HOUSE RESEARCH ORGANIZATION
Texas House of Representatives

focus REPORT

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SB 7 Update: How Counties Provide Indigent Defense

Texas lawmakers in 2001 enacted SB 7 by Ellis, the Fair Defense Act, setting new requirements for counties to meet in providing legal defense for indigent criminal defendants. Since then, most counties have developed indigent defense plans that meet many of the law's requirements, but a few are lagging behind, according to analysis by a state task force and by two independent groups. Counties also report difficulties in paying for implementation, even with the influx of $7.2 million in state grant money this summer.

Each county in Texas establishes and runs its own system for indigent defense. SB 7 requires counties for the first time to report to the state on the procedures they use and the amounts they spend to provide legal services for indigent defendants. The newly created Task Force on Indigent Defense has analyzed information from the first set of reports, sent to the Office of Court Administration by January 1, 2002. Additional reports about county expenditures are due to the task force by November 1.

Another source of information on how counties have responded to SB 7 is a March 2002 report, *Quality of Initial County Plans Governing Indigent Defense in Adult Criminal Cases*, produced by two advocacy groups, the Equal Justice Center and Texas Appleseed. The report, on line at www.equaljusticecenter.org, analyzed plans from 95 counties that contain 90 percent of the state population. It concluded that about one-third of those plans were good or very good examples of successfully implementing SB 7; one-third had a significant shortcoming in one or two core requirements; and one-third fell well short of the requirements. While smaller counties may have had more difficulty crafting their initial plans, the report said, exceptionally good plans can be found in counties of all sizes. The two groups plan to update their

As Texas counties implement the 2001 law setting new standards for providing legal counsel for indigent defendants, some have proposed amending the law's requirements.

report this fall to reflect changes made since the counties submitted their plans to the task force.

Proposals have arisen to amend the law by eliminating or extending the deadlines for appointing attorneys, removing some restrictions on county appointment methods, establishing statewide standards for indigency, and increasing state funding for counties. Some have proposed repealing the law and restoring counties' authority to establish indigent defense systems as they see fit, as long as they meet constitutional requirements. Others say this would return Texas to an unacceptable situation in which each county — and sometimes each court within a county — had its own system for handling indigent defendants, jeopardizing the guarantee of prompt access to counsel or to qualified counsel.

Major provisions of SB 7

SB 7 made major changes in Texas' system for providing attorneys for indigent criminal defendants, including:

- setting deadlines for the appointment of attorneys;
- requiring judges to adopt countywide procedures for the appointment of attorneys and requiring the appointment of attorneys from public lists through a rotation system, unless the county chooses an alternative system or a public defender system;
- requiring counties to adopt procedures and objective financial standards for determining when a criminal defendant is indigent;
- requiring judges to establish objective qualifications for appointed attorneys;
- requiring that attorneys, experts, and investigators be paid according to a published fee schedule;
- requiring counties to report information on their indigent defense systems to the state; and
- requiring counties to develop similar plans for juvenile cases.

Proposals have arisen to eliminate or extend the deadlines for appointing counsel to represent indigent defendants.

SB 7 also created the Task Force on Indigent Defense, part of the Texas Judicial Council, to develop policies and standards for counties to follow in providing representation for indigent defendants and to award grant money to counties for indigent defense services. The task force has eight ex-officio members and five members appointed by the governor. Gov. Rick Perry made his appointments to the task force in January 2002. Information about the task force is on line at *www.courts.state.tx.us/tfid*.

For background on the debate over indigent defense legislation, see *The Best Defense: Representing Indigent Criminal Defendants*, House Research Organization Focus Report Number 76-18, November 22, 1999; analysis of SB 7 in the May 16, 2001, *Daily Floor Report*; and analysis of the enacted version of SB 7 in *Major Issues of the 77th Legislature*, HRO Focus Report Number 77-11, July 2, 2001.

Deadlines for appointing attorneys

SB 7 sets deadlines for appointing attorneys for indigent criminal defendants. A person must be brought before a magistrate within 48 hours of being arrested for a hearing in which the person is accused of the crime, often called an Article 15.17 hearing after the Code of Criminal Procedure article that requires the hearing. Under SB 7, if the defendant requests an appointed attorney, the magistrate either must appoint an attorney immediately or must transmit the request to the appointing authority within 24 hours. In counties with populations of 250,000 or more (currently, the 15 largest counties), an attorney must be appointed within one day of receiving the request; in smaller counties, the deadline is three days.

