

# Comal County Client Choice Program – Baseline Site Visit Report

## INTRODUCTION

In August 2013, the Comal County Commissioners Court contracted with the Justice Management Institute to evaluate its upcoming Client Choice Program – the first of its kind on the United States. The implementation of client choice in Comal County presents a unique opportunity to test a potentially more effective alternative to the current appointed counsel practice. JMI continues to be an enthusiastic partner with Comal County and the broader implementation team as this project unfolds.

JMI's process and outcome evaluation culminates in a report to Comal County detailing the strengths and weaknesses of the program as implemented, its outcomes as determined through both qualitative and quantitative data analysis, and recommendations for continuing the program. JMI has worked and will continue to work with the county, the implementation consultant, and others to finalize the design of the evaluation plan. As per its original proposal, JMI's major tasks and activities include:

1. With the implementation consultant, convene a Client Choice Working Group to articulate the specific goals and objectives of the program and to finalize evaluation plan
2. Establish a baseline for the evaluation by mapping the current practice for providing indigent defense services in Comal County and determining the flow/availability of valid and reliable information on the current practices
3. Collect data on implementation process and impacts
4. Prepare final report

JMI has already initiated work with the implementation consultant and Client Choice Working Group to design and implement the client choice program with fidelity, both to document the implementation process and lessons learned and to determine how effective client choice is as an alternative to appointed counsel.

The purpose of this report is to describe JMI's work relative to the second task, "Establish a baseline for the evaluation by mapping the current practice for providing indigent defense services in Comal County and determining the flow/availability of valid and reliable information on the current practices." In October 2013, JMI staff documented the process by which indigent clients are identified, their counsel assigned, and counsel are compensated for the work they have done with their clients. Over the course of a week, field staff conducted interviews with representatives from all of the major stakeholder groups, including judges, administrators, and clerks from both courts, one of the magistrates, the prosecutor's office, appointed defense counsel, and the auditor's office. Subsequently, the key narrative from this report was validated by a subgroup of these informants. This report summarizes the findings and describes the process by which one becomes qualified and eligible as appointed counsel in Comal County.

## BACKGROUND

Comal County, Texas is the 38<sup>th</sup> largest county in Texas<sup>1</sup> with an estimated population in 2012 of 114,384. The majority of the county's residents are White, non-Hispanic or Latino (70.1%) with the next largest racial or ethnic group being Hispanics or Latinos of any race (25.8%)<sup>2</sup>. Compared with the rest of the state, Comal County is more affluent with a median household income from 2007-2011 of \$65,521

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<sup>1</sup> According to 2010 census data from the Census Bureau's Population Estimates Program (PEP).

<sup>2</sup> Based on 2012 estimates from the US Census Bureau.

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and a poverty rate of 9.5 percent for the same period. In 2010, there were 193.9 persons living in Comal County per square mile.

Comal County has a jurisdictional criminal justice system with District Courts handling felonies and County Courts of Law handling misdemeanors. The District Courts are the general trial courts of the state, handling most major litigation. These courts hear felony cases, but they also hear divorce proceedings, questions involving titles to land, contested elections, juvenile matters, and any civil matter involving a claim of \$1,000 or more.

The two Comal County Courts at Law have jurisdiction over all class A and B misdemeanor criminal cases and all civil cases filed in the County Courts. They also have jurisdiction in probate, mental commitments, guardianship, and traffic and other appeals from Justice and Municipal Courts.

District Court and County Courts at Law have concurrent jurisdiction over a number of case types including family law cases, such as divorce, modifications, adoptions, and juvenile matters.

Defendants charged with Class B Misdemeanors and higher, who can prove indigence, have the right to appointed counsel in Comal County. Counsel for indigent defendants are selected from lists of qualified attorneys, who are paid by the county for their time representing these clients. There is no institutional public defender system in Comal County.

