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INTRODUCTION

Comal County, Texas is a small county of 129,048 residents, situated between and Austin and San Antonio.[1] Felony cases are handled by four judges in the District Court in Comal County, and misdemeanors by two judges in County Courts at Law (CCAL). In FY2015,[2] the District Courts added 594 felony cases and disposed of 501. The courts had 737 active criminal cases pending as of August 31, 2015.[3] That same year, lawyers assigned to indigent defendants were paid for 445 non-capital felony trial cases.[4] The CCAL added 2,065 misdemeanor cases and disposed of 1,957 during the same fiscal year. On August 31, 2015, the CCAL had 3,002 active criminal cases pending. Lawyers assigned to indigent defendants were paid for 901 misdemeanor cases that year.[5] The total indigent defense costs, which includes lawyers' fees and other case-related costs, was $800,026 for Comal County in FY2015.[6]

Indigent defense representation in Comal County has been 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 County Court fee schedules.[7] Consistent with practice in counties throughout the country, judges appointed lawyers to indigent defendants. The mechanisms vary, but in Comal County, District and CCAL judges both used an established rotation system, with exceptions made only when special circumstances required.

In 2012, the Texas Indigent Defense Commission (TIDC) and the Texas Court of Criminal Appeals 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 Jim Bethke, Executive Director of the TIDC; Edwin Colfax, Grant Program Manager at the TIDC; and Professor Norman Lefstein of the Indiana University Robert H. McKinney School of Law. Professor Steven Schulhofer of the New York University School of Law also volunteered his expertise to the project.[8] Comal County's judges and six members of the private criminal defense bar were also involved in the planning process.

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[1] See U.S. census estimate, *available at* http://www.census.gov/quickfacts/table/PST045215/48091.

[2] The 2015 fiscal year is the period from September 1, 2014 to August 31, 2015. Fiscal years referred to in this report are always between September 1 and August 31, with the year of the end of the period defining the fiscal year's designation. In this example, the period ends in August 2015, so the fiscal year is designated FY2015.

[3] 2015 Annual Statistical Report, District Courts, Summary by County. Texas Judicial Branch. Accessed December 1, 2016 at http://www.txcourts.gov/media/1194391/4-District-Summary-by-County-Excel.xls

[4] Quick Stats FY 2015, Comal County. Texas Indigent Defense Commission. Accessed on December 1, 2016 at http://tidc.tamu.edu/public.net/

[5] 2015 Annual Statistical Report, Statutory County Courts, Summary by County. Texas Judicial Branch. Accessed December 1, 2016 at http://www.txcourts.gov/media/1301980/4-SCC-Activity-by-County-Summary-Excel.xls

[6] Quick Stats FY 2015, Comal County. Texas Indigent Defense Commission. Accessed on December 1, 2016 at http://tidc.tamu.edu/public.net/

[7] The Comal County District Court fee schedule is *available at* http://tidc.tamu.edu/IDPlanDocuments/Comal/Comal%20District%20Court%20Attorney%20Fee%20Schedule.pdf. The fee schedule for the Comal County Court is *available at* http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=409.

[8] 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 previously cited. *See* notes xx and xx *supra*, Chapter x.

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.

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 the 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. Extensive interviews were conducted with system actors including judges, court administration, the district attorney, and lawyers participating in the assigned counsel program.

JMI's outcome evaluation assessed 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 considered as part of JMI's evaluation.

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 own 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 agency to indigent criminal defendants. These policy arguments as well as the conceptual model are discussed in further detail throughout this report.

FOUNDATION FOR A CLIENT CHOICE MODEL

In its historic *Gideon* decision, the United States Supreme Court held that defendants charged with a felony in state courts, who are unable to afford a defense lawyer, are entitled to legal representation as a matter of constitutional right.[9] The right to counsel also applies to most defendants charged with misdemeanor offenses in state courts.[10] However, neither Supreme Court decisions nor federal

[9] 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.

[10] Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel applies to misdemeanor cases that results 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 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).

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.[11] 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.[12] In some jurisdictions, an agency or program, independent of the court system, assigns assign lawyers to indigent defendants.[13] The latter practice is consistent with the American Bar Association's recommendation that judges should not appoint defense lawyers to criminal cases, in order to maintain the independence of the defense function.[14]

In other countries, one model that has emerged is to provide indigent defendants the agency to choose their own lawyers. Yet, this process for assigning lawyers to defendants without resources to hire their own counsel hasn't been tested in the United States. In England, Scotland, and Wales, as well as in other British Commonwealth countries, defendants may select their own defense lawyer from among those available and deemed qualified to provide representation.[15] Indeed, in Edinburgh, Scotland, it was the public defender program that supported introducing a choice model in an effort to strengthen trust and confidence between attorney and client.[16] An empirical study conducted in Edinburgh had 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.[17]

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

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[11] 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.

[12] 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).

[13] For example, in Massachusetts, private lawyers are appointed by the Committee on Public Counsel Services, which function as the state's public defender agency. *See* Lefstein, Securing Reasonable Caseloads, *supra* note 3 at 196, 220-21. 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. 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).

[14] ABA Providing Defense Services, *supra* note 6, 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.")

[15] *See* Norman Lefstein, Securing Reasonable Caseloads: Ethics and Law in Public Defense 241-44 (American Bar Assoc. 2011) (hereafter Lefstein, Securing Reasonable Caseloads).

[16] Lefstein, *In Search of Gideon's Promise*, *supra* note 9, at 915-16 and n. 528.

[17] *Id*. at 915.

Arguments For and Against Legal and Policy Foundation for Client Choice

As news has spread of this unprecedented model in the United States, Client Choice has invited 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 XXX for a brief written 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. The free market model created in a choice model applies incentives for lawyers in private practices to do the best work possible on behalf of clients or "customers."[18] 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 the 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, lawyers presumably 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, some of these system actors may select lawyers who will dispose of cases more quickly, so as not to consume substantial judicial time or tie up busy trial court calendars.

The hypothesis is that by serving the defendant as the "customer," defense lawyers will invest more in each case and build their skill sets in order to attract the business of more clients. Regardless of the compensation paid to the lawyers, 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

[18] 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 WASHINGTON LAW REVIEW (forthcoming 2016) [hereafter Moore, *The Antidemocratic Sixth Amendment*]; Stephen J. Schulhofer, *Client Choice for Indigent Defendants*, 12 OHIO ST. J. CRIM. L. 505 (2016) [hereafter, Schulhofer, *Client Choice for Indigent Defendants*]; LEFSTEIN, SECURING REASONABLE CASELOADS, *supra* note 3 at 241-49; 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]; Janet C. Hoeffel, *Toward a More Robust Right to Counsel of Choice*, 44 SAN DIEGO L. REV. 525 (2007); Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L. J. 835 (2004) [hereafter Lefstein, *In Search of Gideon's Promise*; 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) (hereafter Holley, *Rethinking the Sixth Amendment for the Indigent Criminal Defendant.)*

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, as discussed above, at the behest of public defenders specifically to build trust and confidence among defendants, and it is still strongly supported by defense lawyers today. In 2013, when England's Ministry of Justice proposed eliminating client choice from the public defense system, there was significant protest from British defense lawyers. Ultimately, the Ministry of Justice abandoned its proposal, and client choice was preserved.[19]

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."[20]

- 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. On the other hand, those who support this notion, posit that judges are best positioned to choose appropriate lawyers for indigent defendants. Allowing uninformed defendants to choose their own lawyers would presumably not increase quality of representation, but quite possibly result in worse outcomes.[21]

- 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, because they feel a sense of idealism and service to a higher cause to represent 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.[22]

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[19] *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."

[20] Schulhofer, *Client Choice for Indigent Defendants*, *supra* note 9, at 532.

[21] Schulhofer, *Client Choice for Indigent Defendants*, *supra* note 9, at 533.

[22] Schulhofer, *Client Choice for Indigent Defendants*, *supra* note 9, at 536.

- Client Choice compromises the effectiveness and efficiency of the criminal justice system. In *United States v. Gonzalez-Lopez,*[23] the Supreme Court addressed the issue of choice among defendants who could afford their own lawyers (i.e., not indigent defendants). However, 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."

  The basic thrust of this decision is that affording indigent defendants the ability to choose their own 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 the 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."[24]

Clearly, there are strengths and weaknesses on both sides of the argument for/against client choice. Nonetheless, Professor Lefstein, along with many other legal scholars, have suggested that given variation in assignment practices and concerns about the quality of representation under different assignment models, the efficacy of a client choice model should be tested in the U.S.

METHODOLOGY

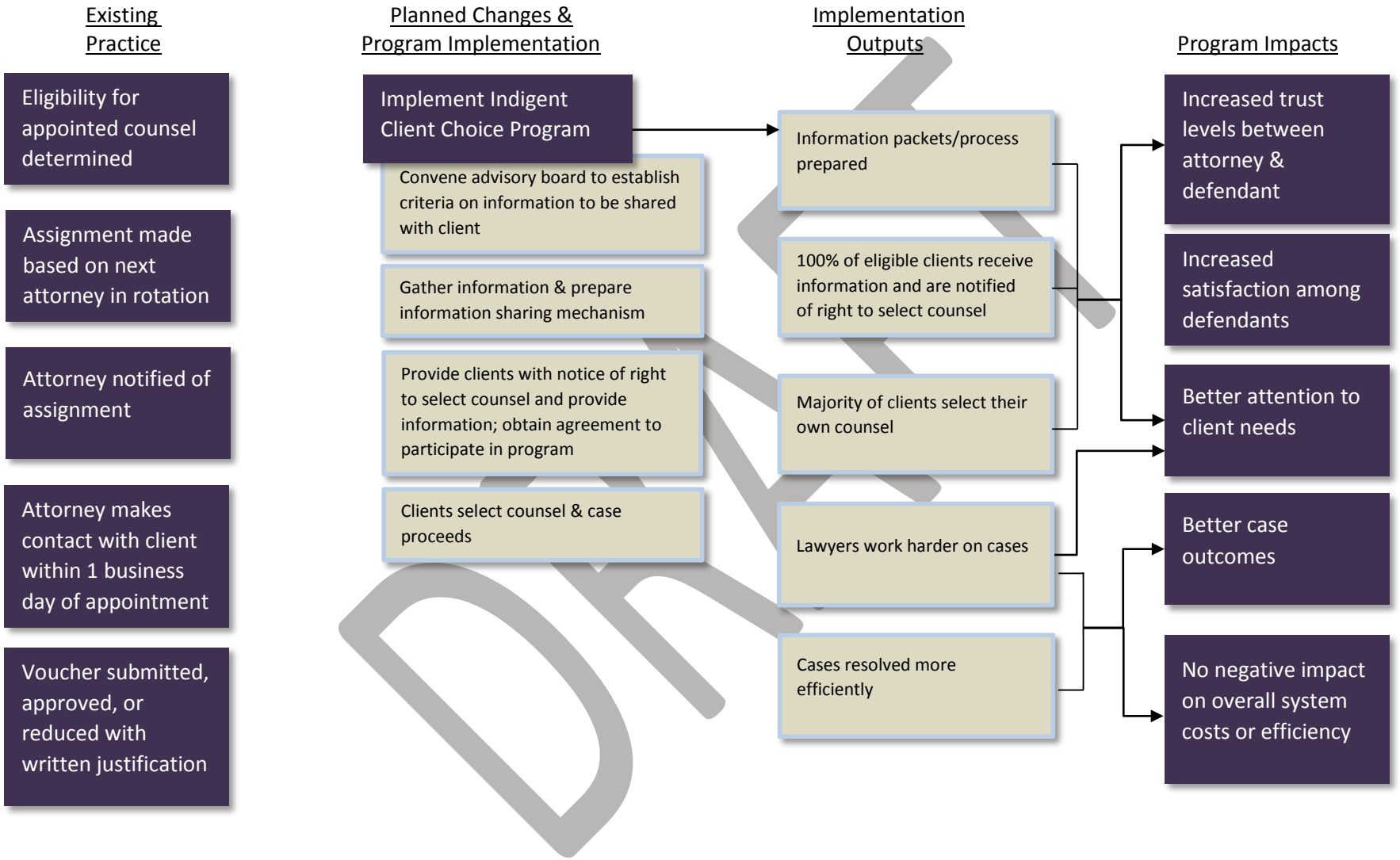
The implementation of Client Choice in Comal County presented a unique opportunity to test assumptions and hypotheses put forth in arguments for and against choice models. Indeed, JMI incorporated these into research questions addressing what the impact of allowing indigent defendants to select their own lawyers might be 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 own 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 what impacts Client Choice may have – positive or negative – were ultimately incorporated into a conceptual model that JMI used to evaluate the program (see Exhibit XXX).