According to the Equal Justice Center/Texas Appleseed report, more than two-thirds of the county plans reviewed by the groups met or exceeded SB 7's requirements for appointing counsel, and some counties had adopted procedures that gave defendants access to counsel sooner than required by the law. However, about one-tenth of the plans had deficiencies, such as specifying time limits that exceed those required by the law, according to the report.

Some counties argue that it is too difficult to meet these short deadlines. For example, some say, it can be difficult to assess accurately within the deadlines whether a defendant is indigent; this can result in counties declaring more defendants indigent and appointing

more lawyers than before the enactment of SB 7, thereby driving up county expenses.

Some critics propose eliminating the deadlines or extending them to five to seven days, arguing that this would give counties more time to process defendants and to ensure that appropriate lawyers were appointed. Even with a change in the statutory deadlines, counties still would be bound to meet constitutional requirements, supporters of these proposals say.

Others counter that extending the deadlines and potentially delaying the appointment of counsel could violate a defendant's right to counsel, resulting in situations in which defendants might plead guilty without being fully informed or counseled. Prompt appointment of counsel, they argue, can speed up legal proceedings and ensure the proper disposition of cases, which can be more cost-effective in the long run. For example, they say, defendants who meet the terms of their probation and pay their fees bring in more money to a county than do defendants with unrealistic or inappropriate probation requirements that result in their not paying fees and being incarcerated for probation violations. Counties that find it difficult to meet these deadlines should study procedures in the many counties that meet the requirements, say supporters of SB 7. To meet the deadlines, some counties may need to make changes in other areas of law enforcement, such as police reporting or prosecutor filing.

Misdemeanor cases. Another proposal would extend or eliminate the deadlines for appointing counsel in misdemeanor cases only. Some counties have reported a marked increase in requests for appointment of counsel in misdemeanor cases, overwhelming the counties' resources. Before SB 7 was enacted, they report, some defendants charged with minor misdemeanor offenses such as writing hot checks or shoplifting met first with prosecutors and chose plea bargains to expedite their cases instead of accepting court-appointed attorneys, even though they knew they had the right to an attorney.

Some counties report that SB 7 procedures have resulted in more people accused of misdemeanors choosing lawyers, thereby slowing down the resolution of cases, though the types of pleas and sentences are the same in the vast majority of cases. In other situations, counties that rarely held trials in misdemeanor cases because defendants accepted plea agreements now find themselves overwhelmed with requests for trials. In less serious cases, some say, it would be more appropriate for counties to meet the constitutional requirements and appoint lawyers if requested by defendants but without having to meet arbitrary deadlines set in statute.

Opponents of changing the law for misdemeanor cases say that defendants have the same constitutional right to counsel in misdemeanor as in felony cases and that extending appointment deadlines or setting up separate systems could violate those rights. They say counties should adjust their systems to handle misdemeanor cases rather than looking for ways to avoid their responsibilities.

Some suggest that counties could use "duty attorneys" to keep misdemeanor cases from bogging down the legal system and escalating county expenditures while ensuring defendants' access to counsel. Under this procedure, an attorney is assigned to cover the magistrate hearings that occur soon after arrest and to provide quick advice or counsel to people who want to plead guilty and have their cases resolved quickly.

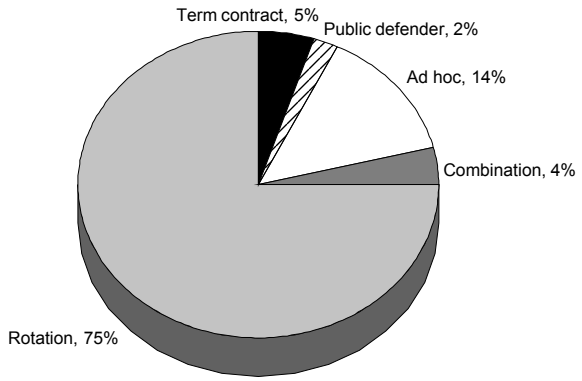
Some counties also report difficulties with the 24-hour deadline imposed by SB 7 for holding probable-cause hearings when people are arrested without warrants for misdemeanors. For example, problems may arise when people are arrested over a weekend but are not booked officially until after probable-cause hearings are held for that day. One proposal would require a hearing within 48 hours after an arrest, the same deadline that applies to felony offenses.

Supporters of SB 7 argue that, rather than changing the law to delay misdemeanor probable-cause hearings, counties should work to coordinate their law enforcement, prosecutorial, and court systems so that they operate efficiently 24 hours a day, seven days a week. Supporters also note that SB 7 allows prosecutors to ask for extensions of the deadline. Counties that have trouble meeting this deadline, they say, could emulate other counties that have developed efficient, cost-effective ways to handle these hearings.

