

Juvenile Board Plans for Appointment of Counsel

By
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The following letter and memorandum were sent to juvenile board chairs, juvenile court judges and chief juvenile probation officers by the Texas Juvenile Probation Commission during the first week of September 2001.

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Dear Juvenile Board Member:

As I am sure you are aware, Senate Bill 7 requires that every juvenile board in Texas adopt a plan for the appointment of counsel for respondents in juvenile court whose families are unable to afford counsel. Copies of those plans are required by Government Code Section 71.0351 to be sent to the Office of Court Administration of the Texas Judicial System in Austin by January 1, 2002.

Having an acceptable plan in place will be necessary to receive state aid to counties for payment of appointed counsel when that aid is disbursed at some time after January 1, 2002. In addition, each juvenile board is required by law to adopt a plan that conforms to statutory requirements whether or not it wishes to apply for state aid.

The purpose of the accompanying memorandum is to assist you in meeting those requirements in a timely fashion. I helped in drafting and worked for the passage of Senate Bill 7. It is the most important piece of criminal and juvenile legislation to pass the Texas legislature in many years. Along with many others, I am determined to do everything possible to make the implementation of Senate Bill 7 a success.

Plan Flexibility. The legislature had no desire to impose a uniform plan on all the counties. Local customs and needs differ, so flexibility exists. However, the legislature did impose certain minimum standards that must be met for a plan to be in compliance with Senate Bill 7.

State Standards and Financial Assistance. Sometime after January 1 when the Governor has appointed the remaining members of the Task Force on Indigent Defense, the Task Force will begin the process of allocating the approximately one million dollars per month

available to it for state aid to localities for indigent defense in criminal and juvenile cases. At this time, nothing is known about what standards will be required to be eligible for that state aid, about the application process or exactly how the funds will be distributed. Those details will come later. But it is clear that no funds can be distributed to a county that has not complied with the requirements of Senate Bill 7 that it have an acceptable appointment plan in operation. In addition, Senate Bill 7 requires the adoption of such a plan whether the local governmental entity seeks state funding or not.

Statutes. There are several statutes that are relevant to the juvenile board's task: (1) Section 51.10 of the Family Code, which establishes the right to counsel in juvenile cases and provides some of the procedures needed to implement that right; (2) Section 51.101 of the Family Code, as added by HB 1118 in 2001, which provides details as to timeliness of appointments and the continuing obligations of appointed counsel to represent a juvenile client; (3) Section 51.101 of the Family Code, as added by SB 7 in 2001, which sets out the basic requirements that a juvenile board's appointment of counsel plan must meet; (4) article 26.04 of the Code of Criminal Procedure, as amended by SB 7 in 2001, which sets out plan requirements in criminal cases and to which a juvenile's board's plan must adhere "to the extent practicable;" (5) article 26.05 of the Code of Criminal Procedure, as amended by SB 7 in 2001, which sets out the systems to be used for payment of the costs of indigent defense; and (6) Section 71.0351 of the Government Code, which sets out the plan reporting requirements. I have appended each of these statutes at the end of the accompanying memorandum.

Disclaimer. The ideas and opinions in the accompanying documents are merely my own for you to accept or reject as you please. They do not necessarily represent the views of Senator Ellis, the author of Senate Bill 7 or of Representative Hinojosa, the bill's sponsor. Nor do they necessarily represent the views of the Texas Juvenile Probation Commission, which is aiding in the distribution of these documents, or of the Office of Court Administration, which is responsible for much of the implementation of the statute.

If I can be of any assistance to any juvenile board members in establishing local plans, please feel free to contact me and I will do all that I can to assist you, at no charge, of course.

Sincerely,

Robert O. Dawson
Bryant Smith Chair in Law
University of Texas School of Law

What Juvenile Boards Must Do to Implement Senate Bill 7

Each Juvenile Board must adopt an appointment of counsel plan by January 1, 2002 and send it to the Office of Court Administration.

Elements of the appointment of counsel plan:

Family Code Section 51.101 [SB 7] sets out the requirements of a juvenile board plan:

1. specify qualifications for attorneys to be on the appointment list with differences in qualifications in accordance with the five levels recognized by law
2. specify the procedures for including attorneys on the list
3. specify the procedures for removing attorneys from the list
4. specify the procedures for appointing attorneys on the list to cases and for payment
5. comply, to the extent feasible, with requirements of criminal court plan under Code of Criminal Procedure article 26.04.

A. Prompt Appointment of Counsel

1. Appointment at detention hearing. If a child is in custody when his or her first detention hearing is held, Section 51.10(f) requires that an attorney be appointed if it is determined that the child's family cannot afford to employ counsel. In most instances, that means that counsel should be routinely provided for unrepresented children at detention hearings since it will often be difficult to make a determination of financial need in a timely fashion.

If for any reason the child is not represented by counsel at the initial detention hearing and the child is detained, Section 51.10(c) then requires the court "immediately" to appoint counsel or order parents to retain counsel if the court has determined they are financially able to do so. If parents can afford counsel, the juvenile court under Section 51.10(d) is required either to order parents to retain counsel or to appoint counsel and order parents to pay counsel fees. The Board plan should provide that these minimum standards for prompt appointment are complied with and set out who has responsibility for assuring compliance in the context of the local system.

When a child is detained, there is an increased likelihood that judicial proceedings will be pursued and, therefore, an enhanced need for counsel to be provided on the merits as soon as possible to enable prompt investigation of the facts and to press for release from detention if feasible. Therefore, under Section 51.101(a) [HB 1118], an attorney provided to represent a child at a detention hearing continues to represent that child on the merits if the child is detained, until the case is terminated or other counsel is provided.

