

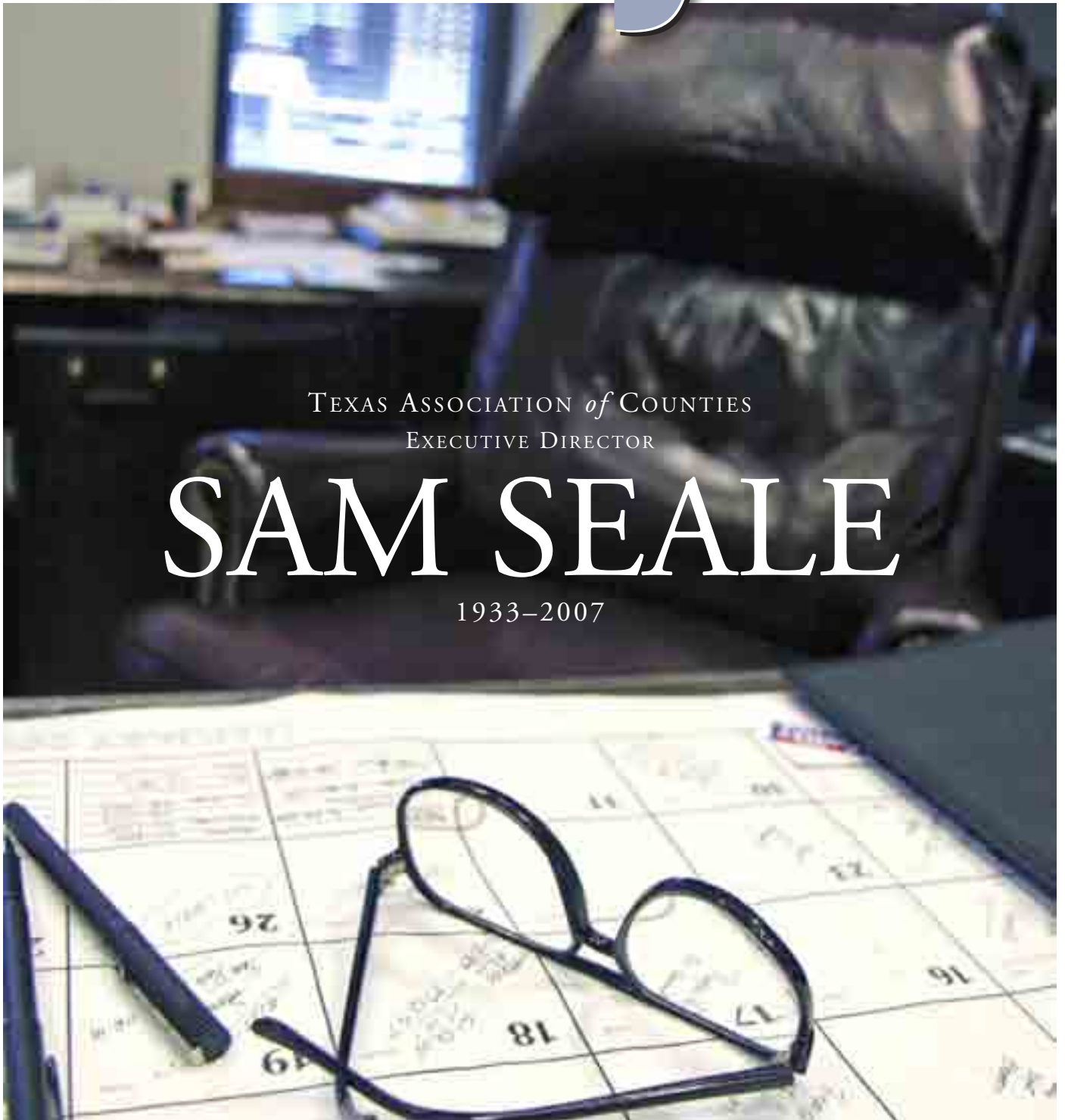
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Public Defenders Make Their Case

As costs rise for indigent defense, more counties turn to public defenders to counsel indigents / By Maria Sprow

WHEN THE 77TH TEXAS LEGISLATURE passed the Fair Defense Act in 2001 to ensure quality and constitutional indigent defense, county officials around the state didn't quite know what hit them.

They soon found out.

Under the act, indigent defense programs around the state were deemed broken in some way – too decentralized, too slow, too few appointments, too bad. Defendants who should have been offered counsel weren't and processes for determining whether a person qualified for counsel were unbalanced or unfair. Attorneys were being assigned to cases they shouldn't have been assigned to, or falling asleep during trial. Defendants were waiting too long in jail before seeing their assigned counsel.

It's not like those things didn't all need to be fixed. They did. But the Texas Fair Defense Act, while finally allotting some state dollars toward indigent defense, anchored the weight of those solutions on the counties, creating one of the most costly mandates in the state's history. As Bexar County Commissioner Tommy Adkisson puts it, the act, still widely referred to as Senate Bill 7, "opened Pandora's box" when it came to the way many counties were handling indigent defense. All the bad things flowing out of the system were costly to fix.

"The cost of indigent defense was starting to cut into our operations. We had a lot of inmates, a lot of people arrested, a lot of people put in jail," said Kaufman County Commissioner Jim Deller, adding that SB 7 put a huge financial crunch on the county. He estimates that within five years of the act's passing, the price of indigent defense had multiplied by three. Instead of spending \$179,000 a year, as they were in 2001, the county was spending \$643,000, not to mention the cost of inmate housing.

So Kaufman County, along with Bexar

County and many other counties across the state, began looking for a lid to Pandora's box, a way to place a cap on the rising costs of indigent defense.

What makes Kaufman and Bexar counties semi-unique is the way they went about capping those costs. Both counties – along with Hidalgo, Val Verde and Travis, with Willacy on the way – created public defender offices for trial periods, though for different levels of the court system. The counties all gained state dollars through a four-year discretionary grant fund administered by the Task Force on Indigent Defense. The first of those four-year grants will soon be coming to a head, with Bexar and Hidalgo counties having to decide within the next two years whether to continue operating their offices entirely out-of-pocket. There is little grant funding for duplicate programs, so other counties will be looking toward those offices' success when determining whether to cap their own costs with a public defender office is a good idea.

