Examining the Impact of Criminal Defense Reform in Texas: Has the Fair Defense Act Been Effective?

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ABSTRACT

The 77th Texas Legislature adopted a sweeping reform of the state's indigent criminal defense system. This paper examines the history leading to the adoption of the Fair Defense Act and its impact. The paper includes a description of the provision of the Fair Defense Act as well as the qualities of an ideal indigent defense system. Using the results from statewide surveys of criminal defense lawyers and prosecutors, the authors find that respondents believe the process of representing indigents clients has improved. More importantly, the process improvements have translated into improvements in the quality of representation provided to indigent clients.

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In 2001, the 77th Texas Legislature adopted the Fair Defense Act (FDA) which was designed to significantly overhaul the criminal defense process for the state's poor. One national expert noted the significance of the legislature's action when he pronounced the FDA as "the most significant piece of indigent defense legislation passed by any state in the last twenty years."[1] Given the relatively poor state of indigent defense in Texas, there were high expectations for the Fair Defense Act. The Act was expected to ensure the timely appointment of counsel so that poor defendants did not sit in jail for weeks or months without legal representation as was then the case in some jurisdictions. The Act was also expected to bring rigor and fairness to the appointment of counsel and to provide counsel with the financial resources and incentives to properly represent their clients. Perhaps most significantly, the legislation, as its name suggests, was intended to bring 'fairness' to the criminal justice process. Prior to the passage of the FDA, it was generally a given that defendants who could afford to retain counsel received a higher level of representation and, indeed, more favorable treatment from the courts than those forced to rely on counsel provided by the courts.

Given these lofty expectations, it is appropriate that we examine whether the goals of the Fair Defense Act have been achieved. The goals of the FDA can be broadly classified into two areas. First, the Act attempts to accomplish process improvements. Examples of process improvements include timely appointment of counsel, fair and impartial assignment of counsel, and adequate compensation for attorneys. Second, the Act, at its core, intends to improve the

[1] See Beardall, Bill. "Texas Indigent Defense Reforms Survive Legislative Session Intact." 2003. http://www.equaljusticecenter.org/new_page_38.htm

quality of representation and, thereby, increase the 'fairness' of the system. In fact, the Act's process improvements, while worthwhile at some level, have been implemented because it is believed they will improve the quality of legal representation for the state's poor.

This paper provides an examination of the Fair Defense Act's early years from the perspective of the criminal defense attorneys and prosecutors. Our analysis seeks to answer whether the FDA has been effective at obtaining its process and representational goals. Before turning to an analysis of the FDA, we provide a brief history of indigent defense in Texas and describe the landscape that lead to the FDA. We then direct our attention to the provisions of the FDA and answer the question of whether the Act has been effective. At the outset, it is important for us to acknowledge that the data on which we have relied are impressionistic (public opinion polls) and that one's view of effectiveness may depend on the role he or she plays in the criminal justice system.

The Right to Counsel and Its Implementation In Texas

Since *Gideon v. Wainwright,* 372 U.S. 335 (1963) indigents accused of criminal offenses that carry a possible punishment of confinement have been entitled to an attorney and the support needed to mount a defense to those charges.[2] The revolutionary effects of *Gideon* were not

[2] In 1963, the United States Supreme Court ruled in *Gideon v. Wainwright*, 372 U.S. 335, that the Constitution required the appointment of an attorney to represent any indigent person charged with a felony level offense. As the Court explained, "In our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crimes. . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries" (372 U.S. at 344). *Gideon,* while a landmark, merely extended the reasoning of *Powell v. Alabama*, 287 U.S. 45 (1932), which had earlier ruled that the Constitution required legal counsel be appointed or otherwise provided for indigents accused in capital cases. Later cases such as *In re Gault,* 387 U.S. 1 (1967), *Argersinger v. Hamlin*, 407 U.S. 24 (1972), and *Ake v. Oklahoma* 470 U.S. 68 (1985) continued to extend the right to counsel and provide additional protections for indigents accused in criminal matters.

nearly as dramatic in Texas as was the case in many other states. This is due in large measure to the fact that as early as 1857, the Texas Code of Criminal Procedure provided, "(w)hen the defendant is brought into Court, for the purpose of being arraigned, if it appears that he or she has no counsel, and is too poor to employ counsel, the Court shall appoint one or more practicing attorneys to defend him." This guarantee of legal counsel in criminal cases, regardless of ability to pay, has been the law in Texas for over 140 years and over 100 years before *Gideon*. In addition to the Texas Code of Criminal Procedure, Article 1, Section 10 of the present (1876) Texas Constitution guarantees the right of counsel and this provision has been found in every Texas Constitution since Texas became a Republic in 1836. (See, *Foster v. State*, 767 S.W. 2d 89 [Tex. Crim. App. 1990]).

