

BILL ANALYSIS

Senate Research Center

S.B. 7
By: Ellis
Criminal Justice
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DIGEST AND PURPOSE

Currently, throughout the many criminal courts of Texas' 254 counties the variety of indigent defense systems result in a lack of uniformity in standards and quality of representation among those many indigent defense systems. As proposed, S.B. 7 provides for added order, accountability, and quality control of the state's provisions relating to indigent defense.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Texas Indigent Defense Council in SECTION 11 (Section 85.004, Government Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Article 1.051, Code of Criminal Procedure, by amending Subsection (c) and adding Subsection (i), as follows:

(c) Requires a court, rather than the court, authorized under Article 26.04 to appoint counsel for indigent defendants in the county to appoint counsel as soon as possible, but not later than 72 hours after the defendant's request for appointment of counsel is received by the court or designated appointing authority if the county has fewer than 250,000 residents, and not later than 24 hours after the defendant's request for appointment of counsel is received by the court or designated appointing authority if the county has 250,000 or more residents. Requires the court to appoint an attorney to represent a person accused of a criminal offense under this article, article 15.17, and article 26.04 whether or not formal changes have been filed with the court. Deletes existing text pertaining to representing the defendant.

[Bill as drafted does not contain a Subsection (i).]

SECTION 2. Amends Article 14.06(a), Code of Criminal Procedure, to require the person making an arrest, except as provided by Subsection (b), in each case enumerated in this Code, to take the person arrested or have the person taken without unnecessary delay, but not later than 24 hours after making the arrest, before the magistrate who may have ordered the arrest, before some magistrate of the county where the arrest was made without an order, or, if necessary to provide more expeditiously to the person arrested the warnings described by Article 15.17 of this Code, before a magistrate in a county bordering the county in which the arrest was made.

SECTION 3. Amends Article 15.17(a), Code of Criminal Procedure, to delete existing text pertaining to the right to request appointment of counsel. Requires the magistrate to also clearly inform the person arrested of the person's right to request the appointment of counsel if the person cannot afford counsel. Requires the magistrate to individually inform each arrested person how to request counsel in a manner understood by the arrested person. Requires the magistrate to cause to be rendered reasonable assistance to the arrested person in completing any forms necessary to request counsel at that time. Requires the magistrate to appoint counsel if the person arrested requests appointment of counsel and is indigent and if the magistrate is authorized under Article 26.04 to appoint counsel for indigent

defendants in the county. Requires the magistrate to immediately transmit, or cause to be transmitted, the forms requesting appointment of counsel to the appointing authority designated under Article 26.04 for appointment of counsel if the magistrate is not authorized to appoint counsel. Requires a record to be made by written forms or other method authorized and adopted under Article 26.04 documenting that the person arrested was advised of the person's right to request the appointment of counsel, that the person was asked whether the person wished to request appointment of counsel, and whether or not he made such a request. Makes a conforming change.

SECTION 4. Amends Article 26.04, Code of Criminal Procedure, as follows:

Art. 26.04. New heading: PROCEDURES FOR APPOINTING COUNSEL. (a) Requires the judges of the county courts, statutory county courts, and district courts having jurisdiction over criminal cases in each county, as a whole, by local rule, to adopt and publish written procedures for timely and fairly appointing counsel for indigent defendants in the county consistent with the procedures for appointing counsel under Articles 1.051, 15.17(a), 26.04, 26.05, and 26.052 of this code.

(b) Requires procedures adopted under Subsection (a) to authorize only the judges of the county courts, statutory county courts, and district courts having criminal jurisdiction in the county or their authorized designee to appoint counsel for indigent defendants in the county, and apply to each appointment of counsel made by a judge or authorized designee in the county.

