” for the MHD to dispose of misdemeanor cases by disposition type. The difference in time spent on misdemeanor cases that are dismissed, versus those that have other outcomes, illustrates both the utility of workload measurement as a management and evaluation tool, and the importance of “small acts of due diligence.” It takes effort to achieve a dismissal instead of a guilty plea, and good attorneys recognize the cases that have the potential for that effort to bear fruit.

HCPD is aware the need to improve its use of information from the case management system, with the Chief Defender particularly mindful of the potential for doing so. So one result of this evaluation should be HCPD learning to develop more meaningful information out of the data they already collect.

Figure 12: HCPD Case Weight for Misdemeanor Cases by Disposition Type, January 2011 to July 2012



Standard- Quality Assurance

Defense counsel's ability, training, and experience match the complexity of the case. (Principle 6) Defense counsel is provided with and required to attend continuing legal education. (Principle 9) Defense counsel is

supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. (Principle 10)

Evaluation

These standards apply to both the Harris County system and the HCPD. The Justice Center was to evaluate HCPD and not the larger system. HCPD's division of work supports the provision of counsel commensurate with experience and training. The supervision and standards provided for by HCPD's Personnel Manual, in conjunction with caseload/workload controls, support the achievement of systemic quality and efficiency.

Standard - Attorney/Client Relationship

Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel. (Principle 3) Defense counsel is provided sufficient time and a confidential space within which to meet with the client. (Principle 4) The same attorney continuously represents the client until completion of the case. (Principle 7)

Evaluation

The first two principles here apply to the Harris County system, while the third applies to both the system and the HCPD. The Justice Center did not review records or otherwise analyze the first two principles with regard to the system, but did survey defense counsel in the county and found that attorneys generally have sufficient time, but experience a lack of privacy in the jail visitation space. With regard to continuous representation, both the assigned counsel system and the HCPD require that counsel represent the client from appointment to case closure (unless permitted by the court to terminate representation). The application of this requirement was demonstrated by the fact that HCPD attorneys carried cases over from their previous practice into HCPD when they came to the new office.

Standard - Parity

There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. (Principle 8)

Evaluation

The HCPD Personnel Manual, Section 12.1, states: "All salaries are based on pay scales similar to those for other Harris County employees, particularly the District Attorney's Office."

The Justice Center heard the concern that HCPD salaries are high compared to the District Attorney's office (the opposite of the typical concern for public defenders), creating an incentive for movement to the new office. The Chief Defender reported that he was given every salary in the DA's office and set salary maximums consistent with theirs, and that no one was hired directly from the DA's office to HCPD. HCPD annual salaries for lawyers are capped as

follows: Chief Defender - \$155,424; Division Chief - \$140,064; and Assistant Public Defender - \$131,000.⁹²

Table 13 shows the average salary by position classification at the Harris County District Attorney's Office, based on the Texas Tribune government employee salary database.⁹³

Table 13: Average Salary by Position Classification at the Harris District Attorney Office

Title	Average Salary
Assistant District Attorney I	\$142,551
Assistant District Attorney II	\$135,520
Assistant District Attorney III	\$114,650
Assistant District Attorney IV	\$84,053
Assistant District Attorney V	\$63,160
Assistant District Attorney VI	\$57,678

If accurate, they do not reflect absolute parity with HCPD, but are not dramatically different. Addressing the thrust of the standard, it does appear that HCPD has been able to attract talented staff, and is competitive in the employment market.

Standard - Bar Participation

Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar (Principle 2)

Evaluation

This principle applies to the system, and has been satisfied for the first time in Harris County by the creation of HCPD. The Justice Center survey of defense counsel (HCCLA) showed that the Harris County criminal bar overall does not appear to be hostile to the existence of HCPD, and in fact are generally complimentary.

Standard - Qualifications

SPDS⁹⁴ 5- 4.1 Chief defender and staff

Selection of the chief defender and staff should be made on the basis of merit. Recruitment of attorneys should include special efforts to employ women and members of minority groups.

Evaluation

Chief Defender Bunin is clearly well qualified to lead the office and was known previously by some Board members.⁹⁵ He was the Federal Public Defender for the Northern District of New York. In 1999, he was appointed by the United States Court of Appeals for the Second Circuit to establish Federal Public

⁹² Unpublished table obtained from the Texas Indigent Defense Commission.

⁹³ See <http://www.texastribune.org/library/data/government-employee-salaries/harris-county/departments/>

⁹⁴ ABA Standards for Providing Defense Services; see fn. 87.

⁹⁵ Review of qualifications and Board member interviews.

Defender offices in the Districts of Northern New York and Vermont. He was twice reappointed to additional four-year terms. In 1995, he established and managed the federal defender organization in the Southern District of Alabama in Mobile. From 1993 to 1995, he was an Assistant Federal Public Defender in the Eastern District of Texas in Beaumont. From 1986 to 1993, he was in private practice in Houston, Texas, where he earned Board Certification in Criminal Law and Board Certification in Appellate Criminal Law from the Texas Board of Legal Specialization.

Chief Defender Bunin was not selected by judges, although he was nominated by a fifteen-member Board with four judges and two court administrators. The Board was constituted pursuant to Texas law, which provides for potential membership to include “an attorney; the judge of a trial court in this state; a county commissioner; a county judge; a community representative; and a former client or a family member of a former client of the public defender's office for which the oversight board was established under this article.”⁹⁶ Neither the statute nor the actual composition of the Board comport with the “Guidelines for the Legal Defense Systems in the United States,” Section 2.10:

The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director. (a) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics. (b) No single branch of government should have a majority of votes on the Commission. (c) Organizations concerned with the problems of the client community should be represented on the Commission. (d) A majority of the Commission should consist of practicing attorneys. (e) The Commission should not include judges, prosecutors, or law enforcement officials.

Clearly the commissioner's court is entitled to rely upon their adherence with statute. However, there is a related issue that can be addressed for the future: the Chief Defender's appointment by order of the Commissioner's Court on November 9, 2010, is not for a fixed term nor is it subject to renewal.

Table 14 shows the distribution of employees in the HCPD by gender and ethnicity.⁹⁷ The Justice Center did not examine or identify any explicit minority recruitment activity, but the demographics of the office show reasonable diversity: a high percentage of female employees, African-Americans represented at a much higher rate than their overall representation in the state, but Hispanics represented at a much lower rate than their overall representation in the state.

⁹⁶ Texas Code of Criminal Procedure, Art. 26.045.

⁹⁷ Data provided by Carmen Mireles, Administrative Assistant, HCPD.

Table 14: Harris County Public Defender Office Employees by Gender and Ethnicity

	Number	Percentage
Female	36	62%
Male	22	38%
Asian/Other	2	3%
African American	14	24%
Hispanic	8	14%
White	34	59%
Total	58	

Standard – Restrictions on Private Practice⁹⁸

SPDS 5- 4.2. Defense organizations should be staffed with full-time attorneys. All such attorneys should be prohibited from engaging in the private practice of law.

Evaluation

HCPD is staffed with full-time attorneys who are prohibited, in the Personnel Manual, Sec. 23.5(D), from the outside practice of law. Section 23 also contains other important ethics and conduct restrictions.

Standard – Facilities & Library

SPDS 5- 4.3. Every defender office should be located in a place convenient to the courts and be furnished in a manner appropriate to the dignity of the legal profession. A library of sufficient size, considering the needs of the office and the accessibility of other libraries, and other necessary facilities and equipment should be provided.

Evaluation

HCPD is suitably located in the criminal courts building in the courts complex in downtown Houston; in fact the county has been very generous in the provision of quality office space. There is ample space for law books, although attorneys in HCPD and everywhere else rely almost completely on Internet-based legal resources, making the standard partially obsolete.

Table 15 summarizes the findings above.

⁹⁸ Standards labeled SBDS are from the ABA's 1990 Standards for the Provision of Defense Services.

Table 15: Harris County Public Defender Office Progress on Meeting Applicable ABA 10 Principles

ABA Principle	Standard	Meets Standard	Evaluation
1	Independent selection, funding, and payment	✓	HCPD exhibits independence, but Chief Defender's position should be for fixed term subject to renewal
5	Workload controlled	✓	Caseload caps included in HCPD manual and followed by court administrators can slow or stop stream of assignments from courts
6	Quality assurance – experience	✓	Counsel appropriately matched to cases
9	Quality assurance – training	✓	HCPD defenders have required attendance
10	Quality assurance – supervision and review	✓	Defense counsel is supervised and attorneys are reviewed
3	Timely assignment	✓	Attorneys are notified as soon as feasible of client arrest
4	Time and space to meet with client	✓	Applies to Harris County overall versus HCPD. Space at jail is not confidential, but time is adequate
7	Attorney/client relationship	✓	Attorneys represent clients through lifespan of case and in repeat cases
8	Parity between defense and prosecution	✓	HCPD salary maximums consistent with DA; exact parity is difficult to assess
2	Bar participation	✓	Current system blends HCPD plus private assigned and contract counsel

C. Commission Grant Compliance

Table 16 below, as introduced in Part V, depicts the 12 objectives in the TIDC grant to create HCPD: to benefit clients, the defense community, and the criminal justice community. The client-directed objectives are satisfied by the creation of the four operational divisions. The defense community objectives, and the first two criminal justice community objectives, are satisfied as set out in the following discussion of defense bar and criminal justice contributions. The third criminal justice community objective, related to representation of the mentally impaired population, is addressed in Part VII, with indications that outcomes for the clients of the Mental Health Division are improved by HCPD. The final criminal justice community objective, developing a BI System, is a larger project for Harris County, where HCPD has a small role but is prepared to meet it.

Table 16: Objectives Stated in HCPDO Grant Application

Clients	Defense Community	Criminal Justice Community
1. Trial and appellate defense in district court criminal cases	1. Provide CLE for attorneys representing indigent clients	1. Create a Public Defender Office responsible for traditional core functions in coordination with an assigned counsel program to represent the indigent
2. Trial and appellate defense in district court juvenile cases	2. Act as a resource for attorneys representing indigent clients	2. Administer hybrid representation model in participating county criminal courts, consistent with their alternative local plan
3. Trial and support services for mentally ill and mentally retarded in 15 county courts	3. Provide services to assigned counsel, indigent clients, and support services	3. Reduce the mentally ill/mentally retarded/ dual diagnosis population and length of stay for the county criminal court target population
4. Appellate representation for indigent county criminal court cases	4. Act as the defense bar's institutional representative and participate in systemic policy development and decision making.	4. Expand performance measures in Harris County Court Business Intelligence System to measure outcomes and program performance

At the onset of this report, the Texas Indigent Defense Commission required HCPD to report 94 aggregate data measures per month. These measures are intended to hold HCPD accountable for the state grant funding it receives and allow TIDC to quantify the value to indigent defense obtained for the funding. Researchers determined that the data collection instrument was problematic. Justice Center staff discussed their concerns with the TIDC, who coordinated a meeting with representatives of the HCPD, TIDC, and the Justice Center to redesign the instrument. The new instrument streamlines collection and will be operationalized by October 2012.⁹⁹ Information about HCPD, based on the existing measures, is discussed below.

