



# **Second Follow-up Review of Maverick County's Indigent Defense Systems**

**November 26, 2012**



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**MISSION**

The Texas Indigent Defense Commission provides financial and technical support to counties to develop and maintain quality, cost-effective indigent defense systems that meet the needs of local communities and the requirements of the Constitution and state law.

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## **Monitoring Background**

The Texas Indigent Defense Commission (Commission) conducted a policy monitoring visit of Maverick County in October 2008. The report was issued on November 24, 2008 and made recommendations concerning the ability to request counsel at magistration and concerning the timing of subsequent appointments of counsel. The County responded on October 21, 2009. This response stated that the County had adopted a new magistration form with a space for noting whether counsel is being requested. The response further stated that the forms for requesting counsel are transmitted to the district and county courts, that a resulting appointment is made within one day of receipt of the request, and that these forms are available for both bonded and detained persons.

The Commission conducted a follow-up visit to Maverick County in December 2009. This report found that the County had, in fact, changed its magistration form and now included a space for requesting counsel. This report made recommendations for the County to ensure that:

- (1) reasonable assistance is provided in completing affidavits of indigence;
- (2) requests for counsel are promptly transmitted to the appointing authority; and
- (3) requests for counsel are ruled upon in a timely manner.

The County responded by agreeing to ensure that:

- (1) jail staff provide assistance to arrestees in completing affidavits of indigence;
- (2) jail staff transmit requests for counsel and their accompanying affidavits to the administrative district court for felonies and to the county court for misdemeanors; and
- (3) requests for counsel are ruled upon in a timely manner.

Staff made a second follow-up visit to Maverick County in June 2012 to ensure that the County has successfully implemented our recommendations. In this report, the term “monitor” is used to refer to actions conducted by Commission staff. This report examines whether the County successfully implemented procedures that address each of our past recommendations. The monitor did not examine areas in which the County did not previously receive a recommendation.

## **Overview of Second Follow-up Monitoring Review**

The policy monitor, Joel Lieurance, conducted a second follow-up visit to Maverick County on June 5 and 6, 2012. On this second follow-up visit, the monitor met with the following people: the county judge; a court administrator for a district court; two justices-of-the-peace; staff for the Eagle Pass Municipal Judge; staff of the sheriff’s office; the district clerk’s office; and the county clerk’s office. The monitor examined misdemeanor and felony case files from the county and district clerks’ offices and magistrate warning records from the Eagle Pass Municipal Court.

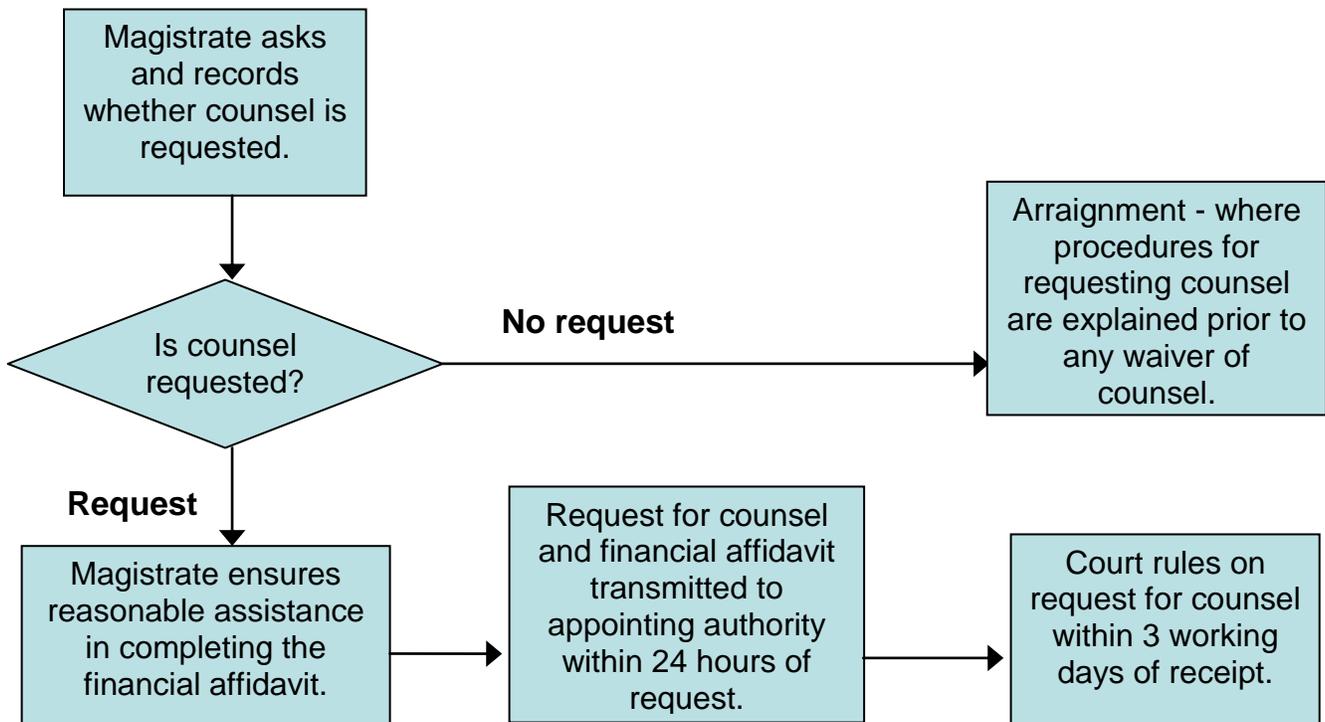
## History of Recommendations and Their Status

