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Indigent Defendants Find Legislative Champion in Task Force By Mark Donald

Texas Lawyer

It wasn't easy getting your way with the Texas Legislature this session -- what with all its infighting and back-biting and uprisings. If lobbyists weren't advocating for guns (see: Castle Doctrine and traveling defense) or God (see: putting "under God" in the Texas pledge and religious liberty in the classroom) they might have found their bills stuck in House Calendar Committee hell, like so many other pieces of legislation that died there.

A surprising group found itself right up there with guns and God: The state's indigent defendants were well represented in this past session by the Task Force on Indigent Defense, a small state oversight agency created under the Texas Fair Defense Act of 2001 (FDA) to monitor and improve indigent defense practices.

Implementing that act has contributed to a dramatic 50 percent increase in the amount spent on indigent defense services. County governments are alarmed by the increase, which they are forced to absorb -- to the detriment of their budgets.

On Aug. 24, 2006, the task force released its "Recommended Legislative Changes" for the 80th Legislature. Of the eight items on its agenda, five were then enacted into law. Although two of the five were somewhat ministerial for the agency, the others included S.B. 168, which eliminated the scheduled 2007 sunset of the once-controversial State Bar of Texas mandatory legal services fee of \$65 per licensed attorney. In 2003, the State Bar would only endorse voluntary rather than mandatory fees to help fund legal aid to the poor. But this session -- which started on Jan. 9 and ended on May 28 -- was different: The State Bar remained neutral on the issue. [See "Modest Proposal?" Texas Lawyer, Sept. 18, 2006, page 1.]

"Other than a few solos who testified against the bill, I suppose most lawyers have gotten used to the fee," says Wesley Shackelford, special counsel to the task force. "It is for such a good cause, it skidded right through the Legislature. It passed faster than any of our other legislation."

H.B. 1267 -- which incorporated two task force proposals and sought to expedite and streamline procedures to ensure that court-appointed lawyers get paid -- also became law.

And the agency saw its own funding increase by a whopping 50 percent -- the beneficiary of an amendment to H.B. 1267, which was authored by state Rep.

Aaron Peña, D-Edinburg, and added a \$2 fee on each conviction for a criminal offense.

"I would say we had a good session, and the funding was a nice bonus at the end that we didn't expect," Shackelford says. "You never expect new money from the Legislature."

Peña did not return a telephone call seeking comment before presstime on July 5.

With its support of H.B. 1267, the task force had sought to fix a problem with Article 26.05(c) of the Texas Code of Criminal Procedure. Under the old law, if a trial judge disapproved of the payment amount requested by an appointed attorney, the judge would approve a lesser amount and put his reasons in writing; any attorney who felt shortchanged could appeal the decision to the presiding judge of the administrative judicial district. "The task force heard that some judges will sit on pay vouchers and won't approve or deny them," says Shackelford.

To solve the problem, language has been added to the statute requiring that "[a]n attorney whose request for payment is disapproved or not acted upon within 60 days of submitting a completed form may appeal the disapproval or failure to act. . . ." It would then fall upon the presiding judge to set an appropriate fee.

Another legislative proposal pushed by the task force and attached to the appropriations bill in a rider would have abolished the \$25,000 limitation on fees awarded to court-appointed attorneys representing indigent inmates who allegedly commit crimes while in the custody of the Texas Department of Criminal Justice (TDCJ). This per-attorney, per-biennium cap was the subject of at least one unsuccessful writ of mandamus before the Texas Supreme Court.

In Re: Raymond Wingfield, et al. challenged the Texas state comptroller's action in refusing to pay inmate Wingfield's attorneys' fees in excess of the \$25,000 cap.

Dallas solo Susan Hays, who represented three relators in the mandamus, says she argued that the payment cap denied Wingfield effective assistance of counsel and that requiring his trial counsel to represent him without timely, adequate compensation constituted an unconstitutional taking. "The court denied the petition without comment after asking for a full briefing," she says.

