

SUBJECT: Providing attorneys for indigent criminal defendants

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 7 ayes — Hinojosa, Dunnam, Keel, Talton, Kitchen, Martinez Fischer, Shields
0 nays
2 absent — Garcia, Green

SENATE VOTE: On final passage, April 10 — voice vote

WITNESSES: For — *Registered but did not testify:* Will Harrell, ACLU of Texas; Keith S. Hampton, Texas Criminal Defense Lawyers Association, Bill Beardall, Texas Appleseed
Against — None
On — *Registered but did not testify:* Diane Devasto; (*On committee substitute:*) Donald Lee, Texas Conference of Urban Counties

BACKGROUND: The Sixth Amendment to the U.S. Constitution guarantees that defendants in criminal prosecutions have legal assistance for their defense. The U.S. Supreme Court has held in a series of cases that due process requires states to provide legal counsel for indigent people charged with felonies or with misdemeanors that involve possible imprisonment.
Texas statutes echo the federal guarantees by requiring courts to appoint attorneys for indigent defendants charged with crimes that are punishable by imprisonment. Also, the Texas Constitution’s Bill of Rights, Art. 1, sec. 10, gives a defendant the right “of being heard by himself or counsel, or both.”
Code of Criminal Procedure (CCP), art. 1.051 states that criminal defendants are entitled to be represented by counsel in any adversarial judicial proceeding that can result in confinement. Under art. 26.04, a court must appoint at least one attorney to defend an indigent person charged with a

felony or a misdemeanor punishable by imprisonment. This means that courts must provide lawyers for indigent defendants accused of felonies and Class A and B misdemeanors; for indigent youths involved in juvenile court proceedings; for indigents being processed for some civil procedures that can result in incarceration, such as involuntary commitment to mental health facilities; and for indigents in any other criminal proceeding, if the court concludes that the interests of justice require representation.

CCP, art. 15.17 requires magistrates to inform arrested persons that if they are indigent, they have a right to request the appointment of counsel. If an indigent defendant requests an attorney, the court must appoint one as soon as possible. Appointed attorneys must represent the defendant until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the court relieves the attorney of the duties and appoints another counsel.

Courts meet these statutory and constitutional requirements in various ways. Each court runs its own program and, except for a certain type of appeal in death penalty cases, no statewide oversight or guidelines exist beyond those in the statutes. While the vast majority of Texas courts use *ad hoc* appointed counsel systems, a few use some type of public defender office, and some courts contract with private attorneys to handle indigent defense.

Appointed attorneys must be paid a “reasonable attorney’s fee” for certain services listed in CCP, art. 26.05. All payments must be made according to a schedule of fees adopted by the county and district criminal court judges in each county and must be paid from the general fund of the county in which the prosecution takes place. In most cases, the state provides no funds to pay for appointed attorneys. However, the state does contribute up to \$25,000 per case for attorneys and expenses for *habeas corpus* appeals of death sentences, a type of appeal that challenges the constitutionality of a conviction.

Most courts that appoint attorneys for indigent defendants reimburse the lawyers with a combination of fixed fees for handling certain duties, such as a jail visit or a day in court, and an hourly rate for other work. Individual judges decide what rates they will pay. In most situations, even when counties or judges have a published fee schedule, judges have the discretion to alter the rates paid to court-appointed attorneys.

Courts are supposed to follow broad requirements in the CCP to determine whether defendants are indigent. Art. 26.04 requires courts to consider factors such as income, property owned, outstanding obligations, necessary expenses, dependents, spousal income, and whether the defendant has posted or is capable of posting bail.

For more information on the indigent defense system in Texas and the debate over changing it, see *The Best Defense: Representing Indigent Criminal Defendants*, House Research Organization Focus Report Number 76-18, November 22, 1999.

DIGEST:

CSSB 7 would make various changes in the state's system for providing attorneys for indigent criminal defendants, including:

- ! setting deadlines for the appointment of attorneys;
- ! requiring judges to adopt county-wide procedures for the appointment of attorneys and requiring the appointment of attorneys from public lists using a rotation system, unless a county chose an alternative system or a public defender system;
- ! requiring judges to establish objective qualifications for appointed attorneys;
- ! amending the standards for determining whether a defendant is indigent;
- ! authorizing all counties to establish public defenders;
- ! changing some of the requirements for compensating attorneys;
- ! establishing new guidelines for the standards applied to attorneys appointed in death penalty cases;
- ! requiring counties to submit to the state information on their indigent defense systems; and
- ! creating a statewide task force to distribute grants to counties for indigent defense services, to develop policies and standards for indigent defense, and to monitor the systems implemented.