D. Defense Bar and Criminal Justice Contributions

In addition to satisfying basic requirements for operating a credible and effective public defender office, HCPD has demonstrated a willingness to add value to the overall criminal justice system in the county. For example, while this report was being written, the HCPD presented to Harris County Commissioners a \$350,000 grant proposal to the Department of Justice's Bureau of Justice Assistance, to develop and staff a comprehensive training program

⁹⁹ Colfax, Edwin. "RE: updates to progress report." Email to Jessica Tyler. 6 September 2012.

for newly-appointed assigned counsel in the county. The grant funding was approved by the Department of Justice on August 22, 2012.

Technology in the courtroom may prove problematic to defense bar members with little opportunity to practice or train with it. HCPD's Systems Administrator spent six years working for the Harris County Office of Court Management supporting court-related technology, which impressed upon him the lack of in-house technical assistance or hands-on training for the defense attorneys. During his tenure with HCPD, he has assisted defense members with viewing digital evidence and facilitated a courtroom practice session for a firm preparing for a high-profile trial. These experiences and knowledge led to the creation of the CLE *Mastering Courtroom Technology* for the defense community. The course includes documentation detailing technical procedures in court and support contacts.¹⁰⁰

HCPD has committed the Appellate Division to focus on reviewing 250 to 400 cases for potential writs based on possible error by a forensic lab technician. The office also offers immigration law advice to private practitioners, with a webpage that offers the following invitation: "The PDO offers all defense attorneys the opportunity to speak with a staff immigration attorney about immigration consequences implicated in their cases, from the availability of bond from the immigration court to substantive issues regarding removability."¹⁰¹ And, as noted previously, since start-up the office has conducted 10 outreach presentations; visited 21 facilities and programs that affect their clients; and conducted 54 CLE events.

One area of room for improvement is in capturing the kind of information in the previous sentence. The CLE events were recorded as required by the TIDC grant, but the other two data points were hand-gathered. HCPD management should have more consistent information on the outreach and program visitation activity of the office. The holistic defense model, discussed in Part VII, includes practices such as outreach presentations and site visits, to be connected to the client's community and its resources, and to constantly build bridges for collaboration.

¹⁰⁰ Giannantonio, Ben. "RE: Tech stuff for Report." Email to Jessica Tyler. 18 September 2012.

¹⁰¹ HCPD webpage at: <http://harriscountypublicdefender.org/support/immigration/> .

VII. Assessment of Mental Health Division

A. Specialized Defense Services

As discussed in Part III.C. Harris County has a long history of excellent attention to the issue of identifying mentally ill offenders in the justice system. The Mental Health Division (MHD) of the HCPD is the latest chapter in that story. The goal of the division is to provide specialized defense services to mentally ill defendants, with the attorney effort in each case supported by psychosocial services staff who connect defendants with mental health and other services, and who can further research their case for mitigation purposes.

The psychosocial services staff (PSS), in coordination with defense counsel, works to ensure continuity of care for individuals with serious mental illnesses entering and leaving the Harris County jail. The office has signed a contract with Harris County Mental Health Mental Retardation Authority (MHMRA), the local agency coordinating state and locally funded mental health services, to provide three staff who can provide data mining services. MHMRA currently has clerks in jail facilities with access to a client's prior history of diagnoses, hospitalizations, mental health service contacts, and prescriptions. The clerk can copy or fax information on any client and send it to the public defender.

Once the individuals are referred to the MHD, the PSS works with MHMRA staff at the jail to identify existing prescriptions, refer individuals for psychosocial assessments to confirm prescriptions, and identify appropriate community treatment options. The PSS also works with clients on signing up for or reactivating benefits and securing housing, as well as educating family members on available community resources. If housing is a condition of release, the office refers a client to a provider and arranges for the provider to pick up the client upon release. PSS is also available to work with counsel to interview clients whose mental illnesses make communication difficult and to help identify those for whom competency evaluations will be appropriate.

In interviews with the members of the PSS, the most common client service needs identified were housing, treatment, medication, and clinical impressions.

1. **Housing:** When the MHD started, PSS members went to community meetings to see the options available, visited different housing options and explained their population to the housing providers. After interviewing the client to determine family, resources, and preferred outcome, the goal is to find a home in 10 days or sooner. If the client has one of the "top three" diagnoses (schizophrenia, bipolar, major depressive disorder) housing is easier, because they qualify for SSI.

While putting together the housing plan, staff does a Forensic Assertive Community Treatment referral so the client can receive continued care and a prescription while they wait for a follow-up appointment. There is no formal follow-up, but there are so few resources, the PSS talk to housing providers constantly. The office has one person dedicated to finding supportive housing, personal care at home, inpatient care, etc.

2. Treatment: As with housing, the first step is to address whether the client has family or insurance to determine in- or out-patient treatment options. MHMRA receives mental illness referrals.

3. Medication: Identify if the client is on medication, getting the right medication, getting the right dosage; PSS can talk to the jail nurse to see if the client is actually taking medicine.

4. Clinical Impressions: Assess the client to determine if they need further assessment or diagnosis. PSS can also get all records from Texas public hospitals and provide them to the attorney. Private or out-of-state records must be subpoenaed.

The PSS further supports the attorneys in the MHD in trial, sometimes serving as fact witnesses, describing the client's needs and the plan of action for which they are hoping, usually as a condition of probation. This is helpful, especially for the felony clients. The PSS also goes to court to educate families on the client's diagnosis, to query the family about the client's medical history, or to fill in gaps. Upon discharge of the client, the action plan includes a "special release" document, which has the name, date and facility of the housing plan, and is forwarded from the court to the jail. The specific person named must be present to sign the client out.

The Justice Center interviews identified the following "intangibles" of additional value that PSS provides in these cases:

- The attorney can concentrate on the facts of the alleged offense while PSS concentrates on the mental health needs of the client.
- PSS can assist clients who have families, linking them to resources such as nonresidential care for the mentally ill.
- PSS provides a cushion between the family, client, and attorney. Clients are often hostile to attorneys, and the PSS can change that dynamic.
- Housing and medication resources that PSS identifies are not paid for by the county, but rather with federal SSI disability money.

Interviews with attorneys in the MHD were also conducted. The attorneys reported that the HCPD leadership direction is to provide a holistic delivery of defense and psychosocial services. This direction is evident from the HCPD webpage which includes information on holistic defense:

*Holistic defense is a **client-centered** and interdisciplinary model of public defense that addresses the circumstances driving poor people into the criminal justice system and the consequences of that involvement by offering comprehensive legal representation, social work support, and advocacy for the client.*¹⁰²

The attorneys reported that most of the time their clients spend in jail is time due to waiting for competency restoration, which counts toward time served; in fact, “they will not go to trial, because they get so much credit [for the time spent awaiting competency restoration].” The MHD conveyed that they save time by checking the system for when the person is restored and then getting them into court at the first opportunity, whereas assigned counsel would simply wait until the next court date. These comments prompted the Justice Center to examine the differences between cases with competency examinations, and those without.

Table 17 differentiates cases with at least one event coded “competency hearing” from those with none. Cases coded “competency hearing,” that then resulted in a sentence to county jail, had an average sentence of 93 days but also an average of 61 days credit, for a balance of 33 days owed on average. The cases without a competency hearing as a recorded event had much shorter average county jail sentences of 35 days; with only a fifth as much credit however, so time owed for those cases with competency hearings averaged 22 days, or 66 percent of the average sentence. An additional result shown in this differentiation is the dismissal rate: 55 percent of the cases with a competency hearing event code received a dismissal, versus 23 percent of those without a competency hearing.

Table 17: Differences in Cases With and Without Competency Exams, January 2011 to June 2011

	Case Has Event Code “Competency Hearing”	Case Does Not Have Event Code “Competency Hearing”
Total Cases	120	331
Total Probation Sentences	1	2
Average Probation Sentence	365 Days	273 Days
Total Jail Sentences	49	221
Average Sentence	93 Days	35 Days
Average Potential Credits	61 Days	13 Days
Balance of Sentence	33 Days	22 Days
Total Dismissed	66	77
Proportion Dismissed	55%	23%

¹⁰² See <http://harriscountypublicdefender.org/holistic-defense/>.

Additional intangible benefits of the MHD, as reported by the attorneys in the division, include:

- *Private attorneys ask us questions about how to get a diagnosis.*
- *Appointed attorneys want to pass a case over; after a person gets a second charge, the office will take that case, and appointed counsel seems relieved.*
- *When we walk into court, everyone seems happy to see us; nobody is fighting to take the mental health cases [this observation was repeated by several misdemeanor judges].*
- *We find families of the mentally ill whose families thought they were dead, and find “missing persons” who are actually mentally ill.*
- *Most attorneys not working MH cases would be less likely to notice when a person is in the state hospital longer than appropriate, which the state does not monitor.*
- *Normally a person has to receive probation to get treatment.*

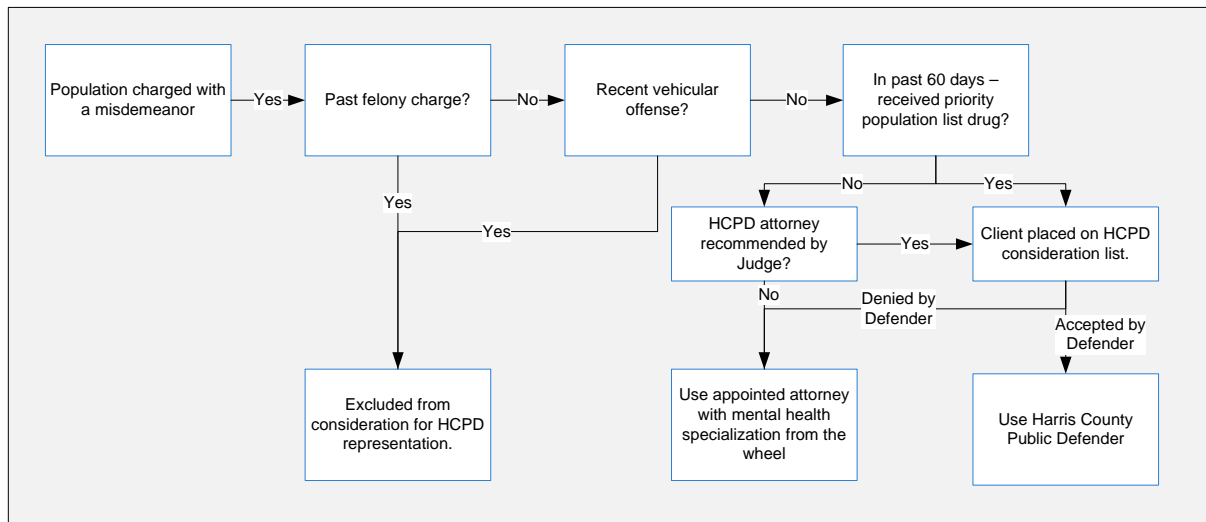
Finally, the Justice Center team interviewed some judges who refer cases to the MHD, and received nothing but enthusiastic reports, using words like “thrilled,” and “extremely professional.”¹⁰³ These interviews were followed by a survey delivered to the fifteen misdemeanor judges, which received only four responses as of publication of this report. Again, the reviews were consistently favorable, and highlighted the assistance that MHD attorneys provide to other counsel.

