



The Power of Choice

The Implications of a System Where Indigent Defendants Choose Their Own Counsel

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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. The purpose of this website is to provide access to the data that drives the Commission's work as well as information about indigent defense.

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EXECUTIVE SUMMARY

The United Nations' International Covenant on Civil and Political Rights (ICCPR), adopted in 1966, was not only based on the legal rights in force in the United States and other nations but has also framed the strengthening and establishment of legal systems of countries throughout the globe. Overall, Article 14, quoted in the sidebar, sets part of the standard for the rights of the accused in a criminal justice system.

Justice systems must ensure that the accused understand the charges against them and the actions taken during the course of a trial. They must be protected against harming themselves through self-incrimination. Their cases must be resolved expediently, and they must have the resources to prepare, to argue, to protect, and to represent their interests with expert assistance. These are among the key tenets of what is considered a just system in the United States and internationally.

One aspect of these rights and protections has been a source of great debate, however, and interpreted differently across the globe – the right of accused persons to choose their own lawyer. In the cases of those with financial resources, there is no argument that they may retain the private lawyer of their choice. However, indigent defendants who cannot afford the high cost of lawyers have not been extended that right in the United States, based in part on the argument that they are provided defense lawyers at no cost to them, who are substantively of equivalent talent and skill as a private lawyer. Yet, some academics and practitioners believe that there are differences in the quality of representation, despite the fact that many of the lawyers who provide indigent defense representation also have a private practice through which defendants retain their services. Moreover, the perceptions about quality of representation vary. While some believe private lawyers to be better equipped to defend the accused, others believe that indigent defense lawyers are more experienced and better advocates. Regardless, at issue is not so much the question of skill but rather differences in the level of effort put forth or time commitment allotted to indigent cases. As such, there is cause to believe that the lack of choice removes a fundamental right to the lawyer that an indigent defendant prefers.

The Texas Indigent Defense Commission (TIDC) and the Comal County, Texas District and County criminal courts took unprecedented steps to explore how the right to choose their own counsel might be extended to indigent defendants within the United States and what the impacts would be on defendants, defense lawyers, and the criminal justice system overall. In doing so, designing and pilot testing a Client

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) To be tried without undue delay;
- (d) To be tried in his presence, and **to defend himself in person or through legal assistance of his own choosing**; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- (g) Not to be compelled to testify against himself or to confess guilt.¹

Choice program provided indigent defendants with the option to select their lawyer and was intended to provide new and stronger incentives for attorneys to provide quality representation by better aligning lawyers' interests with the interests of their indigent clients.

Over the course of the planning and implementation of what came to be called Client Choice, the Justice Management Institute (JMI) has evaluated the implementation of this program – informed by a similar system in Great Britain – and the outcomes it has had. Even though the evaluation looked at a brief time frame of one-year with a sample from a mid-sized county of 129,048 residents,¹ JMI was able to make a number of findings that suggest that Client Choice is a viable model that can be replicated in other jurisdictions and continue to be studied.

JMI designed a robust process and outcome evaluation to the Client Choice proof of concept, gathering and analyzing the evidence from this pilot project in Comal County, TX, to demonstrate whether or not Client Choice is viable and feasible in a typical U.S. criminal justice system (in this case, one that uses an appointed counsel system). In the report that follows, the reader will find that Client Choice is a viable model that can be replicated and studied further. Its implementation showed no evidence of adverse effects to defendants, to lawyers, or to the cost effectiveness and administration of the justice system.

The process and outcome evaluation focused on four primary research questions:

- Does a Client Choice model impact the quality of representation for indigent defendants?
- Does a Client Choice model produce greater levels of satisfaction and feelings of procedural justice than a traditional court-appointed model?
- Does allowing defendants to select their lawyer impact case outcomes?
- What is the impact of a Client Choice model on the criminal justice system in terms of costs and efficiencies?

Key findings from the evaluation are summarized below.

Does a Client Choice model impact the quality of representation for indigent defendants?	Client Choice does improve certain measures of quality: timeliness of the first meeting between defense lawyer and client and the responsiveness of lawyers to requests for meetings by their clients. <ul style="list-style-type: none">• Defendants who chose their lawyers met with their lawyers sooner than their peers, who elected to have the court choose their lawyers through the conventional appointment process.• Varying by subgroups of defendants, there is evidence that some Client Choice participants were able to meet with their lawyers when asked more often than their non-participating peers.• No statistically significant differences were found in defendant perceptions regarding: How hard their lawyers worked for them, the location of their meetings, and the overall number and length of these meetings.
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¹ See U.S. Census estimate, *available at* <http://www.census.gov/quickfacts/table/PST045215/48091>.

<p>Does a Client Choice model produce greater levels of satisfaction and feelings of procedural justice than a traditional court-appointed model?</p>	<p>Client Choice shows a moderately positive impact on the sense of procedural justice among Client Choice participants. The strongest relationships were Client Choice participants' stronger perceptions of fairness and impartiality, when compared to their peers. JMI found mixed results for transparency (i.e., whether lawyers clearly explained the issues of the case to the defendant) and for influence in the case (i.e., whether defendant perspectives and choices meaningfully guided the defense strategy). However, there were some subgroups that had positive experiences with regard to transparency and influence that were statistically significant. Although the main hypothesis that Client Choice would produce a greater sense of procedural justice is not fully supported, it is possible that it is a function of volume and not Client Choice <i>per se</i>. One unanticipated implementation phenomenon that resulted in several lawyers being inundated with cases early in the launch of Client Choice likely had an impact on the capacity of those lawyers to provide the standard of representation defined in these measures.</p>
<p>Does allowing defendants to select their lawyer impact case outcomes?</p>	<p>A number of significant differences in how cases were disposed were identified in this analysis. Client Choice participants pled guilty to lesser charges or proceeded to trial more often than their peers. This difference is statistically significant with Client Choice participants 2.96 times more likely than non-Client Choice participants to plead to a lesser charge than to go to trial, even when controlling for prior convictions. This is an important finding, as is discussed in the report, in that it suggests a higher level of representation in that lawyers chosen by defendants were more successful advocates for achieving pleas to lesser charges and more zealous in pursuing trial verdicts rather than settling for plea deals.</p>
<p>What is the impact of a Client Choice model on the criminal justice system in terms of costs and efficiencies?</p>	<p>Although there is some minimal indication of reduction of costs, generally the findings were that Client Choice did not increase system costs or decrease efficiencies. Further study may demonstrate more positive outcomes, but JMI certainly did not find evidence to support the concerns of some that Client Choice would result in major systemic disruptions.</p>

Another important finding is that the majority of defendants who were offered the option to choose their attorney did so. This finding, in and of itself, suggests that defendants support the idea of having a voice in their representation—and specifically who represents them.

This report is not a wholesale affirmation that Client Choice will resolve all of the limitations and criticisms of indigent defense systems in the United States, but it does present enough evidence to justify its replication, refinement, and further study as one mechanism to address many of these concerns.

Professor Norman Lefstein of the Indiana University Robert H. McKinney School of Law has contributed substantially to this report and by preparing Appendices A and B describing the original plan for implementation of Client Choice and by providing his analysis of a legal basis for this model in the United States. His publications, cited in this report and Appendices are worth reviewing, but one point covered in Appendix B is particularly important to elevate to the Executive Summary of this report.

There has been some confusion about whether the model piloted in Comal County, Texas is a “voucher program.” However, as it operates in Comal County, Client Choice is substantively different than a voucher system. Whereas vouchers would provide defendants with a fixed amount to cover the cost of their defense and the capacity to choose *any* lawyer to represent them, Client Choice does not create a direct financial transaction between defendant and lawyer. Instead, the existing payment mechanism for appointed counsel is maintained. Arguably, as practiced in Comal County, Client Choice safeguards against defendants’ choosing unqualified lawyers by restricting choices to a list of lawyers approved to serve as appointed counsel by the Criminal and Misdemeanor Court judges. Keeping the payment mechanism centralized maintains the efficiency of the current system, and providing defendants with a list of lawyers from which to choose provides a measure of quality control. However, what these two systems share is that both voucher systems and Client Choice provide defendants a measure of choice about the defense lawyer to represent them.

It is in that spirit that the following evaluation has been constructed – to test how a choice model could indeed be successfully implemented in a system that has never before attempted such a model.

Finally, it should be emphasized that the Comal County Client Choice project involved an assigned counsel jurisdiction in which representation was provided exclusively by private lawyers. Implementation of Client Choice in defense systems that rely upon public defenders and lawyers who provide representation through contracts for defense services undoubtedly present different and perhaps challenging implementation issues. On the other hand, the arguments in support of and in opposition to Client Choice are equally applicable regardless of the defense delivery system adopted in the jurisdiction.

INTRODUCTION

In 2012, the Texas Indigent Defense Commission (TIDC) began planning an unprecedented model for assigning lawyers to indigent defendants in criminal court. Working with the Comal County District and County criminal courts, the process of developing and implementing the first Client Choice program in the United States began.

The principal team that developed the program and oversaw its implementation included James Bethke, Executive Director of the TIDC; Edwin Colfax, Grant Program Manager of the TIDC; and Professor Norman Lefstein of the Indiana University Robert H. McKinney School of Law. Professor Stephen Schulhofer of the New York University School of Law also volunteered his expertise to the project.² Comal County’s judges and six members of the private criminal defense bar were also involved in the planning process. In addition, a national advisory panel, comprised of legal scholars and defense attorneys from Texas and around the country was convened by TIDC several times by telephone to review and provide input on the program design.

The Justice Management Institute (JMI) joined the project in 2013 as the evaluators of Client Choice and acted as participant observers in the design process. JMI’s primary role was to conduct a comprehensive process and outcome evaluation of Client Choice, which was ultimately launched in February 2015, just prior to the initiation of the program by the courts.

JMI’s process evaluation documented changes in practice as a result of Client Choice in its first year of operation, as well as variations between the original program design and its implementation. JMI analyzed assignment data for lawyers representing indigent defendants, the frequency of defendants’ use of choice, cost information, and changes in lawyer participation in the appointed counsel program.³ Extensive interviews were conducted with system actors including judges, court administrators, the district attorney, and lawyers participating in the assigned counsel program.

JMI’s outcome evaluation examined the extent to which Client Choice produced improvements in indigent defense representation, better case outcomes for defendants, and better procedural justice. In addition, concerns about the viability of a Client Choice model and its impact on the system—namely decreased efficiency and increased costs—were also an integral component of the evaluation.

² Professor Schulhofer is the Robert B. McKay Professor of Law at the New York University School of Law. He has published extensively in the criminal justice area, including articles about the use of Client Choice in criminal defense. Stephen J. Schulhofer, *Client Choice for Indigent Defendants*, 12 OHIO ST. J. CRIM. L. 505 (2016)[hereafter, Schulhofer, *Client Choice for Indigent Defendants*]; Stephen J. Schulhofer & David D. Friedman, *Reforming Indigent Defense: How Free Market Principles Can Help to Fix a Broken System* (Cato Institute 2010), available at <http://www.cato.org/publications/policy-analysis/reforming-indigent-defense-how-free-market-principles-can-help-fix-broken-system>.

³ “Appointed counsel program” in this report refers to an indigent defense system where judges select criminal defense lawyers for indigent defendants from a group of pre-qualified lawyers. Those lawyers, often referred to as “appointed or assigned counsel” are then paid using public funds through a system of submitting bills for their time. In the case of the study site, Comal County, TX, “appointed or assigned counsel” were deemed qualified and therefore available to accept cases involving indigent defendants through an application process and approval of the County’s judges, who decided upon the pool of qualified counsel.

The process and outcome evaluation addressed four research questions:

- Does a Client Choice model impact the quality of representation for indigent defendants?
- Does a Client Choice model produce greater levels of satisfaction and feelings of procedural justice than a traditional court-appointed model?
- Does allowing defendants to select their lawyer impact case outcomes?
- What is the impact of a Client Choice model on the criminal justice system in terms of costs and efficiencies?

These research questions emerged both from the conceptual model upon which the Client Choice design was based, as well as the assumptions and hypotheses about the impact of extending the choice of lawyer to indigent criminal defendants.

DEFINING THE CLIENT CHOICE MODEL

In its historic *Gideon* decision, the United States Supreme Court held that defendants charged with a felony in state courts, if unable to afford a defense lawyer, are entitled to legal representation as a matter of constitutional right.⁴ The right to counsel also applies to most defendants charged with misdemeanor offenses in state courts.⁵ However, neither U.S. Supreme Court decisions nor federal legislation have ever addressed the mechanism by which lawyers should be provided to indigent defendants. Therefore, each state has developed its own procedures for determining how best to provide defense representation.

The practice in federal courts and in most state courts is for judges to appoint defense counsel.⁶ At the local level, the mechanisms vary from appointments that are made using an established rotation system, to appointments that are distributed on an *ad hoc* basis.⁷ In some jurisdictions, an agency or program,

⁴ *Gideon v. Wainwright*, 372 U.S. 335 (1963). Four years later, in *In re Gault*, 387 U.S. 1 (1967), the Supreme Court extended the right to counsel to youths charged with delinquency in juvenile court proceedings.

⁵ *Argersinger v. Hamlin*, 407 U.S. 25 (1972)(right to counsel applies to misdemeanor cases that result in a defendant's loss of liberty). Today, the majority of states recognize a right to counsel in misdemeanor cases if imprisonment is possible. *See, e.g., Lewis v. State*, 501 S.W.2d 88 (Tex. Crim. App. 1973)(accused charged in a criminal case in which imprisonment may be imposed has a constitutional right to legal representation and, if accused is unable to afford counsel, courts are required to appoint a lawyer absent an affirmative waiver of the right). For examples in which the right to counsel has been extended beyond what the Supreme Court has required, *see JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL* 24, n. 31 and accompanying text (Constitution Project 2009)[hereafter *JUSTICE DENIED*].

⁶ In Texas, for example, the law requires that the "court or the court's designee" appoint counsel. *See TEX. CODE CRIM. PROC. Art. 1.051 (c) and 26.04.*

⁷ The American Bar Association has long recommended that assignments to private lawyers be distributed in accord with an established rotation system except "[w]here the nature of the charges or special circumstances require" an exception. *AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES*, Std. 5-2.3 (3rd ed. 1992)[hereafter *ABA PROVIDING DEFENSE SERVICES*].

independent of the court system, assigns lawyers to indigent defendants.⁸ The latter practice is consistent with the American Bar Association's (ABA) recommendation that judges should not appoint defense lawyers to criminal cases in order to maintain the independence of the defense function.⁹

One model that has been used abroad is to provide indigent defendants the opportunity to choose their lawyers. Yet, this process for selection of lawyers by indigent defendants has not previously been attempted in the United States. In England, Scotland, and Wales, as well as in other British Commonwealth countries, defendants may select their defense lawyers from among those available and deemed qualified to provide representation.¹⁰ Indeed, in Edinburgh, Scotland, the public defender program itself requested that the Scottish parliament amend the law to allow for public defenders and private lawyers to compete. The request was grounded in the belief that defendants who chose their lawyers would have greater trust and confidence in their counsel. Their assumption was ultimately proven. An empirical study conducted in Edinburgh demonstrated that public defenders who were assigned to their cases by judges "consistently had lower 'levels of trust and satisfaction' from their clients" than private solicitors who were chosen by their clients.¹¹

Client Choice in Comal County, Texas represents the first use of this model in the United States.

Client Choice versus Defense Vouchers

In their article *Reforming Indigent Defense*, Stephen J. Schulhofer & David D. Friedman propose a program of Client Choice based on "defense vouchers" – "lump sum voucher[s] [that] would grant a fixed amount to cover the cost of defense, with the amount presumably depending on the nature of the charge, with different rates for capital cases, other felonies, and misdemeanors."¹² Defendants could use these vouchers to pay for or offset the cost, depending on the value of the voucher, to hire the lawyer of their choice. The New York Times brought national attention to vouchers when it reported that in Comal

⁸ For example, in Massachusetts, private lawyers are appointed by the Committee on Public Counsel Services, which functions as the state's public defender agency. In San Mateo County, California, defense lawyers are assigned to cases by the county's Private Defender Program, which is overseen by the county's bar association. See NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 196, 220-21 (American Bar Association 2011) [hereafter LEFSTEIN, SECURING REASONABLE CASELOADS]. In Texas, counties are permitted to delegate the appointment process to an independent "managed assigned counsel program." See TEX. CODE CRIM. PROC., Article 26.047. Currently, Lubbock and Travis Counties have adopted managed assigned counsel programs for appointing lawyers and delivering defense services for indigent defendants. Texas Indigent Defense Commission, Fiscal Year 2014 Annual Fund and Expenditure Report 8-9 (2014).

⁹ ABA PROVIDING DEFENSE SERVICES, *supra* note 7, Std. 5-1.3 ("The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged by the administrators of the defender, assigned-counsel, and contract-for-services programs.") See also AMERICAN BAR ASSOCIATION TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 1 (2002) ("The public defense function, including the selection, funding, and payment of counsel is independent.")

¹⁰ See LEFSTEIN, SECURING REASONABLE CASELOADS, *supra* note 8, at 241-44.

¹¹ Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L. J. 835, 915 (2004) [hereafter Lefstein, *In Search of Gideon's Promise*].

¹² Schulhofer & Friedman, *Reforming Indigent Defense: How Free Market Principles Can Help to Fix a Broken System*, *supra* note 2.

County, Texas, “[d]efendants there will soon be able to use government money to choose their defense lawyers.”¹³ However, the use of vouchers in Comal County had been rejected early in the planning process. Vouchers would almost certainly have delayed the assignment of lawyers to defendants’ cases, would have been extremely difficult and costly to administer, and would have been contrary to Texas law.

Statutes in Texas, as in many other states, provide for defense lawyers to be appointed by judges. To implement a program in which defendants would retain their own lawyers by using county-issued vouchers would have required a statutory amendment approved by the Texas legislature and signed by the Governor. Instead, early in the planning for Client Choice, the decision was made to give defendants the option either to have the court appoint counsel through its normal “wheel” or “rotation” process or for defendants to select their defense lawyers from among those approved by Comal County’s judges to provide defense representation.

Arguments For and Against: The Legal and Policy Foundation for Client Choice

As news has spread about the Client Choice pilot program, there has been much speculation about its advantages and pitfalls. Policy arguments on both sides, and the assumptions upon which they are based, served as the backdrop for designing and testing Client Choice in Comal County. Some of the key policy arguments are summarized below. For a more comprehensive review of the law behind Client Choice in the United States, please see Appendix A for additional discussion prepared by Professor Norman Lefstein.

In Support of Client Choice

Client Choice will improve the quality of indigent defense representation. One of the primary arguments in support of Client Choice is that it will result in better indigent defense representation, because the free market will incentivize lawyers in private practices to provide the best possible representation on behalf of clients or “customers.”¹⁴ Like entrepreneurs in all professions and businesses, lawyers will compete for clients and will want to earn repeat business and build positive reputations based on testimonials of those who have used their services or products. In the choice model, the customer is the defendant, not judges or third party organizations who assign lawyers to cases. In the typical U.S. system, some argue that lawyers are pressured to please judges or third parties who appoint them, whose interests may not always be aligned with those of the defendant. For instance, in some jurisdictions, lawyers may be selected because it is believed that they will dispose of cases more quickly than other lawyers, thereby consuming less judicial time and not tying up busy trial court calendars.

¹³ Adam J. Liptak, *Need-Blind Justice*, N.Y. TIMES (Sunday Review), Jan. 4, 2014.

¹⁴ There are a number of law review articles and other publications that support permitting indigent defendants to select their own defense lawyer. Many of the articles also address the pros and cons of Client Choice. *See, e.g.*, Janet Moore, *The Antidemocratic Sixth Amendment*, 91 WASH. L. REV. 1705 (2016)[hereafter Moore, *The Antidemocratic Sixth Amendment*]; Schulhofer, *Client Choice for Indigent Defendants*, *supra* note 2; LEFSTEIN, SECURING REASONABLE CASELOADS, *supra* note 8 at 241-49; Schulhofer & Friedman, *Reforming Indigent Defense: How Free Market Principles Can Help to Fix a Broken System*, *supra* note 2; Janet C. Hoeffel, *Toward a More Robust Right to Counsel of Choice*, 44 SAN DIEGO L. REV. 525 (2007); Lefstein, *In Search of Gideon’s Promise*, *supra* note 11; Kenneth P. Troccoli, *I Want a Black Lawyer to Represent Me”: Addressing a Black Defendant’s Concerns with Being Assigned a White Court-Appointed Lawyer*, 20 LAW & INEQ. 1 (2002); Wayne D. Holley, *Rethinking the Sixth Amendment for the Indigent Criminal Defendant: Do Reimbursement Statutes Support Recognition of a Right to Counsel of Choice for the Indigent?*, 64 BROOK. L. REV. 181 (1998).

The hypothesis is that by serving the defendant as the “customer,” defense lawyers will invest more in each case and develop their skills in order to attract business from more clients. Defendants inevitably will sort out the better lawyers from those who provide substandard or more marginal representation. Less effective lawyers will receive fewer cases, become discouraged, and leave the practice of defense representation to the better lawyers who will be selected much more frequently.