Historically, the day-to-day implementation of the requirements of *Gideon* occurred through a number of systems. Criminal cases in Texas are tried in the counties in which the offenses occur.[3] Prior to the Fair Defense Act each court had the authority to develop its own

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[3] To understand how Texas came to have this patchwork delivery system, rather than the unified systems found in some other states, it is necessary to consider how Texas historically treated the issue. Texas was one of four states that placed sole responsibility for funding indigent defense at the local county level. It joined Pennsylvania, South Dakota and Utah in that approach. FAIR DEFENSE REPORT: ANALYSIS OF INDIGENT DEFENSE PRACTICES IN TEXAS, (2000), 34-35. Years ago, many of the counties merely assigned local attorneys to handle these cases with little or no compensation or funds for expenses. Because receiving these appointments was so unpopular, the bar associations in some counties developed a system whereby they assessed their membership and established a pool of funds from which attorneys who were willing to take these cases would be paid or have their county pay supplemented. Indeed, it was such an arrangement that resulted in a statute creating the first public defender effort in Texas. In 1969, the Tarrant County Bar Association (Fort Worth), which had been assessing its members for these funds, succeeded in transferring that financial burden to the county by persuading the legislature to provide one county-paid public defender position for each Tarrant County district court that handled criminal matters. Art. 26. 042, Tex. Code Crim. Proc. Even at present, some county bar associations in major metropolitan areas continue to assess members who do not want to take court appointments and use these funds to "sweeten" the pool of funds from which remuneration is paid to those attorneys who are willing to handle them. For example, in El Paso County, each attorney must either accept criminal appointments or pay a $600 assessment which is deposited in the county's Indigent Criminal Defense Fund.

delivery system for legal services to the poor.[4] Given that there are over 400 district courts and over 450 county courts operating in the 254 counties of Texas, diversity in the provision of legal services to indigent defendants was the order of the day.[5] As is the case nationally, three primary methods of delivery were encountered: assigned counsel programs, contract services, and public defender programs.

Texas Assigned Counsel Systems. While all three methods of providing legal representation continue to be used in Texas, the assigned counsel system is the most prevalent. However, given the great diversity found in the 254 Texas counties, use of that seemingly descriptive label may be misleading. Texas "appointed" or "assigned" counsel systems have historically varied significantly throughout the state. In some courts, the judge would assign counsel on an "as needed" basis, without benefit of a formal list of eligible attorneys or a systemized rotation method. It was a true "ad hoc" appointment. Some judges assigned attorneys from a list of all the licensed attorneys in the county,[6] while other judges only assigned

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[4] An exception to this model of local court autonomy is found in the representation of death penalty post-conviction proceedings. In that limited context, there is some uniformity imposed by state statute. Arts.11. 071§2A and 26, 052, Tex. Code Crim Proc.

[5] The Texas "system" has been described as potentially having more than 800 different indigent defense models. The resulting variations prompted one research group to observe: "We found that judges, administrators and practitioners in one county rarely have much familiarity with the local indigent defense procedures used in other counties. In fact they often have little or no familiarity with the practices in other courts within their own county, outside of those courts where they sit or practice." Fair Defense Report, 3.

[6] Prior to the Fair Defense Act, one of the most interesting and innovative methods by which counsel were selected for appointment was found in Travis County. Under this system attorneys wishing appointments made formal application and had to be approved by the judges who, for felonies, then placed each attorney in one of three categories ("A", "B" or "C" plus a capital murder group and an appellate group) based on his or her experience, years of practice, and other criteria indicating legal skills. This was not unlike "flights" of players at a golf tournament. Each new indigent case was categorized as an "A", "B" or "C" offense based on the applicable punishment range and then an administrator appointed the next lawyer, alphabetically, on that respective list. This system allowed the Travis County judges to control which lawyers were on the list and what list they are on; however, the actual appointment of a particular attorney to a particular case was done by someone else. The Travis County system also provided machinery, at least at the county court level, by which a trial judge could sanction an attorney if that is deemed necessary. These sanctions included requiring the attorney to work with a mentor, placing the attorney on probation, requiring the attorney to take additional training or removal of the attorney from the appointment list.

attorneys from pools of those who had volunteered for such service, whether in that particular court or in the county as a whole. In some jurisdictions, attorneys were given the choice to "opt in" or "opt out" of the potential appointment pool.[7] Other judges restricted their appointments to attorneys who met certain standards, such as years of practice, minimum trial experience or proof of continuing legal education.[8] In short, the reality was that each of the over 800 criminal judges in Texas determined the method by which attorneys would be appointed to criminal cases in his or her court. As a result, there was no single "appointed counsel" system, but rather there were a great number of such systems, many with their own particular twists.