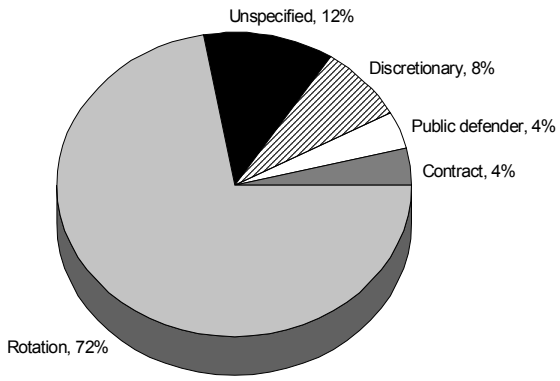
Equal protection. A separate issue is whether different deadlines for appointing attorneys in different-sized counties violate defendants' equal-protection guarantees found in the state and federal constitutions. In a September 2002 opinion (JC-0549), Attorney General John Cornyn determined that a court likely would find that these differing provisions do *not* violate equal-protection guarantees.

How Counties Select Attorneys to Represent Indigent Defendants

Source: Task Force on Indigent Defense



Source: Equal Justice Center/Texas Appleseed



Attorney selection procedures

Judges in each county must adopt and publish countywide procedures that meet the standards in SB 7 for appointing attorneys for indigent defendants. Appointments must be made from a public list of attorneys through a rotation system, unless the county uses a public defender or establishes a countywide alternative system that meets the law's requirements. SB 7 authorizes any county to establish a public defender office. If the county uses a rotation system, a judge must establish a list of qualified attorneys and must specify the qualifications for those on the list. Juvenile boards in each county must follow similar requirements.

The first set of reports analyzed by the Task Force on Indigent Defense showed that 75 percent of counties were using a rotation system to appoint lawyers for indigent defendants. Fourteen percent used an "ad hoc" system under which individual judges appoint lawyers whom the judges consider most appropriate, without specifying an objective system of selection, though some plans specified factors that judges should consider. Five percent of counties used term contracts with attorneys in private practice to provide the necessary representation; almost 5 percent used a combination of systems; and 2 percent used a public defender system under which a public or nonprofit entity employs attorneys to represent indigent defendants.

The Equal Justice Center and Texas Appleseed reported similar but slightly different numbers. Their report said that 72 percent of the counties analyzed were using a rotation system to appoint attorneys. Colorado, Dallas, El Paso, Webb, and Wichita counties used public defender systems; these counties, representing 4 percent of the plans examined, all used public defender systems before the enactment of SB 7. Another 4 percent used contract services; typically under these plans, a judge chooses a small group of attorneys for appointment to the cases from that judge's court. Eight percent of the counties used plans allowing judges unlimited discretion to assign lawyers to cases. Twelve percent of the county plans were unspecified. Some used what the report called "mixed" systems; for example, some used public defenders or contract attorneys but also specified other appointment methods, usually a rotation system, for use when caseloads are excessive or when a conflict of interest exists. However, the report said that four counties apparently used a mixed system to circumvent the requirement that the area's judiciary adopt a countywide plan.

Judges and attorneys in some counties argue that the procedures and paperwork required by SB 7 have slowed the appointment process and the progress of cases. Some say it now takes twice as long to appoint an attorney as it did before the law took effect. For example, some counties used to take newly arrested defendants before judges who immediately appointed attorneys present at the "jail call." This resulted in defendants seeing their attorneys immediately, whereas under the rotation system outlined in SB 7, attorneys are not necessarily present but are appointed from a list and may not see their clients until after that day.

Others have reported difficulties with knowing how to implement SB 7's requirements when a person is arrested on a warrant that was issued in another county. They say it is unclear whether a court in the arresting county, where the inmate is housed only temporarily, or the county issuing the warrant, where the inmate eventually will be moved, should appoint the attorney and how this can occur within the statutory deadlines. Some suggest that counties could handle these situations by having the arresting county appoint temporary counsel — or at least make counsel available — and having the other county appoint counsel when the inmate is moved.

According to the Equal Justice Center/Texas Appleseed report, SB 7's requirements for attorney qualifications are crucial to ensure fair, neutral, and nondiscriminatory selection of attorneys. Most counties meet these requirements by specifying a combination of previous criminal practical experience, trial experience, and continuing legal education and by establishing appointment lists based on offense seriousness, the report said. Also, SB 7 requires that attorneys on the appointment list be approved by a majority of judges trying cases at that level. The report said that most county plans do a fairly good job of implementing these requirements, but that some plans fail to specify objective attorney qualifications for some or all cases and that some plans deem every lawyer in a county to be qualified.

