

SUBJECT: Qualifications for appointed appellate and trial lawyers in capital cases

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 8 ayes — Gallego, Fletcher, Kent, Miklos, Moody, Pierson, Vaught, Vo

0 nays

3 absent — Christian, Hodge, Riddle

WITNESSES: For — (*Registered, but did not testify:* Jazmin Acuna, Texas Criminal Justice Coalition; Scott Cobb, Texas Moratorium Network; David Gonzalez, Texas Criminal Defense Lawyers Association; Andrea Marsh, Texas Fair Defense Project; Andrew Rivas, Texas Catholic Conference; Jennifer Willyard, Texas Defender Service; Abel Zamora, American Civil Liberties Union of Texas; Steven Been; Terri Been; Alison Dieter, Judith Filler; Emily Glick; Galia Harrington; Margie Harrington)

Against — None

BACKGROUND: Courts must appoint attorneys for indigent criminal defendants, including those facing the death penalty, for both the trial and any 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 Court of Criminal Appeals, and with a habeas corpus appeal, which can raise issues outside of the trial record.

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 their own 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 not been found by a court to have rendered ineffective assistance in the trial or appeal of a capital case;
- 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.

**DIGEST:** HB 2058 would establish separate sets of requirements for trial attorneys and appellate attorneys appointed in death penalty cases.

The bill would list specific requirements for appellate attorneys in death penalty cases. These requirements would be the same as those applied to trial attorneys, except that:

- instead of a requirement to have tried to a verdict as lead defense counsel a significant number of certain types of cases, the bill would require appellate attorneys to have authored a significant number of appellate briefs, including briefs for homicide trials and other second-degree or first-degree felony trials or capital trials or certain other serious and violent offenses listed in Code of Criminal Procedure, art. 42.12, sec. 3g(a)(1); and
- instead of requiring trial experience with certain types of witnesses and mitigating evidence, appellate attorneys would be required to have trial *or appellate* experience in the using and challenging the same type of mental health and forensic expert witness and in the use of mitigating evidence at the penalty phase of a death penalty trial.

HB 2058 also would replace the current requirement that trial attorneys have at least five years of experience in criminal *litigation* with a requirement of at least five years of criminal *law* experience for both trial and appeals attorneys.

HB 2058 would take effect September 1, 2009, and local selection committees would have to amend their standards for appointed attorneys

within 75 days of the bill's effective date. The bill would apply only to attorneys appointed to a death penalty case on or after its effective date.

**SUPPORTERS  
SAY:**

By establishing different requirements for trial and appellate attorneys in death penalty cases, HB 2058 would expand the pool of attorneys available to do appellate work, which would result in both trial and appellate attorneys having appropriate qualifications.

Current law requires that all attorneys appointed in death penalty cases — both trial and appellate — have tried to a verdict as lead defense counsel a significant number of felony cases. This requirement excludes attorneys who may be highly qualified because of their extensive experience in appeals, but not in trials. Current law also allows attorneys with only trial experience to be appointed for an appeal, when they may not be the best choice for the appeal in a case.

HB 2058 would solve these problems by establishing separate, relevant qualifications for both trial and appellate attorneys appointed in death penalty cases. The qualifications would mirror each other, except for two places in which the attorneys would have to have either specific trial or appellate experience. HB 2058 likely would improve the pool of available attorneys since each set of attorneys would have qualifications applicable to their role in a case.

If attorneys have experience and track records doing appellate work, there is no need to require them to have specific trial experience, just as there is no need for attorneys appointed for a trial to have appellate experience. For example, there are some attorneys who have done only appellate work their entire career, and it would be inappropriate to continue to exclude them because they do not have trial experience. The bill's requirement that appellate attorneys have authored a significant number of briefs in serious felony cases, along with the other statutory requirements and criteria set by local selection committees, would ensure that these attorneys were qualified to be appointed for an appeal.

HB 2058 could be especially helpful in rural areas that might have qualified appellate attorneys who could aid the limited number of lawyers handling death penalty cases.

Changing the requirement that trial and appellate attorneys have at least five years of experience in criminal litigation to a requirement that they

have at least five years of criminal law experience would clear up questions about what it means under current law for an attorney to have five years of experience in criminal litigation. One reading of that requirement could be that it excludes highly qualified candidates, like law professors or criminal court staff attorneys. The change in the bill would ensure that such attorneys would be eligible. These attorneys, like all those on the list, would have to meet the other qualifications concerning trial or appellate experience.

Local selection committee boards would continue to exercise their authority and discretion to decide who is qualified to be appointed in death penalty cases. This would continue to serve as a check on the broad qualifications in current law and HB 2058.

**OPPONENTS SAY:** To develop a pool of the most qualified appellate attorneys appointed to appeal death penalty cases for indigents, it might be best to require that they have some trial experience. One way to assure that might be to include a requirement that they have participated in some manner in at least a limited number of trials.

**NOTES:** The companion bill, SB 1130 by Seliger, has been referred to the Senate Jurisprudence Committee and had a public hearing on April 1.