Texas Public Defender Systems. Texas, like many other states, permits counties to develop public defender systems. Prior to the Fair Defense Act, the Texas Code of Criminal Procedure restricted the use of public defenders to eight judicial districts.[9] One of these eight

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[7] Prior to the Fair Defense Act, three counties, Bexar, El Paso and Midland, presented a variation on the assigned counsel model. In these counties, all eligible lawyers were initially put on the appointment lists, but then were allowed to "buy out" of service by paying the county a fee to *not* receive court appointments. Thus, all lawyers who did not wish to handle criminal cases or who at least do not want to handle indigent defendants, simply paid an additional "tax" to the county to have their names removed from the appointment lists.

Under the Bexar County plan, approximately 5,000 lawyers appeared on the list. Attorneys "opted out" of service by paying a $500 annual fee to the San Antonio Bar Association. Attorneys were also given the choice to "opting in" and requesting additional "bonus cases" for which they would be paid. Estimates placed approximately 20 percent of eligible attorneys in the "opt out" category. Roughly a quarter of eligible attorneys both failed to pay the fee or requested cases, and thus were placed on the appointment list by default. Appointments were made from the list in alphabetical order. Once appointed, attorneys who defaulted onto the list had a second opportunity to "opt out" by paying a $1,000 fee to the plan. Attorneys accepting "bonus cases" in addition to their annual allotment were paid by the Bar Association on an hourly basis and by the county from those funds derived from attorneys paying to "opt out" on the system. FAIR DEFENSE REPORT, 16.

The El Paso plan similarly used a general appointments list containing the name of all qualifying attorneys in the county and excluding those who have paid the $600 "opt out" fee. Because El Paso also had a public defender's office, only half the of appointments were made from the rotation of the computerized list of eligible attorneys. FAIR DEFENSE REPORT, 17.

[8] Harris County had by far the most rigorous formal requirements for appointments. In that county, any attorney who wished to be appointed to represent indigents in criminal cases must first be "certified" as competent by passing an exam and by showing proof of his or her trial or appellate experience, attendance at continuing legal educations programs or Board Certification by the State Bar of Texas. All of the Harris County judges agreed to limit their appointments to "certified" lawyers and the county auditor was instructed not to pay any voucher submitted for a lawyer who was not on the approved list. FAIR DEFENSE REPORT, 24,50.

[9] Arts. 26. 041 - 26.049, Tex. Code Crim. Proc.

districts is a multi-county district.[10] The remaining seven judicial districts involve single-county public defender offices.[11] Even in such a seemingly small sample, there were, however, great differences in the organizations and the scope of the eight public defender operations. Wichita County (population 122,378) was the only county that sought to have the public defender office handle all cases, other than those having a conflict of interest or other impediment. Consequently, that office represented approximately 85 percent of all indigent defendants. At the other end of the spectrum, Tarrant County (Fort Worth) had a single "public defender" appointed in each of that county's eight district courts that handle criminal matters.[12] The judge of each of these courts made this appointment and then assigned to this "public defender" such cases as the judge deemed appropriate. Commonly these amounted to only a small percentage of the total indigent cases in that court and were often restricted to matters that could be disposed of quickly.[13] The Tarrant County "public defenders" were usually considered to be half-time employees. They had no central office, investigators, secretaries or other support staff. When support services were needed, the Tarrant County public defenders had to petition the judge in each individual case, just as did any court appointed counsel.[14]

Between Wichita County in which the public defenders office represented almost all of the indigents accused of crime and Tarrant County where the public defenders handled only a very small percent of the cases, were other public defender offices such as those found in Dallas and El Paso counties. The Dallas County Public Defender office has an annual budget of over $3.5 million and, as of May 2000, employed 49 attorneys. These lawyers work in all but two of

[10] The 33rd Judicial District is comprised of Blanco, Burnet, San Saba, Mason and Llano counties.
[11] For example, Dallas and Wichita counties.
[12] See, Article 26.042, Texas Code of Criminal Procedure.
[13] Examples of cases involving a potentially quick disposition would include cases in which community supervision (probation) is the obvious punishment outcome, probation revocation proceedings and the like.
[14] Art. 26.05, Tex. Code Crim. Proc.

Dallas County's felony and misdemeanor courts and handle between 43-45 percent of the county's indigent defense requirements. The individual courts vary in the manner and degree to which they utilize the public defender office, but that office has represented indigent clients in cases ranging from minor misdemeanors to death penalty trials. In 2000, the El Paso County Public Defenders Office had approximately 18 lawyers on the staff and operated under a budget of about $1.2 million. That office then represented about half of the indigent persons prosecuted in that county. Now in 2005, the El Paso Public Defender Office has a staff of 27 full-time attorneys and a budget of approximately $3 million. They continue to handle about half of that county's indigent defendants.

