

Orders for Repayment of Appointed Attorney Costs Under Code Criminal Procedure art. 26.05(g) & (g-1)

Revised November 2017

Counties May Reduce Their Net Indigent Defense Costs Through Appropriate Use of Article 26.05(g) and (g-1) Repayment Orders

Although the discussion about how to prevent free-riding often has focused on rigorous front-end screening of requests for appointed counsel,¹ orders for repayment of attorney fees under Code Criminal Procedure Article 26.05(g) can be an even more effective tool for limiting a county's net indigent defense costs. That is because Article 26.05(g) allows counties to recoup fees even from defendants who are financially unable to employ private counsel at the beginning of their case—and who thus qualify for appointed counsel—if those defendants have the ability to repay some or all of the costs of their defense during the pendency of their case or at the time of conviction.

The ability to seek repayment from defendants also can mitigate concerns about the potential cost of making timely appointments of counsel in borderline cases of indigence. Defendants who are found to have the ability to pay back costs for counsel can be ordered to do so.

On June 9, 2017, Governor Greg Abbott signed SB 527 into law, which clarified Texas's attorney fee recoupment process by adding subsection (g-1) to Article 26.05.² Effective September 1, 2017, the new subsection requires judges to provide defendants with written notice and the opportunity to present evidence before ordering defendants to pay any amount of unpaid attorney fees.

Some Texas counties have successfully used repayment orders to reduce their indigent defense costs. In 2016, the total recouped statewide was \$11,055,035, which is about 4.5% of the total amount spent on indigent defense. Two hundred three counties reaped these rewards, recouping up to 68% of their indigent defense expenditures from defendants. However, fifty-one counties did not recoup any of their indigent defense costs in 2016. The

¹ See, e.g., RICHARD K. SCOTCH & CHARLES McCONNEL, THE COSTS AND BENEFITS OF AN INDIGENT DEFENDANT VERIFICATION PROGRAM: A REPORT SUBMITTED TO THE TEXAS INDIGENT DEFENSE TASK FORCE (2007).

² Act of May 28, 2017, 85th Leg., R.S., ch. 554, § 1, 2017 Tex. Sess. Law Serv. (West).

reasons for this variation in counties' experience with repayment orders are not known.

Courts' Authority to Order Repayment of Attorney Fees is Limited by Defendants' Ability to Pay

While repayment orders can reduce indigent defense costs, it is “illogical for a trial court to appoint a defendant counsel and then find the defendant in contempt and sentence him to prison for failure to reimburse the county for the expense of his defense without first considering his ability to make payments.”³

The U.S. Supreme Court allows states to recoup appointed counsel costs from criminal defendants if the related statute is “carefully designed to insure that only those who actually become capable of repaying the State will ever be obliged to do so.”⁴ Article 26.05(g) applies only to defendants who a court determines are “able to pay” back part or all of the cost of their defense, and thus is constitutionally “tailored to impose an obligation only upon those with a foreseeable ability to meet it.”⁵

The Court of Criminal Appeals has affirmed that an order to repay appointed attorney fees is invalid if it is entered without any “determination or finding by the trial court that appellant had any financial resources or was ‘able to pay’ the appointed attorney fees.”⁶ Since that ruling, the courts of appeals have modified many criminal judgments to delete improper attorney fee repayment orders.⁷

The Article 26.05(g) ability-to-pay finding is a prerequisite to ordering repayment of attorney fees in any case, including those with ordering repayment as a condition of probation.⁸ Defendants who are ordered to repay attorney fees as a condition of probation without such a finding must bring

³ *Ex parte Gonzales*, 945 S.W.2d 830, 833 (Tex. Crim. App. 1997).

⁴ *Fuller v. Oregon*, 417 U.S. 40, 53 (1974).

⁵ *See Id.* at 54.

⁶ *Mayer v. State*, 309 S.W.3d 552, 553 (Tex. Crim. App. 2010).

⁷ *See, e.g., Phelps v. State*, No. 06-16-00116-CR, 2017 Tex. App. LEXIS 3104 (Tex. App.—Texarkana April 10, 2017, pet. filed); *Kirkland v. State*, 488 S.W.3d 379 (Tex. App.—Beaumont 2016, no pet.); *West v. State*, 474 S.W.3d 785 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *Jones v. State*, 428 S.W.3d 163 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *Stinecipher v. State*, 438 S.W.3d 155 (Tex. App.—Tyler 2014, no pet.); *Smith v. State*, 421 S.W.3d 161 (Tex. App.—San Antonio 2013, no pet.); *Wolfe v. State*, 377 S.W.3d. 141 (Tex. App.—Amarillo 2012, no pet.).