2. Appointment after adjudication or certification petition served when child not in custody. If a child is released at the initial detention hearing, or was released by intake, or referred to the juvenile court without being in custody, then there is no need under Section 51.101 [HB 1118] for appointment of counsel unless and until a petition for adjudication or discretionary

transfer is filed. The reason is that many of these cases will result in nonjudicial handling with no realistic risk of legal prejudice to the child. There is a greatly-reduced need for legal representation in those circumstances, so to conserve limited financial resources none is required. The process of deferred prosecution is structured under Section 53.03(a) to operate on the basis of a waiver of the right to require a petition and hearing that is made by the child and an adult, but not necessarily an attorney. If a petition is filed, then the court is required by Section 51.101 [HB 1118] to determine indigency and if it is determined that the family is indigent, appointment becomes necessary not later than five working days after the petition is served on the child. In some cases in which a child is not in custody when a petition is filed, the whereabouts of the child is not known. Counsel need not be provided until after the child is located and served with the petition—there is little a lawyer can do to represent a client while he or she is evading apprehension. The Board plan should address in detail the steps involved in determining indigency and making the appointment.

In some local systems, the summons will set a date for the initial court hearing that is later than five working days after service on a child not in custody. This may be necessary, if for no other reason, because the date of service cannot be known at the time the summons is issued. Compliance with Section 51.101 [HB 1118] would exist, in my opinion, if the summons includes or is accompanied by information to the child and adults served as to how they may request the prompt appointment of counsel if they are unable to afford counsel. It is then up to them to take prompt action so as to assure appointment within five working days. If they take no action and if the child and adults appear for the initial court hearing without counsel, the juvenile court (or a court delegate) would be required to determine indigency and, if it is determined the family is indigent, immediately to appoint counsel for the child.

3. Appointment after modification motion filed If a child is already on judicial probation and a motion to modify is filed that seeks either revocation with commitment to the Texas Youth Commission or modification to require confinement in a secure local facility, then indigency must be determined upon filing the petition and if the family is determined to be indigent, appointment of counsel made within five days of filing the motion. The obligation to determine indigency arises from filing a motion to modify, rather than from serving it, since the law does not require that a motion to modify be served [Section 54.05(d) merely requires that reasonable notice be given to all parties] and since the court will probably already have determined indigency of the family of a child who is on probation.

If the motion to modify seeks revocation and commitment to the TYC, then under Family Code Sections 54.05(h) and 51.10(b)(4) both an attorney and a hearing before the juvenile court are required and cannot be waived. If the motion seeks confinement in a secure facility for more than 30 days, then both an attorney and a hearing are required. If the motion seeks confinement in a secure facility for 30 days or less, then an attorney is required under Section 51.101(e) [HB 1118], but a hearing may be waived by the child and counsel under Section 54.05(h). Appointing counsel when modification and any term of secure confinement is sought is required constitutionally in both criminal and juvenile cases even for short periods of confinement, such as 30 days.

An attorney is not required and the child with an adult—parent, guardian, guardian ad litem or attorney—are permitted to waive hearing before the juvenile court in cases in which modification of disposition is sought but not to commit the child to the TYC or to place him or her in a secure local facility. Most motions to modify fit this description and are made to effect changes in probation conditions, to provide for early discharge from probation, or to extend the

probation period. Appointing counsel in those circumstances would waste limited resources and is not required.

B. Standard Appointment Program and Alternative Appointment Program

Under Family Code Section 51.101(b) [SB 7], the Juvenile Board's plan must, "to the extent practicable" comply with the requirements of article 26.04 of the Code of Criminal Procedure. That article deals with the details of the appointment system to be used in criminal cases. Many of those provisions are not by their nature applicable to juvenile proceedings. That is why the modifier "to the extent practicable" was added to Section 51.101. Section 51.101(b) sets out two particulars in which the juvenile board plan is different from the requirements of article 26.04: (1) the child's indigency is determined by the assets and income of the parent or other person responsible for the support of the child, not by the child's assets and income and (2) if an alternative plan is adopted, the juvenile board must adopt it, not the juvenile court judge or judges.

Article 26.04(a) sets out the requirement of rotational appointment from a public appointment list:

A court shall appoint an attorney from a public appointment list using a system of rotation, unless the court appoints an attorney under Subsection (f), (h), or (i). The court shall appoint attorneys from among the next five names on the appointment list in the order in which the attorneys' names appear on the list, unless the court makes a finding of good cause on the record for appointing an attorney out of order. An attorney who is not appointed in the order in which the attorney's name appears on the list shall remain next in order on the list.

Subsection (f) provides for appointment of a staff attorney of a public defender's office in counties with such an office. Subsection (i) permits a court to appoint an attorney in a felony case from the appointment list of any county in the administrative judicial region, thereby increasing the pool of attorneys qualified for appointment in serious cases.

Subsection (h) authorizes a judge to appoint an attorney from an alternative program in a county in which an alternative program has been adopted. Subsection (g) sets out the requirements for an alternative program for the appointment of counsel in criminal cases. Most of its requirements are not applicable to juvenile cases. Subsection (g)(1)(B) provides that an alternative program may "use a multicounty appointment list using a system of rotation." This is designed for rural counties with few lawyers and for counties in which the county seat may be located near another county so that the natural area for appointing counsel extends into the next county and permits out-of-county appointments to be made in all cases, not just in felonies. A juvenile board that wishes to have a multicounty appointment list may do so by designating its plan as an alternative program. Any alternative program must be approved by the presiding judge of the administrative judicial region. Such approval is not a step that is required for a "standard" plan.