Client Choice enhances trust and confidence between lawyers and clients. If the defense lawyer is chosen by the defendant, some persons believe that trust and confidence between client and lawyer is enhanced. In Edinburgh, Scotland, the public defender office initially did not compete with private solicitors who accepted indigent defense cases. Like in the U.S., judges appointed counsel. Yet, Client Choice was introduced by the public defender office, as discussed above, specifically to build trust and confidence between lawyer and client. In 2013, England’s Ministry of Justice proposed eliminating Client Choice from the public defense system, raising significant protest from British defense lawyers. Ultimately, the Ministry of Justice abandoned its proposal, and Client Choice was preserved.¹⁵

Critiques of Client Choice

Client Choice denies more deserving defendants of the best lawyers. A primary argument against Client Choice is that such a model gives an unfair advantage to “less deserving” defendants, such as habitual offenders. “Habitual offenders, who might have a better sense of the strengths and weaknesses of available counsel, would have an unfair advantage. In a client-choice system, defendants with poor information allegedly would get poor lawyers more often than they do now, while defendants who have the best information, repeat offenders in particular, would benefit.”¹⁶

Client Choice incorrectly assumes that indigent criminal defendants are capable of assessing the quality of defense lawyers. Another argument against Client Choice contends that indigent defendants have neither sufficient knowledge of the law nor an understanding of the necessary skills required of an effective lawyer to make informed decisions about the best person to represent them. Those who support this notion posit that judges are best positioned to choose appropriate lawyers for indigent defendants. Allowing uninformed defendants to choose their lawyers would presumably not increase quality of representation, but quite possibly result in worse outcomes.¹⁷

Client Choice could undermine the idealism that motivates many lawyers to work in indigent defense. Defense lawyers often sacrifice higher compensation to work as public defenders or appointed counsel,

¹⁵ See Catherine Baksi, THE LAW SOCIETY GAZETTE, *MoJ Unveils Tendering Plans for Criminal Defence*, April 8, 2013 (“On the removal of Client Choice, head of legal aid at the Law Society Richard Miller said: ‘Client Choice is widely regarded as an important driver of quality in the justice system. It is very concerning, and revealing, that the government appears prepared to sacrifice this vital principle.’”) available at <http://www.lawgazette.co.uk/news/moj-unveils-tendering-plans-for-criminal-defence/70293.fullarticle>; Ministry of Justice Press Release, *Law Society and MoJ Agree New Proposals for Criminal Legal Aid*, Sept. 5, 2013, available at <https://www.gov.uk/government/news/law-society-and-moj-agree-new-proposals-for-criminal-legal-aid>. Justice Secretary Chris Grayling is quoted in the press release as follows: “The proposals we have agreed make sure legally-aided lawyers will always be available when needed and that people can choose the lawyer they want to help them.”

¹⁶ Schulhofer, *Client Choice for Indigent Defendants*, *supra* note 2, at 532.

¹⁷ *Id.* at 533.

because they are idealistic and want to serve a higher cause in representing the poor. Client Choice highlights free market incentives and profit motive, which some believe may taint the field of indigent criminal defense as a worthy public service.¹⁸

Client Choice compromises the effectiveness and efficiency of the criminal justice system. In *United States v. Gonzalez-Lopez*,¹⁹ the U.S. Supreme Court addressed the issue of choice among defendants who could afford their own lawyers. Justice Antonin Scalia wrote in the majority opinion that “[t]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them. ... We have recognized a trial court’s wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar.”²⁰

Gonzales-Lopez assumes that affording indigent defendants the ability to choose their lawyers will slow down the criminal justice system and have collateral, negative impacts on the capacity of the court to manage its caseload effectively. Professor Norman Lefstein, in his exploration of the efficacy of a Client Choice model in the U.S. also noted this concern in listing arguments against Client Choice: “[T]he belief that judges know best whom to appoint and thus are able to protect defendants from making a poor selection of counsel; that defendants lack sufficient information to make informed choices; that appointments of counsel should be distributed to the private bar in rotation; that the most popular lawyers will be overwhelmed with cases; and that judicial efficiency requires that defendants be precluded from selecting their own counsel since counsel’s unavailability might lead to delays in court proceedings.”²¹

THE CLIENT CHOICE SITE: COMAL COUNTY, TEXAS

Comal County, Texas agreed to be the first jurisdiction in the United States to develop a proof of concept for Client Choice. Comal County, situated between and Austin and San Antonio, is a mid-sized county of 129,048 residents. Felony cases are handled by four judges in the District Court in Comal County, and misdemeanors by two judges in County Courts at Law (CCL). In FY2015, the District Courts added 594 felony cases and disposed of 501. The courts had 737 active criminal cases pending as of August 31, 2015. That same year, lawyers assigned to indigent defendants were paid for 445 non-capital felony trial cases. The CCL added 2,065 misdemeanor cases and disposed of 1,957 during the same fiscal year. On August 31, 2015, the CCL had 3,002 active criminal cases pending. Lawyers assigned to indigent defendants were paid for 901 misdemeanor cases that year. Total indigent defense costs in FY2015, which includes lawyers’ fees and other case-related costs, was \$800,026.

Prior to the pilot test of the Client Choice program, indigent defense representation in Comal County was provided solely by private criminal defense lawyers serving as assigned counsel. Compensation was provided to these lawyers on a per case basis, pursuant to District Court and CCL fee schedules. District Court and CCL judges in Comal County appointed lawyers to indigent defendants, using an established rotation system, with exceptions made only when special circumstances required.

¹⁸ *Id.* at 536.

¹⁹ 548 U.S. 140 (2006).

²⁰ *Id.* at 151-52. The *Gonzales-Lopez* decision is further discussed in Professor Norman Lefstein’s Appendix A.

²¹ Lefstein, *In Search of Gideon’s Promise*, *supra* note 11, at 917.

STUDY METHODOLOGY

The implementation of Client Choice in Comal County presented a unique opportunity to test the feasibility of such a model in light of the assumptions and hypotheses put forth in arguments for and against choice models. Indeed, JMI incorporated these into research questions, thereby addressing the impact of Client Choice on case processing, procedural justice, and the criminal justice system as a whole. As noted earlier, these questions included the following:

- Does a Client Choice model impact the quality of representation for indigent defendants?
- Does a Client Choice model produce greater levels of satisfaction and feelings of procedural justice than a traditional court-appointed model?
- Does allowing defendants to select their lawyer impact case outcomes?
- What is the impact of a Client Choice model on the criminal justice system in terms of costs and efficiencies?

The thinking about the possible impacts Client Choice – positive or negative – were ultimately incorporated into a conceptual model (shown on the following page) that JMI used to evaluate the program.

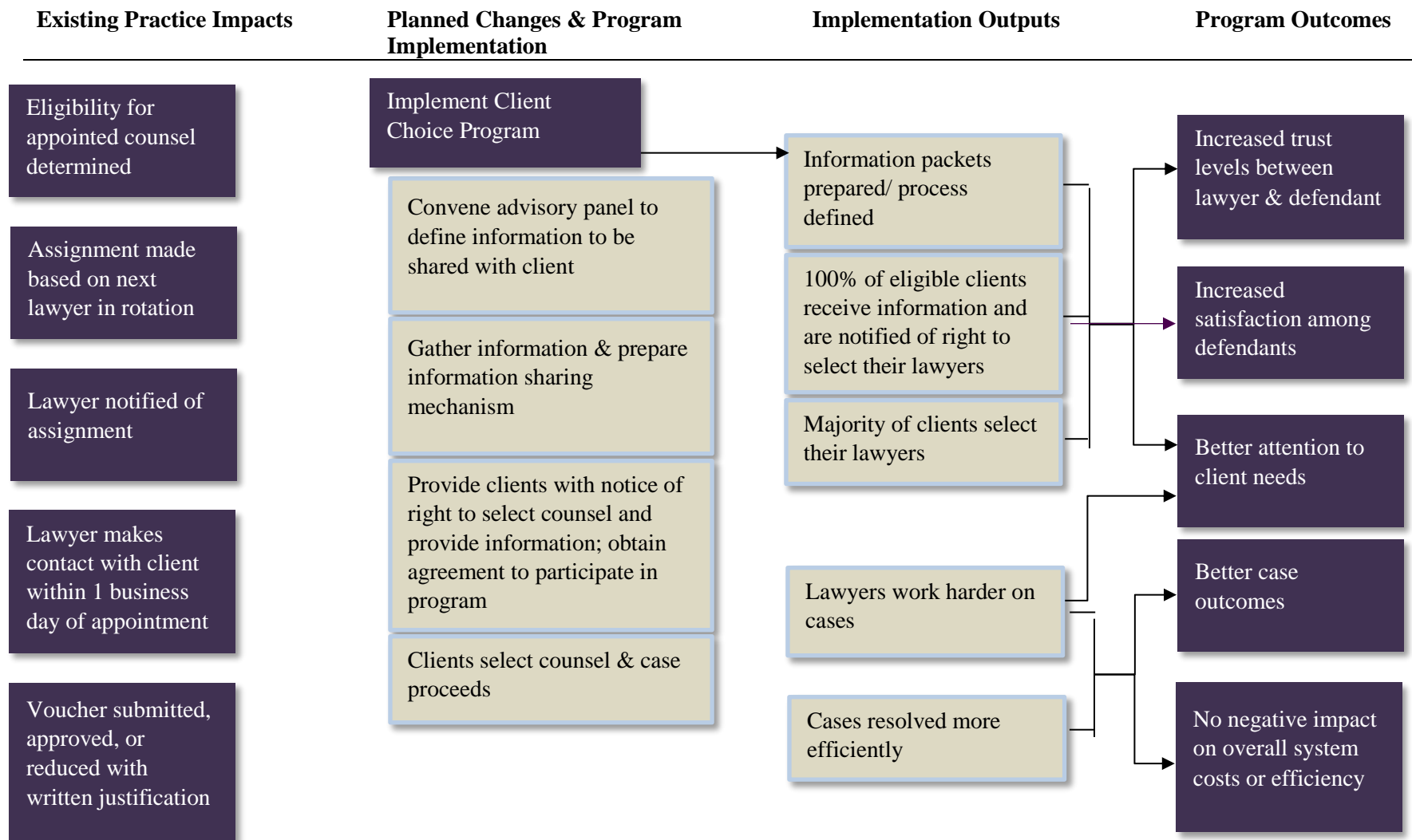
JMI designed complementary process and outcome evaluations to test this conceptual model. The process evaluation methodology consisted largely of qualitative approaches—structured interviews, observations, and focus groups—to assess how well Client Choice was implemented as well as the challenges and barriers encountered in implementation. Specific areas that were addressed included:

- Timing for appointment of counsel
- Determination of indigence
- Process of appointing counsel
- Communication of appointments to other stakeholders and the defendants
- Accountability for the quality of representation

The outcome evaluation used a pre-/post-test design, using comparison groups to analyze differences between indigent defendants who chose their lawyers and those for whom the court chose lawyers. Specific areas addressed included:

- Quality of representation
- Case outcomes
- Procedural justice
- Case processing efficiency
- Costs of representation

Conceptual Model for Client Choice Program



Both the process and outcome evaluations were grounded in the practical applications of the Client Choice model in the United States. The findings were as much about testing the conceptual model and finding impacts of such a program as it was about demonstrating proof of concept – that this model has the potential for real-world application within the context of the U.S. criminal justice system.

Process Evaluation

The process evaluation used primarily qualitative methods to assess how effectively the original plan for Client Choice was implemented, the scope of any resulting changes to the adjudication process, and the perception of system actors regarding the program's operation as well as its impact on factors such as the quality of representation; defendant satisfaction; relationships among the court, defense counsel, prosecution, and defendants; and the efficiency of the court's normal business practice.

In October 2013, JMI conducted a week-long site visit to the District Courts and the CCL in Comal County to establish a baseline for the process evaluation. Field staff documented how indigent defendants are identified, how lawyers are assigned to cases, and how they are compensated. Seventeen interviews were conducted with representatives from all of the major stakeholder groups, including the District Court and CCL judges and administrators, the Magistrate, the District Attorney, and three lawyers on the appointed counsel list. The findings were summarized in a baseline report and validated by a subgroup of these stakeholders.

In December 2015 – ten months after the February 2015 launch of Client Choice – JMI staff, assisted by Professor Lefstein, began the second phase of its process evaluation by conducting another round of interviews with key stakeholders, including a sample of 22 lawyers accepting indigent defense cases. The interviews were conducted in-person during a week-long site visit and subsequently by teleconferences over the course of several months into 2016. Each interview followed a structured protocol that covered stakeholders' perceptions of the implementation process and any notable changes in behavior or practice. In total, 34 system actors, including 13 who participated in the pre-implementation system review, were interviewed.

Comparative analyses were conducted on the key process variables using the baseline study, the program plan, and the post-implementation interviews.

Outcome Evaluation

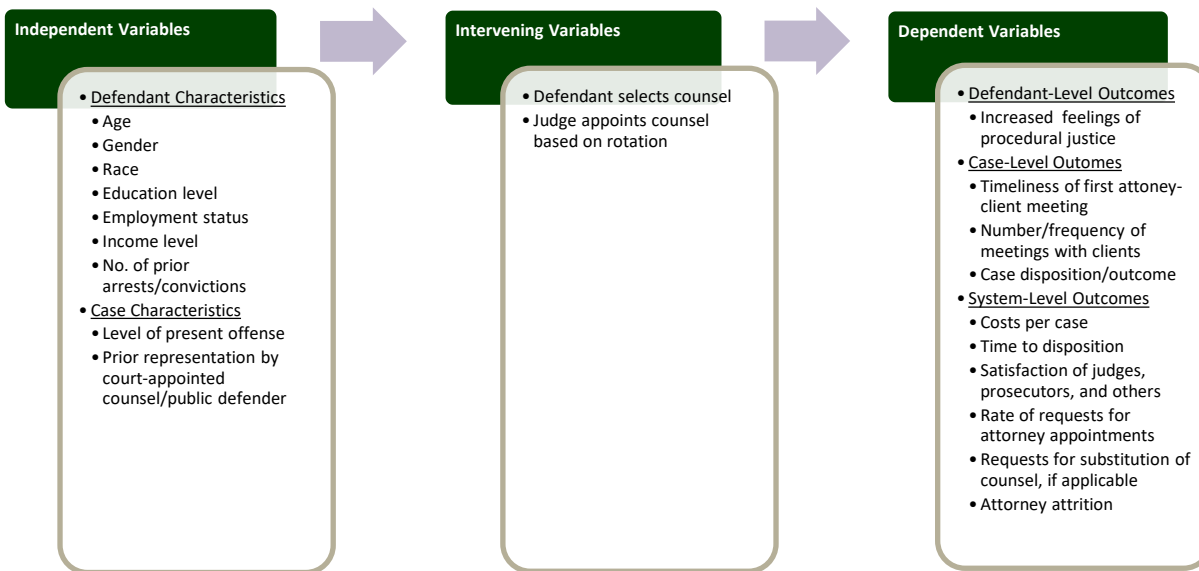
JMI's outcome evaluation was designed to assess the extent to which Client Choice produced improvements in indigent defense representation, better case outcomes for defendants, and better procedural justice. Concerns about the viability of a Client Choice model and its impact on the system, such as decreased efficiency and increased costs, were also considered.

This part of the evaluation used a pre-post-test design, examining differences in case processing, case outcomes, procedural justice, and costs among samples of defendants whose cases were handled prior to and during the implementation of Client Choice. The primary data collection instrument was a survey of defendants. Additional information about case type, disposition, and sentencing was collected from the Comal County online court records. The total sample size of 187 was comprised of 119 pre-test participants and 68 post-test participants.

The outcome evaluation was designed to answer the research questions about the efficacy of a choice model for indigent defendants at three different levels—the individual defendant level, the case level, and

the system level. JMI used a series of descriptive analyses; regression analyses (linear, logistic, and ordinal); along with other inferential statistics such as analysis of variance, t-tests, and cross-tabulations to explore the answers to these evaluation questions. The chart below illustrates the key variables that were included in the outcome evaluation.

Key Variables for the Outcome Evaluation



Study Sample

Sampling for the evaluation included both the sampling of individuals as part of the process evaluation and a sampling of defendants for the outcome evaluation. Each of these samples is described in the following sections.

Sampling of Lawyers Participating in Appointed Counsel Program

To ensure that JMI captured a complete picture of implementation and its perceived impacts, it was critical to speak to a large sample of lawyers who participated in the appointed counsel program while Client Choice was in place. The lawyers interviewed needed to be asked about how Client Choice impacted them and their colleagues and also afforded a chance to comment on their experiences with clients who had chosen them and clients appointed by judges through the normal rotation process.

The Comal County judiciary maintained three lists of lawyers who had been accepted by the bench to serve as appointed counsel for indigent defendants. (These lists continued to be used during the implementation of Client Choice.) Specifically, the District Court maintained two lists and the CCL judges maintained their own list. The District Court lists were as follows:

- The first list (referred to by the District Court judges as “List A”) included lawyers qualified by the bench to represent indigent defendants in the most serious felony cases in District Court, and
- List B included lawyers qualified by District Court judges to represent defendants in third degree felony cases and state jail felonies (i.e., lower level felonies).

The CCL list included lawyers deemed eligible to represent defendants with misdemeanor cases in County Court. Lawyers who were qualified to represent defendants in felony cases also were qualified to represent misdemeanor defendants, but they could opt out of doing so.

At the time of the post-implementation review, 13 lawyers were eligible to handle the most serious felonies in District Court (List A). An additional 17 lawyers were qualified by the court to handle less serious felonies (List B). Twenty-five lawyers were listed separately as eligible to be appointed in CCL cases. These 25 lawyers overlapped considerably with Lists A and B.

The 22 lawyers interviewed represented a broad cross-section of practitioners in the Comal County criminal courts. Seven lawyers were interviewed who could represent any felony in District Court (List A). Also, another nine lawyers eligible to represent indigent defendants only on less serious felonies (List B) were interviewed. Six CCL-eligible lawyers were also interviewed. The 22 interviewed lawyers were quite diverse: they ranged in experience practicing criminal law; their practices had differing proportions of retained and appointed cases, and they varied in their levels of participation in the courts' assigned counsel program. As of December 2015, these lawyers had graduated from law school a median of 19 years earlier and had practiced criminal law for most of that time (a median of 13 years). Most of the lawyers interviewed also had spent significant time accepting appointed cases in Comal County (a median of 8 years). Eighteen of the 22 lawyers (82 percent) had practiced in Comal County for three or more years and nine for over a decade (41 percent). Two-thirds of the lawyers were solo practitioners, and thirteen (59 percent) had some staff support, usually a single staff person or one staff member with part-time assistance.

All appointed counsel interviewed reported that they had been selected by defendants through Client Choice, and almost all of the lawyers had several years of experience prior to February 2015 against which to compare the new program. Although most interviewees could not recall the exact number of indigent defendants who had selected them, their estimates ranged from two to 60 individuals between February 2015 and December 2015, with the most common estimate being 20 "choice clients."

Defendant Characteristics

During the Client Choice pilot program, 1,104 defendants' cases were handled in District Court and the CCL—485 defendants in District Court and 619 defendants in CCL. Of these defendants, 72% opted to participate in Client Choice and select their lawyer. The majority of the remaining 38% of defendants had their lawyers appointed by the courts, although there were 5 defendants where there was no information about whether or not they had representation or how it was obtained. In total, 47% of the defendants participating in Client Choice were charged with felonies, and 53% of the Client Choice defendants were charged with misdemeanors. Among the non-Client Choice defendants, 33% were charged with felonies and 67% were charged with misdemeanors.

In 2014, prior to the February 2015 launch of Client Choice, JMI initiated a pretest to collect baseline data on defendant satisfaction with the Comal County criminal justice system and on their sense of procedural justice. In total, 119 defendants were surveyed during the pretest. After the launch of Client Choice, another 68 defendants were selected to participate in the post-test survey. The post-test survey duplicated the questions administered to the defendants prior to the launch of Client Choice, with only the addition

of a few items regarding their knowledge of and experience with Client Choice.²² Of those defendants who were surveyed after the implementation of Client Choice, only a quarter of the respondents opted to have the court choose their defense lawyers in the conventional way, and the other 75 percent chose their lawyer through the new program. The table below compares the demographics of respondents to the pre-survey and respondents to the post-survey who participated in Client Choice.

Characteristic	Pre-Test (n=119)	Post-Test (n=68)
Gender	71.4% Male 28.6% Female	76.5% Male 23.5% Female
Average Age	33 years	33 years
Race		
White	53.8%	55.9%
Black	6.7%	10.3%
Latino/Hispanic	34.5%	30.9%
Other	5.0%	2.9%
Education Level		
No schooling	3.4%	4.5%
K-8	1.7%	1.5%
9-12 (no degree)	20.3%	13.4%
HS Degree/GED	50.0%	49.3%
1-4 years college (no degree)	13.6%	22.4%
AA/AS or Professional Certification (not Bachelors or Master's degree)	5.9%	7.5%
BA/BS Degree	4.2%	0.0%
MA/MS Degree	0.0%	1.5%
PhD/ED/JD	0.8%	0.0%
Average Number of Prior Convictions	4	4
Had Court Appointed Counsel Before	76.1% Yes 23.9% No	72.1% Yes 27.9% No
Highest Current Charge	52.9% Misdemeanor 47.1% Felony	30.5% Misdemeanor 69.5% Felony

²² The smaller post-test sample size can be attributed to a number of factors, including the relatively low volume of cases in the Comal County criminal courts, confusion about who was responsible for collecting post-data among certain system actors, and logistical issues related to tracking defendants post-disposition.

In general, there were no statistical differences between the pre- and post-test samples with one exception. During the pre-test, there were a greater number of defendants charged with a misdemeanor. In fact, the odds of a defendant during the pre-test being charged with a misdemeanor was .39 greater than having a felony charge, which is a relatively small difference and more reflective of the nature of criminal caseloads in Comal County and across the country, where a greater percentage of all cases entering the court are for misdemeanor charges. Among the post-test sample, the odds of being charged with a felony were greater than being charged with a misdemeanor.

In addition to capturing socio-demographic information about defendants, JMI included a number of control variables to ascertain whether certain defendants had a greater sense of respect for, and trust and confidence, in the justice system, and what impact these beliefs might have on their sense of procedural justice.

Respondents were asked to rate their level of agreement with the following statements:

- You should accept the decisions made by the court, even if you do not agree with the decisions.
- It is in the community’s best interest when people do what the court orders them to do.
- Disobeying a court’s order is seldom justified.
- Judges and the courts can be trusted to make decisions that are right for the people in your community.

Respondents generally disagreed with these statements, with some exceptions. More than half disagreed that it is in the community’s best interest when people do what the court orders, and almost half disagreed that judges and courts can be trusted. With regard to accepting the court’s decisions and disobeying a court order is justified, the majority of defendants disagreed, but approximately one-third agreed with the statements.

Survey Statement	Level of Agreement ²³	
	Client Choice Defendants	Non-Client Choice Defendants
Accept decisions made by the court	47%	39%
In the community’s best interest to do what the court orders	31%	27%
Disobeying a court order is seldom justified.	35%	31%
Judges/courts can be trusted to make the right decisions.	36%	34%

JMI analyzed defendant characteristics and level of respect for the courts to identify whether or not the two samples (Client Choice and non-Client Choice) differed from each other. There were no statistical differences between the two groups.

²³ Percentages are calculated from those defendants who responded that they “strongly agreed” or “agreed” with the statement.

