

Overview of H.B. 1178 Requirements

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 takes 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 document sets forth procedures for obtaining counsel waivers in order to assist judges, prosecutors, and court staffs implement H.B. 1178.

Procedures for Obtaining Waivers of the Right to Counsel

Prior to the First Appearance

[The procedures below assume a request for counsel is pending. A defendant may withdraw a request for counsel; however the Code of Criminal Procedure as amended by HB 1178 does not specify what procedures judges and prosecutors may use to obtain counsel waivers from defendants who withdraw their requests for counsel. We will share with you any guidance on this issue that may be provided in the future by the courts or Task Force.]

- Rule on requests for counsel made prior to the first appearance setting (e.g., at the Article 15.17 hearing) and appoint counsel if the defendant is indigent.
 - If the person who requested counsel is in jail, appoint counsel no later than the end of the first (counties with populations of 250,000 or more) or third (counties under 250,000) working day after the date the appointing authority receives the request for counsel.
 - If the person who requested counsel is released on bail prior to the appointment of counsel, appointment of counsel is not required until the defendant's first court appearance or when adversary judicial proceedings are initiated, whichever comes first. Adversary judicial proceedings are initiated against a defendant by, among other things, the filing of an indictment or information

First Appearance

Defendants who appear without counsel at the first appearance setting will fall into two 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

- Use magistration records to identify defendants who requested counsel prior to first appearance and who have not yet received rulings on their requests, and immediately rule on those requests for counsel. (See note related to withdrawals of counsel requests in above section). Because the court may not direct or encourage a defendant who has requested the appointment of counsel to communicate with the prosecutor, and the prosecutor may not communicate with the defendant, unless the court has denied the request, the court may not

treat the initial application as moot and require the defendant to initiate another request for appointed counsel.

- If the defendant's request for appointed counsel is denied, the court should follow the procedures applicable to defendants who request counsel at first appearance and whose requests are denied (see below).

All other defendants who appear at first appearance without counsel

- Inform the defendant of the right to counsel;
- Inform the defendant of the procedure for requesting appointed counsel; and
- Provide the defendant a reasonable opportunity to request appointment of counsel.

Then follow the appropriate procedures depending on whether or not the defendant asserts the right to counsel.

Defendants who request appointed counsel

- Appoint counsel if the defendant is indigent. The court may not direct or encourage the defendant to communicate with the prosecutor, and the prosecutor may not communicate with the defendant, unless the court has denied the request for appointed counsel.
- 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.
 - 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.
- 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, follow the procedures for obtaining a waiver of the right to counsel (see below).

Defendants who express an intent to retain private counsel

- 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:
 - Inform the defendant of the right to request appointed counsel; and
 - Provide the defendant a reasonable opportunity to request appointment of counsel.
- If a defendant chooses to request counsel, appoint counsel if the defendant is indigent. The court may not direct or encourage the defendant to communicate with the prosecutor, and the prosecutor may not communicate with the defendant, unless the court has denied the request for appointed counsel.
- If the defendant chooses to forego the opportunity to request appointed counsel and instead waives the right to counsel, follow the procedures for obtaining a waiver of the right to counsel (see below).

Defendants who choose to waive the right to counsel

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

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. The defendant may also waive the notice requirement and proceed to disposition.