As costs for indigent defense continue to rise – more so than before in many counties because of Senate Bill 6 from the 2005 legislative session, which required counties to appoint an attorney to represent the parents in Child Protective Services cases in which the parents are declared indigent, among other mandates – the importance of both quality and cost-effectiveness of counsel will continue to increase. For public defenders, the peak period of time to establish their affordability and quality will be within the next five to 10 years, as data collected from the newly formed "model" programs will grow. Those who have seen the data so far have faith that the office will prevail and seem confident that public defender offices are the most effective providers of indigent defense. Others will argue that public defender offices are

only good for some counties and won't make a difference in their own.

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Meet the Defense

Commissioner Deller first started looking into a public defender office three years ago, after talking to some people with the Dallas public defender's office. At the time, SB 7 and regional growth from Dallas had put a large financial crunch on the county – expenses were three times what they were prior to the Fair Defense Act. Still, Deller hadn't been able to convince anyone that a public defender's office could solve their problems.

"The commissioners court had pacified me by putting a line item in the budget so that we could continue looking at it," Deller said, adding that other local leaders, including County Judge Wayne Gent and District Judge Howard Tygrett, got on board as costs began to rise. Then, the Task Force approved the county for a grant and the idea snowballed.

So far, every indication I have had is the office is doing a wonderful job. Once they see that, I believe more jurisdictions will seriously consider the advantages of establishing a regional office, especially in the rural areas.

"My discussions with Dallas County were about salary, procedure, protocol," Deller said, adding that the county probably would not have risked the front-end costs of a public defender office had it not been for the grant funding. "I wanted to know the mechanics more than anything. ... I'm not a lawyer and I don't know their business. I just wanted to make sure if we had a public defender, what his caseload would be and if he would make it worthwhile to set up a good department. I wanted to make sure that the caseload would be enough to justify the costs."

Generally, the recommended staff size is one public defender for every 400 misdemeanor cases the office would handle per year, or one public defender for every 150 felony cases, or one public defender for every 250 juvenile cases; and then one investigator and one staff for every five attorneys.

Kaufman's new public defender office, which just opened in November, has a first year budget of about \$240,000, though the county also still spends additional money on assigned counsel when the office has reached its maximum caseload, or when there's a conflict that prevents the office from taking on a case or when the judge feels it fit to assign the case to a private attorney.

"If we were a real small county, we probably wouldn't have tried this, because we just couldn't afford it," Deller said.

But just this past year, four counties in West Texas – Val Verde, Edwards, Terrell and Kinney – worked around that problem, creating a regional office out of Val Verde. It's the first such regional program in the state, and it's also the first program in Texas where a county contracted with a non-profit indigent defense provider. Val Verde is also the second semi-rural or mid-sized county (with a population of just more than 45,000) to implement a public defender's office.

Local officials and district judges there spent two years talking about trying to find a way to control indigent defense expenses. They resolved to form a public defender office after listening to a presentation made in 2003 by Texas RioGrande Legal Aid, a non-profit agency that promised the officials that such an office would provide cost savings while improving indigent defense. Val Verde County won a discretionary grant from the TFID in 2005 and then formed an oversight board to oversee implementation of the new office. The commissioners court issued a request for proposals from agencies interested in providing the counties with indigent defense, but received only one response, from the RioGrande Legal Aid group. The new office opened its doors May 1.

Each day, a public defender or investigator interviews newly incarcerated inmates in order to gather financial and legal information on the defendants. Based on that interview, the public defenders then determine whether an inmate qualifies for indigent counsel and whether the office can handle the case or if there is a conflict of interest in representing an individual. The office utilizes videoconferencing technology in order to conduct indigency reviews for defendants in the partnering counties.

Whether the office is a true success is still under evaluation. The county is working to ensure proper tracking and reporting of the program's elements, including the number and types of cases that go through the office, the cost effectiveness of the program and whether the daily interviewing system is impacting the area's jail population.

"I think counties are going to be looking to see how successful Val Verde is. So far, every indication I have had is the office is doing a wonderful job. Once others see that, I believe more jurisdictions will seriously consider the advantages of establishing a regional office, especially in the rural areas," said Jim Bethke, executive director of the Task Force on Indigent Defense. "More and more jurisdictions are looking at this as an alternative to just purely assigned counsel."

Need a public defender office? Ask these questions.

The "Blueprint for Creating a Public Defender Office in Texas" recommends that county officials ask the following questions when determining whether a public defender office is appropriate:

- What effect would a public defender have on the quality of criminal justice delivered?
- Would a public defender be as good, better or worse than a privately assigned counsel?
- Would the local criminal defense bar support a public defender office or rebel against the establishment of such an office?
- How much would a public defender office cost?
- How would the cost of a public defender office compare to current expenditures?
- What will be the long-term financial impact to the county?
- Would the judiciary utilize the public defender office so that economies of scale can be realized?
- Does the county have the resources to adequately fund such an office?
- Why change if the current system appears to be functioning adequately?
- How much effort and time will be needed to obtain the local political buy-in to put in place an effective and efficient public defender office?

Bexar County still uses a rotating court appointed attorney system for its regular cases, but it began exploring a public defender office for appellate cases after appellate judges began noting that many of the appeals filed in the county were poorly written and researched. Private attorneys were effectively turning in poor work, or no work at all, because the appeals work was too cumbersome for the pay.

“Appeals is a very specialized area,” said Angela Moore, the county’s new chief appellate public defender, adding that the office was also easier on county officials to start and experiment with, because fewer attorneys are needed since there are fewer appeals than there are cases.

Moore noted that even after the public defender office opened, some appeals cases were still being assigned to private attorneys who apparently didn’t want the work.

“Just this last week, three cases were sent to us because the original attorneys never finished their appeals. They basically abandoned their client,” she said. “The judges know that when a case is assigned to a public defender office, it’s taken care of. They don’t have to baby-sit the case.”