THE IMPLEMENTATION OF CLIENT CHOICE

Based on the process evaluation, Client Choice in Comal County was viewed as a valuable model among systems actors, who generally believed it enhanced procedural justice through client selection. The administration of the program operated smoothly with only one substantial deviation from the original plan, related to the amount of time afforded to defendants to consider and make their choices. Lawyers generally believed that they received ample information regarding the program and that any administrative changes associated with the model's implementation did not have an adverse effect on their performance. Indeed, several system actors, including judges and the lawyers representing indigent defendants, observed specific improvements in the areas of defense practice and satisfaction by defendants and/or lawyers. Others observed non-specific improvements – believing that there had been positive changes in quality but that they were not able to pinpoint or describe specifically what those changes were. Specific findings are detailed in the following sections.

Planned versus Actual Implementation

In total, JMI interviewed 39 system actors in 2013 and 2015 to document changes in the adjudication process and to assess how closely the implementation of Client Choice adhered to the original design. Seventeen system actors, including judges, court administration staff, prosecutors, and defense lawyers, were interviewed in October 2013, before the launch of Client Choice. Thirteen of those individuals were interviewed again in December 2015 as part of the post-evaluation, with the addition of twenty-one system actors, primarily lawyers participating in the appointed counsel program.

Overall, interviewees had a positive view of Client Choice, with critiques and commentary focused mostly on implementation issues. Where administrative changes were necessary during initial implementation, they were described as minimally disruptive. One possible exception was collection of evaluation data, particularly in the CCLs, where a combination of miscommunication and workload delayed the collection of evaluation data about the process and outcomes of Client Choice. (The impact of delayed data collection is discussed subsequently in the section on findings from the quantitative analysis.)

The implementation of Client Choice and JMI's findings with regard to implementation are discussed below. For a complete discussion of the original design of Client Choice, please see Appendix B.

Magistrate Intake at Jail

Most defendants arrested by police usually have their first interaction with the judicial system at a magistrate's hearing that takes place inside the jail. This hearing occurs within 24 to 48 hours after arrest. Prior to this initial hearing, the magistrate reviews the arresting police officer's report to determine if probable cause exists. In cases where there is not probable cause, the magistrate will require further detail from law enforcement or otherwise order defendant's release.

However, probable cause is found in the vast majority of cases, so the magistrate proceeds with a hearing with the defendant. The defendant is advised of his or her rights (including the right to a court appointed lawyer if the defendant cannot afford a lawyer), given an explanation of the purpose of the hearing and the arresting charges, and asked questions about his/her background (e.g., employment and permanence of residence) to inform the pretrial release and bail decision.

The magistrate only considers the issue of appointed counsel if the defendant's charges are a Class B Misdemeanor or above. If eligible defendants (based on arrest charges) want to apply for a lawyer, the

magistrate assesses indigency. The magistrate approves or denies the application for an appointed lawyer at this time. This part of the intake process remained unchanged under Client Choice.

Application for Eligibility and Selection of Counsel

Implementation of Client Choice began during the first week of February 2015. Eligibility for appointed counsel continued to be determined through a standard eligibility screening, but the previous practice of lawyer assignments changed. Although the magistrate continued the practice of asking whether an indigent defendant wanted appointed counsel, defendants were now told that they had a choice either to select their lawyer from the list of lawyers approved to handle indigent cases for the level of offense charged or to have the court determine the lawyer to represent them. If the latter situation, the courts continued to select from their lists of approved lawyers an assigned counsel to provide representation through a rotation system.

Defendants who elected to choose their lawyer were provided with the list of attorneys eligible to provide representation for the level of offense charged. Then they were excused from the hearing room and afforded time, usually about fifteen minutes, to review a binder of Lawyer Information Forms (LIFs) corresponding to the level of the defendant's charges. The LIFs contained basic information about each available lawyer on the appointed counsel list.²⁴ The amount of time afforded to defendants to review the LIFs and make their choice of lawyers (indicating their top three choices, from which one would be assigned to the defendant dependent on availability) deviated from the original program design.

Under Texas law, in counties with a population of less than 250,000²⁵ indigent defendants must receive appointed counsel within three working days of their request to the court. Therefore, the implementation plan stipulated that defendants would have up to 48 hours to review information about available lawyers and make their choices. This part of the plan was not implemented as designed for in-custody defendants because of concerns by the principal magistrate of keeping track of the many defendants who would need to be brought back from the jail and asked about whether they had made a decision about their choice of counsel. Moreover, jail officials supported the shorter time provided, because of the burden of having to bring defendants back to the magistrate from different parts of the jail after they had decided about a lawyer to represent them. (This subject is also discussed in Appendix B.)

The associate magistrates, who typically held hearings during weekends, reportedly did not complete all of the necessary paperwork related to indigency and forms indicating defendants' choice of counsel due

²⁴ The Lawyer Information Form (LIF) contained the name of the lawyer; the name of his or her law firm and the principal law firm address; email and internet site (if any); law school attended and graduation year; year licensed in Texas; types of cases handled (e.g., criminal, domestic relations, etc.); approximate portion of practice time spent on criminal cases for persons unable to afford counsel during the prior 12 months; approximate number of defendants represented in all criminal cases during the prior 12 months; whether the lawyer was ever publicly disciplined and, if so, a brief explanation; and languages spoken in addition to English. Phone numbers were not provided, because the six lawyers advising the implementation team did not believe that lawyers would consent to being interviewed. The LIFs of lawyers fluent in Spanish were not translated into Spanish, but Spanish speaking only defendants were provided a list of lawyers fluent in their language and qualified to provide representation for the offense level with which they were charged.

²⁵ See Article 1.051, Code of Criminal Procedure. Counties over 250,000 have one working day to appoint counsel.

to the extra work involved. Instead, the cases of these defendants were postponed until the lead magistrate returned on Mondays.

From the perspective of defendants, this stage of the process was initially confusing. Defendants who were not in custody and who had the opportunity to choose their lawyers at first court appearance also found the choice process confusing. In both cases, defendants were asked to express their top three choices for lawyers from those available. By indicating the names of three lawyers, some defendants believed they would be assigned all three lawyers rather than one. When this occurred, the magistrates clarified that the defendant would only be assigned to one of the three lawyers they listed based on lawyers' availability, which was also indicated in writing on the selection form.²⁶

Decisions about the content of information provided on the LIF were made during the implementation stage and dictated by several factors. First, the implementation team was concerned that if information requested of lawyers could not be readily verified, the program might be disseminating material that was unverified and might be in violation of ethical rules restricting lawyer advertising.²⁷ Second, the amount of information, even if seemingly minimal, mirrored what is essentially a "real-world setting" – the information that defendants with resources would consider when choosing which lawyers to hire.

The lead magistrate, however, opined that the information made available to defendants was insufficient to make well-informed decisions (a concern raised by other system actors during later interviews). Several system actors reported that defendants often made decisions based on word of mouth within the jail (or from family and friends) in addition to or instead of the information on the LIFs. The perception was that defendants tended to choose well-known lawyers who had recently won well-known cases for peers in or outside of the jail.

In fact, in a survey of defendants, JMI was able to confirm these perceptions among system actors. JMI found that those defendants who selected their lawyer reported generally that they agreed it was an easy choice to make, but did not necessarily agree it was easy to get information about a lawyer to inform their choice. When asked about the factors that influence their selections, defendants primarily cited the lawyer's reputation, followed by years of experience, recommendation from a family member or friend, and prior representation of the defendant by the lawyer. This is consistent with perceptions about how choices were made.

Formal Assignment of Counsel by the Court

At the time of JMI's baseline visit, the magistrates made final determinations about eligibility for appointed counsel only for those defendants with cases bound for District Court. In cases bound for CCL,

²⁶ The Selection of Lawyer Form that defendants completed states that "I have made a decision about the lawyer to represent me in my case. I also understand that I may list up to three names of lawyers. In order of preference, if available, the lawyer that I would like to represent me is as follows:" This language is followed by three blank spaces in which the names of up to three lawyers can be written.

²⁷ See Texas Disciplinary Rules of Professional Conduct, Rule 7.05 (a)(3): "A lawyer shall not...knowingly permit...another person to send, deliver, or transmit, a written...message...to a prospective client for the purpose of obtaining professional employment on behalf of any lawyer...if the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim." Several members of the Advisory Panel expressed concerns that lawyers approved to represent defendants in Comal County would engage in advertising to encourage defendants to select them, but there is no evidence that this ever occurred.

the magistrates only submitted the completed eligibility application, and the determination was made by a County Court judge. With the launch of Client Choice, the CCL judges agreed to make the process the same as the District Court's so that all eligibility determinations would be made by magistrates. As indicated above, indigent defendants noted on the eligibility form either that they wanted the court to choose a lawyer on their behalf (via rotation) or that they wanted to select their lawyer from the list.

Prior to Client Choice, eligible defendants were appointed counsel by either a District Court or CCL judge, depending on the most serious charge against the defendant (i.e., a felony or misdemeanor). As noted earlier, the typical assignment process had been to use a "wheel system" for determining the lawyer to be assigned to a new case. Judges would sequentially choose the next lawyer in the rotation from those qualified to handle the defendant's case, based on the severity of the charges. During the baseline review, JMI found that lawyers were sometimes skipped, even if next on the "wheel," but the reasons for deviation were not systematically recorded.²⁸

Once a lawyer was appointed, the defendant was provided with the lawyer's contact information and, if out of custody, was asked to contact him or her. For in-custody defendants (i.e., those detained pretrial), all of this activity happened prior to the defendant's first court appearance, and the order of appointment was faxed to the attorney immediately upon completion. For those defendants who were not in custody, this process took place at the first court appearance. The lists provided to defendants were different based on the severity of the charges against them (see discussion of pre-qualified lists of lawyers in Process Evaluation: Sampling of Lawyers Participating in Appointed Counsel Program).

Client Choice did not significantly change court procedures. For those defendants who elected to have the court choose their lawyers, the process remained unchanged. For those who elected to participate in Client Choice, the changes were minimal. In-custody defendants made their selections during the eligibility interview in the jail, so their lawyers were already assigned prior to their first court appearance. Those defendants who had not been detained and who wanted to choose their lawyers came to their first court appearance and spoke with court staff to make their selections. These defendants completed the Selection of Lawyer form, which was then reviewed by court administrators to determine the availability of the selected lawyers.²⁹ Based on that review, the administrators made appointment recommendations to the presiding judge in the case. Reportedly, "choice" defendants, whether in or out of custody, were usually assigned their first or second choices depending upon lawyer availability.

Although additional time was required to have out-of-custody defendants choose their lawyers at first appearance and then return to court after having contacted their lawyer, the change in the selection and appointment process for "choice" defendants was not described by judges or lawyers as having significant impact on the efficiency of court operations and case management. Even though the general impression was that the impact was not significant, delays did occur from time to time. In addition to out-of-custody indigent defendants who needed to make their selections in court, if they elected to participate in Client

²⁸ Reportedly, the reasons may have to do with an indication from the lawyer that he or she has too many cases; the judge's assessment that the lawyer has too many cases; the need for a bilingual lawyer; or the judge's assessment that, based on the needs of the defendant, another lawyer might be more compatible with the defendant. Three lawyers reported that they were overwhelmed by Client Choice clients.

²⁹ The court administrators also verify that the lawyer selected is approved for appointments to the type of case with which the defendant is charged. For example, a lawyer approved only for misdemeanor cases will not be appointed for a defendant charged with a felony. Lawyers approved for appointments to cases were also permitted to remove themselves temporarily from receiving all or some types of cases. See Appendix B for further discussion of this subject.

Choice, some in-custody defendants would also need to make these selections at first appearance. The lead magistrate described these individuals as defendants who initially intended to retain private counsel but could not do so by the time of their arraignment. These instances added some time to the typical administrative process in the court, yet only one of five interviewees directly involved in these steps of the process reported that the additional time was significant. In fact, case processing time did not increase, as discussed in the Systems Impacts section.

First Appearance and Ongoing Adjudication

Beyond the changes in the process of selecting and assigning lawyers for indigent defendants, the remainder of the adjudication process remained unchanged. As documented during the baseline study, the lawyers already assigned to indigent defendants' cases typically waived arraignment and proceeded to a pretrial hearing, regardless of whether the case was in District or CCL. By this time, an indictment or information had already been filed in the District or County Court, respectively. For those defendants who were assigned lawyers at their first court appearance, they were provided contact information for their lawyers and the arraignment was reset to allow them time to confer with their defense counsel.

Stakeholder Perceptions of Changes in Defense Representation

To capture stakeholder perceptions about changes in defense representation and the overall adjudication process, interviews were conducted with 34 system actors, including 22 lawyers who served as appointed counsel for indigent defendants. The remainder of those interviewed included three of the four District Court judges, both CCL judges, three administrative and coordination staff for both courts, the District Court Clerk, the lead Magistrate Judge, and the District Attorney and Chief Prosecutor. Defense lawyers provided the most feedback regarding changes in practice, as often other stakeholders, notably judges and prosecutors, did not necessarily know whether defendants had participated in Client Choice. However, where there were comments provided by the other system actors, they are provided below.

To further test the “proof of concept” in Comal County’s Client Choice Program, the effort through interviews was to determine perceptions of stakeholders about changes in procedural justice and quality of representation when defendants exercised Client Choice. Claims made during these interviews were checked against data collected from the Comal County criminal justice system and the Texas Indigent Defense Commission. All interviews adhered to standardized protocols and were conducted under promises of anonymity.³⁰

Participation in Client Choice

The perceptions of the system actors interviewed varied widely about the level of participation by defendants in Client Choice. Most interviewees believed that the participation was high, although the staff responsible for one of the courtrooms reported participation as low as ten percent. However, a review of the appointment logs shows that, between February 1, 2015 and January 31, 2016, 72.3 percent of all assignments of counsel to indigent criminal defendants were Client Choice (798 cases out of 1,104).

Assignments by Lawyer in Client Choice

The lawyers interviewed generally reported a seamless transition to offering defendants the option to choose their lawyers. There was concern among some lawyers that Client Choice would bring about

³⁰ Copies of the protocols used are included in Appendix B

negative change in the criminal justice system, but as one interviewee commented, once Client Choice began, lawyers were “barely aware that [it] was underway.” As discussed earlier, the changes in the assignment process were administrative and largely invisible to appointed lawyers, who received their assignments in the same way that they always had except each new appointment was accompanied by a notice from either District Court or County Court indicating whether they had been chosen by the defendant or selected by the court through the normal rotation process.

During the first two to three months of Client Choice, several lawyers (corroborated by other system actors interviewed) reported that three defense lawyers received a disproportionately large number of appointments – as much as 80 percent of all indigent cases (although as noted below, the quantitative analyses did not bear out these perceptions). These three lawyers, like all others who participated as assigned counsel, did no advertising and took no new steps to promote themselves. Because of the high volume of cases, lawyers at different times removed themselves from the lists of available lawyers for appointment, which was expressly authorized under the Client Choice Implementation Plan. (These individuals would later make decisions to accept appointed counsel cases again.) Upon review of the assignment data, JMI found that indeed there were two lawyers, who were chosen at a disproportionately high rate during the first month of Client Choice. However, consistent with the interviewees’ reports, the assignments began to spread across more lawyers over time. Even so, there were consistently a small number of lawyers, between three and five, who represented about a third of all Client Choice cases.

Month	Findings Regarding Lawyers with Highest Numbers of Appointments
February 2015	Two lawyers accepted 44.2 percent of all assignments across all courts.
March 2015	The same two lawyers accepted 30.3 percent of all assignments.
April 2015	Four lawyers, including the two lawyers mentioned in the previous two months, represented 34.1 percent of all assignments.
May 2015	Three lawyers, including only one of the original two lawyers referenced in February and March, represented 33.0 percent of all assignments.
June 2015	Five lawyers, including only one of the original two lawyers referenced in February and March, represented 34.4percent of all assignments.
July 2015	Again, as in February and March, two lawyers represented 33.3 percent of all assignments with the same one lawyer from February 2015 continuing to be among the highly-utilized lawyers.
August 2015 – January 2016	The one lawyer who had been consistently among the most utilized appointed counsel continued that pattern through September 2015. From October through January, that individual did not appear as one of the most utilized lawyers, but a third of all appointed indigent cases continued to rest with 3-5 lawyers, with common names continuing to be represented from month to month. Fifty-four unique lawyers were available for appointment across all courts. ³¹

³¹ Although beyond the scope of this study, JMI collected data about assignments through June 2016 and the same trends continued with 3-5 lawyers accepting the majority of cases. Because the lawyers who had been used so frequently at the early stages of implementation had taken a hiatus from accepting new indigent defense cases, new lawyers emerged as consistent “picks” by indigent defendants, with two lawyers in particular consistently accepting cases within the top third of appointments. Despite the claim that the cases were distributed more evenly over time, the quantitative data indicate a continued pattern of choosing a handful of lawyers as appointed counsel for indigent criminal cases.

The reasons why a handful of lawyers received a third of all indigent cases at the outset of the program is unclear. More than a third of the lawyers interviewed explicitly commented that defendants based their decisions on the reputations of lawyers defined either by long-term experiences their peers had had with those lawyers or a recent, high profile case that the lawyers had won. Two court staff and at least two lawyers interviewed also suggested that the alphabetical listing of the Lawyer Information Forms in the selection binders presented to defendants inadvertently skewed assignments—that those whose names were at the beginning of the listings were chosen more frequently since defendants may not have been inclined to review all of the available profiles. As a result, the interviewees who made this observation suggested regularly mixing the order in which the Lawyer Information Forms were arranged. However, JMI reviewed the assignment patterns in District Court and in the CCLs and could not find data to support to support this claim.

Generally, lawyers did not report an impact on the mix of their retained cases and their indigent defense assigned cases. However, three of the 22 lawyers interviewed differed with this assessment, claiming that they lost paying clients who, although indigent, would have leveraged other resources, such as “grandma,” to pay for defense representation of a lawyer they respected and believed would serve them well. One lawyer illustrated the point by describing a defendant who abandoned his plan of mustering the resources to retain this lawyer as private counsel, after the defendant learned that he could choose the particular lawyer that he wanted to represent him for free. Two of the three lawyers making this claim reported that when they removed themselves from the appointed counsel lists, they promptly attracted more privately retained cases.

However, the available data provided from the District Courts and CCLs do not indicate that the experiences of these two lawyers are generalizable. While these two lawyers indeed may have seen an increase in privately retained cases, the overall proportion of cases with retained versus appointed counsel did not change. In the period between February 1, 2014 and January 31, 2015 (prior to Client Choice), 61.4 percent of District Court cases had Paupers Affidavits filed. In the period between February 1, 2015 and January 31, 2016, that figure remained about the same at 60.6 percent (a difference of -0.9 points). Similarly, CCL did not see a change. The percentage of cases where a Paupers Affidavit was filed was 62.9 percent pre-implementation and 62.2 percent post-implementation (a difference of -0.7 points). Accordingly, there did not appear to be an impact on the overall mix of retained and assigned counsel cases in the county.

Appointed Counsel Compensation under Client Choice

The claims that Client Choice may have, in some cases, reduced the size of individual lawyers’ private practices was the focus of another part of JMI’s analysis—how, if at all, did the current fee structure impact the introduction of Client Choice?

During JMI’s baseline visit in 2013, lawyers identified a number of reasons for accepting indigent defense cases, despite a universal view that the fees paid were far below what the private market could demand. Among these reasons was a desire to gain experience in criminal court, a sense of responsibility to “giving back” to the community, and developing a reliable supplement to private practice income.

When asked again in December 2015, the reasons did not change significantly. Lawyers explained their participation in the appointed counsel program as:

- “A retirement job, and I want to be active.”

- “I do not take cases for the money. I like helping people, and it’s a fun area of law.”
- “I want to provide service, as it’s the Christian thing to do.”
- “I was an indigent kid.”
- “[This work is] a courtesy to the court.”
- “I like the [indigent defense] practice” since I “became a lawyer to be a litigator.”
- “It’s income, and if I have to be in court anyway, it’s nice to receive a check now and then.”
- “I enjoy criminal defense, defendants need adequate representation, and it will not hurt me financially, [although] I could get along without [the cases].”
- “It’s income and giving back to the community.”
- “It is income, which is nice, and I know the check won’t bounce.”
- “I take cases to get experience, and sometimes there are cases where little work is required.”

The themes of “giving back” and gaining experience are repeated in these quotes from lawyers. Again, lawyers mentioned that appointed counsel cases provide supplemental or a steady stream of income, echoing what JMI documented in 2013. However, Client Choice introduced a level of uncertainty that had not previously existed for Comal County’s appointed counsel. Lawyers could no longer depend on a regular stream of criminal case assignments. They were and still are subject to the choices of defendants – choices that are far less predictable than the previous assignment system that had been the exclusive mechanism for assignment to indigent defendants’ criminal cases.

Therefore, JMI explored whether or not Client Choice changed how many cases were assigned to appointed counsel and how they were paid. Most of the lawyers interviewed in 2015 reasserted that the fee structure set for appointed counsel cases was far below what they could charge private clients. The differential was most commonly described as private retainers being between 5 and 10 times more than the fee rates paid for indigent defense cases. Even if low relative to private rates, several lawyers commented that the rates in Comal County were higher than some neighboring counties, including the much larger Travis County, in which Austin is the largest city.

In fiscal year 2015, fees for non-capital felonies paid to appointed lawyers in Comal County were significantly higher than the average payments for the state of Texas and also higher than the fees paid in nearby counties, such as Bexar, Caldwell, Guadalupe, Hays, and Travis counties. However, average payments are driven not only by variation in rates but also by differences in time to disposition or trial. In fiscal year 2015, 57 percent of Comal County’s District Court criminal cases pended for over 180 days. Although Bexar, Caldwell, and Travis did not have times to disposition that high, Guadalupe and Hays had 56 percent and 51 percent of their criminal cases pend for over 180 days, respectively. Comparing only Comal, Guadalupe, and Hays Counties, Comal County’s average payment was still significantly higher (Comal: \$987.51; Guadalupe: \$573.12; and Hays: \$623.82).³²

³² Office of Court Administration, Texas Judicial Branch. (2015). Annual Statistical Report for the Texas Judiciary, Fiscal Year 2015; *available at* <http://www.txcourts.gov/statistics/annual-statistical-reports/> (last visited on December 31, 2016).

The variations were far less pronounced when comparing average misdemeanor payments. Comal's average payments for misdemeanors were slightly higher than the other counties, with the exception of Caldwell County.³³

Even though the level of compensation was not mentioned as a significant driver of the decision by lawyers to participate as appointed counsel for indigent defendants, three lawyers indicated that they were shifting their practices from criminal defense to child protective cases, because the Comal County rates paid in these cases were higher (reportedly \$70/ hour).