(c) Requires the court or designee, whenever a court, rather than the court, or designee authorized under Subsection (a) to appoint counsel for indigent defendants in the county determines that a defendant accused of, rather than charged with, a felony or a jailable misdemeanor is indigent or that the interests of justice require representation of a defendant in a criminal proceeding, to appoint one or more practicing attorneys to defend the accused in accordance with procedures adopted and published under Subsection (a). Requires the court, except as provided by Subsections (d) and (e), to appoint an attorney from public appointment lists using a fair system of rotation. Requires a public appointment list of attorneys qualified to provide representation in jailable misdemeanor cases in the county to be established by formal action of the judges of the county courts and statutory county courts having jurisdiction over misdemeanor cases in each county. Authorizes those judges, where deemed appropriate, to establish more than one appointment list graduated according to the seriousness of the alleged misdemeanor and the attorney's qualifications to provide representation in misdemeanor cases with that degree of seriousness. Requires a public appointment list of attorneys qualified to provide representation in felony cases in the county to be established by formal action of the judges of the district courts having jurisdiction over felony cases in each county. Authorizes those judges, where deemed appropriate, to establish more than one appointment list graduated according to seriousness of the alleged felony and the attorney's qualifications to provide representation in felony cases with that degree of seriousness. Requires the court or designated appointing authority to appoint attorneys from among the next four names on the authorized appointment list in the order in which the attorneys' names appear on the list, unless the court states on the record good cause for appointing an attorney out of order. Requires any attorney who is not appointed in order to remain next in order on the rotation list. Sets forth requirements for the appointment list. Requires the court, in a death penalty case, to appoint counsel in accordance with the provisions of Article 26.052.

(d) Authorizes, in a county in which a public defender is appointed under Article 26.044, the court or designee authorized under Subsection (a) to appoint counsel for indigent defendants in the county, to appoint the public defender to represent the

defendant in accordance with guidelines established for the public defender.

(e) Authorizes two-thirds of the judges of the county courts, statutory county courts, and district courts having jurisdiction over criminal cases in a county, by formal action, to establish an alternative procedure for appointing counsel for indigent defendants in the county. Requires, in that event, the written procedures adopted and published under Subsection (a) to specify county-wide procedures that meet certain criteria.

(f) Authorizes courts, in a county in which an alternative procedure for appointing counsel is established as provided by this subsection and is approved by formal action of the county officials who allocate funding for indigent defense services in the county, to appoint attorneys to represent defendants by using the alternative procedure.

(g) Requires an attorney appointed under this article, rather than subsection, to make every reasonable effort to contact the defendant not later than 24 hours after the attorney is appointed an interview the defendant as soon as practicable, and represent the defendant until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the attorney is relieved of the attorney's duties by the court or replaced by other counsel for legal cause stated on the record.

(h) Provides that an attorney who fails to comply with Subsection (f)(1) is subject to being replaced by other counsel. Requires an attorney's repeated or willful failure to comply to result in removal from consideration for appointment to represent indigent defendants in the future.

(i) Requires procedures adopted and published under Subsection (a) to specify the procedures used in the county to determine whether a defendant is indigent so as to warrant appointment of counsel.

(j) Sets forth the only factors which may be considered in determining whether a defendant is indigent. Deletes existing text pertaining to requirements of the court and the defendant's posting of bail. Prohibits the court from considering whether the defendant has posted or is capable of posting bail as a factor in determining whether a defendant is indigent. Deletes existing text pertaining to denying appointment of counsel. Requires the standards and procedures established to determine whether a defendant is indigent to apply equally to all defendants whether in custody or released on bail.

(k) Authorizes the appointing authority, in establishing standards and procedures for determining whether a defendant is indigent as provided by Subsection (h) and (i) above, to adopt the standards established by the Texas Equal Access to Justice Foundation or the federal Legal Services Corporation for determining whether an indigent person is eligible for civil legal assistance.

(l) Reletters existing Subsection (c).

(m) Reletters existing Subsection (d) and makes a nonsubstantive change.

(n) Provides that a person determined by the court to be indigent is presumed indigent unless there occurs a material change in financial circumstances. Authorizes the defendant, the defendant's counsel, or the attorney representing the state, if there is a material change in financial circumstances after a determination of indigency or nonindigency is made, to move for reconsideration of the determination. Reletters existing Subsection (e).

(o) Requires the procedures adopted and published under Subsection (a) to specify procedures that ensure that no indigent defendant charged with a jailable misdemeanor or felony is required to communicate with a prosecutor regarding the offense prior to appointment of and an opportunity to confer with defense counsel, or an informed waiver of counsel by the defendant on the record in open court.

(p) Reletters existing Subsection (f).

SECTION 5. Amends Article 26.044, Code of Criminal Procedure, as follows:

Art. 26.044. New heading: PUBLIC DEFENDER. (a) Defines “pubic defender.”

(b) Authorizes the commissioners court of any county, on written approval of a judge of the county courts, statutory county courts, or district courts having jurisdiction over criminal cases in the county, to appoint a governmental entity or nonprofit corporation, rather than one or more attorneys, to serve as a public defender. Deletes existing text pertaining to having four county courts and four district courts. Authorizes a public defender to agree to serve more than one county. Authorizes the commissioners courts of two or more counties to enter a written agreement to jointly fund and appoint a regional public defender. Requires the commissioners court, in appointing a public defender under this subsection, to specify certain specific information.