CSSB 7 would apply to people arrested for or charged with offenses that occurred after the bill's effective date, January 1, 2002.

Deadline for appointment of counsel. CSSB 7 would require that in most counties, lawyers be appointed for indigent defendants who request an attorney as soon as possible and at least by the third working day after the

court or the court's designee received the defendant's request for a lawyer, if adversarial judicial proceedings had been initiated. In a county with a population of 250,000 or more (roughly, the 15 largest counties), attorneys would have to be appointed by the end of the first working day after the court or the court's designee received a request.

In counties of 250,000 or more, if an adversarial judicial proceeding had not been initiated, a court would have to appoint counsel immediately following the first working day after receiving an indigent defendant's request for a lawyer. In other counties, this deadline would be after the third working day.

Courts or their designees could appoint new counsel without unnecessary delay if a defendant were charged with a second offense and if a good cause for appointing a new attorney was stated on the record.

CSSB 7 would establish a deadline for the current requirement that a defendant be taken before magistrates without unnecessary delay. A defendant would have to be taken before a magistrate within 48 hours of being arrested.

A magistrate would have to tell the defendant in a manner the person could understand — including by providing interpreters, if necessary — of the procedures to request an attorney. A magistrate also would have to help the defendant complete the forms to request an attorney.

Magistrates authorized to appoint attorneys for indigent defendants would have to do so by the three- and one-day deadlines established by CSSB 7. A magistrate who was not authorized to make the appointments would have 24 hours after the defendant requested an attorney to transmit the request to the appointing authority.

Procedures for appointing attorneys. CSSB 7 would require the judges of the county courts, statutory county courts, and district courts with jurisdiction over criminal matters in each county to adopt and publish county-wide procedures for timely and fairly appointing attorneys for indigent defendants.

Appointments would have to be made from a public list of attorneys using a system of rotation, unless the county used a public defender or an alternative system established according to the requirements in CSSB 7. Also, in cases in which the defendant was accused of a felony, the court or its designee could appoint an attorney from any county in the court's administrative judicial region.

Appointments using the rotation system would have to be made from among the next five names on the list in the order in which the names appeared on the list unless the court made a finding of good cause for appointing an attorney out of order. Attorneys not appointed in the order their names appeared on the list would have to remain next in order on the list.

The appointment procedures adopted by the county's judges would have to:

- ! authorize only the judges or their designees to appoint attorneys;
- ! apply to all appointments;
- ! ensure that indigent defendants had an opportunity to confer with their appointed attorneys before judicial proceedings began;
- ! require appointments for defendants in capital cases in which prosecutors sought the death penalty to meet the specific requirements in the Code of Criminal Procedure for death penalty cases; and
- ! ensure that appointed attorneys followed the procedures adopted by the courts.

Appointed attorneys would have to make every reasonable effort to contact defendants by the end of the first working day after their appointment and to interview defendants as soon as practicable after being appointed. Attorneys who violated these requirements could be replaced, and attorneys who intentionally or repeatedly violated them could be removed from consideration for other appointments by a majority of judges of the appropriate court.

Qualifications for appointed attorneys. In counties in which courts must appoint attorneys from a public list, the judges of county courts and statutory county courts trying misdemeanors would have to establish a public appointment list of qualified attorneys and to specify the qualifications to be on the list. The judges could establish more than one list graduated according

to the seriousness of the offense and the attorney's qualifications. District court judges trying felony cases would have to do the same for attorneys qualified to provide representation in felony cases and also could establish more than one appointment list. Counties could appoint public defenders according to guidelines established by CSSB 7.

Attorneys on the appointment list would have to apply to be on the list, meet the objective qualifications established by the judges, meet the qualifications established by the Task Force on Indigent Defense, and be approved by a majority of the judges establishing the list.

