

Public Interest Groups as Partners:
A Resource for Implementation of H.B. 1178

Presented by:

Andrea Marsh
Executive Director
Texas Fair Defense Project

2007 Indigent Defense Workshop
Texas Task Force on Indigent Defense
October 17, 2007

Introduction

With the passage of H.B. 1178, the 80th Texas Legislature promulgated new procedures that judges and prosecutors must follow when obtaining waivers of the right to counsel from defendants charged with a felony or Class A or B misdemeanor. H.B. 1178 went into effect on September 1, 2007. Waivers obtained after September 1, 2007, will be presumed invalid if they are obtained in violation of the procedures specified in the bill.

This paper intends to explain the changes to the law made by H.B. 1178 and to set forth model procedures for obtaining counsel waivers in order to assist judges, prosecutors, and court staff in implementation of the bill. This paper also addresses how the procedures specified in H.B. 1178 interact with other provisions of Texas law governing the right to counsel in criminal cases, including the Fair Defense Act (FDA).

H.B. 1178 – An Overview

What is the purpose of H.B. 1178?

According to the Bill Analysis for H.B. 1178, the Legislature was concerned that prior law did not provide sufficient guidance on what procedures must be followed in order to ensure that a defendant proceeding without counsel does so subject to a voluntary and intelligent waiver.ⁱ Waivers of the right to counsel that are not voluntary and intelligent are invalid.ⁱⁱ

H.B. 1178 addresses this legislative concern by clarifying the circumstances under which a court is authorized to obtain from a defendant a waiver of the right counsel and under which an attorney representing the state is authorized to communicate with a defendant who is not represented by counsel.ⁱⁱⁱ

H.B. 1178 also amends prior law to ensure that defendants can try to hire a lawyer on their own without losing the opportunity to request appointed counsel if it turns out that they cannot afford to hire a lawyer. This change should encourage defendants who have some income to attempt to hire a lawyer because they now can do so without being treated as having constructively waived the right to appointed counsel.

The Legislature also made amendments to Article 1.051(g) that bring Texas statutory law into conformance with recent U.S. Supreme Court case law regarding waivers of the right to counsel.^{iv}

What court proceedings are affected by H.B. 1178?

The procedures specified in H.B. 1178 for obtaining waivers of the right to counsel apply in felony and Class A or B misdemeanor cases, i.e., “in any adversary judicial proceeding that may result in punishment by confinement.” These are the same classes of cases in which indigent defendants have the right to appointed counsel.^v

An adversary judicial proceeding is initiated against a defendant “by way of formal charge, preliminary hearing, indictment, information, or arraignment.”^{vi} Because adversary judicial proceedings are initiated against a defendant no later than by the filing of an indictment or information, courts of jurisdiction must satisfy the requirements of H.B. 1178 no later than when a defendant appears without counsel after the charging document has been filed, e.g., at the defendant’s first appearance or arraignment.

What procedures does H.B. 1178 require judges to follow when a defendant is not represented by counsel?

- When a defendant appears in court for the first time after adversary judicial proceedings have been initiated, the court must advise the defendant of the right to counsel and the procedures for requesting appointed counsel and give the defendant a reasonable opportunity to request counsel before the court may direct or encourage the defendant to communicate with a prosecutor.
- If the defendant requests appointed counsel when given the opportunity to do so, the court must rule on the request and may only direct or encourage the defendant to speak to the prosecutor if the request is denied and, subsequent to the denial, the defendant has been given a reasonable opportunity to retain private counsel or has waived the opportunity to retain private counsel.
- If an indigent defendant who has refused appointed counsel in order to retain private counsel appears in court without counsel after having been given an opportunity to retain counsel, the defendant must be given a reasonable opportunity to request appointed counsel or the court must obtain a waiver of the right to counsel before the court may, upon 10 days’ notice or waiver of the same, proceed to a dispositive setting.
- If a defendant wishes to waive the right to counsel for purposes of entering a guilty plea or proceeding to trial, the court must advise the defendant of the nature of the charges against the defendant. If the defendant is proceeding to trial, the court also must advise the defendant of the dangers and disadvantages of self-representation.
- Finally, judges and magistrates may not order a defendant to be rearrested or require a defendant to give another bond in a higher amount because the defendant requests the assistance of counsel, appointed or retained, or withdraws a waiver of the right to counsel.