[23] 548 U.S. 140 (2006).
[24] Lefstein, *In Search of Gideon's Promise*, *supra* note 9, at 917.

Exhibit 1: Client Selection Program: Conceptual Model



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 and 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 own lawyers and those for whom the court chose lawyers. Specific areas that were addressed to assess the effects on defendants, case processing, and the system overall included:

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

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 adjudication process, and the perception of system actors of the impacts the program had 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 CCAL in Comal County to establish a baseline for the process evaluation. Field staff documented how indigent defendants are identified, how their lawyers are assigned, and how these lawyers are compensated for their indigent defense work. Seventeen interviews were conducted with representatives from all of the major stakeholder groups, including the District Court and CCAL 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 informants.

This baseline study and the review of the program plan, developed with JMI staff as participant observers, were then compared to another qualitative study after Client Choice had been implemented. In December 2015 – ten months after the February 2015 launch of Client Choice – JMI began the second phase of its process evaluation by conducting a greater number 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 and subsequently by teleconferences over the course of several months into 2016. JMI led these interviews, with assistance from Professor Lefstein. Professor Lefstein's notes from the interviews were used as an additional point of verification for the information collected, but all

efforts were taken by JMI to ensure that any bias that may have come from his involvement as a member of the principal team that designed Client Choice were mitigated. Multiple JMI staff were present during the interviews and all notes were cross referenced with those of 1-2 JMI staff members present during the interviews with Professor Lefstein. In total, JMI interviewed 34 system actors, including 13 who had participated in the pre-implementation system review.

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 able to speak to how Client Choice impacted them and their colleagues on the appointed counsel list, as well as to their own experiences with both clients who had chosen them through Client Choice and clients who elected to have the court make the choice.

The Comal County judiciary maintains three lists of lawyers eligible to be appointed to criminal cases against indigent defendants. The District Court maintains two lists: one of lawyers eligible to handle the most serious felonies and another for lawyers eligible to represent indigent defendants only on less serious felonies. The County Court at Law (CCAL) maintains a single list of eligible lawyers for misdemeanor cases. At the time of the post-implementation review, 13 lawyers were eligible to handle the most serious felonies in District Court. An additional 17 lawyers were qualified by the court to handle less serious felonies. Twenty-five lawyers were listed separately as eligible to be appointed in CCAL cases, with significant overlap with the two District Court lists.

The 22 lawyers interviewed represented a broad cross-section of practitioners in the Comal County criminal courts. JMI interviewed seven lawyers who could represent any felony in District Court and another nine lawyers who were eligible to represent indigent defendants only on less serious felonies. Six CCAL-eligible lawyers were also interviewed. The 22 interviewed lawyers represented was 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 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.”

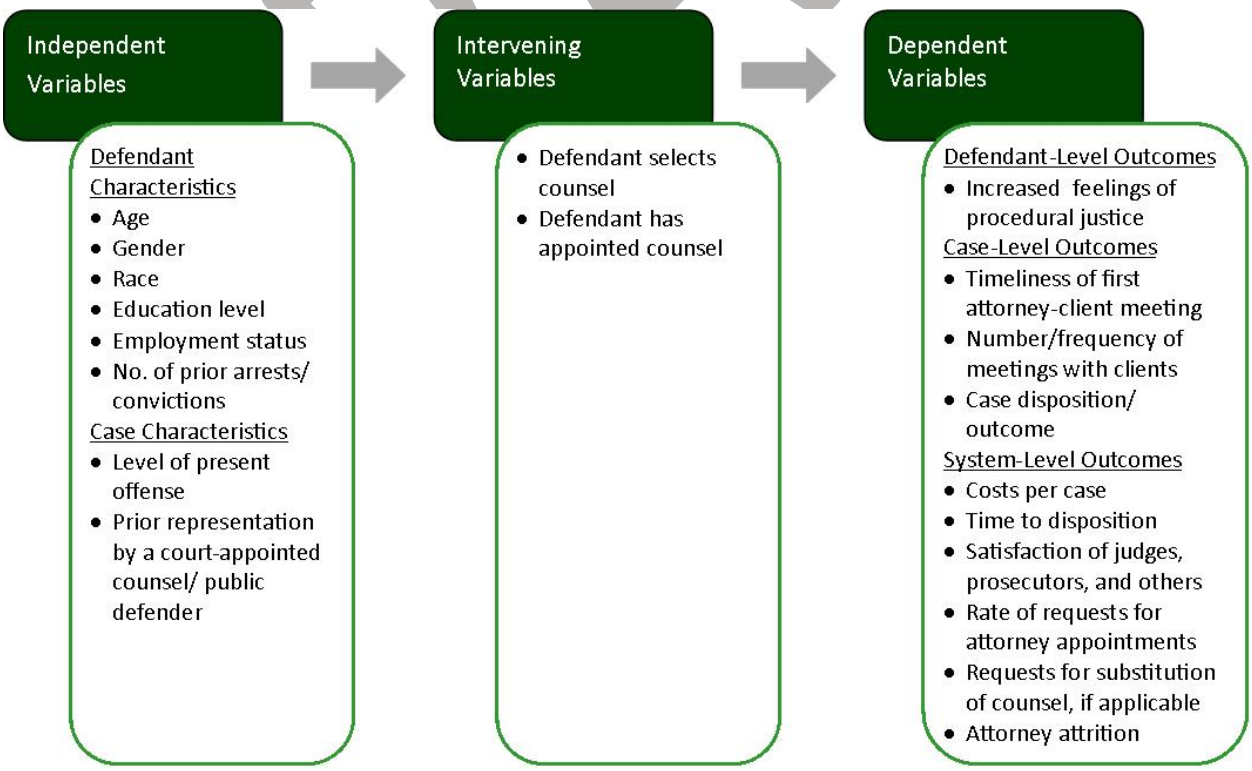
Outcome Evaluation

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 administered by a member of the evaluation team, who did not work with the justice system. Additional information about case type, disposition, and sentencing was collected from the Comal County online court records. The total sample size of 301 was heavily skewed toward defendants during the pre-test period, who accounted for more than 80% of the sample. During the pilot phase of the program, JMI received surveys from only 53 defendants, resulting in a highly uneven sample. To account for this, the data were weighted prior to analysis. Even with adjustments, generalizing conclusions from the findings should be avoided given the relatively small sample sizes.

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.



Defendant Characteristics

In 2014, prior to the February 2015 launch of Client Choice, 119 defendants were interviewed to set a baseline for their satisfaction with the Comal County criminal justice system and for their sense of procedural justice. After the launch of Client Choice, another 53 defendants were interviewed using same survey, with only the addition of a few items regarding their knowledge of and experience with Client Choice. Ten of the 53 respondents opted to have the court to choose their defense lawyers in the conventional way, and the other 43 chose their own lawyer through the new program.[25] Table XX compares the demographics of respondents to the pre-survey and respondents to the post-survey who participated in Client Choice.

Table XX. Comparison of Respondents to Pre-Survey in 2014 and Post-Survey in 2016

Characteristic	Pre-Test (n=119)	Post-Test (n=53)
Gender	71.4% Male 28.6% Female	81.4% Male 18.6% Female
Average Age	33 years	34 years
Race		
White	53.8%	62.8%
Black	6.7%	11.6%
Latino/Hispanic	34.5%	20.9%
Other	5.0%	4.7%
Education Level		
No schooling	3.4%	2.4%
K-8	1.7%	0.0%
9-12 (no degree)	20.3%	9.5%
HS Degree/GED	50.0%	59.5%
1-4 years college (no degree)	13.6%	26.2%
AA/AS or Professional Certification (not Bachelors or Master's degree)	5.9%	2.4%
BA/BS Degree	4.2%	0.0%
MA/MS Degree	0.0%	0.0%
PhD/ED/JD	0.8%	0.0%
Average Number of Prior Convictions	4.39	4.78

[25] The smaller post-test sample size can be attributed to a number of factors, including the relatively low volume of the courts in Comal County, Texas as a smaller justice system, confusion about who was responsible for collecting post-data among certain system actors, and logistical issues related to tracking defendants post-disposition. Also, as mentioned later in the report, while the implementation process was generally not perceived as disruptive, the activities related to data collection for the evaluation process were. As a result, a handful of system actors abandoned documenting process data when they felt that those activities were interfering unreasonably with their day-to-day responsibilities.

Had a Public Defender Before	76.1% Yes 23.9% No	65.1% Yes 34.9% No
Highest Current Charge	52.9% Misdemeanor 47.1% Felony	29.7% Misdemeanor 70.3% Felony

Whereas there are some key similarities among the pre- and post-test samples, the most significant difference is the size of the samples and the greater representation of defendants with felony cases among the post-test respondents. The post-test sample is too small to allow for meaningful analysis of the population of defendants who opted for Client Choice, relative to the pre-test respondents. As such, the data were weighted, as noted above, and analyses focused primarily on observed differences between those defendants who selected their own attorneys and those for whom the court appointed attorneys.[26]

THE PROCESS OF EXTENDING CHOICE TO INDIGENT DEFENDANTS

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 seems to have gone smoothly with only some variations from the original plan. Lawyers generally felt 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, not just the lawyers representing indigent defendants, observed specific and non-specific improvements in practice and/or satisfaction by defendants and their lawyers alike.

The Implementation of Client Choice Relative to the Original Design

In total, JMI interviewed 39 system actors in 2013 and 2015 to document changes in the adjudication process and assess how successfully 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 more lawyers participating in the appointed counsel program.

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

[26] The comparison group (i.e., those defendants whose attorneys were appointed for them) included both defendants who were offered Client Choice and opted out (n=10), along with a portion of pre-test defendants to improve the balance in the sample size.

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

Magistrate Intake at Jail

Most defendants arrested by police usually have their first interaction with the court 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 the law enforcement or otherwise order the defendant's release.

Probable cause is, however, found in most cases, so the magistrate holds 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 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 above a Class C Misdemeanor, since misdemeanors below this level are not eligible for appointed counsel. Additional criteria with respect to the defendant's expectation to make bond were no longer considered early in the implementation of Client Choice. 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. The intake process remained unchanged under the Client Choice.

Application for Eligibility and Selection of Counsel

When Client Choice was implemented during the first week of February 2015, the previous practice of assignment changed. The magistrates continued the practice of asking whether an indigent defendant wanted appointed counsel. Eligibility for appointed counsel was determined through a standard eligibility screening. Whereas previously defendants were not provided with a choice about how to have lawyers appointed to represent them, the magistrate asked defendants whether they would like to have the court decide which lawyer would represent them or whether they would like to select their own lawyer (Client Choice).

Defendants who did elect to choose their own lawyer were then excused from the hearing and afforded time, usually about fifteen minutes, to review a binder of Lawyer Information Forms (LIF), containing basic information about each available lawyer on the appointed counsel list.[27] The time afforded to

[27] The LIF provided 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 any 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.

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 of the lawyer) deviated from the original program design.

Under Texas law, indigent defendants must receive appointed counsel within 72 hours of their request. 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 because of concerns about delaying the processing of defendants. The principal magistrate therefore decided to provide defendants less time. 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 made a decision about which lawyers they had chosen.

The associate magistrates, who typically cover hearings during weekends, reportedly did not complete all of the necessary paperwork related to indigency and forms indicating defendants' choice of their own lawyers, again because of the extra work involved. Instead, these cases and defendants were postponed until the lead magistrate returned, causing further delays.

From the perspective of defendants, this stage of the process (and the point at which defendants who were not in custody had to choose lawyers at first appearance) was initially confusing. Again, 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.[28]

Decisions about the information provided on the LIF were made during the implementation stage. The format of the Lawyer Information Form was ultimately dictated by (1) what was allowable by ethical standards regarding advertising[29] and (2) what the advisory group of lawyers thought would be acceptable and practical for local appointed counsel. Nevertheless, the lead magistrate 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). However, several system actors, including the lead magistrate, 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 these forms. 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.

[28] As noted previously, the Selection of Lawyer Form completed by defendants 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. See Chapter xx at note xx *supra* and accompanying text.