B. Caseflow and Clearance Rate

Figure 13 below depicts the decision process for referral of cases to MHD, often referred to as the “algorithm.” Indigent defendants receive an attorney from the MHD at their first appearance if they meet the following criteria: (a) a record of receiving a prescription within the last 90 days for a psychotropic medication; (b) indigence; (c) no retained counsel; (d) charges that do not include vehicular offenses; and (e) no record of prior felony convictions. If these criteria are met, HCPD assigns defendants to MHD counsel.

¹⁰³ Interviews with Judge Jean Hughes, County Criminal Court at Law No. 15, and Judge Sherman Ross, County Criminal Court at Law No. 10 (and Local Administrative Judge for the Statutory County-Level Courts), July 20, 2012.

Figure 13: Target Population and Referral Process for Cases to the Mental Health Public Defender Division



MHD Special Counsel Floyd Jennings provided an overview of the case process with regard to mentally ill clients and questions of competence, once the case is received in the HCPD:

- *Because we have 24/7 psychiatric services and a 250 bed psychiatric hospital within the jail itself, if a defendant presents any issue of capacity, upon appointment and attempts to communicate with the defendant, counsel will ask for a 21 day reset.*
- *PSS staff will contact the defendant, obtain all medical information and monitor his/her condition to ensure that the person has been seen by a psychiatric physician and is medication compliant.*
- *If, after this reasonable period of stabilization, the defendant appears yet incompetent, then a Motion for a Competency Examination will be filed. Given the current standard,¹⁰⁴ these will be ordered without question.*
- *If the defendant is adjudicated incompetent and has been medication non-compliant then the jail staff will, independently, seek a medication order prior to the person's transfer for restoration. Our counsel, by court decision as described, are uninvolved in that process.*
- *Upon treatment for restoration, if the defendant is unrestored, the state virtually universally is dismissing and seeking a 46B.151 transfer to the Probate Court for civil commitment.¹⁰⁵*

Figure 14 shows the misdemeanor mental health cases and their resolutions for cases processed between January 2011 and June 2011. Clients tend to have more than one case, and cases tend to involve almost three settings to be disposed. Almost a third of cases are

¹⁰⁴ The standard for raising the issue of competency in 46B was lowered, effective 9/1/2011.

¹⁰⁵ Memorandum from Floyd Jennings to Carl Reynolds, July 27, 2012.

dismissed, the best possible outcome for the client, tempered by the fact that over a quarter of dismissals (40/148) are because another charge reached a conviction.

Figure 14: Misdemeanor Mental Health Case Resolutions, January 2011 to June 2011

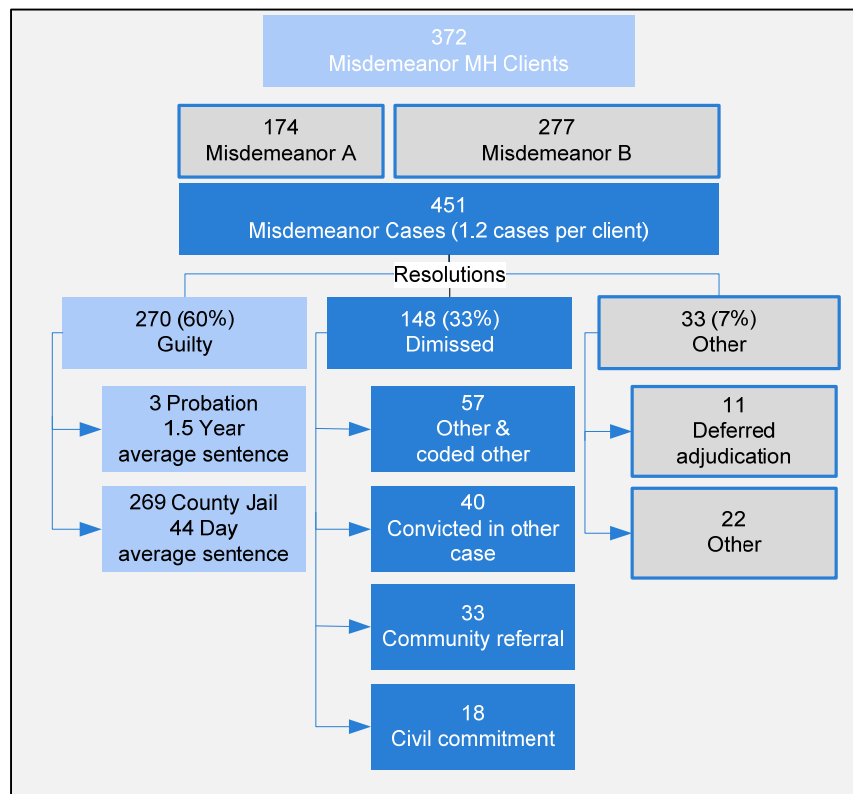
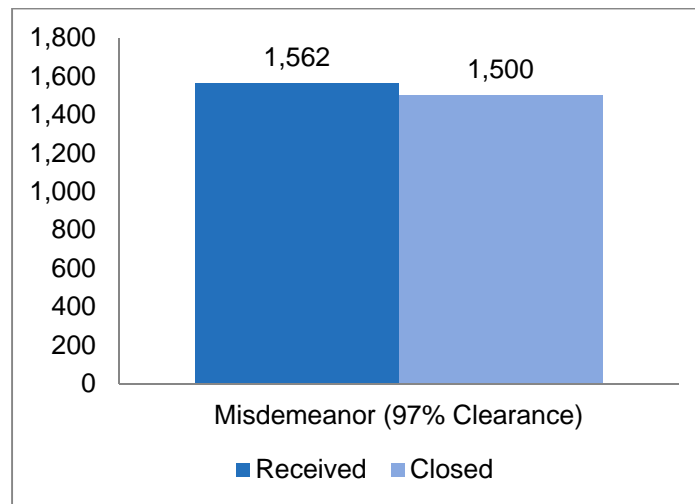


Figure 15 shows the clearance rate for misdemeanor cases processed from April 2011 through June 2012. Clearance rate is a basic measure that courts and defenders use to determine whether they are keeping pace with the incoming cases: which is represented as the number of outgoing cases as a percentage of the number of incoming cases, so that 100 percent means keeping pace.¹⁰⁶ The clearance rate for the MHD was a 97 percent in the time period depicted.

¹⁰⁶ National Center for State Courts, CourtTools, Measure 2, available at: http://www.ncsconline.org/D_Research/CourTools/Images/courttools_measure2.pdf

Figure 15: Misdemeanor Clearance Rate, April 2011 to June 2012



C. Workload Analysis

Workload analysis adds a crucial dimension to a simple “caseload” measure such as “350 mental health misdemeanors,” by quantifying the weight, or the amount of time needed for each case, that should be accounted for to control and manage the overall workload of the staff. Basic performance measures that can be gathered using workload analysis are Case-Weight by Attorney, and Attorney (and other staff) Time by Case-type. The National Center for State Courts (NCSC) recently completed a workload analysis for the Virginia Indigent Defense Commission, and described the study as follows:

A basic premise of this study is that all criminal cases are not equal—in other words, more complex case types require more time to defend. Workload assessment is a resource measurement methodology that weights case filings to capture the varying complexity and corresponding workload associated with various types of cases. The end result is a set of workload standards that provide a uniform and comparable measure of the attorney and support staff time required to handle cases effectively in each public defender office.¹⁰⁷

The NCSC study relied on a time study conducted specifically for that purpose. The HCPD uses an off-the-shelf case management system (Defender Data) to capture case-related activity across staff in the office. This preliminary report provides the first opportunity to examine the workload of HCPD by looking specifically at the MHD case activity, and illustrates ways that HCPD management can begin to view and utilize the information they are collecting.

¹⁰⁷ “Virginia Indigent Defense Commission Attorney and Support Staff Workload Assessment,” National Center for State Courts, 2010; available at: <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/accessfair&CISOPTR=189>.

Table 18 shows time data by event for misdemeanor mental health cases between January 2011 and July 2012. MHD handled 1,505 cases in that time period with an average effort or case weight of 5.4 hours (5 hours, 24 minutes) per case. Table 18 further illustrates the number of cases in which an event, such as “Court,” occurred at least once, and the average duration for the event if it occurred on a case. For example, if a case had client contact, the case had an average of 1.7 hours (102 minutes) of client contact. Table 18 also suggests the need for management definitions for purposes of data entry. For example, did only 662 of the 1,505 cases involve client contact? This seems unlikely, and in fact, client contact is often concurrent with court appearances, which occurred in 98 percent of cases. It appears the office uses *court* as the dominant code, but this makes parsing judicial interaction and client interaction impossible. No standards or models, national or otherwise, currently exist for data capture or collection by public defenders, nor did Defender Data (the off-the-shelf case management system used by HCPD) come with data entry rules. HCPD should create an internal data dictionary to standardize these codes, which can be referenced office-wide and by outside researchers, as well as replicated in other public defender offices.