What procedures does H.B. 1178 require prosecutors to follow when a defendant is not represented by counsel?

- Consistent with a prosecutor’s ethical duties,^{vii} H.B. 1178 prohibits prosecutors from initiating or encouraging an attempt to obtain a waiver of the right to counsel from an unrepresented defendant.

- A prosecutor may not communicate with a defendant who has requested appointed counsel unless the request has been denied and, subsequent to the denial, the defendant has been given a reasonable opportunity to retain private counsel or has waived the opportunity to retain private counsel.

Procedures for Obtaining Waivers of the Right to Counsel in a Manner Consistent with H.B. 1178

Successful implementation of H.B. 1178 is necessary to protect the finality of criminal convictions because waivers of the right to counsel obtained in violation of the bill's provisions will be presumed invalid, and convictions obtained against unrepresented defendants in the absence of a valid waiver of the right to counsel are subject to reversal on appeal.^{viii}

Implementation of H.B. 1178 also will facilitate self-representation in appropriate cases, because constitutional case law requires a defendant to validly and affirmatively waive the right to counsel in order to effectively assert the right to self-representation.^{ix}

The following model procedures are intended to assist judges and prosecutors in developing local procedures for obtaining waivers of the right to counsel that both comply with H.B. 1178 and are consistent with constitutional law.

Magistration/Article 15.17 Proceedings

H.B. 1178 does not amend Article 15.17 of the Code of Criminal Procedure or other provisions relating to the duties of magistrates after an individual has been arrested. However, Article 15.17 and H.B. 1178 interact in important ways since defendants are given information about the right to counsel at the 15.17 hearing if one is held in their case and, under H.B. 1178, when they appear in the court of jurisdiction. Moreover, whether or not a defendant requests counsel at magistration will impact what procedures the court of jurisdiction must follow at first appearance in order to comply with the new law.

With respect to the right to counsel, at a 15.17 hearing the magistrate is required to:

1. Inform the person arrested of the right to counsel;
2. Inform the person arrested of the right to request the appointment of counsel; and
3. Ensure that reasonable assistance in completing the necessary forms for requesting appointment of counsel is provided to the person at the same time the person is requesting the right to counsel.^x

If the person arrested does not speak and understand the English language or is deaf, the magistrate must ensure that information on the right to counsel and other rights enumerated in Article 15.17 is provided to the person in a language they do understand.^{xi}

If an arrested person requests appointment of counsel, the magistrate is required to rule on the request or, if he or she is not authorized to rule on the request, to transmit the request to the

appointing authority (the court or the court's designee under Article 26.04 to appoint counsel in the county) no later than 24 hours after the person arrested requests appointment of counsel.^{xii}

Note: Most counties create paperwork documenting that the magistrate provided the information required under Article 15.17. This paperwork also documents that the magistrate asked the person arrested whether they wanted to request appointment of counsel at that time, and what the person's response was. However, many jurisdictions do not record additional information such as the defendant's stated reason, if any, for declining to request appointed counsel, e.g., that the defendant declined to request appointed counsel in order to attempt to retain private counsel.

Under H.B. 1178, defendants who refuse appointed counsel in order to attempt to retain private counsel are entitled to one additional opportunity to request appointed counsel if they find that they cannot afford to hire private counsel. ***If the county documents that the defendant expressed the intent to retain private counsel at magistration, when applicable, this will reduce the number of settings in the court of jurisdiction required to comply with H.B. 1178*** (i.e., the court of jurisdiction may proceed directly to affording the defendant the opportunity to request appointed counsel instead of holding two settings, one at which the defendant expresses the intent to retain private counsel and a second at which the defendant requests appointed counsel after failing to retain private counsel).

After Magistration

If the person arrested requested appointed counsel at the Article 15.17 hearing, the appointing authority is required to appoint counsel if the defendant is indigent.

