

SUBJECT: Reporting local rules for appointing defense counsel for indigent persons

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 7 ayes — Keel, Riddle, Denny, Hodge, Pena, Raymond, Reyna

0 nays

2 absent — Escobar, P. Moreno

WITNESSES: For — Andrea Marsh, ACLU of Texas

Against — None

BACKGROUND: Courts must appoint attorneys for indigent criminal defendants, including those facing the death penalty, for trial and appeals. Defendants sentenced to death in Texas may challenge their convictions in two ways: with a direct appeal, which deals with errors of law in the original trial and is heard automatically by the Texas Court of Criminal Appeals, and with a *habeas corpus* appeal, which can raise issues outside of the trial record.

The Code of Criminal Procedure, art. 26.052(d)(2) establishes minimum requirements for attorneys appointed to represent indigent defendants facing death sentences at trial and direct appeal. A local selection committee in each administrative judicial region must adopt standards for these appointed attorneys that meet the minimum statutory requirements. The statute requires that attorneys:

- be members of the State Bar of Texas
- have proficiency and commitment to providing quality representation;
- have at least five years experience in criminal litigation;
- have experience as lead defense counsel in a significant number of felony cases, including homicide trials and other second-degree or first-degree felony trials or capital trials
- have trial experience using and challenging mental health or forensic expert witnesses and investigating and presenting mitigating evidence at a death penalty trial; and

- have participated in continuing legal education or other death penalty training courses.

Code of Criminal Procedure, sec. 11.071, establishes guidelines and procedures for providing counsel to indigent defendants for *habeas* appeals in death penalty cases. Convicting courts are required to appoint attorneys for these indigent defendants and to notify the Court of Criminal Appeals of the appointment. The Court of Criminal Appeals must adopt rules for the appointment of these attorneys, and convicting courts may appoint an attorney only if the appointment follows these rules. The Court of Criminal Appeals has established a list of approved attorneys from which convicting courts make their appointments.

In 2001, the 77th Legislature revised the system for appointing attorneys for indigent criminal defendants. The bill established a Task Force on Indigent Defense to develop policies and standards for legal representation and other services to indigent defendants. The standards developed by the Task Force for appointment of counsel in death penalty cases have to be consistent with standards specified by the Code of Criminal Procedure. The Task Force is made up of five members, including an active district judge serving as a presiding judge of an administrative judicial region.

The Legislature also required counties annually to provide indigent defense information to the Office of Court Administration (OCA). In the form and manner determined by the OCA, counties must send a copy of all formal and informal rules used to provide attorneys to indigent defendants and a schedule of fees for appointed indigent defense counsel to the OCA.

**DIGEST:**

CSHB 1701 would amend Government Code, sec. 71, to require the Task Force on Indigent Defense to determine the manner in which the rules used to provide indigent defendants with counsel should be compiled and presented to the OCA. Counties would submit this information every other year.

The bill also would require counties to submit to the OCA any revisions to previously submitted rules or forms or verification that the rules and forms previously submitted still were in effect. In each county, the chair of the juvenile board would have to submit similar information on rules adopted by the juvenile board.

A judge serving as presiding judge of an administrative judicial region would not have to be an active judge to be appointed by the governor to the Task Force on Indigent Defense.

CSHB 1701 also would require that standards set for trial attorneys appointed as lead counsel in death penalty cases and attorneys appointed as lead appellate counsel in direct appeals of death penalty cases require that such attorneys had not been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any criminal case.

The Court of Criminal Appeals would have until January 1, 2006, to amend the rules adopted under Code of Criminal Procedure, art. 11.071, to comply with this bill.

A local selection committee would have until the 75th day after the effective date of this bill to conform with the requirements of Code of Criminal Procedure, art. 26.052. Attorneys appointed on or after the 75th day after the effective date of this bill would have to meet the new requirements.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2005.

**SUPPORTERS  
SAY:**

CSHB 1701 would make positive changes to the existing requirement that counties provide indigent defense information. Given the Task Force's role in promoting quality indigent defense, they are in a better position than the OCA to gauge the most appropriate way in which counties should compile and present information. The bill also would improve the quality of indigent defense by prohibiting those who have been found to have rendered ineffective assistance of counsel to serve as indigent defense counsel in death penalty cases.

**OPPONENTS  
SAY:**

Requiring counties to submit information to the OCA every other year, rather than every year, could lead to a loss of transparency in the indigent defense system. The public would not be able to obtain accurate and up-to-date information if counties made changes in their indigent defense plans within two years. The annual reporting requirement is especially important for the public to obtain accurate information about counties that have not stabilized their indigent defense practices.

NOTES:

The substitute would allow former judges to serve on the Task Force of Indigent Defense. The substitute also would require that trial attorneys appointed as lead counsel in death penalty cases and attorneys appointed as lead counsel in direct appeals of death penalty cases not have been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any criminal case.

A related bill, HB 268 by Keel, passed the House by 140-0 on March 21. In addition to requiring that attorneys appointed as lead counsel in trials or direct appeals of death penalty cases not have been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of a criminal case, HB 268 would include other qualifications for trial and appellate attorneys appointed as lead counsel in death penalty cases.

Under that bill, trial attorneys appointed as lead counsel in death penalty cases would have to:

- have tried felony cases to a verdict as lead prosecutor or lead defense counsel; and
- have experience as a member of a prosecution or defense trial counsel team in jury selection in a capital case in which the death penalty was sought, in direct examination or cross-examination of mental health or forensic expert witnesses, and in the presentation or cross-examination of mitigating evidence at the penalty phase of a homicide trial.

Also under HB 268, an attorney appointed as lead appellate counsel in the direct appeal of a death penalty case would have to:

- be a member of the State Bar of Texas;
- exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases;
- have participated in continuing legal education courses or other training related to criminal defense in death penalty cases;
- have at least five years of experience in criminal trial or appellate litigation; and
- have participated in the preparation of appellate briefs for the prosecution or defense, or in the drafting of appellate opinions as a staff attorney for an appellate court, in felony cases, including

homicide cases and other cases involving an offense punishable as a capital felony or a felony of the first or second degree.