Since her office opened in October 2005, it has taken in more than 400 appeals cases. The office is designed so that attorney’s workloads, and not caseloads, are capped, and once the cap has been reached, cases are handed to qualified private attorneys on a rotating basis until the public defenders’ workloads lighten. Cases are also still given to private attorneys if there’s a conflict, such as when more than one defendant involved in a crime is appealing a verdict, or if a defendant asks that his original assigned counsel stay on the case.

“I certainly believe the private bar plays a very important role in the criminal justice system,” Moore said, adding that her office strives to be an asset to those lawyers still handling appeals.

In Bexar County, figures show that the average cost per appellate case handled by an court-appointed attorney is around \$3,000. The APDO in its first year of service handled 235 cases, so the total cost without the public defender’s office would have been somewhere around \$705,000. The public defender’s office actual operating costs for that year was just \$446,890 – or an average of \$1,901 – so the county saved an estimated \$258,110. That figure does not include grant funding the county is receiving from the Task Force, Moore said.

She said her area is looking to expand its public defender’s office in two ways: the county is investigating the feasibility of starting a public defender office that specializes in mental health cases and jurisdictions within The Fourth Court of Appeals are considering expanding her office to help cover appeals cases from the other 31 counties in the area.

“Our cost-effectiveness is amazing,” she said, adding that she believes other counties could benefit by taking the regional approach.

Hidalgo County also started a public defender office in October 2005. The office only takes on 25 percent of the county’s misdemeanor cases; attorney appointments in all felony indigent cases and the other 75 percent of misdemeanor cases are still based on the assigned counsel system.

Hidalgo County settled on the specialized defender office because it was looking for a way to curb costs and lower jail overcrowding. The county wanted to see if it could cut the jail population down by focusing on inmates who were taking up space because of petty crimes while somehow stabilizing its indigent defense budget. According to one report, on one day in October 2005, there were 1,106 defendants being held at the Hidalgo County Jail, 30 percent of whom were being held pretrial on misdemeanor offenses.

The office is staffed with a chief public defender, Jaime Gonzalez (a former prosecutor), five assistant public defenders, an investigator, an administrative assistant and a first assistant public defender. This year’s budget for the office was \$486,000.

Gonzalez said he did believe the grant funding aided his local officials in their decision to start a public defender office, since it took away the inherent financial risk.

“They wanted to justify to those people who said it wasn’t going to be a needed program that there would be substantial savings,” he said, adding that he believes the county could end up expanding the office to include felony cases in due time. “We are going to have to build up the office, build up the salary before we can do the felony cases. The thinking is, let’s show results first, now, and then do felony cases. The local officials wanted to start off slow to see how the program would work and then expand from there.”

So far, the results have been compelling. Since the office has opened, the jail population is down an average 200 inmates a day, though Gonzalez can’t take full credit, as the county made improvements in the bonding process and District Attorney’s office as well. Regardless, the county no longer has to house inmates in nearby counties.

Gonzalez said he does not know if a public defender office would be cost-effective in all counties, but that he believes the office is essential for Hidalgo because of the county’s large low-income and undocumented population. The same is true of other counties with public defender offices, such as Val Verde, El Paso and Webb. Willacy County also has a large low-income population and has just been approved to receive a discretionary grant to start a public defender office.

“If we show the progress that we are showing, I’m positive the county will pick us up and fund 100 percent of our budget,” he said.

Just this last week, three cases were sent to us because the original attorneys never finished their appeals. They basically abandoned their client. The judges know that when a case is assigned to a public defender office, it’s taken care of. They don’t have to baby-sit the case.

Assigned Counsel was Original Solution to Indigent Defense, but Availability of Grants May Take Texas in New Direction

The Constitution of the United States of America in its Sixth Amendment guarantees all Americans accused of a crime the right to counsel, but it wasn't until 1963 that the U.S. Supreme Court established that indigent persons accused of a crime in state court had the right to court-appointed counsel at taxpayer's expense.

At the time when the ruling came down and states had to establish a system of carrying out such a right, most states and jurisdictions created public defender offices, in which an attorney or group of attorneys became public servants with the sole job of defending the indigent. In the worst-case scenarios, those attorneys haven't been paid as well as their private counterparts and their offices have been badly underfunded, but an attorney was available for indigent defendants nonetheless.

Texas took a slightly different approach than other states, with the state deciding to pass the buck to counties and let counties determine how to best represent indigent defendants. Starting up a public office is complicated and costly, so most Texas counties took a simpler approach: assigned counsel, in which judges appoint a private practicing lawyer in the area to an indigent's case in exchange for a small fee.

"The state of Texas basically told counties, go forth and set this up," said Jim Bethke, the executive director of the Task Force on Indigent Defense, adding that, in many areas, the system has adapted and progressed into a fine-driving vehicle to carry out the indigent defense mandates.

The assigned counsel system in general does have its merits. It allows judges the flexibility of appointing the best person for the job. It allows indigent defendants access to highly qualified and experienced attorneys. It utilizes an existing resource. It spreads the indigent workload out among the community, so no one person or office is overloaded by the mandate. It helps the local bar association members and smaller law practices meet their necessary bottom line.

It's just that many believe cost-effectiveness and affordability are not one of those merits. Plus, there are other arguable downsides: judges who use cronyism to appoint attorneys to cases; lawyers with more important things to do with their time; private

practitioners who don't have the resources to properly defend clients who can't afford to pay; inexperienced attorneys getting assigned cases outside their specialty.

Even before the Texas Fair Defense Act was passed in 2001 as a reenforcement to the 1963 decision, several counties had determined that the assigned counsel system wasn't working for them, at least, not by itself. El Paso, Dallas, Colorado, Webb and Wichita counties had all had long-standing public defender offices prior to 2001, and Travis County has also had a juvenile public defender office for decades. Cameron County had just established a juvenile public defender office in 1999. Those counties developed the offices for different reasons – in El Paso, it was in response to a lawsuit – but other counties did not jump on board.

That is, until several years after Senate Bill 7, which not only established new regulations for indigent defense, but also created the Task Force on Indigent Defense to help administer new grants to be used for improving indigent defense systems.