Prior to the ruling, Hays says she had been working on a "legislative fix" and teamed up with the task force's Shackelford to streamline the layered bureaucracy that created "a convoluted and self-defeating" payment system for attorneys representing indigent inmates. Before enactment of H.B. 1267, any court-appointed attorney's fees in excess of \$250 had to be certified by the trial court and then sent to a TDCJ board, which would then request that the Texas State Comptroller's Office pay the money.

"The language of §26.051(h) of the Texas Code of Criminal Procedure was mandatory -- the comptroller has no discretion but to pay," Hays said in an earlier interview with Texas Lawyer. "But because the Legislature had not made a specific appropriation for the funds, the comptroller treated those fees as a miscellaneous claim." And the comptroller would not pay a miscellaneous claim, said Hays, unless it was verified by the

Texas attorney general as a legally enforceable obligation of the state, "which gives the AG veto power over a judge's order and that gets into a whole separation of powers argument."

Although Texas Solicitor General Ted Cruz could not be reached before presstime, the AG's office argued in its mandamus brief that the comptroller can only spend money under a specific appropriation and the only appropriation to date for attorneys' fees in indigent inmate cases is under the state's Miscellaneous Claims Act.

"The real problem was that attorneys didn't want to do these cases, because they didn't know when they would get paid -- it might take six months or a year," says Shackelford. "And for a little county with a big prison system, these cases are a big driver of the criminal justice system."

To fix the problem, Hays and Shackelford helped draft the legislation that would have removed the payment of attorneys' fees from the miscellaneous claims fund with its \$25,000 cap and instead would have made it a line item in the appropriations act, says Hays. But as of presstime there is some confusion as whether the correct line item language made it into the final version of the appropriations act, and the legal effect of the legislation remains uncertain, says Hays.

H.B. 1267 made the appointment of private counsel in indigent inmate cases subject to the Fair Defense Act and streamlined the payment procedures for these attorneys by, among other things, "taking the TDCJ out of the equation," says Shackelford.

Waivers

Although the task force had no hand in shepherding H.B. 1178 through the Legislature, it may help implement the legislation, which sets up new procedures for ensuring that defendants -- indigent or not -- make informed, voluntary waivers of their right to counsel, if they are so inclined.

The Texas Fair Defense Project (TFDP), an advocacy organization that represents the rights of indigent defendants, drew statewide attention to the issue in June 2006, when it filed *Kerry Heckman, et al. v. Williamson County, et al*, a class-action suit brought in state court on behalf of indigent defendants charged with misdemeanors punishable by imprisonment in Williamson County. The plaintiffs allege in their petition that the defendants -- who include three county court-at-law judges who preside over misdemeanor cases -- routinely deny them access to attorneys through methods that include providing "inaccurate and misleading" information about their right to counsel in order to discourage requests for counsel and encouraging defendants to waive their right to counsel and speak directly to prosecutors. The plaintiffs contend, among other things, that the defendants have violated their Sixth Amendment right to counsel and 14th Amendment right to due process of law.

"As far as I am concerned the lawsuit is frivolous," argues Steve Ackley, the civil litigation chief in the Williamson County Attorney's Office who represents the county in the suit. The defendants have filed

a general denial and a plea to the jurisdiction, arguing that the district court in Williamson County lacks jurisdiction to hear the case. "The county's position is that a district court sitting in civil jurisdiction cannot interfere with the pretrial rulings of a criminal court," says Ackley. But on Oct. 4, 2006, visiting Judge Joseph H. Hart from Travis County refused to dismiss the case, and the defendants have filed an interlocutory appeal to the 3rd Court of Appeals.

H.B. 1178 "is definitely related to the issues in the lawsuit," says Andrea Marsh, the director of TFDP and a driving force behind the passage of the legislation. "The bill was really motivated by the fact that we are not going to litigate similar issues in 150 counties, and this was an effort to get this resolved without the need for litigation."

The bill addresses "a constellation of practices across Texas that seek to limit access to counsel," says Marsh.

If they occur as alleged, these practices are more likely to surface in misdemeanor courts, where the volume is high, the stakes are low, and the incentive to move cases efficiently is great. And counties, already strained by budget-busting costs stemming from the increased number of lawyers that their judges must appoint under the FDA, may view a stingy appointment system as a means of curbing those costs.

