

**House Committee on Criminal Jurisprudence Interim Charge 3:** Review the overall state of indigent defense and delivery of services to indigent defendants in Texas under the Fair Defense Act and other applicable laws. Examine the procedures for the appointment of counsel, including public defender options for rural communities, the monitoring of workloads and performance of attorneys, and the funding of those services. Examine counsel options for indigent defendants during magistrate proceedings and the administration and funding of county indigent defense systems. (Joint charge with the House Committee on County Affairs)

### **The Impact of Non-Profit Corporation Public Defender Programs in Rural South Texas: The Texas RioGrande Legal Aid Experience**

**Executive Summary.** Since 2006 Texas RioGrande Legal Aid (TRLA) has provided criminal defense representation to indigent clients in felonies, misdemeanors, juvenile cases and appeals in fourteen rural South Texas counties. Other than capital cases where the death penalty is sought or where TRLA as a law firm has a conflict of interest, all persons accused of crimes who meet financial guidelines are accepted for representation by the firm's staff attorneys. From initial interviews and eligibility screening through final appeal, TRLA provides comprehensive services to its defender clients. The impact has been remarkable.

**Background and History.** The Fair Defense Act in 2001 ushered in a new era for indigent defense in Texas. Before the Act, and before the Texas Indigent Defense Commission, almost all Texas counties relied upon court-appointed private attorneys for indigent criminal defense. There was no state funding and no state management; all costs were paid by counties from their property tax revenues. Rural counties with an inadequate tax base paid court-appointed lawyers a small fraction of the market rates for legal fees, if they paid at all. In the vast majority of misdemeanor cases, no attorney was appointed, in flagrant disregard of constitutional requirements.

In rural counties, where there is a dearth of attorneys to begin with, those willing to take low-fee appointments generally travel from more urban counties, but are not paid for their travel expenses. Consequently, in most rural jurisdictions there is woefully inadequate defense for indigent clients: excessive caseloads; little, if any, communication between lawyer and client; no efforts to contest excessive bond; no investigations; no pre-trial motions filed; no discovery reviewed; and no trials. Of course, there is also no monitoring, no performance evaluations, no supervision and no training. It is literally "meet 'em and plead 'em" at its worst.

For indigent clients the consequences are all-too-often life altering: after excessive confinement in pre-trial detention, the accused finally accepts a coerced plea of guilty "for time served" just to get released from jail, whether having an adequate defense or not. She will now suffer for the rest of her life with the collateral consequences of a criminal conviction on her record, for future employment, education, licensing, insurance, public benefits, and reputation in the community, to name a few.

The Fair Defense Act and TIDC have brought profound change to that dismal scenario, particularly in rural counties that now have public defender programs. By the close of FY 2020, TIDC had been instrumental in furthering the creation of defender programs in 28 counties, 20 of them rural. Nine more rural counties will be added to the system in FY 2021. All of the rural defender programs will share some important characteristics. They will provide institutionalized management and supervision, oversight, caseload controls, improved quality of defense, and better coordination with other stakeholders in the criminal justice system, including courts, prosecutors, law enforcement, clerks, and county executives.

There are generally two distinct types of public defender programs in Texas – those operated as a department of a county government and those operated by a non-profit corporation. Multi-county regional defender programs generally are operated by an “administrative county” that takes the lead, with other counties executing interlocal agreements with the lead county. TIDC typically makes a grant to the lead county on behalf of all participating counties, and, if run as a governmental department, all staff members are employees of the lead county. The lead county assumes liability for such matters as employment disputes and legal malpractice claims. In some programs participating counties may have some governance powers through an oversight board with authority designated by commissioners court resolutions.