An alternative program may under Subsection (g)(1)(A) provide for a mixed system of delivery of defense services to the indigent: appointed counsel and contract lawyer. In criminal cases, there can be one alternative program for felony cases and another for misdemeanor cases or one program for both.

It should be emphasized that the availability of an alternative program under subsection (g) is not an authorization for each juvenile court judge to adopt his or her own appointment system. That is one of the features of current practice that Senate Bill 7 was intended to end. Subsection (g) authorizes only the adoption of a “countywide alternative program *** by a formal action in which two-thirds of the judges of the courts *** vote to establish the alternative program.” In juvenile cases, Section 51.101(b)(1)(B) [SB 7] requires that an alternative program must be established by the entire juvenile board, not by a judge or judges sitting in juvenile cases. An alternative program gives some flexibility not provided by the standard program, but it is not a license for each judge to use an individualized system.

If an alternative program is adopted by the juvenile board, the juvenile court is not required to make appointments in the rotational fashion required under the standard program. However, any alternative program must under Subsection (g)(2)(D) assure that “appointments are reasonably and impartially allocated among qualified attorneys.” That is designed to discourage judicial favoritism in making appointments.

Plans by juvenile boards with multi-county jurisdiction should deal with each county in the board’s jurisdiction. A single plan could be adopted to cover all counties with individual variations, or a different plan may be adopted for each county by the juvenile board. The only requirement is that any plan for any county in a juvenile board’s jurisdiction must be approved by the entire juvenile board.

Under ordinary administrative law principles, board action requires that there must be an affirmative vote of at least a majority of the members of the juvenile board for a plan to be approved by the board. See Government Code Section 311.013.

C. Qualification of Attorneys to Be on the Appointment List

The board is required by Section 51.101(a)(1) [SB 7] to adopt a plan that “specifies the qualifications necessary for an attorney to be included on an appointment list from which attorneys are appointed to represent children in proceedings under this title.” In addition, Section 51.101(b)(2) [SB 7] requires that the plan must “recognize the differences in qualifications and experience necessary for appointments” to five different types of cases.

The five categories are: (1) cases in which the allegations are of conduct indicating a need for supervision, (2) cases in which the allegations are of delinquent conduct in which commitment to TYC is not possible [misdemeanor cases without the required prior adjudications or contempt of a justice or municipal court]; (3) cases in which the allegations are of delinquent conduct in which indeterminate commitment to TYC is possible, (4) cases in which determinate sentence proceedings have been initiated by obtaining grand jury approval of a petition alleging a covered offense, and (5) cases in which proceedings for discretionary transfer to criminal court have been initiated by the filing of a certification petition or motion.

The plan should establish eligibility requirements for attorneys to be appointed to each of these categories of cases. Obviously, the categories are arranged in ascending order of seriousness so the qualifications of attorneys must likewise be fixed in ascending order of competency and experience. Some of the relevant variables that could be used are (1) number of years licensed to practice law, (2) number of prior juvenile cases, (3) number of prior juvenile cases of specified type, e.g., determinate sentence, certification, probation revocation, (4) continuing legal education credits in juvenile law, (5) performance on any local examination in juvenile law that may be administered on behalf of the Board, (6) whether the attorney is certified

in juvenile law by the Texas Board of Legal Specialization, (7) the opinion of a judge or referee before whom the attorney has appeared as to the attorney's skills and diligence.

Article 26.04(d) imposes four requirements for attorneys to be included on the appointment list. Each such attorney

- (1) applies to be included on the list;
- (2) meets the objective qualifications specified by the judges under Subsection (e);
- (3) meets any applicable qualifications specified by the Task Force on Indigent Defense; and
- (4) is approved by a majority of the judges who established the appointment list under Subsection (e).

As applied to the juvenile justice system, this means (1) volunteers, no draftees, (2) who meet the juvenile board's qualifications to be included on lists for one or more of the five categories of cases recognized by Section 51.101(b)(2) [SB 7], (3) who meet any Task Force requirements that may later be imposed, and (4) who are approved by a majority of the members of the juvenile board that adopted the plan.

Under (4) juvenile board action is necessary to approve of the inclusion of an attorney on a list or lists, although consistent with the purpose of the legislation a plan might provide for temporary approval of an attorney by the judge sitting in the juvenile court pending full juvenile board action within a reasonable time.

The plan should also establish procedures to be followed by an attorney who wishes to be placed on the appointment list. The plan should establish an application form or fix responsibility for creating such a form in conformity with the plan. The plan should specify the details of the application process--with whom is the application filed, etc.

D. Removing Attorneys from the Appointment List.

Section 51.101(a)(2)(A) [SB 7] requires that a plan must include "procedures for *** removing attorneys from the list." The plan should specify that only the juvenile board has the authority to remove an attorney, although it should provide that a judge sitting as a juvenile court who has good cause to believe that an attorney should be removed under board standards should have the power to remove an attorney from an appointment and not make further appointments pending full board action within a reasonable time. The plan should also address what the grounds of removal might be, e.g., failure vigorously and competently to represent the client, violation of ethical rules, and what procedures should be used to remove attorneys from the list, e.g., giving the attorney an opportunity to appear before the juvenile board.

Article 26.04(j) and (k) speak to removal from the list:

- (j) An attorney appointed under this article shall:
 - (1) make every reasonable effort to contact the defendant not later than the end of the first working day after the date on which the attorney is appointed and to interview the defendant as soon as practicable after the attorney is appointed; and
 - (2) 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 after a finding of good cause is entered on the record.