Judges trying juvenile cases in each county would have to adopt a plan that specified the qualifications necessary for an attorney to be on an appointment list and would have to establish procedures for appointing attorneys in juvenile cases. To the extent practicable, the plans would have to comply with the requirements for appointing attorneys in the adult criminal justice system, except that the plans should recognize the difference and qualifications needed for handling juvenile cases.

Alternative programs for appointing attorneys. County-wide alternative programs for appointing counsel could be established. An alternative program for both misdemeanor and felony cases could be established by a vote of two-thirds of the judges of county courts, statutory county courts, and district courts trying criminal cases. An alternative program for only misdemeanor cases or only felony cases could be established by a vote of two-thirds of the judges trying those kinds of cases.

Alternative programs could use a single method or a combination of methods to appoint lawyers and could use a multicounty appointment list using a rotation system. The procedures would have to ensure that attorneys appointed in misdemeanor cases met specified objective qualifications and were approved by a majority of judges of county courts and statutory courts trying misdemeanor cases, and that attorneys appointed in felony cases met qualifications and were approved by a majority of district court judges trying felony cases.

Appointments also would have to be allocated reasonably and impartially among qualified attorneys. Appointments in capital murder cases in which

the death penalty was sought would have to comply with Code of Criminal Procedure requirements specifically for those kind of cases.

The presiding judge of the administrative judicial region would have to approve any alternative program. The judges who established the program would have to have the approval of the commissioners court if the alternative program obligated a county by contract or created new positions that caused an increase in the expenditure of county funds.

Determining indigency. Procedures for appointing attorneys would have to include procedures and financial standards for determining whether a defendant was indigent and would have to apply to all defendants, regardless of whether they were in custody or had been released on bail.

Instead of current law *requiring* courts to consider certain factors when determining whether a defendant was indigent, CSSB 7 would *authorize* the appointing authority to consider certain factors, including the defendant's assets, income, obligations, expenses, dependents, spousal income available to the defendant, and the defendant's ability to repay a loan. The appointing authorities could not consider whether a defendant had posted or was capable of posting bail, except to the extent that it reflected the defendant's financial situation.

Defendants who were determined to be indigent would be presumed to remain indigent during the cases' proceedings unless their financial circumstances changed materially.

Public defenders. CSSB 7 would authorize any county to establish a public defender's office. A commissioners court, with written approval of a judge of a county court, statutory county court, or district court trying criminal cases, could appoint a governmental entity or nonprofit corporation as a public defender. Commissioners courts of two or more counties could agree to jointly appoint and fund a regional public defender.

Before appointing a public defender, a commissioners court would have to solicit proposals for the office and select a proposal that demonstrated reasonably that the defender would provide adequate representation for

indigent defendants. The total cost of the proposal could not be the sole consideration in selecting a proposal.

A public defender's office would have to be directed by a chief public defender with at least three years' experience practicing law and with substantial experience in criminal law. Public defenders could refuse appointments if there were a conflict of interest, if the defender had insufficient resources to represent the defendant adequately, if the defender could not provide representation that followed the rules of professional conduct, or if the defender showed other good cause.

CSSB 7 would repeal the statutes that allow individual counties or judicial districts to employ public defenders and a statute that allows Harris County to contract with specified entities to help the county provide attorneys to indigent defendants. Public defenders established under statutes that CSSB 7 would repeal could continue under the terms of current laws.

Compensation for appointed attorneys. CSSB 7 would add preparation and presentation of oral arguments and preparation for motions for rehearings to the list of duties for which appointed attorneys must be paid.

Fee schedules, which judges must adopt under current law, would have to take into consideration overhead costs and customary rates charged for similar legal services in the community. Appointed counsel would have to itemize the services they performed, not simply report them, as under current law.

Appointed attorneys in non-capital cases would have to be reimbursed for reasonable and necessary expenses, including expenses for investigation and for mental health and other experts. Expenses incurred with prior approval would have to be reimbursed if the request was reasonable, and expenses incurred without prior approval would have to be reimbursed if reasonably necessary and reasonably incurred. Attorneys who submitted claims for legal services not performed by the attorney could be removed from consideration for appointments.

CSSB 7 would establish guidelines for what judges must do if they paid amounts different from those requested by the appointed attorneys. Judges

who disapproved the requested amount of payment would have to make written findings stating the amount approved and reasons for approving an amount different from that requested. An attorney whose payment request was not approved could appeal the decision by filing a motion with the presiding judge of the administrative judicial region, who would have to determine the appropriate amount of payment.