⁸ *Tex. Att’y Gen. Op.* GA-0884 (2011); *see also* TEX. CODE CRIM. PROC. art. 42A.301(b)(11) (attorney fee reimbursement allowed as a condition of community supervision “if the judge determines that the defendant has financial resources” and “in an amount that the judge finds the defendant is able to pay”).

their claim in a direct appeal or risk forfeiture.⁹ The claim is forfeited if the defendant was aware of his obligation to pay the fees but did not bring the claim in a direct appeal.¹⁰ No objection is necessary at the trial court level to preserve the claim for appeal.¹¹

Model Procedures for Article 26.05(g) Repayment Orders

This document is intended to provide Texas judges with model procedures for ordering repayment of appointed attorney fees and associated costs (such as expenses for investigators and experts) in a manner that complies with case law and Article 26.05(g). Two model repayment orders also are included.

Step One: Timely Appoint Counsel to Eligible Indigent Defendant

The Texas Code of Criminal Procedure requires that counsel be appointed within one or three working days (depending on county population) after an eligible indigent defendant requests an attorney.¹²

“[I]ndigent’ means a person who is not financially able to employ counsel.”¹³ Thus, it is possible for a defendant to be simultaneously “indigent” as that term applies to the right to appointed counsel and also capable of repaying all or part of the amount expended by the county for his or her defense. This is because oftentimes the amount expended by the county for legal services in a particular case, and thus the amount the defendant may be ordered to repay under Article 26.05(g), is less than the amount it would cost the defendant to hire a private attorney for the same case.

If a defendant cannot afford to hire counsel at market rates, the court should timely appoint counsel even if, in making the determination of eligibility for counsel, the court finds that the defendant could afford to pay some or all of the county’s costs for his or her legal services. In this situation, the court may follow steps two to four to order repayment of appointed attorney fees during the pendency of the charge and/or upon conviction as court costs.

During admonishments to defendants who may request appointed counsel, it is appropriate for judges to state that defendants who request and receive counsel may be required to repay the county all or part of the cost of their defense. However, because incomplete information about the possibility of repayment may be misleading and interfere with the right to counsel, courts

⁹ *Wiley v. State*, 410 S.W.3d 313, 318 (Tex. Crim. App. 2013).

¹⁰ *Riles v. State*, 452 S.W.3d 333, 337 (Tex. Crim. App. 2015).

¹¹ *Mayer*, 309 S.W.3d at 556.

¹² TEX. CODE CRIM. PROC. art. 1.051(c).

¹³ TEX. CODE CRIM. PROC. art. 1.051(b).

that discuss the possibility of repayment should explain that defendants may not be ordered to repay attorney fees unless the court has evidence that they have the ability to do so.

Step Two: Determine Current or Final Cost of Legal Services Provided

There are two fact determinations that trial courts must make before ordering defendants or convicted persons to repay counsel fees: the cost of legal services that have been provided and the amount the defendant is able to repay. The question of whether a defendant has the ability to repay the specific amount of defense costs in his or her case can only be answered after the amount of those costs is known. As part of the determination of the current or total cost of legal services provided, courts should confirm that appointed attorneys' fee amounts are reasonable and based on itemized bills or vouchers.¹⁴

If the court wishes to order the defendant to repay appointed attorney fees during the pendency of his or her case, the court needs to know the current cost of the legal services that have been provided. The court may only order the defendant to pay up to the amount incurred and may not order the defendant to pay prospective costs.¹⁵

- In counties where the fee schedule includes minimum or set amounts per type of charge (e.g., a flat fee for a misdemeanor plea), the court can enter an order for repayment of the minimum or set amount. Such an order can be entered directly upon appointing counsel. If the final voucher approved by the court exceeds the minimum fee reimbursed by the defendant during the pendency of the charges, the court may enter a separate order for reimbursement of the difference between the previously reimbursed amount and the final amount paid by the county, subject to the defendant's ability to pay.
- If a court orders repayment during the pendency of the case in a county with an hourly fee schedule, attorneys will need to turn in interim vouchers on a schedule set by the court rather than only a final voucher at the end of the case and ordered repayments cannot exceed the amount approved in interim vouchers. Any amount not reimbursed during the pendency of the case can be subject to a separate order for reimbursement upon conviction, subject to the defendant's ability to pay.
- In counties with a public defender or contract defender, the court will need to develop a formula for calculating the cost of legal services

¹⁴ TEX. CODE CRIM. PROC. art. 26.05(a), (c).

¹⁵ See TEX. CODE CRIM. PROC. art. 103.002 ("An officer may not impose a cost for a service not performed").

provided in individual cases¹⁶ and for determining when such costs are incurred.

