

## **Comments on Formula Grant Change Procedure and Timeline Submitted to the Texas Task Force on Indigent Defense**

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### A. Commenter Identity

As requested in the Task Force's January 2005 Texas Register publication, the following organizations submit the comments in this document:

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None of the organizations or individuals submitting these comments will be impacted in any way by any change in grant formula, except in that all of us work in the public interest to promote the efficient and effective use of limited resources to ensure that all indigent criminal defendants are afforded access to counsel in compliance with all constitutional and statutory requirements.

### B. Comment Summary

We believe that the stated goals of Tex. Gov. Code § 71.062 would best be achieved by changing the grant formula to divide available resources based exclusively on the poverty population in each county. Other improvements upon the current grant formula exist, but they are less effective. They include distributing available resources based upon each county's tax base, the indigent caseload reported in each county, or upon some combination of total population, poverty population, tax base, and indigent caseload. All numbers necessary to apply all formulas discussed below to all counties are available from the Task Force itself and from the Texas Comptroller, and are attached in the appendix to this comment.

### C. Formula Goals Should Determine Formula Choice

Experience proves that the Task Force's choice of grant formula has a direct, immediate impact upon the indigent defense services available throughout Texas. The statute mandates that any formula adopted by the Task Force "distribute [resources] to counties in a fair manner" and "promote compliance by counties with the requirements of state law." Under this mandate, all of the following are valid goals for the Task Force to pursue with its formula choice:

- create incentives to improve the quality of indigent defense services;
- fairly distribute the indigent defense tax burden borne by county taxpayers; and
- enable all counties, regardless of tax base, to meet minimum indigent defense standards.

The Task Force should begin by naming the goals that it is trying to achieve with its formula

choice, and then it may gauge the strength of each formula proposal using these criteria.

Obviously some goals are more controversial than others, in indigent defense as in education. We submit that consideration of each county's indigent defense needs and ability to afford adequate indigent defense services is especially necessary when state and federal constitutional rights are at issue. As the Task Force has reported to the Texas Legislature, the state itself is responsible for ensuring that adequate indigent defense services are available statewide. Though the state has, of course, assigned primary funding responsibility to county governments, the state formula grant is a key means of ensuring that inadequate county tax resources do not lead to delivery of substandard indigent defense services anywhere in Texas. The undeniable reality is that some counties struggle to find the funds necessary to fund adequate indigent defense each year while others simply balance indigent defense funding needs against discretionary programs. The formula grant should therefore take into account the disproportionate burden that Texas's poorer counties bear in meeting constitutional requirements concerning indigent defense.

#### D. The Current Grant Formula is Mediocre

The current formula's virtues are simplicity and objectivity, in that a share of the total available state resources is provided to each county on a per capita basis, as determined by a neutral third party, the U.S. Census bureau, and the number of people in each county is somewhat related to indigent defense caseloads. But the current formula is arguably not fair because it does not account for:

- differences in per-capita indigent defense expenditures in each county;
- the indigent defense caseload differences in each county, especially in border counties that experience high rates of trans-national crime;
- gross disparities in property values subject to ad valorem taxation; or,
- differences in cost of services among counties, particularly in rural counties where attorneys must travel longer distances to provide services.

And entirely apart from the issue of fair distribution, the current formula does nothing to improve quality, since it provides the same share of funds to each county regardless of the efficacy or efficiency of any county's practices, and it does nothing to help those counties least able to afford indigent defense services.

#### E. Poverty Population Is The Superior Formula Basis

Poverty population is the superior indigent defense grant distribution formula because it shares all of the simplicity and objectivity of the current formula, is less susceptible to the attacks on fairness that can be leveled at the current formula, and, unlike the current formula, promotes quality improvement as well as access to the resources needed to meet minimum standards in the poorest counties.