Appointment of attorneys in death penalty cases. CSSB 7 would establish new guidelines for the standards that current law requires to be adopted for attorneys appointed in death penalty cases. The standards would have to include:

- ! at least five years' experience in criminal litigation;
- ! trying to a verdict as lead defense counsel a significant number of felony cases, including homicide trials and other first, second, or capital felonies;
- ! trial experience in the use of and challenges to mental health or forensic expert witnesses and investigating and presenting mitigating evidence at the penalty phase of a death penalty trial;
- ! participation in continuing legal education or other training relating to defense in death penalty cases; and
- ! proficiency and commitment to providing quality representation to defendants in death penalty cases.

To remain on the list of attorneys who could be appointed in death penalty cases, attorneys would have to complete the state bar's minimum continuing legal education requirements, including training relating to death penalty defense.

By April 1, 2002, local committees that exist under current law in each administrative judicial region to adopt standards for the qualifications of attorneys appointed in death penalty cases would have to amend their previously adopted standards to conform with standards required by CSSB 7. Attorneys appointed in death penalty cases that began on or after April 1, 2002, would have to meet the standards set by CSSB 7.

Sending local information to the state. By January 1 of each year, each county would have to submit to the state Office of Court Administration

(OCA) a copy of the rules and forms, including a fee schedule, describing the procedures used in the county to provide indigent defense. The local administrative district judge would have to send the OCA a copy of rules and forms adopted by district court judges trying felony cases, and the local administrative statutory county court judge would have to do the same for the rules and forms adopted by judges of the county courts and statutory county courts trying misdemeanor cases.

A county auditor or a person designated by the commissioners court would have to send to OCA on a monthly, quarterly, or annual basis information showing the total amount spent by the county to provide indigent defense services and an analysis of the amount spent in each court for different types of defense services. OCA would have to forward the information to the Task Force on Indigent Defense.

Task Force on Indigent Defense. CSSB 7 would establish a Task Force on Indigent Defense to develop policies and standards to provide legal representation and other defense services to indigent defendants at trial, on appeal, and in post-conviction proceedings. The policies and standards could include:

- ! performance standards for appointed attorneys;
- ! qualification standards for appointed attorneys, including qualifications commensurate with the seriousness of the proceeding, for the representation of mentally ill and noncitizen defendants, legal education, and testing and certification;
- ! standards for determining whether a defendant is indigent;
- ! standards for the reasonable compensation of appointed attorneys;
- ! standards for support services for appointed attorneys;
- ! policies and standards for an *ad hoc* assigned counsel program and public defender programs;
- ! standards for a contract defender program;
- ! standards for legal clinics or other law-school programs that provide legal services to indigents; and
- ! policies and standards for appointing attorneys for juveniles.

The task force would have to distribute funds to counties for indigent defense services, help counties improve their indigent defense systems, and monitor counties receiving grants.

CSSB 7 would require the task force to distribute grant money through the comptroller to the counties based on the counties' compliance with the task forces' standards and on the county's compliance with state laws relating to indigent defense. Counties could not reduce the amount of money they provided for indigent defense because of funds they received from the task force.

The task force would have to develop a plan for counties to report indigent defense information, to monitor the effectiveness of counties' indigent defense systems, and to ensure counties' compliance with laws relating to indigent defense. The task force would have to submit an annual report to the governor, lieutenant governor, House speaker, and Texas Judicial Council that included information on the quality of legal representation provided by appointed attorneys and on Texas' indigent defense practices as compared to state and national standards. The task force also would have to report to the Legislative Budget Board and the judicial council on indigent defense expenditures and grants made by the task force.

The task force would be a standing committee of the judicial council and would include eight *ex officio* members and four appointed members. The *ex officio* members would be the chief justice of the Texas Supreme Court; the presiding judge of the Court of Criminal Appeals; a senator appointed by the lieutenant governor; a House member appointed by the speaker; a court of appeals justice serving on the judicial council and designated by the governor; a county court, statutory county court, or statutory probate court judge who was on the judicial council and was designated by the governor; the chair of the Senate Criminal Justice Committee; and the chair of the House Criminal Jurisprudence Committee.