Texas Contract Defender Systems. Contract defender systems have grown in popularity and variations of this delivery model are found in both large and small Texas counties.[15] Under this system, either the county,[16] or an individual court within the county,[17] contracts with an attorney or group of attorneys to represent all or a portion of the indigent criminal defendants over a given period of time. The typical Texas contract defender model is an agreement between one or more attorneys and one judge. Under this system, judges do not appoint attorneys on a case-by-case basis; rather the contract attorneys handle the entire docket or a specific number of cases. The contracts range from one day's duration[18] to a semi-permanent, multi-month term.[19]

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[15] The Texas Appleseed Fair Defense Project noted this trend in its research study of 23 Texas counties. Out of that pool, one-third of the counties (8) used some type of contract services. In the view of the project, however, none of the contracts it reviewed complied with national guidelines or standards such as STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES (American Bar Association 1990) or GUIDELINES FOR NEGOTIATING AND AWARDING INDIGENT DEFENSE CONTRACTS (National Legal Aid and Defender Association 1984). FAIR DEFENSE REPORT, 19.

[16] For example, Young County (population 18,126).

[17] For example, Harris County; *see* Article 26.041, Texas Code of Criminal Procedure.

[18] This model was frequently encountered at the county court level where the judge may orally contract with counsel to be the "attorney for the day", handling all the cases that the court received on that particular day for a flat rate. If the case was not disposed of at that initial setting, a new lawyer was appointed. FAIR DEFENSE REPORT, 20.

[19] Contract defender systems are increasingly popular on the national front as well. See *American Bar Association, Standards for Criminal Justice: Providing Defense Services*, Standard 5 - 12 commentary at 6 (3d ed. 1990);

Indigent Criminal Defense in Texas Prior to the Fair Defense Act

As noted above, the process of representing indigent criminal defendants in Texas prior the Fair Defense Act was haphazard and, according to perceptions, lacked rigor and was fraught with all sorts of problems. The State Bar of Texas Committee on Legal Services to the Poor in Criminal Matters conducted state-wide surveys of criminal defense lawyers, prosecutors, and judges in the years leading up to the passage of the Fair Defense Act.[20] The results of these surveys painted a picture of a system that lacked appropriate resources, necessary oversight, and resulted in different standards of justice for those who could not afford to hire an attorney compared to those able to retain their own counsel. This conclusion can be illustrated by examining survey results related to five different aspects of the pre-FDA indigent criminal defense system.

Who qualifies as an indigent? One of the most central questions to any system of indigent legal representation is the issue of determining who is qualified to receive legal services paid by the taxpayer. Prior to the implementation of the FDA, the state did not require counties to have written criteria for determining this most basic issue. Surveys from defense attorneys,

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National Association of Criminal Defense Lawyers, *Low-Bid Criminal Defense Contracting: Justice in Retreat*, CHAMPION, Nov.1997, 22- 24. Commentators disagree on whether such systems provide a lower quality of representation as opposed to public defender or appointed counsel programs. *Contrast,* Meredith Anne Nelson, Comment, *Quality Control for Indigent Defense Contracts*, 76 Ca. L. Rev. 1147, 1151-55 (1998) *with*, David Paul Cullen, *Indigent Defense Comparison of Ad Hoc and Contract Defense in Five Semi-Rural Jurisdictions*, 17 Okla. City U. L. Rev. 311, 374-75 (1992). The defects generally ascribed to low-bid contract systems are that: "contracts are awarded on the basis of cost alone without inquiry into attorney qualifications; attorneys are paid a flat fee regardless of the number or complexity of cases that arise; no funds are available for investigation or support services; attorneys are neither trained nor supervised; and there are no caseload limits or performance standards." Margaret H. Lemos, Note, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense,* 75 N. Y. U. L. Rev. 1808, footnote 25 (2000).

[20] The survey to criminal defense attorneys was distributed to a sample of 3000 individuals and received a response rate of 46%. The survey of prosecutors was distributed to all prosecutors in the state (n=1,942) and received a response rate of 57%. The survey of judges was distributed to all judges with criminal jurisdiction (n=846) and received a response rate of 58.4%. The results from these three surveys were widely publicized and believed to be influential in the passage of the Fair Defense Act.

prosecutors and judges confirmed that many jurisdictions did not have written criteria for determining indigent status. In some jurisdictions this meant that anyone who requested a lawyer was given one, while in other courts judges required proof of financial means. Not surprising, this lack of clarity caused some folks to be dissatisfied with the process. It should be pointed out that since the process of determining indigent status was placed in the hands of the judge (or his or her designee), judges were generally more satisfied with this practice.

Does the county in which you practice have formal written criteria used in determining indigency status?