Category and Initial Recommendation Year	Court Level	Status as of the June 2012 Visit	Satisfied	Pending
Magistrate Warnings (2008)	Felony and Misdemeanor	The magistration form did not include a space to record whether the arrestee requested counsel.	√	
Magistrate Warnings (2008)	Felony and Misdemeanor	The arrestee must be informed of the right to appointed counsel and must be asked whether the arrestee is requesting counsel. A record must be made indicating whether the arrestee requested counsel.	√	
Magistrate Warnings (2008)	Felony and Misdemeanor	If the arrestee requests counsel, procedures must be put in place for assisting the arrestee fill out the necessary forms.		√
Magistrate Warnings (2008)	Felony and Misdemeanor	Requests for counsel must be promptly transmitted to the appointing authority.		√
Timely Appointment of Counsel (2008)	Felony	The felony courts must put in a place a procedure to appoint counsel for bonded persons in accordance with <i>Rothgery v. Gillespie County</i> .		√
Timely Appointment of Counsel (2009)	Felony	The felony courts must put in a place a procedure to appoint counsel within three working days of request.		√
Timely Appointment of Counsel (2009)	Misdemeanor	The misdemeanor courts must put in a place a procedure to appoint counsel within three working days of request.		√
Continuity of Counsel (2012)	Felony	Attorney appointments must comply with Article 26.04(j)(2) so that appointed attorneys represent their clients until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the attorney is permitted or ordered by the court to withdraw as counsel after a finding of good cause is entered on the record.		√
Waivers of Counsel (2012)	Misdemeanor	The misdemeanor courts must put in a place a procedure to ensure that Article 1.051 waivers of counsel requirements are met.		√
Fair, Neutral, and Non-discriminatory Attorney Selection Process (2008)	Felony	<p>In 2008, the top 10% of felony attorneys received 3.6 times their representative share. This recommendation occurred before the introduction of our policy monitoring threshold.</p> <p>The County response to our 2008 report noted that the County does not have an adequate number of qualified attorneys to handle felony cases.</p> <p>The monitor's follow-up visits did not focus on this matter.</p>		

## Magistrate's Warnings

Magistrate's warnings are given to arrestees for class A and B misdemeanor offenses as well as for felony offenses. Under Article 15.17(e) of the Texas Code of Criminal Procedure, a record is to be made of the magistrate asking whether the arrestee wants to request appointed counsel and of the arrestee's response to the question. If the arrestee requests counsel, Article 15.17(a) requires the magistrate to "ensure that reasonable assistance in completing the necessary forms for requesting appointment of counsel is provided to the person at the same time". Once the arrestee indicates that counsel is being requested, "the magistrate shall without unnecessary delay, but not later than 24 hours after the person arrested requests appointment of counsel, transmit, or cause to be transmitted to the court or to the courts' designee authorized under Article 26.04 to appoint counsel in the county, the forms requesting the appointment of counsel."

