

# **CLIENT CHOICE IMPLEMENTATION PLAN**

**In the**

## **COMAL COUNTY COURT at LAW**

**January 9, 2015**

This plan outlines procedures for implementing “client choice” in the Comal County Court at Law (hereafter “County Court.”) The choice of counsel afforded defendants is limited because the only lawyers eligible for client selection will be those who have been approved by the County Court’s judges as qualified to provide representation in misdemeanor cases. Procedurally, all lawyers selected by defendants to provide representation will be appointed by County Court judges consistent with Texas law.

Client choice will be available for defendants as of the date that this implementation plan becomes operational. Defendants who appeared before a magistrate or judge prior to the plan’s implementation date will not be permitted to have their appointment of counsel vacated and to select the lawyer of their choice.

### **1. Arrestee Appears Before Magistrate or County Court Judge**

Many of the persons in Comal County who are arrested and charged with a misdemeanor appear before a magistrate in the Comal County Jail. At this initial proceeding, Texas law requires that all arrestees be advised of their legal rights pursuant to Article 15.17 of the Texas Code of Criminal Procedure.

Subsection (a) of Article 15.17 requires that “[t]he magistrate shall...inform the person arrested of the person’s right to request the appointment of counsel if the person cannot afford counsel. The magistrate shall inform the person arrested of the procedures for requesting appointment of counsel.”<sup>1</sup>

After the Article 15.17 warnings are given to each defendant, the magistrate signs a “Magistrate’s Warning” form so that in each case a written record exists reflecting the information provided to the defendant.

Some defendants charged with misdemeanors do not appear before a magistrate in the Comal County Jail. These defendants are released from the jail on a standard

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<sup>1</sup> The duty to advise arrestees of their right to counsel applies to defendants who are able to post bond. Article 26.04 (m) states the following: “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.”

\$2,000 or \$3,000 bond and given a summons to appear later in County Court. These defendants, therefore, have their first judicial appearance before a County Court judge rather than a magistrate in the jail.

In order to implement client choice, this plan addresses necessary changes in several forms now in use by magistrates before whom defendants make their initial judicial appearance in the Comal County jail.<sup>2</sup> There is also a new form titled, "Selection of Lawyer," to be used in the implementation of "client choice."

This plan does not expressly address the forms used in County Court when defendants bypass the magistrate and make their first judicial appearance before a County Court judge. However, the changes to the two existing forms used by the magistrates, as well as the one new recommended form, are suitable for County Court use.

## **2. Modifications to Advisements and "Magistrate's Warning Form"**

In order to implement client choice, several changes will be made to the advisements given to each defendant, which in turn will be reflected in the "Magistrate's Warning" form now in use. Attached as Exhibit A is the current Magistrate's Warning form; changes to the form are shown in Exhibit B.

The changes make clear to defendants that if they are found indigent and thus eligible for representation by a lawyer paid by Comal County, they will have a choice of options, i.e., they either will be able to choose their own lawyer or to have the County Court select a lawyer for them. Thus, new paragraph (f) in the Magistrate's Warning form is as follows:

Further, I want to inform you that if you meet indigence standards, Comal County is using a new procedure for appointing a lawyer for you. As a result of this new procedure, you will be able to choose your lawyer from a list of lawyers approved by the Court to provide legal representation in your case and paid by Comal County. But if you do not want to choose your own lawyer, the Court will select a lawyer for you and this lawyer will be appointed to represent you and paid by Comal County. I will explain this procedure to you more fully if you meet indigence standards.

## **3. Modifications to "Affidavit of Indigence" Form and Proposed New "Selection of Lawyer" Form**

- a. Modifications also have been made to the "Affidavit of Indigence" form. Attached as Exhibit C is the form currently in use; changes to the form are shown in Exhibit D.

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<sup>2</sup> The revised forms are titled "Magistrate's Warning" (Exhibit B) and "Affidavit of Indigence" (Exhibit D).

Set forth below is an explanation of the changes and the reasons why the changes are necessary.

- b. The current Affidavit of Indigence form provides a defendant only one option concerning representation by counsel, i.e., “I hereby request the Court to appoint counsel for me.”<sup>3</sup> In order to implement client choice, the form has been changed to make clear that a defendant also is able to select his or her own lawyer. Accordingly, the revision of the form now has a new section, titled “Defendant’s Preference about a Lawyer,” which spells out three options for the defendant.<sup>4</sup>

We anticipate that this section of the form will normally be completed by the defendant with the magistrate’s assistance, who will explain to the defendant the three options listed. Magistrates also will make the decision about whether or not the defendant is indigent and therefore entitled to legal representation paid for by Comal County.

- c. Pursuant to option 1, the defendant elects to choose his or her own lawyer and knows the name of one or more lawyers by whom they would like to be represented. Accordingly, the form provides space in which the defendant can list the names of up to three lawyers in order of preference. Option 1 is likely to be selected only by persons who previously have been defendants in Comal County and had a positive experience with one or more defense lawyers.

