



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 7, 1997

The Honorable Carl E. Lewis
Nueces County Attorney
901 Leopard, Room 206
Corpus Christi, Texas 78401-3680

Letter Opinion No. 97-063

Re: Whether the commissioners court in a county with a public defender's office must provide funding to pay court-appointed attorneys who are not members of the public defender's office (RQ-913)

Dear Mr. Lewis:

You inform us that the Commissioners Court of Nueces County may establish a public defender's officer under the authority of article 26.044 of the Code of Criminal Procedure. In the event that it does so, you inquire about the obligation of the county to provide funding for court-appointed attorneys who are not employed by the public defender's office. If after establishing a public defender's office the commissioners court remains obligated to pay attorneys appointed by the trial courts, you wish to know whether the court may set a limit on the amount of funds it will make available to pay those fees.

The Commissioners Court of Nueces County is authorized by article 26.044 of the Code of Criminal Procedure¹ to appoint one or more attorneys to serve as a public defender, who is to be paid an annual salary. Article 26.044 also provides that "[a] public defender or an attorney appointed by a court of competent jurisdiction shall represent each indigent person who is charged with a criminal offense . . . and each indigent minor who is a party to a juvenile delinquency proceeding in the county."² "If an attorney other than a public defender is appointed, the attorney is entitled to the compensation provided by Article 26.05 of this code."³ Thus, even after a county has appointed a public defender, attorneys who are not public defenders may be appointed to represent indigent defendants, and they are entitled to the usual compensation authorized for court-appointed attorneys.

Article 26.05 of the Code of Criminal Procedure provides that "[a] counsel, other than an attorney with a public defender's office, appointed to represent a defendant in a criminal proceeding, including a habeas corpus hearing . . . shall be paid a reasonable attorney's fee" for the legal services

¹Article 26.044 of the Code of Criminal Procedure authorizes the commissioners court of any county having four county courts and four district courts to appoint a public defender. You inform us that Nueces County satisfies the requirements of this provision.

²Code Crim. Proc. art. 26.044(f).

³*Id.* art. 26.044(h).

identified in that provision. Payments are to be made in accordance with a schedule of fees adopted by formal action of the county and district criminal court judges within the county and "shall be paid from the general fund of the county in which the prosecution was instituted or habeas corpus hearing held and may be included as costs of court."⁴ We have held that a county has a ministerial duty to direct payment of attorney fees ordered by a court under article 26.05 unless the commissioners court can show that the court's award is so unreasonable as to amount to an abuse of discretion.⁵

Accordingly, even after the commissioners court has established a public defender's office, it remains obligated to pay attorneys appointed by the trial courts to represent indigent defendants and must direct payment of the full amount of attorney fees ordered by a court under article 26.05, unless it can show that the trial court's award is so unreasonable as to amount to an abuse of discretion.⁶

S U M M A R Y

After the commissioners court has established a public defender's office pursuant to article 26.044 of the Code of Criminal Procedure it remains obligated to pay attorneys appointed by the trial courts to represent indigent defendants and must direct payment of the full amount of attorney fees ordered by a court under article 26.05, unless it can show that the trial court's award is so unreasonable as to amount to an abuse of discretion.

Yours very truly,



Susan L. Garrison
Assistant Attorney General
Opinion Committee

⁴*Id.* art. 26.05(b), (d).

⁵Attorney General Opinion DM-354 (1995) at 3, 5-6. *See Westergren v. Banales*, 773 S.W.2d 764, 765 (Tex. App.--Corpus Christi 1989, no writ); *Smith v. Flack*, 728 S.W.2d 784, 789-90 (Tex. Crim. App. 1987); *Gray County v. Wagner & Finney*, 727 S.W.2d 633, 636 (Tex. App.--Amarillo 1987, no writ); Attorney General Opinion H-499 (1975).

⁶We believe it would be an abuse of discretion if the court-ordered fee did not comport with the fee schedule adopted by the judges for the county pursuant to article 26.05 of the Code of Criminal Procedure. *See* Attorney General Opinion DM-354 (1995) at 3, 5-6.