## BASELINE FOR CURRENT PRACTICE

### OVERALL WORKFLOW

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JMI began its work by conceptualizing the overall criminal justice system through the lens of the appointment and assignment process for indigent defense counsel. Figure 1 provides a simplified view of the criminal justice system in Comal County from the perspective of indigent defense. Defendants, who are arrested are detained in county jail, see a magistrate within 24-48 hours. The magistrate determines whether probable cause exists for each charge against the defendant. If probable cause is found, the magistrate informs the defendant of the charges, sets bail, and reviews completed applications for court-appointed attorney, if applicable. For cases bound for District Court, the magistrate makes a final determination about eligibility for appointed counsel, whereas for cases bound for County Courts of Law (CCL), the magistrate simply submits the completed application without making a determination. In both cases, the magistrate submits a complete package of case-related paperwork to the appropriate court, as the case eventually proceeds to the District Attorney's office to be filed.

Defendants who remain detained in jail must meet with counsel within 24 hours of determination of eligibility, so their appointment process is expedited. However, defendants, who are released from detention, do not typically have counsel appointed until their cases are formally filed in court. Then, they are issued summons for a first appearance or arraignment. According to the Texas Code of Criminal Procedure, they could indeed apply for counsel before this initial appearance, but it appeared from the interviews that these applications rarely happened.

At arraignment, most defendants released on bond go through the process of applying for appointed counsel and being deemed eligible, which often means that arraignments are reset for a later date to allow for defendants to meet with their attorneys. After this point, the adjudication process continues

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until disposition of the case, when the appointed counsel may submit to the presiding judge a final bill reflecting the hours s/he worked on the case. This bill is paid after review and approval by the judge.

### MAGISTERIAL WORKFLOW

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The interaction that defendants have with the court system happens in the jail with the magistrate. Figure 2 details what occurs during the magistrate hearing. This hearing happens within 24 to 48 hours of arrest at the jail. The magistrate reviews police report from the arresting officer to determine whether there is probable cause to proceed with the case. In cases where there is not, the magistrate may require further detail from the law enforcement agency or otherwise order the release of the defendant.

If there is probable cause to proceed, the magistrate holds a hearing with the detained defendant. He or she advises the defendant of his or her rights (including the right to court appointed counsel if the defendant cannot afford an attorney), explains the purpose of the hearing and the arresting charges, and asks questions about the defendant's background (e.g., employment and permanence of residence) to inform a decision about pretrial release and bail.

As reflected in Figure 2, the magistrate goes through a number of "decision points" or key questions to guide how the hearing proceeds. First, the magistrate only considers raising the issue of appointed counsel if the arresting charges are above a Class C Misdemeanor. (Defendants charged with Class C Misdemeanors are not eligible for appointed counsel.) Second, the magistrate asks the defendant whether s/he expects to be able to make bond and therefore leave the jail. If the defendant does expect to make bond, the magistrate does not ask the defendant whether he or she wishes to initiate a request for counsel. If the defendant does not expect to make bond or is unsure, then the magistrate will proceed with an explanation of the option of appointed counsel for qualified defendants and ask if s/he would like to pursue getting counsel.

If the defendant does wish to apply for appointed counsel, the magistrate will go through the process of completing the application with the defendant by running through the questions on the form. This form will ultimately be part of the package of paperwork that the magistrate delivers to the appropriate courts after all the hearings of the day. Here, however, there is some variation in the process depending on the class of the charge. If the defendant's case is bound for District Court (i.e., charged with a felony), the magistrate has been asked by the District Court judges to approve or deny the application at the time of this hearing. Therefore, in these cases, the defendant's application has already been reviewed (and potentially approved) within 24 to 48 hours of arrest.

If the defendant's case is bound for CCL (i.e., charged with a Class A or B Misdemeanor), the magistrate has not been given that instruction by the CCL judges, so the application is not reviewed at that time and submitted unsigned to the CCL. In both cases, the magistrate hand delivers these documents to both courts on a daily basis.

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### DISTRICT COURT WORKFLOW

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At this point, there are several groups of indigent defendants to consider.