	Attorneys	Prosecutors	Judges
Yes	32.3%	36.9%	51.9%
No	33.7%	32.9%	48.1%
Don't Know	34.0%	30.3%	

How satisfied are you with the current method of determining a defendant's indigent status in your jurisdiction?

	Attorneys	Prosecutors	Judges
Very Satisfied	10.6%	16.2%	27.4%
Somewhat Satisfied	25.2%	31.0%	45.0%
Neither Satisfied nor Dissatisfied	23.6%	22.9%	14.8%
Somewhat Dissatisfied	24.1%	19.7%	10.2%
Very Dissatisfied	16.5%	10.3%	2.6%

How are attorneys assigned? Not only did many participants in the criminal defense system lack clarity as to how indigent status was determined, many were also less than satisfied with the process of assigning legal representation. For example, in cases where the initial legal issues appeared to be more complex, most judges admitted they did not have formal procedures for selecting counsel and less than a third of the defense attorneys and prosecutors were aware of provisions (either formal or informal) for monitoring the quality of representation provided by assigned counsel. In perhaps one of the more disturbing, although not necessarily surprising responses, judges indicated that they were aware of colleagues who were at least sometimes influenced in their decision to appoint counsel by whether the appointed lawyer was the judge's

friend (39.5%), contributed to their political campaign (35.2%), the attorney simply asked to be appointed (91.3%), the attorney needed money (52.4%), the judge wanted to supplement a semi-retired attorney's income (24.3), or because the attorney had a reputation for moving cases, regardless of the quality of representation (46.4%). What is surprising about these responses is that concern for the quality of legal representation or the qualifications of the lawyer appear to be absent.

Are there formal provisions for selecting court appointed counsel in more complex, serious or special cases (e.g., mentally ill)?

	Attorneys	Prosecutors	Judges
Yes	22.6%	29.2%	45.2%
No	40.3%	37.9%	54.8%
Don't Know	37.1%	32.8%	

What provisions, if any, exist for monitoring the quality of representation provided by attorneys serving as court appointed counsel?

	Attorneys	Prosecutors
None Exist	42.4%	39.2%
Formal Provisions Exist	4.4%	2.2%
Informal Provisions Exist	26.3%	28.1%
Don't Know	26.9%	30.4%

How satisfied are you with the current method of appointing counsel in indigent criminal cases in your jurisdiction?

	Attorneys	Prosecutors	Judges
Very Satisfied	14.4%	22.4%	45.8%
Somewhat Satisfied	31.9%	31.0%	43.3%
Neither Satisfied nor Dissatisfied	15.8%	25.9%	7.5%
Somewhat Dissatisfied	22.8%	16.3%	3.4%
Very Dissatisfied	15.2%	4.4%	0.0%

Is attorney compensation sufficient? Perhaps the most fundamental issue facing all indigent criminal representation systems is funding. The issue manifests itself in how much to pay assigned counsel, at what level to fund the contract system and the proper funding level for public defender systems. The surveys conducted prior to the FDA revealed that funding levels may have been responsible, in some cases, for the perceived poor quality of representation. For example, 73% of criminal defense attorneys responded that they had spent money out of their

own pocket to represent their indigent clients. Furthermore, they indicated that the county's payment was only approximately 30% of their normal billing rate meaning that the attorney was, in effect, helping to subsidize the indigent criminal defense system in a manner not expected of any judge, prosecutor, or, for that matter, citizen of the state. Not surprising, substantial numbers of defense lawyers and prosecutors believed that the pre-FDA rates of compensation were not sufficient to attract quality lawyers (recall that under some systems in the state the lawyers could 'opt out') and that the low level of compensation adversely impacted the quality of representation.

Do you believe that current rates of compensation are sufficient to attract and retain qualified private counsel for court appointed indigent cases?

	Attorneys	Prosecutors	Judges
Yes	15.1%	49.2%	49.4%
No	77.1%	37.6%	40.9%
Don't Know	7.8%	13.2%	10.0%

Based on your observations, does the level of compensation paid to assigned counsel in any way affect the quality of representation?

	Attorneys	Prosecutors	Judges
Yes	67.8%	38.4%	27.1%
No	22.9%	46.9%	62.4%
Don't Know	9.3%	14.6%	10.4%

Do defense lawyers have sufficient access to support services? To properly do their job in a complex legal environment, defense lawyers need to make use of special services (e.g., mental health experts, DNA experts, etc.). In the pre-FDA environment since the country was paying the bill, however, the assigned lawyer had to first seek the approval of the judge before committing the county's finances to the expert. It was possible, indeed it was quite common, for a judge to refuse to spend additional taxpayer resources on an expert. Presumably, this denial

adversely impacted the defense lawyer's ability to adequately represent his or her client since the lawyer's professional judgment was that the expert was necessary. Over sixty percent (61%) of defense lawyers responded that they did not feel that they had received the support services they needed to represent their clients and that over thirty percent (31%) of all such requests were denied. Substantial numbers of prosecutors and judges concurred that this situation was problematic. Approximately one in four prosecutors and judges (22.%% for prosecutors and 26.7% for judges) believed that defense lawyers did not receive the services they needed and roughly thirty percent believed that these denials sometimes prevented the defense lawyer from providing quality legal representation (32.8% for prosecutors and 29.5% for judges).

