

MEMORANDUM

To: David Slayton
From: Wesley Shackelford, Deputy Director, TIDC
Scott Ehlers, Director of Public Defense Improvement, TIDC
Re: Statutes to Suspend for Supreme Court of Texas Emergency Order in Response to Operation Lone Star
Date: July 21, 2021
Pages: 3

You asked for a list of statutes that need to be suspended for an Emergency Order in response to Operation Lone Star (OLS). Here are our suggestions:

Art. 26.04, Tex. Code of Criminal Procedure

Art. 26.04(a): procedures for appointing counsel may need to differ from the counties' countywide procedures for timely and fairly appointing counsel (i.e., the county's indigent defense plan). TIDC or OCA should be authorized to modify appointment procedures in disaster declaration counties for OLS cases. However, timelines for appointment of counsel (referenced in 26.04 but spelled out in 1.051(c)) should not be suspended.

Art. 26.04(b): Suspend to allow TIDC to designate who appoints counsel in disaster declaration counties for OLS cases. Right now only judges in the county or their designee can appoint counsel.

Art. 26.04(c): Suspend to allow TIDC's designee to appoint counsel in in disaster declaration counties for OLS cases.

Art. 26.04(d): Suspend to allow TIDC or its designee to set objective qualifications for attorneys to be on the appointment list for OLS cases and that take precedence over local qualifications. Suspend the requirement that a majority of judges in disaster declaration counties have to approve attorneys on the appointment list for OLS cases. Allow TIDC or its designee to approve attorneys on the appointment list for OLS cases.

Art. 26.04(e): Authorize TIDC or its designee to establish public appointment lists of attorneys qualified to provide representation in disaster declaration counties for OLS cases. Also authorize TIDC to specify objective qualifications for an attorney to be on the appointment list for OLS cases. Suspend requirement that judges trying misdemeanors and felonies establish the public appointment list to represent defendants in OLS cases.

Art. 26.04(f): Clarify that this statute applies in disaster declaration counties in which a public defender office is representing defendants arrested pursuant to OLS.

Art. 26.04(f-1): Clarify that this applies to managed assigned counsel programs that are operated to appoint counsel for OLS cases.

Art. 26.04(g): Authorize TIDC to establish an alternative program for appointing counsel for indigent defendants in disaster declaration counties for OLS cases and waive requirement that judges have to approve an alternate program to appoint counsel for misdemeanor and felony OLS cases.

Art. 26.04(h): Clarify that TIDC’s designee can appoint an attorney using an alternative program. NOTE: There is a provision here about Commissioners Court having to approve increases in expenditures. We might want to waive this.

Art. 26.04(i): Authorize the appointment of an attorney from a county outside the court’s administrative judicial region to represent a felony defendant in an OLS case.

Art. 26.04(j): Clarify that these requirements apply to attorneys appointed by TIDC’s designee.

Art. 26.04(k): Authorize TIDC or its designee to remove an attorney from the appointment list for OLS cases; not limited to the reasons listed in (k).

Art. 26.044, Tex. Code of Criminal Procedure

Code of Criminal Procedure Art. 26.044(b): Waive the requirement that a commissioners court has to create a department of enter into a contract for a public defender office to operate in the county.

Code of Criminal Procedure Art. 26.044(b)(2): Existing public defender’s offices need to be authorized to accept appointments in courts and counties not previously designated under this subsection (i.e. out of its normal service area), as well as potentially different types of cases than previously authorized to provide representation by this subsection.

TIDC should be authorized to allow public defender offices of its choosing to operate in disaster declaration counties to represent defendants in OLS cases.

Art. 26.047, Tex. Code of Criminal Procedure

Code of Criminal Procedure Art. 26.047(b): Waive the requirement that a commissioners court has to create a department of enter into a contract for a managed assigned counsel program to operate in the county.

Code of Criminal Procedure Art. 26.047(b)(1): Existing managed assigned counsel programs need to be authorized to accept appointments in courts and counties not previously designated under this subsection, as well as potentially different types of cases than previously authorized by this subsection.

TIDC should be authorized to allow a managed assigned counsel program of its choosing to operate in disaster declaration counties to oversee appointments, payments, and indigent defense services defendants in OLS cases.

Art. 26.05, Tex. Code of Criminal Procedure

Code of Criminal Procedure Art. 26.05(b): Payments to attorneys may need to be made according to a fee schedule or schedules that differ from those previously adopted by the judges of an individual county under this subsection. Existing public defender’s offices need to be authorized to accept appointments in courts and counties not previously designated under this subsection.

Code of Criminal Procedure Art. 26.05(c): Approval of attorney fee vouchers and other legal service providers paid under this subsection may need to be approved by someone other than the judge presiding in the case or director of a managed assigned counsel program. TIDC or its designee should be authorized to review and approve these vouchers.

Code of Criminal Procedure Art. 26.05(e): Authorize TIDC or its designee to remove an attorney from consideration for appointments if it is shown the attorney submitted a claim for legal services not performed by the attorney.

Code of Criminal Procedure Art. 26.05(f): Payments to attorneys and other legal services providers may need to be made from an entity other than the county in which prosecution was initiated as provided in this subsection, such as TIDC, TIDC's designee, or the Office of Court Administration.

Government Code, Sec. 79.037

Government Code Sec. 79.037(a)(2): TIDC needs authority to provide grant funds directly to a non-profit corporation that provide indigent defense services. These could include the Lubbock Private Defender Office, a managed assigned counsel program that may oversee appointments and payment to attorneys providing representation in Operation Lone Star cases. It could also include Texas RioGrande Legal Aid, which operates public defense programs in several counties in the region. Authority for TIDC to provide funding directly to non-profits is contained in HB 295, which becomes effective on September 1, 2021.

Texas Administrative Code

Title 1, Texas Administrative Code, Sec. 173.103: TIDC may need to award grant funds to counties or non-profit corporations without the use of a Request for Applications (RFA) provided for this section.

In addition to suspending the above statutes, TIDC may need the following additional powers to stand in for the judges and their local procedures for appointing and paying counsel under Code of Criminal Procedure Art. 26.04(a), also known as the indigent defense plans:

- Authorization to approve individual attorneys, public defender offices, and managed assigned counsel programs to receive appointments for Operation Lone Star cases; and
- Authorization to approve expenditures related to Operation Lone Star representation such as fee vouchers