If this option is selected, the magistrate will confirm that the lawyer selected is on the approved misdemeanor list *and* is available to be selected by the defendant. If one or more of the lawyers selected is available, the magistrate will transmit the form to the County Court so that the first of the available lawyers chosen by the defendant can be appointed.<sup>5</sup>

- d. Pursuant to option 2, the defendant also elects to choose his or her own lawyer, but the defendant needs time to make a selection. The form provides space in which the magistrate can insert the date and time by which the defendant will need to convey his or her choice of a lawyer. In order to afford adequate time for

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<sup>3</sup> Some defendants reject the offer of a court appointed counsel, believing that they have adequate financial means to retain a private lawyer. Later, when they discover they cannot afford to hire counsel, they ask for a court appointed lawyer. In this circumstance, the client choice process outlined in this plan will be implemented.

<sup>4</sup> The Affidavit of Indigence form (Exhibit C) refers both to “attorneys” and “counsel.” The revision of this form (Exhibit D), which contains new language about a defendant’s preference related to legal representation, primarily uses the word “lawyer” in the belief that this word is best understood and most often used by defendants.

<sup>5</sup> In paragraph 4 b. *infra*, we recognize that defense lawyers must be permitted to declare themselves “unavailable” for court appointments, including cases in which they are selected by defendants to provide representation, if they believe they have too much work and thus are unable to provide “competent” and “diligent” representation as required by Texas Rules of Professional Conduct.

defendants to make their selection of defense counsel, defendants will be given up to 48 hours in which to make their decision. More than this amount of time will unduly delay defense counsel's entry into the case.<sup>6</sup>

In addition, when a defendant elects option 2, the magistrate will give the defendant a list of the approved misdemeanor lawyers eligible to be selected to provide representation and also make available information about the lawyers, as explained in paragraph 5 *infra*. The defendant also will be given a new form titled, "Selection of Lawyer," in which the defendant will be able to list, in order of preference, up to three lawyers to provide defendant's representation. See Exhibit E.

Defendants who only speak and understand Spanish will be afforded the opportunity to select a defense lawyer who is fluent in Spanish. In order to implement this policy, Lawyer Information forms (Exhibit F) submitted by Spanish-speaking lawyers and the Selection of Lawyer form (Exhibit E) will be translated into Spanish.

- e. If a defendant elects option 2 and remains in the Comal County Jail, the magistrate will retain the "Affidavit of Indigence" form. If the defendant returns the form to the magistrate within the 48-hour deadline and selects one or more lawyers, in order of preference, to provide representation, both the "Selection of Lawyer" form and the "Affidavit of Indigence" form will be sent to the County Court so that the first of the available lawyers selected can be appointed to represent the defendant.<sup>7</sup>
- f. If a defendant selects option 2 and remains in custody in the Comal County Jail but does *not* return the "Selection of Lawyer" form to the magistrate within the 48-hour deadline, the magistrate will send the "Affidavit of Indigence" form to the County Court so that a lawyer may be appointed for the defendant according to the regular court appointment process.
- g. If a defendant elects option 2 and is released from the Comal County Jail before expiration of the 48-hour time limit for choosing a lawyer *and* has not yet returned to the Magistrate his or her "Selection of Lawyer" form, the defendant will be asked for the form by Comal County Jail personnel. This matter has been discussed with Major John Bell of the Comal County Jail, and jail officials who

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<sup>6</sup> Art. 1.051 of the Texas Code of Criminal Procedure states that "if an indigent defendant is entitled to and requests appointed counsel and if adversarial judicial proceedings have been initiated against the defendant, a court or the court's designee...shall appoint counsel...not later than the end of the third working day after the date on which the court or the court's designee receives the defendant's request for appointment of counsel."

<sup>7</sup> Magistrates will track defendants who have selected option 2 and arrange with jail officials to have jailers, on a daily basis, ask defendants who have outstanding "Selection of Lawyer" forms if it has been filled out. All such completed forms will need to be transmitted to the magistrate within the 48 hour allotted time period.

check out inmates have agreed to seek to obtain from such inmates prior to their release all such uncompleted forms. If the defendant completes the form before being released, it will be sent to the Magistrate who will then send it to the County Court together with the “Affidavit of Indigence” form so that defendant’s selection of counsel can be implemented. If a defendant fails to complete the form before being released, a lawyer will be appointed to provide representation in accordance with the regular court appointment process. In this instance, the magistrate will promptly forward the “Affidavit of Indigence” form to the County Court.

- h. Option 3 reflects current practice, in which the defendant requests that the County Court appoint a lawyer to provide representation.
- i. All lawyers appointed to represent defendants will be informed by the County Court Administration office whether their appointment to a defendant’s case is the result of client selection or was made through the regular court appointment process.