If the court wishes to order a convicted defendant to repay appointed attorney fees as court costs upon conviction, the court will need to determine the total cost of the legal services that were provided in the case before the court can determine whether and to what extent the defendant has the ability to repay that cost. Because ordered repayments cannot exceed the amount approved by the court under Article 26.05(c), courts will need to require attorneys to bring final vouchers to sentencing in order for the court to enter a repayment order at that hearing. The alternative (if attorneys submit final vouchers after sentencing) is for the court to revisit the case, subject to retaining jurisdiction, upon submission of the final voucher in order to consider whether repayment is appropriate. In cases where financial information in the original affidavit of indigency or other parts of the record does not support an ability-to-pay finding, the court will need to hold a hearing upon submission of the final voucher before ordering repayment. For this reason, counties may want to make habitual submission of final vouchers at sentencing a requirement of re-applying for the appointment list.

Step Three: Determine Indigent Defendant's Ability to Pay

Trial courts may order defendants or convicted individuals who were previously determined indigent and given court-appointed counsel at county expense to repay some or all the costs of their defense “[i]f 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.”¹⁷ The determination regarding defendants’ financial resources required by Article 26.05(g) must be carried out in each case to ensure that the state meets the U.S. Supreme Court requirement that defendants “who remain indigent or for whom repayment would work ‘manifest hardship’ are forever exempt from any obligation to repay.”¹⁸

“[T]he defendant’s financial resources and ability to pay are explicit critical elements in the trial court’s determination of the propriety of ordering reimbursement of costs and fees” that must be supported by record evidence.¹⁹

¹⁶ See TEX. CODE CRIM. PROC. art. 26.05(g)(2) (“the actual amount, including any expenses and costs, that would have otherwise been paid to an appointed attorney had the county not had a public defender’s office”); TEX. CODE CRIM. PROC. art. 42A.301(b)(11) (same).

¹⁷ TEX. CODE CRIM. PROC. art. 26.05(g).

¹⁸ See *Fuller*, 417 U.S. at 53.

¹⁹ *Mayer*, 309 S.W.3d at 556.

A court's review of a defendant's financial circumstances under Article 26.05(g) is closely related to the court's review of those circumstances to determine whether a defendant is indigent. If the evidence the court relied on to find a defendant indigent does not support an ability-to-pay finding, the court may not order a defendant to repay attorney fees unless additional evidence is introduced to show that there has been a material change in the defendant's financial circumstances.²⁰

Record evidence about a defendant's ability to pay for counsel may include evidence of 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.²¹ Any term of imprisonment, fines, mandatory court costs, or probation fees imposed by the court on conviction also may affect a defendant's ability to pay appointed attorney fees at the time a court makes an Article 26.05(g) determination.

Article 26.05(g) requires a present determination of financial resources and does not allow speculation about possible future resources.²²

Step Four: Order Defendant to Repay County the Amount He or She is Able to Pay

Once the court determines the amount of defense costs in a particular case, and if the court determines that the defendant has the ability to repay all or part of those costs, the court may order the defendant to repay the amount that he or she is able to pay. Repayment may be ordered during the pendency of the charge, upon conviction, and/or at any time during a defendant's sentence of confinement or period of supervision.

Two model orders are included in this document. The first is for ordering repayment during the pendency of the charge. The second is for ordering repayment as court costs upon or after conviction, during the term of either the defendant's sentence of confinement or placement on community supervision. These model orders can also be included as conditions of community supervision.

If the court enters both orders, the defense costs the defendant is ordered to repay upon or after conviction cannot exceed the total amount of defense costs incurred minus the amount already repaid by the defendant during the pendency of the charge.

²⁰ *Wiley*, 410 S.W.3d at 317.

²¹ See TEX. CODE CRIM. PROC. art. 26.04(m).

²² *Cates v. State*, 402 S.W.3d 250, 252 (Tex. Crim. App. 2013).

Applicable Statutes

Texas Code of Criminal Procedure Article 26.05(g)

If the judge determines that a defendant has financial resources that enable the defendant to offset in part or in whole the costs of the legal services provided to the defendant in accordance with Article 1.051(c) or (d), including any expenses and costs, the judge shall order the defendant to pay during the pendency of the charges or, if convicted, as court costs the amount that the judge finds the defendant is able to pay. The defendant may not be ordered to pay an amount that exceeds:

- (1) the actual costs, including any expenses and costs, paid by the county for the legal services provided by an appointed attorney; or*
- (2) if the defendant was represented by a public defender's office, the actual amount, including any expenses and costs, that would have otherwise been paid to an appointed attorney had the county not had a public defender's office,*

Texas Code of Criminal Procedure Article 26.05(g-1)

(1) This subsection applies only to a defendant who at time of sentencing to confinement or placement on community supervision, including deferred adjudication community supervision, did not have the financial resources to pay the maximum amount described by Subsection (g)(1) or (2), as applicable, for legal services provided to the defendant.