Do indigents receive fair representation? Until this point, the questions have focused on the pre-FDA *process* of representing indigent criminal defendants and not the outcome. The question of whether indigent and non-indigent criminal defendants received the same brand of justice is, most would agree, the most important question. While process issues should not be dismissed, if, at the end of the day, a flawed process results in equal justice, then most observers would be satisfied. If, on the other hand, the standard of justice is different for indigent and non-indigent, then we have reason to be concerned.

Unfortunately, the surveys of lawyers, prosecutors, and judges indicated that there was reason to believe that the brands of justice differed for indigents and non-indigents prior to the FDA. Substantial numbers of defense lawyers (75%) responded that clients with retained counsel received better representation than those with appointed counsel. While the numbers of prosecutors and judges holding this belief were somewhat smaller, it is worth noting that significant numbers of both groups shared this belief. The general perception was that those representing paying clients spent more time preparing, put on a more vigorous defense, and were

better qualified. It is important to remember that in a judge assigned system, the lawyers selected to represent indigent clients are the same lawyers that one may hire as a retained counsel. This observation was a particularly strong indictment of the pre-FDA system since it meant that on days where the lawyer was representing paying clients they worked hard, prepared, and put on a vigorous defense, but on days where they represented clients assigned to them by the court, the same lawyer provided a level of representation below that provided to the paying client.

In generally, do you believe that clients with retained counsel receive better representation than clients who have received court appointed attorneys?

	Attorneys	Prosecutors	Judges
Retained counsel always provide better representation	10.6%	2.0%	1.6%
Retained counsel usually provide better representation	64.4%	36.8%	40.4%
Retained and court appointed counsel typically provide the same quality of representation	24.0%	57.1%	52.2%
Court appointed counsel usually provide better representation	0.9%	4.0%	5.8%
Court appointed counsel always provide better representation	0.0%	0.1%	0.0%

Thinking of the defense attorneys you have noticed behaving differently depending on the nature of their client

		YES		NO	
		Prosecutors	Judges	Prosecutors	Judges
a.	Do these attorneys devote less time to their indigent clients?	90.3%	87.3%	9.7%	12.7%
b.	Are these attorneys less prepared to defend their indigent clients?	76.0%	72.7%	24.0%	27.3%
c.	Do these attorneys put on a less vigorous defense of their indigent clients?	65.5%	66.0%	34.4%	34.0%

Striving for an Ideal Indigent System

As the data in the previous section reveal, the situation in Texas prior the Fair Defense Act was far from ideal. The system was one in which substantial numbers of lawyers, prosecutors, and judges were dissatisfied with the appointment process. It was a system that did not provide adequate compensation or support services to defense lawyers. More importantly, it was a system that seemed to yield different standards of legal representation and justice depending on the economic situation of the defendant. Almost everyone would agree with the

principle that indigent defendants should have access to the same quality of justice as defendants who retain their own counsel, yet this did not appear to be the case in pre-FDA Texas.[21]

The outcomes of cases should not differ based on whether counsel is appointed or retained, that is, on the financial resources of the defendant. For the right to an attorney to be meaningful, the system of representing indigents should meet a number of criteria, regardless of the delivery model used.[22]

- *Qualified and Independent Attorneys.* Legal counsel appointed to represent indigent clients in criminal matters should be competent and assigned in a fashion that encourages vigorous defense of their assigned clients. The assigned attorneys should, at all times, be seen as independent advocates for their clients and adhere to the highest ethical and professional standards. As a corollary, and in order to assure the independence of counsel, the system of representing indigent defendants should be devoid of political considerations. Political party preference, electoral considerations, and financial pressures should have no place in determining judicial outcomes.
- *Prompt Appointment.* The counsel should be assigned within a reasonable number of hours or days and not a matter of weeks or months after the arrest. Waiting until indictment to provide an attorney, which was not an uncommon occurrence in many pre-FDA jurisdictions, was not unlike waiting until the autopsy to provide a physician.