If the person who requested counsel is in jail, the appointing authority is required to appoint counsel as soon as possible but no later than the end of the third working day after the date the appointing authority receives the request for counsel in a county with a population of less than 250,000, and no later than the end of the first working day after the date the appointing authority receives the request for counsel in a county with a population of 250,000 or more.^{xiii}

If the person who requested counsel is released on bail prior to the appointment of counsel, the appointing authority is required to appoint counsel at the defendant's first court appearance or when adversary judicial proceedings are initiated, whichever comes first.^{xiv}

Note: Adversary judicial proceedings are initiated against a defendant no later than the filing of an indictment or information. An indictment or information is filed against most defendants before their first appearance in the court of jurisdiction. If that occurs, ***courts should appoint counsel to bond defendants at the time an information or indictment is filed, and thus prior to their first court appearance, in order to comply with Article 1.051(j)***. Appointing counsel to bond defendants before their first appearance also will avoid at least one court appearance in the court of jurisdiction, because the defendant will not appear without counsel at the first appearance and require a reset in order to allow for the appointment of counsel.

First Appearance

Defendants who appear without counsel at first appearance will fall into three different categories. Judges should determine which category a defendant falls into and then follow the appropriate procedures.

Defendants who requested appointed counsel prior to first appearance

Although qualified bond defendants who request counsel at magistration usually should receive appointed counsel immediately subsequent to the filing of an indictment or information (see Note Box on page 4 above), in some circumstances defendants will not receive a ruling on their counsel request prior to their first appearance and thus will appear in court without counsel.

The court should use magistration records to identify defendants who requested counsel prior to first appearance and immediately rule on pending requests for counsel. The court must appoint counsel if the defendant is indigent. If a defendant requests appointed counsel at magistration, the court may not direct or encourage the defendant to communicate with the prosecutor,^{xv} and the prosecutor may not communicate with the defendant,^{xvi} unless the request for counsel is denied. A counsel waiver obtained in the absence of a judicial ruling denying the request for counsel will be presumed invalid.^{xvii}

Note: A defendant's financial circumstances often will have changed between the time the defendant initially completed the application for appointed counsel at magistration and the defendant's first appearance, particularly if the defendant has been released on bond. The court may ask the defendant to supplement the pending application for appointed counsel with updated financial information. However, the court should be very wary about treating the initial application as moot and making the defendant initiate another request for appointed counsel. If the prosecutor communicates with a defendant who requested counsel at magistration and never received a ruling on that request, the prosecutor will violate Article 1.051(f-1) of the Code of Criminal Procedure as enacted by H.B. 1178 and the waiver will be invalid.

If the defendant's request for appointed counsel is denied, the defendant then must be given a reasonable opportunity to retain private counsel before the court can direct or encourage the defendant to communicate with the prosecutor and before the prosecutor can communicate with the defendant.^{xviii} However, the defendant can waive the opportunity to retain private counsel if he or she wants to communicate with the prosecutor at the first appearance setting.^{xix}

A defendant who requested appointed counsel at magistration also may appear without counsel at first appearance because the request for counsel was denied prior to first appearance. In this situation, just as in the situation where the request for counsel was denied at first appearance, the defendant must be given a reasonable opportunity to retain private counsel before the court can direct or encourage the defendant to communicate with the prosecutor and before the prosecutor can communicate with the defendant.^{xx} The defendant can waive the opportunity to retain private counsel.^{xxi}

Note: H.B. 1178 states on several occasions that the defendant must be given a “reasonable opportunity to retain” appointed counsel. The bill does not specify what constitutes a “reasonable opportunity.” Appellate courts are likely to look at the totality of the circumstances in determining whether an opportunity to retain private counsel is reasonable. Circumstances the courts may consider include whether the defendant was informed that he was being given an opportunity to retain counsel and that the case would proceed after the expiration of the time provided even if the defendant failed to retain counsel. If a court does not deny a defendant’s request for counsel until first appearance, it is advisable to give the defendant a reset in order to retain private counsel and to inform the defendant of the potential consequences of failing to retain private counsel before the next court date. However, courts may be able to avoid resetting the cases of defendants whose requests for counsel are denied *prior* to first appearance if procedures are in place to provide defendants with the information specified above sufficiently in advance of first appearance so that they have a reasonable opportunity to retain counsel prior to the first appearance setting.

