

**INDIGENT DEFENSE AMENDMENTS**

2023 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Ryan D. Wilcox**

Senate Sponsor: Todd D. Weiler

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**LONG TITLE**

**General Description:**

This bill amends provisions related to indigent defense.

**Highlighted Provisions:**

This bill:

- clarifies when a court may order indigent defense services and resources;
- amends provisions related to the Indigent Aggravated Murder Defense Fund; and
- makes technical and conforming changes.

**Money Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

**AMENDS:**

**78B-22-203**, as last amended by Laws of Utah 2022, Chapter 281

**78B-22-302**, as enacted by Laws of Utah 2019, Chapter 326

**78B-22-701**, as last amended by Laws of Utah 2022, Chapters 281, 451

**78B-22-702**, as renumbered and amended by Laws of Utah 2019, Chapter 326

**78B-22-703**, as renumbered and amended by Laws of Utah 2019, Chapter 326

**78B-22-704**, as renumbered and amended by Laws of Utah 2019, Chapter 326

**ENACTS:**

**78B-22-705**, Utah Code Annotated 1953

*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section **78B-22-203** is amended to read:

**78B-22-203. Order for indigent defense services.**

(1) (a) A court shall appoint an indigent defense service provider who is employed by an indigent defense system or who has a contract with an indigent defense system to provide indigent defense services for an individual over whom the court has jurisdiction if:

(i) the individual is an indigent individual; and

(ii) the individual does not have private counsel.

(b) An indigent defense service provider appointed by the court under Subsection (1)(a) shall provide indigent defense services for the indigent individual in all court proceedings in the matter for which the indigent defense service provider is appointed.

(2) (a) Notwithstanding Subsection (1), the court may order that indigent defense services be provided by an indigent defense service provider who does not have a contract with an indigent defense system if the court finds by clear and convincing evidence that:

(i) all the contracted indigent defense service providers:

(A) have a conflict of interest; or

(B) do not have sufficient expertise to provide indigent defense services for the indigent individual; or

(ii) the indigent defense system does not have a contract with an indigent defense service provider for indigent defense services.

(b) A court may not order indigent defense services under Subsection (2)(a) unless the court conducts a hearing with proper notice to the indigent defense system by sending notice of the hearing to the county clerk or municipal recorder.

(3) (a) A court may order reasonable indigent defense resources for an individual who has retained private counsel only if the court finds by clear and convincing evidence that:

(i) the individual is an indigent individual;

(ii) the individual would be prejudiced by the substitution of a contracted indigent defense service provider and the prejudice cannot be remedied;

(iii) at the time that private counsel was retained, the individual:

(A) entered into a written contract with private counsel; and

(B) had the ability to pay for indigent defense resources, but no longer has the ability to pay for the indigent defense resources in addition to the cost of private counsel;

(iv) there has been an unforeseen change in circumstances that requires indigent defense resources beyond the individual's ability to pay; and

(v) any representation under this Subsection (3)(a) is made in good faith and is not calculated to allow the individual or retained private counsel to avoid the requirements of this section.

(b) A court may not order indigent defense resources under Subsection (3)(a) until the court conducts a hearing with proper notice to the indigent defense system by sending notice of the hearing to the county clerk or municipal recorder.

(c) At the hearing, the court shall conduct an in camera review of:

(i) the private counsel contract;

(ii) the costs or anticipated costs of the indigent defense resources; and

(iii) other relevant records.

(4) A court may only order the representation of an indigent individual by an indigent defense service provider in accordance with this section.

(5) A court may not order indigent defense resources be provided to an indigent individual, except as provided in:

(a) Subsection (3); or

(b) Section [78B-22-705](#).

~~[(4) Except as provided in this section, a court may not order indigent defense services.]~~

Section 2. Section **78B-22-302** is amended to read:

**78B-22-302. Compensation for indigent defense services.**

(1) An indigent defense system shall fund indigent defense services ordered by a court ~~[in accordance with]~~ under Section 78B-22-203.

(2) An indigent defense system shall ensure that there are adequate funds for indigent defense resources when a court orders indigent defense services under Section 78B-22-203.

Section 3. Section 78B-22-701 is amended to read:

**78B-22-701. Establishment of Indigent Aggravated Murder Defense Fund -- Use of fund -- Compensation for indigent legal defense from fund.**

(1) ~~[For purposes of this part]~~ As used in this part, "fund" means the Indigent Aggravated Murder Defense Fund.

(2) (a) There is established a custodial fund known as the "Indigent Aggravated Murder Defense Fund."

(b) The Division of Finance shall disburse money from the fund at the direction of the board and subject to this chapter.

(3) The fund consists of:

(a) money received from participating counties as provided in Sections 78B-22-702 and 78B-22-703;

(b) appropriations made to the fund by the Legislature as provided in Section 78B-22-703; and

(c) interest and earnings from the investment of fund money.

(4) The state treasurer shall invest fund money with the earnings and interest accruing to the fund.

(5) The fund shall be used to assist participating counties with ~~[financial resources]~~ expenses for indigent defense services, as provided in Subsection (6), to fulfill ~~[their]~~ the constitutional and statutory mandates for the provision of constitutionally effective defense for indigent individuals prosecuted for the violation of state laws in cases involving aggravated murder.

(6) Money allocated to or deposited [~~in this fund shall be~~] into the fund is used only:

(a) to reimburse participating counties for [~~expenditures made for an attorney appointed to represent~~] expenses incurred for indigent defense services provided to an indigent individual, other than a state inmate in a state prison, who is prosecuted for aggravated murder in a participating county; and

(b) for administrative costs pursuant to Section 78B-22-501.