The subject of compensation for appointed counsel requires further examination. One of the key arguments for implementing Client Choice is to introduce free market forces that encourage competition leading to improved quality. However, the level of competition cannot be separated from the level of compensation. In Comal County, compensation for lawyers is reportedly lower than market rates, which presumably has a negative effect on competition. Ideally, the evaluation would have been able to test the competition hypothesis more directly, but comparison of the implementation of Client Choice across a number of systems with different fee structures was not possible. Therefore, the impact of competition and variation in fees per case could not be explored.³⁴ However, a discussion of the cost per case in Comal County and how it has changed is included in the quantitative findings later in this report.

Many factors, including compensation and the introduction of choice itself, are likely to have impacted changes in the assignment of cases to lawyers. Those factors clearly had considerable effects on the number of indigent defendants with assigned cases represented by appointed counsel, as shown in the table below.

Changes in Assigned Cases for Appointed Counsel in District Court (FY2014 to FY2015)

- 44 lawyers were assigned cases in District Court in *both* 2014 and in 2015.
- 14 lawyers saw an increase of 50 percent or more in the number of District Court cases to which they were assigned
- 10 lawyers saw a decrease of 50 percent or more in the number of District Court cases to which they were assigned
- 20 lawyers saw an increase of 50 percent or more in total payments for District Court cases to which they were assigned. 14 saw a 100 percent or more *increase* in total payments.
- Eight lawyers saw a decrease of 50 percent or more in total payments for District Court cases to which they were assigned. No one saw a decrease of 100 percent or more in total payments.

³³ Here is the comparative FY 2015 data: Texas non-capital felony cases: \$651.31; Bexar: \$470.31; Caldwell: \$654.98; Comal: \$987.51; Guadalupe: \$573.12; Hays: \$623.82; and Travis: \$497.34. Texas Misdemeanor cases: \$207.69; Bexar: \$114.20; Caldwell: \$367.36; Comal: \$240.87; Guadalupe: \$145.39; Hays: \$216.39; and Travis: \$188.35.

³⁴ Professor Schulhofer argues that Client Choice may actually result in positive outcomes for defendant, regardless of the level of compensation to appointed counsel. Furthermore, Schulhofer argues that the choice model may strengthen the capacity of indigent defense lawyers in appointed counsel programs to attract additional resources. See Schulhofer, *Client Choice for Indigent Defendants*, *supra* note 2; Schulhofer & Friedman, *Reforming Indigent Defense: How Free Market Principles Can Help to Fix a Broken System*, *supra* note 2, at 15-16.

Changes in Assigned Cases for Appointed Counsel in County Courts of Law (FY2014 to FY2015)

- 23 lawyers were assigned cases in CCL in *both* 2014 and in 2015.
- 11 lawyers saw an increase of 50 percent or more in the number of CCL cases to which they were assigned
- Three lawyers saw a decrease 50 percent or more in the number of CCL cases to which they were assigned
- 10 lawyers saw an increase of 50 percent or more in total payments for CCL to which they were assigned. Six saw an increase of 100 percent or more in total payments.
- Four lawyers saw a decrease of 50 percent or more in total payments for CCL to which they were assigned. No one saw a decrease of 100 percent or more in total payments.

To the question of whether lawyers stopped taking appointed counsel cases, the data from FY2014 and FY2015 indicated that a number of attorneys who accepted cases in 2014 did *not* accept cases in 2015. Eighteen lawyers who had been appointed to District Court cases in FY2014 were not appointed in FY2015. These lawyers, on average, had accepted three cases in FY2014 and in total had represented indigent defendants in 61 cases. In CCL, seven attorneys were not appointed to cases in FY2015, but in 2014 averaged about 5 cases each and received a total of 38 cases. However, it is not clear from the data why the non-participation took place in FY2015 or if it was in any way related to the implementation of Client Choice.

Staff also kept records of which lawyers continued to participate in the appointed counsel program, by keeping their names on the official lists from which judges or defendants could choose defenders. During the study period, 10 lawyers left the program in Comal County. Of the ten lawyers, three were suspended from participation, and four left because of new job opportunities and did not continue to practice criminal defense. One explicitly explained that the non-participation was related to not being able to get enough cases from the panel program, and the remaining two left for unknown reasons.

An additional lawyer joined the appointed counsel program but shortly left to accept a new job. Another simply transferred between courts (i.e., initially eligible to accept CCL cases and then approved to accept District Court cases). Three lawyers requested temporary removal from the lists, because of the high volume of cases they were receiving. (These are the same individuals discussed earlier in the report who were selected in a high percentage of the cases.) During the study period, only two new lawyers were added to the assigned counsel program. (An additional three joined the program after the study period ended on January 31, 2016.)

Changes in the Quality of Indigent Defense Representation in Client Choice

JMI did not find meaningful differences in the number of complaints or requests for change of counsel (either in reviewing logs of these activities or in self-reports during interviews). If there were a decrease in quality of representation, an increase in complaints or requests for relief would certainly be one indicator. On the contrary, judges, court administrators and clerks, prosecutors, and defenders interviewed perceived an improvement in the quality of criminal defense representation.

JMI only had partial data on complaints filed against appointed counsel, which is a limited indicator of formal requests to change the lawyer appointed to an indigent defendant's case. In the nearly eight month period between April 27, 2015 and December 17, 2015, 59 complaints against appointed counsel were filed. (Unfortunately, the log did not disaggregate the complaints by the court presiding over the defendant's case.) Eighteen of these lawyers were chosen by defendants and the remaining 41 were assigned to indigent defendants using the "wheel." Ten (56%) of the complaints against "choice lawyers"

were based on lack of communication or responsiveness. For those lawyers not appointed through Client Choice, 39 percent of the complaints against them were also based on a lack of communication. Another 42 percent were based on a lack of action on the case by the lawyer. JMI did not have access to comparative data regarding complaints from the pre-implementation period.

The qualitative assessments of those interviewed revealed mixed perceptions, particularly between judges (who had generally favorable opinions of Client Choice) and lawyers (whose opinions were more mixed) about changes and improvements in representation. Although 65 percent of interviewees reported that there had been no changes in courtroom practices and representation after the implementation of Client Choice, 12 of the 34 people interviewed, including most of the judges, reported seeing or experiencing improvements in defense representation. Some judges, who agreed there were improvements, could not pinpoint specific changes in practices. However, among those judges who did provide specifics, several commented that defense lawyers were more assertive, better prepared, and more frequently saw their clients. At least one judge also noted that there was an increase in requests for funds to hire investigators, which is an indication of better preparedness and thoroughness on the part of the lawyers, and that lawyers seemed more willing to take cases to trial.

One judge explained, “[Defense lawyers] wanted to impress the judge and not their clients. There’s a significant difference in impressing the judge [and] working with clients and going to trial and doing whatever it takes.” In addition, another judge noted that clients seemed to be more satisfied with their lawyers, commenting that there were fewer requests by defendants to fire their lawyers and ask for a substitution of counsel. Another observed that the lawyers known to be the most competent were the ones who were appearing more frequently in their courtrooms. The other lawyers, about whom the judges were worried, were seen far less. One judge spoke to the role Client Choice might play in upholding justice overall: “the delivery of a better product keeps the [justice] system in check,” which was supported by another judge’s comment that “fewer defendants were as angry with the system as in the past.”

In addition, there was some belief among judges that Client Choice may have had an impact on competition for cases. One judge specifically noted that the criminal court had seen an increase in “reasonably good” criminal defense attorneys from San Antonio, who were ultimately added to the felony list of attorneys. This judge went on to say that he believed there were “fewer poorer lawyers” on the appointment lists than in the past.

Among those who saw improvements were also six lawyers, who pointed to greater involvement and cooperation by defendants in their cases as the likely cause of improved practice. Greater pressure to work hard for their clients was reportedly driven by two factors: (1) the lawyer had been chosen specifically by the defendants and (2) the lawyer’s performance had implications for the frequency with which they would be chosen in the future. Only one of these interviewed lawyers pointed to specific areas of improvement—the frequency with which he or she met with defendants and the thoroughness of investigations.

When lawyers were asked about whether they changed their practices or behaviors relative to *any* of their criminal defense clients (whether assigned indigent defendants or private clients), most lawyers answered

that they had not.³⁵ When considering only their “choice” clients and their other appointed clients, 68 percent of the lawyers interviewed (15 of 22) also reported that they offered the same representation to all of their indigent clients. Yet, when asked more directly about satisfaction and trust, a substantial number of lawyers reported some changes as summarized below:

Regarding Lawyer Satisfaction

- Seven lawyers (32%) reported “No change” in their own satisfaction levels when representing Client Choice defendants.
- Another seven lawyers (32%) experienced an increase in their own satisfaction, because they “had been chosen by the client rather than assigned.”
- Three lawyers (14%) reported feeling greater responsibility to defendants in Client Choice cases because a defendant’s “choosing [the lawyer] is like their retaining you. You want to get them the best result and not let them down.” One lawyer claimed that he had more concern for Client Choice cases, because defendants had “higher expectations” of their chosen counsel.

Regarding Defendant Satisfaction

- Eleven lawyers (50%) claimed that defendants’ overall trust in their lawyers increased. These lawyers posited that because defendants had personally selected their lawyers on the basis of expecting to get a positive outcome, they deferred more to their lawyers and trusted their advice more readily.
- Two lawyers drew a more nuanced distinction. They claimed, when compared to other defendants, individuals who took the time to look more carefully at the backgrounds of potential lawyers or whose families had done so were far more satisfied with their representation and trusted the advice of their lawyers more.
- One lawyer warned that defendants who choose their own counsel were more demanding, further suggesting that the demands were not always reasonable.
- Six lawyers (27%) were unsure if Client Choice had any impact on satisfaction/trust by defendants.

The qualitative data gathered from system actors, including judges and a large sample of the lawyers representing indigent defendants, suggest that there have been some attitudinal and practice changes among lawyers as a result of Client Choice. The outcome evaluation findings that follow provide further insight into interviewees’ perceptions of Client Choice.

³⁵ JMI also inquired about differences in the representation lawyers provide to their paying clients versus their indigent clients. Six lawyers (27 percent) openly acknowledged that there were differences. Consistent with behavior before the introduction of Client Choice, these lawyers reported that they provided better and more thorough explanations of the status of the case and about the defense strategy. One attorney explained that paying clients get more “handholding.” For example, calls from these paying defendants are answered more frequently and in a timelier manner. Another lawyer, who was not among those openly acknowledging a difference in treatment, did however explain, that “lawyers have less of an incentive to do the best job for their [appointed] clients. The more work you do, the less you are paid.” While these findings are interesting relative to a broader question about compensation of appointed counsel, they are not related to the process or outcome findings of Client Choice.

IMPACT OF CLIENT CHOICE IN COMAL COUNTY

Quantitative analyses clearly indicated that a majority of defendants preferred to select their lawyer rather than have one chosen for them by the court. The overall outcome evaluation, however, presents a mixed picture of the implementation of Client Choice, challenging many of the hypotheses about the advantages of the Client Choice model, particularly the benefits to defendants that were defined at the onset of the study. The findings that follow are based largely on the responses by defendants before and during the implementation of Client Choice. The findings suggest the need for further analysis of this model with a larger sample of defendants – one that provides additional insight into what drives some of the observed differences and that identifies strategies to optimize the program model within the U.S. legal system. The following sections describe JMI’s findings with regard to the following key outcome areas and supporting variables or indicators:³⁶

Quality of representation	<ul style="list-style-type: none"> • Timeliness of first meeting • Number and length of meetings • Location of meetings • Responsiveness to requests for meetings • How hard the lawyer worked for the defendant
Case outcomes	<ul style="list-style-type: none"> • Dismissal or acquittal • Deferral or diversion • Guilty plea as charged • Guilty plea, lesser charge • Guilty verdict by trial
Procedural justice	<ul style="list-style-type: none"> • Fairness <ul style="list-style-type: none"> ○ How lawyers treat defendants ○ Whether lawyers respect their clients ○ How much knowledge lawyers have of clients • Advocacy for the Defendant’s Interests <ul style="list-style-type: none"> ○ How concerned lawyer is for defendant ○ Whether lawyer works for defendant’s best interest • Influence of Defendant in the Case <ul style="list-style-type: none"> ○ How much time lawyer spends listening to defendant ○ Whether lawyer asks for defendant’s opinions ○ Whether lawyer values defendant’s opinions • Transparency <ul style="list-style-type: none"> ○ Whether lawyer explains clearly/ answers questions ○ Whether defendant is kept informed ○ Whether lawyer is honest
System costs and efficiencies	<ul style="list-style-type: none"> • Impact on case processing time • Impact on costs for indigent defense representation

³⁶ As explained in the discussion in the section titled, Methodology: Outcome Evaluation, JMI used a number of different sources for the outcome evaluation. As listed here, two of the four outcome areas – quality of representation and procedural justice – were drawn from the pre- and post-test surveys. Data regarding case outcomes were based on a review of defendants’ criminal case files. Lastly, system costs and efficiencies drew from case processing and cost data drawn from the State of Texas Office of Court Administration, the Texas Indigent Defense Commission, and the Office of the Auditor in Comal County, TX.

Client Choice Impact on the Quality of Representation

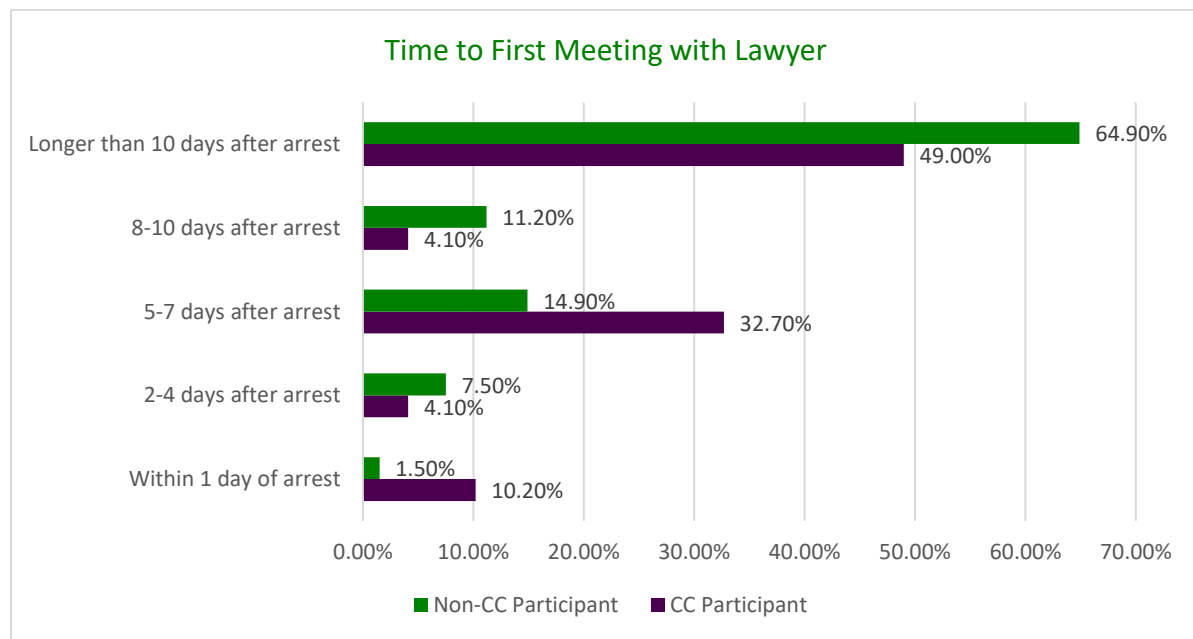
One of the key hypotheses about how Client Choice would improve indigent defense systems was the incentive for lawyers to represent their clients more zealously as they would now have to compete for defendants who had the option to select them. Specifically, a choice model that creates “competition” among lawyers would raise the overall quality of all lawyers available to indigent defendants. In the current study, quality of representation was operationalized along several domains related to the nature and frequency of meetings as well as the defendants’ perceptions of how hard their lawyers worked for them. The key variables examined included:

- Timeliness of first meeting
- Number and length of meetings
- Location of meetings
- Responsiveness to requests for meetings
- How hard the lawyer worked for the defendant

(It should be noted that this part of the impact analysis is based exclusively on defendant survey responses, as JMI did not have other data regarding attorney-client contact.)

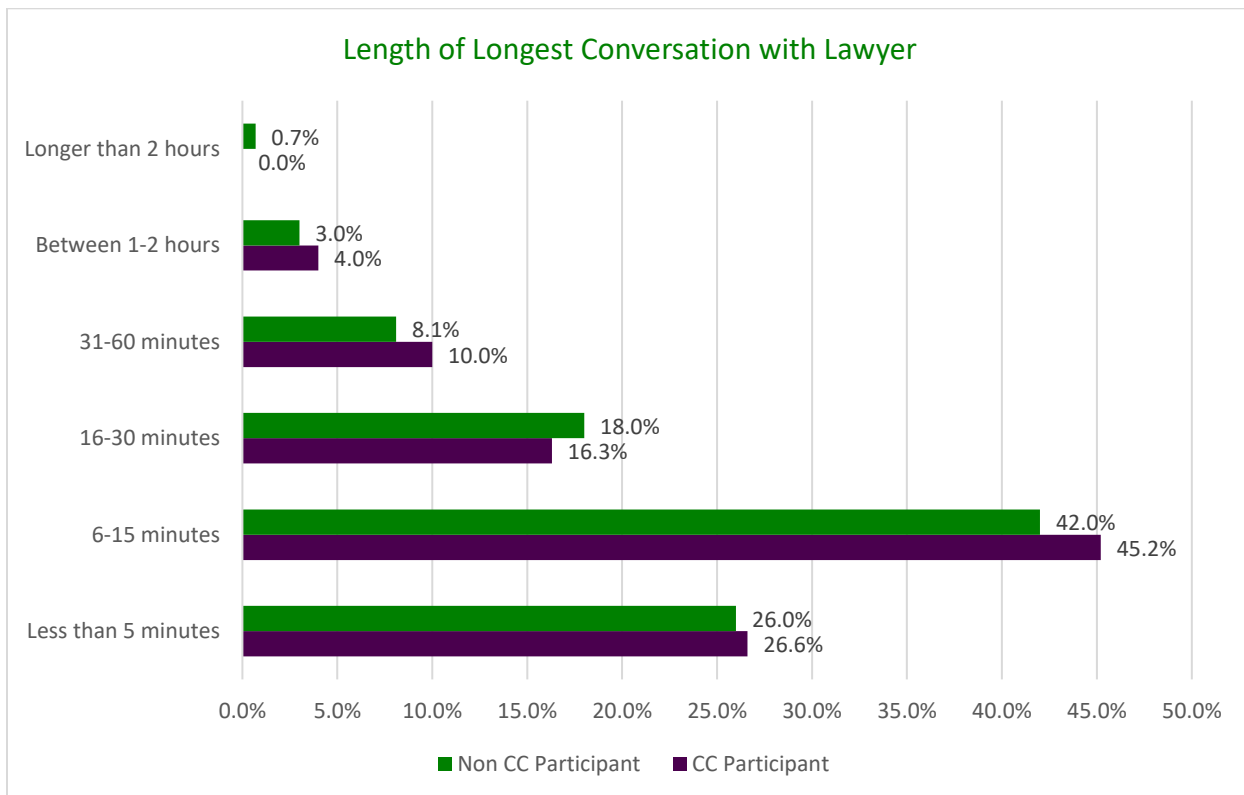
Timeliness and Length of Meetings

Quality representation requires that lawyers spend time with their clients. Therefore, the first indicator of quality representation examined was how soon after arrest lawyers first met in person to interview their clients. Although the majority of all defendants, regardless of participation in Client Choice, met with their lawyers in-person more than 10 days after their arrest, the data also showed that Client Choice participants met with their lawyers in person sooner (within 7 days of their arrest) more often than non-Client Choice participants (47% compared to 23%). In fact, the analyses showed that the odds of Client Choice defendants meeting with their lawyers in-person within 7 days were 0.778 times greater than for non-Client Choice participants.



JMI then analyzed the number of meetings defendants had with their lawyers over the course of their case. Defendants in general met with their lawyers very few times—an average of 1.8 times in person and 1.53 times by phone. However, the number of meetings that occur over the life of a case is likely to be driven, in part, by the length of time it takes to dispose of a case—the longer the elapsed time, the more meetings there are likely to be. On average, when controlling for outliers, misdemeanor cases were disposed within 237 days of filing and felonies were disposed within 267 days. However, additional analyses examining the relationship between the elapsed time to disposition and the number of meetings did not reveal any statistical relationship in this sample.

Quality representation also involves longer and more substantive meetings with defendants. JMI found that defendants in general (regardless of participation in Client Choice), who met with their attorneys sooner after arrest were statistically more likely to have longer meetings than those who did not meet with their attorney shortly after arrest. The longer it took for a defendant to have his/her first meeting with the lawyer, the shorter the length of the longest meeting between defendant and lawyer. Although this may seem counterintuitive (i.e., that the more time that passed between arrest and the first meeting would prompt a lengthy meeting at some point), in fact it may be an indicator of lower quality representation. Under the choice model then, one would expect a statistical difference in the length of meetings for Client Choice defendants; however, there were no observed statistical differences based on participation in Client Choice—the majority of both Client Choice (71%) and non-Client Choice (68%) participants reported conversations of 15 minutes or less.



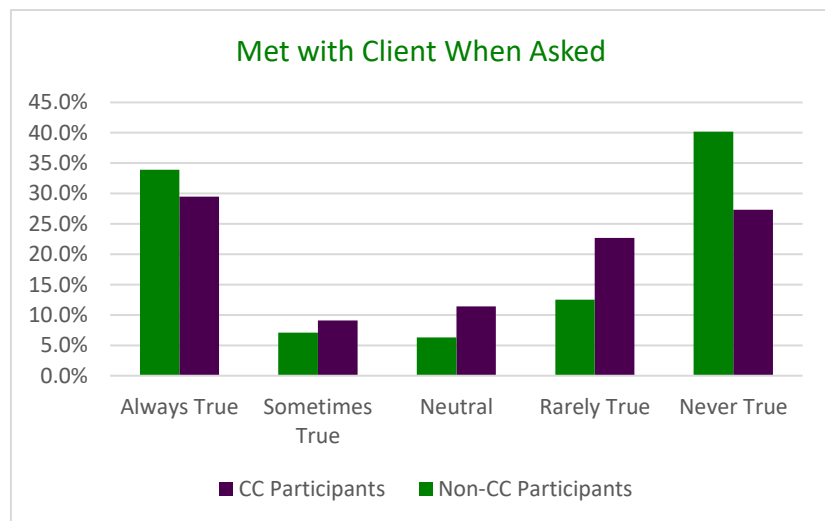
Although there were few significant findings that support the hypothesis that a choice model has an impact on the timeliness of the first meeting with a client or the frequency with which meetings occurred, there are some important conclusions that can be drawn from these analyses. First, the time between arrest and the first meeting with the lawyer was shorter for Client Choice defendants as compared to non-

Client Choice defendants. This finding supports the idea that a choice model has an impact on lawyer behavior as it relates to timeliness of the first meeting.

