

County of Nueces



OFFICE OF THE

COUNTY ATTORNEY

WALTER D. BRYAN
Chief, Civil Division

LAURA GARZA JIMENEZ,
Chief, Criminal Division

TYNER W. LITTLE, III
Chief of Administrative Services

CARL E. LEWIS
COUNTY ATTORNEY
NUECES COUNTY COURTHOUSE
901 LEOPARD
ROOM 206 (512)888-0286
CORPUS CHRISTI, TEXAS 78401-3680

FILE # ML-38962-96

I.D. # 38962

RR 913
July 15, 1996

RECEIVED

JUL 22 1996

Opinion Committee

The Honorable Dan Morales
Attorney General, State of Texas
300 W. 15th Street
Austin, Texas 78701
(mailed via CM,RRR #P 051 699 135)

RE: REQUEST FOR OPINION; PUBLIC DEFENDER SYSTEM

Dear General Morales:

The Commissioners Court of Nueces County and the Board of Judges are considering alternatives for providing representation to indigent defendants. We ask your office to assist us by issuing an opinion which addresses the following questions:

1. If the Commissioners Court of Nueces County establishes a public defender office under the authority of Article 26.044 of the Texas Code of Criminal Procedure, what is the obligation of the commissioners court to provide funding for attorneys who are not members of the public defender office and are appointed by trial court judges to represent indigent defendants?
2. If after establishing a public defender office the commissioners court remains obligated to provide funds to pay attorneys appointed by the trial courts, may the commissioners court set a limit on the amount of funds it will make available for payment of court-appointed attorney fees?

II. DISCUSSION

1. If the Commissioners Court of Nueces County establishes a public defender office under the authority of Article 26.044 of the Texas Code of Criminal Procedure, what is the obligation of the commissioners court to provide funding for attorneys who are not members of the public defender office and are appointed by trial court judges to represent indigent defendants?

HONORABLE DAN MORALES
REQUEST FOR OPINION
page 2

Nueces County is authorized pursuant to Article 26.044, Code of Criminal Procedure to establish a public defender office. Nueces County has eight (8) district courts and four (4) county courts at law, satisfying the requirements of Article 26.044. At this time no public defender office exists in Nueces County.

Article 26.044 further provides, inter alia, for the designation of one or more attorneys to serve as public defender with an annual salary set by the commissioners court and paid from the appropriate county fund. The public defender is charged with responsibility for representing indigent defendants, however, this representation is contingent upon the appointment by a court of competent jurisdiction and is concurrent with the court's authority to appoint other attorneys. **Article 26.044(c) and (f), Code of Criminal Procedure.**

Nueces County is attempting to reconcile the authority of the Commissioners Court to create potentially a "fully staffed" public defender office with the authority of the trial courts to appoint attorneys, who may or may not be members of the public defender staff. Obviously, there are significant budgetary considerations involved in this reconciliation.

Article 26.04, Code of Criminal Procedure requires a trial court to appoint one or more attorneys to represent an indigent defendant. Subsection (a) provides:

"(a) Whenever the court determines that a defendant charged with a felony or a misdemeanor punishable by imprisonment is indigent or that the interests of justice require representation of a defendant in a criminal proceeding, the court shall appoint one or more practicing attorneys to defend him. An attorney appointed under this subsection shall represent the defendant until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the attorney is relieved of his duties by the court or replaced by other counsel."

Article 26.044(f) provides:

"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 in a county having at least four county courts and at least four district courts and each indigent minor who is a party to a juvenile delinquency proceeding in the county."

The provisions of Article 26.04(a) and 26.044(f) leave open

the possibility that a trial court may appoint attorneys, other than public defenders, to represent indigent defendants. Both of these provisions permit the trial courts to protect the constitutional rights of indigent defendants to have the assistance of counsel in their cases. **Const.Art. I, Section 10.**

We are aware of your findings in Attorney General Opinion No. DM-354 (June 22, 1995). Following the decision in Smith v. Flack, 728 S.W.2d 784 (1987), your opinion concluded that there was a "mandatory duty upon the county to pay court-appointed attorney fees," id at 789-90, and the review by the commissioners court of attorney fee awards ordered under article 26.05 of the Code of Criminal Procedure is to be performed as a ministerial act.

