

CLIENT CHOICE IMPLEMENTATION PLAN

In The

COMAL COUNTY DISTRICT COURT

January 9, 2015

This plan outlines procedures for implementing “client choice” in the Comal County District 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 District Court as qualified to provide the requisite representation. Procedurally, all lawyers selected by defendants to provide representation will be appointed by District 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 District Court Judge

The majority of persons in Comal County who are arrested and charged with a felony appear before a magistrate in the Comal County Jail. At this initial judicial 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.”¹

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 felonies do not appear before a magistrate in the Comal County Jail. For example, when defendants are arrested pursuant to a warrant, a bond

¹ 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.”

amount for the defendant's release is often specified. When these defendants make bond promptly and are released, their first judicial appearance is before a District Court judge rather than a magistrate in the jail.

In order to implement client choice, this plan addresses necessary changes in two forms now in use by magistrates before whom defendants make their initial judicial appearance in the Comal County Jail.² 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 District Court when defendants bypass the magistrate and make their first judicial appearance before a District Court judge. However the changes to the two existing forms to be used by the magistrates, as well as the one new form, are suitable for District Court use.

2. Modifications to Advisements and to "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.³

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 District 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.

² The revised forms are titled "Magistrate's Warning" (Exhibit B) and "Application of Indigence and Representation by a Lawyer" (Exhibit D).

³ Exhibit A refers both to "counsel" and "attorney." Exhibit B uses the word "lawyer" in the belief that this word is best understood and most often used by defendants.

3. Modification to “Application of Indigence and Request for Appointment of Counsel” Form; and Proposed New “Selection of Lawyer” Form

- a. Modifications also have been made to the “Application of Indigence and Request for Appointment of Counsel” form. Attached as Exhibit C is the form currently in use; changes to the form are shown in Exhibit D.⁴

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

- b. First, the title of the form has been changed. Instead of the form being titled, “Application of Indigence and Request for Appointment of Counsel,” the form is titled, “Application of Indigence and Representation by a Lawyer.”

Although all lawyers who represent defendants will continue to be appointed by the District Court consistent with Texas law, the emphasis on “appointment of counsel” in the form’s title may be confusing to some defendants. Instead, emphasis should be on who makes the selection of a lawyer, i.e., does the defendant select his or her own lawyer? Or does the District Court make the selection? For persons who previously have been defendants in criminal courts whether in Comal County or in other jurisdictions, terms like “court appointment” or “appointment of counsel” may be understood by defendants to mean that they have no choice about their selection of a lawyer.

- c. Further, the current form provides the defendant only one option. i.e., “I hereby request the Court to appoint counsel to me.”⁵ In order to implement client choice, the form has been changed to make clear that the defendant is able to select his or her own lawyer. The revision of the form then spells out three options.

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 continue to make the decision about whether or not the defendant is indigent and therefore entitled to legal representation paid for by Comal County.

- d. 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

⁴ Exhibit C refers both to “counsel” and “attorney.” Exhibit D primarily uses the word “lawyer” in the belief that this word is best understood and most often used by defendants.

⁵ 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.

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 felony list for the offense(s) with which the defendant is charged *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 Office of District Court Administration so that the first of the available lawyers chosen by the defendant can be appointed.⁶

- e. Pursuant to option 2, the defendant also elects to choose his or her own lawyer, but the defendant needs time to make his or her 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 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.⁷

In addition, when a defendant elects option 2, the magistrate will give the defendant a list of the approved lawyers who are eligible to be selected to provide representation in the defendant's case and also make available information about the lawyers, as explained in paragraph 6 *infra*. The defendant also will be given a 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.

- f. If a defendant elects option 2 and remains in the Comal County Jail, the magistrate will retain the "Application of Indigence and Representation by Lawyer" form. If the defendant returns the "Selection of Lawyer" form to the magistrate within the 48-hour deadline and selects one or more lawyers, in order

⁶ 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 are thus unable to provide "competent" and "diligent" representation as required by Texas Rules of Professional Conduct.