Second, there are relationships between how long it takes after a defendant’s arrest to meet with his/her lawyer and other indicators of quality representation. In thinking about quality, one would expect that a lawyer, who is providing quality representation, to meet with his/her client quickly; frequently; and depending on the nature of the case, for at least an hour or two. The data show fairly clearly that when the first meeting does not take place quickly, there are statistically shorter meetings. Participation in the Client Choice program did not, however, produce statistically significant differences in terms of the average length of meetings. It is possible that the length of meetings were impacted by lawyer caseloads, particularly given that a handful of attorneys handled a third of Client Choice cases. A longer study period, which would have allowed for some “normalization” of this phenomenon may indeed show that lawyers spent more time with the clients who selected them for representation.

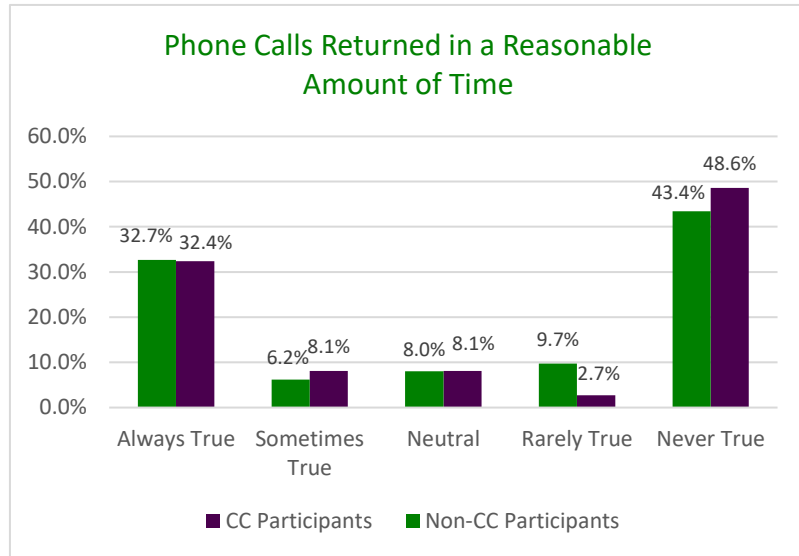
Responsiveness to Meeting Requests

In addition to the timeliness and frequency of meetings, the evaluation also considered lawyers’ responsiveness to requests for meetings and whether phone calls were returned in a reasonable amount of time. Client Choice participants were less likely to feel that their lawyers met with them when asked, compared to non-Client Choice participants. However, the difference was not statistically significant. Based on the interviews with attorneys and judges, Client Choice defendants tended to select “popular” lawyers, which reportedly resulted in these lawyers being busier and perhaps less likely to respond promptly to phone calls. This early tendency to gravitate toward a small number of lawyers could explain why defendants may not have felt their lawyer met with them when asked.



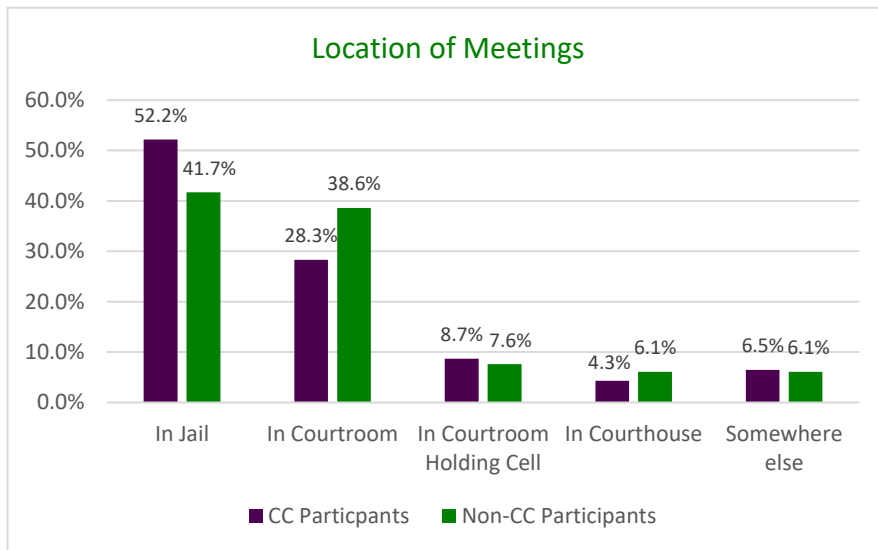
Notably though, a large proportion of defendants, regardless of how their lawyers were obtained, felt that their lawyers never met with them when asked, and in fact, more of these individuals were non-Client Choice participants than Client Choice participants (43% compared to 27%). In addition, among all defendants, regardless of their participation in Client Choice, those charged with misdemeanors were statistically more likely to agree that their lawyers met with them when asked. Other possible factors that could influence defendants’ responses to this question did not prove significant. For example, whether or not defendants had ever been represented by a court-appointed lawyer/public defender in a previous case did not have any impact on defendants’ feelings about whether or not their lawyers met with them when asked.

Similar results were found with regard to defendants’ opinions about whether or not phone calls were returned in a reasonable amount of time—most felt that this was not true. There were very slight differences observed between Client Choice and non-Client Choice defendants. Slightly more Client Choice participants reported that it was never true that phone calls were returned in a reasonable amount of time (45.2%) as compared to non-Client Choice participants (42.5%). Only 38.9% of non-



Client Choice participants reported that it was always true their lawyers returned phone calls in a timely manner, compared to 40.5 percent of Client Choice participants. None of these differences however, were statistically significant. The most notable finding was that defendants charged with misdemeanors were statistically more likely to agree that their lawyers returned phone calls than those charged with felonies. No other control variables had an impact on defendants’ perceptions.

The last indicator related to meetings focused on where defendants most often met in- person with their lawyers, with the thought that those who only met with their lawyers in the courtroom or the courthouse were not receiving the highest quality representation.



The majority of defendants, regardless of whether or not they selected their lawyer, met most frequently in-person with lawyers in jail. This finding is not surprising given the reports of the high number of defendants held in pretrial detention and consistent with the professional duty of lawyers to meet with their clients promptly after having been appointed. If meetings

with clients were not taking place in the jail, defendants would likely not meet with their lawyers until they came to court.³⁷ Even so, as shown in the chart, a greater percentage of non-Client Choice participants met most often in-person with their lawyers in courtrooms or the courthouse than did

³⁷ Unfortunately, JMI was not able to obtain data on the defendants’ custodial status.

defendants who selected their lawyers. The finding, while interesting, is simply descriptive of the sample studied by JMI and is not a statistically significant finding.

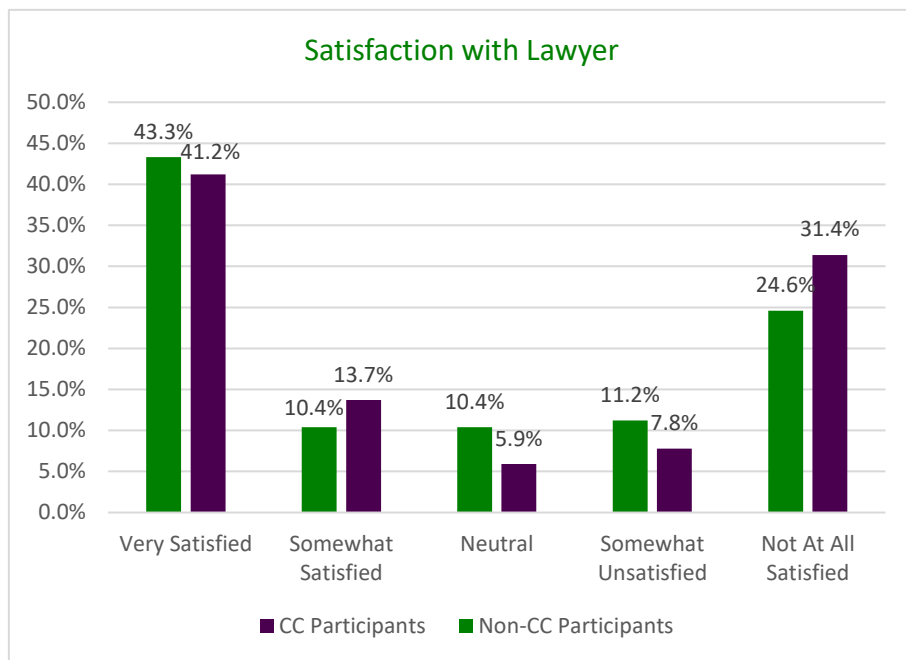
Intensity of Lawyers' Work on Behalf of Defendants

Defendants' perceptions about how hard lawyers worked for them were considered, as well as their overall level of satisfaction with their lawyers. Defendants were asked to rate their level of agreement with the statement, "My lawyer worked hard for me." Overall, approximately half of the defendants disagreed that their lawyers worked hard for them (55% among Client Choice participants and 54% among non-participants). Likewise, there were no observed differences between the two groups in terms of their agreement with the statement. Despite defendants' mixed assessments of the quality of representation they received, 55% of Client Choice defendants reported that they were satisfied or very satisfied overall with their lawyer, compared to 54% of non-Client Choice participants.

With regard to other key control variables, female defendants were three times more likely to be satisfied than male defendants, regardless of whether or not they participated in Client Choice ($p > .001$).

Statistically, Client Choice did not impact defendants' perceptions about the strength of the advocacy provided by their lawyers. As noted earlier, a handful of attorneys received the most Client Choice

participants, reportedly increasing their caseloads thereby perhaps straining the level of advocacy they could provide to their clients. Another possibility that warrants further examination in subsequent evaluations of choice models is that defendants who participated in Client Choice simply had higher expectations of the level of advocacy they would receive. JMI collected information about whether or not defendants had been represented previously by a public defender or court-appointed lawyer, which could serve as a proxy measure of defendants' expectations. Adding this variable into the model did not change the findings. More specific measures related to expectations could yield more insight into the drivers of defendants' perceptions about the quality of the representation they received.



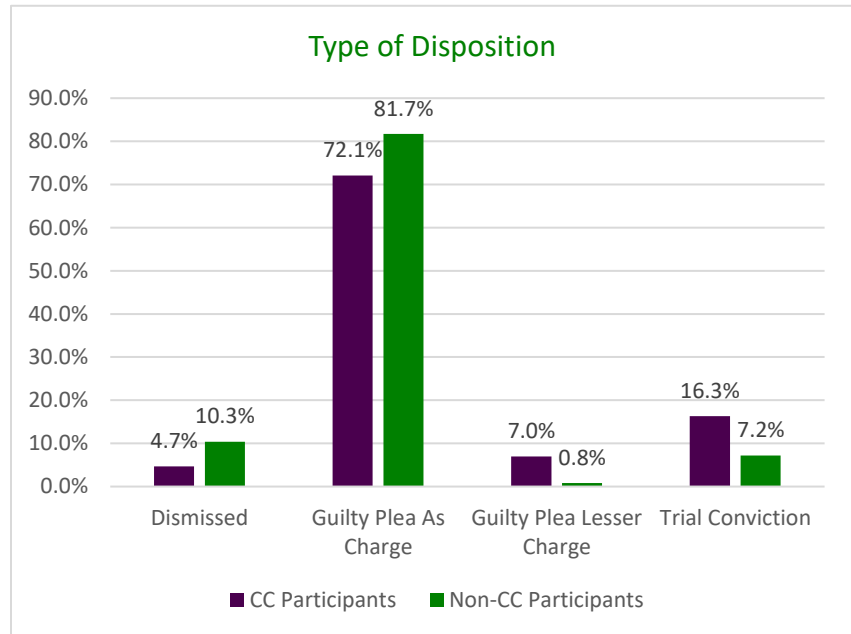
Case Outcomes

Part of the theoretical basis for Client Choice is that if lawyers provide better representation, there are likely to be differences in case outcomes, notably in terms of type of case dispositions and sentences imposed. With the majority of cases nationwide and in Comal County being disposed by plea, JMI's evaluation was designed to test the hypotheses that Client Choice results in more favorable plea negotiations and case outcomes.

First, JMI explored whether or not selecting one’s own lawyer impacted how cases were disposed. The specific dispositions considered were:

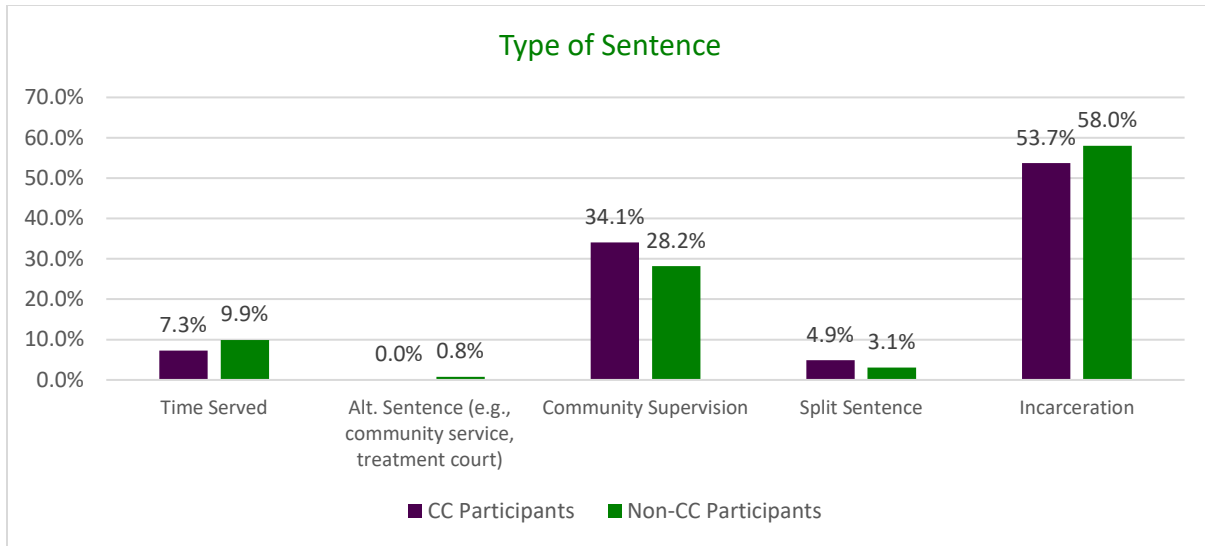
- Dismissal or acquittal
- Deferral or diversion
- Guilty plea as charged
- Guilty plea, lesser charge
- Guilty verdict by trial

JMI found that there were indeed significant differences in how cases were disposed. Not surprisingly, the majority of cases were pled guilty as charged; however, there were significantly more Client Choice cases who pled guilty to a lesser charge. In addition, more Client Choice cases went to trial than cases that had lawyers chosen for them by the court. The strength of the relationship between Client Choice participation and the type of disposition is moderately strong, meaning that there is indeed a statistical difference. In fact, the results of a nominal regression showed that Client Choice cases were 2.96 times more likely than non-Client Choice cases to be disposed by a plea to a lesser charge than to go to trial, even when controlling for the defendants’ prior convictions. An analysis of the prevalence of dismissals between Client Choice and non-Client Choice cases yielded a small difference that was not statistically significant. There were no acquittals in the study sample.



When the type of charge was taken into consideration, the results also showed that the odds were greater that a Client Choice participant charged with a misdemeanor had his/her case dismissed than going to trial. For non-Client Choice participants there was no statistical difference. There were no similar observed statistical differences for defendants charged with felonies.

The second question that the evaluation explored focused on assessing the types of sentences received by defendants. The majority of defendants, both Client Choice and not, received sentences of incarceration or community supervision. Defendants who selected their lawyer were 2.65 times more likely than non-Client Choice defendants to receive a sentence of community supervision than incarceration.



Both the findings related to disposition and sentences provide strong support for the hypothesis that a choice model produces better case outcomes for defendants. As an indicator of representation quality, these findings are indeed consistent with lawyers’ reports that they were mindful of trying to achieve the best outcomes for defendants under the Client Choice program. The better case outcomes may also reflect that defendants were capable of selecting lawyers who were among Comal County’s most capable assigned counsel.

Procedural Justice

A key premise of choice models in public defense is that allowing defendants to select their lawyers can increase their sense of procedural fairness, legitimacy in the process, and more satisfaction with the outcome. JMI’s evaluation included four procedural justice domains: fairness, impartiality, influence, and transparency. Each of these domains was further broken down into questions focused on a different element as discussed below.

Fairness

Procedural fairness was operationalized into three primary variables—treatment, respect, and knowledge of defendant. Specifically, the measures of procedural fairness included the following measures:

- Whether or not the defendant was treated the same as the lawyer’s other clients
- The degree to which the lawyer treated the defendant with respect
- Whether or not the lawyer took time to get to know more about the defendant

For each question, defendants were asked to rate their level of agreement with each of these statements on a scale ranging from 1 to 5, with 1 representing strongly agree and 5 representing strongly disagree.

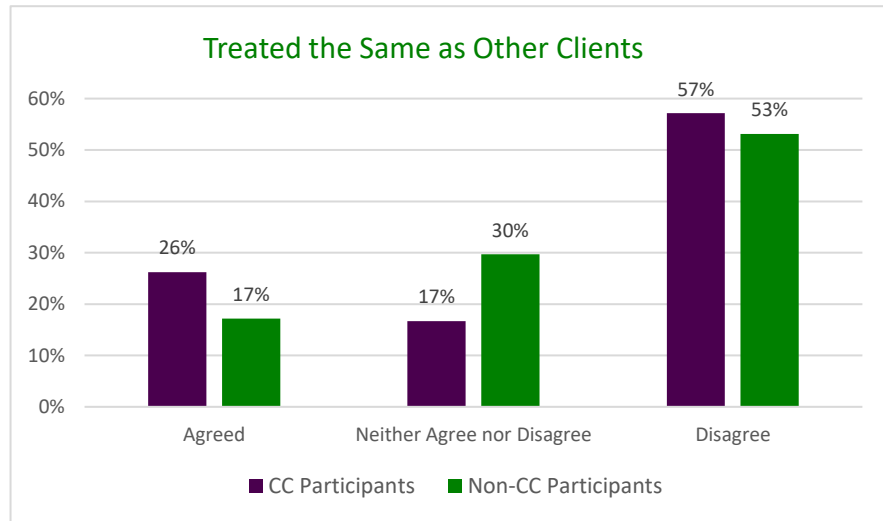
Ordinal regression analyses were conducted on each of the statements, controlling for whether or not the defendant participated in Client Choice, type of case, and whether or not the defendant had been previously represented by a court appointed lawyer/public defender. Additional control variables such as gender, age, education level, and race were also included initially, but the small sample size resulted in several missing cells for analysis and as such, these variables were eliminated from the full models and run separately where possible.

Treatment

In general, defendants disagreed with the statement that they were treated the same as other clients, but as shown in the chart, there were differences between Client Choice and non-Client Choice defendants worth noting. Of particular note is that slightly more Client Choice participants agreed or strongly agreed that their lawyer treated them the same as other clients than the non-Client Choice defendants.

The regression analyses indicated that the observed differences are not statistically significant. There are also no differences in how much defendants agreed that their lawyer treated them like other clients based on defendant race, education, or prior representation by a public defender or court appointed lawyer.

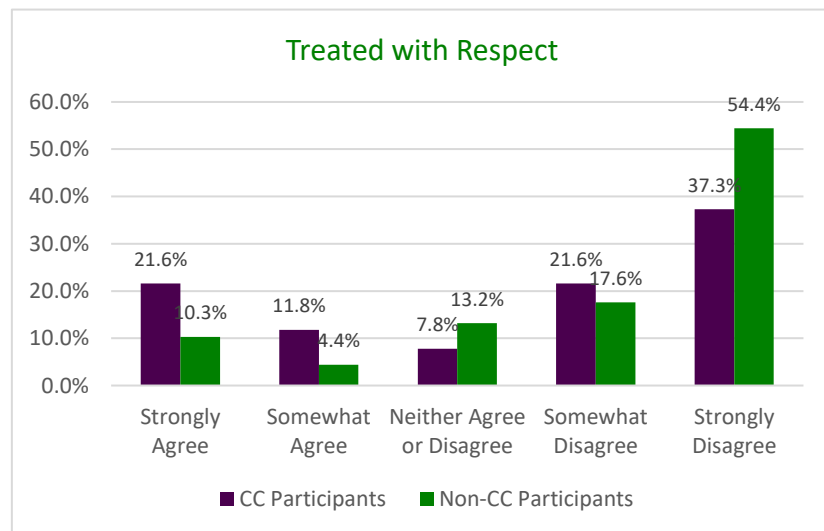
However, age and gender were significantly related to agreement about treatment. Younger Client Choice defendants (aged 25 or less) were more likely to agree that they were treated the same as other clients as compared to non-Client Choice defendants in the same age category. Female defendants, regardless of participation in Client Choice, were less likely to report that they felt they were treated like other clients than male defendants.



Respect

Feeling that a lawyer treated you with respect is another component of procedural fairness. More than twice as many Client Choice defendants as non-Client Choice defendants (22% vs. 10%) agreed or strongly agreed that their lawyer treated them with respect. In fact, the odds of a Client Choice defendant agreeing that he/she had been treated with respect were 0.44 times greater than for non-Client Choice participants, which was statistically significant.

Despite this finding, the majority of all defendants strongly disagreed with this statement. As with feelings about treatment, female defendants overall were less likely to agree that they were treated with respect than their male counterparts. On the other hand defendants, who were 35 years old or less, were statistically more likely



to agree they were treated with respect, although participation in Client Choice did not impact their feelings. Education, race, prior representation, and charge did not have any effect on respect.