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[21] Discussing the American justice system in general, not merely in its criminal law aspects, ethicist and law professor Monroe Freedman admits there is a "troubling question... about the fairness of a client-centered adversary system in which the wealth of the contending parties — and, therefore, the quality of the representation — may be seriously out of balance." He responds that the criticism is not so much of the adversary justice system as it is of our larger capitalist system:

> One response is that unequal justice is one of the costs of the American economic system. How much food, housing, clothing, education, or other basic needs can one afford? Sadly, equal justice may be far down on the list for a major portion of our citizens.

Monroe H. Freedman, UNDERSTANDING LAWYERS' ETHICS (Matthew Bender 1990) at 41.

[22] While the precise rank order of these criteria or "standards" may vary by author, there is general consensus in the legal community that certain "core" components are essential.

- *Adequate Compensation.* Attorneys representing indigent clients should have the necessary incentives to provide their clients with their best defense. Additionally, payment for legal services provided should be made in a timely fashion. It is most likely that the resources necessary to adequately compensate and support an appropriate indigent defense system will require a commitment of state level resources.
- *Access to Support Services.* Legal counsel representing indigent clients should have access to the resources necessary to properly defend their clients, including special support services such as experts (e.g., forensic, DNA, ballistic, psychological, etc.).
- *Equal Judicial Outcomes Regardless of Client's Economic Resources.* The ability of the client to pay for legal representation should not have an influence on judicial decisions. Stated differently, there should not be a pattern of differential decisions based on the client's ability to pay for his or her legal counsel. Indigents with court appointed counsel should receive the same judicial outcomes as similarly situated defendants who retain their own counsel.

Using these criteria as benchmarks, Burnett et al. noted that "on balance, and despite the presence of several local indigent defense practices deserving 'favorable mention,' Texas (fell)s short of meeting the established criteria for independent, qualified, and effective indigent defense"[23]. As has been reported elsewhere, the system of indigent delivery in Texas was found to be "politicized, ineffective, and provide(d) a different standard of justice when compared to those who (could) afford their own attorneys."[24]

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[23] See Burnett, Catherine Green, Michael K. Moore, and Allan K. Butcher. "In Pursuit of Independent, Qualified, and Effective Counsel: The Past and Future of Indigent Criminal Defense in Texas." South Texas Law Review. Summer 2001. Vol. 42, No. 3, p. 599.

[24] See Butcher, Allan K. and Michael K. Moore. "Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense in Texas," 2000. http://www.uta.edu/pols/moore/indigent/whitepaper.htm, page 20.

The Fair Defense Act (2001) was designed to correct the ills that existed in the Texas indigent criminal defense "system." The Equal Justice Center noted that "prior to the enactment of the FDA, Texas had no indigent defense "system." Indigent defense in the state was a patchwork quilt of different procedures and informal practices which varied widely from one county to the next and often from one court to the next within the same county. The Legislature determined there was too little consistency, no guarantee of prompt access to counsel, no minimum quality standards, inadequate state oversight, and insufficient funding" (2002, 1). For a state with so many identifiable problems, any reform was generally regarded as a step forward. The question of interest here is whether the FDA did, in fact, improve the indigent defense system in Texas.

Features of the Fair Defense Act

Before turning to an examination of the effectiveness of the Fair Defense Act, it is worthwhile to summarize the major provisions of the legislation. As noted above, the legislation was passed by the 77th (2001) Texas Legislature and became law in January 2002. Despite rumors that the FDA would be repealed during the subsequent legislation session, it survived without change and saw funding to support the legislation's mandates marginally increased. This last point should not be overlooked since the 78th Legislative session (2003) was particularly harsh on social services as Texas attempted to adjust its budget to erase a $15 billion deficit.

Using the criteria above, the major provisions of the FDA can be summarized as follows:

* S*tate Level Funding Commitments.* The Texas Fair Defense Act provides some level of state funding. For the first time, Texas made state monies available for indigent defense services in

cases other than capital murder. During FY2003, the state spent $12,298,611 which was funneled to counties who had adopted indigent defense plans which meet minimum standards[25] set by the legislature and a Task Force created by the statute.[26] The state funding is, however, not a total funding package. It is more in the nature of a supplemental, or "add-on", incentive for counties.[27]

* *Professional Standards for Representing Indigent Clients.* The Texas Fair Defense Act is significant in its requirement that counties adopt and publish county-wide indigent defense systems. Those systems must meet the basic minimum standards specified by relevant

[25] Under the Fair Defense Act, the process of creating standards for Texas indigent defense will be a multi-part effort. It is an evolutionary process. The Texas Fair Defense Act contains some minimal quality standards as part of the statutory framework. Those standards will likely be supplemented by the Task Force on Indigent Defense. Consequently counties wishing to partake of this appropriation were faced with the prospect of creating interim standards effective January 1, 2002, and the further prospect of reconfiguring county procedures, if necessary, following implementation of the Task Force and its subsequent adoption of standards. In that the Texas Fair Defense Act charges the Task Force to develop standards that are consistent with nationally recognized standards, counties had a fair indication of the nature of the standards ultimately to be adopted by the Task Force.