Table 18: Time Data by Event for Misdemeanor Mental Health Cases, January 2011 to July 2012

Event	Total Occurrences	Mean Duration Per Case in Minutes if Event Occurs	Proportion of Time	Duration in Average Case
Administration	44	36 Minutes	.6%	2 Minutes
Assistance	1	30 Minutes	0%	0 Minutes
Client Contact	662	1 Hour 42 Minutes	11%	36 Minutes
Correspondence	508	1 hour 12 Minutes	6%	18 Minutes
Court	1,473	2 Hours 30 Minutes	64%	3 Hours 30 Minutes
Investigation	124	1 Hour 36 Minutes	1%	3 Minutes
Meeting	409	1 Hour 54 Minutes	5%	16 Minutes
Psychosocial Services	71	18 Minutes	1%	3 Minutes
Research	17	1 Hour 12 Minutes	.2%	1 Minute
Review	520	2 Hours 12 Minutes	8%	25 Minutes
Social Work	241	1 Hour 42 Minutes	3%	10 Minutes
Writing	1,433	48 Minutes	1%	2 Minutes
Total Cases	1,505		100%	5.4 Hours (5 Hours 24 Minutes)

Table 19 below shows the amount of time each offense type required: 5.4 hours overall (as noted) for a case in the MHD, and 13.4 hours for a violent (weapon) offense, the highest weighted case type; in this case it is possible that the low number of cases (13) drives the average up. This type of information will be useful for management in the event of a shifting mix of case types, for example, more DUI cases coming in would be a more time-intensive proposition than more drug cases.

Table 19: Time Data for Misdemeanor Mental Health Cases by Case Type, January 2011 to July 2012

Event	Total Cases	Average Duration in Hours
Against Person	155	7 Hours 18 Minutes
Against Property	710	5 Hours 6 Minutes
Against Public Administration	174	5 Hours 48 Minutes
Alcohol	21	3 Hours 18 Minutes
Drug	171	3 Hours 48 Minutes
DUI	21	8 Hours 42 Minutes
Family Assault	102	7 Hours 36 Minutes
Other	64	3 Hours 36 Minutes
Public Order & Indecency	74	4 Hours 6 Minutes
Weapon	13	13 Hours 24 Minutes
Total Cases	1,505	5 Hours 24 Minutes

One of the hallmarks of a public defender office that distinguishes it from an assigned counsel system is the existence and availability of investigative resources. (Recall that 0.1 percent of indigent defense expenditures in the misdemeanor assigned counsel system is spent on investigation.) HCPD management may want to track how those investigator resources are deployed, such as by case type or by activity, and analyze the results, such as those reported in Table 20.

Table 20 below shows the distribution of outcomes for all cases receiving investigator time. Cases that use an investigator are much less likely to result in conviction, and more likely to be dismissed.

Table 20: Distribution of Outcomes for All Cases Receiving Investigator Time, January 2011 to July 2012

Disposition	Number	Percentage	Average for All Cases
Guilty	54	44%	63%
Dismissed	60	48%	31%
Deferred	5	4%	2%
Other	5	4%	4%
Total	124	124	1,505

Figure 16 below shows the allocation across activities of the average time of 5.4 hours across all MHD cases. As one might expect, in-court time predominates. Using this overall average allocation as a benchmark, HCPD management will be able to look at time across activities, across different case types. If a case type tends to use more of one sort of activity than another, it could provide an opportunity to deploy staff more advantageously.

Figure 16: Event Proportions on a Misdemeanor Mental Health Case, Total Cases January 2011 to July 2012

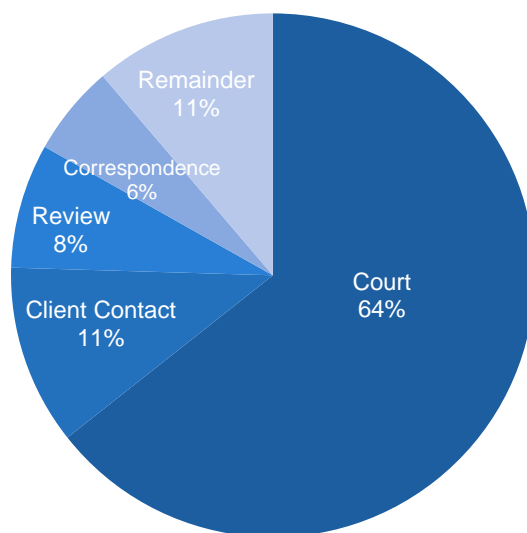


Figure 17 below shows the same analysis for dismissed cases. Dismissed cases take longer to dispose – 8 hours and 48 minutes - and have proportionately less time in court. However, 51 percent of almost nine hours is almost 4.5 hours, and 64 percent of 5.4 hours is about 3.5 hours, so the absolute amount of time in court is appreciably greater for dismissed cases.

**Figure 17: Event Proportions on a Misdemeanor Mental Health Case, Dismissed Cases
January 2011 to July 2012**

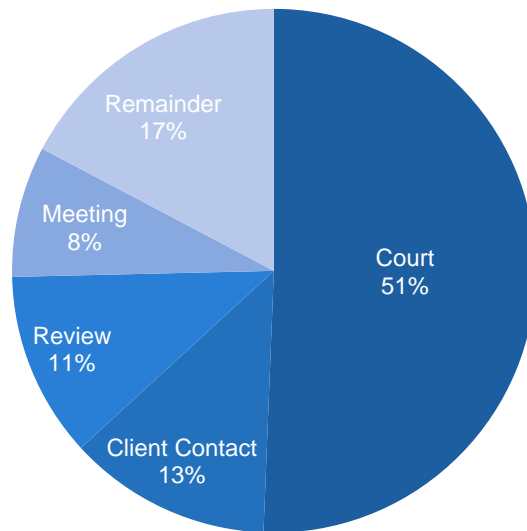
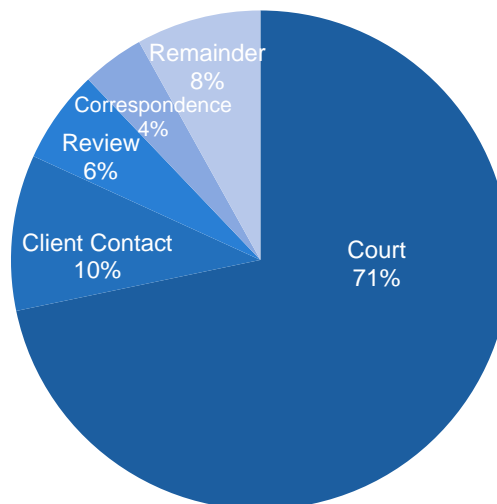



Figure 18 below shows the proportions of time spent on activities in a case with a guilty plea. There is a much higher percentage of time spent in court, but a similar amount of time spent on client contact.

**Figure 18: Event Proportions on a Misdemeanor Mental Health Case, Pled Guilty Cases
January 2011 to July 2012**



The Justice Center proposes to work further with HCPD management to improve their capability to extract workload meaning from the time records they are keeping in Defender Data. Because the office is so new and is operating within the intended constraints on caseload, the information developed at this point should be useful as benchmarks for HCPD



management, as time goes on. The process of developing this reporting and feedback capability will provide an opportunity for greater efficiency and cost-effectiveness, as well as better outcomes.

D. Outcomes

Workload analysis merges into outcome analysis with the ability to think first about the possible case outcomes such as guilty pleas, dismissals, etc., and then see how much time is spent achieving each of them. Comparing Figures 19 and 20 above provides the first glimpse of that capability, showing the difference in time allocation between cases that end in dismissal, and cases that end in a guilty plea.

Figure 19 below shows the number of hours necessary for MHD to dispose cases with outcomes of guilty plea, deferred adjudication, dismissal, and other. It demonstrates that cases that end in dismissal take over twice as much time (8.8 hours versus 3.7 hours), as resolving a case with a guilty plea. The difference in time spent on misdemeanor cases that are dismissed, versus those that have other outcomes, illustrates both the utility of workload measurement as a management and evaluation tool, and the importance of “small acts of due diligence.” It takes effort to achieve a dismissal instead of a guilty plea, and good attorneys recognize the cases that have the potential for that effort to bear fruit.

Figure 19: Number of Hours Necessary for HCPD to Dispose a Misdemeanor Case by Disposition Type, January 2011 to July 2012

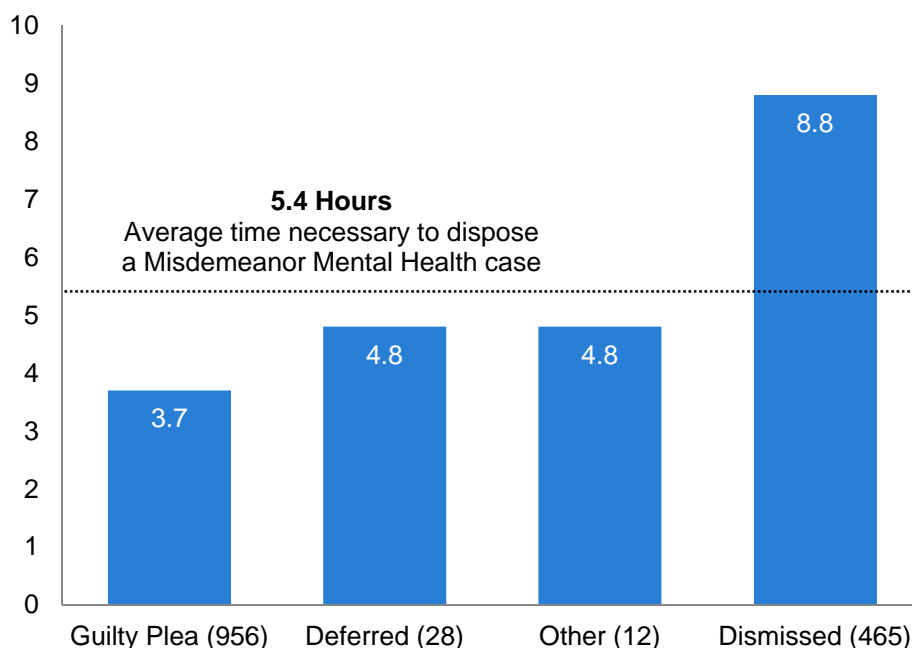


Table 21 below shows time distribution by dismissal reason. Not all case dismissals represent equally positive outcomes for the client or the office. The amount of time involved in achieving a dismissal due to conviction of another charge is less (6.4 hours) than the more positive dismissal due to community referral (10.4 hours). The data suggests that the office is achieving better outcomes in the cases that it spends more time on, and by inference, focusing resources on cases with potential for better outcomes. In addition, with the largest dismissal category as “Coded Other,” Table 18 suggests an area where more granular data gathering might be fruitful.