Since its inception, the Task Force has focused on collecting and analyzing data on those public defender offices already in place. That data has implied that public defender offices have been successful in keeping costs down on an average case-by-case basis when compared to counties using assigned counsel systems, and the Task Force has since continued to create more and more resources geared toward building new models of the offices.

Much of its discretionary grant funds have been used to create model public defender offices. In the past two years, counties have created an appellate public defender office, a misdemeanor public defender office, the nation's first stand-alone mental health public defender office and the state's first regional public defender office, which is also the first public defender office in the state run by a non-profit.

"As with any government function, if you start something new, you are taking a risk," said Task Force Grants Administrator Bryan Wilson, adding that the grants help. "You are taking a lot of the start-up cost and the risk associated with it and pushing it off onto the state. And the grant starts by covering 80 percent of the costs, then 60, then 40, then 20, so you are loading up with state dollars on

the front end, when you have to buy all your computers and office supplies."

Bexar County Commissioner Tommy Adkisson said he didn't think his county would have become involved with a public defender office if it weren't for the state grant funding, but that he now believes such offices are a viable solution to the rising costs of indigent defense due to Senate Bill 7.

"We've had a very dismal experience with the financial end and the exuberant costs of indigent defense. I think we were spending somewhere at or near \$3 million a year and then it went up to \$8, \$9, \$10 million a year," Adkisson said, adding that once the county was offered the opportunity to participate in the grant program, officials decided it wasn't something they could responsibly pass up. Opposition to the office was minimal, he added.

"We viewed public defender offices as being potential opportunities for us to put a lid on the ever sky-rocketing cost of the mandate," he said, adding that he believes the county will consider expanding the office if it continues with its cost effectiveness and high level of quality. "I think it's worked out pretty decently so far. Like everything else, time will tell how it shakes out."

But Wilson said that there's still a risk associated with the program, even when grant money is involved. "It came up so many times in Bexar County, if we build this office, do we, the commissioners court, have the trigger? Can we kill this program if it proves ineffective?" Wilson said. "If the commissioners came to believe that this was a really bad deal for them, they'd be able to bring it to an end."

In the future, counties may have to take on the risk themselves without the aid of grant funding if they want a public defender office, especially if they are looking to replicate a program already in place.

"We're addressing different specializations within these grants. So far I haven't had anyone come in and ask for a repeat of this kind of program. We would have to score it in accordance with our priorities," Wilson said, adding that duplicate programs are not a priority for the discretionary grant program, though the Task Force is still interested in regional programs and in creating programs for counties with populations less than 250,000 and 50,000. "Any time that counties can come to-

gether to solve a problem across a geographical area, we consider that a good thing.”

One idea that may stand a good chance of funding in the future is a regional public defender office to oversee capital murder and death penalty cases in the Panhandle and West Texas area.

David Slayton, the director of court administration in Lubbock County, has been working to build the state’s first regional public defender office for capital cases. Should it receive grant funding from the Task Force, the office would service the 7th and 9th Administrative Judicial Regions, an area which covers the Panhandle and then some, for a total of 85 counties. “When we are criticized about something from other states, we are often criticized for our capital defense, how it is decentralized and willy-nilly,” he said.

Slayton traveled around the region to build support for the idea, and received little opposition, even though discussions about a regular public defender office for Lubbock had floated around the county several years ago and had been stopped in part by objections from local bar members.

“This is an opportunity to really centralize the process,” Bethke said. “I am excited about the will of the people to take on this new initiative. Texas is the only state in the nation that has the death penalty that does not have some sort of centralized office.”

Capital cases are different from regular cases in many ways. They are much more ex-

pensive and require a lot more time and effort on behalf of the attorneys. A county will often spend between \$100,000 and \$250,000 on one capital case, if not more. That’s a big expense, especially for something that may or may not happen in any given year, especially when the possibility exists that a county will have to pay for three or four such cases in a given year. And even though a county spends a lot of money on a capital murder case, it’s still often not a full reimbursement for the attorney’s actual efforts.

According to the proposal so far, all counties in the region would help fund the capital murder office, and the cost per county will be dependant on the county’s population and number of prior capital murder cases, with the smallest counties paying \$1,000 per year. If no grant funding is received, the largest county involved, Lubbock, would pay around \$127,000 per year. Since Lubbock averages 2.5 capital murder cases a year, that’s less than half what it may otherwise spend. Smaller counties that do not have death penalty cases may spend more over the short term, but the office would be insurance for them; theoretically, it’ll pay off if they have a capital murder case in the next 100 to 200 years.

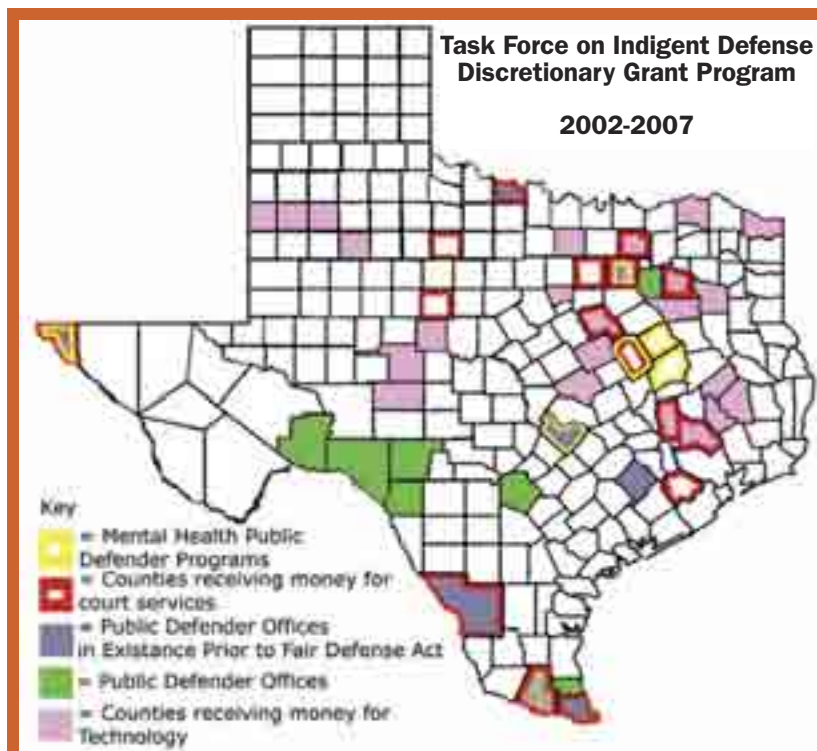
“The cost benefit to the county is huge,” he said. “I have not heard of any county at all complain about the fact that they’ll be able to know what the basic costs of these cases will be every year. It is really good insurance, it is cheap insurance. I wanted to make sure

that even the smallest of counties would get into this.”