"If you look at the number of defendants receiving appointed attorneys statewide, Texas falls far below the national benchmark for defendants having access to counsel, and I don't think that is because we have fewer indigent people," Marsh says. "There are structural problems leading people to proceed without counsel in Texas. H.B. 1178 responds to some of these problems but not all of them."

The new law presumes that a waiver of the right to counsel is invalid if, among other things, the prosecutor initiates or encourages an attempt to obtain the waiver from an unrepresented defendant or the court directs or encourages a defendant to communicate with a prosecutor before the court advises the defendant of the right to counsel and the procedure for requesting appointed counsel. Defendants are not prohibited from speaking with prosecutors, but the statute makes it clear, says Marsh, that "when a person appears in court without counsel, the judge needs to make sure every defendant is advised of his right to counsel and has the opportunity to apply for a lawyer before that person has an un-counseled conversation with the prosecutor."

In his testimony before the House Criminal Jurisprudence Committee, Ryan Locker, an assistant county attorney in Brown County, expressed reservations about the bill as originally drafted. Ryan, representing the interests of his county, was concerned that the bill added an additional layer of delay by requiring defendants who had waived their right to counsel to return to court before they could speak with a prosecutor. "You would be shocked at the number of people who say, 'I am guilty, and I just want to get back to work,' " says Locker. "The original bill overcorrected the problem by giving defendants an additional reset. All we wanted to do was make sure we could speak to the people who wanted to speak to us."

Huge Endeavor

To accommodate Locker's concerns, Marsh tweaked the bill, which was authored by state Rep. Ron M. Escobar, D-Kingsville. In its amended form, H.B. 1178 faced no further opposition. But that doesn't mean prosecutors are happy with it, particularly some in Williamson County.

"This is bad legislation that went under the radar screen and was passed by the advocates who sued our county," says Ackley. "I don't have a problem with the waivers. My problem is with the real-world limitation it puts on contact between the state's attorney and defendants," which can be necessary to give prosecutors the discretion they need to dispose of cases. Without judges being able to encourage contact with prosecutors or prosecutors being able to encourage defendants to waive the right to counsel, says Ackley, there will be more kinks in the system and the arraignment process will be slower and more costly.

Cases that were once resolved after one setting now will be reset to accommodate waivers, says Dee Hobbs, criminal courts chief in the Williamson County Attorney's Office. This is not so much because the statute demands it but because Williamson County feels obliged to be overly cautious in its approach to waivers. "We want to be well within the range of compliance with the new statute," Hobbs says.

Locker still wonders who is in a position to enforce the legislation. The State Bar can sanction a prosecutor, he says, but who is going to file the grievance? "Some defense attorney who happens to be in the courtroom and overhears a prosecutor talking to a defendant? Most defense attorneys are not going to take up the charge of that indigent," he says.

To gain statewide compliance with the statute, Marsh is seeking the assistance of the task force, which envisions a role for itself in educating local officials about the new waiver procedures embodied in the statute.

"We hope to convene a small group of stakeholders both from the advocate community and the courts, key people who can strategize with us about how to get the word out," says Shackelford. There will be some kind of educational document or brochure that comes out of this working group."

The task force may be freer to engage in this kind of marketing activity in part because H.B. 1267 has doubled its operating budget, increasing its funding by more than \$7.5 million. Although the task force has yet to commit these new funds, Shackelford anticipates some of it will go toward offsetting county governments' increased expenses for indigent services. Some of the money may be added to the task force's discretionary grant program, which has given start-up funds for new public defenders' offices. On the drawing board is a proposal for an 85-county regional capital defender's office for the 7th and 9th administrative districts, which cover much of West Texas. Four staff attorneys will defend indigents accused in capital cases, replacing an appointment system of private attorneys whose practices often cannot take the financial hit of capital cases. And with 85 counties pooling their resources as an insurance policy against future death Penalty

cases, smaller counties with tight budgets would be protected from the financial drain of capital cases. Shackelford says the capital defender's office hopes to be up and running by the winter of 2008.

"We are excited to see something like this become a model for other regions across the state," Shackelford says. "But because of the complexity of organizing so many counties, it is probably the most challenging project we have ever undertaken."

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