



# **Policy Monitoring Follow-up Review – Maverick County**

**October 2017**



Texas Indigent Defense Commission  
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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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## **Background**

### **November 2008 Initial Monitoring Review**

In November 2008, the policy monitor for the Texas Indigent Defense Commission (Commission) issued a report on Maverick County's indigent defense practices. This initial policy monitoring report made recommendations concerning:

- Inclusion of a space to document requests for counsel on the magistrate warning form;
- Procedures for taking requests for counsel and promptly transmitting the financial paperwork to the courts;
- Prompt rulings on counsel requests; and
- The distribution of attorney appointments in felony cases.

Maverick County's response noted that the magistrate warning form had been updated to include a space to request counsel. Magistrates were to provide financial paperwork to requesting defendants, and this paperwork was to be transmitted to the courts. The response further noted that once the paperwork was completed, the information was to be sent to the appointing judge within one day of receipt. As to the distribution of felony attorney appointments, the response noted a lack of available attorneys who wished to receive appointments.

### **January 2010 Follow-up Monitoring Review**

Commission staff conducted a follow-up review and issued a report in January 2010. The monitor found the county had adopted the new magistrate warning form and arrestees were given the ability to request counsel at the Article 15.17 hearing. However, the processes for obtaining financial information from arrestees and transmitting this information to the courts was not seamless. As a result, counsel was often not appointed in a timely manner. The monitor did not make a further examination into the distribution of appointments since the Commission had little knowledge of the availability of criminal defense attorneys in the county. The county responded to the report by agreeing to ensure that:

- Jail staff provide assistance to arrestees in completing affidavits of indigence;
- 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
- Requests for counsel are ruled upon in a timely manner.

### **November 2012 Follow-up Monitoring Review**

In November 2012, staff issued a second follow-up report. During this review, staff found that jail staff were meeting with inmates every weekday morning and were providing arrestees with financial forms for requesting counsel. Completed forms were then transmitted to the courts. This process was a solid improvement over previous practices. However, it did not address the requests made by arrestees who made bail

prior to meeting with jail staff about completing financial forms. Regarding appointments of counsel, staff found there was no process to promptly rule on requests made by defendants who made bail. When counsel was appointed for detained defendants prior to case filing, the appointment was often a temporary appointment, and counsel would be replaced after the indictment without a finding of good cause. In misdemeanor cases, defendants who had requested counsel at the Article 15.17 hearing would sometimes enter an uncounseled plea without a ruling on the request.

In response to the report, the county adopted a document to record the following information: whether counsel was requested at the Article 15.17 hearing; whether the arrestee received the financial questionnaire and assistance in completing it; and whether the paperwork was forwarded to the courts. This documentation was designed to be an alert that a request for counsel needed to be ruled upon by the courts. As to the continuity of counsel, the courts agreed that all appointments would follow Article 26.04(j)(2)'s requirement that an attorney continue with the case unless good cause is entered on the record.

## History of Report Recommendations and Their Status

Category and Initial Recommendation Year	Court Level	Status as of the October 2017 Review	Satisfied	Pending
Magistrate Warnings (2008)	Felony / Misd.	The magistration form did not include a space to record whether the arrestee requested counsel.	√	
Magistrate Warnings (2008)	Felony / Misd.	The arrestee must be informed of the right to appointed counsel and must be asked whether he/she requests counsel. A record must be made indicating whether the arrestee requested counsel.	√	
Magistrate Warnings (2008)	Felony / Misd.	If the arrestee requests counsel, procedures must be put in place to assist the arrestee in filling out necessary forms. Requests for counsel must be promptly transmitted to the appointing authority.		√
Timely Appointment of Counsel (2008)	Felony	The felony courts must put into place a procedure to appoint counsel within three working days of request.		√
Timely Appointment of Counsel (2010)	Misd.	The misdemeanor courts must put into 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 through case disposition unless the court orders the attorney to withdraw after a finding of good cause is entered on the record.	√	
Waivers of Counsel (2012)	Misd.	The misdemeanor courts must put into place a system to ensure that Article 1.051 waivers of counsel requirements are met.		√
Waivers of Counsel (2017)	Misd.	The waiver language for an uncounseled guilty plea does not match Article 1.051(g).		√
Fair, Neutral, and Non-discriminatory Attorney Selection Process (2008)	Felony	In 2008, the top 10% of felony attorneys received 3.6 times their representative share. The County response to our 2008 report noted that the County does not have an adequate number of qualified attorneys to handle felony cases. The monitor re-examined the matter in 2017.	√	