Some propose doing away with requirements that county procedures for appointing attorneys meet certain statutory requirements, such as being fair, neutral, and nondiscriminatory. They say these requirements can be too restrictive, can remove judicial discretion in making appointments, and can result in the appointment of attorneys with inappropriate experience. When judges have more discretion, they can appoint attorneys on the basis of their expertise, not because a computer randomly chose their names in a "neutral" manner, supporters of this change say. They argue that computerized selection could result in more reversals on appeals, thereby clogging the court system and costing more money in the long run. The news media, election opponents, and the public provide adequate oversight of judges' appointment decisions, they say.

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Opponents of changing the law argue that SB 7's provisions are necessary to ensure the fairness of the appointment system throughout the state. Abuses of the old system, they say, proved that it did not provide adequate oversight of judges' decisions; under SB 7, counties retain autonomy to develop their own procedures and flexibility to use alternative appointment systems as long as they meet the law's broad guidelines.

Determining indigency

While portions of state law mention indigency in regard to criminal defendants, no definitive statutory test exists, leaving each county to determine when a defendant is indigent. Code of Criminal Procedure, sec. 1.051 defines an indigent as someone who is not financially able to employ counsel, and sec. 26.04(m) lists factors that courts may consider when determining indigency.

SB 7 requires counties to specify the procedures and financial standards they use to decide if a defendant is indigent. These standards must apply to defendants regardless of whether they are in custody or have been released on bail.

The Task Force on Indigent Defense reports that 63 percent of counties are using statutory factors to determine indigency. These plans state the type of financial evidence — such as income, assets, obligation, expenses, and other factors listed in Code of Criminal Procedure, sec. 26.04 — to be considered in deciding whether a defendant is indigent. According to the task force, 18 percent of counties decided to deem people indigent if they earned below a specified percentage of the federal poverty level (FPL), either 100 percent, 125 percent, or 150 percent. Eleven percent of counties allowed defendants to be considered partially indigent — and usually required to pay a small fee for their lawyers while the court paid the rest — if their income was between 125 percent and 175 percent of the FPL. Eight percent of counties listed no standards or statutory factors.

The Equal Justice Center/Texas Appleseed report said that while many county plans use sound financial standards and procedures to determine indigency,

SB 7 and the Burdine Case

Differing interpretations of SB 7 have fueled a debate over how to apply the indigent defense law in a well-known case that often was cited as a reason to enact the law. In the case of Calvin Jerold Burdine, a state district judge has cited SB 7 in refusing to appoint Burdine's long-time appeals attorney to handle a court-ordered retrial in the murder case.

In 1999, a U.S. district judge ordered Burdine, who had been convicted of a 1983 murder and sentenced to death, to be retried or freed because his court-appointed attorney often slept during the trial. This denied Burdine the effective assistance of counsel in violation of the Sixth Amendment to the U.S. Constitution, Judge David Hittner ruled. The attorney, now deceased, claimed that he had been concentrating, not sleeping.

Judge Hittner's ruling was appealed, and the 5th U.S. Circuit Court of Appeals ruled that Burdine should be retried. That ruling also was appealed, but the U.S. Supreme Court declined to hear the case, allowing the 5th Circuit decision to stand. Earlier, the Texas Court of Criminal Appeals had rejected attempts to overturn Burdine's conviction on the same grounds.

In June 2002, Judge Joan Huffman of the 183rd Criminal District Court in Harris County refused to appoint Robert McGlasson, the Atlanta attorney who has handled Burdine's appeal for the past 15 years, to represent Burdine at the retrial. Some have criticized her decision, arguing that SB 7 was intended to ensure that defendants receive the most qualified defense and that, in this case, McGlasson is clearly the most qualified. Others, including state Sen. Rodney Ellis and Rep. Juan Hinojosa, authors of SB 7, have criticized the decision on the grounds that SB 7 should not be invoked in the Burdine case because the law applies only to cases in which the offense occurred after January 1, 2002. The concept of continuity of counsel should be respected, critics argue, noting that McGlasson was appointed to handle state matters and handled many state pleadings for Burdine over the years. Attorney-client relationships that existed before SB 7 took effect should not be severed by the new law, they say.

Defenders of the judge's decision say the judge is following SB 7's requirements. They say that local rules adopted to comply with SB 7 require that an attorney for Burdine be appointed from a list of attorneys who have proved their qualifications to handle capital cases in Harris County. McGlasson, they say, is not on the list of attorneys approved to handle capital cases in Harris County and has not provided evidence to the court that he is qualified to try a capital murder case in Texas.