[29] *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.

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 CCAL, the magistrates only submitted the completed eligibility application and the determination was made by the County Court judge. Unrelated to the launch of Client Choice, the courts decided to make the process uniform so that all determinations were made by magistrates. As indicated above, eligible defendants would also have indicated on the eligibility form that they want the court to choose a lawyer on their behalf or that they want to select their own lawyers (by making a list of their three top choices, from which one would be chosen).

Eligible defendants were appointed counsel by either a District Court or County Court (CCAL) judge, depending on the severity of the charges against the defendant (i.e., felony or misdemeanor). 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 may be skipped, even if next on the "wheel," but the reasons for deviation were not systematically recorded.[30]

Once a lawyer was appointed, the defendant was provided with the lawyer's contact information and 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. During this appearance (arraignment), the appointed lawyer was provided with materials related to the defendant's case, including contact information for his or her client. For those defendants who were not in custody, this process took place at the first appearance.

The court maintained three lists of lawyers who were accepted by the bench to serve as free, appointed counsel for indigent defendants. The District Court maintained two lists:

- The first list (commonly referred to as "List A") included lawyers qualified by the bench to represent indigent defendants in the most serious felony cases in District Court.
- 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).

CCAL maintained its own list, which included lawyers deemed eligible to represent defendants with misdemeanor cases in County Court. Lawyers who were qualified to higher level lists could choose not to be assigned lower level cases and therefore opt out of being included on those lists. None of the lists are published by the courts.

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 did elect to participant 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 by their first appearance. Those defendants who had not been detained and who wanted to choose their own lawyers came to first

[30] 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.

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.[31] 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 to their first or second choices.

Although there was some additional time taken to have primarily out-of-custody defendants choose their own 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 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. In addition to out-of-custody, indigent defendants who needed to make their selections in court, if they elected to participate in Client 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 did add some time to the typical administrative process in the court, yet only one of five interviewees directly involved in this part of these steps of the process reported that the additional time was significant.[32]

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 CCAL. At this time, an indictment or information was already filed in the District or County Court, respectively. For those defendants who were assigned to counsel at first appearance, they were provided with contact information for their assigned lawyers and the arraignment was reset to allow them time to confer with their defense lawyer.

Stakeholder Perceptions of Changes in Defense Representation

To capture stakeholder perceptions about changes in defense representation and the overall adjudication process, JMI conducted interviews with 34 systems 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 CCAL judges, three members of the court administrative and coordination staff for both courts, the District Court Clerk, the lead Magistrate Judge, and the District Attorney and Chief Prosecutor. Defense lawyers had the most feedback to provide regarding changes in practice, as often other stakeholders, notably judges and prosecutors, did not necessarily know whether

[31] 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 may also remove themselves temporarily from receiving all or some types of cases.

[32] However, four of the five respondents who were involved in these assignment process did report the additional steps necessary to support the *evaluation* of Client Choice were time consuming and slowed down the processing of cases. These activities, such as maintaining logs of how lawyers were chosen and collecting pre-implementation and post-implementation surveys, reportedly had a negative impact on the capacity of the court to keep its typical pace.

defendants had participated in Client Choice. However, where there were comments provided by the other system actors, they are provided below.

In addition to exploring the success and seamlessness of the implementation process, JMI sought to determine what some of the procedural justice and quality outcomes might be, when defendants did exercise choice. Claims made during these interviews were checked against data collected from Comal County criminal justice system and the Texas Indigent Defense Commission. All interviews adhered to standardized protocols and were conducted under promise of anonymity.[33]

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 individuals responsible for one courtroom reported participation as low as ten percent. Review of the appointment logs shows that, between February 1, 2015 and January 31, 2016, 72.5 percent of all assignments of counsel to indigent criminal defendants were Client Choice (800 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 own lawyers. There was some skepticism that Client Choice would bring about a disastrous 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 (and 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. These three lawyers, like all of the other lawyers in the appointed counsel program, did no advertising and took no new steps to promote themselves. Because of the high volume of cases, two of these lawyers chose to remove themselves from the lists of available lawyers for appointment. (These individuals would later make decisions to accept appointed counsel cases again.)

Upon review of the assignment data, JMI did find that indeed there were *two* lawyers, who were chosen at a disproportionately high rate, and, at their peak, these lawyers were assigned 44.2 percent of all of the indigent case across District Court and CCAL. However, consistent with the interviewees' reports, the assignments did begin 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 assignments.

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.

[33] Copies of the protocols used are included in Appendix xx.

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, like 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[34].

The drivers of this phenomenon of a handful of lawyers receiving a third of all indigent cases are less clear. 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, higher profile win (despite prior experience). Two court staff and at least two lawyers interviewed also suggested that the alphabetical listing of the Lawyer Information Forms in the selection binder 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.[35]

Generally, lawyers did not report an impact on the balance between their retained cases and their indigent defense cases (assigned cases). Three of the 22 lawyers interviewed differed with this report, claiming that they were losing paying clients who would, although qualified as indigent, would have leveraged other resources, such as "grandma," to pay for the defense representation of a lawyer they respect and believe would serve them well. One lawyer reported that after a defendant learned that he could be assigned to this particular lawyer, he abandoned his original plan of mustering the resources to retain him/her as private counsel. Most the lawyers making these claims reported that when they removed themselves as available for appointment to indigent defendants' criminal cases, they were able to attract more private cases.

[34] Although out of the scope of this study, JMI did have 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 being 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.

[35] JMI reviewed the assignment patterns in District Court and in the CCALs and could not find data to support to support this claim.

However, the available data provided from the District Courts and CCALs do not support the observations of these few lawyers. In fact, there was no change in the proportion of cases with retained versus appointed counsel (and the number of lawyers participating in the appointed counsel program remained the same). 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, CCAL did not see a change. The percentage of cases were a Paupers Affidavit was filed was 62.9 percent pre-implementation and 62.2 percent post-implementation (a difference of -0.7 points). So, although the phenomenon described by three lawyers may in fact take place in some small number of cases, their experiences do not appear to be the norm.

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 did the current fee structure interact with 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 would 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 practices to buffer their practices against ebbs and flows in their private practice.

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 of gaining experience are repeated in these quote from lawyers. Also among them is the notion that the appointed counsel cases provide supplemental or a steady stream of income, echoing what JMI documented in 2013. However, Client Choice did introduce a level of uncertainty for all appointed counsel that had not previously existed. 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 rates paid for representing indigent defendants. 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.

For instance, 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. Although still higher, the difference in average misdemeanor payments per case were only slightly higher in Comal County with the exception of Caldwell County.[36]

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 did indicate that they were shifting their practice to child protective cases rather than criminal defense, because the rates paid in Comal County were higher. The area of compensation systems for appointed counsel that requires further examination. One of the key arguments for implementing Client Choice is to introduce free market forces that encourage competition that will improve quality. However, the level of competition cannot be separated from the level of compensation. However, without comparison of the implementation of Client Choice across a number of systems with different fee structures, the impact of competition and variation in fees per case could not be explored.

Nonethless, JMI did examine whether the greater uncertainty about fees that lawyers could expect to earn from representing indigent defendants had an impact on participation. JMI found that this higher level of uncertainty generally did not result in reports of specific, self-imposed caps on lawyers' assignments to indigent defendants' cases. However, the three lawyers mentioned above did rebalance their caseloads toward the higher paying child protective cases. With only a one-year implementation study period, it may be too early to determine whether this behavior will extend to other lawyers and what the impact will be to the larger appointed counsel program in Comal County.

When comparing the number of indigent defendants' cases and total amount paid for those cases to appointed cases for fiscal years 2014 to 2015,[37] JMI did find that there were increases of more than 50 percent in the number of cases and amount paid to a small subset of attorneys, generally about 45 percent of the lawyers who practiced as appointed counsel in both FY2014 and FY2015. [38] The average

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

[37] FY 2014 is the period from September 1, 2013 to August 31, 2014. FY 2015 is the period from September 1, 2014 to August 31, 2015. Client Choice was launched during FY2015 in February 2015, so that fiscal year includes eight months of that program's operation.

[38] The lawyers' records reviewed for this analysis excluded those who had any cases other than adult criminal or adult misdemeanor, in order to control for other case types that would have skewed the counts and amounts paid. In FY2015, this process excluded 17 cases assigned with payments totaling $13,129 (1 and 4 percent of the totals

amount paid per District Court cases (accounting for only the cases assigned and paid within the fiscal year) rose by 33.2 percent ($712 to $948), but for CCAL cases, the average paid remained fairly flat, showing a small decrease of 5.5 percent ($265 to $250).[39]

From FY2014 to FY2015, for Comal County, TX cases,
• 44 lawyers were assigned cases in District Court in *both* 2014 and in 2015. • 14 lawyers saw a 50 percent or higher *increase* in the number of District Court cases to which they were assigned • 10 lawyers saw a 50 percent or higher de*crease* in the number of District Court cases to which they were assigned • 20 lawyers saw a 50 percent or higher *increase* in total payments for District Court cases to which they were assigned. 14 saw a 100 percent or higher *increase* in total payments. • Eight lawyers saw a 50 percent or higher *decrease* in total payments for District Court cases to which they were assigned. No one saw a 100 percent or higher *decrease* in total payments.
• 23 lawyers were assigned cases in CCAL in *both* 2014 and in 2015. • 11 lawyers saw a 50 percent or higher *increase* in the number of CCAL cases to which they were assigned • Three lawyers saw a 50 percent or higher de*crease* in the number of CCAL cases to which they were assigned • 10 lawyers saw a 50 percent or higher *increase* in total payments for CCAL to which they were assigned. Six saw a 100 percent or higher *increase* in total payments. • Four lawyers saw a 50 percent or higher *decrease* in total payments for CCAL to which they were assigned. No one saw a 100 percent or higher *decrease* 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 CCAL, seven attorneys were not appointed cases in FY2015 with

for that year). In FY2014, the exclusion amounted to 1 percent of the overall total in both the number of cases and in the amount paid.

[39] Note that the costs per case included here will be different than those discussed in the impact section of the report findings. The difference lies in the different level of detail available in the source data JMI had. Here, the analysis is based on data disaggregated by lawyer and county, but does not separate criminal from other types of cases, so adjustments had to be made to remove the confounding variable of lawyers' acceptance of other case types (see note 38). Later in this report, the impact of Client Choice on indigent defense costs is discussed using *aggregate* data that does separate felony and misdemeanor cases from other types of cases. Despite the different types of source data used, the adjusted costs per case used here and the actual costs per case reported later in this report are reasonably close. In FY2014, the adjusted costs per case are reported here as $712 for felonies and $265 for misdemeanors. The aggregate data discussed later in this report reveal that the costs are $747 and $252, respectively. Similarly, in FY2015, the costs per case reported here are $948 for felonies and $250 for misdemeanors, compared to the aggregate costs per case of $1,012 and $241, respectively.

average of 5 cases each and a total of 38 cases in FY2014. However, it is not clear from the data why the non-participation took place in FY2015.

Reviewing appointment logs maintained by the courts, JMI only has limited data regarding the lawyers who affirmatively removed themselves from the appointment list temporarily or permanently. The logs only covered the period between February 1, 2015 and July 1, 2015 (which would fall within FY2015) and identify only nine lawyers who took this action during that six-month period.[40]

Changes in the Quality of Indigent Defense Representation in Client Choice

JMI did not find any meaningful differences in the number of complaints or requests for change of counsel (either in reviewing the logs of these activities or in the self-reports during interviews), which would have indicated a decrease in quality had there been a rise in complaint or requests for relief. On the contrary, those system actors interviewed indicated increases in perceptions of quality in criminal defense representation. Appointed lawyers did not report any differences since the inception of Client Choice with respect to the frequency of defendant requests to have appointed counsel removed from cases. In fact, interviewees reported that such defendant requests had typically been infrequent. However, some judges and court staff did claim that there were indeed fewer of these requests.

JMI only had partial data on complaints filed against appointed counsel, which is a limited indicator of formal requests to change the assigned lawyer 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. 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.