1. Indigent defendants who are still in the community because they paid their bond.
2. Indigent defendants who are in jail during pretrial and *have applied but not been approved for appointed counsel (pending review by a judge)*.
3. Indigent defendants who are in jail during pretrial and *have been approved for appointed counsel*.
4. Indigent defendants who are in jail during pretrial and have not applied for appointed counsel (probably because they expected to be released on bond but failed to muster the resources).

In the case of district court (Figure 3), defendants in Group 1 who are out in the community are issued summons by the District Court indicating the date of the first court appearance and detailing what documentation will be necessary should they seek to apply for counsel. Indigent defendants during this time have the right to apply for indigent defense counsel if they inquire but are otherwise not provided with or sent any forms to apply for indigent defense counsel until arraignment.

Because the magistrate reviews and approves applications for appointed counsel, there are no defendants in Group 2 when it comes to district court. (They all fall in Group 3.) For those individuals who have had a Pauper's Affidavit signed and submitted by the Magistrate, they are quickly assigned counsel by the District Court Administrator (within 3 business days), and counsel must then meet with their new clients within 24 hours. These meetings may occur before the filing of an indictment and before the defense attorney has any information about the case.

Group 4 may proceed to arraignment never having applied for appointed counsel. These defendants probably expected to be released on bond but failed to muster the resources. The magistrate has usually informed these individuals that they can contact jailers and request an application for appointed counsel. The jail does not proactively identify these unrepresented individuals. However, the magistrate may review a jail report to identify these individuals and assist with a Pauper's Affidavit.

At the first appearance or arraignment, defendants who are represented by appointed counsel (coming from the jail) will typically have counsel waive arraignment and proceed to a pretrial hearing. By this time, an indictment has been returned and defense counsel would have reviewed the facts of the case. On the other hand, defendants who are coming to court unrepresented (typically in response to a summons) first meet with the clerk of court for intake. The clerk determines whether the defendant intends to retain counsel or apply for appointed counsel and provides the appropriate forms. Defendants seeking appointment of counsel will complete the form, often not having appropriate documentation as required and indicated on the summons, and swear to the accuracy of the statements made on the form to the clerk. The judge will review the application in open court and make a determination. If the judge approves the Pauper's Affidavit, the arraignment is reset for a later date to give defendants an opportunity to meet with their appointed counsel. (Counsel are appointed during this court appearance, as described below). If the judge denies the application, s/he issues an Order to Employ Counsel (OTEC) and resets the case for an OTEC hearing 30 days out to allow enough time for the defendant to retain counsel. The latter process is also used if a defendant indicates a desire to retain counsel from the start.

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If a defendant is qualified for appointed counsel, an attorney is appointed that day by the District Administrator from one of two lists of attorneys. List A includes qualified attorneys who are eligible to represent clients on any felony matter. List B includes qualified attorneys who are eligible to represent clients only on third degree felonies or state jail felonies. The Administrator goes down the list sequentially choosing the next A or B attorney, depending on the case. Sometimes attorneys may be skipped for other reasons, but reasons for deviation from the list are not systematically recorded. Once an attorney is selected, the defendant is provided with the contact information for the appointed counsel and asked to contact him/her. Again, all of this happens on the date of arraignment. After arraignment, the appointed counsel is provided with the appropriate paperwork and may contact the defendant directly. The criminal case proceeds through normal adjudication thereafter.

### COUNTY COURT OF LAW WORKFLOW

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As in District Court, there are four groups of indigent defendants considered in the County Court of Law (CCL).

1. Indigent defendants who are still in the community because they paid their bond.
2. Indigent defendants who are in jail during pretrial and *have applied but not been approved for appointed counsel (pending review by a judge)*.
3. Indigent defendants who are in jail during pretrial and *have been approved* for appointed counsel.
4. Indigent defendants who are in jail during pretrial and have not applied for appointed counsel (probably because they expected to be released on bond but failed to muster the resources).

Practices in the CCL (Figure 4) are no different than in District Court with respect to Group 1 defendants who are out in the community. Indigent defendants during this time must wait to apply for indigent defense counsel until arraignment. There are also no differences with respect to Group 4 – they may proceed to arraignment never having applied for appointed counsel, or affirmatively reach out the magistrate to file a Pauper's Affidavit while in jail.