There is much more evidence of the correlation between *poverty* population and the need for indigent defense services than there is between the *total* population and the need for indigent defense services. First, every serious study confirms that poor people are far more likely to be charged with crime than middle-income or wealthy people. *E.g. World Bank Journal of Law and Economics* at 17 (August 2001) (“The main conclusion of the paper is that income inequality, measured by the Gini index, has a significant and positive effect on the incidence of crime.”), [http://econ.worldbank.org/files/15757\\_FajnzylberEtAlInequalityCrime.pdf](http://econ.worldbank.org/files/15757_FajnzylberEtAlInequalityCrime.pdf). Involvement in the criminal justice system is directly linked to the low educational levels, perceived need for material goods, and lack of community ties that are predominantly found in poor people. Involvement in the criminal justice system is also linked to police practices that focus upon the racial groups, neighborhoods, and offenses that are most likely to be tied to poor people. Thus, while any individual’s poverty alone says little or nothing about whether the individual will likely be involved in the criminal justice system, there can be no legitimate dispute but that poor people as a group are far more likely to be charged with crime than wealthier people.

Of course, the indigent defense caseload data collected by the Task Force confirms that 12% of Texas’s poverty population is charged with crime each year, while only 4% of its total population is charged with crime. In many counties, the indigent criminal caseload is three to four times the county’s poverty rate. Thus, a county’s poverty population more closely reflects its indigent defense needs than does its total population.

A county’s total population, and similarly its total criminal caseload, are much less relevant to its indigent defense needs than are its poverty population and its indigent defense caseload. The fact that a county has many non-indigent people, or many cases against non-indigent defendants, says little or nothing about its indigent defense needs. Only its number of poor people and the number of criminal cases against them indicate its actual indigent defense needs (we discuss the merits of indigent caseloads as a formula basis below). Accordingly, the percentage of poverty population in each county is a much more reliable gauge of the percentage of people who are unable to afford private counsel than is the current total population basis.

Poverty population is not only a more accurate indicator of actual indigent defense needs than total population, it is also capable of improving quality and of ensuring resources necessary for minimum standards in ways that a total population-based formula is not. This is because the higher a county’s poverty rate, the less that county will be able to afford adequate indigent defense services. Because a poverty-population formula shifts resources to poorer counties, it reduces the likelihood that actual lack of resources is the reason for any substandard indigent defense practices in those counties.

Other significant reasons supporting a poverty population formula include:

- the Task Force’s cost data indicates that indigent defense services typically each cost more per case in poorer rural counties, likely due to travel and the difficulty of recruiting attorneys;

- Texas's border counties are among its poorest, and they bear the significant and unique burden of providing indigent defense services to people who cross the border and are accused of crime, though of course such people are never counted in the county's total population;
- the formula data is available on a consistent basis from a neutral source, the Census Bureau; and
- the formula for distributing federal funding for civil legal services is based on the poverty population within each of the 200 regions served by legal aid programs, providing a model for the allocation of indigent defense funding among counties.

#### F. Other Formula Improvements

While poverty population is the superior formula choice, these other improvements upon the current formula also are available.

1. Indigent Caseload. Indigent caseload itself has been proposed as a formula basis that directly responds to the need for indigent defense services at the county level. An indigent caseload formula is simple and is theoretically a fair distribution based on actual need for services, but the actual caseload numbers collected by the Task Force may not accurately report indigent caseloads. These figures are collected and reported by the counties themselves, and reflect appointments made subject to indigence standards that often vary from county to county. Moreover, a county that has trouble affording adequate indigent defense services may appoint counsel in fewer cases, thus artificially reducing the indigent caseload precisely in those places where resources are most needed. Finally, our examinations of misdemeanor indigent defense practices in numerous counties indicate that widespread and serious shortcomings remain in a broad array of practices, causing us to doubt most seriously the total indigent caseload figures for misdemeanor cases. Thus, we submit that indigent caseload should be considered as a formula basis, if at all, for felony cases and in combination with other bases as described below.

2. Tax Base. A formula based on each county's per-capita tax base promotes fairness by distributing grants according to each county's existing ability to pay, and ensures access to the resources necessary for all counties to provide adequate quality services. The formula reported in the appendix divides the statewide average per-capita tax base by each county's actual per-capita tax base. Thus, counties with high per-capita tax bases, which can most afford adequate indigent defense services on their own, have a quotient less than one, and counties with low per-capita tax bases, which can least afford adequate indigent defense services without state assistance, have a quotient greater than one. Each county's quotient is then multiplied by its total population for a tax-base adjusted population. The grant is distributed according to each county's share of this tax-base adjusted population.