## Current Review

Commission staff members Joel Lieurance, Brandon Bellows, and Scott Ehlers (collectively, “the monitor”) made site visits to Maverick County on July 18-19, 2017 and on September 14, 2017 to conduct a third follow-up review of the county’s indigent defense practices. The purpose of this review was to examine whether Maverick County successfully addressed the findings and recommendations from the previous reports. Recommendations that must be addressed are set inside a text box. In the current review, the monitor observed a misdemeanor court docket and examined the following records:

- 59 felony and 55 misdemeanor case files;<sup>1</sup>
- Magistrate warning records maintained by justices of the peace and the City of Eagle Pass;
- Data reported to the Office of Court Administration (OCA) as part of its monthly Judicial Council Monthly Court Activity Reports; and
- Data reported to the Commission as part of its Indigent Defense Expense Report.

## Statistics Showing Requests for Counsel and Appointment of Counsel

Data reported to the Commission and to OCA indicate the percent of misdemeanor defendants who receive appointed counsel has increased since the initial 2008 review. However, the percentage is still well below the state average, and only a small fraction of those requesting counsel receive appointed counsel. In felony cases, appointment rates are in line with and exceed state averages.

**Table 1: Article 15.17 Requests for Counsel and Resulting Appointments**

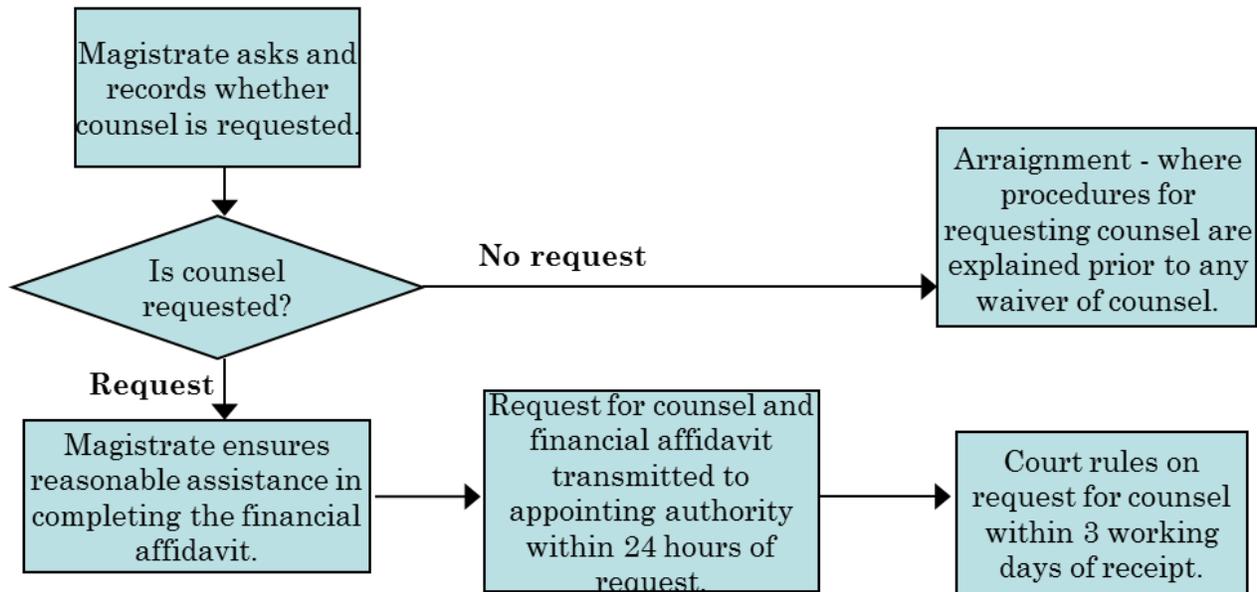
<b>Year</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>Texas 2016</b>
Misdemeanor Requests for Counsel at Art. 15.17 Hearing	522	614	539	641	n/a
New Misdemeanor Cases Added	298	571	726	1,168	481,253
Misdemeanor Cases Paid	13	14	30	33	214,674
% Misdemeanor Cases Defended with Appointed Counsel	4.4%	2.5%	4.1%	2.8%	44.6%
Felony Requests for Counsel at Art. 15.17 Hearing	164	155	143	163	n/a
New Felony Cases Added	183	139	132	131	276,879
Felony Cases Paid	144	149	102	107	200,580
% Felony Cases Defended with Appointed Counsel	78.7%	107.2%	77.3%	81.7%	72.4%

<sup>1</sup> The sample used FY2016 cases (filed between October 2015 and September 2016).