If the defendant fails to retain private counsel after having been given a reasonable opportunity to do so, or if the defendant waives the opportunity to retain private counsel, the court should:

1. Inform the defendant of the nature of the charges alleged in the information or indictment;
2. Inform the defendant of the range of punishment for the alleged offense(s); and
3. Obtain a written waiver of the right to counsel that substantially complies with the language contained in Article 1.051(g).

Note: In a 2004 case, the U.S. Supreme Court clarified what admonitions must be given to a defendant who chooses to waive the right to counsel in order to enter a guilty plea. The Court held that a waiver of the right to counsel for purposes of entering a plea is valid if the defendant is informed of the nature of the charges, the range of allowable punishments for the charges, and the right to be counseled regarding the plea. *Iowa v. Tovar*, 541 U.S. 77, 81 (2004). Informing defendants of the nature of the charges – e.g., the elements of the charged offense – allows them to better assess whether they are in fact guilty of the charges and may facilitate informed guilty pleas.

After the defendant waives the right to counsel, he or she may choose to discuss a plea bargain with the prosecutor and the court may set the case for disposition on 10 days’ notice.^{xxii} The defendant may waive the notice requirement.

Defendants who expressed an intent to retain counsel at magistration

Defendants in this category can be identified only if the magistrate’s paperwork records defendants’ stated reasons for refusing to request appointed counsel. (See Note Box on page 4 above.)

If the magistrates in a county record defendants' stated reasons for refusing to request appointed counsel, the court should use magistration records to identify defendants who expressed an intent to retain private counsel at magistration. If a defendant in this situation is identified and appears in court without counsel, the court should:

1. Inform the defendant of the right to request the appointment of counsel; and
2. Provide the defendant a reasonable opportunity to request appointment of counsel.^{xxiii}

Note: H.B. 1178 states on several occasions that the defendant must be given a “reasonable opportunity to request” appointed counsel. The bill does not specify what constitutes a “reasonable opportunity.” Appellate courts are likely to look at the totality of the circumstances in determining whether an opportunity to request counsel is reasonable, and circumstances that they may consider include (1) whether the appropriate paperwork for submitting a request for counsel was made available to the defendant, (2) whether reasonable assistance in completing the necessary forms for requesting appointment of counsel was provided, and (3) whether information on the right to request counsel and assistance in requesting counsel was provided to non-English speaking defendants in a language they understand.

If a defendant chooses to request counsel, the court must appoint counsel if the defendant is indigent. The defendant's ability to pay the legal fees quoted to him by any private attorneys he or she attempted to retain prior to the first appearance may supplement previously available information regarding the defendant's financial eligibility for appointment of counsel.

The court may not direct or encourage the defendant to communicate with the prosecutor,^{xxiv} and the prosecutor may not communicate with the defendant,^{xxv} unless the request for counsel is denied. A counsel waiver obtained in the absence of a judicial ruling denying the request for counsel will be presumed invalid.^{xxvi}

If the defendant chooses to forego the opportunity to request appointed counsel and instead waives the right to counsel, the court should:

1. Inform the defendant of the nature of the charges alleged in the information or indictment;
2. Inform the defendant of the range of punishment for the alleged offense(s); and
3. Obtain a written waiver of the right to counsel that substantially complies with the language contained in Article 1.051(g).

After the defendant waives the right to counsel, he or she may choose to discuss a plea bargain with the prosecutor and the court may set the case for disposition on 10 days' notice.^{xxvii} The defendant may waive the notice requirement in order to enter a plea at the first appearance.