Lawyer Knowledge of the Defendant

Another indicator of fairness used in the study was the extent to which defendants felt that lawyers took the time to get to know more about them. As with other aspects of procedural fairness, most defendants, regardless of how their lawyer was obtained, disagreed that this was true. Among the minority that did agree, slightly more Client Choice defendants (39%) felt this way as compared to 36 percent of defendants who selected their lawyers. The model, however, showed no statistically significant differences in opinions. None of the other predictor variables (age, gender, race, education, prior representation, or charge) had any impact on the likelihood that a defendant agreed that the lawyer took the time to get to know more about him/her.

Based on these results, there is evidence to suggest that a choice model impacts defendants' perceptions of procedural fairness. For all three indicators, more Client Choice defendants agreed with the statements more frequently than non-Client Choice defendants, although only the measure of respect rose to the level of statistical significance. One explanation is that defendants with prior convictions, who had been represented by a court-appointed lawyer or public defender in the past, may have higher expectations, thereby explaining some of the lower ratings. Further examination of the data did in fact show that defendants with prior convictions were statistically more likely to disagree that they were treated with respect or that their lawyer took time to get to know them. This was true for both Client Choice and non-Client Choice defendants who had prior convictions. The odds of both reporting higher levels of agreement were 0.22 and 0.36 higher than those defendants who did not have prior convictions, and based on the mean scores, Client Choice defendants had slightly higher levels of agreement than non-Client Choice defendants. In addition, defendants who had been represented by a public defender or court-appointed attorney in the past were statistically more likely to agree that their lawyer took time to get to know them. As such, Client Choice does appear to have an impact on defendants' perceptions of procedural fairness, particularly if there has been prior involvement in the justice system.

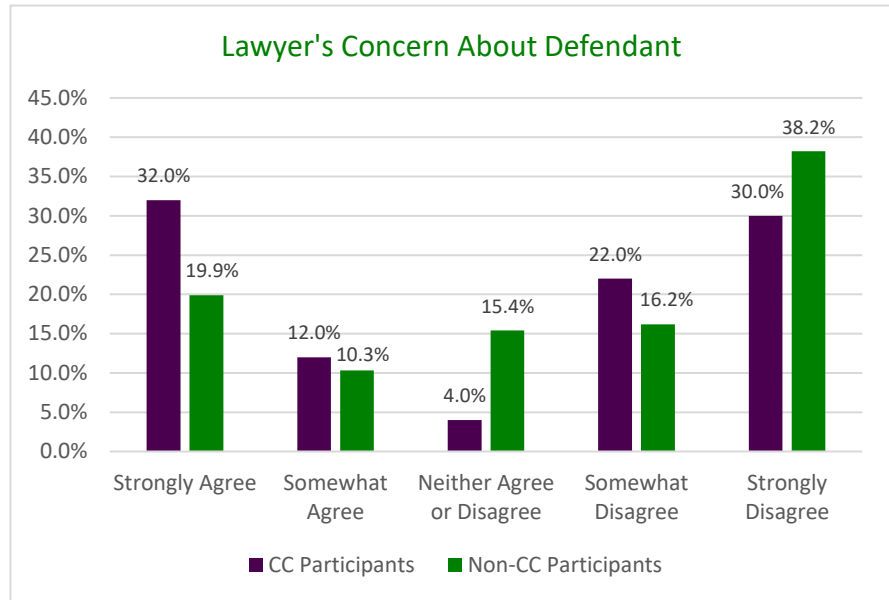
Advocacy for the Defendant's Interests

JMI included three measures of the strength of advocacy for the defendant's interests in the survey—the degree to which lawyers showed concern for what happened to the defendant, how hard the defendant felt the lawyer worked on his/her behalf, and if the defendant felt the lawyer wanted the best for him/her. Results for each of these measures are discussed below.

Concern for Defendant

Defendants were fairly evenly split on whether or not they agreed that their lawyers showed concern for what happened to them. Slightly more than half of all defendants disagreed with the statement, and just under a half agreed with the statement. However, more Client Choice participants (32%) strongly agreed that their lawyers showed concern compared to only 20% of defendants whose lawyers were appointed by the court.

JMI examined other factors that could influence a defendant's feelings about whether or not their lawyer showed concern for them (e.g., prior representation, prior conviction, highest charge, and gender). Only charge type and gender impacted the level of agreement. Defendants charged with felonies were statistically less likely to feel that their lawyer showed concern for them than those charged with misdemeanors. In addition, female defendants in general were statistically less likely than male defendants to agree that their lawyer showed concern for them.

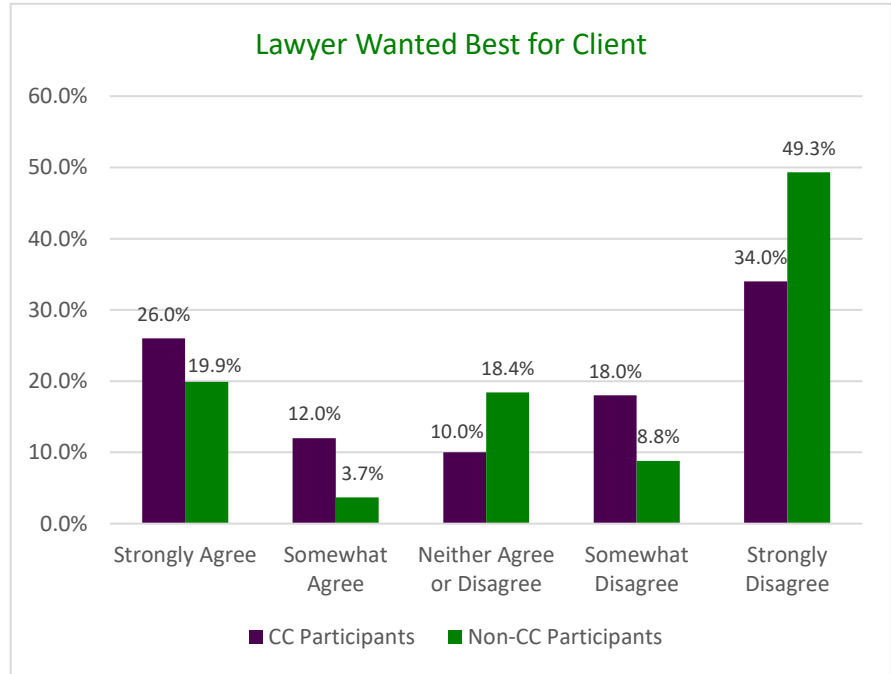


Worked Hard for Defendant

Interviews with lawyers who participated in Client Choice indicated that many were cognizant of defendants' expectations that the lawyers would work hard for their clients since the lawyers had been chosen by them. Indeed, quantitative analyses in fact showed that statistically more Client Choice defendants felt their lawyers worked hard for them (41%) than did non-Client Choice defendants (33%). In fact, eliminating those defendants who neither agreed nor disagreed, the odds that a Client Choice defendant felt that his/her lawyer worked hard were 1.53 times that of a non-Client Choice defendant.

Best Interest

When asked whether or not they felt their lawyer wanted the best for them in their case, the majority of defendants disagreed or strongly disagreed, although a greater number of non-Client Choice defendants disagreed than did Client Choice defendants (52% of Client Choice participants and 58% of non-Client Choice participants). Moreover, level of agreement with the statement was higher for those defendants who selected their lawyer (38%) as compared to those with lawyers chosen for them by the court (24%). In fact, Client Choice participants were 0.44 times more likely to agree that their lawyer wanted the best for them than non-Client Choice participants. Younger Client Choice defendants (less than 35 years) were also statistically more likely to agree they were treated with respect than older defendants in Client Choice or non-Client Choice defendants.



Defendants charged with misdemeanors were 2.7 times less likely to agree that their lawyers wanted the best for them as compared to defendants charged with felonies. In addition, Client Choice participants who had been represented previously by a court-appointed lawyer were more likely than those who had not had prior representation to disagree that their lawyer wanted the best for them. The race/ethnicity of a defendant, age, or educational level did not impact how defendants felt about whether or not their lawyers wanted the best for them.

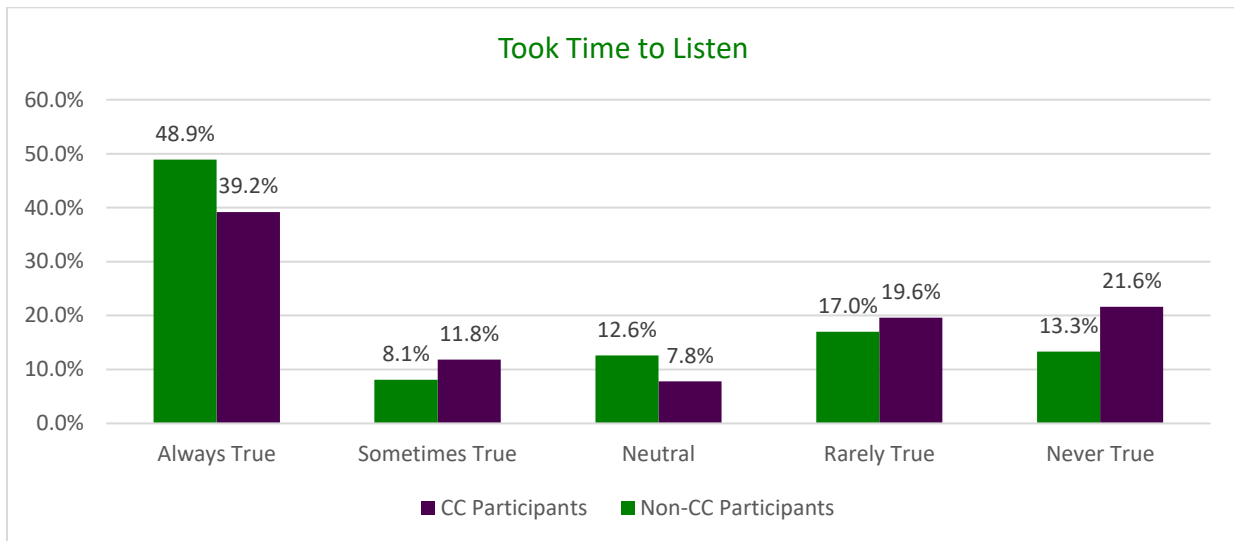
The results of the analyses generally support the hypothesis that a choice model results in greater feelings among defendants that their lawyers advocated zealously for them, particularly with regard to whether or not the defendant felt that the lawyer wanted the best for his/her client and if the lawyer worked hard. Interestingly, defendants charged with less serious offenses (i.e., misdemeanors) were statistically less likely to report that their lawyer wanted the best for them. In addition, at least with the concern variable, females were less likely to feel that their lawyer was concerned for them. Both of these findings suggest a need for further research.

Influence of Defendant in the Case

Giving individuals a voice in their case and involving them in the process is another indicator of how just defendants felt the process was. To measure this particular aspect of procedural justice, defendants were asked to rate their level of agreement with three statements:

- My lawyer took the time to listen to me,
- My lawyer asked my opinion about how to proceed with my case, and
- My lawyer felt my opinions were important.

In general, fewer Client Choice defendants felt that their lawyers took the time to listen to them than did non-Client Choice defendants (51% compared to 57%). The differences though were not statistically significant. Defendants charged with misdemeanors were statistically more likely to agree that their lawyer took time to listen than did those charged with felonies. Women were also statistically more likely to report higher levels of agreement than men. These two findings are quite different from other results related to procedural justice in this study where those charged with misdemeanors and females were more likely to report higher levels of disagreement than agreement. The finding here is unclear, suggesting the need for further examination of these procedural justice measures. Other control variables, such as whether or not the defendant had been represented by a public defender or court appointed lawyer in a prior case, did not have an impact on participants' responses to this item.



In addition, there were no observed differences generally between Client Choice participants and non-Client Choice participants in terms of how they rated the extent to which their lawyers asked their opinions about how to proceed with the case. In fact, the responses were nearly identical in terms of whether or not this was never true or always true. When controlling for age, JMI did find that Client Choice defendants, aged 25 years of less, were statistically more likely to agree that they were asked for their opinion than older Client Choice defendants or non-Client Choice defendants. In addition, it is important to note that the majority of defendants overall felt that it was always true that they were asked for their opinions (58% of Client Choice defendants and 57% of non-Client Choice defendants).

The conclusion to be drawn from this set of analyses is that Client Choice does not appear to have a significant impact on how involved defendants feel they are in their cases and in the work of their defense lawyers in representing them.

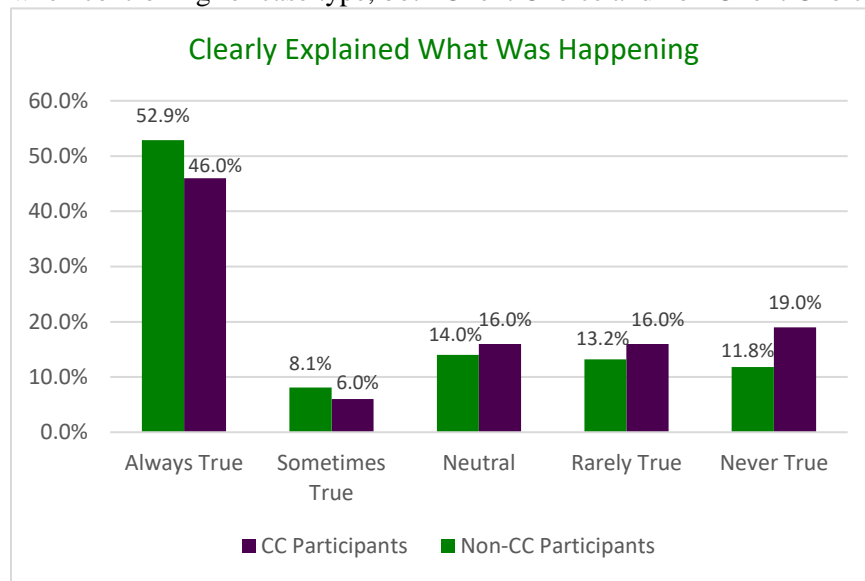
Transparency

In the context of procedural justice, transparency was operationalized as the extent to which lawyers were forthcoming with information about the case. Specifically, defendants were asked to rate if their lawyers clearly explained what was happening with the case, answered questions clearly, kept them informed, and were honest with them.

Clear Explanation and Answered Questions

The majority of all defendants felt that their lawyers clearly explained what was happening in the case (61% of non-Client Choice participants and 52% of Client Choice participants). However, Client Choice

defendants generally felt that it was less true that their lawyers explained what was happening than did non-Client Choice defendants. Indeed, the odds of Client Choice defendants reporting lower ratings (i.e., never true or almost never true) were 0.53 times that of non-Client Choice defendants. Interestingly, when controlling for case type, both Client Choice and non-Client Choice defendants, charged with



misdemeanors were more likely to report that their lawyer clearly explained what was happening with their case than those charged with felonies.

Another interesting finding was that younger defendants were statistically more likely to feel that their lawyer clearly explained what was happening. This was true regardless of whether or not the defendant selected his/her attorney.

With regard to other measures of transparency—whether or not lawyers answered questions about cases or spent time with the defendant before court, there were no observed statistical differences between Client Choice participants and those defendants whose lawyers were chosen by the court. Again, JMI tested the hypothesis that the lower ratings were related to higher expectations among defendants who had previously been represented by a public defender or court-appointed counsel but found no statistically significant relationships.

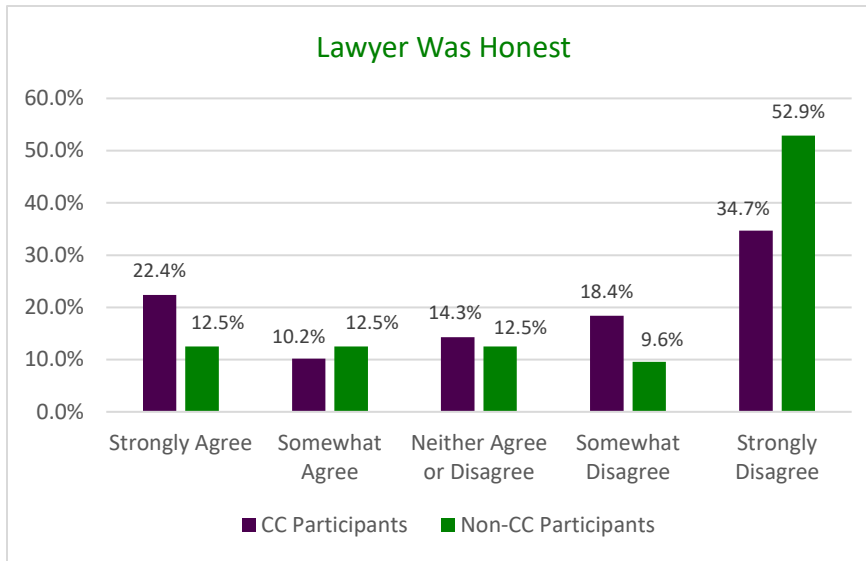
Kept Informed

Defendants overall tended to disagree that their lawyers kept them informed about what was happening in the case, regardless of whether or not they participated in Client Choice. Sixty percent of non-Client Choice defendants and 56 percent of Client Choice defendants reported that they somewhat or strongly disagreed that they were kept informed.

Despite the fact that being able to select one’s lawyer did not result in the defendant feeling that they were more likely to be kept informed about their case, there were some statistical differences based on different control variables. First, Client Choice defendants aged 25 years or less were more likely to feel that they were *not* kept informed about their case. Second, female defendants were more likely to agree they were kept informed than male defendants. Third, individuals charged with misdemeanors were statistically more likely to feel that they were well-informed than those charged with felonies. This suggests that while some classes of defendants feel lawyers are providing enough information about what is happening with their cases during the process, Client Choice does not positively impact this.

Honesty

Analyses of the extent to which defendants felt their lawyers were honest were far more favorable than other factors assessing transparency. Defendants who selected their lawyer were 0.55 times more likely to agree that their lawyers were honest with them than non-Client Choice defendants. Client Choice defendants under the age of 25 were also statistically more likely than older defendants to feel their



lawyers were honest with them. Controlling for other factors, JMI found statistical differences based on type of charge and gender as well. Defendants charged with misdemeanors were 6.1 times more likely to feel their lawyers had been honest with them than those charged with felonies. Female defendants were also statistically more likely than male defendants to feel their lawyers had been honest.

In total, JMI found mixed support for the hypothesis that a choice model fosters a greater sense of transparency. The greatest impact was among Client Choice defendants charged with misdemeanors, particularly with regard to lawyers' clear explanations of what was happening in the cases and the extent to which defendants felt their lawyer was being honest with them.

In terms of procedural justice overall, there is moderate support for a choice model with respect to the degree such a model positively impacts defendants' sense of procedural justice. The strongest relationships appear to be between choice and defendants' sense of fairness and impartiality. The mixed results for defendant involvement in the case and transparency could be a product of time and caseloads. As noted earlier, there were a handful of "popular" lawyers who were selected by defendants, which likely influenced those lawyers ability to provide the kind of personalized attention that defendants likely expected. In addition, while participation in Client Choice in and of itself was not statistically related to all of the measures of procedural justice, one finding does stand out, which is the impact of age. JMI found that sense of procedural justice was statistically higher for most measures for younger Client Choice defendants. There are several possible explanations for this including the fact that first time defendants are often under the age of 25 and as defendants age there is a greater probability of a longer criminal history and involvement with the system. In addition to age, the results indicate that other classes of defendants, notably those charged with misdemeanors and females, have different perceptions of their experience than those charged with felonies and male defendants. These are areas in which a more robust study may shed additional light.

System Impacts

The major impacts of a Client Choice model are clearly felt most acutely by defendants and illustrated by their experiences and the outcomes of their cases. However, as a model that fundamentally changes a typical U.S. indigent defense system, there remains the major question of what impact Client Choice has

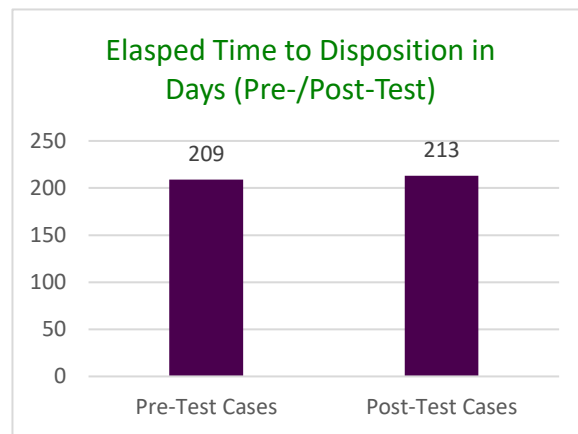
on the justice system as a whole. All things being held equal, failure to find a negative impact in terms of costs or efficiency suggests that the implementation of a choice model for indigent defendants does no harm on a system level. With further study of larger sample sizes, it may be proven that a choice model could be implemented that produces meaningful results for defendants without great cost or disruption to the justice system.

To examine the impact on the system, JMI looked at two key variables—case processing times and costs for indigent defense representation. Case processing times were calculated using the filing and disposition dates. Costs for indigent defense representation were drawn from Texas Indigent Defense Commission (TIDC) reports from FY2011 to FY2015, along with unaudited data from FY2016.