Fourteen of the 38 counties having public defender programs in Texas in FY 2021 will have them managed by a non-profit corporation, as authorized by the Fair Defense Act. Tex. Code Crim. Proc. Art. 28.044(b). Texas RioGrande Legal Aid, the only existing non-profit provider, has been in operation for fifty years. Organized in 1970 as a civil legal services provider with grants from the federal Legal Services Corporation, it has now become the largest LSC grantee in the nation, with over 200 lawyers providing free legal services to the indigent residents of 68 counties in Southwest Texas and migrant farm workers in six southern states. TRLA operates through lawyer specialists in some 45 different practice areas, including, among others, employment, housing, domestic violence, consumer, immigration, natural disaster assistance, environmental justice, and international child abduction. In 2006, TRLA added criminal defense to its portfolio of services.

Felony-qualified attorneys are recruited from the local community and the criminal defense bar from around the state, as well as established public defender programs in other jurisdictions. They must meet trial experience requirements as well as compliance with annual continuing legal education standards in criminal law. Entry-level attorneys are recruited from TRLA’s well-established network of contacts at law schools across the country, particularly those that furnish large numbers of public interest attorneys. For decades, TRLA has enjoyed an excellent national reputation among public interest employers.

The staff lawyers in the Public Defender Division rely heavily on the support staff. In addition to traditional investigative duties, the investigators visit the jails on a daily basis to conduct the initial interview and eligibility screening of those arrested in the last 24 hours, identifying conflict issues, facts about the case, and potential witnesses. They may obtain information about employment, family, ties to the community and other information relevant to the setting of bail and bail conditions. As a result, TRLA typically enters into representation

within a matter of hours after arrest, not days or weeks. A TRLA defender will promptly have the information and evidence to begin the negotiating process with the prosecutors to work out plea agreements, dismissals and other dispositions of cases on an accelerated schedule.

The TRLA defender program clients also have ready access to the assets of the larger law firm, addressing various collateral issues such as immigration, employment, family, housing, public benefits, and mental health that often confront someone caught up in the criminal justice system. In addition to addressing the constitutionally-required services required by *Padilla v. Kentucky*, 559 U.S. 356 (2010), TRLA clients have these other wrap-around, holistic services available that may have profound impacts on their ability to fully recover from a criminal accusation.

**TRLA Organization and Structure.** As a corporation organized under the Texas Non-Profit Corporation Act, Tex. Bus. Code Ch. 22, TRLA is governed by a 25-member board of directors chosen from bar associations and client-based organizations. The board hires an executive director, who carries out board policies in accordance with federal and state laws and regulations, as well as grant conditions on funds received from the Legal Services Corporation, the Texas Access to Justice Foundation, the Texas Indigent Defense Commission and some 60 other sources of grants and donations.

Indigent defense services are managed through the TRLA Public Defender Division and its Division Director, Abner Burnett, a lawyer with over three decades of criminal law experience. The Deputy Director is Heriberto Silva, the former District Attorney of Starr County. Five regional offices are each managed by a Chief Defender and include the number of staff attorneys, investigators and support staff as indicated in the table below.

<b>TRLA Public Defender Offices, FY 2021</b>			
Bee Regional PD <i>since June 2009</i>	<b>Beeville:</b> Bee, Live Oak, McMullen, Refugio, Goliad	8 lawyers	3 investigators, 1 mental health peer specialist, 1 secretary
Starr Regional PD <i>since August 2016</i>	<b>Rio Grande City:</b> Starr, Jim Hogg, Duval	7 lawyers	2 investigators, 1 secretary
Willacy County PD <i>since June 2008</i>	<b>Raymondville:</b> Willacy	2 lawyers	1 investigator
Lavaca County PD <i>since October 2017</i>	<b>Hallettsville:</b> Lavaca	2 lawyers	1 investigator
Atascosa Regional PD <i>November 2020</i>	<b>Jourdanton:</b> Atascosa, Wilson, Karnes, Frio	13 lawyers	4 investigators, 1 office manager, 1 secretary

All of the counties served by the TRLA Public Defender Division have populations less than 100,000, making them eligible for TIDC Improvement Grants in the category for Rural Regional Public Defender Sustainability Grants. Under the terms of those grants, TIDC pays 80% of the cost of the program in its initial year of operation and 2/3rds of the cost in subsequent years. Under current law the grant must be made to a county, which then in turn contracts with a non-profit such as TRLA for the services. TRLA provides the legal services and administers the grant, including data and financial reporting for the public defender component.