(2) At any time during a defendant's sentence of confinement or period of community supervision, the judge, after providing written notice to the defendant and an opportunity for the defendant to present information relevant to the defendant's ability to pay, may order a defendant to whom this subsection applies to pay any unpaid portion of the amount described by Subsection (g)(1) or (2), as applicable, if the judge determines that the defendant has the financial resources to pay the additional portion.

(3) The judge may amend an order entered under Subdivision (2) if, subsequent to the judge's determination under that subdivision, the judge determines that the defendant is indigent or demonstrates an inability to pay the amount ordered.

(4) In making a determination under this subsection, the judge may only consider the information a court or courts' designee is authorized to consider in making an indigency determination under Article 26.04(m).

(5) Notwithstanding any other law, the judge may not revoke or extend the defendant's period of community supervision solely to collect the amount the defendant has been ordered to pay under this subsection.

Texas Code of Criminal Procedure Article 42A.301(b)

Conditions of community supervision may include conditions requiring the defendant to:

(11) if the judge determines that the defendant has financial resources that enable the defendant to offset in part or in whole the costs of the legal services provided to the defendant in accordance with Article 1.051(c) or (d), including any expenses and costs, reimburse the county in which the prosecution was instituted for the costs of the legal services in an amount that the judge finds the defendant is able to pay, except that the defendant may not be ordered to pay an amount that exceeds:

(A) the actual costs, including any expenses and costs, paid by the county for the legal services provided by an appointed attorney; or

(B) if the defendant was represented by a public defender's office, the actual amount, including any expenses and costs, that would have otherwise been paid to an appointed attorney had the county not had a public defender's office[.]

If judges or clerks have any questions about repayment orders, please contact:

TEXAS INDIGENT DEFENSE COMMISSION
209 W. 14th St., Suite 202
Austin, Texas 78701
p. 512.936.6994
<http://www.tidc.texas.gov/>

Cause No. _____

State of Texas

§
§
§
§
§

In the _____ Court

v.

_____ County, Texas

ORDER FOR INDIGENT DEFENDANT TO OFFSET COST OF LEGAL SERVICES PROVIDED BY THIS COUNTY DURING PENDENCY OF CHARGE

WHEREAS, the Court previously determined that the Defendant is indigent under the procedures and standards adopted by the judges of this county and has appointed counsel to represent the defendant in this matter, the Court now FINDS that:

Determination 1: The cost of the legal services provided to the defendant as of this date is \$_____. This amount is reasonable and based on itemized bills in the record, this county's flat fee schedule, or the Court's calculation in the record of the cost of legal services provided to the defendant by a public defender or contract defender.

Determination 2: The defendant, while indigent, has the ability to pay \$_____ of the total cost of the legal services provided as of this date.

THEREFORE, the Court ORDERS the defendant to [CHECK ONE]:

- Pay the amount in Determination 2 (\$_____) by _____, 20__.
- Pay \$_____ amount per month during the pendency of this charge until the defendant has paid the full amount in Determination 2 (\$_____). Upon adjudication or dismissal of this charge, no further monthly payments are due under this order.

Signed and entered on _____, 20__.

Presiding Judge

Cause No. _____

State of Texas

§

In the _____ Court

§

v.

§

§

§

_____ County, Texas

ORDER FOR CONVICTED INDIGENT DEFENDANT TO OFFSET COST OF LEGAL SERVICES PROVIDED BY THIS COUNTY AS COURT COSTS

WHEREAS, the Court previously determined that the Defendant is indigent under the procedures and standards adopted by the judges of this county and appointed counsel to represent the defendant in this matter, and the defendant has been convicted in this cause, the Court now FINDS that:

Determination 1: The remaining balance of the cost of the legal services provided to the defendant (total cost minus the amount already reimbursed by the defendant during the pendency of this charge) for this cause is \$_____. This amount is reasonable and based on itemized bills in the record, this county's flat fee schedule, or the Court's calculation in the record of the cost of legal services provided to the defendant by a public defender or contract defender.

Determination 2: The defendant, while indigent, has the ability to pay \$_____ of the total cost of the legal services provided in this cause.

THEREFORE, the Court ORDERS the defendant to pay \$_____ as court costs.

Signed and entered on _____, 20__.

Presiding Judge