Table 21: Time Distribution by Dismissal Reason

Dismissal	Number	Percentage	Average Time Necessary In Hours
Coded Other	163	35%	8.7
Community Referral	134	29%	10.4
Convicted in Other Case	76	16%	6.4
Civil Commitment	58	12%	8.3
Remaining	34	7%	9.2
Total	465		8.8

Outcome analysis is crucial to understanding the value of providing quality indigent defense services. Outcome differentials were the headline in the significant study by Thomas Cohen at the Bureau of Justice Statistics, cited previously:

*In general, defendants represented by assigned counsel received the least favorable outcomes in that they were convicted and sentenced to state prison at higher rates compared to defendants with public defenders. These defendants also received longer sentences than those who had public defender representation.*¹⁰⁸

The extensive PPRI study of the Wichita County, Texas public defender, discussed in Part II.D., had a similar finding: other factors being equal, public defender clients were 23 percent more likely to have all charges dismissed and 10 percent less likely to be found guilty than defendants represented by private assigned attorneys.

Both of those studies were conducted with large datasets (and over much more time), allowing the use of multivariate analysis to reach the conclusions noted above. Future reports in this evaluation sequence will be able to document a number of outcome measures for HCPD, but the office has not been in existence for long enough to have much meaningful data about desirable measures such as recidivism reduction. In addition, the Justice Center does not currently have the kind of detailed data for cases in the assigned counsel system to provide comparative outcomes for HCPD versus assigned counsel.

At this juncture, the data and time available allowed the Justice Center only to look at comparative outcomes (bivariate analysis) for three groups of defendants from the Harris county misdemeanor courts: a pilot study of cases filed between October 7, 2010 and January 24, 2011 of 28 mentally ill misdemeanor defendants who were represented by specially qualified mental health counsel; a control group of 124 mental health misdemeanor defendants from the same time period, represented by assigned counsel; and the MHD's clientele, 372 defendants, from February 1, 2011 through June 30, 2011. All the defendants met the "algorithm," the decision protocol that identifies them as mentally ill offenders meeting specific criteria for referral to the public defender for specialized defense. See Figure 13.

Table 22 below shows the demographic and offense characteristics of the three study groups. The three groups have similar demographic and offense profiles, except that the

¹⁰⁸ Cohen, Thomas H., "Who's Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes," (2011). Available at SSRN: <http://ssrn.com/abstract=1876474> or <http://dx.doi.org/10.2139/ssrn.1876474>

HCPD clients have a higher offense tendency, with fewer property and drug offenses and a higher proportion of Class A misdemeanors.

Table 22: Demographics of Pilot, Match, and Public Defender Study Groups

Topic	Pilot Study Misdemeanor MH Attorney	Match Group Appointed Attorney	Public Defender Jan 2011 to June 2011
Sample	28 Offenders	119 Offenders	372 Offenders
Demographics			
Male	73%	68%	69%
Female	27%	32%	31%
Black	31%	49%	53%
Hispanic	8%	6%	Not collected
White	58%	45%	45%
Crime			
Misdemeanor A	31%	29%	40%
Misdemeanor B	69%	70%	60%
Property	58%	50%	42%
Against Public Admin.	11%	9%	13%
Drug	19%	19%	13%
Other/Remaining	12%	28%	32%

Table 23 shows the case outcomes for the three groups studied. HCPD clients received convictions in 60 percent of their cases, versus 86 and 87 percent by the pilot and wheel attorney clients. There are additional clients with convictions on one of their cases, but a dismissal on one or more of their other cases. Taking those into account, HCPD clients still had fewer convictions at 70 percent versus the 93 and 92 percent conviction rates for the pilot and match group. Clients received full dismissals (all cases dismissed) 27 percent of the time when represented by the HCPD. The high rate of dismissals for HCPD suggests quality defense work, even with 11 percent of them resulting from conviction of another charge; clearing another charge with a conviction occurred 7 percent of the time for the pilot study and 5 percent of the time for the match group. However, the remaining public defender clients were more likely to receive a slightly longer jail sentence (43 days) than those in the pilot study represented by specialized mental health assigned counsel (38 days) and those in the match group represented by assigned counsel (28 days). This may be a reflection of more severe cases assigned to HCPD and of the culling effect of the higher dismissal rate.

Table 23: Case Outcomes

Topic	Pilot Study Misdemeanor MH Attorney	Match Group Appointed Attorney	Public Defender Jan 2011 to June 2011
Pre-Trial			
Set Bond Amount	\$2,750	\$2,509	---
Persons Bonding	4%	4%	17%
Pre-Trial Jail Days	11	7	31
Pre-Trial Jail Days (No Bond)	12	7	35
Pre-Trial Jail Days (Bonded)	1	11	15
Court Actions			
Cases Per Person	1.1	1.1	1.2
Convictions	86%	87%	60%
Misdemeanor A Convictions	29%	30%	38%
Total Convictions	93%	92%	70%
Deferred	0%	2%	2%
Dismissed	14%	10%	38%
All Charges Dismissed	7%	5%	27%
Jail Time for Convicted	100%	100%	97%
Sentence in Days	38 Days	28 Days	43 Days

The cases in the three study groups were also compared in terms of recidivism, defined here as an arrest within 365 days of case resolution. Case resolution occurs in two ways: the case is dismissed; or the case is disposed with a sentence attached. In the latter situation, if the sentence involved jail time, the offender is tracked for 365 days following sentence completion date. The lag is included, because the client does not have the opportunity to recidivate while incarcerated. Every client receives the same 365 day window of exposure upon case completion to ensure a comparison of like measures. Using arrests reported to the Department of Public Safety, the model records the clients' first re-arrest following case resolution and then removes the offender from the tracking group.

This analysis must be prefaced with the fact that a number of factors wholly independent from attorney representation drive recidivism, and attorney representation is not traditionally thought to have any effect on recidivism. In Harris County, every offender has access to equivalent resources following case resolution, regardless of defense provider. Harris County cannot provide low-cost long-term treatment, housing options, or re-entry

services for misdemeanants on the back end of a case. HCPD does provide community outreach to influence and encourage the provision of these services to diminish countywide recidivism rates, but that process is a long-term proposition. Recidivism analysis in the longer term should have more salient results than the preliminary analysis the Justice Center was able to accomplish at this time.

Table 24 below shows recidivism in the form of the percentage of persons arrested within one year of case disposition for each study group.¹⁰⁹ About half of all clients were re-arrested within one year, regardless of the type of defense received. Slightly less than half of the public defender clients (49 percent) were re-arrested within one year, compared to 50 percent for the matched group referred to assigned counsel, and 54 percent of the pilot study group, who were referred to the specialized mental health assigned attorney. The first re-arrest occurred, generally speaking, about four months after the case was disposed, with the public defender clients first re-arrest occurring 105 days after disposition compared to 113 days for pilot study clients and 120 days for match group clients.

Table 24: Recidivism Rates for Clients in Pilot Study, Match Group and Public Defender Mental Health Misdemeanor Cases

	Pilot Study Misdemeanor MH Attorney	Match Group Assigned Attorney	Public Defender Jan 2011 to June 2011
Percentage of Clients Re-arrested One Year After Disposition	54%	50%	49%
Days to Re-arrest	113	120	105

Table 25 below shows the proportion of the three most common offenses for which the recidivists were arrested. A combination of larceny, trespassing, and drugs were the most common offenses for re-arrest. The pilot study had so few clients (28), every category other than larceny and trespassing had only one observation. The clients represented by the HCPD were generally re-arrested for lower level offenses such as larceny, drug possession, obstructing the police, and trespassing, but there were two arrests for homicide and two for robbery.

¹⁰⁹ The arrest history for the pilot study was generated for all 28 clients. The match group had history for 115, with 7 excluded due to lack of state identifying number. The 353 clients with full cases had 31 exclusions due to lack of 365 day exposure period and 3 due to missing identification numbers.

Table 25: Top Recidivism Crimes for Clients in Pilot Study, Match Group and Public Defender Mental Health Misdemeanor Cases

	Pilot Study Misdemeanor MH Attorney		Match Group Assigned Attorney		Public Defender Jan 2011 to June 2011	
	<i>Offense</i>	<i>Percent</i>	<i>Offense</i>	<i>Percent</i>	<i>Offense</i>	<i>Percent</i>
Most Frequent	Larceny	27%	Drug	16%	Trespassing	18%
Second Most Frequent	Trespassing	27%	Larceny	14%	Drugs Alcohol	9.4% 9.4%
Third Most Frequent			Trespassing	11%	Larceny	9%
Balance		47%		59%		54%

In summary, HCPD mental health clients are more likely to receive a dismissal of the case or be acquitted than those defended by assigned counsel or the specialized mental health assigned attorney. However, the remaining public defender clients were more likely to receive a slightly longer jail sentence if convicted. Finally, for the groups studied, the one-year re-arrest rates are comparable, and high; this population is likely to re-appear in the criminal justice system.¹¹⁰

¹¹⁰ "Arrest and Linkage to Mental Health Services among Clients of the Clark County Mental Health Court Program," Psychiatric Services Online, v. 56 no. 7 (2005), p. 855, available at <http://journals.psychiatryonline.org/data/Journals/PSS/3647/853.pdf>, showing a one year re-arrest rate 46 percent; "Criminal Recidivism in Mentally Ill Offenders," Bulletin of the American Academy of Psychiatric Law, v. 24 no. 2 (1996), p. 183, available at: <http://www.jaapl.org/content/24/2/177.full.pdf>, showing a one year re-arrest rate of 68 percent; and "Evaluating the Efficiency and Community Safety Goals of the Broward County Mental Health Court," Behavioral Science Law 23: 227–243 (2005), p. 233, available at: http://www.floridatac.org/files/document/MHC_Christy_2006.pdf, showing 47percent re-arrest rate at one year for study group and 56percent re-arrest rate for comparison cohort.

VIII. Assessment of Appellate Division

A. Caseload and Caseflow

The Appellate Division includes a Chief and 10 Assistant Public Defenders, with the chief carrying a full caseload (25 cases), unlike other divisions of HCPD. Attorneys have received cases from 12 of 15 County Courts: County Courts 3, 8, and 11 have assigned none. The absent three courts present a question of judicial cooperation, but not a caseload concern because the office has received 16 misdemeanor appeals since its inception. The Appellate Division has worked on cases from all but one criminal district court (the 183rd); however, some courts have given proportionately fewer than others, some are carry-over cases from the HCPD attorneys' private practices, and still other courts are represented in the case management system because HCPD assisted the assigned private attorney working on the case.¹¹¹ The Appellate Division has not represented any juvenile clients, but in FY 2011, Harris County had only three juvenile appeals, so it is possible none have been filed.