## Timely Appointment of Counsel

When an arrestee is brought to an Article 15.17 hearing, the magistrate must ask the arrestee if he/she wants to request counsel. If the defendant requests counsel, the magistrate must ensure reasonable assistance in completing the application, and must transmit the request and accompanying forms to the appointing authority within 24 hours of the request being made.<sup>2</sup> Upon receipt of the counsel request, the court (appointing authority) has three working days to determine indigence, and appoint counsel for those determined to be indigent.<sup>3</sup> The court cannot delay the appointment of counsel because the defendant makes bail.<sup>4</sup>

**Figure 1: Statutory Time Frames for Handling Counsel Requests**



Past monitoring reviews showed problems in timely appointment of counsel when requests were made at the Article 15.17 hearing. In response, Maverick County created procedures in which jailers would document that they provided financial forms to arrestees requesting counsel and that they forwarded those forms to the courts. In felony cases, requests are forwarded to the 365<sup>th</sup> District Court, and in misdemeanor cases, they are forwarded to the Maverick County Court.

### Felony Cases

To assess the timeliness of Maverick County’s appointment procedures in felony cases, the monitor examined the time from request for counsel until appointment of counsel or denial of indigence. Under the Commission’s monitoring rules, a county is presumed to be in compliance with the prompt appointment of counsel requirement if

<sup>2</sup> Tex. Code Crim. Proc. art. 15.17(a).

<sup>3</sup> Tex. Code Crim. Proc. art. 1.051(c).

<sup>4</sup> Tex. Code Crim. Proc. art. 1.051(j). *Rothgery v. Gillespie County*, 554 U.S. 991 (2008).

at least 90% of indigence determinations in the monitor’s sample are timely.<sup>5</sup> The monitor examined 59 cases filed in FY2016 and found 52 requests for counsel. Counsel was appointed in a timely manner in 50% of sample cases. This falls below the Commission’s threshold for presuming a jurisdiction’s practices ensure timely appointment of counsel (90% threshold).<sup>6</sup> Counsel was typically appointed promptly when the request was made in court, but was not timely when the request was made at an earlier time.

**Table 2: Times to Appointment in Felony Cases**

	Number from Sample	Percent of Sample
Total cases in which defendants requested counsel	52	
Request for counsel ruled upon in ‘x’ workdays		
0 workdays	21	40.4%
1 workday + 24 hours allowed to transmit a request	1	1.9%
2 workdays + 24 hours transmission	4	7.7%
3 workdays + 24 hours transmission	0	0.0%
<b>Timely Rulings on Requests</b>	<b>26</b>	<b>50.0%</b>
4 – 7 workdays + 24 hours transmission	1	1.9%
More than 7 workdays	18	34.6%
No ruling on request	7	13.5%
<b>Total Untimely / No Rulings on Requests</b>	<b>26</b>	<b>50.0%</b>

### Misdemeanor Cases

To assess the timeliness of the county’s appointment procedures in misdemeanor cases, the monitor examined the time from request for counsel until appointment of counsel, or denial of indigence, in 55 cases. From the sample, the monitor found 20 requests for counsel. Counsel was appointed in a timely manner in approximately 5% of cases. This falls below the Commission’s 90% threshold for presuming a jurisdiction’s practices ensure timely appointment of counsel.<sup>7</sup> All but one of the sample requests did not receive a ruling on the counsel request. This fact may be an indication that the court is not receiving all requests.

<sup>5</sup> 1 TEX. ADMIN. CODE § 174.28.

<sup>6</sup> The monitor did not obtain magistrate warning forms for all cases examined. The monitor disregarded one of the 47 counsel requests as the date of appointment could not be ascertained.

<sup>7</sup> The monitor did not obtain magistrate warning forms for all cases examined.