Most system actors, including lawyers, reported that there had been no changes in courtroom practices or the behaviors of any of those involved in court proceedings, including defendants, after the implementation of Client Choice. However, a small minority (9 of 34 interviewed) did report seeing or experiencing some non-specific improvement in defense representation. Specifically, six lawyers, who reported improvements, attributed it to greater involvement and cooperation by defendants in their cases. Greater pressure to work hard for their clients was reportedly driven by two factors: (1) the lawyer had been chosen specifically by the defendant 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 asked about whether they changed their own practices or behaviors relative to *any* of their criminal defense clients (whether assigned indigent defendants or private clients), most lawyers

[40] The aforementioned miscommunications about data collection protocols were partially responsible for the limited data collection in this area. Also, as mentioned in the report, certain system actors abandoned documenting process data when evaluation activities became obtrusive to their day-to-day responsibilities.

answered that they had not.[41] 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 great number of lawyers reported some changes as summarized below and which may have had unreported impacts on lawyer practice.

Regarding Lawyer Satisfaction

- Seven lawyers (32%) reported "No change" in their own satisfaction levels when representing Client Choice defendants.
- Another seven lawyers (32%) did experience 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 expressed that he had more concern for Client Choice cases, because defendants now had "higher expectations" of their chosen counsel.

Regarding Defendant Satisfaction

- Eleven lawyers (50%) claimed that defendants' overall trust increased. These appointed counsel posited that because defendants had personally selected their lawyers on the basis of expecting to get a positive outcome, they deferred more to the lawyer and trusted his or her advice more readily.
- Two lawyers drew a more nuanced distinction. The levels of trust by defendants who had researched or whose families had investigated the background of the potential lawyers were far more satisfied and trusted their lawyers more readily. However, those who did not do any research when choosing a lawyer did not exhibit different behaviors.
- One lawyer did warn that defendants who choose their own counsel were more demanding, 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 a large sample of the lawyers representing indigent defendants in Comal County, do suggest that there are some changes in attitudes and practice among lawyers as a result of Client Choice. The outcome evaluation findings that follow provide further insight into interviewees' perceptions of Client Choice.

[41] Of note, 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." 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, "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 of the impacts produced by Client Choice are mixed. It is clear that a majority of defendants preferred to select their own lawyer rather than to have one chosen for them by the court. However, many of the hypotheses about the advantages of the client choice model, particularly the benefits to defendants, did not always bear out in the analyses. As indicated earlier, the outcome evaluation results are limited because of a small sample size and some of the mixed results may be more a product of a lack of power than a true finding about the efficacy of a choice model. Having noted this, there are indeed some notable findings that suggest the need for a much larger test of Client Choice with a larger sample of defendants.

The following sections describe JMI's findings with regard to the following key outcome areas:

- Quality of representation
- Case outcomes
- Procedural justice
- System costs and efficiencies

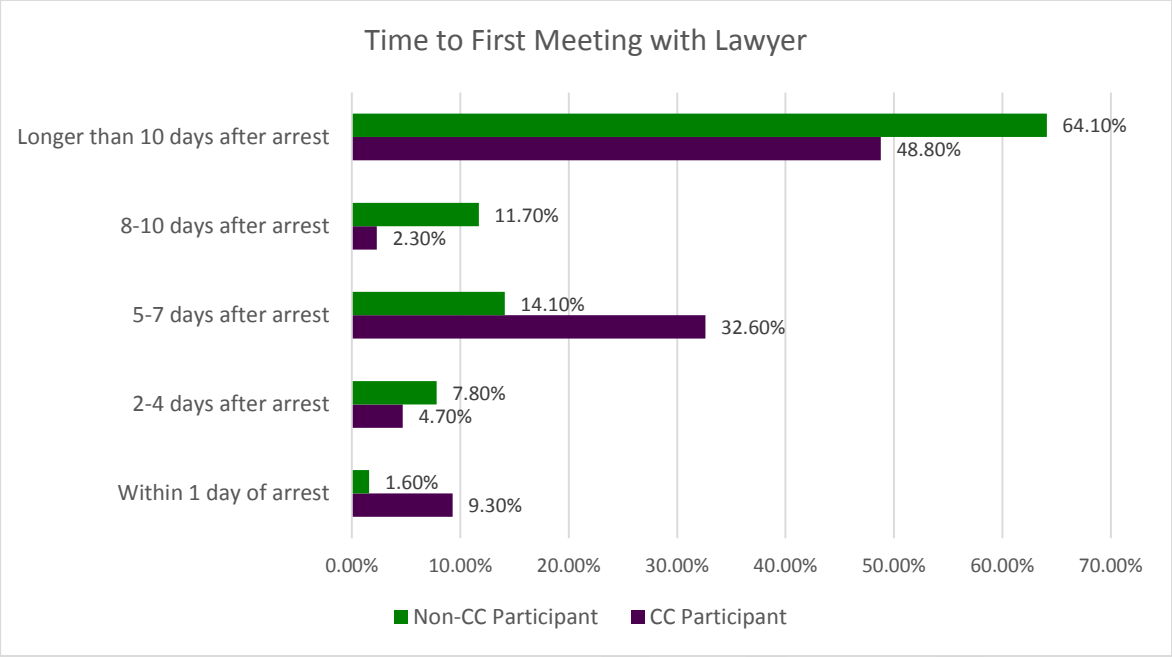
Client Choice Impact on the Quality of Representation

One of the major benefits thought to come from allowing indigent defendants to select their own lawyers is that lawyers will provide better representation because of the increased "competition" for business. 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 the lawyer worked for them. The key variables that were 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

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 with their clients. In general, Client Choice participants reported meeting with their lawyer sooner than non-Client Choice participants as shown below.



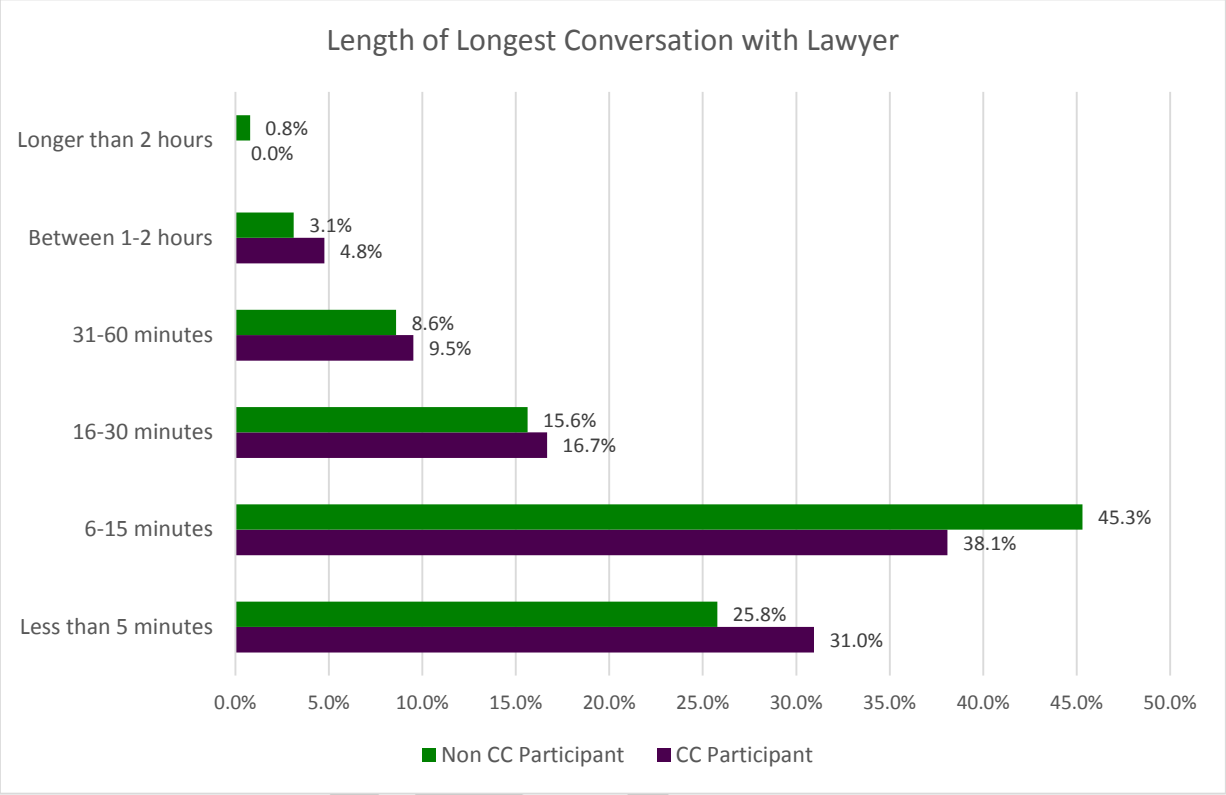
Although the majority of all defendants, regardless of participation in Client Choice, met with their lawyer more than 10 days after their arrest, the data also showed that Client Choice participants met with their lawyer within 7 days of their arrest more often than non-Client Choice participants (46.6% compared to 23.5%).

Further analysis also showed that the timeliness of the first meeting improved after the start of Client Choice. In fact, the likelihood that the first meeting occurred within 10 days of arrest increased after Client Choice started. Post-test participants (those whose cases were initiated after the implementation of Client Choice) were statistically more likely to meet with their lawyer sooner after arrest than pre-test participants. Moreover, the odds of a Client Choice defendant meeting with his/her lawyer before 10 days were 0.443 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 two times in person. The average number of meetings conducted by phone was also low (2 times on average for Client Choice participants and 1 time for non-Client Choice participants). Interestingly, the longer it took for a defendant to meet with his/her lawyer following the arrest, the fewer times they met either by phone (which was a statistically significant finding) or in person. It should be noted, however, that 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, misdemeanor cases in the study were disposed within 32.5 days and felony cases within 28.0 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. Again, the length of time between arrest and the first meeting was statistically related to the length of the longest meeting. 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

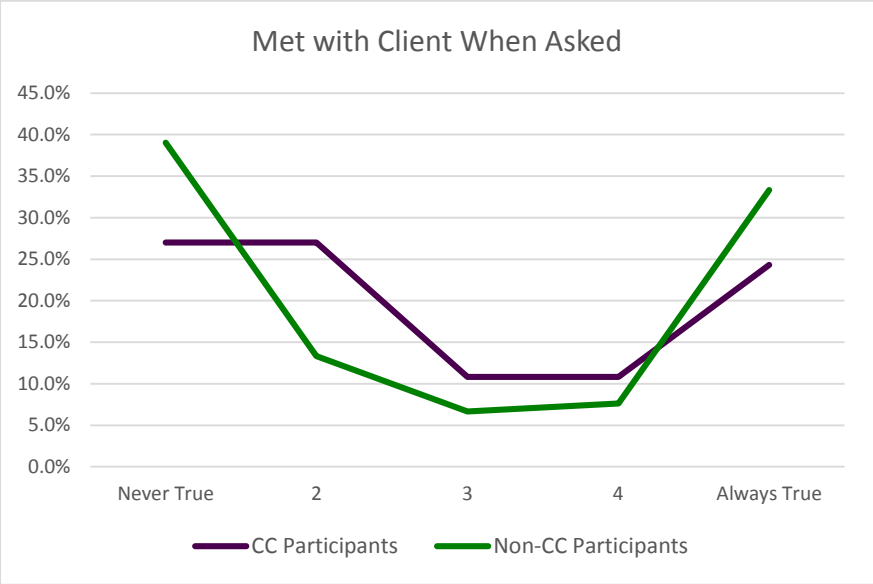
counterintuitive (i.e., that the more time that passed between arrest and the first meeting would prompt a lengthy meeting at some point), in fact it may be an indicator of lower quality representation. One would expect a statistical difference in the length of meetings for client choice defendants; however, there were no statistical differences based on participation in Client Choice—the majority of both Client Choice and non-Client Choice 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, even with the small sample size, 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 does support the idea that a choice model has an impact on lawyer behavior as it relates to timeliness of the first meeting.