Slayton anticipates that the office would include a chief public defender, four assistant defenders, and six other staff members. The assistant defenders, he said, would hopefully be spread through out the region and would work by telecommuting to the main office in Lubbock, so that way attorneys can be assigned to cases according in part to their geographical proximity to the client.

Some of those who have attended the meetings have brought up some concerns, like how to ensure the office will only be used for death penalty cases and figuring out a smooth process for taking public defenders off non-death penalty cases, but Slayton said he’s been able to work out solutions. Long-term, the biggest challenge may be determining what happens should a county decide they no longer want to be a part of the regional office. So far, response to the idea has been so favorable that Slayton is actually hopeful the project won’t require a local match for the first year, which he said may be crucial, since the office would be reliant on all counties’ continued participation.

“If we had enough counties drop out, it would become cost prohibitive. Right now, the advantage is spreading the cost out,” Slayton said, adding that he predicts interest in such an office will only grow. “Is this a step in the direction of a statewide public defender for capital murder? We wouldn’t be offended.”



Since the Fair Defense Act passed, 46 counties have been awarded discretionary grants from the Task Force on Indigent Defense.

Counties receiving funding for technology improvements, including video conferencing, data management systems and integrated information systems include: Bell, Hidalgo, Dallas, Lamar, Montgomery, Smith, Travis, Wichita and Wise in 2003; Dallas, Tarrant and Travis in 2004; Collin, Grimes, Henderson, Hockley, McLennan, Tom Green and Van Zandt in 2005; Hill, Hood and Polk in 2006; and Lubbock in 2007.

Counties receiving funding for court services improvements, including indigent defense coordinators, a forensic resources coordinator and a centralized indigency determination magistration project, include: Cameron, Collin, Dallas, Ft. Bend, Haskell, Hidalgo, Montgomery, Taylor, Van Zandt and Wichita in 2003; Limestone and Webb in 2004; and El Paso, Grimes, Hill and Tarrant in 2005.

Counties receiving money for public defender’s offices include: Bexar and Hidalgo in 2005; Val Verde, Edwards, Terrell and Kinney for a regional office in 2006; and Kaufman and Willacy in 2007.

Counties receiving grant funds for the creation of a mental health public defender office include: El Paso in 2004; Dallas and Limestone, Freestone and Leon for a regional office in 2005; and Travis in 2007.

Counties that already had public defender offices in existence prior to the Fair Defense Act were Travis, Dallas, El Paso, Colorado, Webb, Wichita and Cameron.

Data, Arguments Building in Favor of Public Defender Offices

In general, those most familiar with indigent defense can talk longer and more extensively about the benefits of public defender offices than they can about the negatives. Even still, many county officials are cautious when it comes to switching away from that fine-driving indigent defense vehicle and moving toward the semi-truck type vehicle that public defender offices can provide.

Part of the problem is that the numerical data in the past, and even still now, hasn't been at all conclusive.

For example, six counties had been operating public defender offices prior to the Fair Defense Act, and after the Fair Defense Act, analysis from the "Blueprint for Creating a Public Defender Office in Texas" report showed that only two of those county offices were operating significantly below the costs of those counties' assigned counsel systems.

Faring best were Cameron and Dallas counties. In Cameron, where the poverty rate is 35.25 percent, the average cost per indigent case in Fiscal Year 2003 was \$411, a figure that represents cases given to both the public defender's office and to assigned counsel. The average cost per case within the public defender's office, which specialized in juvenile offenses, was just \$124. In Dallas County, with a poverty rate of 11 percent, the overall average cost per case was \$358 in fiscal year 2003; the average cost per case within the public defender's office was just \$184.

Faring okay were Colorado, Travis and Wichita counties. In Colorado County, where the poverty rate is 20.07 percent, the average cost per case in Fiscal Year 2003 was \$547, which includes cases given to both the public defender's office and to assigned counsel. The average cost per case within the public defender's office was \$503. In Travis County, which has a 13.09 percent poverty rate and operates a specialized juvenile public defender's office, the overall average cost per case was \$380.42. The average cost per case within the public defender's office was \$354.82. In Wichita County, the poverty rate is 16 percent. Its overall average cost per case was \$364, but within the public defender's office, the average cost per case was just \$308.

The difference between the two figures was smallest in El Paso County, which has a poverty rate of 27.89 percent. There, the overall average cost per case was \$363, and the average cost per case within the public defender's office was \$348.

Faring the worst cost-wise appeared to be Webb County. There, the overall indigent defense cost per case was \$424; within the public defender's office, the average cost per case was higher, at \$530. The poverty rate there is 35.17 percent.

But those figures only take into account the number of cases and cost. They don't take into account other considerations, such as the complexities of the cases or how and why a case would be assigned to the public defender office as opposed to assigned counsel. And for counties that didn't already have a public defender's office, start up costs weren't taken into consideration.

The programs that have started since the Fair Defense Act are still all too new to offer anything more than an initial analysis.

However, further reports generated by and for the Task Force continue to state that "there is evidence to suggest that public defenders can provide comparable quality legal services at lower cost than other delivery methods. Statewide, cost per case is lower for indigent defendants represented by public defenders – a pattern that has held over a three-year period," even though that difference fell in 2005 for both misdemeanor and felony cases, states the Task Force report

"Evidence for the Feasibility of Public Defender Offices in Texas."