Defenders of the decision note that under SB 7, attorneys appointed to death-penalty cases before April 2002 are governed by the law in effect when the attorney was appointed. However, they say, McGlasson has not shown the court that he had been appointed to the Burdine case by a Texas court, although a federal court had appointed McGlasson to handle part of Burdine's federal appeal. The court is ready and willing to appoint a competent, qualified trial attorney, they say.

Judge Hittner's court is scheduled to hold a hearing October 17 on who will be appointed to represent Burdine. The American Civil Liberties Union filed a lawsuit in the federal court seeking to have McGlasson appointed. Previously, the Texas Criminal Defense Lawyers Association had asked the Texas Court of Criminal Appeals to allow McGlasson to remain on the case, but the court refused to hear the request.

almost half of the plans resulted in difficulties in applying the standards equally countywide. Examples of sound financial standards cited by the report include using a multiple of the FPL plus an asset limit as a floor below which a defendant is considered indigent; deeming a defendant indigent if net monthly income after expenses is below a specific amount; and deeming a defendant indigent if the defendant is eligible for certain means-tested public benefits programs. The report said that some counties have misunderstood SB 7's requirement and, instead of establishing an objective financial standard such as an amount of money or resources, only list types of financial evidence to be considered.

Some question whether allowing counties to determine when a criminal defendant is indigent — rather than setting a uniform, statewide standard — violates a defendant's right to equal protection under the state and federal constitutions. In JC-0549, Attorney General Cornyn concluded that a court likely would find that this flexible indigency standard did *not* violate equal-protection guarantees.

State funds for counties

The general appropriations act for fiscal 2002-03 set aside almost $20 million of state money to implement SB 7 and to provide grants to counties for their indigent defense programs. The funds come from court costs paid when a person is convicted of an offense.

In July 2002, the Task Force on Indigent Defense awarded $7.2 million in grants to 238 counties for their indigent defense programs. Awards were based on county population, whether the county's indigent defense costs had increased, and whether the county's plan met SB 7's requirement for the timely appointment of lawyers. The grants ranged from about $2,000 given to some rural counties to about $1 million awarded to Harris County. Sixteen counties received no grants; ten of those counties did not apply, and six did not qualify for various reasons, such as failing to demonstrate that their expenses for indigent defense would be higher than in the previous year, according to the task force.

When the applications initially were submitted, only 68 counties met the criteria established for the grants. For example, a county's plan might have failed to include or identify a system for bringing a defendant before a magistrate within 48 hours of arrest. The task force worked with the counties to bring their plans into compliance with the requirements.

For fiscal 2003, the task force plans to award grants totaling $11.2 million by January 1, 2003. Applications for $9.6 million in formula grants are due in October 2002. These grants will be based on county population; on counties meeting SB 7's requirements for prompt appointment of counsel, attorney fee schedules, and procedures for paying expenses such as expert and investigator fees; and on counties submitting plans for dealing with indigent juvenile defendants. Applications for another $1.6 million in discretionary grants are due in December 2002. Priority for these grants will favor collaborative efforts dealing with indigent defense, such as shared software programs or a regional public defender office, and the development of programs that could be replicated by other counties.

From partial-year expenditures submitted by the counties, the task force estimates that counties spent a total of $93 million on indigent defense in fiscal 1999. Counties report that their costs have increased because of increased administrative work, paying for the appointment of attorneys with more experience, an increase in the number of accused misdemeanants requesting attorneys, and the requirement for faster communications with appointed attorneys, district attorneys, jails, and courts. By one estimate, counties spent about $30 million more under SB 7 than they previously had spent on indigent defense.

Some counties, legal advocacy groups, and others have called for the state to provide more financial support. In September 2002, the County Judges and Commissioners Association of Texas adopted a resolution asking that the Legislature appropriate sufficient funds to compensate counties for the full cost of implementing SB 7 or else repeal the law. Supporters of increased funding say the state grants cover only about 10 percent to 12 percent of the costs of county indigent defense systems, placing Texas among the states that provide the lowest portion of state funds for indigent defense and the lowest amount per capita. Most states provide between 50 percent and 100 percent of indigent defense costs, they say.

Others say the state should provide what it can but that counties need to ensure that their systems are constitutional and meet SB 7's requirements. Counties whose spending was low before the enactment of SB 7 may have to increase their spending to meet these requirements and to ensure that attorneys are appointed in a fair and timely way.

— by Kellie Dworaczyk

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