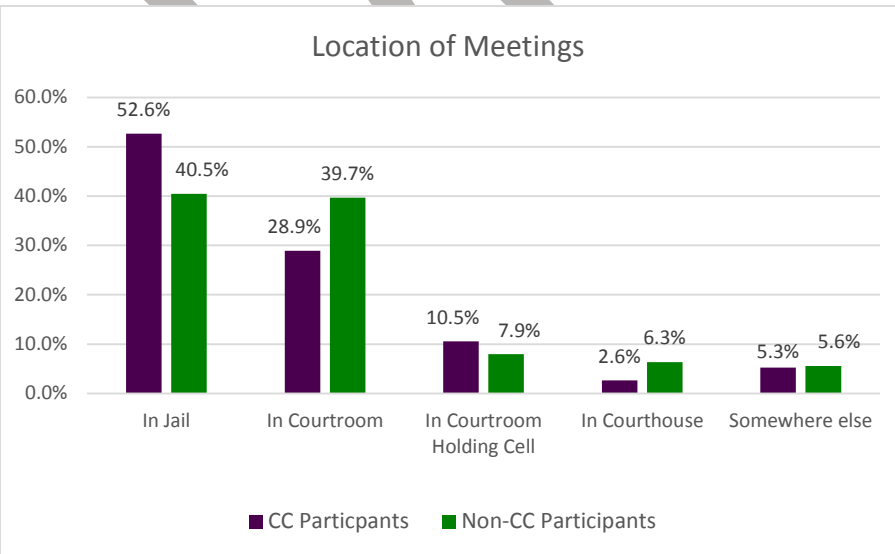
Second, there are relationships between how long it takes after a defendant's arrest to meet with his/her lawyer and other indicators of quality representation. In thinking about quality, one would expect that a lawyer, who is providing exceptional representation, to meet with his/her client quickly; 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 is a trend toward fewer and shorter meetings. Client Choice did demonstrate some impact on mitigating this effect (although not to a level of statistical significance), lending some support to the hypothesis that a choice model improves representation quality.

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 lawyer met with them when asked, compared to non-Client Choice participants. Notably though, a large proportion of defendants, regardless of how their lawyer was obtained, felt that their lawyers never met with them when asked. That said, more of these individuals were non-Client Choice participants than Client Choice participants. In addition, among all defendants, regardless of their participation in Client Choice, those charged with felonies were more likely to agree that their lawyers met with them when asked.)ther 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 the lawyer 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. There were very slight differences observed between Client Choice and non-Client Choice defendants. Just over half of the non-Client Choice defendants (53%) reported that it was true their lawyers returned phone calls in a timely manner, compared to 48 percent of Client Choice participants. As with requests for meetings, defendants charged with felonies were statistically more likely to agree their lawyers returned phone calls than those charged with misdemeanors. No other control variables had an impact on defendants' perceptions.



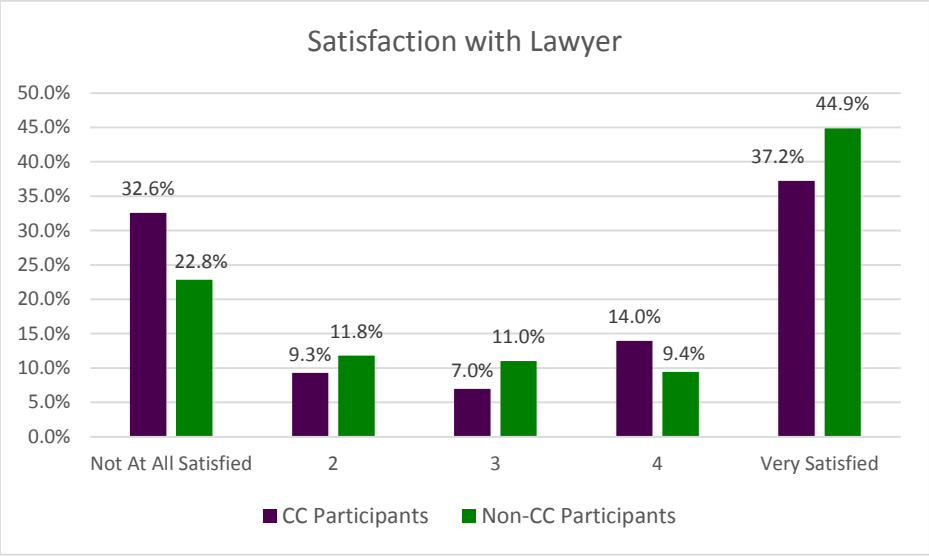
The last indicator related to meetings focused on

where defendants met with their lawyer, 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 own lawyer, met with lawyers in jail. This finding is not surprising given the reports of the high number of defendants held in pretrial detention and who would only be able to meet with their lawyers in court.[42] Even so, as shown in the chart, a greater percentage of non-Client Choice participants met with their lawyer in the courtroom or the courthouse than did defendants who selected their own 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 lawyer. Defendants were asked to rate their level of agreement with the statement, "My lawyer worked hard for me." Overall, the majority of defendants disagreed that their lawyer worked hard for them (56% among Client Choice participants and 55% among non-participants). Likewise, there were no observed differences between the two groups in terms of their agreement with the statement. Just over one-third of Client Choice participants and 33% exactly of non-Client Choice participants thought their lawyer worked hard for them.

Despite defendants' mixed assessments of the quality of representation they received, 42% of Client Choice defendants reported that they were satisfied overall with their lawyer, compared to 35% of non-Client Choice participants. In fact, the mean rating for Client Choice participants was 3.14 out of 5, with 5 being very satisfied, compared to 2.80 for non-Client Choice participants. However, the difference in means is not statistically significant. Notably, Client Choice participants who had been represented by a court-appointed lawyer or public defender in a prior case reported higher levels of satisfaction with their lawyer than those who had not prior representation. The odds were 0.173 times higher.



With regard to other key control variables, female defendants were 2.634 times more likely to be less satisfied than male defendants, regardless of whether or not they participated in Client Choice. Likewise, defendants charged with felonies were 10.081 less likely to be satisfied than those charged with misdemeanors.

Although the findings are not strong with regard to the impact of Client Choice on the strength of the advocacy provided by lawyers, the data provide some indication that there may be higher levels of

[42] Unfortunately, JMI was not able to obtain data on the defendants' custodial status.

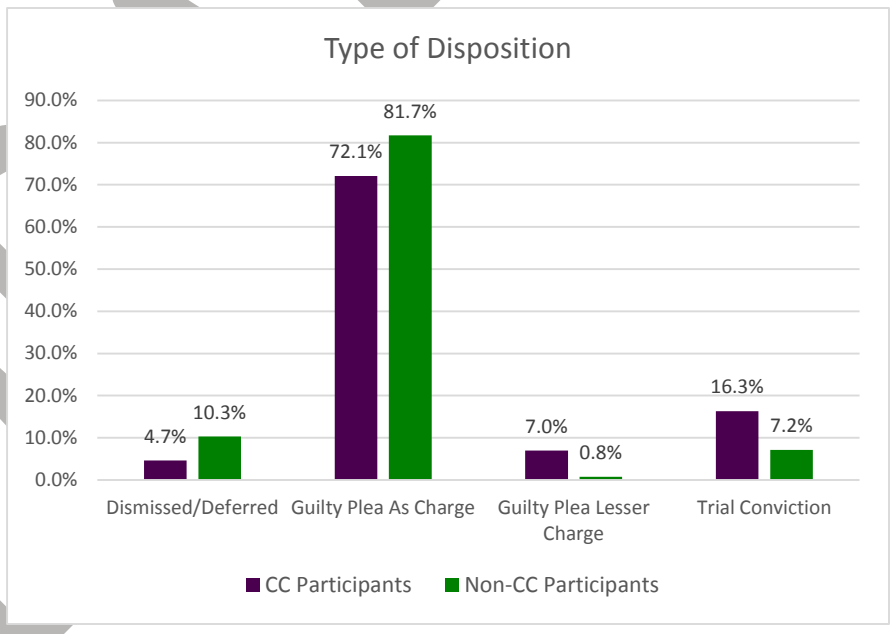
satisfaction for defendants who choose their own lawyer, especially among those who have had experiences with court appointed lawyers or public defenders in prior cases before the courts.

Case Outcomes

Part of the theoretical basis for Client Choice is that if lawyers provide better representation, there are likely to be differences in the case outcomes, notably in terms of type of case disposition and the types of sentences received. 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:

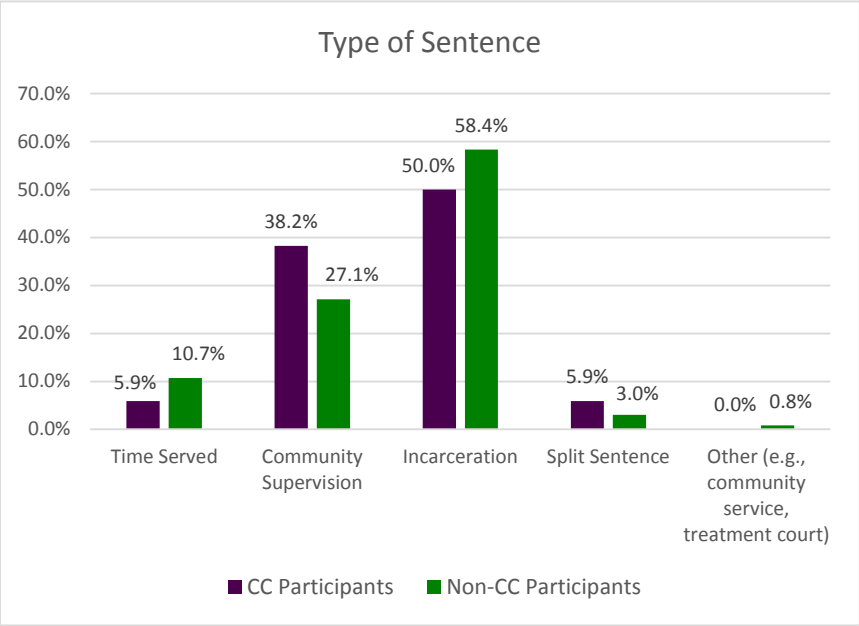
- Dismissal or acquittal
- Deferral or diversion
- Guilty plea as charged
- Guilty plea, lesser charge
- Guilty verdict by trial



Although the sample size is quite small, there were indeed significant differences in how cases were disposed. As shown below, the majority of defendants pled guilty as charged; however, there were significantly more Client Choice defendants who pled guilty to a lesser charge or whose case went to trial than defendants who had their lawyer chosen for them by the court. The results of a nominal regression showed that Client Choice participants were 2.37 times more likely to go to trial and 10.161 times more likely to pled guilty to a lesser charge than non-Client Choice defendants, even when controlling for prior convictions. An analysis of the prevalence of dismissals, acquittals, and deferrals between Client Choice and non-Client Choice defendants yielded a small difference that was not statistically significant.

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 felony pled guilty to a lesser charge than a non-Client Choice participant charged with a felony. There were no similar observed statistical differences for defendants charged with misdemeanors.

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 followed by community supervision. Defendants who selected their own lawyer, who were charged with a felony, were 2.85 times more likely than non-Client Choice defendants to receive a sentence of community supervision than incarceration. The model is not strong, however, because of the small sample size.



JMI's analysis also suggested some drivers of overall success in case outcomes. Defendants who met frequently in person with their lawyer were 1.3 times more likely to receive a split sentence than a sentence of incarceration alone. Also, defendants who met by phone with their lawyer were 1.2 times more likely to be sentenced to community supervision than to incarceration. Finally, the more times a defendant met with his/her lawyer, the likelihood of being sentenced to time served increased by a factor of .255. Although these findings may have implications for the general practice of indigent defense, the differences did not hold when Client Choice participation was added into the model, and thus are not considered to be a direct result of a choice model.