(k) A court may replace an attorney who violates Subsection (j)(1) with other counsel. A majority of the judges of the county courts and statutory county courts or the district courts, as appropriate, trying criminal cases in the county may remove from consideration for appointment an attorney who intentionally or repeatedly violates Subsection (j)(1).

As applied to juvenile cases, the juvenile board should be empowered by the plan to remove from all pending cases and from the appointment list an attorney who intentionally or repeatedly fails promptly to contact his or her client in violation of the statute.

Article 26.05(e) authorizes removal from the appointment list of an attorney who has been found to have submitted a claim for legal services not performed by the attorney. As applied in juvenile cases, the juvenile board would be empowered to remove such an attorney.

The plan should also specify the procedures to be used by an attorney who wishes to remove his or her name from the list.

E. Appointing Attorneys to Cases from the Appointment List.

In some counties, it will probably not be possible to establish separate qualifications for each of the five categories of cases because of unavailability of attorneys in the county. In such cases, it may be possible to combine two or more categories. Also, if an attorney is not available to meet the board's qualifications for the category of case to receive an appointment, there is sufficient flexibility to appoint an available lawyer who comes closest to meeting those qualifications. If the charge is a felony, article 26.04(i) permits the court to appoint an attorney from the appointment list of any county within the same administrative judicial region. Finally, a juvenile board with more than one county within its jurisdiction may establish an alternative program that aggregates some or all of those counties into a single plan, thereby enlarging the pool of qualified attorneys for all types of cases, not just felonies.

Article 26.04(a) sets out the rotational appointment requirement:

A court shall appoint an attorney from a public appointment list using a system of rotation, unless the court appoints an attorney under Subsection (f), (h), or (i). The court shall appoint attorneys from among the next five names on the appointment list in the order in which the attorneys' names appear on the list, unless the court makes a finding of good cause on the record for appointing an attorney out of order. An attorney who is not appointed in the order in which the attorney's name appears on the list shall remain next in order on the list.

As noted earlier, subsection (f) authorizes appointment of a staff attorney of a public defender office, while subsection (h) authorizes alternative programs under some circumstances, and subsection (i) authorizes appointments in felony cases from lists in counties in the same administrative judicial region.

The rotational appointment requirement is designed to discourage judicial favoritism in making appointments. The requirement is not as rigid as it seems. It is subject to qualifications:

(1) the attorney appointed must have been determined by the juvenile board to be qualified for the category of case for which the appointment is being made—if not, he or she is not on the list for that category of case and not eligible for appointment;

(2) the judge is required to appoint the next name on the list from within the next five names on the list unless a finding of good cause is made to skip that lawyer and go to the next name, but not beyond the next five names—the good cause finding may be based on any number of good reasons for skipping over an attorney without reflecting adversely on that lawyer;

(3) often appointments are made in “batches” so that a judge can match case demands with the attorney’s abilities without making a finding of good cause on the record; and

(4) the court can appoint an attorney to a felony case from any public appointment list in any county in the same administrative judicial region.

Skipping over an attorney within the first five names on a finding of good cause is “on the record,” but that merely means the record of the finding is available upon demand. That is not the same as publicizing the finding gratuitously. The finding might be recorded in the case file of the case in which an appointment is made or might alternatively be recorded in papers kept in the judge’s chambers as part of the documents used for making appointments.

It is likely that most juvenile court judges could operate comfortably within the rotational requirements of the standard program.

The rotational appointment requirement can be avoided totally by the juvenile board adopting an alternative program, as discussed earlier. While a rotational system is not required under an alternative program, the adopted procedures must assure that “appointments are reasonably and impartially allocated among qualified attorneys.” Unlike a standard program, as noted earlier, an alternative program must be approved by both the juvenile board and by the presiding judge of the administrative judicial region.

While avoiding the rotational requirements of the standard plan is not a very good reason for a juvenile board to adopt an alternative program, being able under article 26.04(g)(1)(B) to combine the lists of several counties into one list may be a good reason particularly in rural Texas. If that option is used, then that section requires that appointments be made “using a system of rotation,” without spelling out the details of that system.

F. Paying for Indigent Defense.

Family Code Section 51.101(b) [SB 7] requires that the juvenile board’s plan must “to the extent practicable” comply with the requirements of Article 26.04 of the Code of Criminal Procedure. Article 26.04 requires that any procedures adopted must be consistent with article 26.05 with deals with compensation of counsel.

In addition, Family Code Section 51.10(i) provides:

[A]n attorney appointed under this section to represent the interests of a child shall be paid from the general fund of the county in which the proceedings were instituted according to the schedule in Article 26.05 of the Texas Code of Criminal Procedure, 1965.

Section 51.10 adopts the principle that attorneys appointed to represent respondents in juvenile court should be paid the same as attorneys appointed to represent defendants in criminal court for comparable work in comparable cases.

Because of this, the juvenile board should coordinate its efforts to set up a system for compensation of appointed attorneys in juvenile court with those of the criminal court judges. The juvenile board is required to adopt a fee schedule based on the fee schedule adopted by the criminal court judges. Article 26.05(a) requires that the criminal court fee schedule must provide that appointed counsel be paid

a reasonable attorney's fee for performing the following services, based on the time and labor required, the complexity of the case, and the experience and ability of the appointed counsel:

- (1) time spent in court making an appearance on behalf of the defendant as evidenced by a docket entry, time spent in trial, and time spent in a proceeding in which sworn oral testimony is elicited;
- (2) reasonable and necessary time spent out of court on the case, supported by any documentation that the court requires;
- (3) preparation of an appellate brief and preparation and presentation of oral argument to a court of appeals or the Court of Criminal Appeals; and
- (4) preparation of a motion for rehearing.