The governor, with advice and consent of the Senate, would appoint the remaining four members, who would have to be an active district judge serving as a presiding judge of a judicial region, a judge of a constitutional county court or a county commissioner, a practicing criminal defense attorney, and a public defender or someone employed by a public defender.

Members would serve two-year staggered terms.

The task force would have to meet at least quarterly. Members would not be paid for being on the task force but could be reimbursed for expenses. The task force's budget would be part of the Texas Judicial Council's budget.

CSSB 7 would require that 13.98 percent of the court costs paid when a person was convicted of an offense go to a newly created account in general revenue, the fair defense account, instead of to the general revenue fund. The account could be appropriated only to the task force to implement CSSB 7's requirements. This would apply only to court costs collected on or after the bill's effective date, January 1, 2002.

SUPPORTERS
SAY:

CSSB 7 would address many of the problems with Texas' current system of providing legal counsel for indigent defendants. A December 2000 report on the state's indigent defense system by the Texas Appleseed Fair Defense Project, along with numerous other studies, have reported problems with the system, including an absence in uniformity in the appointment process, the competency of attorneys, and the compensation of appointed attorneys. This absence of uniformity means that policies can vary widely from county to county and even from court to court, and while some policies result in prompt appointment of competent attorneys for defendants, others do not. CSSB 7 would help address these unfair disparities by setting statewide standards for counties' indigent defense systems and by providing state money to help counties with their indigent defense systems.

These changes could help prevent incidents like the one in which a court-appointed lawyer slept during a Texas capital murder trial, and they could prevent indigent defendants from being represented by appointed defense attorneys who miss filing deadlines because they are incompetent or who never meet their clients before a trial and thus cannot prepare an adequate defense.

Deadline for appointment of counsel. While the current system requires the appointment of counsel for indigent defendants, it sets no statewide limit on the time that an indigent defendant must wait before having an attorney appointed. This can mean that indigent defendants languish in jail because they cannot afford to hire an attorney or post bail. Not having an attorney

appointed quickly can have many repercussions for defendants, such as the inability to challenge the amount of bail that has been set or to invoke certain rights. While some areas, particularly large urban jurisdictions, report that they appoint attorneys for indigents within hours or a day or two, in other areas it is not uncommon for defendants to spend weeks — sometimes even months — in jail.

CSSB 7 would remedy this by requiring the appointment of attorneys within one or three working days of certain deadlines set in the bill, depending on the size of the county. This would give smaller counties, which may have fewer resources than larger counties, more time. The requirements would not be a problem for the many counties that already meet these deadlines, and it is not unreasonable to require other counties to match their performance.

These deadlines and their tie to the initiation of adversarial judicial proceedings to trigger the start of the deadline clock would help ensure a simple, streamlined process throughout Texas for appointing attorneys and that attorneys would be provided by the point in the criminal justice process that the Constitution requires. Other proposed triggers for starting the deadline clock, such as after formal charges have been filed, might not meet this constitutional requirement.

Meeting the deadlines in CSSB 7 would not be costly to counties for cases in which defendants were arrested but charges were not filed immediately or cases in which defendants were out on bail. Because in most situations lawyers are paid flat fees for cases, the cost would be the same no matter when the attorney was appointed. If an attorney were being paid by the hour, the total hours spent on the case would be the same whether the case started quickly or slowly. In any case, judges would have authority to pay amounts that differed from those requested. Defendants often need attorneys even if charges have not been filed. For example, an attorney often can prompt the system to file charges or release a defendant. CSSB 7 could reduce costs to counties if defendants spend less time in jail. Any problems that arose could be addressed by having prosecutors and law enforcement officers work together to move cases.

CSSB 7 would not impose any arbitrary penalty, such as requiring that a defendant be released if the deadlines were not met. It simply would set a statewide standard.

Procedures for appointing attorneys. CSSB 7's requirements for county indigent defense systems would ensure that the appointment process was fair in every county by requiring judges to adopt county-wide procedures for the timely, fair appointment of attorneys. Counties would retain the autonomy to develop their own procedures as long as they met the bill's broad guidelines.