The feasibility report, available online at the Task Force Website at www.courts.state.tx.us/tfid, lists several advantages to public defender offices, besides the cost per case differences. Those advantages, according to the report, are:

- Budget stability;
- The institutional infrastructure that ensures quality counsel;
- The ability to set established performance standards;
- Possible improved access to investigators through staff resources;
- Assurance that indigent attorneys will have specialization in criminal law, versus another field; and
- Increased ability to monitor the quality of legal work being provided by utilizing the chief public defender as the single point of contact for any issues that may arise, among others.

"One of the things that argue for a public defender system are that you get a cadre of people together who are experts in one specific area of the law," said Robert Riley, a long time public defender in El Paso County who once had a private practice office for five years. He added that if he has a question about how to handle a case or a particular aspect of the law, all he has to do is walk down the hall and into the next office, where his boss works, or any other office down the hall. "There are a lot of people I can go to, to ask questions," he said, pointing out that every person in his office is a criminal law specialist, and none of them has to devote time to personal injury cases, or tax cases or other types of cases that a practicing attorney in a private practice may take on.

But El Paso is a large office, a long-established office. According to its website, the office has 30 public defense attorneys and about 20 support staff. Riley describes the office as "pretty old" with "a lot of experience" – about 540 years worth, total, with the average attorney having 18 years of practicing law currently under their belts, as well as a draw of newer, younger attorneys who are stealing that collective experience and learning from it.

"Collectively, we have just about seen it all," Riley said.

Angela Moore, the chief appellate public defender in Bexar County, said she believes there are several reasons why counties should create public defender offices in their area.

"The accountability of attorneys is so much higher when you have an actual public defender office," said Moore, who may appear biased but has held many roles as an attorney, including as a private practitioner, a county attorney, an Assistant U.S. Attorney and an Assistant Criminal District Attorney. "It's extremely difficult to compete and provide excellent work as a solo practitioner, simply because of economies of scale."

But some argue that creating a public defender office could hamper the system, because the indigent would no longer have as much access to the best private practice criminal defense attorneys. A new public defender office may not have that collective experience immediately, and many suburban or rural offices will never have as many personnel resources and benefits as the El Paso office.

Public defender offices have had their share of bad raps and publicity, mostly due to chronic underfunding. The City of New Orleans, after Hurricane Katrina, had to almost close down its already-starving public defender office because 75 percent of its budget came from traffic ticket revenue. The office, which once had 39 public defenders, was cut down to just 8, each making about \$29,000 a



Two counties, Travis and Cameron, have public defender offices devoted entirely to helping juveniles.

year, according to news reports, which also found that even prior to Katrina, the system was letting defendants go 400 days without interviews, and some defendants who had seen their public defender said the attorneys were more interested in crossword puzzles than providing a defense.

Also, a study published in 2006 by two Emory University economists comparing the results of public defenders to private attorneys in Denver could be interpreted to show that defendants don't have a lot of faith in their public defenders, and that public defenders don't get the results that private attorneys do.

The study, titled "An Empirical Study of Public Defender Effectiveness: Self-Selection by the 'Marginally Indigent'" and published in the *Ohio State Journal of Criminal Law*, looked at 5,224 felony criminal cases filed in Denver in 2002 and took into account the amount of jail time defendants received. The study found that the average sentence for defendants who used public defenders was three to five years longer than the average sentence for defendants who used private attorneys.

However, the study did not take into account court-assigned attorneys (though that would be from the same pool of lawyers as the private attorneys); it only compared the work and outcomes of free-market attorneys to public defenders. And Colorado State Judge Morris Hoffman, who co-wrote the study, theorized that the reason behind the longer sentences is because defendants are more likely to

use public defender offices when they are guilty, and more likely to seek out private counsel when they are innocent.

"Our data suggested that, contrary to the law's rather binary notion of indigency, a large chunk of felony criminal defendants are what we have called 'marginally indigent.' They could, if they had to, tap hidden resources, or the resources of family and friends, to retain private lawyers," Morris wrote in a *New York Times* opinion piece. "Imagine a marginally indigent defendant charged with first degree murder, and imagine that he is innocent. Wouldn't that defendant do everything in his power to marshal the resources to hire a private lawyer, if he believed, rightly or wrongly, that the private lawyer were (sic) more likely to achieve an acquittal?"

Paradoxically, problems with funding of public defender offices in other states have in some cases led to discussions about privatizing the indigent defense systems, according to Morris's opinion piece.

Proponents of the assigned counsel system can list other pitfalls to creating a public defender office. Not only is a public defender office easy to underfund, it's also simple to overload, and low salaries may make it difficult to attract experienced lawyers to the office.

To avoid those pitfalls, Moore recommended that public defender offices be accountable to an oversight committee, so that committee members can help determine the office's budget, productivity, quality and operating procedures. Moore herself operates under such a committee, as does the new Hidalgo County Public Defender's Office, and said the setup helps assure the quality of the department.

In a May 2006 analysis of the Hidalgo and Bexar county public defender offices, The Spangenberg Group, an independent research and consulting firm specializing in civil and criminal justice-system related topics, had other advice for making sure the offices run smoothly. The advice included:

- Using workload standards that take into consideration complexity of the cases instead of caseload standards, especially at the appellate level;
- Having briefs reviewed by a second defender before they are



Public Defenders say there are a variety of reasons why they are able to provide a good defense for their clients while remaining cost-effective for counties, including that their time and salary are devoted entirely to helping indigent clients and not other private cases.

filed;

- Standardizing all forms that can be standardized and making forms available to all attorneys in the office via an internal computerized network;
- Making sure all offices have written conflict policies that include caseloads and representation of co-defendants; and
- Include policies on how an office will count, weigh and assign cases and handle performance of outside legal work.

Another worry is that a public defender office may have problems regarding its independence from the rest of the system.

In El Paso, the public defender office recently began getting money in its budget for use of outside experts. That's both good and bad – good because the money is there, but bad because some judges may use that budget as an excuse not to give attorneys additional money when they request it for a case.