Section 4. Section 78B-22-702 is amended to read:

**78B-22-702. County participation.**

(1) (a) A county may participate in the fund subject to the provisions of this chapter.

(b) A county that does not participate in the fund, or is not current in the county's assessments for the fund, is ineligible to receive money from the fund.

~~[(b)]~~ (c) The board may revoke a county's participation in the fund if the county fails to pay the county's assessments when due.

(2) To participate in the fund, the legislative body of a county shall:

(a) adopt a resolution approving participation in the fund and committing that county to fulfill the assessment requirements as set forth in Subsection (3) and Section 78B-22-703; and

(b) submit a certified copy of that resolution together with an application to the board.

(3) By January 15 of each year, a participating county shall contribute to the fund an amount computed in accordance with Section 78B-22-703.

(4) A participating county may withdraw from participation in the fund upon:

(a) adoption by the county's legislative body of a resolution to withdraw; and

(b) notice to the board by January 1 of the year before withdrawal.

(5) A county withdrawing from participation in the fund, or whose participation in the fund has been revoked for failure to pay the county's assessments when due, shall forfeit the right to:

(a) any previously [~~payed~~] paid assessment;

(b) relief from the county's obligation to pay [~~its~~] the county's assessment during the

period of ~~[its]~~ the county's participation in the fund; and

(c) any benefit from the fund, including reimbursement of costs that accrued after the last day of the period for which the county has paid ~~[its]~~ the county's assessment.

Section 5. Section **78B-22-703** is amended to read:

**78B-22-703. County and state obligations.**

(1) (a) Except as provided in Subsection (1)(b), a participating county shall pay into the fund annually an amount calculated by multiplying the average of the percent of ~~[its]~~ the county's population to the total population of all participating counties and of the percent ~~[its]~~ of the county's taxable value of the locally and centrally assessed property located within that county to the total taxable value of the locally and centrally assessed property to all participating counties by the total fund assessment for that year to be paid by all participating counties as is determined by the board to be sufficient such that it is unlikely that a deficit will occur in the fund in any calendar year.

(b) The fund minimum ~~[shall be]~~ is equal to or greater than 50 cents per person of all counties participating.

(c) The amount paid by a participating county ~~[pursuant to]~~ under this Subsection (1) ~~[shall be]~~ is the total county obligation for payment of costs ~~[pursuant to]~~ in accordance with Section **78B-22-701**.

(2) (a) A county that elects to initiate participation in the fund, or reestablish participation in the fund after participation was terminated, is required to make an equity payment in addition to the assessment required by Subsection (1).

(b) The equity payment ~~[shall be]~~ is determined by the board and represent what the county's equity in the fund would be if the county had made assessments into the fund for each of the previous two years.

(3) If the fund balance after contribution by the state and participating counties is insufficient to replenish the fund annually to at least \$250,000, the board by a majority vote may terminate the fund.

(4) If the fund is terminated, the remaining money shall continue to be administered and disbursed in accordance with the provision of this chapter until exhausted, at which time the fund shall cease to exist.

(5) (a) If the fund runs a deficit during any calendar year, the state is responsible for the deficit.

(b) In the calendar year following a deficit year, the board shall increase the assessment required by Subsection (1) by an amount at least equal to the deficit of the previous year, which combined amount becomes the base assessment until another deficit year occurs.

(6) In a calendar year in which the fund runs a deficit, or is projected to run a deficit, the board shall request a supplemental appropriation to pay for the deficit from the Legislature in the following general session.

(7) The state shall pay any or all of the reasonable and necessary money for the deficit into the fund.

Section 6. Section **78B-22-704** is amended to read:

**78B-22-704. Application and qualification for fund money.**

(1) A participating county may apply to the board for benefits from the fund if that county has incurred, or reasonably anticipates incurring, expenses ~~[in the defense of]~~ for indigent defense services provided to an indigent individual for an offense involving aggravated murder.

(2) An application may not be made nor benefits provided from the fund for a case filed before September 1, 1998.

(3) ~~[H]~~ Except as provided in Subsection (4), if the application of a participating county is approved by the board, the board shall negotiate, enter into, and administer a contract ~~[with counsel for the indigent individual and costs incurred for the defense of that indigent individual, including fees for counsel and reimbursement for indigent defense services incurred by an indigent defense service provider]~~ for the cost of indigent defense services with an attorney or entity appointed to represent the indigent individual.

(4) The board shall pay an indigent defense service provider with a contract under Subsection (3) for indigent defense resources approved by a court under Section [78B-22-705](#).

~~[(4)]~~ (5) A nonparticipating county is responsible for paying for indigent defense services in the nonparticipating county and is not eligible for any legislative relief.

Section 7. Section **78B-22-705** is enacted to read:

**78B-22-705. Extraordinary expense -- Motion.**

(1) If an indigent defense service provider is representing an indigent individual for an offense involving aggravated murder and the indigent defense service provider has a contract with the board under Section [78B-22-704](#), the indigent defense service provider may file an ex parte motion with the court for an order for the payment of indigent defense resources not covered by the contract between the indigent defense service provider and the board.

(2) (a) Except as provided in Subsection (2)(b), an indigent defense service provider shall file an ex parte motion under Subsection (1) before the cost for indigent defense resources is incurred.

(b) An indigent defense service provider may file an ex parte motion under Subsection (1) for a cost incurred for indigent defense resources on and after May 14, 2019, but before May 3, 2023.

(3) Upon an ex parte motion under this section, the court shall conduct an in camera review of:

(a) the indigent defense service provider's contract with the board;

(b) the cost, or the anticipated cost, of the indigent defense resources for which the indigent service provider seeks approval; and

(c) any other relevant record.

(4) The court may order the board to pay for indigent defense resources sought by the indigent defense service provider under this section.