Opinion No. DM-354 considers the constitutional implications of trial court judges providing legal assistance to the indigent, and absent some patently unreasonable award of fees, this is a constitutional protection which should not be disturbed by the commissioners court. The opinion does not consider, however, whether the establishment of a public defender office which would have a pool of attorneys available to serve the indigent upon the appointment of the trial court would satisfy the constitutional concerns so as to offer some limitation of the discretion of the trial court to appoint other attorneys and to award them fees.

Article 26.044 of the Code of Criminal Procedure leaves open the possibility that the trial court may appoint attorneys who are not members of the public defender office. The question remains whether the trial courts may override the fiscal purposes of the commissioners court in creating a public defender office by appointing attorneys who are not with the office. From a budgetary perspective, the commissioners court might be required to fund duplicate budgets for the public defender office and the court-appointed attorneys.

In Smith v. Flack, *supra*, the court in a footnote makes the following observation which is germane to the questions of this request:

"We do note that the Commissioners Court of Harris County has been given authority to contract with certain legal entities to provide counsel for indigent defendants in lieu of paying for court-appointed counsel. See Art. 26.041, V.A.C.C.P. (Supp.1987). Through that authority, the Commissioners Court can certainly control the amount of money paid for the defense of indigent defendants in criminal prosecutions. Cf. Art. 26.05,

supra. However, in the instant case, the Commissioners Court did not contract with relators pursuant to Art. 26.041, supra." Id. at 791, footnote, 10.

Other provisions of Chapter 26 of the Code of Criminal Procedure authorize specific counties and judicial districts to establish public defender offices: Art. 26.042, Tarrant County; Art. 26.043, Wichita County; Art. 26.045 33rd Judicial District; 26.046, Webb County; 26.047, Colorado County and 26.048, Cherokee County.

These various special provisions are not uniform in their treatment of the authority of the public defender to have exclusively the obligation to represent indigent defendants. In Tarrant County, there remains authority for trial courts to appoint counsel other than the public defender to represent indigent defendants, by virtue of Art. 26.042 (e) which provides:

"(e) A public defender or a practicing attorney appointed by a court of competent jurisdiction shall represent each indigent person who is charged with a criminal offense in a Tarrant County court..." (emphasis added)

In Wichita (26.043{g}), Webb (26.046[g]), Colorado (26.047[g]) and the counties of the 33rd Judicial District (26.045[c]) the obligation to represent indigent defendants appears to rest exclusively with the public defender. The language of each provision is identical in providing that the "**public defender shall represent each indigent person who is charged with a criminal offense**" in the county or district in question. Furthermore, all of these provisions may be read to permit the trial courts to appoint other counsel only in the event of the existence of a conflict of interest.

There seems to be clear differentiation among the various special public defender statutes to the effect that in some counties the obligation to represent indigent defendants rests exclusively with the public defender. The commissioners courts of those counties appear obligated only to provide funding for the public defender office and for those limited instances which require appointment of other counsel where a conflict of interest exists. The authority of the trial court judges to appoint counsel appears to have been legislatively limited.

Since there is no special legislation affecting the authority of Nueces County to create a public defender office, Nueces County has available only the provisions of the general statute, Art. 26.044. This article, while authorizing the county to create the

HONORABLE DAN MORALES
REQUEST FOR OPINION
page 5

public defender office, offers no apparent limitations on the authority of the trial court judges to appoint attorneys. It may be concluded, absent passage of a special statute authorizing the creation in Nueces County of a public defender office which would bear exclusively the obligation to represent indigent defendants, the trial courts of Nueces County will retain the authority to appoint attorneys other than the public defender and the commissioners court will remain obligated to pay the fees awarded by trial court judges to those appointed attorneys.

Payment of attorneys fees awarded pursuant to a schedule adopted by the formal action of the district and county judges of Nueces County is for the commissioners court of Nueces County a ministerial duty. Art. 26.05, C.C.P. The commissioners court of Nueces County is without authority to "cap" or otherwise limit the fees awarded by the trial court in accordance with a duly adopted fee schedule.

We appreciate your consideration of the questions raised here. Please advise if we are required to take further action or if you desire additional information. Thank you.

Yours truly,



Carl E. Lewis
Nueces County Attorney