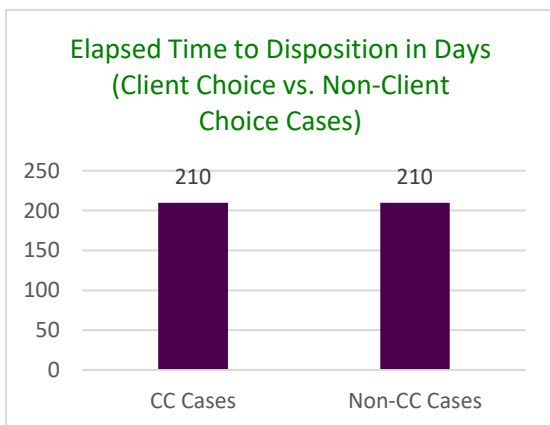
Impact on Case Processing Times

One of the concerns about a choice model is that it will increase case processing times and thereby have larger implications for the overall efficiency and effectiveness of the justice system as a whole. A comparison of the average time to disposition showed differences between pre- and post-test cases that disappeared when Client Choice was implemented.³⁸

Although the case processing time does appear to have become longer during the post-test phase (increasing from 209 to 213 days), when Client



Choice was operating, an examination of just Client Choice and non-Client Choice cases (eliminating those cases in which the defendant did not participate in Client Choice or did not have a lawyer appointed by the court) shows that there was no actual difference in elapsed time from filing to disposition during



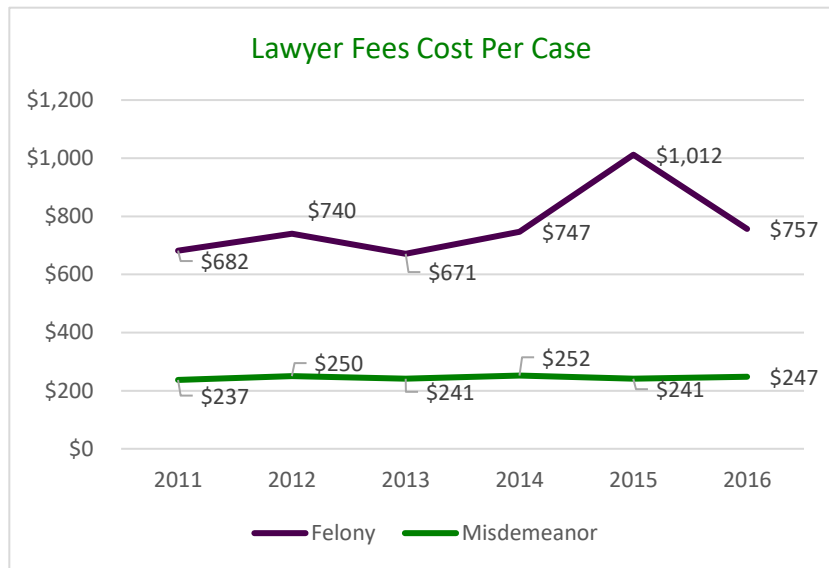
the study period. This finding suggests that there were no significant delays in case processing in cases where the defendants select their lawyer.

When broken down by case type, and accounting for outliers in the data, the average case processing time for misdemeanors was 237 days compared to 267 days for felonies. Again, an analysis of variance did not show that Client Choice negatively impacted case processing times as the average times did not vary between those who selected their lawyers and those for whom the court appointed lawyers.

³⁸ Because the time data were positively skewed by a few outliers with very long elapsed time from filing to disposition, the median was used.

Impact on Costs

As noted above, the cost per case data were drawn from the Texas Indigent Defense Commission (TIDC) that tracks fees paid to lawyers in indigent cases and total expenditures paid. In terms of the total expenditures (fees paid to lawyers plus other costs that include costs for investigators, experts, etc.), there have been increases in both felony and misdemeanor cases. Total felony expenditures increased 9% between 2012 and 2016, and total misdemeanor expenditures have increased 8% over the same time period. Lawyer fees paid in felony cases in Comal County have also been trending upward since 2012 and 2016. Fees paid to lawyers in felonies rose 6%, from an average of \$739.71 per case to \$756.98 per case. There was a significant increase (27%) that occurred between 2014 and 2015, which anecdotal information suggests was a result of a particularly high profile, complex, and prolonged case in District Court. Indeed, felony trial court attorney fees decreased by 16% from 2015 to 2016, the fees fell by 16%, bringing the cost per case closer to the average cost in 2014. The lawyer fee costs for misdemeanor cases have remained relatively stable over time.



The potential anomaly in 2015 makes it difficult to assess what impact the Client Choice program may have had on costs. Client Choice has continued on, however, past the pilot period and as such, the stabilization of costs in 2016 suggests that there was no significant negative impact on the costs associated with lawyer fees or other expenditures for either felony or misdemeanor cases.

Unfortunately, given the nature of the data, JMI was not able to test for a direct causal relationship between Client Choice and costs, and as such our findings are simply suggestive of a relationship. Additional data on costs paid specifically in Client Choice cases and in non-Client Choice cases, broken down by fees and other expenses, would allow for such a test and provide a more reliable assessment of the impact of a choice model on system costs.

CONCLUSION

The decision to pilot test a choice model, allowing defendants to select their lawyers, puts Comal County, Texas, at the forefront of innovation in indigent defense service delivery. Although the implementation process presented some minor challenges, the Client Choice model was largely implemented without disruption to the criminal justice system or the courts. As a proof of concept, Client Choice in Comal County's assigned counsel system was a success. The process of introducing the option for defendants to choose their lawyers was largely invisible to the judges and lawyers involved in the day-to-day operation of the criminal courts. Defendants participating in Client Choice certainly saw no worse outcomes, and there is evidence that some of their case outcomes were better as well as their experiences and sense of procedural justice.

In addressing the broader question of whether a Client Choice model could be introduced successfully into a U.S. indigent defense system, Comal County's experience suggests that it can. However, as suggested in the Executive Summary of this report, procedures for implementing Client Choice may present different issues and approaches if the defense delivery system involves public defenders and/or contract lawyers instead of assigned counsel. Additionally, it should be noted that other jurisdictional differences such as size/population may affect the way Client Choice operates in important ways. For example, in larger jurisdictions with more lawyers, it may be harder for defendants to learn of lawyers' reputations for quality service, thus changing the information landscape. Also, while not observed in Comal County, in urban jurisdictions with more active attorney advertising efforts, the risk of unethical solicitation of defendants may be a factor.

Current Understanding about the Implementation of Client Choice

The process and outcome evaluation provided both some insights into the efficacy of the model, considerations for future implementation in other jurisdictions, and a number of areas for further research in larger jurisdictions introducing Client Choice. The implementation of Client Choice generally followed the original plan but there were some limitations that may have affected the experiences defendants and lawyers had and the case outcomes for those participating in the program.

- In-custody defendants were provided approximately 15 minutes to review the profiles of eligible lawyers from which they could select, rather than the 48 hours originally planned. The additional steps necessary to allow defendants to review and select lawyers to represent them caused some disruption in normal administrative process at the very front-end of the criminal justice process. The activities necessary to support the evaluation (e.g., data collection and logging) were also cited by some as disruptive. Therefore, shortcuts like these arose in the operation of the jail, magistrate presentments, and court processes.
- The implementation of Client Choice resulted initially in a high volume of selections of a small number of lawyers. These lawyers chose to remove themselves from the appointed counsel program temporarily, but the phenomenon raises questions about how the new market for defense lawyers may impact the participation of not only lawyers who do not represent their clients as well, but also the participation of those who have a strong, positive reputation as advocates.
- Although not directly observed in the initial year of implementation, several lawyers raised concerns that Client Choice creates additional barriers to entry into the defense lawyer "market" for those who join the appointed counsel program with little experience. New lawyers may not be able to gain experience in order to develop their skills, which over time will mean a smaller and smaller pool of defense lawyers from which defendants can choose.

These issues did not present barriers to the successful implementation of Client Choice because approximately three-fourths of defendants in misdemeanor and felony cases elected to choose their lawyers. However, the implementation process in Comal County did raise a few issues that can inform replication of this model in other jurisdictions. For instance, the next jurisdiction that considers this model may want to monitor attorney caseloads to ensure that caseloads do not become unmanageable or overwhelming for an attorney as a result of the number of defendants selecting them. Jurisdictions may also want to create a mechanism, to include mentoring by experienced lawyers or an orientation program, by which new lawyers can be integrated into the appointed counsel program without compromising defendant choice. Finally, consideration should be given to how impact on the system will be monitored. Data systems ideally should allow for on-going analysis of impact (such as appointments, costs, and pretrial detention) that can be broken down into Client Choice and non-Client Choice categories.

Current Understanding about the Impacts of Client Choice

Beyond implementation, the impact evaluation found some advantages and no major disadvantages to having a choice model. Although the sample size in this study was small, which limited the capacity to conduct more in-depth analyses, there were insights into how Client Choice can benefit defendants, lawyers, and the broader criminal justice system. Moreover, it did not produce the adverse effects that critics have cautioned against.

- Although not all measures of quality of representation showed clear advantages, there is some indication that defendants who choose their lawyers experience more timely meetings and greater responsiveness from their lawyers.
- There is moderate support for an increased sense of procedural justice under Client Choice, with the stronger relationships being in defendants' sense of fairness and impartiality.
- There is mixed evidence that a choice model fosters a greater sense of transparency, with only some subgroups reporting greater transparency (e.g., Client Choice defendants charged with misdemeanors), such as lawyers' efforts to explain criminal cases to their clients.
- The Client Choice model appears to have a more positive effect for younger defendants as well as those defendants charged with misdemeanors.
- Client Choice defendants did experience better case outcomes. These defendants were 2.96 times more likely than non-Client Choice defendants to plead to a lesser charge than to go to trial, even when controlling for prior convictions.

Positive impacts of Client Choice on other measures of quality of representation, such as how hard lawyers worked for their clients, impartiality, and the influence and voice that defendants had in the handling of their cases, were not supported by the analyses here. No statistically significant findings were found in these areas, based on the perceptions of defendants. In addition, there were no significant improvements in case outcomes or procedural justice for individuals charged with felonies. Given the serious nature of felony cases, future choice programs should consider examining the factors that underlie this finding. These mixed findings, particularly with regard to certain aspects of procedural justice, are another reason to pursue further study of this model with a larger sample size.

Concerns about increased costs and decreased efficiency were not borne out in JMI's evaluation. Costs per case have been rising over the past several years and did spike between 2014 and 2015 while Client Choice was being implemented. Yet according to data from TIDC, those costs have fallen back down to the previous levels in 2016, suggesting Client Choice did not have a significant impact on costs. Additional data tracking by attorney fees and other associated costs, separated by Client Choice and non-Client Choice cases would allow for analysis to test this hypothesis.

Client Choice may also have a positive effect on case processing times. A common concern is that allowing defendants to select their lawyers can create delays in the adjudication process. JMI's analysis of case processing times (from initial court filing to disposition) did not find any significant increase and in fact, Client Choice cases were resolved in slightly less time than non-Client Choice cases. Further examination of case processing times is needed, however, to confirm this finding. Ideally, a sample of matched Client Choice and non-Client Choice cases (matched on case type, number of prior convictions, attorney, and judge) that allows for a comparison of elapsed time to different points in the case processing

continuum³⁹ and overall from filing to disposition would provide much greater detail about how a choice model affects case processing times.

Beyond the findings of no significant *negative* impacts on the system, the remainder of JMI's evaluation generally supports the continued operation of a choice model in Comal County. The majority of system actors (judges, defense lawyers, and prosecutors) were supportive of Client Choice. Although a few noted potential disadvantages, particularly among the defense lawyers, the data did not bear out their concerns. Nonetheless, Comal County should monitor potential unintended consequences about disproportionate numbers of cases going to a handful of attorneys, loss of business, and loss of income, as it continues Client Choice.

Exploring Other Possible Systemic Outcomes

JMI's study suggests that a choice model may have other larger impacts on the criminal justice system as a whole that merit further examination. First, the statistically significant differences in case outcomes, particularly with regard to a greater likelihood of community supervision or pleas to lesser sentences can have an impact on the jail population. Reductions in the daily jail population as well as average length of stay (an area that was not captured by the current study) could produce significant cost savings for the county. JMI recommends that, if the choice model continues, data be collected that allows for such comparative analyses (jail stays for Client Choice defendants compared to non-Client Choice defendants) over time. Another potential impact, particularly on the jail population, may lie in pretrial detention rates. Although not included in JMI's study, there are enough positive findings with regard to case disposition that suggest defendants who select their attorney may have lower pretrial detention rates, or fewer pretrial detention stays, than those with court-appointed attorneys.

Second, although the findings are mixed with regard to how Client Choice may impact defendants' perceptions of procedural justice, other research has shown that when there are greater feelings of procedural justice, compliance with the sentencing conditions increase, which could impact recidivism rates and probation revocations among others. JMI believes that sample size and the influence of prior representation by an appointed lawyer are likely swaying the results. As such the procedural justice survey should be re-administered with a much larger and balanced sample (i.e., comparable size groups of Client Choice and non-Client Choice defendants). Additional measures of client expectations about their representation should also be explored. Finally, the fact that younger Client Choice defendants had a greater sense of procedural justice emanating from certain factors (like transparency), while female defendants and older defendants had less positive perceptions about procedural justice make additional study desirable.

Given the limitations of the present analysis resulting from limited data, future efforts to study Client Choice should include an on-site researcher if possible. We have noted above that implementing the program was generally regarded as manageable. However, the additional tasks required of court personnel related to studying the impact of the program, such as administering surveys to defendants, monitoring program implementation and collecting data were overshadowed by the competing demands of regular court business.

³⁹ Case processing points should include elapsed time between the probable cause hearing and first appearance, from first appearance to arraignment, from arraignment to motions, from arraignment to trial/plea, and from trial/plea to sentencing. It is desirable as well to count the number of events that occur in the life of a case (i.e., number of pretrial conferences, number of continuances, and number of hearings on motions).

JMI has already stated that, as a proof of concept, Client Choice in Comal County succeeded. Overall, JMI believes that Client Choice was also successful both in terms of implementation and in demonstrating some key positive system level outcomes. With the caveat that generalizations should be made cautiously from many of the findings due the sample size, there is enough evidence to suggest that a choice model has no negative impacts on the adjudication process in Comal County. Defendants clearly valued the opportunity to select their lawyers, as evidenced by the large majority that opted to do so. Importantly, the judges overseeing the program believe it to have produced improvements in representation and support its continuation beyond the pilot period. Furthermore, the evaluation does not show that the cost of the program is significant, if even a factor at all; although this is an area for additional study.

APPENDICES

APPENDIX A. CONSTITUTIONAL ARGUMENT REGARDING CLIENT CHOICE

By Norman Lefstein, Professor of Law and Dean Emeritus, *Indiana University Robert H. McKinney School of Law*

Regardless of whether Client Choice makes sense from a policy perspective, in recent years an important constitutional argument in support of Client Choice on behalf of indigent defendants has emerged. The Supreme Court, however, has not squarely ruled on the argument.

Both state supreme courts and the United States Supreme Court have said that indigent defendants do not have a right to the lawyer of their choice.⁴⁰ To illustrate, in *Morris v. Slappy*,⁴¹ decided by the Supreme Court in 1983, the defendant requested a continuance when the public defender representing him became unavailable due to surgery just before the defendant's trial. The defendant objected to having another public defender substituted on the eve of trial, but the trial court ordered the trial to proceed without the defendant's original lawyer. After his conviction, the defendant assigned as error on appeal the failure of the trial court to grant him the lawyer that he preferred. However, the Supreme Court upheld the trial judge's decision to substitute another public defender over the defendant's objection, declaring that an indigent defendant is not entitled to a "meaningful relationship" between an accused and his counsel."⁴²

More recently in *United States v. Gonzales-Lopez*,⁴³ decided in 2006, the Supreme Court addressed the right to counsel of choice for a defendant who could afford to retain his own lawyer. The defendant was prosecuted in a Missouri federal court and, after his conviction, complained on appeal that he was improperly denied the private lawyer that he preferred, a member of the California bar. The Supreme Court held that the defendant had been denied the lawyer of his choice, and the defendant's conviction was reversed. Further, the Supreme Court ruled for the first time that when defendants of financial means are denied their preferred lawyer, reversal does not depend on a showing that defendant's lawyer provided deficient representation and that the defendant was prejudiced by his lawyer's conduct.⁴⁴ It is enough, according to the Court, that the defendant who has money to retain counsel is denied the lawyer that he prefers.

The Court emphasized that the error in the case was a "structural defect" and had nothing to do with whether the defendant had received a fair trial. This is because the right to counsel of choice is the "root

⁴⁰ *E.g.*, *Wheat v. United States*, 486 U.S. 153, 159 (1988) ("[T]he essential aim of the [Sixth Amendment] is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers."); *State v. Jimenez*, 815 A.2d 976, 980 (N.J. 2003) ("[A]ccused is guaranteed the right to the assistance of counsel, but not the constitutional right to counsel of his choice.").

⁴¹ 461 U.S.1 (1983).

⁴² *Id.* at 14.

⁴³ 548 U.S. 140 (2006).

⁴⁴ Normally, when a defendant seeks to reverse a criminal conviction based upon the failure of the defense lawyer to provide effective assistance of counsel as required by the Sixth Amendment, the defendant must establish that the representation did not constitute reasonably effective assistance of counsel *and* that the defendant was prejudiced, meaning that the outcome of the case would likely have been different except for defense counsel's error(s). *See Strickland v. Washington*, 466 U.S. 668 (1984).

meaning of the constitutional guarantee” of the Sixth Amendment.⁴⁵ In the words of Justice Scalia who authored the majority’s opinion: “Where the right to be assisted by counsel of one’s choice is wrongly denied...it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation [of the right to counsel]; deprivation of the ‘right’ is complete when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of representation he received.”⁴⁶

But what about defendants who cannot afford to hire a defense lawyer? Are they entitled to have their convictions reversed if denied their lawyer of choice? Although unnecessary to the Court’s holding in the case and therefore dictum,⁴⁷ *Gonzales-Lopez* answered no. Citing several of its prior decisions and without offering any analysis to justify significant differential treatment of rich and poor, Justice Scalia wrote the following: “[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them. ... We have recognized a trial court’s wide latitude in balancing the right to counsel of choice against the needs of fairness, and against demands of its calendar.”⁴⁸

Ordinarily, the issue of an indigent defendant’s right to select counsel of their choice arises after a lawyer has been appointed for the defendant, and there is a major disruption of the attorney client relationship, with the defendant asking that another lawyer be substituted. A Wisconsin Supreme Court case decided after *Gonzales-Lopez* illustrates what sometimes happens.⁴⁹ The defendant became dissatisfied with his public defender and asked the trial court for a substitution of counsel. The request was not made on the eve of trial as in the *Slappy* case, but instead four months before the defendant’s trial was scheduled to begin. The defendant explained that he “‘did not feel comfortable with [his lawyer]’ and did not trust”⁵⁰ him, and the Wisconsin State Public Defender program was prepared to arrange for a different lawyer to represent the defendant. In addition, the lawyer originally appointed for the defendant moved to withdraw from the case. The trial court nevertheless rejected defendant’s request for a substitution of counsel, defendant was convicted at trial, and on appeal claimed that his Sixth Amendment right to counsel of choice had been violated, relying upon the Supreme Court’s *Gonzales-Lopez* decision. Defendant argued that there had been a structural denial of his Sixth Amendment right to counsel, and thus his conviction should be reversed without a showing of inadequate representation and prejudice. However, based upon precedents in this area of the law, the Wisconsin Supreme Court held that since defendant was indigent, no constitutional violation had occurred.

In a concurring opinion, a Wisconsin Supreme Court justice made clear that she and the court’s Chief Justice were “troubled” by the result. Referring to *Gonzales-Lopez*, she explained that the right to have one’s conviction reversed “automatically” when counsel of choice is denied is applicable only to

⁴⁵ *Gonzales Lopez, supra* note 4347, at 147-48.

⁴⁶ *Id.* at 148.

⁴⁷ “Dictum” is a word especially familiar to lawyers. It refers to a “judge’s remark or observation on some point of law which is not essential to the case in question, hence not binding as a legal precedent.” WEBSTER’S NEW WORLD DICTIONARY (1989).

⁴⁸ *Gonzales Lopez, supra* note 4347, at 151-52.

⁴⁹ *State v. Jones*, 326 Wis.2d 380, 797 N.W.2d 378 (2010).

⁵⁰ 326 Wis.2d at 391, 797 N.W.2d at 384.

defendants with sufficient money to hire their own lawyer. However, she then added the following: “Because the right to counsel of choice does not apply to an entire class of defendants, *Gonzales-Lopez* is difficult to reconcile with the American ideal of equal justice under law.”⁵¹ Further, she explained that if the defendant had had money and sought other counsel of his choice four months before trial, it likely would have been error not to reverse the conviction, and the reversal would have been ordered without regard to whether the defendant was prejudiced by counsel’s performance at trial. On the other hand, the justice noted that “because...[the defendant] was dependent upon the Office of the state public defender for representation, he had no right to counsel of his choice, and he has no recourse unless he can show that his appointed attorney’s performance was ineffective.”⁵²

A recent law review article dealing with the issue of Client Choice for indigent defendants argues that the refusal to permit a choice of counsel for indigent defendants is a denial of both equal protection of the law and due process of law.⁵³ These provisions of the Constitution often have been applied in the criminal justice area to eliminate disparities in treatment between rich and poor defendants.⁵⁴

The issue of whether indigent defendants have a constitutional right to lawyers of their choice is presented here so that readers will understand that, in view of the *Gonzales-Lopez* decision, a right of Client Choice by indigent defendants is likely to be litigated further in the courts and perhaps also considered by legislative bodies in deciding upon systems for providing defense lawyers for those unable to afford counsel.

⁵¹ 326 Wis.2d at 417, 797 N.W.2d at 397.

⁵² 326 Wis.2d at 419, 797 N.W.2d at 398.

⁵³ Moore, *The Antidemocratic Sixth Amendment*, *supra* note 14.

⁵⁴ “As the Court made clear decades ago, ‘[b]oth equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, ‘stand on an equality before the bar of justice in every American court.’” Moore, *The Antidemocratic Sixth Amendment*, *supra* note 14, quoting *Griffin v. Illinois*, 351 U.S. 12, 17 (1953). Also, in many states defendants unable to retain counsel are often ordered to make payments in support of their defense representation, which means that the situation for these defendants’ is similar to defendants who can afford to hire a lawyer. “Today, cost recovery mechanisms typically take two primary forms: (1) recoupment, a court order imposed at the conclusion of a case for the defendant to pay an amount reflecting the actual cost of attorney’s fees, and (2) contribution (sometimes referred to as “application fees,” “co-pays,” “user fees,” or “administrative” or “registration” fees), a fixed sum imposed at the time of appointment.” Ronald F. Wright and Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense* 47 WM. & MARY L. REV. 2045, 2052 (2006). See also Holley, *Rethinking the Sixth Amendment for the Indigent Criminal Defendant*, *supra* note 14.

APPENDIX B. ORIGINAL PLAN FOR IMPLEMENTING CLIENT CHOICE

By Norman Lefstein, Professor of Law and Dean Emeritus, *Indiana University Robert H. McKinney School of Law*

This section provides detail about key aspects of the planning and design process for Client Choice in Comal County and explanations for key decisions made during the process. The following discussion addresses three major areas: (1) planning for the Client Choice project; (2) the implementation plans prepared for executing the project; and (3) significant issues requiring resolution before the project could begin.