Differences emerge with respect to Groups 2 and 3, because the magistrate may accept applications for appointed counsel but not approve or deny them. (Unlike in the District Court situation, there *are* defendants in both Groups 2 and 3.) These applications are submitted to the CCL, which are then reviewed by the CCL judges within 3 business days. During this time, the CCL Coordinators assign counsel to qualified defendants. Once appointed, counsel are expected to meet with their new clients within 24 hours. These meetings may occur before the filing of a bill of information and before the defense attorney has any details about the case.

At the first appearance or arraignment, defendants who are represented by appointed counsel (coming from the jail) will typically have counsel waive arraignment and proceed to a pretrial hearing. By this time, an information should have been filed and defense counsel would have reviewed the facts of the case. On the other hand, defendants who are coming to court unrepresented (typically in response to a summons) first meet with the CCL Coordinator for intake. The CCL Coordinator presents defendants with one of three options for representation: (1) *pro se* or self-representation; (2) retained counsel; or (3) appointed counsel for qualified, indigent defendants.

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If a defendant decides to proceed *pro se*, s/he must fill out a form to waive the right to counsel before the judge and then may proceed with the arraignment.

If the defendant decides to retain counsel, the judge will issue an Order to Employ Counsel and the arraignment is reset for 30 days out to allow enough time for the defendant to retain counsel.

If the defendant decides to apply for appointed counsel, the CCL Coordinator provides the defendant with the appropriate form to complete. Typically, defendants often do not have appropriate documentation as required and indicated on the summons. Once completed, defendants are asked to swear under oath to the accuracy of the statements made on the form to the CCL Coordinator. The judge reviews the application in open court and makes a determination about eligibility. If the judge approves the Pauper's Affidavit, the arraignment is reset for a later date to give defendants an opportunity to meet with their appointed counsel. (Counsel are appointed during this court appearance, as described below). If the judge denies the application, s/he issues an Order to Employ Counsel and resets the arraignment for 30 days out to allow enough time for the defendant to retain counsel.

A regular practice is for defendants to pursue self-representation first in order to resolve the case more quickly. In these cases, defendants will discuss their cases with the district attorney that day and try to negotiate a deal. If the defendant is unsatisfied, s/he returns to the CCL Coordinator to pursue one of the other two options – often the option of appointed counsel. JMI field staff did not make a determination about the advice judges give these defendants or whether they specifically address collateral consequences of criminal conviction.

For cases in which the defendant is found to be indigent, appointed counsel are selected that day by the CCL Coordinator from a list of attorneys called the “wheel.” The wheel is simply a running list of attorneys housed in Odyssey, the information system for the County court system, and the Coordinator goes down the list sequentially to choose an attorney. Sometimes attorneys may be skipped, but reasons for deviation from the list are not systematically recorded. Once selected, the defendant is provided with the contact information for the appointed counsel and asked to contact him/her. Again, all of this happens on the date of arraignment. After arraignment, the appointed counsel is provided with the appropriate paperwork and may contact the defendant directly. The criminal case proceeds through normal adjudication thereafter.

### WORKFLOW EXPEDITERS

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As has been described in part already, defendants who remain in pretrial custody trigger certain “expediters” or truncated processes to ensure that their detention before adjudication is not unnecessarily long. One such expeditor is the review of their Pauper's Affidavits within 3 business days and the subsequent requirement that they meet with counsel within 24 hours of assignment.

The other major expeditor relates to the filing of an information or indictment. For Class A misdemeanors, the district attorney must file an information within 30 days of arrest for defendants who are in custody. For Class B, an information must be filed within 15 days. For felonies, an indictment must be filed within 90 days. If these timeframes are violated, then detained defendants are eligible for release on a personal recognizance bond (PR bonds). The magistrate regularly reviews a jail report with lengths of stays and issue PR bonds in these cases. Once a month, the magistrate compiles a list of

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those defendants charged with a felony who have been in jail for more than 90 days without indictment and sends that list to the District Court Coordinator. However, the district attorney in felony cases has been requiring that defense counsel submit *writs of habeas corpus* in these cases, before a PR bond is granted. Defense attorneys decide whether to file a Motion for Writ of Habeas Corpus for a hearing before a District Court Judge.