3. Combinations. Combinations of formulae should not be rejected for complexity alone. In

fact, the mathematical calculations required to produce multiple-basis formulae are simple and readily performed. The second most popular formula identified in Item 2h of the Task Force's Grant Survey was indeed a four-part formula. Thus, if no single formula basis is found to sufficiently meet all of the goals identified by Task Force, then it should consider whether combinations of appropriate bases will more precisely promote its goals. Some bases, of course, are always inappropriate.

#### G. Increased Expenditures Is An Inappropriate Formula Basis

The Task Force's grant formula survey and its Comment Request indicate that some counties want the formula to be based upon the relative increase of each county's indigent defense expenditures since the baseline year of 2001, when the Fair Defense Act (FDA) became law. Any formula based on *increased* expenditures has several important shortcomings. Foremost, increased-expenditure formulas reward many counties that were providing the cheapest and worst quality indigent defense services before the FDA, and there is no basis in fairness for doing so. A county that was paying the costs necessary to meet constitutional standards before the FDA is no less deserving of state assistance than a county that failed to do so before the FDA. To the extent that some counties provided adequate indigent defense services before the FDA, and then voluntarily incurred further significant cost increases after the FDA, they remain free to improve the efficiency of their systems or revert to prior practices that were adequate. They cannot in fairness claim a disproportionate share of limited state resources that are desperately needed by other counties simply because they chose to increase their indigent defense costs.

Second, the 2001 baseline expenditure data that would be necessary for an increased-expenditure formula is unreliable and arbitrary. The data on which the baseline figures are based was recorded before the FDA's data collection requirements were in place, and therefore the baseline figures often incorporate incomplete data, estimated expenses, and expenses related to appointments that are beyond the scope of the FDA (*e.g.*, appointments in parental termination cases). Even if the baseline numbers were reliable, they may not accurately reflect a county's average pre-FDA indigent defense expenditures, as the baseline is calculated based on a single-year snapshot that may or may not represent a "typical" year. This is particularly true as to the 200 most rural counties, where small expenditure variations will cause disproportionate impact.

Finally, a formula based on relative expenditure increases risks rewarding inefficiencies. Indigent defense expenses may have increased since 2001 at least in part as the result of improved services or necessary increases in attorney compensation, but they also are influenced by county bond practices, jail intake procedures, the decision to use centralized vs. decentralized magistrations, etc. A grant allocation formula based on expenditure increases alone, without any examination of the efficiency of the systems that created those increases, is likely to direct funding toward counties that have made less efficient choices when structuring their indigent

defense systems, at the expense of counties that have achieved greater efficiencies. In sum, increased expenditures should be rejected as a formula basis because it fails to promote any legitimate goal for the grant program.

#### H. Grant Floor

Whether the current \$5,000 grant floor should be retained requires further study. If, as in the past has proved to be true, the floor continues to help secure FDA compliance in smaller counties, then the floor serves an express statutory purpose and should be retained, at least in the absence of other compliance options. Nonetheless, if the money provided by the floor is not being spent to actually improve indigent defense services, or if study shows that this money is somehow indirectly supplanting county resources, then it should be redirected to larger counties where it is needed. Thus, before deciding what to do with the current floor, the Task Force should study the following in a statistically significant sample of counties that were awarded the \$5,000 floor grant:

- extent to which actual practices comply with FDA plan publication, appointment timing, attorney qualification, fee schedule, selection method, and indigence standard requirements;
- efficacy of alternative methods for securing compliance in smaller counties;
- how floor grants have been used, and the impact that floor grants have had on the delivery of indigent defense services;
- whether a lower floor would be adequate to promote compliance; and
- whether floor grants are more likely than straight formula grants to indirectly supplant county funds, and in a related matter, when the 2001 baseline data should be replaced with more current baseline data to evaluate supplantation.

#### I. Grant Timing & Procedure

We support any proposal that improves the efficiency of the formula grant application process for counties and for the Task Force as long as the formula grant's statutory function as a FDA compliance enhancement mechanism is not compromised. The actual mathematical formula chosen by the Task Force for the grant should have no impact whatsoever on the efficiency and timing of the grant process.

#### J. Conclusion

We thank you for the opportunity to submit our comments, and we look forward to participating in the workgroup process where the consequences of the formulae that we have described, and any related ones that may be derived from those proposed, may be explored in full.