Procedural Justice

A key premise of choice models in public defense is that allowing defendants to select their own 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

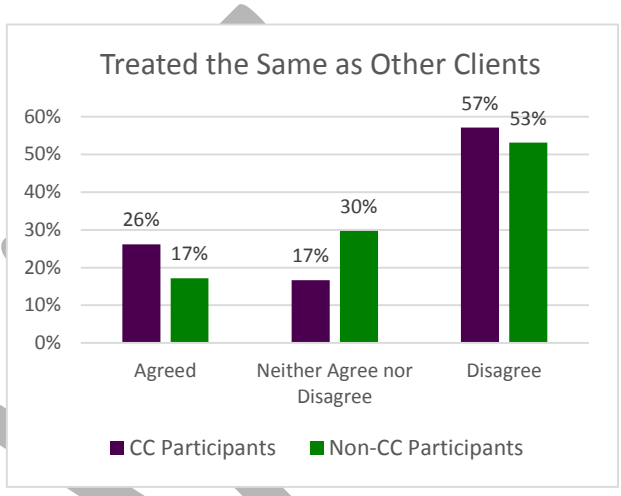
Procedural fairness was operationalized into three primary variables—treatment, respect, and knowledge of defendant. Specifically, the measures of procedural fairness included the following three questions:

- 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

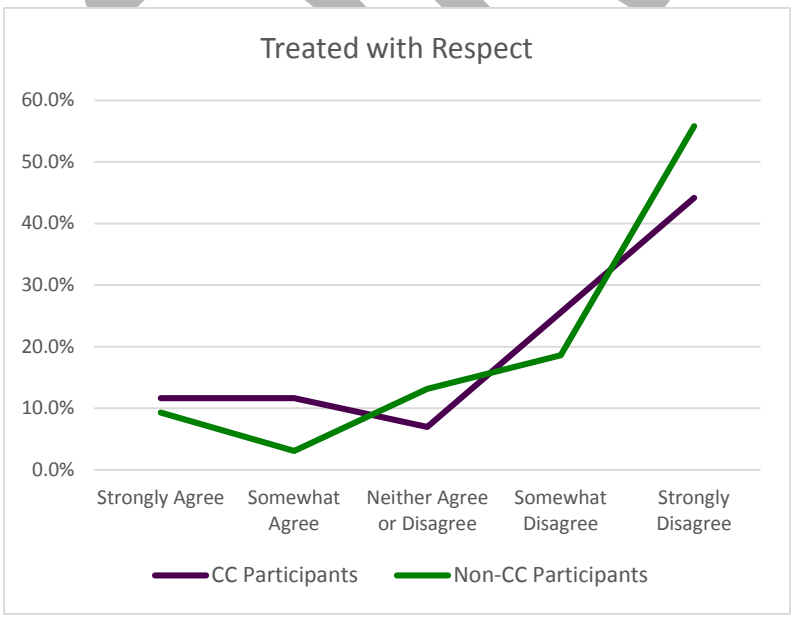
For each question, the defendant was asked to rate their level of agreement with each of these statements on a scale ranging from 1 to 5, with 1 representing strongly agree and 5 representing strongly disagree. Ordinal regression analyses were conducted on each of the questions, controlling for whether 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 some differences between Client Choice and non-Client Choice defendants worth noting even though they were not statistically significant. 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 differences observed 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. However, age and gender were significantly related to agreement about treatment. 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. Older defendants were also more likely to state that they were treated differently than other clients.



Respect

Feeling that a lawyer treated you with respect is another component of procedural fairness. Nearly twice as many Client Choice defendants as non-Client Choice defendants (23% vs. 12%) agreed or strongly agreed that their lawyer treated them with respect. Nonetheless, the majority of all defendants strongly disagreed with this statement. Neither of these observed differences, however, were statistically significant. As with feelings about treatment, female defendants overall were less likely to agree that

they were treated with respect than their male counterparts. Education, age, 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 defendants with court-appointed lawyers (36%) felt this way as compared to 33 percent of Client Choice defendants. 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.

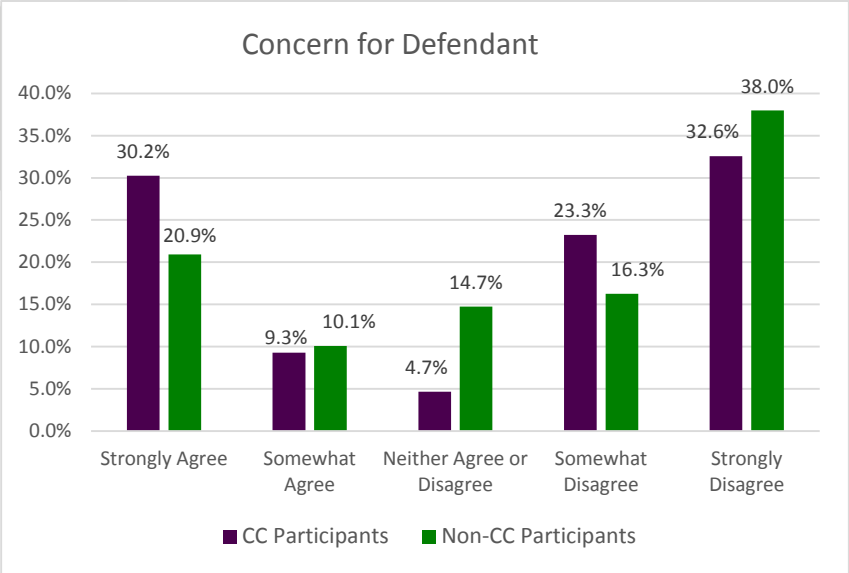
Based on these results, it is impossible to conclude that a choice model impacts defendants' perceptions of procedural fairness. One explanation, which did not stand in our analyses but warrants further examination, is that defendants with prior convictions, who had been represented by a court-appointed lawyer or public defender in the past, may have higher expectations, thereby explaining some of the lower ratings. The small sample size precluded more in-depth analyses to explore this explanation beyond a simple ordinal regression. Many of the cell estimates were well below the expected values making the models unreliable. Recoding variables to eliminate the issues with cell sizes ultimately meant reducing possible responses into binary options (Agree/Disagree), which did increase the strength of the model (although not to statistical significance). Future research with a more robust sample could provide greater insight into how a choice model might impact defendants' perceptions of procedural fairness.

Impartiality

JMI included three measures of impartiality 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 lawyer 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 (30.2%) strongly agreed that their lawyer showed concern compared to only 20.9% of



defendants whose lawyers were appointed by the court. This difference is not statistically significant.

Controlling for other factors did produce more interesting results. First, prior representation by a public defender did impact the degree to which a defendant agreed that their current lawyer showed concern. The odds of a Client Choice participant, who had been represented by a court-appointed lawyer/public defender previously, agreeing with the statement were 0.287 times more likely than a Client Choice participant who had not had a public defender in the past. Second, female defendants in general were statistically less likely than male defendants to agree that their lawyer showed concern for them. Finally, defendants charged with felonies were also statistically less likely to agree that their lawyer showed concern for them than defendants charged with misdemeanors.

Best Interest

When asked whether or not they felt their lawyer wanted the best for them in the case, the majority of defendants disagreed or strongly disagreed (60% of Client Choice participants and 58% of non-Client Choice participants). Having noted this, level of agreement with the statement was slightly higher for those defendants who selected their own lawyer (33%) as compared to those with lawyers chosen for them by the court (23%).

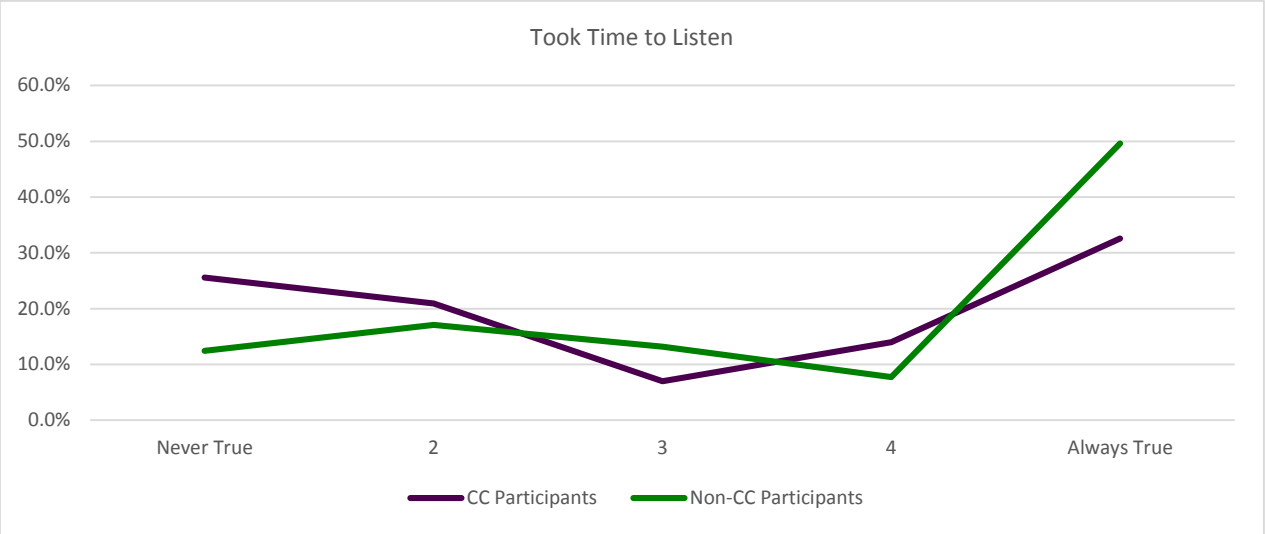
Defendants charged with felonies were less likely to agree that their lawyer wanted the best for them as compared to defendants charged with misdemeanors. Women were also less likely than males to agree with the statement. The race/ethnicity of a defendant, age, or educational level did not impact how defendants felt about whether or not the lawyer had their best interest in mind for the case.

As with procedural fairness, the results of the analyses generally do not support the hypothesis that a choice model results in greater feelings among defendants that their case was handled with impartiality. The one notable exception, which again speaks to the need for additional research with larger sample sizes, is the fact that Client Choice defendants who had been represented by a court-appointed lawyer/public defender in a prior case, were more likely to feel as though their lawyer was concerned about what happened to them. Another salient finding, although not directly related to the evaluation of Client Choice *per se* is that female defendants generally felt as though they were not treated with impartiality, suggesting another need for further research.

Influence of Defendant in the Case

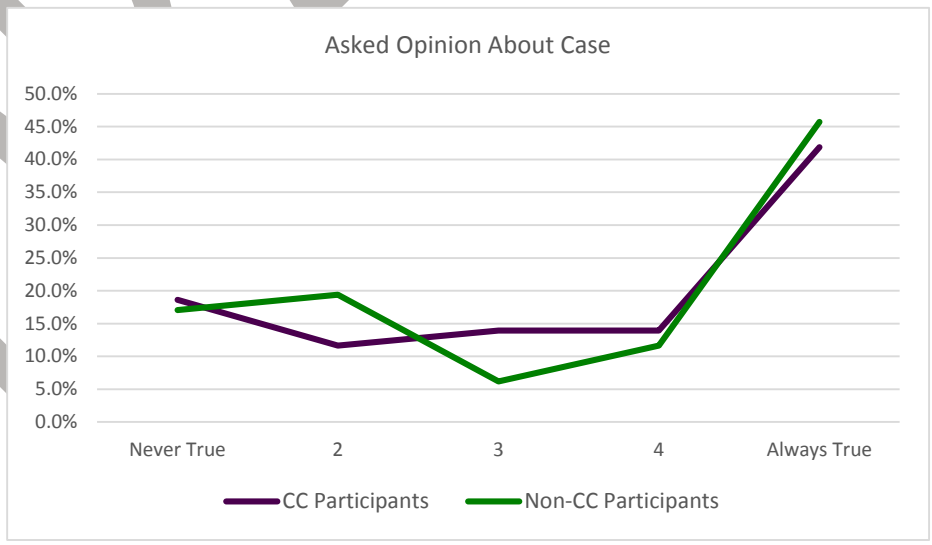
Giving individuals a voice in their case and involving them in the process is another indicator of how just defendants felt the process was. To measure this particular aspect of procedural justice, defendants were asked to rate their level of agreement with three statements:

- 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 (57% compared to 47%). In fact, the odds of a defendant who selected his/her own lawyer reporting that it was less true that their lawyer listened to them were 0.49 times that of non-choice defendants. Other control variables, such as whether or not the defendant had been represented by a public defender in a prior case, did not have an impact on participants' responses to this item.

In addition, there were no observed differences 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. However, it is important to note that the majority of defendants overall felt that it was always true that they were asked for their opinions.