One important effect of the TIDC grants from the counties' point of view is to shift a substantial property tax burden back to the state, which they see as welcome relief from "unfunded mandates" from state government. Of course, the fact that they get a vastly improved indigent defense system at significantly reduced cost hardly goes unnoticed as well.

**Government vs. Non-Profit Corporation.** One of the first decisions a county or group of counties must confront is whether to establish a government-run defender program or contract out to a non-profit corporation. There are some significant reasons why the non-profit approach is preferable:

- Professional Independence. In 2002 the American Bar Association published "10 Principles of a Public Defense Delivery System." The first principle was that the public defense function be independent of undue interference from judges, prosecutors, and public officials. A non-profit corporation provides a higher measure of independence than a county-operated system.
- Experience. TRLA brings a wealth of experience in delivering legal services to the poor. With existing systems for management, supervision, accounting, recruitment, human resources, information technology, and office logistics, TRLA can put together a turnkey public defender system quickly and efficiently, usually beginning to accept case assignments within four or five weeks of signing a contract. Fifty years serving the indigent residents of Texas is uniquely valuable.
- Reputation in the public interest legal community. Over the last five decades TRLA has established a solid reputation in the legal services public interest community as a zealous advocate for its clients. That reputation brings great dividends in its ability to recruit and retain top quality legal talent.
- Holistic legal services. TRLA offers its eligible defender clients the full range of services available from the civil program, reducing the chances for recidivism.
- Liability. The non-profit model shields the participating counties from a variety of possible liability dangers, including malpractice and employment disputes.

**Challenges.** TRLA operates its defender programs in the poorest parts of the state and indeed, the nation. High rates of poverty, low educational attainment, and a large population of

Spanish-speaking clients present unique challenges to a successful defender program. In addition to those obstacles, the mere fact that the program operates in a rural environment, often far removed from urban amenities, makes recruitment and retention of professional staff more difficult. Distances between county seats and resulting travel time and expense reduce the efficiency of operations. Notwithstanding the tough environment, TRLA brings measurable benefits to the clients it serves and the justice system where it operates.

**Impact of the TRLA Defender Program.** The TRLA Public Defender program has brought major positive change to the administration of justice in the counties it serves. Appointment rates have improved; indeed, in many counties well over 90% of all felony cases have TRLA representation as well as half of the misdemeanors. More important for clients is that the quality of representation has dramatically improved. The PD staff engage with the accused within hours of arrest, not weeks or never, and they stay involved with the client throughout the representation process. Discovery is obtained and reviewed, pre-trial motions are filed, bonds are reduced, forensic investigations occur, mental health experts are retained, trials are held, and appeals are filed.

Criminal court trial judges, most of whom are former prosecutors, praise the program because its lawyers are not only available but are also reliable, they rarely seek continuances, and they are prepared and announce ready for trial. Dockets are not delayed and the jail population is reduced. TRLA works cooperatively with court coordinators, clerks, jailors, probation officers, and prosecutors to make the justice system move more smoothly and efficiently. And contracting with TRLA for public defender services for 90% of its criminal and juvenile cases affords county officials much-needed budget predictability.

Finally, a recent study by TRLA of data from the Texas Commission on Jail Standards, comparing average jail days before and after<sup>1</sup> the advent of a TRLA defender program indicates that over all ten counties there has been a 17.8% reduction in jail days among pre-trial detainees and those re-arrested for parole violations, the population TRLA serves. Of course, reducing jail time for county detainees not only reduces jail operating costs, it also frees up some county jail space for rental revenue from housing federal detainees or those from other counties.

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<sup>1</sup> TRLA compared the average jail days among pre-trial detainees and parole violators for the 36 months before the PD program began accepting appointments in the county and the 36 months after. In counties where the PD program had not been in existence for the full 36 months, the actual number of months was used instead.