⁷ 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."

of preference, to provide representation, both the “Selection of Lawyer” form and the “Application of Indigence and Representation by Lawyer” form will be sent to the District Court Administration office so that the first of the available lawyers selected can be appointed to represent the defendant.⁸

- g. 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 “Application of Indigence and Representation by Lawyer” form to the District Court Administration office so that a lawyer may be appointed for the defendant according to the regular court appointment process.
- h. 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 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 District Court together with the “Application of Indigence and Representation by Lawyer” 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 “Application of Indigence and Representation by Lawyer” form to the District Court Administration office.
- i. Option 3 reflects current practice, in which the defendant requests that the District Court appoint a lawyer to provide representation.
- j. All lawyers appointed to represent defendants will be informed by the District 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. There are two lists of lawyers maintained for felony cases. List A includes lawyers approved to represent defendants on any felony matter. List B includes approved lawyers eligible to represent defendants on third degree felonies and state jail felonies. These lists are not publicly disseminated nor are they shared

⁸ 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.

with the lawyers who provide representation in District Court. As further explained in paragraph 6, the lists of lawyers as members of an A or B panel will not be expressly disclosed.

- b. An up-to-date registry of lawyers on the A and B lists will be maintained by the Office of District Court Administration consistent with current practice. In order to implement client choice, there is one change in current practice deemed essential, 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.”⁹
- c. In order for lawyers to declare themselves “unavailable” for additional cases, all lawyers on the A and B lists will be informed that if they determine that they cannot accept additional appointments, they must email the designated person in the District Court Administration Office and advise that they need to be temporarily removed from whichever list their name appears. In order to be reinstated, a lawyer will need to email the designated person in the District Court Administration Office and advise that he or she is now prepared to accept additional cases. When this occurs, the lawyer’s name will be placed back on either the A or B list, and they will once again be eligible for client selection and appointments through the regular court appointment process.
- d. District Court personnel will maintain a computerized list of all approved felony lawyers who serve as assigned counsel in Comal County District Courts. The list will include a place in which authorized personnel of the District 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

⁹ 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 Public Defense Related to Excessive Workloads 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.

magistrates and to District 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. Class of Cases Excluded from Client Choice

Sex offense cases involving children will be excluded from the client choice program. This is because these types of cases are invariably very time-consuming and often quite difficult. There is also concern that in a system of client selection, lawyers with a reputation for handling such cases may become overwhelmed by clients seeking their services.

The following specific offenses are the ones that will be excluded from client choice: Section 21.02 (Continuous Sexual Abuse of Young Child or Children); 21.11 (Indecency with a Child); 21.12 (Improper Relationship between Educator and Student); 22.011 (2) (Sexual Assault [of a child]); and 22.021 (1)(B) (Aggravated Sexual Assault [of a child]).¹⁰

Since client choice will be unavailable when defendants are charged with one of the above offenses, court forms currently in use should be used in processing these cases. The revised court forms for use with client choice included as attachments to this implementation plan should not be used.

6. 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 e. *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 list of the lawyers approved to represent the defendant. If the defendant's charges require a lawyer from the felony A list, the defendant's list of lawyers will be comprised of available and approved lawyers from the A panel. If a defendant is charged with a B-level felony, the defendant will receive the names of lawyers available and approved from both the A and B lawyer panels. Lawyers from the A list will be included since all of these lawyers are approved for the most serious felony cases and also are qualified to provide representation in B-level felony cases. However, the lists of lawyers furnished to defendants will not be labeled as A or B lists.

¹⁰ Capital murder cases will be excluded from the client choice program since such cases are assigned through an existing separate regional appointment process.

- 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 assigned counsel. Although defendants will not receive their own copies of the “Lawyer Information” forms completed by lawyers on the A and B lists, they will be able to make notes about the lawyers on their list of the available 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 e. *supra*.

When a defendant’s initial judicial appearance occurs before a District Court judge, the same procedure will be implemented as in the Comal County Jail. Thus, defendants advised of their client selection options and who elect option 2 will receive a list of the lawyers appropriate for selection, as indicated above, for A or B-level felony cases and afforded time in which to review the appropriate “Lawyer Information” forms (Exhibit F). The papers necessary to implement this procedure will be available to the District Court’s judges.

Attachments:

- Exhibit A: Magistrate’s Warning
- Exhibit B: Magistrate’s Warning (revision of Exhibit A)
- Exhibit C: Application of Indigence and Request for Appointment of Counsel
- Exhibit D: Application of Indigence and Representation by a Lawyer
(revision of Exhibit C)
- Exhibit E: Selection of Lawyer (new)
- Exhibit F: Assigned Counsel Program Lawyer Information (new)