Article 26.05(c) provides,

Each fee schedule adopted shall state reasonable fixed rates or minimum and maximum hourly rates, taking into consideration reasonable and necessary overhead costs and the availability of qualified attorneys willing to accept the stated rates, and shall provide a form for the appointed counsel to itemize the types of services performed.

The juvenile board should adapt the criminal fee standards to conform to the procedures used in juvenile cases.

If an attorney submits a payment voucher that is cut by the trial judge, article 26.05(c) provides an appeals mechanism. The attorney can appeal the trial court's decision to the presiding judge of the administrative judicial region, whose decision on the matter is final. The juvenile board's plan should recognize that same process of appeal.

Investigative expenses and payment of experts are also provided. Article 26.05(d) provides:

A counsel in a noncapital case, other than an attorney with a public defender, appointed to represent a defendant under this code shall be reimbursed for reasonable and necessary expenses, including expenses for investigation and for mental health and other experts. Expenses incurred with prior court approval shall be reimbursed in the same manner provided for capital cases by Articles 26.052(f) and (g), and expenses incurred without prior court approval shall be reimbursed in the manner provided for capital cases by Article 26.052(h).

Article 26.052(f), (g) and (h), which apply to capital cases, provide:

(f) Appointed counsel may file with the trial court a pretrial ex parte confidential request for advance payment of expenses to investigate potential defenses. The request for expenses must state:

- (1) the type of investigation to be conducted;

(2) specific facts that suggest the investigation will result in admissible evidence; and

(3) an itemized list of anticipated expenses for each investigation.

(g) The court shall grant the request for advance payment of expenses in whole or in part if the request is reasonable. If the court denies in whole or in part the request for expenses, the court shall:

(1) state the reasons for the denial in writing;

(2) attach the denial to the confidential request; and

(3) submit the request and denial as a sealed exhibit to the record.

(h) Counsel may incur expenses without prior approval of the court. On presentation of a claim for reimbursement, the court shall order reimbursement of counsel for the expenses, if the expenses are reasonably necessary and reasonably incurred.

Those standards and procedures, which previously applied only in capital cases, now apply in all criminal and juvenile cases in which counsel is appointed. The juvenile board's plan should address the issue of payment of investigative and expert expenses by establishing a procedure for claims, review and payment that complies with those provisions.

Statutory Provisions

Family Code § 51.10. Right to Assistance of Attorney; Compensation.

(a) A child may be represented by an attorney at every stage of proceedings under this title, including:

(1) the detention hearing required by Section 54.01 of this code;

(2) the hearing to consider transfer to criminal court required by Section 54.02 of this code;

(3) the adjudication hearing required by Section 54.03 of this code;

(4) the disposition hearing required by Section 54.04 of this code;

(5) the hearing to modify disposition required by Section 54.05 of this code;

(6) hearings required by Chapter 55 of this code;

(7) habeas corpus proceedings challenging the legality of detention resulting from action under this title; and

(8) proceedings in a court of civil appeals or the Texas Supreme Court reviewing proceedings under this title.

(b) The child's right to representation by an attorney shall not be waived in:

(1) a hearing to consider transfer to criminal court as required by Section 54.02 of this code;

(2) an adjudication hearing as required by Section 54.03 of this code;

(3) a disposition hearing as required by Section 54.04 of this code;

(4) a hearing prior to commitment to the Texas Youth Commission as a modified disposition in accordance with Section 54.05(f) of this code; or

(5) hearings required by Chapter 55 of this code.

(c) If the child was not represented by an attorney at the detention hearing required by Section 54.01 of this code and a determination was made to detain the child, the child shall immediately be entitled to representation by an attorney. The court shall order the retention of an attorney according to Subsection (d) or appoint an attorney according to Subsection (f).

(d) The court shall order a child's parent or other person responsible for support of the child to employ an attorney to represent the child, if:

(1) the child is not represented by an attorney;

(2) after giving the appropriate parties an opportunity to be heard, the court determines that the parent or other person responsible for support of the child is financially able to employ an attorney to represent the child; and

(3) the child's right to representation by an attorney:

(A) has not been waived under Section 51.09 of this code; or

(B) may not be waived under Subsection (b) of this section.

(e) The court may enforce orders under Subsection (d) by proceedings under Section 54.07 or by appointing counsel and ordering the parent or other person responsible for support of the child to pay a reasonable attorney's fee set by the court. The order may be enforced under Section 54.07.

(f) The court shall appoint an attorney to represent the interest of a child entitled to representation by an attorney, if:

(1) the child is not represented by an attorney;

(2) the court determines that the child's parent or other person responsible for support of the child is financially unable to employ an attorney to represent the child; and

(3) the child's right to representation by an attorney:

(A) has not been waived under Section 51.09 of this code; or

(B) may not be waived under Subsection (b) of this section.

(g) The juvenile court may appoint an attorney in any case in which it deems representation necessary to protect the interests of the child.

(h) Any attorney representing a child in proceedings under this title is entitled to 10 days to prepare for any adjudication or transfer hearing under this title.

(i) Except as provided in Subsection (d) of this section, an attorney appointed under this section to represent the interests of a child shall be paid from the general fund of the county in which the proceedings were instituted according to the schedule in Article 26.05 of the Texas Code of Criminal Procedure, 1965. For this purpose, a bona fide appeal to a court of civil appeals or proceedings on the merits in the Texas Supreme Court are considered the equivalent of a bona fide appeal to the Texas Court of Criminal Appeals.

Family Code § 51.101. Appointment of Attorney and Continuation of Representation. [HB 1118]

(a) If an attorney is appointed at the initial detention hearing and the child is detained, the attorney shall continue to represent the child until the case is terminated, the family retains an attorney, or a new attorney is appointed by the juvenile court. Release of the child from detention does not terminate the attorney's representation.