Overall, during its first year of operations, the Appellate Division represented 10 percent of all indigent Harris County appeals. The division can carry a maximum of 275 cases per year (25 cases each, for 11 attorneys). Harris County paid for 256 indigent appeals in FY 2011. If case and indigence rates maintain at this level, the Division will be able to handle all of the county's indigent caseload, except for conflict cases (such as multiple defendants, each needing separate counsel, with no organizational link between the attorneys).

Figure 20 depicts the process for the Appellate Division to receive cases for representation. To make a referral, the trial court contacts the Appellate Division at the end of a trial and the Chief Appellate Defender assigns the case to one of the Assistant Public Defenders. The notice of appeal is actually filed prior to referral to the Appellate Division; it must be filed within 30 days after the day sentence is imposed or suspended, or after the day the trial court enters an appealable order, or within 90 days after the day sentence is imposed or suspended if the defendant timely files a motion for new trial.¹¹² The attorney files a request for court records, including the court reporter's transcript and the court record. The

¹¹¹ Appellate Division Director Bob Wicoff reported via email on August 26, 2012 there are a handful of courts with long standing relationships to contract counsel. The 183rd is one of those courts – the lack of use of the HCPD has more to do with loyalty built over years of work. The 209th is another court not using the HCPD, but shown in Defender Data, because an HCPD appellate attorney assisted the assigned attorney with case research.

¹¹² Texas Rules of Appellate Procedure, R. 26.2.

appellate record must be provided within 60 or 120 days, depending on the circumstances.¹¹³ After the attorney receives the transcript and record, there is a 30-day period to write and file a brief. The Court of Appeals considers the record and briefs, and sometimes grants oral argument, to make a decision. The possible outcomes are to reverse and remand, sending the case back to the trial court; reverse and enter a judgment of acquittal; or to affirm the judgment below. The case may also be abated for some time, prior to ultimate resolution. Cases from Harris County are appealed to either the 1st Court of Appeals, or the 14th Court of Appeals, by random selection; the two appellate courts have identical geographic boundaries, which include Harris County.

Figure 20: Process to Assign Appellate Cases to the Appellate Division

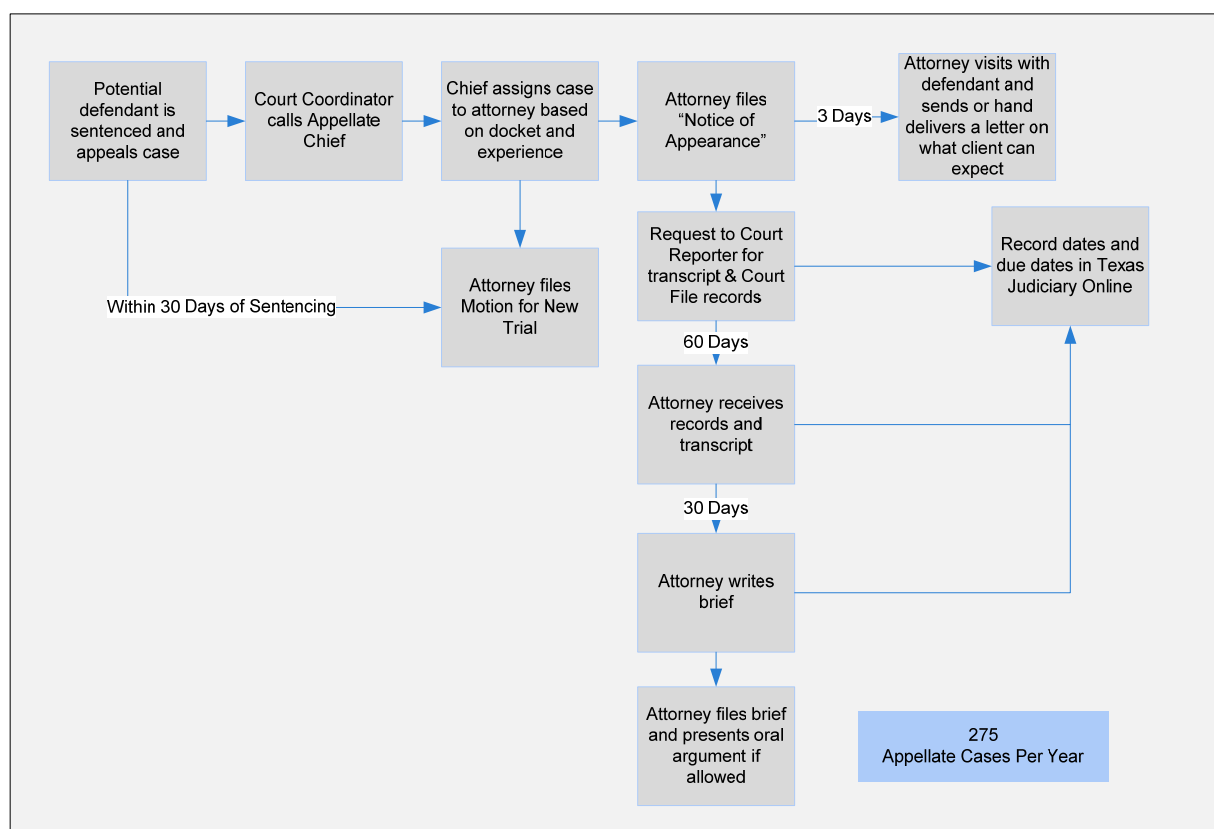


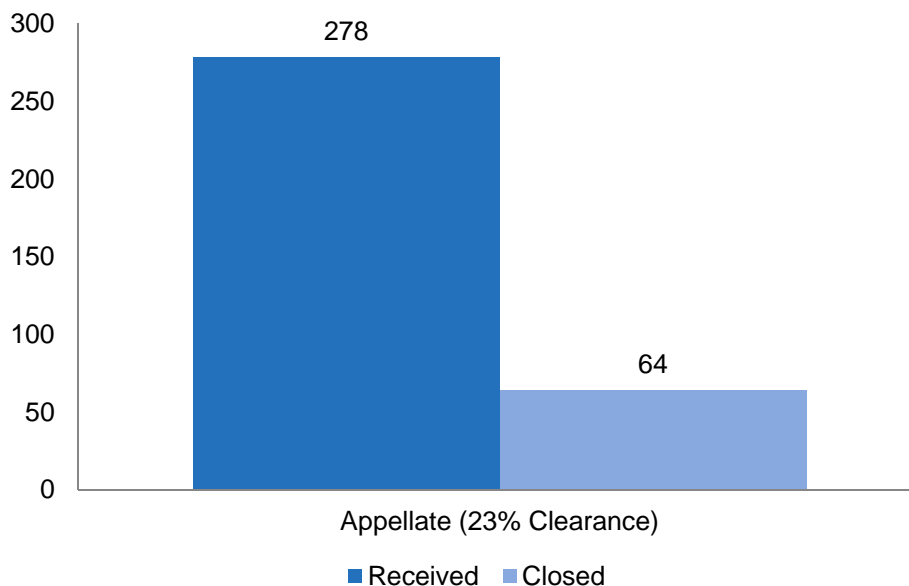
Figure 21 shows the appellate cases received and closed from April 2011 to June 2012. In 2011, the average time from filing to disposition for criminal cases in the 1st Court of Appeals was 11.1 months, and in the 14th Court of Appeals was 7.8 months.¹¹⁴ With longer times to case disposition comes a lower clearance rate of 23 percent for appellate cases, as

¹¹³ Texas Rules of Appellate Procedure, R. 35.2.

¹¹⁴ "Annual Report for the Texas Judiciary, FY 2011," Court of Appeals Activity Detail, Texas Judicial Council, available at: <http://www.courts.state.tx.us/pubs/AR2011/AR11.pdf>.

shown in Figure 21. (The Mental Health Division, handling misdemeanors that resolve in a short period of time, has a clearance rate of 97 percent; see Figure 15.)

Figure 21: Appellate Cases Received and Closed, April 2011 to June 2012



The clearance rate is volatile due to the low number of cases, so one is unlikely to tell much about the efficiency of the Appellate Division until case closures stabilize. Appellate cases in Texas took an average 8.4 months to dispose and 9.4 months in Harris County. Only cases assigned between April and October 2011 would have 9.4 months to be potentially disposed, and counted in the clearance rate.

B. Qualitative Assessment

Appellate lawyers analyze the trial record, conduct legal research, write briefs, and participate in oral arguments. Typically the defense must analyze the whole trial record, searching for error, while the prosecution can focus on areas raised by the defense. Measuring the quality of work of the appellate lawyer can have subjective, qualitative components. A poor quality defense brief, for example, would have features like the “transcript march” statement of facts instead of re-casting the story of the case; a failure to discuss the standard of review; or a failure to walk the reviewing court through a harm analysis to address the issue, “If there is error, is it reversible?”

The Justice Center team did not conduct this type of subjective examination. Instead, the assessment has been oriented toward examining operational and quantitative issues. The

Justice Center had hoped to interview the appellate judge who are “customers” of the Appellate Division’s work; however, some of the judges felt that it would be inappropriate to participate and comment on the work of attorneys who re-appear in their court, so that set of interviews was not conducted.


The Justice Center did interview opposing counsel in the District Attorney’s Office - Appellate Division (the director of the office and six other attorneys), and obtained some useful commentary on the work of the HCPD Appellate Division’s lawyers. Overall, the commentary was positive, but there were criticisms as well. Prosecutors reported that HCPD lawyers are good writers, with briefs more clearly written than those by contract counsel, which makes the opposing lawyer’s job (as well as the appellate court’s job) easier and more efficient. They reported that HCPD lawyers keep up with trends in the law, which is possible because of a centralization of resources, also making it easier to communicate and exchange information. One attorney stated that if HCPD Appellate Division needs funding help, he would testify on their behalf, suggesting that he really likes having the office around: “A defendant needs quality representation regardless of guilt, and the defendant and the system need people who *love* what they are doing.”