**4. Maintaining Lists of Lawyers and Lawyer “Unavailability”**

- a. The list of approved lawyers to provide misdemeanor representation has not heretofore been disseminated to the lawyers who are on the list. However, in order to implement client choice, the names of lawyers on the misdemeanor list will inevitably become more public, as it will be necessary to share the list with defendants who elect to choose their own lawyer. See *also* paragraphs 3 d. *supra* and paragraph 5 b. *infra*.
- b. An up-to-date registry of lawyers on the list will continue to be maintained by the County Court. In order to implement client choice, there is one change in current practice deemed necessary, namely, to permit lawyers to declare themselves “unavailable” for court appointments if they conclude they have too much work and therefore cannot accept additional cases lest they be unable to provide “competent” and “diligent” representation as required by Texas Rules of Professional Conduct. This option is quite important in a system of client choice since it is conceivable that a few lawyers may be selected repeatedly to provide representation, resulting in their becoming overwhelmed with too many cases. This feature of the program is fully consistent with approved standards of the State Bar of Texas: “If counsel’s caseload is so large that counsel is unable to meet these performance guidelines, counsel shall inform the court or courts before whom counsel’s cases are pending.”<sup>8</sup>

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<sup>8</sup> State Bar of Texas, Performance Guidelines for Non-Capital Defense Representation, Guideline 1.3 I (2011). In addition, the Texas Rules of Professional Conduct, Rule 1.01, requires that lawyers furnish “competent” and “diligent” representation in all cases. Further, comment 6 to this rule states that “[a] lawyer’s workload should be controlled so that each matter can be handled with diligence and competence.” Rule 6.01 (a) is also relevant since it recognizes that “good cause” is present for seeking to avoid appointments by a tribunal when “representing the client is likely to result in violation of...rules of professional conduct.” Similarly, the American Bar Association recommends in its Eight Guidelines of

- c. In order to enable lawyers to declare “unavailability” for new misdemeanor appointments, all lawyers on the approved misdemeanor list will be informed that if they conclude they cannot accept additional appointments, they should email the appropriate designated person in County Court in charge of the misdemeanor list and state that they need to be temporarily removed. In order to be reinstated, a lawyer who has been removed will need to email the appropriate designated person in County Court and advise that they are now prepared to accept additional cases. Accordingly, the lawyer’s name will be placed back on the list of approved lawyers, and the lawyer will once again be eligible for client selection and court appointments through the regular appointment process.
- d. County Court personnel will maintain a computerized list of all approved misdemeanor lawyers who serve as assigned counsel in Comal County Courts. The list will include a place in which authorized personnel of the County Courts can indicate the names of any lawyers who have declared that they are temporarily unavailable for appointments to new cases. The list also will be accessible to the magistrates and to County Court judges so that they will be able to determine at all times the names of any approved lawyers who are temporarily unavailable for new court appointments.

## **5. Information about Lawyers**

- a. All lawyers approved to provide defense representation in the County and District Courts will be asked to complete online a one-page form containing information about their professional backgrounds. A copy of this form is attached as Exhibit F. All such completed forms will be made available for viewing by defendants in the Comal County Jail who state that they want to select their own lawyer but would like to have some time in which to make their decision. This is option 2, discussed at paragraph 3 d. *supra*.
- b. The process in the jail will be implemented as follows: When a defendant elects option 2, the Magistrate will give the defendant a one-page list of the lawyers approved to provide misdemeanor representation. The list will not be labeled a “List of Misdemeanor Lawyers”, but instead will be color coded on a light colored paper, in order to distinguish the list from the two lists of lawyers eligible for appointments to felony cases, which will be on different colored paper.
- c. Soon after defendants receive their list of lawyers, they will be afforded a brief opportunity by jail officials to go to a small private area in which to review the appropriate Exhibit F forms completed by approved misdemeanor lawyers. The

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Public Defense Related to Excessive Workloads, approved in 2009, that “Public Defense Providers consider taking prompt actions...to avoid workloads that either are or are about to become excessive,” including “[n]otifying courts...that the Provider is unavailable to accept additional appointments.” See Guideline 5 at 9. These guidelines are available at [www.indigentdefense.org](http://www.indigentdefense.org).

Exhibit F forms will be color coded and will correspond with the color of the one-page list of misdemeanor lawyers.

Although defendants will not receive their own copies of the “Lawyer Information” forms completed by approved misdemeanor lawyers, they will be able to make notes about the lawyers on their one-page list of the available misdemeanor lawyers given to them by the Magistrate, and they will be able to use this list of lawyers to complete the “Selection of Lawyer” form (Exhibit E) discussed in paragraph 3 d. *supra*.

When a defendant’s initial judicial appearance occurs before a County Court judge, the same procedure will be implemented as in the Comal County Jail. Thus, if a defendant is determined to be indigent and, after being advised of their client selection options, the defendant elects option 2, the defendant will receive the one-page color coded list of approved misdemeanor lawyers and afforded time in which to review the “Lawyer Information” forms completed by these lawyers (Exhibit F). The papers necessary to implement this procedure will be available to the County Court’s judges.

Attachments:

- Exhibit A: Magistrate’s Warning
- Exhibit B: Magistrate’s Warning (revision of Exhibit A)
- Exhibit C: Affidavit of Indigence
- Exhibit D: Affidavit of Indigence (revision of Exhibit C)
- Exhibit E: Selection of Lawyer (new)
- Exhibit F: Assigned Counsel Program Lawyer Information (new)