The public list and rotation appointment system outlined in CSSB 7 would remove the appearance that appointments could be based on attorneys' relationships with judges and that political donations from lawyers could influence the appointments. It also could buffer criticisms that some judges appoint attorneys who are more concerned with moving a case through the court than with providing a vigorous defense. CSSB 7 would not mandate that judges choose a specific lawyer but would give judges the necessary flexibility to choose the best lawyer for each case by allowing appointments from among the next five names on the list.

CSSB 7 would not require counties to use a public appointment list, but would give counties the flexibility to develop alternative systems or to use public defenders. CSSB 7 would ensure the fairness and acceptance of these systems by setting broad guidelines for alternative systems and public defender's offices and by requiring that two-thirds of the judges in an area approve the alternative system.

CSSB 7 would clarify current law by specifically allowing a judge to designate another entity, such as a court administrator, to appoint attorneys. Although this sometimes is done sometimes under current law, CSSB 7 would ensure judges have the necessary authority. Judges who were elected to run the judicial system would retain the ultimate responsibility and oversight of any designee, and all guidelines and requirements established by CSSB 7 would apply to judges' designees.

Some defendants report that under current law, they did not see their appointed attorney until immediately before a court proceeding. CSSB 7

would address this by requiring attorneys to make efforts to contact and interview defendants soon after being appointed.

Qualifications for appointed attorneys. The widely diverse systems in use now for appointing attorneys result in inconsistent and sometimes incompetent representation for indigents within counties or even from courtroom to courtroom. Currently, Texas courts might use criteria for appointments ranging from a list of all criminal lawyers in a jurisdiction to a list of lawyers who have said they would like to be appointed for criminal indigents, or to a list of lawyers who meet certain educational requirements or have a certain type of experience.

CSSB 7 would address the lack of uniform standards for appointed attorneys by requiring courts to establish objective qualifications necessary for attorneys to be on appointment lists. CSSB 7 would not infringe on judicial discretion, because judges would be the ones setting the qualifications for appointments and could make them broad enough to allow for attorneys with differing types of experience.

Determining indigency. While courts are supposed to follow broad requirements in the Code of Criminal Procedure to determine whether defendants are indigent, some counties simply consider a defendant indigent if the person is in jail and unable to make bail. This criterion can exclude some defendants unfairly from the indigent defense system simply because they could make bail. Posting bail does not necessarily mean that a defendant has enough money to pay a lawyer.

CSSB 7 would address this problem by requiring counties to have procedures and financial standards for making the determination of indigency and by prohibiting those who appoint attorneys from considering whether defendants had posted bail, except to the extent that it reflected a defendant's financial situation. The bill would allow courts to consider a defendant's ability to repay a loan, because this can reflect a person's financial position. However, the ability to repay a loan would be only one factor among many that would be considered.

Public defenders. All counties should be authorized explicitly to create public defender's offices, which can be an effective, cost-efficient way to

provide representation for indigent defendants. CSSB 7 would not mandate adoption of a public defender's system, but only would give counties this option. By requiring the approval of one or more judges to establish a public defender's office, CSSB 7 would ensure that county commissioners and judges would collaborate in setting up the office. This would mirror a successful system used in Dallas County that requires commissioners and judges to work together to set up a public defender's office.

Compensation for appointed attorneys. CSSB 7 would ensure that appointed attorneys are paid for all appropriate work by adding work done for oral arguments and motions for rehearings to the list of services for which they must be paid and by requiring that payment fee schedules, which are required in each county under current law, include consideration of overhead costs and customary rates for similar services. This would not require judges to pay the top rate charged by attorneys, only that judges *consider* customary rates when adopting a fee schedule.

Also, CSSB 7 would require judges to state why they paid amounts different from those requested by appointed attorneys but would allow judges to keep their authority to pay less than the fee schedule. This would help address the problem of some judges arbitrarily violating fee schedules and paying attorneys less. In some cases, attorneys can interpret this as a rebuke for putting up a vigorous defense or for taking a case to trial. CSSB 7 also would allow adequate oversight of judges by allowing attorneys to appeal judges' decisions.

CSSB 7 also would address the problem of some counties either not reimbursing or else severely restricting defense lawyers' payments to expert witnesses and investigators by clarifying that expenses for experts and investigators should be paid when reasonable.

CSSB 7 would not impose statewide fee schedules because local control over the fees paid to appointed attorneys is the best way to ensure that attorneys are paid according to local standards, instead of by an arbitrary statewide standard. Under CSSB 7, judges would retain authority to set fee schedules, as under current law, because they are elected to run the judicial system.