**Figure 1: Process for Handling Requests for Counsel Required Articles 15.17 and 1.051**



### Requests for Counsel

The monitor noted in his initial follow-up report that the County had successfully adopted a magistrate warnings form that included a space to note whether the arrestee requested counsel. At the time of the December 2009 visit, magistrates were not required to submit the number of persons requesting counsel to the Office of Court Administration (OCA), but beginning September 2011, both municipal courts and justice courts are now required to submit this information to OCA in monthly reports. The monitor found that the Eagle Pass Municipal Courts were correctly reporting this information to OCA. The monitor spoke with two Maverick County justices-of-the-peace who were making monthly reports to OCA but who had not yet begun reporting the number of persons requesting counsel at magistrations. Both of these justices-of-the-peace have been trying to adjust to the new OCA reports and agreed to begin tracking and reporting requests for counsel. Three other Maverick County

justices-of-the-peace have not yet submitted any criminal data reports to OCA since the adoption of the new reporting structure.

The new magistrate warning data is very informative. For the first six months of its collection, the Eagle Pass Municipal Court reported that 58 magistrate's warnings were given to felony arrestees, and 45 of these arrestees requested counsel (78% of felony arrestees requested counsel). A total of 276 warnings were given to persons arrested for class A or class B misdemeanor offenses, and 193 of them requested counsel (70% of misdemeanor arrestees requested counsel).

### **Reasonable Assistance in Completing Affidavits of Indigence**

At the December 2009 visit, the monitor found that when persons requested counsel that they were not given an affidavit of indigence at the time of magistration, but could receive the forms later at the jail. Jailers would provide assistance with affidavits of indigence, but the time when the assistance was provided would vary. In the County's response to the follow-up report, there was agreement that affidavits of indigence would be provided to arrestees at municipal court magistrate warnings and then collected by jail staff upon transfer to the county jail. Jail staff would provide assistance in completing the affidavits to those still needing it at the time of the transfer. For magistrate warnings made at the county jail, affidavits of indigence would be provided to inmates at the time of the hearing, assistance would be provided in completing affidavits, and the affidavits would be promptly collected by jail staff.

During the current visit, the monitor spoke with jail staff about the processes for collecting affidavits of indigence and for providing assistance to complete the affidavits. According to interviews, jail staff reviews the inmate list every weekday morning at 8 am. Jail staff visits new inmates, gives them affidavits of indigence if counsel is requested, and provides assistance to those needing it. This process captures requests for counsel from many persons, but has the weakness that persons who bond out before being seen by a jailer will not receive the necessary forms for requesting counsel or be able to have their requests for counsel transmitted to the court.

**Second Follow-up Finding 1:** Article 15.17(a) requires that magistrates ensure that reasonable assistance in completing necessary financial forms is provided to arrestees at the time of magistration. Jail staff is able to provide assistance in completing financial forms to those arrestees who are in the Maverick County Jail on weekday mornings. For those persons who are arrested and who bond before jail staff can meet with them, there is no process in place to provide arrestees with affidavits of indigence or with assistance in completing the financial affidavits.

**Second Follow-up Recommendation 1:** The County must put in place a process to ensure that arrestees receive the forms necessary for requesting counsel and receive reasonable assistance in completing the forms. Article 15.17 places this responsibility on magistrates.

### **Transmission of Requests for Counsel to the Courts**

At the December 2009 visit, the monitor found that requests for counsel were not promptly transmitted to the courts. Under the report response, jail staff agreed that requests for counsel would be promptly transmitted to the county court in misdemeanor cases and to the local administrative district court in felony cases.

During the current visit, the monitor spoke with jail staff to determine the effectiveness of requests for counsel transmissions. If jail staff is able to assist an arrestee complete an affidavit of indigence, jail staff are able to promptly transmit the request for counsel to the appointing authority.

However, there is no process for transmitting requests for those persons who request counsel at magistration but who bond prior to an interview with jail staff.

**Second Follow-up Finding 2:** Article 15.17(a) requires that requests for counsel are transmitted to the appointing authority within 24 hours of the request. Jail staff seems to have put in place a process for promptly transmitting requests for counsel when they are able to interview the person making the request. There does not appear to be a process for transmitting requests for counsel made by those who bond before jail staff can interview them.

**Second Follow-up Recommendation 2:** The County must put in place a process to ensure that all persons who request counsel will have their requests promptly transmitted to the appointing authority. Article 15.17 puts this responsibility on magistrates.

## **Appointment of Counsel**

At the time of the October 2008 monitoring visit, requests for counsel were not typically made until the initial appearance in the court with dispositive jurisdiction (i.e. district or county court). The report from our December 2009 visit noted that there were issues with the timely appointment of counsel. The response to that report indicated the County would set up a system where requests for counsel would be faxed from the jail to the district and county courts. Once the courts received the requests, the courts agreed to make timely determinations of indigence.