"You have to have a spine," said Riley. "You go to the court for

funding for some experts, and they are saying, 'well, you should have the money in your budget,' and they are looking at anything extra for the public defender's office as a county burden," he said, adding that private attorneys do not experience that sort of relationship with judges, because they are paid a fee as salary and do not have any other budget to use.

"We have to fight them so we can get the resources we need, but not make them hate us so much that it hurts the client," Riley added.

But Moore said having a public defender office makes it easier for attorneys to stay independent from the court system, since salaries aren't dependent on the district judges and courts, whereas a court-assigned attorney gets paid by vouchers. If a judge decides he or she doesn't like a brief submitted by the attorney, they could conceivably cut the pay the attorney receives, Moore said.

On the one hand, that means that court-assigned attorneys' pay may be tied to the quality of their work; on the other hand, Moore said, it may mean an attorney won't put as much effort into a brief, knowing he or she will probably not receive as much money for their work as they think its worth.

"We don't file vouchers, so judges don't have any say over what we are paid," Moore said. "I believe that's imperative."

But by far the biggest challenges to starting a public defender office are getting commissioner court funding and bringing the legal community – the district judges and local bar associations – on board.

Jaime Gonzalez, the chief public defender in Hidalgo County, said that his office has a good relationship with the local defense bar, though that wasn't immediately the case.

"At first we were seen as a competitor, because we were taking cases away from them. We were seen as picking their pockets out of potential income. But there are so many cases to go around," said Gonzalez, adding that he estimates it took about six months for the sentiment to change. "They thought their income based on court-appointed cases was going to go down a lot, but they've seen that it hasn't gone down

It's really good to get people who like to fight, who like to defend the constitution, or who believe in defending the rights of poor people.

that much. People began to realize, it's not that big of a change."

Task Force on Indigent Defense Executive Director Jim Bethke said all or most of the public defender offices in the state currently share about 50 percent of their appointments with the private bar.

"In reality, I think the maximum that a public defender office is going to handle would be 80 to 85 percent, and we have no jurisdiction close to that," Bethke said. "There is nothing to say that you couldn't set up a system that handles 80 percent of the cases."

Gonzalez said the local bar members also came on board after realizing that the office was a resource to them, and vice versa.

"I still rely on them for advice and for tips on how to manage certain cases and vice versa," he said, adding that the grant funding and cost savings to the county can go toward helping the local defense bar. The grant funding goes toward continuing education for the county's public defenders – who Gonzalez said are able to attend more seminars than their private attorney counterparts – and toward producing manuals and other resources open to all bar members. "It's just a matter of talking to the local defense bar and telling them, 'We are on your side, we are not trying to take clients away from you.'"

Some attorneys and judges are also concerned that a public defender office may lack proper funding or be abused as a resource by the courts, and that the quality of defense may therefore suffer.

"They just wanted to make sure it was done correctly. They didn't want us to be a conveyor belt for criminal cases," said Gonzalez, about some attorneys' initial opposition to his office.

From a commissioner's court point of view, the most effective argument against creating a public defender office is "if it ain't broke, don't fix it" and having to get together funding for something new, something that could end up not working, either because of political-type reasons – control, power, funding – or because of lack of support from the legal community, who can bog down public defenders by throwing too many cases and not enough money at the office.

"I think we have kind of talked about starting a public defender office in passing, but we have not done a formal study," said Bell County Judge Jon Burrows, adding that he has always been pleased by the private bar's work on the county's indigent cases. "We follow what other counties are doing, and when the reports are out, I'm sure we will look at those and see if there is information there that shows that we should reopen the issue."

He added that he sees several disadvantages in his county for starting a public defender office.

"The disadvantage would be that there are different levels of expertise that may be involved with staffing a public defender office," he said, adding that he believes the office would have a hard time employing attorneys who are as experienced as the private attorneys

currently being assigned cases. He said office space was another concern he had, and that, regardless, he believed the assigned counsel system was the best choice for his county. "I think we are far away from creating a public defender office, if that should ever happen. Our system appears to be working quite well."

Riley said he didn't believe most new public defender offices would be challenged by finding experienced attorneys wanting to work there. He cited many of his own reasons for leaving his own private practice and going back to public defense.

One benefit of switching from a private practice into a public defender office, he said, was the ability to perform a public service, not just by giving the indigent their constitutional right to a fair trial, but also through community service programs public defender offices, because they are tied to the county budget and saving taxpayer dollars, can benefit from developing. The El Paso office once used grant funding to start a program that focused on taking juveniles who had gotten into trouble and keeping their younger siblings out of trouble. Another grant supported an outreach program designed to keep their clients from re-entering the system, in which attorneys worked with social workers in the office to find clients things like affordable housing and food stamps.

There are also the benefits of having health insurance and retirement, not having to squeeze clients into paying for services rendered and not having to deal with the other annoyances of running a business.

Then, there's the job itself: the romance between the lawyer and the courtroom, the law, the speech, the trial. "I love the trial work. When I was a solo practitioner, it was really hard on me to go out and try a case that takes a week. But here, it's okay because there's still enough people here that all the work is going to get done if I'm in a trial," Riley said. "It's really good to get people who like to fight, who like to defend the constitution, or who believe in defending the rights of poor people. A lot of people can be highly motivated by money, but we never have rich clients. A public defender is not going to get great gobs of money, but they are going to be doing good work."

"In law school, you always have that romantic notion that you're going to be the voice for the voiceless, and then reality settles in," said Gonzalez, whose office sees a lot of illegal immigrants who are in the county as laborers. Another large chunk of his clientele are young people, mostly under 25, accused of drug crimes, driving while intoxicated or minor thefts. "I applied because I thought I could make a difference. I love what we do, we go in there and we help people that are here illegally, who have the same rights as any other citizen, but because they don't know their rights, they may plead guilty to something, and the guilty plea may affect their immigration status for the next 20 years."

Counties, Task Force work to improve assigned counsel, contract defender systems

Not all counties are choosing to switch over to public defender offices, and experts say there are a variety of approaches to take when it comes to improving indigent defense and the appointed attorney process in order to meet the requirements of the Texas Fair Defense Act.