All other defendants who appear at first appearance without counsel

This category will include most defendants who did not request counsel at magistration (i.e., any defendant who did not request counsel at magistration and who is not on record as having expressed an intent to retain private counsel) and defendants who have not had an Article 15.17 hearing before a magistrate prior to their first appearance. Defendants may not have appeared before a magistrate either because they were released on bond before receiving an Article 15.17 hearing or because they are appearing in the court of jurisdiction subject to summons.^{xxviii}

When defendants in this category appear in court without counsel, the court should:

1. Inform the defendant of the right to counsel;
2. Inform the defendant of the procedure for requesting appointed counsel; and
3. Provide the defendant a reasonable opportunity to request the appointment of counsel.^{xxix}

Note: When informing defendants of the right to counsel, the court should inform defendants of their right to be counseled regarding their plea and their right to be represented by counsel at the first appearance hearing, and not simply tell defendants that they have a right to be represented by counsel at trial. In a 2004 case, the U.S. Supreme Court stated that defendants must be advised of their right to be counseled **regarding their plea** in order for a counsel waiver to be valid when a defendant pleads guilty without the assistance of counsel. *Iowa v. Tovar*, 541 U.S. at 81. Defendants may be able to challenge the validity of their counsel waivers and convictions if courts only advise them of the right to be represented by counsel at trial.

Defendants who request appointed counsel

If a defendant chooses to request counsel, the court must appoint counsel if the defendant is indigent. The court may not direct or encourage the defendant to communicate with the prosecutor,^{xxx} and the prosecutor may not communicate with the defendant,^{xxxi} unless the request for counsel is denied. A counsel waiver obtained in the absence of a judicial ruling denying the request for counsel will be presumed invalid.^{xxxii}

If the defendant's request for appointed counsel is denied, the defendant then must be given a reasonable opportunity to retain private counsel before the court can direct or encourage the defendant to communicate with the prosecutor and before the prosecutor can communicate with the defendant.^{xxxiii} However, the defendant can waive the opportunity to retain private counsel if he or she wants to communicate with the prosecutor at the first appearance setting.^{xxxiv}

If the defendant fails to retain private counsel after having been given a reasonable opportunity to do so, or if the defendant waives the opportunity to retain private counsel, the court should:

1. Inform the defendant of the nature of the charges alleged in the information or indictment;
2. Inform the defendant of the range of punishment for the alleged offense(s); and

3. Obtain a written waiver of the right to counsel that substantially complies with the language contained in Article 1.051(g).

After the defendant waives the right to counsel, he or she may choose to discuss a plea bargain with the prosecutor and the court may set the case for disposition on 10 days' notice.^{xxxv} The defendant may waive the notice requirement in order to enter a plea at the first appearance.

Defendants who express an intent to retain private counsel

If a defendant first expresses an intent to retain private counsel at their first appearance, the court should reset the defendant's case in order to provide the defendant a reasonable opportunity to retain private counsel.

If the defendant subsequently returns to court without counsel, the court should:

1. Inform the defendant of the right to request the appointment of counsel; and
2. Provide the defendant a reasonable opportunity to request appointment of counsel.^{xxxvi}

If a defendant chooses to request counsel, the court must appoint counsel if the defendant is indigent. The defendant's ability to pay the legal fees quoted to him by any private attorneys he or she attempted to retain may supplement previously available information regarding the defendant's financial eligibility for appointment of counsel.

The court may not direct or encourage the defendant to communicate with the prosecutor,^{xxxvii} and the prosecutor may not communicate with the defendant,^{xxxviii} unless the request for counsel is denied. A counsel waiver obtained in the absence of a judicial ruling denying the request for counsel will be presumed invalid.^{xxxix}

If the defendant chooses to forego the opportunity to request appointed counsel and instead waives the right to counsel, the court should:

1. Inform the defendant of the nature of the charges alleged in the information or indictment;
2. Inform the defendant of the range of punishment for the alleged offense(s); and
3. Obtain a written waiver of the right to counsel that substantially complies with the language contained in Article 1.051(g).

After the defendant waives the right to counsel, he or she may choose to discuss a plea bargain with the prosecutor and the court may set the case for disposition on 10 days' notice.^{xl} The defendant may waive the notice requirement in order to enter a plea at the first appearance.