### **Felony Appointments**

Under Article 15.17, magistrates have 24 hours to transmit requests for counsel to the appointing authority. The courts then have three working days to make a determination of indigence. The monitor examined twenty-five felony cases from the district clerk's files.<sup>1</sup> From this sample, twenty cases received appointed counsel, three cases received retained counsel, and two cases were dismissed without a record of an attorney in the case file. Based upon the records in the case file, 17 of the 20 cases received appointed counsel within this time frame (85% timely).

The Commission's administrative rules set a presumption that a jurisdiction's processes are timely if the monitor's sample is at least 90% timely. In this instance, the timeliness of the felony sample narrowly missed this threshold (85% timely). However, the sample did not appear to take into account all of the requests for counsel made by arrestees. Of the twenty appointments of counsel, twelve were made at the initial appearance or later, and eight were made prior to the initial appearance. All eight appointments made prior to the initial appearance were for detained individuals. No appointments were made for persons on bond who had requested counsel prior to the initial appearance.

None of the eight appointments of counsel for detained individuals were based upon requests made within two days of arrest. One can infer that none of these requests were made at the time of magistration. Since the Eagle Pass Municipal Court reported that 78% of their felony arrestees requested counsel at magistration, one would expect that some of the defendants from the monitor's sample had requested counsel at magistration.

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<sup>1</sup> These 25 felony cases were filed between July 2011 and December 2011. Cases were selected by picking groups of cases and examining all cases from the group in a sequential manner.

**Second Follow-up Finding 3:** Felony requests for counsel made at magistration are not being promptly ruled upon.

**Second Follow-up Recommendation 3:** The district courts must set up a process for making timely felony appointments of counsel. In order for an appointment to be timely, the court must rule on the initial request for counsel.

The monitor noticed that three of the orders appointing counsel contained the words, “pre-indictment only”. (See Appendix A for two of these appointment orders.) In addition, one of the cases had an appointment of counsel prior to the initial appearance, and then a later request for counsel and appointment of a different attorney at the initial appearance. In those instances where counsel was replaced, the monitor did not observe findings of good cause for the attorney replacement in the case file. Article 26.04(j)(2) of the Code of Criminal Procedure presumes that appointments are for the duration of a case unless there is a finding of good cause entered on the record when it states:

*(j) An attorney appointed under this article shall:*

*(2) represent the defendant until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the attorney is permitted or ordered by the court to withdraw as counsel for the defendant after a finding of good cause is entered on the record.*

**Second Follow-up Finding 4:** Felony appointments made prior to the indictment do not appear to be for the duration of the proceedings. Replacement of counsel is allowed with a finding of good cause, but the monitor did not observe any findings of good cause for replacing counsel.

**Second Follow-up Recommendation 4:** Attorney appointments must comply with Article 26.04(j)(2) so that appointed attorneys represent their clients until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the attorney is permitted or ordered by the court to withdraw as counsel after a finding of good cause is entered on the record.

### **Misdemeanor Appointments**

The monitor examined 40 misdemeanor cases from the county clerk’s files.<sup>2</sup> From this sample, there was a record of two cases having retained counsel and one case having appointed counsel. The one misdemeanor appointment was made on the date of the request. Twenty-one of the forty cases had defendants agreeing to a plea and signing a waiver of counsel. The misdemeanor case files did not contain any records indicating whether the defendants requested counsel at magistration.

The fact that there was only one ruling on a request for counsel is troubling. According to data reported by the Eagle Pass Municipal Courts, 70% of misdemeanor arrestees requested counsel at magistrate warnings in the period between September 2011 and February 2012. This request rate is an indication that some of the arrestees from this sample probably requested counsel at magistration. However, the monitor found no rulings on these requests for counsel.

When a defendant requests counsel and later pleads pro se, under Article 1.051(f) of the Code of Criminal Procedure, the associated waiver of counsel is presumed invalid unless there is a denial of indigence. Twenty-one of the sample cases pled pro se and signed a waiver of counsel. If some of these persons requested counsel, their waivers of counsel are presumed invalid since there is no associated denial of indigence.

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<sup>2</sup> These 40 misdemeanor cases were filed between June 2011 and December 2011. Cases were selected by picking groups of cases and examining all cases from the group in a sequential manner.