Some criticism emanated from the interviews with the District Attorney’s appellate staff. In particular, there was the perception that the office has “a problem with lateness” and a “blatant disregard for filing extensions.” This point was also noted in an interview with the Clerk of the 14th Court of Appeals, who indicated that he had called the HCPD on the issue of filing too many extensions.¹¹⁵ And, the quantitative analysis below, based on case management information from the two appellate courts, indicates that HCPD has filed extensions in two-thirds of their cases. However, the analysis also shows that the prosecution files more extensions per case; see Table 28.

The Justice Center noted three other qualitative and positive indications of the Appellate Division’s work. First, the division has sponsored 34 of the 54 CLE events that HCPD has sponsored since inception.¹¹⁶ This includes sessions that the Appellate Division conducts on appellate case hand-downs (new opinions), where each lawyer has one case to brief, and they talk with the trial lawyers about the applicability and practice consequences of the decision. These sessions may explain the prosecutor’s comment that his/her counterparts in HCPD keep up with trends in the law, which is possible because of a centralization of

¹¹⁵ Interview with Christopher Prine, Clerk, 14th Court of Appeals, May 15, 2012.

¹¹⁶ TIDC performance measures, with input from HCPD. This data field exemplified inconsistent reporting.



resources. This kind of activity by the Appellate Division is just what one would hope to see from the institutional presence of a public defender office, and is key to their ambition to raise the level of criminal practice in the county.

Second, the division already has two attorneys with Criminal Appellate Law Board certification, among its 11 appellate lawyers (and the Chief Defender makes three in the HCPD). Board certification is a significant accomplishment.¹¹⁷ Reportedly, the District Attorney's Appellate Division has 3 Board certified attorneys, of the 19 attorneys in the office.¹¹⁸ Third, the division has enjoyed some significant case wins, such as the five cases reported to the Board in March, 2012.

C. Quantitative Assessment

As a condition of the TIDC grant, HCPD supplies information in a progress report that includes a large number of measures, including 40 that are specific to the Appellate Division. The Justice Center proposed, and TIDC and HCPD are implementing, a replacement list of measures, improving the clarity of the report. Many of the measures are useful operational measures but are not central to examining the performance of the division. However, a few of the most useful measures are analyzed here to begin providing a quantitative assessment of the operations of the office.

Table 26 shows totals and averages for six selected Appellate Division measures from April 2011 to June 2012 as reported by HCPD to the TIDC. The total counts were averaged for their 15 months of operation when appropriate. For example, Measure 1.a. provides the number of days in custody while the felony appeal was pending, an average of 211 days (or 3,165/15).

¹¹⁷ See <http://www.tbls.org/WhyChooseBoardCertified.aspx>.

¹¹⁸ Interview with Bob Wicoff, HCPD Appellate Division Chief, August 3, 2012.

Table 26: Selected TIDC Appellate Division Measures, April 2011 to June 2012

Measure	Total	Monthly Average
1. Track and report average amount of time defendants disposed this month were in custody while appeal pending	3,000 days	200 days
a. Felony Appeal	3,165 days	211 days
2. Report the appellate court disposals	64	4
a. Favorable to the client each month	1	
b. Unfavorable to the client	11	.73
3. Motions for new trial		
a. Requested each month	25	2
b. Granted	3	
4. Report the number of <i>Anders</i> briefs filed each month	14	.93
5. Report the number of non- <i>Anders</i> briefs		
a. Filed each month	135	9
b. Filed timely each month	128	8.5
c. With request for oral argument each month	105	7
6. Report the number of filings each month		
a. Motions for extension	297	19.8

In this instance, it is also worth noting the monthly figures, shown below in Table 27. As time passes and the office exists longer, the time in custody seems to creep upward. Moving cases more quickly can lead to marginal jail cost savings for the county. But, the HCPD has limited control over a lengthy process that is partly in the hands of the appellate court, the court clerk, and court reporter. It is also not clear if the number of extensions filed by the office has an impact on increasing this number.

Table 27: Average Amount of Time Felony Appellants Were in Custody While Appeal Pending, by Month Disposed

	April 2011	May 2011	June 2011	July 2011	Aug. 2011	Sept. 2011	Oct. 2011	Nov. 2011	Dec. 2011	Jan. 2012	Feb. 2012	Mar. 2012	April 2012	May 2012	June 2012
Days in Custody (Average)	205	167	170	176	176	180	182	198	218	229	240	251	209	227	337

Measure 2 in Table 26 above reports the number of cases disposed over the life of the Appellate Division as 64; however, categories a. and b. should add up to that 64, and they add up to 12. (And, in the appellate courts' data systems, discussed below, the total HCPD cases disposed comes to 84.) There must be more rigorous attention to the logic of the reporting

system, as suggested earlier in this report. The TIDC and the HCPD are in the process of re-designing this measure system at the time of this report.

Measure 3, Table 26, reflects that a total of 25 motions for new trial have been filed by HCPD Appellate Division, and three have been granted, representing victories for the defense.

Measures 4 and 5 of Table 26 reflect the counts of “*Anders* briefs” and non-*Anders* briefs. An “*Anders* brief” refers to the 1967 United States Supreme Court case *Anders v. California*,¹¹⁹ which held that, even if appellate counsel believes that an appeal is frivolous, he or she must prepare a brief to assist the court in understanding the facts and the legal issues in the case. National standards for appellate public defenders include a whole part (nine standards) on procedures for *Anders* briefs, which begins as follows:

1. Each office shall have a procedure for determining how the office shall handle cases which fall under the criteria of *Anders v. California*, 386 U.S. 738 (1967), and how such decision should be communicated to the courts and the clients.
2. An office may determine that *Anders* briefs shall never be filed, but such decision should be made only after consideration of the ramifications of such decision, and consultation with representatives of the appellate court, and with representatives of the prosecution. Appellate defenders should consider that filing merit briefs in every case may undermine the credibility of the appellate defender with the appellate courts. On the other hand, appellate defenders should consider that the filing of *Anders* briefs may compromise the office's reputation within the client community.
3. The appellate defender shall adopt an extremely strict standard in determining what cases have "no arguable merit." Such cases should be genuinely frivolous, and not simply cases which the appellate defender believes will not prevail on appeal.¹²⁰

In the previously-noted 2009 Spangenberg review of the Bexar County Appellate Public Defender Office, concern over the number of *Anders* briefs was stressed: “In FY 2007, the APDO filed 26 *Anders* briefings. In FY2008, this number increased quite dramatically to 46 filings. . . . As a percentage of the total briefings filed, *Anders* briefings increased from 22 percent in FY2007 to 28 percent in FY2008.”¹²¹

¹¹⁹ 386 U.S. 738 (1967).

¹²⁰ “Standards and Evaluation Design for an Appellate Public Defender’s Office,” National Legal Aid and Defender Association, available at:

http://www.nlada.org/Defender/Defender_Standards/Standards_For_Appellate_Defender_Offices.

¹²¹ “An Evaluation of the Bexar and Hidalgo County Public Defender Offices: Final Report,” TSG 2009, p. 16; available at: <http://www.courts.state.tx.us/tidc/pdf/Bexar%20%20Hidalgo%20Final%20Report%2005-27-09.pdf>

In the case of HCPD, Measure 4 of Table 26 indicates that 14 *Anders* briefs have been filed in 15 months for an average of just under 1 per month, and Measure 5 indicates that 135 non-*Anders* briefs have been filed. As a percentage of all briefs filed [14 *Anders* briefs divided by 149 briefs (14 *Anders* + 135 non-*Anders*)], HCPD is at about 9.4 percent, favorable compared to the Bexar office, but not zero, which would also be a concern. HCPD does not have a written policy on *Anders* briefs, and should, but clearly takes the issue seriously, as demonstrated by the comments of Appellate Division Director Bob Wicoff:

[I]t is impossible for me to review every record to check the attorney's conclusion that there are no arguable points to raise, so to a great extent, I'm obliged to trust their judgment (as I am with regard to assuming they spotted all the issues in any case). That said, if someone intends to file an Anders brief from a jury trial, rather than from a guilty plea or motion to revoke probation, I go over it thoroughly with the lawyer just to make sure they're considering all angles.

Most lawyers avoid Anders briefs if they can, not simply because they don't want to throw in the towel, but because Anders briefs often take a lot more time than non-Anders briefs. But we certainly do file Anders briefs. In those situations, the court of appeals reviews the case. I would rather that happen than raise a palpably silly argument. . . . give the client that second review.

Some lawyers take the position that they will never file an Anders brief, no matter what. It is a badge of honor. One lawyer I knew had a thrown-down issue that complained that the laws of the State of Texas were inapplicable because Texas never properly became part of the U.S. If he couldn't find anything else, he raised that. I don't think that serves the client's best interests. I have been appointed to at least three cases in my career to replace an attorney who filed an Anders brief. He or she didn't spot an issue, but the Court of Appeals did. If that attorney had taken the "file anything but an Anders" approach, then the issue would never have come to light.

We think we see all the issues, but sometimes we don't. It's like there being a misspelling in something you write. If you don't realize there's a misspelling, then you're not going to be looking it up. However, a second pair of eyes might see it. Likewise, it's appropriate for a second pair of eyes to look at a brief if you can't find anything. It's a safeguard against your having just overlooked something. It may be bad for the ego if they find something that you overlooked, but it's best for the client.¹²²

Measure 6 in Table 26 reflects the number of motions for extension filed, reported as 297. The court case management information discussed below reports this number as 203, for roughly the same time period. This discrepancy is difficult to understand; one might predict that the HCPD count would under-report, but not over-report by almost a third.

¹²² Bob Wicoff e-mail exchange with Carl Reynolds, August 30, 2012.

In addition to the information reported to TIDC, the Justice Center was able to run data from the case management systems of the 1st and 14th Courts of Appeal, with the assistance of the Office of Court Administration. These systems allow cases to be identified by attorney handling the appeal, so HCPD cases could be separated out for the time period February 3, 2011 through August 7, 2012. The following discussion is based on that source, and court of appeals summary data that is routinely reported to the Office of Court Administration.

HCPD represented 238 clients in 303 appellate cases filed between February 2, 2011 and August 7, 2012 in the 1st and 14th Courts of Appeal. The majority of clients (85 clients or 88 percent) had one case. Of the 303 cases, 215 (71 percent) remain active, 84 have been disposed, and 4 have been and remain abated. (There are 20 cases in which a disposition of *abated* is recorded. In 16 of those, there is a new line for the case and it is recorded as being *reinstated*. The four cases without reinstatement likely will be reinstated, but there has not been enough time elapsed for that to occur in the data sets.)