(b) If there is an initial detention hearing without an attorney and the child is detained, the attorney appointed under Section 51.10(c) shall continue to represent the child until the case is terminated, the family retains an attorney, or a new attorney is appointed by the juvenile court. Release of the child from detention does not terminate the attorney's representation.

(c) The juvenile court shall determine, on the filing of a petition, whether the child's family is indigent if:

(1) the child is released by intake;

(2) the child is released at the initial detention hearing; or

(3) the case was referred to the court without the child in custody.

(d) A juvenile court that makes a finding of indigence under Subsection (c) shall appoint an attorney to represent the child on or before the fifth working day after the date the petition for

adjudication or discretionary transfer hearing was served on the child. An attorney appointed under this subsection shall continue to represent the child until the case is terminated, the family retains an attorney, or a new attorney is appointed by the juvenile court.

(e) The juvenile court shall determine whether the child's family is indigent if a motion or petition is filed under Section 54.05 seeking to modify disposition by committing the child to the Texas Youth Commission or placing the child in a secure correctional facility. A court that makes a finding of indigence shall appoint an attorney to represent the child on or before the fifth working day after the date the petition or motion has been filed. An attorney appointed under this subsection shall continue to represent the child until the court rules on the motion or petition, the family retains an attorney, or a new attorney is appointed.

Family Code § 51.101. Appointment of Counsel Plan. [SB 7]

(a) The juvenile board in each county shall adopt a plan that:

(1) specifies the qualifications necessary for an attorney to be included on an appointment list from which attorneys are appointed to represent children in proceedings under this title; and

(2) establishes procedures for:

(A) including attorneys on the appointment list and removing attorneys from the list; and

(B) appointing attorneys from the appointment list to individual cases.

(b) A plan adopted under Subsection (a) must:

(1) to the extent practicable, comply with the requirements of Article 26.04, Code of Criminal Procedure, except that:

(A) the income and assets of the child's parent or other person responsible for the child's support must be used in determining whether the child is indigent; and

(B) any alternative plan for appointing counsel is established by the juvenile board in the county; and

(2) recognize the differences in qualifications and experience necessary for appointments to cases in which:

(A) the allegation is:

(i) conduct indicating a need for supervision;

(ii) delinquent conduct, and commitment to the Texas Youth Commission is not an authorized disposition; or

(iii) delinquent conduct, and commitment to the Texas Youth Commission without a determinate sentence is an authorized disposition;

(B) determinate sentence proceedings have been initiated; or

(C) proceedings for discretionary transfer to criminal court have been initiated.

Code of Criminal Procedure article 26.04. Procedures for Appointing Counsel.

(a) The judges of the county courts, statutory county courts, and district courts trying criminal cases in each county, by local rule, shall adopt and publish written countywide procedures for timely and fairly appointing counsel for an indigent defendant in the county arrested for or charged with a misdemeanor punishable by confinement or a felony. The procedures must be consistent with this article and Articles 1.051, 15.17, 26.05, and 26.052. A court shall appoint an attorney from a public appointment list using a system of rotation, unless

the court appoints an attorney under Subsection (f), (h), or (i). The court shall appoint attorneys from among the next five names on the appointment list in the order in which the attorneys' names appear on the list, unless the court makes a finding of good cause on the record for appointing an attorney out of order. An attorney who is not appointed in the order in which the attorney's name appears on the list shall remain next in order on the list.

(b) Procedures adopted under Subsection (a) shall:

(1) authorize only the judges of the county courts, statutory county courts, and district courts trying criminal cases in the county, or the judges' designee, to appoint counsel for indigent defendants in the county;

(2) apply to each appointment of counsel made by a judge or the judges' designee in the county;

(3) ensure that each indigent defendant in the county who is charged with a misdemeanor punishable by confinement or with a felony and who appears in court without counsel has an opportunity to confer with appointed counsel before the commencement of judicial proceedings;

(4) require appointments for defendants in capital cases in which the death penalty is sought to comply with the requirements under Article 26.052;

(5) ensure that each attorney appointed from a public appointment list to represent an indigent defendant perform the attorney's duty owed to the defendant in accordance with the adopted procedures, the requirements of this code, and applicable rules of ethics; and

(6) ensure that appointments are allocated among qualified attorneys in a manner that is fair, neutral, and nondiscriminatory.

(c) Whenever a court or the courts' designee authorized under Subsection (b) to appoint counsel for indigent defendants in the county determines that a defendant charged with a felony or a misdemeanor punishable by confinement is indigent or that the interests of justice require representation of a defendant in a criminal proceeding, the court or the courts' designee shall appoint one or more practicing attorneys to defend the defendant in accordance with this subsection and the procedures adopted under Subsection (a). If the court or the courts' designee determines that the defendant does not speak and understand the English language or that the defendant is deaf, the court or the courts' designee shall make an effort to appoint an attorney who is capable of communicating in a language understood by the defendant.

(d) A public appointment list from which an attorney is appointed as required by Subsection (a) shall contain the names of qualified attorneys, each of whom:

(1) applies to be included on the list;

(2) meets the objective qualifications specified by the judges under Subsection (e);

(3) meets any applicable qualifications specified by the Task Force on Indigent Defense; and

(4) is approved by a majority of the judges who established the appointment list under Subsection (e).