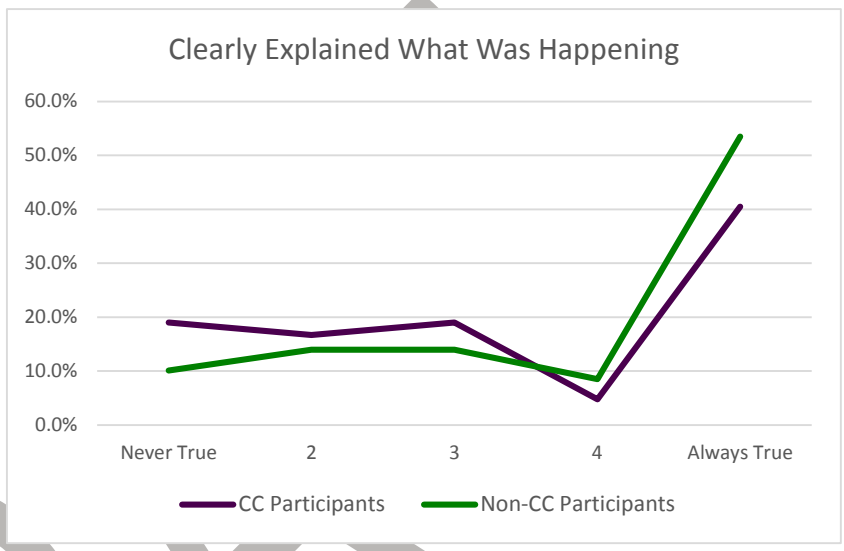
Consistent with the findings above, defendants' perceptions about the extent to which their lawyers asked for their opinions were not statistically different between Client Choice and non-Client Choice defendants. This said, slightly more Client Choice participants agreed with the statement (37%), than non-Client Choice participants (29%).

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 lawyer clearly explained what was happening with the case, answered questions clearly, kept them informed, and was honest with them.

Clear Explanation and Answer Questions

More than 60 percent of non-Client Choice participants reported that it was true or always true that their lawyer clearly explained what was happening in their case, compared to only 45% of Client Choice participants. The differences observed were statistically significant—the odds of Client Choice defendants reporting lower ratings were 0.549 times that of non-Client Choice defendants. Interestingly, when controlling for case type, Client Choice defendants, and indeed defendants in general, charged with felonies were more likely to report that their lawyer clearly explained what was happening with their case.



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. One hypothesis for the lower ratings among Client Choice defendants is that they had higher expectations of their lawyers than those whose lawyers were appointed by the court. JMI tested this hypothesis by examining differences between the two groups based on whether or not they had been represented by a public defender in the past. Although there were no significant interactions with regard to whether or not the defendant felt his/her lawyer listened, there was a relationship as it related to whether or not the lawyer explained things clearly. The odds of a Client Choice defendant, who had been previously represented by a public defender, feeling that the lawyer did not explain things clearly were 0.21 times higher than those defendants who had not had a public defender before. This finding does provide some support for the hypothesis that defendants who have had prior contact with the court are likely to have higher expectations about their lawyers under a choice model.

Kept Informed

Defendants overall tended to disagree that their lawyer kept them informed about what was happening in the case, regardless of whether or not they participated in Client Choice. Sixty percent of both Client Choice and non-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 own 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, those with prior representation by a public defender were less likely to agree they were informed. Second, female defendants were less likely to agree they were kept informed than male defendants, and finally individuals charged with felonies were statistically less likely to feel that they were well-informed. This suggests that overall defendants feel lawyers aren't providing enough information about what is happening with the case during the process, and that Client Choice does not remedy this.

Honesty

Analyses of the extent to which defendants felt their lawyer was honest were not favorable. Only a quarter of defendants agreed with this statement, and participation in Client Choice did not impact the results. Controlling for other factors, JMI found statistical differences based on type of charge and gender. Defendants charged with felonies were less likely to feel their lawyer had been honest with them, as did female defendants. Interestingly, White defendants were slightly more likely than non-White defendants to agree that their lawyers were honest with them about their case, however, this particular finding did not reach the threshold for statistical significance.

In total, JMI did not find strong support for the hypothesis that a choice model fosters a greater sense of procedural justice. There are several possible explanations for these findings that could be explored further with a larger sample size. The data presented here, however, do provide some indications. For instance, defendants who have had prior contact with the courts may have different expectations that are impacting their sense of procedural justice. There are also some results that suggest that women and men experience the justice system differently, which is another area to be explored. This said, any generalizations from these data should be done cautiously given the small sample size.

Influence of Trust and Confidence on Sense of Procedural Justice

In addition to measuring how Client Choice might have impacted defendants' sense of procedural justice, 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. Almost half disagreed that one should accept the court's decisions, that it is in the community's best interest to do what the court orders, and that judges/courts can be trusted to make decisions that are right for the community. For each of these, less than a third generally agreed; the remainder were neutral.

An analysis of how Client Choice defendants differed from non-Client Choice defendants showed that generally, more Client Choice defendants reported higher levels of agreement with the statements about acceptance of court decisions and obeying court orders. For other two statements, both Client

Choice and non-Client Choice defendants had the same level of agreement. These findings are presented below and based simply on the frequency of responses, and the observed differences are not statistically significant.

	Level of Agreement[43]	
	Client Choice Defendants	**Non-Client Choice Defendants**
Accept decisions made by the court.	44%	39%
In the community's best interest to do what the court orders	26%	26%
Disobeying a court order is seldom justified.	40%	31%
Judges/courts can be trusted to make the right decisions.	33%	33%

Although the preliminary descriptive analyses did not indicate statistically that Client Choice participants were more or less likely to have respect for and trust the courts based on the individual questions;, further analyses did reveal some interesting findings. First and foremost, when taken in totality (i.e., all four indicators of respect combined into a single variable), JMI found that Client Choice defendants were more likely to have a greater respect for the courts than non-Client Choice defendants. In fact, they were 8.86 times more likely than defendants who had their attorneys appointed for them to have higher levels of respect for the court. In addition, other patterns suggest that respect and trust are important factors in how defendants, particularly Client Choice defendants experienced procedural justice. To further explore this, a series of regression analyses were performed, using a composite variable of respect for the courts.[44] Overall, there were several statistically significant findings, some stronger than others. These findings included the following:

- Client Choice defendants with high respect for the court were 8.147 times more likely than non-Client Choice defendants to report that their lawyers clearly explained what was happening with their case, regardless of the non-Client Choice defendant's respect for the law.
- Client Choice defendants with high respect for the court were 28.926 times were more likely to agree that their lawyer showed concern for what happened to them that non-client Choice defendants.
- Client Choice participants with high respect for the court were 6.269 times more likely than non-Client Choice defendants to report that they were ***not*** treated the same as other clients.
- The odds of a Client Choice participant with high or medium respect for the courts and reporting that they believed their lawyer was honest with them were 0.112 and 0.223 respectively higher than for those with low respect for the court or non-Client Choice defendants.

[43] Percentages are calculated from those defendants who responded that they strongly agreed or agreed with the statement.

[44] Regression analyses included both ordinal and binary logistic regression. Due to the small sample size, several variables were recoded into binary variables of agree/disagree to allow for an examination of whether a relationship existed or not. For the logistic regression, a composite variable, respect for the court, was created that incorporated all four questions into a single variable.

Although not these results do not necessarily speak to the overall impact Client Choice, they do suggest that individuals who opted to participate in Client Choice had a higher level of respect for the law and the higher the levels of respect, the greater the sense of procedural justice.

System Impacts

Case processing and cost

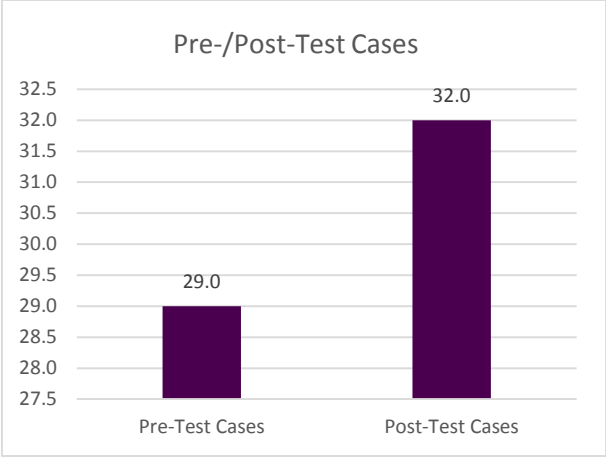
Although the findings are mixed with regard to individual defendant and case level outcomes, another major question is what impact Client Choice has on the justice system as a whole. All things being held equal, failure to find a negative impact in terms of costs or efficiency would suggest that the 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 without great cost or disruption to the justice system, a choice model could be implemented that produces meaningful results for defendants in terms of their sense of procedural justice and for the legitimacy of the criminal justice system.

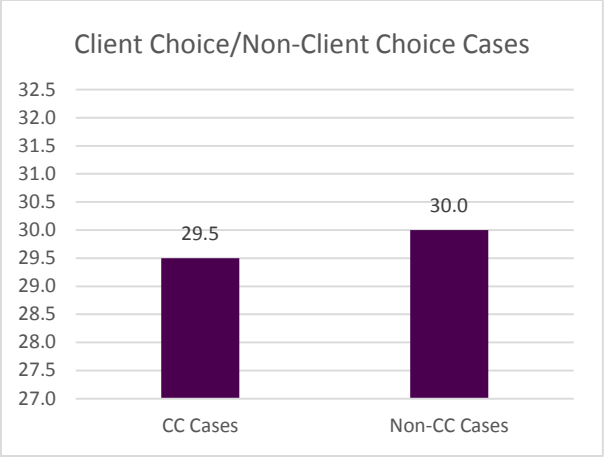
To examine the impact on the system, JMI looked at several key variables—case processing times, costs for indigent defense representation, and stakeholder opinions of the choice model. Case processing times were calculated using the date the case was opened and disposed. Costs for indigent defense representation were drawn from Texas Indigent Defense Commission (TIDC) reports from FY2011 to FY2015, along with unaudited data from FY2016. Stakeholder opinions of Client Choice were gathered during structured interviews with judges, defense lawyers, and prosecutors, and reported in the section on the process evaluation findings.

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 mean time to disposition showed differences between pre- and post-test cases. Because the data were highly skewed, the median is used for preliminary comparative purposes as shown in the charts below.

TIME TO DISPOSITION (IN DAYS)

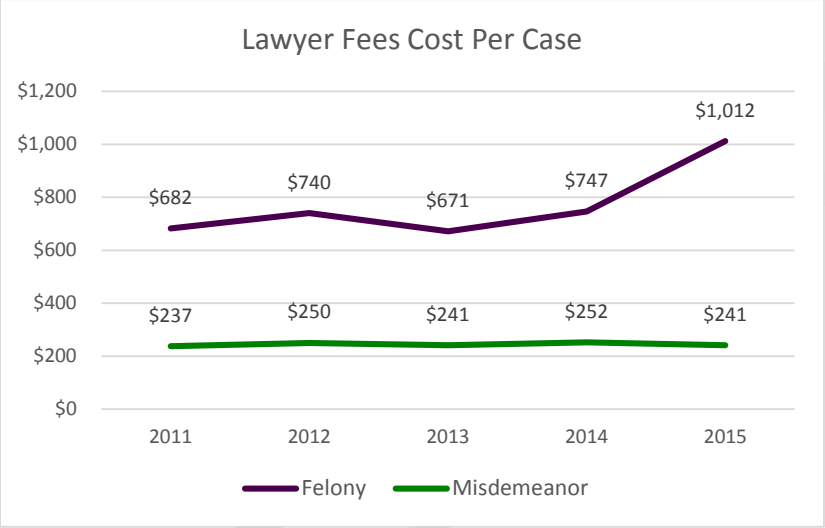




Although the case processing time does appear to have become longer during the post-test phase, when Client Choice was operating, an examination of just Client Choice and non-Client Choice cases shows that the actual difference in elapsed time from case opening to disposition is only a half day. Not surprisingly, the differences between the medians are not statistically significant. These results suggest that the use of Client Choice does not increase case processing time overall, but again, this is an area in which further research should be conducted.

Further examination of case processing times by case type shows no statistically significant differences based on case types. Interestingly, misdemeanor cases overall took on average slightly longer to dispose than felony cases. Accounting for outliers in the data, the median case processing time for misdemeanors was 230.5 days compared to 201.0 days for felonies. Case processing times did increase after the implementation of the Client Choice, but the observed difference was not statistically significant overall. This is an area for more possible study with a larger pre-/post-sample size to determine if the differences observed in JMI's analysis occurred by chance alone. Similarly, additional analyses examining case processing trends over time could yield additional information about whether or not the length of time to dispose of cases has been growing over time, and as such is not directly related to the use of a Choice model.

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. Lawyer fees paid in felony cases in Comal County have been trending upward since 2011, with a significant increase (35.5%) occurring between 2014 and 2015. The lawyer fee costs for misdemeanor cases has remained relatively stable over time.