**Second Follow-up Finding 5:** The County does not have a process for ruling on misdemeanor requests for counsel made at magistration, and as a result, counsel is not appointed within the statutory timeframes required by the Fair Defense Act.

**Second Follow-up Recommendation 5:** The county court must set up a process for making timely misdemeanor appointments of counsel. In order for an appointment to be timely, the court must rule on the initial request for counsel.

**Second Follow-up Recommendation 6:** The county court must set up a process for ensuring that waivers of counsel meet the requirements of Article 1.051. In order for waivers of counsel to be presumed valid, there must be a ruling on all requests for counsel before a waiver is signed.

## **Conclusion**

The monitor appreciated meeting with Maverick County officials and staff. Staff would like to offer our assistance in helping the County enhance its indigent defense system.

# Appendix A – Sample Orders Appointing Counsel

## DECLARATION OF FINANCIAL INABILITY TO EMPLOY COUNSEL

Cause No. U 11-11-24 - 1103 J / 12-01-07018-MCR

THE STATE OF TEXAS

IN THE \_\_\_ DISTRICT COURT

Lavender COUNTY, TEXAS

OFFENSE CHARGED: Poss on Manj

ARRESTED?  YES, Since (date) 11/19/11  
 NO

> 5165 = 50165

Have you been Indicted?  YES  NO

I am a Defendant in the above entitled action, I am not representing myself. Pending, I have no assets except the following: 1. My earnings are (Name and address of employer(s), and amount of weekly or monthly earnings)

2. I have other income in the amount of (State sources of income and amount paid weekly or monthly)

3. I am supporting child(ren) as follows:

4. Earned income from Employment (Name and address of employer(s) and earnings)

5. I own the following property: (Address where located) (Payments) (Balance Owed) (Value)

a. Home 0  
b. Automobiles 0  
c. Furniture 0  
d. Other vehicles 0  
e. Stocks and Bonds 0  
f. Other personal property 0

g. Other land and building AT 250' CLOCK P.M.  
h. Notes, mortgages, trust deed 0  
i. Motorcycle(s) 0  
k. Livestock 0  
l. Jewelry 0

FILED  
DEC 16 2011

IRENE RODRIGUEZ  
DISTRICT CLERK, LAVENDER COUNTY, TEXAS  
BY: [Signature] DEPUTY

6. I have the following money:

a. In Jail \$ 0  
b. At Home \$ 0  
c. Checking Accounts \$ 0  
d. In Savings Accounts \$ 0

e. In Safety deposit box \$ 0  
f. Being held or owed to me \$ 0  
g. Other \$ 0

7. I have the following debts and/or expenses in addition to those listed above: 0

8. I am \_\_\_ am not \_\_\_ free on Bail \$ \_\_\_\_, Name of person who posted Bail Bonds: \_\_\_\_\_

On this \_\_\_ day of \_\_\_\_\_, 200\_\_, I have been advised by the \_\_\_ Court of my right to representation by counsel in the trial of the charge pending against me. I certify that I am without means to employ counsel of my own choosing and hereby request the court to appoint counsel for me. I declare under penalty of perjury that the foregoing is true and correct.

THIS DECLARATION WILL NOT BE CONSIDERED COMPLETE UNLESS SIGNED BY DEFENDANT.

Defendant's Signature

Defendant's Address

Use reverse side for Additional Information  
Approved:   
Not Approved:

Date Defendant's Telephone No.

Attorney Appointed: Rolando Salinas  
Tel #: \_\_\_\_\_

Pre-Indictment Only

ORIGINAL

12/14/11  
DATE

[Signature]  
JUDGE SIGNATURE

**DECLARATION OF FINANCIAL INABILITY TO EMPLOY COUNSEL**

Cause No. MW 0111 JP 31 11-12-069710-MOK

THE STATE OF TEXAS

IN THE 305th DISTRICT COURT

Harris COUNTY, TEXAS

ARREST DATE: 5.11.11

FELONY OFFENSE CHARGED: Agg. Assault of a Family Member  
IN CUSTODY? YES, Since (date) 5.11.11  
NO

Have you been Indicted? YES NO

I, [Redacted], a Defendant in the above entitled action, I am not represented by counsel at this proceeding, I have no assets except the following: 1. My earnings are (Name and address of employer(s), and amount of weekly or monthly earnings)

\$10  
2. I have other income in the amount of (State sources of income and amount paid weekly or monthly) None