### PAYMENT PROCESS FOR APPOINTED COUNSEL

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The final stage of the indigent defense process for appointed counsel involves filing for payment (Figure 5). Typically, appointed counsel will submit a request for payment at the conclusion of a criminal case, but there are notable exceptions.

First, appointed counsel may submit motions for funds to pay for experts, such as mental competency evaluators. These may be submitted at any time during the adjudication of the criminal case and are reviewed by the judge, who must approve them for payment. The judge may approve the full amount or a partial amount. When the judge approves a partial payment, defense counsel may file additional motions for additional funds if the approved amount is insufficient. Defense counsel interviewed indicated that the process of continuing to cycle through a number of requests for funds was common. Once approved, the order to pay is issued by the judge to Auditor's Office who ultimately renders payment. Second, appointed counsel may submit partial payment vouchers for their own work before the case is disposed. This practice is more common in longer, complex cases.

However, typically, appointed counsel will submit for payment at the conclusion of the case, sometimes even at the final hearing/ disposition. Appointed counsel are asked to submit itemized "bills" that enumerate the number of hours spent and the activities conducted. The judge presiding over the case will review the voucher. In considering the voucher, the judge will consider whether the number of hours billed is appropriate and may adjust the number upward or downward. The judge will also consider what amount to pay for the case. In some cases, such as guilty plea agreements for DWIs or Harassment, there are fixed fees of \$300 for the first case and \$50 for each additional case. In other cases, such as felony pleas or trials, there are ranges of fees, such as \$500 to \$650 or \$400 to \$750 per day (Attachment A). Judges will determine how much to compensate appointed counsel within these ranges. Once the judge has made a final determination, s/he will submit an order to pay with only the total payment amount to the Auditor's Office, who then issues payment. Details about how the amount was determined are not enclosed with those checks. Rather, any such paperwork would be kept in the court record.

### CONSIDERATIONS FOR IMPLEMENTATION OF CLIENT CHOICE

In the process of documenting these workflows, the Justice Management Institute made a number of observations that should inform the design of the Client Choice Program. These observations are shared below for consideration by the Client Choice Working Group, as it considers how to introduce and integrate this new program into Comal County.

### DATA LIMITATIONS

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Qualifications of appointed counsel. All appointed counsel must submit their qualifications for consideration by the judiciary of either the District Court or the County Court of Law, depending on

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which kinds of cases they want to handle. Judges review the applications and make determinations of qualifications based on their experience of what it takes to handle the types of cases in their courtrooms. The process is validated by the review of the applications of the all of the judges, who must come to majority agreement before an attorney is qualified for the appointed counsel list.

Once counsel are added to the list of potential appointed counsel, their qualifications for continued service on the appointment panel is reviewed several times a year – between 2 and 4 times a year. Again, qualifications are reviewed by the judiciaries of each court. These reviews are intended to identify individuals who may need to be removed from the list or promoted or demoted (in the case of District Court which has two classes of appointed counsel). Judges will also consider new applications, as described above, during these meetings. Judges must reach majority or consensus decisions in order to take action based on their review of performance.

Determination of compensation for appointed counsel. Comal County has a fee schedule for a variety of case types and disposition types that guides how appointed counsel are compensated. Judges are responsible for reviewing itemized vouchers from appointed counsel, detailing the work they did and the number of hours spent on a case. While in some cases, such as basic pleas, there are fixed fees, in other cases, such as longer cases, more complex cases, and trials, there are ranges of fees that may be paid. In these instances, judges use their discretion about the amount within those ranges to pay. Furthermore, judges are responsible for determining the reasonableness of the hours claimed and may reduce the number of hours considered for compensation. These decisions are guided by the judge’s experience with the case (judges only review vouchers submitted for cases heard in their courtrooms) and by their overall experience with the complexity of certain cases and matters of law. This area is another place where the information system is limited, because details about the original voucher and the decisions made by the judge are not captured in Odyssey. Hard copies of the voucher are retained in the paper file with the court, while the instruction to pay is submitted without detail to the Auditor’s Office, from which a check is sent to the appointed counsel (again without detail).