(c) Requires the commissioners court, before appointing a public defender under Subsection (b), other than public defender offices in existence on the effective date of this statute, to solicit proposals for the public defender office. Sets forth requirement for a proposal.

(d) Requires the commissioners court, after considering each proposal for the public defender office submitted by a governmental entity or nonprofit corporation, to select a proposal that reasonably demonstrates that the proponent will provide adequate quality representation for indigent defendants in the county. Requires the commissioners court, in selecting a proposal, to consider certain specific criteria.

(e) Requires the appointee or the appointee’s executive director, if the appointee is a nonprofit corporation, to meet certain specific criteria.

(f) Provides that a, rather than the, public defender is entitled to receive an annual salary and reimbursement for expenses incurred in operating the public defender office in amounts, rather than an amount, fixed by the commissioners court and paid out of the appropriate county fund.

(g) Authorizes a public defender to employ and supervise attorneys, investigators, and other personnel necessary to perform the duties of the public defender office as specified by the commissioners court under Subsection (a)(1).

(h) Prohibits an attorney employed by a public defender, except as authorized by this article, from certain specific activities.

(i) Requires the term of appointment for a chief public defender to be designated by the commissioners court, but not less than four years.

(j) Authorizes a public defender to be removed only if certain specific conditions are met.

(k) Authorizes a public defender to refuse an appointment under Article 26.04(d) if

certain conditions are present.

- (l) Deletes previous Subsection (e) pertaining to the removal of a public defender.
Deletes previous Subsection (f) pertaining to requirements of a public defender.

Deletes previous Subsection (h) pertaining to compensation to an attorney other than a public defender. Deletes previous Subsection (i) pertaining to appointment of another attorney.
Deletes previous Subsection (j) pertaining to fees.

SECTION 6. Amends Article 26.05, Code of Criminal Procedure, as follows:

(a) Requires a counsel, other than an attorney with a public defender, appointed to represent a defendant in a criminal proceeding, including a habeas corpus hearing, to be paid a reasonable attorney's fee for performing the certain specific services, based on the time and labor required, the complexity of the case, and the experience and ability of the appointed counsel. Deletes existing text pertaining to reimbursement for expenses.

(b) Requires all payments made under this article to be paid in accordance with a schedule of fees adopted by formal action of the judges of the county courts, statutory county courts, and district courts having jurisdiction over criminal cases in each county. Deletes existing text pertaining to criminal court judges.

(c) Requires each fee schedule adopted to state reasonable minimum and maximum hourly rates taking into consideration overhead costs and customary rates charged for similar legal services in the community and provide a form for the appointed counsel to itemize, rather than a form for reporting, the types of services performed. Deletes existing text pertaining to rates. Requires no payment to be made under this until the form for itemizing, rather than reporting, the service performed is submitted to the county auditor or the person designated by the commissioners court, if the county does not have a county auditor, in accordance with the fee schedule for that county. Deletes existing text pertaining to approval by the court. Requires the county auditor or the person designated by the commissioners court, not later than the 30th day after the date an application for payment of a fee is received under this article, to determine the amount due and pay that amount to the appointed counsel. Authorizes the county auditor or other designated person, in determining the amount due, to solicit the opinion of the presiding judge of the court in which the criminal proceeding was held as to whether the itemized services were reasonably necessary. Requires the opinion of the judge to be included in the record of the criminal proceeding.

(d) Requires a counsel in a non-capital case, other than an attorney with a public defender, appointed to represent a defendant under this code to be reimbursed for reasonable expenses incurred with prior court approval in the manner provided for capital cases by Articles 26.052(f) and (g). Authorizes a counsel, other than an attorney with a public defender, appointed to represent a defendant under this code to be reimbursed for expenses incurred without prior court approval in the manner provided for capital cases by Article 26.052(h).

(e) and (f) Reletters existing Subsections.

(g) Authorizes reimbursements of expenses incurred for purposes of investigation or expert testimony to be paid directly to a private investigator licensed under Chapter 1702 (Private Investigators and Private Security Agencies), Occupations Code, rather than under the Private Investigators and Private Security Agencies Act (Article 4413(29bb), V.T.C.S., or to an expert witness in the manner designated by appointed counsel and approved by the court.