(e) In a county in which a court is required under Subsection (a) to appoint an attorney from a public appointment list:

(1) the judges of the county courts and statutory county courts trying misdemeanor cases in the county, by formal action:

(A) shall:

(i) establish a public appointment list of attorneys qualified to provide representation in the county in misdemeanor cases punishable by confinement; and

(ii) specify the objective qualifications necessary for an attorney to be included on the list; and

(B) may establish, if determined by the judges to be appropriate, more than one appointment list graduated according to the degree of seriousness of the offense and the attorneys' qualifications; and

- (2) the judges of the district courts trying felony cases in the county, by formal action:
- (A) shall:
- (i) establish a public appointment list of attorneys qualified to provide representation in felony cases in the county; and
 - (ii) specify the objective qualifications necessary for an attorney to be included on the list; and
- (B) may establish, if determined by the judges to be appropriate, more than one appointment list graduated according to the degree of seriousness of the offense and the attorneys' qualifications.
- (f) In a county in which a public defender is appointed under Article 26.044, the court or the courts' designee may appoint the public defender to represent the defendant in accordance with guidelines established for the public defender.
- (g) A countywide alternative program for appointing counsel for indigent defendants in criminal cases is established by a formal action in which two-thirds of the judges of the courts designated under this subsection vote to establish the alternative program. An alternative program for appointing counsel in misdemeanor and felony cases may be established in the manner provided by this subsection by the judges of the county courts, statutory county courts, and district courts trying criminal cases in the county. An alternative program for appointing counsel in misdemeanor cases may be established in the manner provided by this subsection by the judges of the county courts and statutory county courts trying criminal cases in the county. An alternative program for appointing counsel in felony cases may be established in the manner provided by this subsection by the judges of the district courts trying criminal cases in the county. In a county in which an alternative program is established:
- (1) the alternative program may:
 - (A) use a single method for appointing counsel or a combination of methods; and
 - (B) use a multicounty appointment list using a system of rotation; and
 - (2) the procedures adopted under Subsection (a) must ensure that:
 - (A) attorneys appointed using the alternative program to represent defendants in misdemeanor cases punishable by confinement:
 - (i) meet specified objective qualifications, which may be graduated according to the degree of seriousness of the offense, for providing representation in misdemeanor cases punishable by confinement; and
 - (ii) are approved by a majority of the judges of the county courts and statutory county courts trying misdemeanor cases in the county;
 - (B) attorneys appointed using the alternative program to represent defendants in felony cases:
 - (i) meet specified objective qualifications, which may be graduated according to the degree of seriousness of the offense, for providing representation in felony cases; and
 - (ii) are approved by a majority of the judges of the district courts trying felony cases in the county;
 - (C) appointments for defendants in capital cases in which the death penalty is sought comply with the requirements of Article 26.052; and
 - (D) appointments are reasonably and impartially allocated among qualified attorneys.
- (h) In a county in which an alternative program for appointing counsel is established as provided by Subsection (g) and is approved by the presiding judge of the administrative judicial region, a court or the courts' designee may appoint an attorney to represent an indigent defendant by using the alternative program. In establishing an alternative program under Subsection (g), the judges of the courts establishing the program may not, without the approval of the commissioners court, obligate the county by contract or by the creation of new positions that cause an increase in expenditure of county funds.

(i) A court or the courts' designee required under Subsection (c) to appoint an attorney to represent a defendant accused of a felony may appoint an attorney from any county located in the court's administrative judicial region.

(j) An attorney appointed under this article shall:

(1) make every reasonable effort to contact the defendant not later than the end of the first working day after the date on which the attorney is appointed and to interview the defendant as soon as practicable after the attorney is appointed; and

(2) 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 after a finding of good cause is entered on the record.

(k) A court may replace an attorney who violates Subsection (j)(1) with other counsel. A majority of the judges of the county courts and statutory county courts or the district courts, as appropriate, trying criminal cases in the county may remove from consideration for appointment an attorney who intentionally or repeatedly violates Subsection (j)(1).

(l) Procedures adopted under Subsection (a) must include procedures and financial standards for determining whether a defendant is indigent. The procedures and standards shall apply to each defendant in the county equally, regardless of whether the defendant is in custody or has been released on bail.

(m) In determining whether a defendant is indigent, the court or the courts' designee may consider the defendant's income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, and spousal income that is available to the defendant. The court or the courts' designee may not consider whether the defendant has posted or is capable of posting bail, except to the extent that it reflects the defendant's financial circumstances as measured by the considerations listed in this subsection.

(n) A defendant who requests a determination of indigency and appointment of counsel shall:

(1) complete under oath a questionnaire concerning his financial resources;

(2) respond under oath to an examination regarding his financial resources by the judge or magistrate responsible for determining whether the defendant is indigent; or

(3) complete the questionnaire and respond to examination by the judge or magistrate.

(o) Before making a determination of whether a defendant is indigent, the court shall request the defendant to sign under oath a statement substantially in the following form:

"On this ____ day of _____, 20 ____, I have been advised by the (name of the court) Court of my right to representation by counsel in the trial of the charge pending against me. I certify that I am without means to employ counsel of my own choosing and I hereby request the court to appoint counsel for me. (signature of the defendant)"

(p) A defendant who is determined by the court to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occurs. If there is a material change in financial circumstances after a determination of indigency or nonindigency is made, the defendant, the defendant's counsel, or the attorney representing the state may move for reconsideration of the determination.

(q) A written or oral statement elicited under this article or evidence derived from the statement may not be used for any purpose, except to determine the defendant's indigency or to impeach the direct testimony of the defendant. This subsection does not prohibit prosecution of the defendant under Chapter 37, Penal Code.

(r) A court may not threaten to arrest or incarcerate a person solely because the person requests the assistance of counsel.

Code of Criminal Procedure article 26.05. Compensation of Counsel Appointed to Defend.