**Table 3: Times to Appointment in Misdemeanor Cases**

	Number from Sample	Percent of Sample
Total cases in which defendants requested counsel	20	
Request for counsel ruled upon in 'x' workdays		
0 workdays	0	0.0%
1 workday + 24 hours allowed to transmit a request	1	5.0%
2 workdays + 24 hours transmission	0	0.0%
3 workdays + 24 hours transmission	0	0.0%
<b>Timely Rulings on Requests</b>	<b>1</b>	<b>5.0%</b>
4 – 7 workdays + 24 hours transmission	0	0.0%
More than 7 workdays	0	0.0%
No ruling on request	19	95.0%
<b>Total Untimely / No Rulings on Requests</b>	<b>19</b>	<b>95.0%</b>

**Third Follow-up Recommendation 1:** If an arrestee requests counsel at the Article 15.17 hearing, procedures for assisting with requests for counsel and for transferring these requests to the appointing authority must be established to meet the requirements of both the indigent defense plan and Article 15.17. These procedures apply to all persons receiving the Article 15.17 hearing (felonies and class A and B misdemeanors).

**Status:** *Defendants are asked if they want to request counsel, and requests are documented. Procedures have been developed to provide assistance with financial forms and to transmit the forms to the courts. However, the October 2017 review revealed that several requests were not ruled upon, which shows there are gaps in how this has been implemented.*

**Third Follow-up Recommendation 2:** 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.

**Status:** *Not addressed with the October 2017 review in cases when counsel is requested at the Article 15.17 hearing.*

**Third Follow-up Recommendation 3:** 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.

**Status:** *Not addressed with the October 2017 review.*

## Waivers of Counsel in Misdemeanor Cases

Article 1.051 of the Code of Criminal Procedure addresses waivers of counsel and allows waivers of counsel that are voluntarily and intelligently made.<sup>8</sup> Article 1.051(f-1) requires the defendant to waive the right to retain counsel prior to speaking with the prosecutor. If the defendant wishes to waive the right to counsel for purposes of entering a guilty plea or going to trial, Article 1.051(g) then requires a signed waiver that shall be filed with and become part of the record for the purpose of entering an uncounseled guilty plea.

Under Article 1.051(f-1), the prosecutor may not initiate a waiver and may not communicate with a defendant until any pending request for counsel is ruled upon, and the defendant waives the opportunity to retain private counsel. Under 1.051(f-2), the court must explain the procedures for requesting counsel and must give the defendant a reasonable opportunity to request counsel. If the defendant has requested counsel, the court may not direct or encourage the defendant to communicate with the prosecutor unless the court has denied the request for counsel and after the denial the defendant has been given a reasonable opportunity to retain counsel and he has failed to do so or the defendant waives the opportunity to retain private counsel. If a defendant wishes to enter an uncounseled plea, he or she must voluntarily and intelligently sign a written waiver, and the language must substantially conform to 1.051(g).<sup>9</sup>

Nineteen sample misdemeanor cases did not contain a record showing a ruling on a counsel request. In nine of these cases, defendants entered uncounseled pleas to the sample case.<sup>10</sup> Under Article 1.051(f-1)(2), there can be no communication between the unrepresented defendant who has requested counsel and the prosecutor unless the request for counsel has been denied, and the defendant has been given a reasonable opportunity to retain and has failed to retain counsel or has waived the right to retain counsel.

According to interviews, the county attorney maintains the Maverick County waiver of counsel form. This is problematic since under 1.051(f-1) and (f-2), the defendant cannot communicate with the prosecutor until: (1) the court advises the

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<sup>8</sup> Article 1.051(f) states:

*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.*

<sup>9</sup> The waiver language of Article 1.051(g) states:

*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)*

<sup>10</sup> The monitor only obtained magistrate warnings corresponding to 30 of the 55 sample case files. If additional magistrate warning forms had been obtained, the total number of defendants who entered uncounseled pleas while having a pending request for counsel may have been higher.

defendant of the right to counsel and the procedures for requesting counsel; (2) the court denies pending requests; and (3) the defendant waives the right to retain counsel.

The monitor found that defendants entering uncounseled guilty pleas signed waivers of counsel, but the waivers differed from the language of Article 1.051(g).<sup>11</sup> This report does not attempt to determine whether the waiver substantially conforms to 1.051(g), but the county may wish to adopt waiver forms that correspond to the Commission's model forms.