Defendants who choose to waive the right to counsel

If the defendant fails to retain private counsel after having been given a reasonable opportunity to do so, or if the defendant waives the opportunity to retain private counsel, the court should:

1. Inform the defendant of the nature of the charges alleged in the information or indictment;
2. Inform the defendant of the range of punishment for the alleged offense(s); and
3. Obtain a written waiver of the right to counsel that substantially complies with the language contained in Article 1.051(g).

After the defendant waives the right to counsel, he or she may choose to discuss a plea bargain with the prosecutor and the court may set the case for disposition on 10 days' notice.^{xli}

Endnotes

- ⁱ HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 1178, 80th Leg., R.S. (2007).
- ⁱⁱ *Jordan v. State*, 571 S.W.2d 883, 884 (Tex. Crim. App. 1978); *see also* TEX. CODE CRIM. PROC. art. 1.051(f).
- ⁱⁱⁱ *See* BILL ANALYSIS, *supra* note 1.
- ^{iv} *See Iowa v. Tovar*, 541 U.S. 77, 81 (2004).
- ^v TEX. CODE CRIM. PROC. art. 1.051(c).
- ^{vi} *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).
- ^{vii} TEX. DISCIPLINARY R. PROF'L CONDUCT 3.09(c).
- ^{viii} *Arizona v. Fulminante*, 499 U.S. 279, 307 (1991) (citing *United States v. Cronin*, 466 U.S. at 659 & n.25).
- ^{ix} *Iowa v. Tovar*, 541 U.S. at 87-88 (2004); *Faretta v. California*, 422 U.S. 806, 835 (1975).
- ^x TEX. CODE CRIM. PROC. art. 15.17(a).
- ^{xi} *Id.*
- ^{xii} *Id.*
- ^{xiii} TEX. CODE CRIM. PROC. art. 1.051(c).
- ^{xiv} TEX. CODE CRIM. PROC. art. 1.051(j) (emphasis added).
- ^{xv} TEX. CODE CRIM. PROC. art. 1.051(f-2).
- ^{xvi} TEX. CODE CRIM. PROC. art. 1.05(f-1)
- ^{xvii} TEX. CODE CRIM. PROC. art. 1.051(f).
- ^{xviii} TEX. CODE CRIM. PROC. art. 1.051(f-1), (f-2).
- ^{xix} *Id.*
- ^{xx} *Id.*
- ^{xxi} *Id.*
- ^{xxii} TEX. CODE CRIM. PROC. art. 1.051(e).
- ^{xxiii} *Id.*
- ^{xxiv} TEX. CODE CRIM. PROC. art. 1.051(f-2).
- ^{xxv} TEX. CODE CRIM. PROC. art. 1.05(f-1)
- ^{xxvi} TEX. CODE CRIM. PROC. art. 1.051(f).
- ^{xxvii} TEX. CODE CRIM. PROC. art. 1.051(e).
- ^{xxviii} The number of Texas defendants who appear in county courts subject to a summons may increase as a result of the passage of H.B. 2391 (effective Sep. 1, 2007), which authorizes law enforcement officers to issue "citations" to defendants who commit specified Class A or B misdemeanors in lieu of arrest.
- ^{xxix} TEX. CODE CRIM. PROC. art. 1.051(f-2).
- ^{xxx} *Id.*
- ^{xxxi} TEX. CODE CRIM. PROC. art. 1.05(f-1)
- ^{xxxii} TEX. CODE CRIM. PROC. art. 1.051(f).
- ^{xxxiii} TEX. CODE CRIM. PROC. art. 1.051(f-1), (f-2).
- ^{xxxiv} *Id.*
- ^{xxxv} TEX. CODE CRIM. PROC. art. 1.051(e).
- ^{xxxvi} *Id.*
- ^{xxxvii} TEX. CODE CRIM. PROC. art. 1.051(f-2).
- ^{xxxviii} TEX. CODE CRIM. PROC. art. 1.05(f-1)
- ^{xxxix} TEX. CODE CRIM. PROC. art. 1.051(f).
- ^{xl} TEX. CODE CRIM. PROC. art. 1.051(e).
- ^{xli} *Id.*