Project Planning

Support for proceeding with Client Choice in Comal County was sought in 2012, when James Bethke, Executive Director of the Texas Indigent Defense Commission (TIDC) and its chair, the Honorable Sharon Keller, Presiding Judge of the Texas Court of Criminal Appeals, held successful meetings with the county's judges, the county's chief prosecutor, county officials, and members of the county's indigent defense bar. By the time detailed planning for the project began in early 2014, the six judges of Comal County's criminal courts (four District Court felony judges and two misdemeanor County Court judges) had agreed to implement Client Choice subject to final approval of project plans.

To assist in developing plans for Client Choice, Comal County retained Professor Norman Lefstein, who served as Program Design Consultant for the project. Professor Lefstein was assisted by Edwin Colfax, Grant Program Manager of the TIDC, who both regularly conferred with James Bethke. Together, these three individuals constituted the principal implementation team for Client Choice. Implementation plans and the project's research design were developed in collaboration with JMI's staff and Professor Steven Schulhofer of the New York University School of Law who volunteered his expertise to the project.⁵⁵

In addition, there were several conference calls with a project advisory panel assembled by the TIDC, including representatives of several national organizations and prominent Texas criminal defense lawyers, representatives of the Texas bar, as well as Texas agencies and programs.⁵⁶ Among the issues discussed with this advisory panel was what defendants should be told about the litigation backgrounds of defense lawyers available for selection, whether the subject of lawyer advertising for indigent clients should be addressed in implementation plans, and options for clients if dissatisfied with the lawyer selected. The advisory panel did not make decisions about the issues discussed, but contributed important and sometimes divergent viewpoints.

Furthermore, Comal County's judges designated six members of the private criminal defense bar to provide advice and counsel to the implementation team about the design of Client Choice. In fact, the major issues covered in the implementation plans were reviewed with these lawyers. For example, certain types of felony sex offense cases were excluded from the District Court's Client Choice plan. The lawyers believed that defendants accused of sex crimes would likely choose the county's several lawyers with experience in these kinds of cases and overwhelm those individuals with extremely complex cases.

⁵⁵ For information about Professor Schulhofer and his publications about Client Choice, *see* note 2 *supra*.

⁵⁶ Persons invited to serve on the advisory panel for the project are listed in Appendix C.

The District Court’s Implementation Plan explains: “Sex offense cases involving children will be excluded from the Client Choice program. This is because these types of cases are invariably very time-consuming and often quite difficult. There is also concern that in a system of client selection, lawyers with a reputation for handling such cases may become overwhelmed by clients seeking their services.”⁵⁷

Implementation Plans

Prior to the launch of Client Choice, substantially similar implementation plans were prepared for both Comal County’s District Court and County Court. These plans explained the way in which Client Choice was intended to function in both the county’s felony and misdemeanor courts. The plans were approved by the six judges of the two courts in January 2015 and posted on the TIDC website for Comal County where they remain available.⁵⁸

Major features of the plans include the following:

1. District Court and County Court implementation plans provide that the choice of available counsel is limited because only lawyers who are approved by the respective courts’ judges to provide indigent defense representation may be selected by defendants. Further, the judges have created three approved lawyer lists, i.e., one for misdemeanor cases, another for lesser felony cases, and a list of lawyers for the most serious felony cases.⁵⁹
2. Defendants are screened for financial eligibility when they appear for their initial court presentment. This occurs either when the defendant is in custody in the Comal County Jail and appears before a magistrate or, because the defendant has been released from custody, appears before a District Court or County Court judge. Wherever this occurs, defendants are advised of their rights and informed that if found to be indigent and thus eligible for representation by a lawyer paid by Comal County, they may either choose their lawyer or have the court select a lawyer for them.
3. Defendants wanting to select their lawyer are provided information about the available lawyers,⁶⁰ following which they may list, in order of preference, up to three lawyers by whom they would like to be represented. In return for obtaining the name(s) of the lawyer(s) preferred by the defendant, the District Court and County Court commit to appointing the first of the available lawyers selected by the defendant.

⁵⁷ Client Choice Implementation Plan in the Comal County District Court, Section 5. Capital cases, which require lawyers with experience in defending death penalty cases, also are excluded from Client Choice. However, during the year when Client Choice was implemented and studied, there were no such cases.

⁵⁸ The District Court implementation plan is *available at* <http://tidc.tamu.edu/IDPlanDocuments/Comal/Comal%20District%20Court%20Client%20Choice%20Implementation%20Plan.pdf>. The County Court implementation plan is *available at* <http://tidc.tamu.edu/IDPlanDocuments/Comal/Comal%20County%20Court%20Client%20Choice%20Implementation%20Plan.pdf>.

⁵⁹ All lawyers on the felony lists are eligible for selection to misdemeanor cases, and all lawyers on the most serious felony list also may be selected to provide representation in less serious felony cases.

⁶⁰ For the information provided to defendants about the lawyers available for selection, *see* note 24 *supra* and accompanying text.

4. The procedure described in the preceding paragraph can be shortened if the defendant knows the name of a lawyer by whom he or she would like to be represented and conveys the information to the magistrate or judge.
5. In order to implement Client Choice, one of the forms that had been used in Comal County in the administration of its assigned counsel program required revision and two new forms created. These forms can be accessed as appendices to the District Court and County Court plans.⁶¹

Important Issues for Resolution

Before implementation plans could be prepared and finalized, a number of issues needed to be resolved. This section explains the most important of these issues, their resolution, and the reasons for the decisions made. Accordingly, the material that follows also provides additional information about the District Court and County Court implementation plans.

No Vouchers and No Legislative Changes

In their article *Reforming Indigent Defense*, Schulhofer & Friedman propose a program of Client Choice using “defense vouchers.” These would be “lump sum voucher[s] [that] would grant a fixed amount to cover the cost of defense, with the amount presumably depending on the nature of the charge, with different rates for capital cases, other felonies, and misdemeanors.”⁶² Vouchers would be issued to defendants, and they then could use the sum specified in the voucher to retain the lawyer of their choice. The idea of vouchers for defense services also received national publicity in a New York Times article about Comal County, Texas, which stated that “[d]efendants there will soon be able to use government money to choose their defense lawyers” and suggested that the planned program could be called “Gideon vouchers.”⁶³ However, the use of vouchers for Comal County’s Client Choice program was rejected, because it would almost certainly have delayed the assignment of lawyers to defendants’ cases, would have been extremely difficult and costly to administer, and would have been contrary to Texas law.

⁶¹ For both District Court and County Court, the new and revised forms include the Magistrate’s Warning Form, a Lawyer Information Form, and a Selection of Lawyer Form. These forms are appendices to the Comal District Court Plan and County Court Plan, *available at* <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=551>

⁶² Schulhofer & Friedman, *Reforming Indigent Defense*, *supra* note 2 at 13. The authors also suggest that the amount of the vouchers could be issued in variable sums based upon how the case was resolved, whether through a guilty plea, trial, or other disposition. The only experimental program in the United States in which vouchers were used involved civil legal aid in the 1980’s in San Antonio, Texas. The study’s conclusion contains the following: “[T]he study demonstrated that vouchers, when limited to representation in non-complex domestic relations cases, can be used, but the fact that more than a third of the clients directly assigned to voucher attorneys in the study did not pursue their cases raises serious questions about the effective workability of this delivery mechanism. The study did not examine any issues regarding the Client Choice features of the voucher mechanism or any possible price or quality effects that might arise from competition among attorneys for vouchers.” American Bar Association Special Committee on the Delivery of Legal Services, *The San Antonio Study of Legal Services Delivery Systems* 58 (unpublished manuscript on file with authors)(May 1989).

⁶³ Adam J. Liptak, *Need-Blind Justice*, N.Y. TIMES (Sunday Review), Jan. 4, 2014.

Statutes in Texas, as in many other states, provide for defense lawyers to be appointed by judges.⁶⁴ To implement a program in which defendants would retain their own lawyers by using county issued vouchers would have required a statutory amendment approved by the Texas legislature and signed by the Governor. Instead, early in the planning for Client Choice, the decision was made to give defendants the option either to have the court appoint counsel through its normal “wheel” or “rotation” process or for defendants to select their defense lawyers from among those approved by Comal County’s judges to provide defense representation.

Information Provided to Defendants

One of the most difficult questions to resolve in planning for Client Choice related to the content and amount of information to provide to defendants about the lawyers available for selection. During the first conference call with the project’s advisory panel, one member argued that defendants should be provided detailed information about the available lawyers, including the numbers and types of cases that lawyers had tried before juries and the trial results, as well as many other details about the lawyers’ qualifications and law practice. However, the implementation team was concerned about disseminating information furnished by lawyers that could not be verified and might violate ethical rules related to lawyer advertising.⁶⁵ Also, several of the six lawyers designated to confer with the implementation team believed that providing minimal information to defendants about the available lawyers was preferable, arguing that many of the available defense counsel were well known and had reputations upon which the client community would rely in selecting defense lawyers.

Another consideration in favor of providing only minimal information about available defense lawyers was a desire to test whether or not Client Choice could successfully function in a setting similar to the kind that confronts clients with sufficient funds to retain counsel. These defendants do not receive any information from the criminal courts about the lawyers available for retention. Presumably such defendants rely upon recommendations of other persons and perhaps access lawyer websites and yellow page advertisements. In other words, these defendants, too, typically have imperfect information about the lawyers available for hire.

Nevertheless, prior to the start of Client Choice and to provide at least some information to defendants about lawyers eligible to serve as appointed counsel, the program developed a Lawyer Information Form (LIF) that all lawyers on one of the court appointment lists were required to complete. Comal County’s judges were apprised of this plan and, at the request of the program, the county’s six judges issued a

⁶⁴ See TEX. CODE CRIM. PROC. Art. 26.04. Texas law and similar statutes in other states do not comply with recommended national standards approved by the American Bar Association. Consider, for example, the ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 1 (2002): “The public defense function, including the selection, funding, and payment of defense counsel, is independent. The public defense function should be independent...and subject to judicial supervision only in the same manner and to the same extent as retained counsel.”

⁶⁵ See Texas Disciplinary Rules of Professional Conduct, Rule 7.05 (a)(3): “A lawyer shall not...knowingly permit...another person to send, deliver, or transmit, a written...message...to a prospective client for the purpose of obtaining professional employment on behalf of any lawyer...if the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.” Several members of the Advisory Panel also expressed concerns that lawyers approved to represent defendants in Comal County would engage in advertising to encourage defendants to select them, but there is no evidence that this ever occurred, probably due to the relatively low fees paid in Comal County for misdemeanor and felony representation. For average fees paid in such cases, see the section in this report titled, “Appointed Counsel Compensation under Client Choice” *supra*.

memorandum in the fall of 2014 sent to all lawyers eligible for defense appointments urging that they complete the LIF about themselves. The memorandum stated that the form had been developed by the TIDC and confirmed that Client Choice would soon begin in Comal County. In addition, prior to the LIF being sent to all of Comal County's approved lawyers, during a training program sponsored by the TIDC in September 2014, the lawyers were informed about how Client Choice would be implemented and that they would be required to complete a lawyer information form that was then being developed.

The LIF asked that lawyers provide the following information:

- Name;
- Law firm and principal law firm address;
- Email and internet site (if any);
- Law school attended and graduation year;
- Year licensed in Texas;
- Types of cases handled (e.g., criminal, domestic relations, etc.);
- Approximate portion of practice time spent on criminal cases for persons unable to afford counsel during the prior 12 months;
- Approximate number of defendants represented in all criminal cases during the prior 12 months;
- Whether the lawyer was ever publicly disciplined and, if so, a brief explanation; and
- Languages spoken in addition to English.⁶⁶

The LIFs of lawyers fluent in Spanish were not translated into Spanish, but Spanish speaking only defendants were provided a list of lawyers fluent in their language and qualified to provide representation for the offense level with which they were charged. The LIF questions did not ask about the sex of the lawyer, though defendants could likely determine this by the lawyers' names, and no photos of the lawyers were requested. The decision not to display lawyers' photos was aimed at minimizing the possibility that lawyers would be selected based upon their sex, race, or appearance.

Besides determining the content of the LIFs, the implementation team had to determine how best to make the forms available for defendants to review, a majority of whom would be in jail after their arrest. As a result, the implementation team discussed the forms with the head of the Comal County Jail and several of the jail's deputies. Their advice was to secure the forms in such a way that none could be defaced or removed from whatever binder or holder was used for their display. The jail's recommended solution to this potential problem was to laminate each of the LIFs and to bind them together with a soldered ring at the top in a manner that would make it virtually impossible for defendants to remove any of the pages from the ring. In the end, however, this course was deemed unnecessary because, contrary to original plans, the LIFs were reviewed by defendants in a room supervised by jail staff. So instead the LIFs were placed into plastic sleeves and then into three separate three-ring notebooks based upon the three different offense levels for which lawyers were approved to provide representation by District Court and County

⁶⁶ The LIF did not include the phone numbers of the lawyers or their law firms. This is because discussions with the six lawyers with whom the implementation team consulted believed that virtually none of the lawyers willing to accept court appointments would consent to interviews before defendants decided about the lawyer they wanted to select. Moreover, once lawyers are appointed for defendants whether through Client Choice or the court's rotation system, the phone numbers of the lawyers are furnished to defendants by administrative staff of the courts.

Court judges.⁶⁷ Similarly, defendants who showed up in court without counsel and were unable to afford a lawyer were given the opportunity to review the LIFs in the courtroom before being asked to decide if they wanted to exercise Client Choice.

The forms were arranged in the notebooks alphabetically, although the implementation team would have preferred to scramble periodically the order of the LIFs during the project to determine the possible effect of lawyers' names appearing at the start of the alphabet. However, the absence of sufficient onsite staff for the program precluded this from being done.

Amount of Time Afforded Defendants to Select a Lawyer

Texas law provides that “if an indigent defendant is entitled to and requests appointed counsel and if adversarial judicial proceedings have been initiated against the defendant, a court or the court’s designee...shall appoint counsel...not later than the end of the third working day after the...court or the court’s designee receives the defendant’s request for appointment of counsel.”⁶⁸ In other words, qualified defendants requesting an appointed lawyer must receive appointed counsel within 72 hours. Ideally, such defendants should receive counsel much sooner so that a lawyer can advocate for the defendant’s release at the first court proceeding and also begin a prompt investigation of the client’s case. This statutory requirement obviously needed to be balanced against the need for defendants to have sufficient time to select the lawyer of their choice. Accordingly, the implementation plans for Client Choice afforded defendants up to 48 hours to decide upon the lawyer they wanted to represent them.⁶⁹

However, this part of the implementation plan did not function in the manner prescribed. The principal magistrate in Comal County’s jail found it burdensome to administer since it delayed the processing of defendants and took too much time to administer. Also, jail officials who originally believed that the plan was feasible decided that it would be too time consuming and sometimes difficult to bring defendants back to the magistrate from different parts of the jail in order to enable defendants to exercise their choice of counsel.

Instead, all defendants determined by the magistrate to be eligible for court appointed counsel were moved to a nearby room, given copies of the LIFs to review, and after about 15 to 20 minutes returned by jailers to the magistrate who inquired if they had completed their Selection of Lawyer form or if they had decided to have the court appoint counsel for them. Although defendants were provided a relatively short

⁶⁷ As discussed earlier, County Court judges approved lawyers for misdemeanor cases and District Court judges approved lawyers for two classes of felony cases. Periodically, the judges of the two courts reviewed the names of the approved lawyers for the purpose of either adding lawyers who applied to provide representation or, if compelling reasons existed, removing lawyers from the panel for which they had been approved.

⁶⁸ See TEX. CODE CRIM. PROC. Art. 1.051.

⁶⁹ Both the District Court and County Court Client Choice Implementation Plans state the following: “In order to afford adequate time for defendants to make their selection of defense counsel, defendants will be given up to 48 hours in which to make their decision. More than this amount of time will unduly delay defense counsel’s entry into the case.”

of amount of time in which to make their decisions about defense counsel, the majority of defendants exercised Client Choice rather than leave the decision to the court.⁷⁰

Lawyers' Option to Remove Themselves from Appointment Lists

Rules applicable to defense representation in Texas, as in states throughout the country, require that lawyers not accept so much work that they are unable to represent adequately all of their clients. Specifically, Texas professional responsibility rules require that lawyers provide “competent” and “diligent” representation.⁷¹ The comment to this rule explains that “[a] lawyer’s workload should be controlled so that each matter can be handled with competence and diligence.”⁷² Because the introduction of Client Choice in Comal County meant there was a possibility that some lawyers might be selected by defendants to provide representation in more cases than they had been accustomed to receiving through the “wheel” or “rotation system” for assigning cases, the implementation plan for Client Choice specifically provided that lawyers can “declare themselves ‘unavailable’ for court appointments *if* they have too much work and therefore cannot accept additional cases lest they be unable to provide ‘competent’ and ‘diligent’ representation....”⁷³ As discussed in the body of this report, some lawyers availed themselves of the opportunity to remove themselves temporarily from the appointment lists.

⁷⁰ See section of the report titled, “Participation in Client Choice” *supra*. Defendants also were given a separate one-page list of the names of the available lawyers for their offense level that they could retain and on which they could note the lawyer(s) they had selected.

⁷¹ Texas Disciplinary Rules of Professional Conduct, Rule 1.01.

⁷² Rule 6.01 (a) is also relevant since it recognizes that “good cause” is present for seeking to avoid appointments by a tribunal when “representing the client is likely to result in violation of...rules of professional conduct.” Similarly, the American Bar Association recommends in its EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS that “Public Defense Providers consider taking prompt actions...to avoid workloads that either are or are about to become excessive,” including “[n]otifying courts...that the Provider is unavailable to accept additional appointments.” See Guideline 5 at 9, *available at* www.indigentdefense.org. See also State Bar of Texas, PERFORMANCE GUIDELINES FOR NON-CAPITAL DEFENSE REPRESENTATION, Guideline 1.3 I (2011)(“If counsel’s caseload is so large that counsel is unable to meet these performance guidelines, counsel shall inform the court or courts before whom counsel’s cases are pending.”)

⁷³ Client Choice Implementation Plan in the Comal County District Court, sec. 4 b (2015); Client Choice Implementation Plan in the Comal County Court at Law, sec. 4 b (2015).

APPENDIX C. ADVISORY PANEL MEMBERS

Project Advisory Panel

- **James Allison**, General Counsel, County Judges & Commissioners Association of Texas, Austin, TX
- **Jeff Blackburn**, Attorney & member, TX State Bar Committee on Legal Services for the Poor, Amarillo, TX
- **Edwin Burnette**, former Vice President and current consultant for Defender Legal Services, National Legal Aid & Defender Association (NLADA), Washington, DC
- **Dr. Dottie Carmichael**, Research Scientist, Public Policy Research Institute at Texas A&M University, College Station, TX
- **Ana Yañez-Correa**, former Executive Director, Texas Criminal Justice Coalition, Austin, TX; currently Program Director for Criminal Justice, Public Welfare Foundation
- **Buck Files**, Immediate Past President, State Bar of Texas, Tyler, TX
- **David Gonzales**, Attorney, Sumpter & Gonzalez, Austin, TX
- **Steve Hanlon**, American Bar Assoc. Standing Committee on Legal Aid and Indigent Defense (SCLAID) Designee, Washington, DC (General Counsel, National Association for Public Defense)
- **Don Hase**, Attorney, Ball & Hase, Fort Worth, TX
- **Marc Levin**, Director, Center for Effective Justice, Texas Public Policy Foundation, Austin, TX
- **Tim Lynch**, Director, Project on Criminal Justice, The Cato Institute, Washington, DC
- **Gene Major**, Texas State Bar Director, Advertising Review, Austin, TX
- **Andrea Marsh**, Executive Director, Texas Fair Defense Project, Austin, TX
- **Bobby Mims**, President, Texas Criminal Defense Lawyers Association, Tyler, TX
- **E. G. “Gerry” Morris**, Attorney, Austin, TX
- **Norman Reimer**, Executive Director, National Association of Criminal Defense Lawyers, Washington, DC
- **Robert Spangenberg**, Indigent Defense Consultant, Boston, MA (*passed away June 22, 2016*)
- **Mary Anne Wiley**, former Deputy General Counsel, Office of the Texas Governor, Austin, TX (now retired)
- **Philip Wischkaemper**, Staff Development Director, Lubbock Private Defender Office, Lubbock, TX

Project Team

- Comal County District Judges **Bruce Boyer, Jack Robison, Gary Steel & Dib Waldrip**
- Comal County Court-at-Law Judges **Randy Gray and Charles Stephens**
- County Judge **Sherman Krause**
- Magistrate **Ellen Salyers**
- District Court Administrator **Steve Thomas**
- Members of the local defense bar: **John Esman, Joseph E. Garcia III, Gina Jones, Frank Suhr, Tommy Vaughn, Deborah Linnartz Wigington**
- **Elaine Nugent-Borakove**, President, Justice Management Institute, Arlington, VA, Program Research & Evaluation Consultant
- **Norman Lefstein, Professor of Law and Dean Emeritus, Indiana University Robert H. McKinney School of Law, Indianapolis, IN**, Program Design Consultant
- **Steven Schulhofer**, Robert B. McKay Professor of Law, New York University School of Law, New York, NY
- **Jim Bethke**, Executive Director & **Edwin Colfax**, Grant Manager, Texas Indigent Defense Commission



Comal County Courthouse

In 1846 Comal County held its first court session in the home of its county clerk, Conrad Seabaugh. Courthouse facilities acquired in 1849 proved inadequate and were replaced with a 2-story building at the southeast corner of the city plaza in 1860. The building fell into disrepair and in 1898 the county chose famous Texas courthouse architect J. Riley Gordon to design a new courthouse. Gordon's original design, incorporating four entrances compatible with the building's proposed location at the center of the plaza, was nevertheless retained when this corner lot site was chosen instead. Austin contractors Fischer and Lamie used stone quarried 10 miles north of New Braunfels on land owned by Texas/U.S. statesman Edward Mandell House to build this courthouse in 1898. The 3 1/2 story Romanesque-style structure features rounded pavilion entrances often employed by Gordon and includes dramatic massing and superb detail in its stone work. A 1929-31 large stone jail addition was designed by Jeremiah Schmidt of New Braunfels. The courthouse underwent considerable interior and minor exterior renovations in 1966-67 and 1987. The courthouse reflects New Braunfels' German heritage and the spirit of Comal County at the turn of the twentieth century.

Recorded Texas Historic Landmark – 1993