SECTION 7. Amends Chapter 71C, Government Code, by adding Section 71.0351, as follows:

Sec. 71.0351. INDIGENT DEFENSE INFORMATION. (a) Requires the county auditor or the person designated by the commissioners court, if the county does not have a county auditor, to prepare and send to the Texas Judicial Council's (TJC) Office of Court Administration (OCA), not later than September 30 of each year, a report that satisfies the requirements of Subsections (b) and (c). Requires each district and county clerk, as a duty of their office, to cooperate with the county auditor or the person designated by the commissioners court and the commissioners court in retrieving information for inclusion in the report.

(b) Sets forth requirements of the report.

(c) Provides additional requirements of the report.

SECTION 8. Repealers:

- Section 26.041(Assistance for Court-Appointed Counsel in Harris County), Code of Criminal Procedure.
- Section 26.042 (Tarrant County Public Defender), Code of Criminal Procedure.
- Section 26.043 (Public Defender in Wichita County), Code of Criminal Procedure.
- Section 26.045 (Public Defender in 33rd Judicial District, Public Defender in Colorado County), Code of Criminal Procedure.
- Section 26.046 (Public Defender in Webb County), Code of Criminal Procedure.
- Section 26.047 (Public Defender in Colorado County), Code of Criminal Procedure.
- Section 26.048 (Public Defender in Cherokee County), Code of Criminal Procedure.
- Section 26.049 (Public Defender in Tom Green County), Code of Criminal Procedure.
- Section 26.050 (Public Defender in 293rd and 365th Judicial Districts), Code of Criminal Procedure.
- Section 26.058 (Public Defender in Aransas County), Code of Criminal Procedure.

SECTION 9. Makes application of this Act prospective.

SECTION 10. Requires a county auditor or other person designated under Section 71.0351, Government Code, as added by this Act, to send to OCA of TJC the first report required by that section on or before September 30, 2002.

SECTION 11. Amends Title 2, Government Code, by adding Chapter 85, as follows:

Sec. 85.001. DEFINITIONS. Defines "council," "member," "executive administrator," "crimes," "juvenile offense," "counsel appointed to represent indigent persons," "ad hoc assigned counsel program," "contract defender program," "public defender program," and "indigent defense support services."

Sec. 85.002. ESTABLISHMENT OF THE TEXAS INDIGENT DEFENSE COUNCIL.

(a) Provides that this Act establishes the Texas Indigent Defense Council (council) as an entity within the judicial branch of government administratively attached to the OCA.

(b) Requires the council to exercise its prescribed powers independently of the

executive director of OCA.

(c) Requires the council to be a legal entity. Sets forth authorizations granted to the council.

(d) Requires the executive director of OCA to provide general administrative support to the council. Defines “general administrative support.”

(e) Requires the budget of the council to be a part of TJC’s budget. Requires the council to consult with the executive director of OCA. Requires the executive director of OCA to assist the council in preparing and presenting to the legislature the council’s budget. Requires the council to have final authority with respect to preparation of its budget and with respect to representation of matters pertaining to the council before the legislature.

(f) Prohibits the executive director of OCA from reducing or modifying the budget of the council or using funds appropriated to the council without the approval of the council.

Sec. 85.003. COMPOSITION OF THE COUNCIL. (a) Sets forth the composition of the council.

(b) Requires members of the council to be appointed to serve staggered terms of six years. Prohibits a member of the council from serving more than two successive terms.

(c) Requires former judges or law professors appointed to the council to have significant specialized legal knowledge or expertise in the area of indigent criminal defense or the administration of indigent defense systems. Requires all persons appointed to the council to have demonstrated a strong commitment to quality representation in indigent defense matters.

(d) Prohibits a person currently employed or serving as a prosecutor, law enforcement official, or any active employees of such persons, from being nominated or appointed to or serving on the council. Prohibits a person who has served as a prosecutor or law enforcement official, or as an employee of such persons, within the five years preceding appointment, from serving on the council.

(e) Prohibits a member of the council from being an active or former judge, except as provided in Subsection (a) of this section.

(f) Requires each member of the council to serve until a successor in office has been appointed. Requires vacancies to be filled by appointment for the unexpired term. Requires removal of council members to be in accordance with policies and procedures adopted by the council.

(g) Requires the council to elect a chair from among its members, to serve for a term of one year. Authorizes the chair to serve up to three successive terms as chair.

(h) Requires initial appointments to the council to be made by September 1, 2001. Requires appointments to the council, thereafter, to be made by September first of the year in which a term has expired. Requires appointments to fill vacancies for unexpired terms on the council to be made within 90 days of the position becoming vacant.