Table 28 shows the distribution of dispositions for the 43 cases reviewed by the court out of the 84 disposed cases. In the 41 dismissed cases, the defendant “loses,” but the disposition is typically not a reflection on the appellate attorney’s efforts: the defendant no longer wants to appeal, notice of appeal was late, or the defendant had an agreed plea and waived his right to appeal. In fact, the first category, voluntary dismissals, can be a positive indication that the client has accepted the attorney’s advice to accept the conviction and sentence as the best possible outcome under the circumstances. The data show two reverse and remand outcomes; presumably, one of these reversals was counted as an “outcome favorable to the client” in the TIDC measures discussed above.

Table 28: Dispositions in Appellate Cases, February 2011 through July 2012

Disposition	N	Percentage
Dismissed	41	49% of 84 Total Cases
Affirmed	36	84%
Affirmed Modification	5	12%
Reversed	2	7%
Total Heard	43	

Table 29 below shows total and rate of dispositions, meaning all cases less those dismissed, for the 1st and 14th Courts of Appeal in 2011, from data routinely compiled by the Office of Court Administration. The HCPD had proportionally more dismissals, 49 percent of

the total cases from Table 27 above, than the average of 24 percent of the total. As noted above, in the context of appeals, unlike trial work, dismissal is not a favorable outcome, but it is also not a uniformly negative outcome. HCPD's higher dismissal rate is an indication of quality defense work. In addition, HCPD's higher reversal rate is a positive indication of their work quality. The HCPD had a 5 percent reversal rate (ratio of number of cases reversed to number of cases heard), while the average for the 1st and 14th Courts of Appeal was 3 percent.

Table 29: Disposition Rate for the 1st and 14th COA, 2011¹²³

Disposition	N	Percentage
Dismissed	315	252% of 1,237 Total Cases
Affirmed	672	73%
Affirmed Modification	41	4%
Reversed	27	3%
Otherwise Disposed	182	20%
Total Heard	922	

HCPD disposed cases, excluding those abated, took an average of 252 days to reach a decision with a minimum of 21 days and a maximum of 526. Dismissed appeals occurred most quickly with an average of 138 days, while the two reversals took by far the longest time, with an average of 447 days.

The Office of Court Administration report does not separate time to disposition by disposition type, but does indicate an average of 9.4 months for criminal cases across the 1st and 14th Courts of Appeals, between filing and disposition. Assuming each month has 30.4(365/12) days, it takes an average of 285 days to dispose all criminal cases. The HCPD, at 252 days, seems to be disposing cases more quickly. Open cases have been open for an average of 213 days, so it appears unlikely they will have a large negative impact on the average, once they are disposed.

Table 30 below shows the number of extensions filed in appellate cases by HCPD. Out of the 303 appellate cases filed between February 2, 2011 and August 7, 2012, 203 had at least one extension filed. This means 67 percent of the cases had at least one extension, though some cases had as many as ten. As noted above, some clients have multiple cases.

¹²³ Activity for the FY Ended August 31, 2011. Office of Court Administration. See Courts of Appeals Activity Detail at <http://www.courts.state.tx.us/pubs/AR2011/toc.htm>. In Table 25 cases affirmed include all cases with any portion affirmed, cases reversed include reversed and remanded and reversed and rendered, and other includes consolidations, voids, and those coded otherwise disposed.

Table 30: Number of Extensions Filed in Appellate Cases

Number of Filings per Case	Cases	Percentage
0	100	33%
1	60	20%
2	45	15%
3	32	11%
4	29	10%
5	23	8%
6	4	1%
7	3	1%
8	5	2%
9	1	0%
10	1	0%
Total	303	

Table 31 below shows the number of extensions filed prior to disposition. There have been 51 cases or 29 percent reaching disposition, within the 203 cases where extensions were filed. The two cases receiving a reversal on the decision had the most extensions filed with six. The dismissed cases had an average of 2.3 extensions. This may suggest that the number of extensions and obtaining a reversal are correlated; certainly it will not surprise HCPD to see this connection.

Table 31: Number of Extensions to Disposition

Disposition	Cases	Percentage	Number of Extensions
Dismissed	10	20%	2.3
Affirmed	34	67%	3.6
Affirmed Modification	5	10%	2.4
Reversed	2	4%	6
Total	51		

Table 32 below shows the distribution by number of extensions and average extensions by attorney type for the same period. The average number of extensions filed, in cases with extensions filed, by appointed and retained counsel are comparable with HCPD. When the prosecution filed extensions, almost double the extensions were filed. Although this suggests the prosecution files the most extensions, this theory does not hold when comparing the proportion of cases in which extensions were filed. Appointed and retained counsel filed

extensions in 45 and 47 percent of their respective cases. The prosecution filed at a slightly lower, though still comparable, proportion of 44 percent. HCPD filed in two thirds of cases, the outlier for the group, which averaged just under 45 percent.

Table 32: Number of Extensions Filed in All Cases by Attorney, February 2011 – August 2012

	Appointed	Retained	Prosecution ¹²⁴	HCPD
Maximum Extensions Filed in a Case	12	8	28	10
Total Cases with Extensions Filed	433	169	795	203
Total Cases with Deadlines	958	361	1,816	303
Percentage of Cases with Extensions	45%	47%	44%	67%
Average Extensions Filed per Case if Extension Filed	2.9	3.0	5.7	3.3

¹²⁴ Prosecution includes Attorney General, County Attorney, District Attorney, Special Prosecutor, and State prosecuting attorney. There are 4,533 cases and 99 percent have the District Attorney's office listed as the prosecutor.

IX. Conclusion: Recommendations and Next Steps

The Justice Center completed this preliminary evaluation in order to provide HCPD with both timely external validation of the start-up of the office, as well as constructive steps to further enhance their operations. The major recommendations identified in the Justice Center's report are as follows:

- The Chief Defender's job position should be defined by a specified term, subject to a recommendation for renewal by the Board the HCPD, and the Board composition itself could be revisited to provide for greater independence from the local judiciary.
- HCPD should enhance the use of their case management system by: defining case data fields to ensure the productive recording of workload and outcome information; gathering non-case-specific information that would benefit management; and exploring the further use of workload data, typified by the information provided in this report, to generate meaningful management reports. The Appellate Division should monitor the number of extensions requested and adopt a written policy on the filing of *Anders* briefs.
- Harris County should continue to support HCPD's controlled caseload, while also examining caseload and workload for the assigned and contract counsel systems, to ensure that they avoid excessive caseloads and adequately compensate all counsel for zealous representation.
- The Indigent Defense Commission should revisit the grant reporting requirements imposed on the HCPD, for greater clarity and utility. (This recommendation is already in the process of implementation by the TIDC and the HCPD.)

The process has been a learning experience on both sides, with the Justice Center benefiting from constant interaction with Chief Bunin and his senior staff, as well as a number of other studies and publications that have informed the dialogue, including:

- The National Legal Aid and Defender Association "standards" website.¹²⁵
- Spangenberg 2007 study of Bexar County with "how to evaluate a PD" appendix.¹²⁶
- "Representing the Mentally Ill Offender" (2010), Texas Indigent Defense Commission.¹²⁷
- "Securing Reasonable Caseloads: Ethics and Law in Public Defense," Lefstein (2011)¹²⁸

¹²⁵ http://www.nlada.org/Defender/Defender_Standards/Defender_Standards_Comp

¹²⁶ <http://www.courts.state.tx.us/tidc/pdf/FinalreportsecondBexarHidalgoPDeval.pdf>

¹²⁷ <http://www.courts.state.tx.us/tidc/pdf/MHStudyFinal.pdf>

- “Who’s Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes” Cohen, Thomas H., Bureau of Justice Statistics (2011).¹²⁹
- “Halting Assembly Line Justice: A Model of Client Centered Defense,” National Legal Aid and Defender Association, 2008.¹³⁰
- “Using Data to Sustain and Improve Public Defense Systems,” Marea Beeman, Justice Management Institute, 2012.¹³¹

The world of public defense seems alive with an ongoing discussion of performance standards, outcome measurement, and holistic defense, and the Justice Center was intrigued to gain the perspective of the Chief Defender on the current state of the art:

Performance measures of indigent defense have yet to be established in a generally accepted format. For over 20 years I have watched many try. Measures may be objective and quantifiable or subjective and anecdotal. The problem with the former is that they often merely measure items that are easily counted, whether or not they are useful to evaluating performance. The problem with the latter is that they are not easily comparable across systems. A mix of both is necessary.¹³²

With this preliminary report, the Justice Center tried to strike a balance between quantitative and qualitative approaches, and became much more conversant in the subtleties of the national discussion of measuring performance for the defense function. Our further work in this area will strive to highlight and synthesize the most recent and promising developments, for the advancement of the field.

The Justice Center proposes to work further with HCPD management to develop their ongoing capability to extract workload meaning from the time records they are keeping in Defender Data. Because the office is so new and is operating within the limitations on caseload, the information developed at this point should be useful as benchmarks for HCPD management, as time goes on. The process of developing this reporting and feedback capability will provide an opportunity for greater efficiency, as well as the potential for greater cost-effectiveness, in better outcomes.

There are areas where more granular data gathering might be fruitful, and areas that suggest the need for management definitions for purposes of data entry. No standards or

¹²⁸


http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.aucthcheckdam.pdf

¹²⁹ <http://ssrn.com/abstract=1876474>.

¹³⁰ http://www.nlada.net/sites/default/files/dc_haltingassemblylinejusticejseri08-2008_report.pdf

¹³¹ Marea Beeman, Justice Management Institute, 2012; not available online.

¹³² Email from Alex Bunin to Carl Reynolds, September 21, 2012.



models, national or otherwise, currently exist for data capture or collection in a public defender office, nor did Defender Data come with data entry rules. HCPD should create an internal data dictionary to standardize these codes, which can be referenced office-wide and by outside researchers, as well as replicated in other public defender offices.

In addition to more detailed case-level information, HCPD should use Defender Data or some other system to consistently record and count non-case activity that furthers the provision of holistic defense, the elevation of the defense community, and the elevation of the criminal justice community. There should be consistent recording of events like community outreach, CLE and other training, consultation with other counsel and officials around the state, and significant system-level meetings and accomplishments.

For subsequent publications in this evaluation, the Justice Center will focus more specifically on: (1) the Felony and Juvenile divisions, including workload, outcomes, and qualitative impressions gained from district judges and district court administration; (2) comparative cost per case and outcomes, (3) implementation of the recommendations in this report; and (4) final recommendations for HCPD and Harris County.