When all case costs (lawyer fees plus other costs for experts, etc.) are taken into account, the trends are similar, with felony case costs overall trending upward (and largest increase occurring between 2014 and 2015). Misdemeanor costs, while generally stable, did show a more pronounced decrease (6.6%) between 2014 and 2015 (overall costs in 2014 were $258 and dropped to $241 in 2015). Looking at the cost per case aggregating felonies and misdemeanors, the overall average costs per case reflect 10.6% and 11.0% increases from 2013 to 2015 ($404 to $447 to $496).

These data are reported by fiscal year, running from October 1 to September 30. The cost per case data from FY2015 therefore capture over half of the implementation period between February 2015 and September 2015. Data from FY2016 provide additional information about the impact on cost per case, covering the remaining portion of the one-year study period from October 2015 to February 2016, as well as eight months of ongoing implementation through September 30.

For FY2016, only unaudited data were available, and only in the aggregate form (i.e., they were not broken down into costs per felony and cost per misdemeanor case). However, two types of average cost comparisons show similar results. First, all fees paid to lawyers in Comal County in 2016, regardless of case type (i.e., include juvenile cases and appeals), were aggregated and the calculated average cost per case is $457 – a decrease of $39 or 8 percent from $496 in 2016. However, the average cost per case in 2015 only included felonies and misdemeanors. Since the 2016 data did not separate out the costs of misdemeanors and felonies from the costs associated with other case types, the second analysis excluded lawyers who represented any cases other than felonies and misdemeanors. When looking at the fees paid to lawyers who in 2016 only reported felony or misdemeanor cases, the average cost per case is slightly higher than the earlier calculation -- $467 per case, which is still $29 or 6 percent lower than the $496 cost per case in 2015. Both analyses yield similar results; costs per case in the fiscal years when Client Choice was implemented fell by between 6% and 8%.

Although, on the surface, it would appear that costs did indeed decrease after the implementation of Client Choice, there is no way at present to test for a direct causal relationship. Additional data on the costs paid specifically in Client Choice cases and in non-Client Choice cases, broken down by fees and other costs, for a larger sample size than the present study would provide a more reliable assessment of the impact of a choice model on system costs. This said, however, there is reason to believe that there is some relationship between the two given that costs had been stable or increasing over time.

CONCLUSION

The decision to pilot test a choice model, allowing defendants to select their own lawyers, puts Comal County, TX, on 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. JMI's findings from the process evaluation found numerous areas in which the implementation could have been improved or streamlined. Defendants need access to sufficient information about prospective lawyers and need time to make informed decisions. Limiting the review and selection time for in-custody defendants to 15 minutes, rather than the 48 hours originally planned, likely forced defendants to select quickly, perhaps without a full review of all available lawyers. The impact of the shorter time period is unclear.

With regard to the level of information about lawyers, it was suggested by the Client Choice advisory group that defendants be given a wide variety of information to inform their selection including, education, areas of legal expertise, outcomes of prior cases, bar memberships, and more. Ultimately the decision was made by the implementation team to provide only that information that would be readily available to defendants to allow for a more "real world" test of the model. The evaluation does not provide any indication whether having more information would in fact have influenced defendants' selections, particularly because experience and reputation were the primary reasons cited by defendants as the reasons they selected their lawyer. Nonetheless, this is an area worthy of additional study.

Overall, the implementation of Client Choice was generally seamless for most system actors. However, there were some issues. First, the impacts that Client Choice did have on the operation of the jail, magistration, and court processes tended to be handled on an individual and *ad hoc* basis rather than on a system level, which did result in inconsistencies. Second, the implementation of Client Choice did result initially in a high volume of assignments to a small number of lawyers. Controls could be put in place to avoid this issue in future implementation of a client choice model. However, if the assumption that choice identifies the highest quality lawyers, then it is notable that the number of those who were in high demand was far smaller than the overall number eligible to be selected. The assumption that a free market system will drive out lawyers who are not deemed by defendants to be the strongest advocates has yet to be fully tested. Yet, even the initial findings about who is selected and who is not may help inform judges' decisions about which lawyers should participate as appointed counsel, so as to ensure that indigent defendants are provided the best options for defense. On the other hand, it was raised during interviews that new lawyers with limited experience are at a significant disadvantage because they have not developed reputations, good or bad, making the barriers to entry into the "indigent defense market" very high. Those barriers too will need to be addressed and studied in the coming years in Comal County and in future implementations.

Beyond implementation, the impact evaluation found no major disadvantages to having a choice model. Concerns about increased costs and decreased efficiency were not borne out in JMI's evaluation. In fact, the major impact at the system level was a slight decrease in costs for indigent defense services. Although a 6-8 percent decrease is small, should Comal County continue to operate Client Choice, it is expected that more defendants will chose to select their own lawyer that could produce more significant costs savings. One cautionary note, however, is that the current data collected on costs did not allow JMI to examine if the decrease in costs is directly attributable to Client Choice or if some other phenomenon caused it. However, as noted before, costs had been on the rise over the past several years so there is reason to believe that Client Choice is, at a minimum, contributing to the decrease, if not causing it outright. 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 own 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 continuum[45] and overall from filing to disposition would provide much greater detail about how a choice model affects case processing times.

Perhaps the most discouraging finding is that there does not appear to be an impact on the quality of representation based on the perceptions of defendants. The choice element did not show any pronounced difference on any of the quality measures explored. However, it did appear that

[45] 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, number of motions hearings).

defendants who had been involved with the court system previously, and had an appointed attorney, were more critical of their chosen attorneys' quality than those who had not. This would be consistent with the hypothesis that individuals who have had court appointed attorneys in the past may have higher expectations about the quality of their representation when they are allowed to choose their own lawyer. In fact, these high expectations are the driving forces for providing the best representation under a free market system. With the small sample size, JMI's analyses to explore this more fully were limited; however, having an appointed lawyer previously was found to produce lower ratings of agreement with the quality measures, and indeed procedural justice measures overall. It is highly recommended that additional research be conducted to explore this dynamic with a larger sample before making conclusions about whether or not Client Choice results in higher quality representation for defendants.

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, should Comal County decide to continue the program, these concerns about a disproportionate number of cases going to a handful of attorneys, loss of business, and loss of income should be monitored over time to ensure that there are no unintended consequences that result from the program.

In addition, there are potentially larger impacts on the overall criminal justice system that are suggested by JMI's findings. First, the statistically significant differences in case outcomes, particularly with regard to a greater likelihood of split sentences 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.

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). Finally, the fact that felony 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.

Overall, JMI believes that Client Choice was successful both in terms of implementation and in demonstrating key positive system level outcomes. With the caveat that generalizations should not be made from many of the findings due the small sample, there is enough evidence to suggest that a choice model has no negative impacts on the adjudication process in Comal County, and perhaps more importantly, that there is evidence to suggest that there may be significant positive long-term impacts for the county and the criminal justice system in terms of costs.

APPENDIX XX. ORIGINAL PLAN FOR IMPLEMENTING CLIENT CHOICE

By Professor Norman Lefstein of the Indiana University Robert H. McKinney School of Law

This provides greater detail about key aspects of the planning and design process for Client Choice in Comal County and the justification for key decisions made during that process. As discussed in the body of the report, deliberate efforts were made to be inclusive in the design process, leverage lessons learned from the international models, and respond to the specific needs and culture of the Comal criminal justice system. The following discussion address 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 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.[46]

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.[47] Among the issues discussed with this advisory group was what defendants should be told about the litigation backgrounds of defense lawyers available for selection,[48] 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 group did not make decisions about the issues discussed, but contributed invaluable feedback and insightful, divergent viewpoints.

Furthermore, Comal County's judges designated six members of the private criminal defense bar to provide additional 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 advisory panel of lawyers believed that defendants accused of sex crimes would likely choose

[46] 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 previously cited. *See* notes xx and xx *supra*, Chapter x.

[47] Persons invited to serve on the advisory panel for the project are listed is in Appendix x.

[48] For discussion of this issue, *see* notes 17-19 *infra*.

the county's several lawyers with experience in these kinds of cases and overwhelm those individuals with extremely complex cases. 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."[49]

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.[50]

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.[51]

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 own lawyer or have the court select a lawyer for them.

3. Defendants wanting to select their own lawyer are provided information about the available lawyers,[52] 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.

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[49] 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.

[50] 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.

[51] 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.

[52] For discussion of the information provided to defendants about the lawyers available for selection, *see* text accompanying notes 16-18 *infra*.

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.[53]

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."[54] 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 that stated that in Comal County, Texas, "[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."[55] 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.

Statutes in Texas, as in many other states, provide for defense lawyers to be appointed by judges.[56] To implement a program in which defendants would retain their own lawyers by using county issued

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[53] 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

[54] Schulhofer & Friedman, *supra* note xx, *Reforming Indigent Defense*, at 13. The authors also suggest that the amount of the vouchers could be issued in variable amounts 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).

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

[56] *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

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 own 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.[57] 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 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. But 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 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

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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."

[57] *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* notes xx *infra* and accompanying text, Chapter xx.

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.[58]

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 Court judges.[59] Similarly, defendants who showed up in

[58] 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.

[59] 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. *See* notes xx-xx *infra* and accompanying text, Chapter xx.

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, yet the implementation team would have preferred to periodically scramble 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."[60] 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.[61]

However, this part of the implementation plan did not function in the manner prescribed. The principal magistrates 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 magistrates 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 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 court.[62]

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.

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[60] TEX. CODE CRIM. PROC. Art. 1.051.

[61] 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." *See* note 9 *supra* for citations to the implementation plans.

[62] *See* text at notes xx – xx *infra*. 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.

Specifically, Texas professional responsibility rules require that lawyers provide "competent" and "diligent" representation.[63] 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."[64] 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…."[65] As discussed in the body of this report, some lawyers availed themselves of the opportunity to remove themselves temporarily from the appointment lists.

[63] Texas Disciplinary Rules of Professional Conduct, Rule 1.01.

[64] *Id*., cmt. 6. 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.")

[65] 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 XX. CONSTITUTIONAL ARGUMENT REGARDING CLIENT CHOICE

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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.[66] To illustrate, in Morris v. Slappy,[67] 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."[68]

More recently in United States v. Gonzales- Lopez,[69] 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.[70] 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 meaning of the constitutional guarantee"[71] of the Sixth Amendment.[72] In the words of Justice Scalia who authored the majority's opinion: "[w]here the right to be assisted by counsel of one's choice

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[66] *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.").

[67] 461 U.S.1 (1983).

[68] *Id*. at 14.

[69] 548 U.S. 140 (2006).

[70] 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).

[71] *Gonzales-Lopez, supra* note 24, at 148.

[72] *Id*. at 147-48.

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."[73]

There is still the question though of whether defendants, who cannot afford to hire a defense lawyer are 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,[74] the answer from *Gonzales-Lopez* is 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."[75]

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.[76] 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" [77] 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, in his case, 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 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."[78] 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

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[73] *Id*. at 148.

[74] "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).

[75] *Id*. at 151-52.

[76] State v. Jones, 326 Wis.2d 380, 797 N.W.2d 378 (2010).

[77] 326 Wis.2d at 391, 797 N.W.2d at 384.

[78] 326 Wis.2d at 417, 797 N.W.2d at 397.

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."[79]

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.[80] These provisions of the Constitution often have been applied in the criminal justice area to eliminate disparities in treatment between rich and poor defendants.[81]

Clearly there are pros and cons to a client choice model as outlined in the various policy arguments. These arguments, along with the questions that are raised about indigent defendants having the same constitutional right to lawyers of their choice as those who can afford attorneys, are important foundations for understanding the rationale for implementing and testing a client choice model. In doing so, the current experiment will provide additional insight about the practical implications and impacts of a client choice model that will likely be useful to legislative bodies in structuring systems for providing defense lawyers for the indigent and for future litigation in the courts.

The issue of whether indigent defendants have a constitutional right to lawyers of their choice has been presented here before discussing our research of Client Choice in Comal County so that readers will understand that, in view of the *Gonzales-Lopez* decision, client choice by indigent defendants is likely to be litigated further in the courts and perhaps also considered by legislative bodies in structuring systems for providing defense lawyers for the indigent.

[79] 326 Wis.2d at 419, 797 N.W.2d at 398.

[80] Moore, *The Antidemocratic Sixth Amendment*, *supra* 9, at ---.

[81] "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* 9, at ---, 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 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 9.