Overrides of the random assignment of appointed counsel. Both the District Court and the CCL use sequential lists of qualified counsel to appoint counsel to the cases of indigent defendants. However, there are instances in which the Court Administrator or Coordinator will override the system by skipping down the list. For example, in District Court, the Court Administrator may skip down the list because the case type calls for a List A attorney but the next name is that of a List B attorney. In other cases, names may be skipped because the judge makes a more nuanced determination that the attorney may not be a good match for the type of defendant or case. For example, the JMI field staff heard of instances when counsel would be skipped because they had already been assigned too many child sex abuse cases, and these cases are especially demanding on attorneys. Attorneys may also be skipped because the defendant needs a bilingual attorney. Other reasons include leaves of absence or illness. These overrides of the regular list rotation are not recorded or tracked systematically nor are the reasons for them. As a result, JMI is not able to determine their frequency or the most common reasons for them.

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### LIMITED KEY QUANTITATIVE, AGGREGATE SYSTEM DATA

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Availability of process-level data. Existing information systems are not equipped with standard reports that track the number of cases or defendants that enter or leave the system at key decision



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points. In other points, the data necessary for a “fall out” analysis are not readily available. For instance, based on the standard reports generated by both courts, JMI was not able to determine the proportion of defendants who retain their own counsel, seek appointed counsel, or proceed as self-represented. Likewise, JMI is not able to determine the number of defendants who apply for appointed counsel but are denied counsel. The existing data system – Odyssey – is used across agencies, which provides an opportunity for data mining. In brief discussions with the Information Technology Department, JMI learned that custom reporting is possible if not potentially resource intensive. However, some data are not entered into the data system at all (such as denied applications for appointed counsel) or recorded in any way (such as the frequency of defendants in CCL proceeding to speak with prosecutors first before deciding whether to proceed as self-represented or to apply for appointed counsel).

### VARIATIONS TO CONSIDER IN CASE PROCESSING

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Differences in approval process for requests for court appointed counsel. As described earlier in this report, the magistrates are empowered to approve applications for appointed counsel when defendants are bound for District Court. However, in the case of defendants bound for CCL, information to complete the applications is taken by the magistrates, but ultimate review and approval must await receipt by one of the two CCL judges.

Access to appointed counsel after magisterial hearing. Earlier in this report, JMI related that magistrates engage in lengthier discussion about the availability of appointed counsel based on the defendant’s indication that s/he can post bail. (However, the magistrates do apprise all defendants of their right to counsel briefly during magistration.) For those defendants who do post bail, they return to their communities and will ultimately receive a summons in the mail indicating their next court date. However, it is not clear how these defendants would seek appointed counsel *before* that first appearance. Indeed, it appears from the interviews that most bonded defendants come to their initial court appearance without counsel but with the intention and need to apply for appointed counsel. For those defendants who expected to post bond but who ultimately did not, there is some risk that those individuals may get lost in the system. In other words, they may stay in jail until their first appearance without the benefit of representation. These defendants may raise particular concern since the Comal County system is clearly designed to expedite the adjudication of cases where the defendant is in custody (e.g., their application for counsel must be reviewed and counsel appointed within 3 business days, and then counsel must visit them within 24 hours).

### NEXT STEPS

As described in the introduction, the Justice Management Institute will continue to work with the Client Choice Working Group to design an appropriate process and outcome evaluation for the program as it is implemented in 2014. The data collected from JMI’s field visit and summarized in this report should inform the design not only of the evaluation but of the program design itself. Per the considerations outlined in this report, the Working Group might consider how current practices in Comal County, Texas might be refined alongside the implementation of client choice in order to enhance the impact of change as well as the transparency of its outcomes on defendants and the broader administration of justice.