Sending local information to the state. Requiring information from each county about its indigent defense system is necessary for the state to monitor the systems for compliance with state guidelines and to ensure that all indigent defendants are receiving adequate services. The reporting would not be burdensome. Counties simply would have to send in a copy of rules and fee schedules that they had adopted, and they could make expenditure reports on an annual, monthly, or quarterly basis.

Task Force on Indigent Defense. By creating this task force, CSSB 7 would ensure that a statewide body was responsible for setting uniform minimum standards and policies and for overseeing counties' indigent defense systems. The task force could set standards for competence and performance to ensure that defendants received adequate representation.

CSSB 7 would help improve indigent defense services in Texas by giving the task force about \$19 million for fiscal 2002-03 to distribute to counties for their indigent defense systems. This could improve the quality of indigent defense services statewide and would help reduce disparities among counties. The state can afford this cost, which would be funded by reallocating from general revenue to the task force a portion of the court costs paid when people are convicted of offenses.

Allowing the task force to oversee the distribution of funds, instead of setting statutory requirements, would be best because the task force could weigh all the options for distribution and could respond to changing needs.

It is appropriate for the state to set standards, monitor, and help fund indigent defense services, because under the U.S. Constitution, providing attorneys for indigents is a state responsibility. The December 2000 report by the Texas Appleseed Fair Defense Project reported that counties across the state spend about \$93 million on indigent defense, amounting to only about \$4.65 per capita. In one study of indigent defense services in 33 states, only North Dakota spent less on average.

The task force needs strong representation from various types of judges, since judicial branch ultimately is responsible for the indigent defense system.

OPPONENTS
SAY:

CSSB 7 is unnecessary because the current system works well and allows localities to devise systems that work for their unique circumstances. Since judges are elected to oversee the justice system, they are, in most cases, the appropriate authority to oversee and run the indigent defense system, without burdensome state requirements or oversight from a statewide task force.

Deadline for appointment of counsel. Setting deadlines for appointing attorneys would restrict local discretion in making appointments and is unnecessary, because attorneys in most jurisdictions already are appointed within a few days. The deadlines set by CSSB 7 could be too onerous in some situations, especially those requiring attorneys to be appointed within one working day in counties with populations of 250,000 or more. Because of the time it can take prosecutors to prepare charges, a one-day turnaround time could be unreasonable. There is no need to set an arbitrary deadline to appoint counsel. Courts act as quickly as possible to appoint attorneys so that jails do not become overcrowded with defendants waiting for their cases to be resolved.

The deadlines also could be costly to counties if charges have not been filed against people who have been arrested or persons are out on bail and counties have to monitor the investigation by law enforcement officers and prosecutors and pay for defendants' attorneys during this time. In addition, counties could end up paying for attorneys in cases that prosecutors eventually drop.

Procedures for appointing attorneys. On the whole, the current system works well, and isolated problems in individual counties should not lead the state to scrap the entire system and to infringe on individual courts' authority by requiring county-wide procedures and by setting statewide requirements for appointments. Requiring appointments from a public list of attorneys would remove judicial discretion in making appointments and could result in an attorney with inappropriate experience being appointed for a case.

The news media, election opponents, and the public provide adequate oversight of judges' appointment decisions. Judges' appointments and the contributors to their campaigns are public records that can be monitored easily, and any misconduct issues can be raised during elections or through established mechanisms for investigating judicial misconduct.

Qualifications for appointed attorneys. There is no need to require courts to establish uniform qualifications for appointed attorneys, because judges already monitor attorneys' competence. Uniform standards could infringe on judicial discretion and could restrict judges inappropriately. For example, requiring membership in a criminal defense association might not ensure that a lawyer was qualified, while allowing only specialists to take these cases could be a burden in small counties. While it would be relatively easy for judges to set standards that require experience, it would not be so easy to set criteria for competence. Judges need to be free to make decisions on a case-by-case basis. Judges are interested in appointing competent attorneys because they do not want to have cases overturned on appeal.

Compensation for appointed attorneys. Judges should retain authority to pay attorneys amounts that differ from what appointed attorneys request without having to justify their decisions. Sometimes hours claimed by appointed attorneys can be inflated or unreasonable, and judges are in the best position to evaluate the work done on a case.