- Waiver of counsel to speak with the prosecutor, available at <http://www.tidc.texas.gov/media/49941/model-waiver-to-speak-with-the-prosecutor.docx>
- Waiver of counsel to enter a plea or proceed to trial, available at <http://www.tidc.texas.gov/media/49932/Model-Waiver-to-Plea.docx>).

The first form waives the right to retain counsel so the defendant can speak with the prosecutor. The court should maintain this form, and if the waiver is signed, the defendant can speak with the prosecutor. If a plea agreement is reached, the defendant can sign a waiver to enter an uncounseled plea (the second form) after the court determines the waiver is voluntarily and intelligently made.

**Third Follow-up Recommendation 4:** The county court must rule upon all requests for counsel prior to any waiver of counsel in accordance with Article 1.051(f-1) and (f-2) of the Code of Criminal Procedure.

**Status:** *Not addressed with the October 2017 review.*

**Third Follow-up Recommendation 5:** The waiver language for an uncounseled guilty plea does not match Article 1.051(g). The county could benefit by adopting the language of 1.051(g).

**Status:** *New Recommendation.*

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<sup>11</sup> The county's waiver states:

*Now comes the Defendant \_\_\_\_\_, on this the \_\_\_\_ day of \_\_\_\_\_, 2015, the above styled and numbered cause in open Court and before having plead guilty / not guilty / no contest to the State's complaint and/or information as filed herein affirmed and announced that Defendant will plea \_\_\_\_\_ to said complaint and/or information and hereby request the consent and approval of the Court to waive the right to have an attorney present or appointed herein, and does hereby upon the consent and approval of the Court waive said right.*

## Continuity of Representation

The 2012 report found some felony cases in which an attorney was appointed to a case before an indictment had been filed. On the order appointing counsel, these cases had a note stating the appointment was ‘Pre-Indictment Only’. After indictment, a new attorney would be appointed to a case. 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.<sup>12</sup>

In the current review, the monitor reviewed 60 felony case files, but did not see any orders appointing counsel with the words ‘Pre-Indictment Only’. **Based on the review of felony cases, Maverick County has addressed this recommendation concerning the continuity of representation.**

## Distribution of Attorney Appointments in Felony Cases

The 2008 report made a recommendation concerning the distribution of appointments in felony cases. The county responded to this recommendation with a statement about a lack of available attorneys who wished to receive appointments. At the time of the initial review (as well as later reviews), the Commission had no knowledge of the number or availability of attorneys accepting appointments in the region. However, beginning in FY2014, counties must now report the number of cases paid and the amount paid to each attorney.

In this report, the monitor reexamines the distribution of attorney appointments in felony cases. The analysis is based on data submitted by the auditor for the Commission’s 2016 Indigent Defense Expense Report. The monitor found that there were 15 attorneys who had received payment for FY2016 felony appointments. The top two attorneys received 26.2% of available appointments, or **2.0 times their representative share**. This distribution of appointments is within of the Commission’s threshold for presuming that a jurisdiction’s appointment system is fair, neutral, and non-discriminatory (maximum of 3.0 times the representative share obtained by the top ten percent of appointed attorneys).<sup>13</sup> **Based on this analysis, Maverick County has**

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<sup>12</sup> Article 26.04(j)(2) 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.*

<sup>13</sup> Title I § 174.28(c)(5)(D) of the Texas Administrative Code states:

*For assigned counsel and managed assigned counsel systems, the number of appointments in the policy monitor's sample per attorney at each level (felony, misdemeanor, juvenile, and appeals) during the period of review and the percentage share of appointments represented by the top 10% of attorneys accepting appointments. A county is presumed to be in substantial compliance with the fair, neutral, and non-discriminatory attorney appointment system requirement if, in each level of proceedings (felony, misdemeanor, and juvenile cases), the percentage of appointments received by the top 10% of recipient attorneys **does not exceed three times their respective share**. If the county can track attorney list changes, the monitor will only examine the distribution of cases for attorneys that were on*

**addressed the recommendation concerning the distribution of felony appointments from the initial 2008 monitoring review.**

## **Conclusion**

The monitor appreciates the professionalism and assistance provided by Maverick County officials and staff. County officials appear willing to make necessary changes to improve the indigent defense system. As mandated by statute, the Commission will monitor the county's transition and process improvements regarding the report's recommendations. If officials in Maverick County desire technical assistance training, please contact our office so we can make such arrangements.