“We have enough attorneys that are willing to serve in that capacity as appointed counsel, and our county is large enough that there is a large enough pool of qualified attorneys, and that makes the appointment system work,” said Bell County Judge Jon Burrows, a member of the Task Force on Indigent Defense. “Our approach has been that, right now, our system is working well.”

The Fair Defense Act required that defendants have access to counsel within one to three working days, that counties come up with a neutral criteria for assigning attorneys to indigent cases, that attorneys be assigned cases based on their experience and qualifications in accordance with the indigent case in question, that counties adopt a locally

defined standard and process for declaring indigence and that attorneys be compensated based on a standardized fee schedule set up by the county and that counties file reports on their individual defense costs and procedures. The Act also creates rules for setting up a public defender’s office, should a county decide to do so.

review and approve all the applications for counsel, and some are in charge of assigning the attorneys to cases. The coordinator can also keep track of the rotating attorney lists, monitor attorneys to ensure they continue meeting educational requirements and keep data on a county’s indigent defense statistics, among other duties.

Attorneys serving under a contract should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice.

Instead of changing the system, Bell County, like a multitude of other counties, hired an indigent defense coordinator, choosing to focus on improving the efficiency and fairness of the appointment process. Indigent Defense Coordinators often

“We hired an indigent defense coordinator when the statute was enacted because it was apparent that additional administrative duties were going to be required in order to track the time frames of how long a defendant went without counsel, and that the size of the existing staff was just not going to be sufficient. We determined it would be best to create a position to deal solely with that one aspect,” Burrows said.

Soon after Bell County created its position, other counties began creating similar positions. According to the Task Force, Cameron, Collin, Dallas, Ft. Bend, Haskell, Hidalgo, Montgomery, Taylor, Van Zandt, Wichita, Webb, Grimes and Hill counties all received discretionary grant funding for indigent defense coordinator personnel, though other counties have created the post as well.

“It keeps us in compliance with the requirements of the system, it helps move the justice process smoothly throughout the county and it helps us make sure that our appointments are made in a timely manner,” Burrows said.

In 2005, Tarrant County took a slightly different approach. Instead of creating a public defender office, the county decided to retool its court appointed attorneys program by improving the process in which requests for counsel are taken and granted.

Its previous decentralized process sent inmates to one of the county’s 41 municipal judges, who would give inmates requesting a court appointed attorney an affidavit of

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indigence form, which the inmate or jailers would fill out. The judge would review the form and then make a decision regarding the request for counsel, and the approved request would then be handled by a centralized office, created in 2001 and called the Office of Attorney Appointments, which would select the attorney. Because 41 different judges were reviewing requests for indigent counsel, there was a "disparate application of the standard of indigency," according to a review of the process by the TFID.

That process changed when Tarrant County received a \$229,312 grant from the TFID to hire four financial information officers, whose job it is to interview people arrested and collect financial information on those who request indigent counsel in criminal court. Instead of being reviewed by any of the 41 judges, the forms all go to a part-time county magistrate, Judge Matt King, who is responsible for reviewing and accepting or denying each of the requests himself. In county court, individual judges still make the indigency determinations, and a common practice is to declare anyone who could not make bail indigent.

While most counties so far are sticking with the assigned counsel appointment system, 27 counties are using contract defender systems at some level in their courts. In January, the Task Force implemented new regulations for those counties.

"The change is that there weren't rules before and now there are," said Wesley Shackelford, special counsel to the Task Force, add-

ing that the Fair Defense Act only addressed assigned counsel and public defender programs. "We set up some general parameters to how these contracts should be formed."

The new regulations focus on contracting procedures, the use of an advisory board to determine which proposal wins the county's contract and the elements to be included in the contract for indigent defense.

"We've brought into the process an open bidding process where you have to publish an RFP and then any attorney who meets the qualifications is eligible to submit a proposal," Shackelford said, adding that, in the past, a county was not required to go through a bidding process when determining which private attorneys it would contract with for its indigent defense services. "I think it will open up the process."

In order to help counties implement the changes, the regulations include commentary by the Task Force. In its commentary, the Task Force said it determined the bidding process was necessary because "attorneys serving under a contract should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice." The Task Force recommends that a county using a contract system form an advisory board to assist in the bidding and selection process, but does not require that counties take such a step.

A list of elements that must be included in the contracts was also included in the regulations.

"I think that's just going to improve the overall process. I think a lot of counties enter into the contracts and don't include all of the eventual actualities," Shackelford said, "Contracts that I have typically seen are quite brief. They focus on the amount of money, the time frame, the types of cases that are typically covered, but I think one of the important items that need to be addressed is the caseload. They now have to have some type of maximum caseload, which wasn't always done."

The Task Force is rolling with other projects as well. In November 2005, the Task Force released its five-year strategic plan for indigent defense, in which it recommended a review of the cost-effectiveness of methods used to determine whether a person is qualified to receive indigent defense, a process which is still ongoing, said Task Force Executive Director Jim Bethke.

For that study, the Task Force reviewed the indigency determination processes in Collin, Van Zandt and Tarrant counties. Collin County uses a highly comprehensive process in which the county verifies every application for indigency. Tarrant and Van Zandt had been more lenient in its verifications, but for the purposes of the study, the counties also began verifying each application, and the Task Force is now analyzing the costs of their lenient policies against the cost associated with having a more strict policy. The report should be published soon and available on the Task Force website at www.courts.state.tx.us/tfid.

"Are people lying on their affidavit of indigence? Are they cheating the system? How many people are lying?" Bethke said. "I don't think the study is going to show that it's cost effective to verify 100 percent of the affidavits, but I think the study is going to show that some type of auditing process, say checking 10 percent, is cost-effective and will enhance public trust and confidence."

In its strategic plan, the Task Force also promised to look at ways to increase qualification standards for attorneys without decreasing the pool of attorneys qualified to handle indigent cases, as well as to study how to better maximize the use of experts and investigators for indigent cases. It vowed to gather more data regarding indigent defense practices around the state, provide more analysis as to what the data means and take that analysis to help make best practices decisions and improvements to the indigent defense process. *



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