The requirement in CSSB 7 that judges consider overhead costs and customary rates when setting fee schedules could make some judges feel that the schedule has to pay the top rates charged by attorneys, resulting in high costs for the counties, which ultimately pay the attorneys.

Sending local information to the state. It could be burdensome for counties to submit so much information to the state on local indigent defense systems, especially reports detailing expenditures in each court for different types of defense services. The fiscal note for CSSB 7 reports that, according to the Texas Association of Counties, 131 counties would have to add a part-time position at a cost of \$17,800 annually to track, accumulate, and report data.

Task Force on Indigent Defense. Establishing a task force to set statewide policies and standards for indigent defense systems would institute an unnecessary layer of state bureaucracy. Counties are best able to develop and implement systems that meet their individual circumstances without unnecessary statewide oversight.

OTHER
OPPONENTS
SAY:

Deadline for appointment of counsel. It would be better not to associate the three- and one-day deadlines for appointing counsel with the initiation of adversarial judicial proceedings, because the point at which this occurs is the subject of some debate.

Determining indigency. CSSB 7 should not allow judges to consider a defendant's ability to repay a loan when considering whether a defendant is indigent. This could be used to deny an attorney to a defendant who might be able to get a loan, possibly from a nontraditional source with high interest rates.

Public defenders. Counties should be authorized to establish public defender systems without the approval of a judge or having to establish them upon a standard like a specified percentage rise in the cost of their indigent defense systems. Since counties ultimately pay the bill for indigent defense systems, they should be able to override a system set up by judges if it is too expensive or otherwise unworkable and to set up a public defender's office.

Compensation for appointed attorneys. A statewide pay scale should be imposed to ensure that indigent defense systems are uniform and of a high quality. The lack of statewide guidelines or rules about compensating attorneys results in a wide range of fees, which, in turn, can result in unfair compensation to attorneys from court to court and uneven representation.

Counties should have approval authority over fee schedules set by judges, and all payments should have to be within those schedules.

Task Force on Indigent Defense. Placing this task force under the Texas Judicial Council and requiring at least six judges on the task force would weight it too heavily in favor of the judiciary. Any statewide oversight body should be more balanced, representing defense attorneys, counties, and others involved in the indigent defense system.

NOTES:

The committee substitute made many changes to the Senate engrossed version, including:

- ! requiring magistrates to provide interpreters for hearing-impaired and non-English speakers;
- ! requiring attorneys placed on the appointment list to meet qualifications specified by the Task Force on Indigent Defense;
- ! requiring appointed attorneys to make efforts to contact defendants by the end of the first working day after appointments, instead of within 24 hours;
- ! providing that defendants who appeared in court without attorneys could confer with their appointed attorney before judicial proceedings began, rather than before communication with the prosecutor;
- ! allowing courts to consider whether a defendant had the ability to obtain a loan when considering indigency;
- ! allowing a commissioners court to specify whether a public defender would serve a term or at the pleasure of the commissioners;
- ! requiring that attorneys on the list of those qualified to be appointed in death penalty cases have tried “a significant number of felony cases,” instead of specifying the number of cases;
- ! adding a requirement that the Task Force on Indigent Defense develop a plan establishing statewide requirements for counties to report indigent defense information, and deleting a requirement that county auditors include certain specific information in the report they submit to the OCA, including the names of appointed attorneys, time spent on a case, and amounts requested and paid;
- ! deleting a requirement that the Department of Public Safety send certain information to OCA about each case involving an indigent defendant;
- ! adding areas in which the Task Force on Indigent Defense would have to develop policies and standards;
- ! requiring the task force, rather than the comptroller, to monitor counties’ compliance with grant requirements; and
- ! eliminating a requirement that the task force submit by September 1, 2002, a report to the Legislative Budget Board on the distribution of grant funds.

The fiscal note for CSSB 7 estimates that \$19.8 million would be available to for the new created fair defense account in fiscal 2002-03 and approximately \$12 million per year thereafter. The account would pay the costs of implementing the bill, with the balance going for grant awards to counties.

The companion bill, HB 1745 by Hinojosa, et al., was placed on the May 10 House General State Calendar. SB 7 was laid out in lieu of HB 1745, then postponed until today.