3. I am [Redacted] other dependents, as follows:  
[Redacted] (Relationship)

4. I have [Redacted] weekly or monthly earnings)

5. I have the following assets (Balance Owed) (Value)  
a. Home X  
b. Automobiles X  
c. Furniture X  
d. Other vehicles X  
e. Stocks and Bonds X  
f. Other personal property X  
g. Other land and building X  
h. Notes, mortgages, trust deed X  
i. Motorcycle(s) X  
k. Livestock X  
l. Jewelry X

6. I have the following money:  
a. In Jail \$ 0  
b. At Home \$ 0  
c. Checking Accounts \$ 0  
d. In Savings Accounts \$ 0  
e. In Safety deposit box \$ 0  
f. Being held or owed to me \$ 0  
g. Other \$ 0

7. I have the following debts and/or expenses in addition to those listed above: None

8. I am am not free on Bail \$ 0, Name of person who posted Bail Bonds: X

On this 18 day of May, 2011, I have been advised by the [Redacted] Court of my right to representation by counsel in the trial of the charge pending against me. I certify that I am without means to employ counsel of my own choosing and hereby request the court to appoint counsel for me. I declare under penalty of perjury that the foregoing is true and correct.

THIS DECLARATION WILL NOT BE CONSIDERED COMPLETE UNLESS SIGNED BY DEFENDANT.

MAY 26 2011  
Use reverse side for Additional Information  
Approved: [Signature]  
Not Approved: \_\_\_\_\_  
DEPUTY

Date \_\_\_\_\_ Defendant's Telephone No. \_\_\_\_\_  
Attorney Appointed: Andrea Casares \*Pre-Indictment Only  
Tel #: \_\_\_\_\_

5/25/11  
DATE \_\_\_\_\_ JUDGE SIGNATURE \_\_\_\_\_

## **Appendix B – Article 1.051(f)-(h) of the Code of Criminal Procedure**

(f) A defendant may voluntarily and intelligently waive in writing the right to counsel. A waiver obtained in violation of Subsection (f-1) or (f-2) is presumed invalid.

(f-1) In any adversary judicial proceeding that may result in punishment by confinement, the attorney representing the state may not:

- (1) initiate or encourage an attempt to obtain from a defendant who is not represented by counsel a waiver of the right to counsel; or
- (2) communicate with a defendant who has requested the appointment of counsel, unless the court or the court's designee authorized under Article 26.04 to appoint counsel for indigent defendants in the county has denied the request and, subsequent to the denial, the defendant:
  - (A) has been given a reasonable opportunity to retain and has failed to retain private counsel; or
  - (B) waives or has waived the opportunity to retain private counsel.

(f-2) In any adversary judicial proceeding that may result in punishment by confinement, the court may not direct or encourage the defendant to communicate with the attorney representing the state until the court advises the defendant of the right to counsel and the procedure for requesting appointed counsel and the defendant has been given a reasonable opportunity to request appointed counsel. If the defendant has requested appointed counsel, the court may not direct or encourage the defendant to communicate with the attorney representing the state unless the court or the court's designee authorized under Article 26.04 to appoint counsel for indigent defendants in the county has denied the request and, subsequent to the denial, the defendant:

- (1) has been given a reasonable opportunity to retain and has failed to retain private counsel; or
- (2) waives or has waived the opportunity to retain private counsel.

(g) If a defendant wishes to waive the right to counsel for purposes of entering a guilty plea or proceeding to trial, the court shall advise the defendant of the nature of the charges against the defendant and, if the defendant is proceeding to trial, the dangers and disadvantages of self-representation. If the court determines that the waiver is voluntarily and intelligently made, the court shall provide the defendant with a statement substantially in the following form, which, if signed by the defendant, shall be filed with and become part of the record of the proceedings:

"I have been advised this \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_, by the (name of court) Court of my right to representation by counsel in the case pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge. Understanding my right to have counsel appointed for me free of charge if I am not financially able to employ counsel, I wish to waive that right and request the court to proceed with my case without an attorney being appointed for me. I hereby waive my right to counsel. (signature of defendant)"

(h) A defendant may withdraw a waiver of the right to counsel at any time but is not entitled to repeat a proceeding previously held or waived solely on the grounds of the subsequent appointment or retention of counsel. If the defendant withdraws a waiver, the trial court, in its discretion, may provide the appointed counsel 10 days to prepare.