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*the appointment list for the entire year. The top 10% of recipient attorneys is the whole attorney portion of the appointment list that is closest to 10% of the total list.*

## **Status of Monitoring Recommendations**

### **Recommendations Not Successfully Addressed**

Maverick County must respond to the following recommendations with a detailed action plan describing how it will resolve each issue.

**Third Follow-up Recommendation 1:** Procedures for assisting with requests for counsel and for transferring these requests to the appointing authority must be established to meet the requirements of both the indigent defense plan and Article 15.17. These procedures apply to all persons receiving the Article 15.17 hearing (felonies and class A and B misdemeanors).

**Initial Year Made: 2008**

**Status:** *Defendants are asked if they want to request counsel, and requests are documented. Procedures have been developed to provide assistance with financial forms and to transmit the forms to the courts. However, the October 2017 review revealed that several requests were not ruled upon, which shows there are gaps in how this has been implemented.*

**Third Follow-up Recommendation 2:** 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.

**Initial Year Made: 2008**

**Status:** *Not addressed with the October review in cases when counsel is requested at the Article 15.17 hearing.*

**Third Follow-up Recommendation 3:** 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.

**Initial Year Made: 2010**

**Status:** *Not addressed with the October 2017 review.*

**Third Follow-up Recommendation 4:** The county court must rule upon all requests for counsel prior to any waiver of counsel in accordance with Article 1.051(f-1) and (f-2) of the Code of Criminal Procedure.

**Initial Year Made: 2010**

**Status:** *Not addressed with the October 2017 review.*

**Third Follow-up Recommendation 5:** The waiver language for an uncounseled guilty plea does not match Article 1.051(g). The county could benefit by adopting the language of 1.051(g).

**Initial Year Made: 2017**

## **Successfully Addressed Recommendations**

**Recommendation:** The County must update its magistration form to comply with Article 15.17(e) and with its indigent defense plan. The new form must state whether the individual is requesting counsel.

**Initial Year Made: 2008**

**Status: *Successfully addressed with the September 2010 review.***

**Recommendation:** Pursuant to Article 15.17, the defendant must be informed of his/her right to appointed counsel and must be asked whether or not he/she is requesting court appointed counsel. This request must be documented.

**Initial Year Made: 2008**

**Status: *Successfully addressed with the September 2010 review.***

**Recommendation:** The distribution of court appointments needs to be reviewed to ensure that the system is fair, neutral, and non-discriminatory. While attorneys have varying qualifications for appointments, a fair, neutral, and non-discriminatory appointment system should limit the occurrences where a few attorneys have significantly more assignments than the median case assignment amount.

**Initial Year Made: 2008**

**Status: *Successfully addressed with the October 2017 review.***

**Recommendation:** 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.

**Initial Year Made: 2012**

**Status: *Successfully addressed with the October 2017 review.***

## Appendix – Total Cases Paid to Defense Attorneys in Maverick County (2016)

Attorney Name	Juvenile Cases	Adult Felony Cases	Adult Misdemeanor Cases	Total Cases Paid	Total Paid
RATLIFF HARPER, JAD POWERS	6	15	5	26	9,970.50
PUENTE-CHACON, PRISCILLA	3	13	2	18	6,950.00
GUERRERO, MONICA ELAINE		11	1	12	5,392.47
HERNANDEZ, FELIPE	1	11	7	19	6,075.00
JUAREZ, EDGAR HUGO	1	11		12	5,200.00
DE HOYOS, JO-ANN S.		10		10	3,710.56
ZAPATA, HUGO		10		10	4,525.00
REYNOLDS, ERIK STEVEN		6		6	4,172.76
CASARES, ANDREA	2	5	8	15	6,043.06
TORRES, GREGORY DEAN		4		4	1,275.00
RAMON, ALBERTO M.		3		3	1,000.00
DE LOS SANTOS, LUIS		3	5	8	4,650.00
ABRAMS, JERALD LEWIS		2		2	700
SALINAS, ROLANDO	1	2		3	1,200.00
FLORES, MARIBEL		1		1	1,651.25
CRAIG, PAMELA ROSE GABRIEL			3	3	1,921.75
FUENTES, ERNESTO	3		2	5	3,407.50