Sec. 85.004. CONDUCT OF COUNCIL BUSINESS. (a) Provides that eight members constitute a quorum for the transaction of business. Requires action by the council to require a

concurrence of a majority of those present, but in no event less than six members of the council.

(b) Requires the council to meet at least quarterly and at such other times as it deems necessary or convenient to perform its duties. Requires meetings of the council to be at such places as the council determines.

(c) Provides that all members of the council are entitled to vote on any matters coming before the council unless otherwise provided by rules adopted by the council.

(d) Prohibits council members from receiving compensation. Provides that council members are entitled to be paid necessary subsistence and travel expenses in accordance with the applicable provisions of the Government Code.

(e) Requires the council to appoint an executive director to hire such personnel as may be necessary to properly discharge the duties assigned to the council under this subchapter, and to supervise and direct the council's staff in carrying out those functions.

(f) Requires the council to monitor and evaluate the performance of the executive director and the council's staff, and establish employee personnel policies for the council.

Sec. 85.005. POWERS AND DUTIES OF THE COUNCIL. (a) Development of Standards. Authorizes the council to develop standards governing the provision of services at trial, on appeal, and in post-conviction proceedings, under this article. Sets forth certain policies and standards to be developed by the council.

(b) Enforcement of Standards. Provides that the council has the authority to take certain enumerated actions.

(c) Compilation and Reporting of Information Regarding Indigent Defense. Sets forth requirements for the council relating to the compilation and reporting of information.

(d) Supervision of Appointed Counsel Assistance Program (ACAP). Sets forth requirements for the council pertaining to its powers and duties relating to the Appointed Counsel Assistance Program.

(e) Provision of Technical and Financial Assistance to Counties. Sets forth requirements for the council pertaining to its powers and duties relating to assistance to counties.

Sec. 85.006. CREATION OF APPOINTED COUNSEL ASSISTANCE PROGRAM; POWERS AND DUTIES OF PROGRAM. (a) Provides that, within the council, ACAP is established.

(b) Authorizes ACAP, upon request, as provided in Subsection (3) of this section, to provide defense services, including but not limited to those specified in this section, in any criminal case in any county in the state in which an indigent defendant is charged with a capital or first-degree felony.

(c) Requires ACAP to assist counties in meeting their constitutional obligations to provide effective legal representation to indigent persons accused of capital or first-degree felonies, and promote the improvements of the quality and delivery of defense services provided to such defendants by certain specific actions.

(d) Office a Legal Entity; Acceptance and Use of Funds. Requires ACAP to be a legal entity. Sets forth authorizations granted to ACAP. Authorizes ACAP to accept funds, grants, and gifts from any public or private source. Requires any funds received to be used to carry out the purpose of ACAP.

(e) Composition of ACAP. Requires the chief council of ACAP to employ, with the advice and consent of the council and its chair, as many assistant counsel and other support staff as may be necessary to discharge ACAP's responsibilities under this Act.

(f) Chief Counsel of ACAP. Requires the chief counsel of ACAP to be appointed by the council. Sets forth requirements for the term, removal, and replacement of the chief counsel.

(g) Qualifications for Chief Counsel of ACAP. Sets forth certain qualifications required of the chief counsel.

(h) Qualifications for Assistant Counsel of ACAP. Sets forth certain qualifications required of the assistant counsel employed by ACAP.

SECTION 17. Amends Article 26.052, Code of Criminal Procedure, as follows:

(d) Requires the local selection committee created in each administrative judicial region (committee) under Section 74.042 (Administrative Regions), Government Code, to adopt standards for qualifications of attorneys to be appointed to represent indigent defendants in capital felony cases in which the state is seeking the death penalty. Sets forth standards required of an attorney in order to be considered eligible to be appointed to represent an indigent defendant in a capital felony case in which the state is seeking the death penalty. Requires the committee to prominently post the standards in each district clerk's office in the region with a list of attorneys qualified for appointment. Requires the committee, upon request, to review the list of attorneys qualified for appointment, in consultation with the council, to ensure that each attorney on the list is in compliance with the requirements of this chapter. Requires the presiding judge of the district court in which a capital felony case is filed to appoint two attorneys qualified under this chapter to represent an indigent defendant as soon as practicable after charges are filed, unless the state gives notice in writing that the death penalty will not be sought in the case.

Sec. 85.007. ANNUAL BUDGET. Requires the chief counsel to prepare and transmit to the council an annual budget showing all anticipated expenses of ACAP for the following fiscal year. Requires the ACAP fiscal year to be the same as the state's fiscal year.

SECTION 12. Effective date: September 1, 2001.