(a) A counsel, other than an attorney with a public defender, appointed to represent a defendant in a criminal proceeding, including a habeas corpus hearing, shall be paid a reasonable attorney's fee for performing the following services, based on the time and labor required, the complexity of the case, and the experience and ability of the appointed counsel:

(1) time spent in court making an appearance on behalf of the defendant as evidenced by a docket entry, time spent in trial, and time spent in a proceeding in which sworn oral testimony is elicited;

(2) reasonable and necessary time spent out of court on the case, supported by any documentation that the court requires;

(3) preparation of an appellate brief and preparation and presentation of oral argument to a court of appeals or the Court of Criminal Appeals; and

(4) preparation of a motion for rehearing.

(b) All payments made under this article shall be paid in accordance with a schedule of fees adopted by formal action of the judges of the county courts, statutory county courts, and district courts trying criminal cases in each county. On adoption of a schedule of fees as provided by this subsection, a copy of the schedule shall be sent to the commissioners court of the county.

(c) Each fee schedule adopted shall state reasonable fixed rates or minimum and maximum hourly rates, taking into consideration reasonable and necessary overhead costs and the availability of qualified attorneys willing to accept the stated rates, and shall provide a form for the appointed counsel to itemize the types of services performed. No payment shall be made under this article until the form for itemizing the services performed is submitted to the judge presiding over the proceedings and the judge approves the payment. If the judge disapproves the requested amount of payment, the judge shall make written findings stating the amount of payment that the judge approves and each reason for approving an amount different from the requested amount. An attorney whose request for payment is disapproved may appeal the disapproval by filing a motion with the presiding judge of the administrative judicial region. On the filing of a motion, the presiding judge of the administrative judicial region shall review the disapproval of payment and determine the appropriate amount of payment. In reviewing the disapproval, the presiding judge of the administrative judicial region may conduct a hearing. Not later than the 45th day after the date an application for payment of a fee is submitted under this article, the commissioners court shall pay to the appointed counsel the amount that is approved by the presiding judge of the administrative judicial region and that is in accordance with the fee schedule for that county.

(d) A counsel in a noncapital case, other than an attorney with a public defender, appointed to represent a defendant under this code shall be reimbursed for reasonable and necessary expenses, including expenses for investigation and for mental health and other experts. Expenses incurred with prior court approval shall be reimbursed in the same manner provided for capital cases by Articles 26.052(f) and (g), and expenses incurred without prior court approval shall be reimbursed in the manner provided for capital cases by Article 26.052(h).

(e) A majority of the judges of the county courts and statutory county courts or the district courts, as appropriate, trying criminal cases in the county may remove an attorney from consideration for appointment if, after a hearing, it is shown that the attorney submitted a claim for legal services not performed by the attorney.

(f) All payments made under this article 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.

(g) If the court determines that a defendant has financial resources that enable him to offset in part or in whole the costs of the legal services provided, including any expenses and costs, the court shall order the defendant to pay during the pendency of the charges or, if convicted, as court costs the amount that it finds the defendant is able to pay.

(h) Reimbursement of expenses incurred for purposes of investigation or expert testimony may be paid directly to a private investigator licensed under Chapter 1702, Occupations Code, or to an expert witness in the manner designated by appointed counsel and approved by the court.

Government Code § 71.0351. Indigent Defense Information.

(a) Not later than January 1 of each year, in each county, a copy of all formal and informal rules and forms that describe the procedures used in the county to provide indigent defendants with counsel in accordance with the Code of Criminal Procedure, including the schedule of fees required under Article 26.05 of that code, shall be prepared and sent to the Office of Court Administration of the Texas Judicial System in the form and manner prescribed by the office. Except as provided by Subsection (b), the local administrative district judge in each county, or the person designated by the judge, shall prepare and send to the office of court administration a copy of all rules and forms adopted by the judges of the district courts trying felony cases in the county. Except as provided by Subsection (b), the local administrative statutory county court judge in each county, or the person designated by the judge, shall prepare and send to the office of court administration a copy of all rules and forms adopted by the judges of the county courts and statutory county courts trying misdemeanor cases in the county.

(b) If the judges of two or more levels of courts adopt the same formal and informal rules and forms as described by Subsection (a), the local administrative judge serving the courts having jurisdiction over offenses with the highest classification of punishment, or the person designated by the judge, shall prepare and send to the Office of Court Administration of the Texas Judicial System a copy of the rules and forms.

(c) In each county, the county auditor, or the person designated by the commissioners court if the county does not have a county auditor, shall prepare and send to the Office of Court Administration of the Texas Judicial System in the form and manner prescribed by the office and on a monthly, quarterly, or annual basis, with respect to legal services provided in the county to indigent defendants during each fiscal year, information showing the total amount expended by the county to provide indigent defense services and an analysis of the amount expended by the county:

- (1) in each district, county, statutory county, and appellate court;
- (2) in cases for which a private attorney is appointed for an indigent defendant;
- (3) in cases for which a public defender is appointed for an indigent defendant;
- (4) in cases for which counsel is appointed for an indigent juvenile under Section 51.10(f), Family Code; and
- (5) for investigation expenses, expert witness expenses, or other litigation expenses.

(d) As a duty of office, each district and county clerk shall cooperate with the county auditor or the person designated by the commissioners court and the commissioners court in retrieving information required to be sent to the Office of Court Administration of the Texas Judicial System under this section and under a reporting plan developed by the Task Force on Indigent Defense under Section 71.061(a).

(e) On receipt of information required under this section, the Office of Court Administration of the Texas Judicial System shall forward the information to the Task Force on Indigent Defense.