[26] The Task Force is a new state entity created by Texas Fair Defense Act, amending Chapter 71 of the Government Code to add Subchapter D. Texas Fair Defense Act, Section 14, 32-24. This amendment creates a standing committee of the Texas Judicial Council composed of five appointed and eight ex officio members. The five appointed members are appointed by the governor, with the advice and consent of the Senate. They are to include: (1) an active district judge serving as a presiding judge of an administrative judicial region (2) a judge of a constitutional county court or a county commissioner (3) a practicing criminal defense attorney (4) a public defender (or employee of a public defender's office), and (5) a judge of a constitutional county court or county commissioner from a county having 250,000 or more population. Texas Fair Defense Act, 33-17. The eight Judicial Council members include: (1) chief justice of the Supreme Court (2) presiding judge of the Court of Criminal Appeals (4) senate member appointed by Lieutenant Governor (5) house member appointed by the Speaker (6) one judge from a county court, statutory county court, or (if neither is on the Council), probate court designated by the Governor (7) chair of the Senate Criminal Justice Committee, and (8) chair of the House Criminal Jurisprudence Committee. Texas Fair Defense Act, 32-21. The Task Force is empowered to develop policies and standards for providing defense services to indigent defendants. Texas Fair Defense Act, 36-14. These may include policies addressing (1) performance standards (2) qualification standards (3) appropriate caseloads (4) determining indigency (5) standards for operating an ad hoc assigned counsel program (6) standards for operating a public defender program consistent with recognized national policies (7) standards for operating a contract defender program (8) reasonable compensation (9) law school clinic programs (8) appointment of counsel in juvenile cases, and (9) other areas the Task Force deems appropriate. Texas Fair Defense Act, 36-18. More details related to the Task Force can be found at http://www.courts.state.tx.us/tfid/TFIDentrance.htm

[27] In this sense, the Texas Fair Defense Act is a "carrot" to reward county compliance. However, it is a comparatively small carrot. During FY2003, Texas spent $131,168,430 on indigent defense, of which 9.4% or $12,298,611 came from the state. This equates to a total per-capita expenditure of $6.29. Compared to other states, Texas ranks quite low in terms of the percent of funds provided to fund indigent defense: Florida 80.2%, Georgia 17.4%, North Carolina 100%, Missouri 100%, Louisiana 24.6%, Alabama 100%, Kentucky 83.4%, South Carolina 67.4%, Oklahoma 66.2%, and Arkansas 100%. Equal Justice Center, March 4, 2004.

provisions of the Texas Fair Defense Act. It is the criminal court judges in each county who have primary responsibility for devising the system.[28] In addition to requiring the judges to select a model and publish it, the Texas Fair Defense Act also accelerates the timing of appointment, regardless of the delivery system used.

Delivery Models

The statute approves all three traditional delivery systems found nationally: assigned counsel, public defenders, and contract defenders. However, it significantly modifies current Texas practices in all three areas.

Assigned Counsel Systems. It is here that the Texas Fair Defense Act makes some of its most sweeping changes. The "default" method for assignment of counsel in jurisdictions that do not have a public defender system is the "rotational" list. The bill seems to abolish the previous ad hoc appointment system.[29] It does so by requiring judges of misdemeanor and felony courts within the county to adopt and publish written county-wide procedures for timely and fairly appointing counsel. With three exceptions, attorneys are appointed from a public appointments list, using a system of rotation.[30] The bill embraces an "opt in" model, requiring that attorneys apply for inclusion on the public appointment list.[31] Once application is made, the attorney must satisfy three hurdles: (1) meet the objective qualifications specified by the judges in the

[28] Under certain circumstances the County Commissioners must approve the system. That occurs when the county adopts an "alternative" plan.

[29] "Seems" is used because the Texas Fair Defense Act allows courts to establish an alternative appointment system by a two-thirds vote of the judges. Even such alternative systems, however, must designate objective qualifications of counsel, which may be graduated according to the seriousness of the criminal charge.

[30] The exceptions are for counties with a public defender system [Art. 26.04(f)], counties that have adopted their own alternative, but comparable, plan [Art. 26.04 (h)]], and defendants with special needs such as for an attorney who speaks the defendant's primary language or one trained to communicate with the deaf, in which case the appointment pool is expanded to any qualified attorney within the administrative judicial region [Art. 26.04(I)].

[31] The rotation system of all qualified attorneys is the default system of appointment.

jurisdiction, (2) meet the applicable qualifications specified by the Task Force on Indigent Defense, and (3) be approved by a majority of the judges establishing the appointment list.

Public Defender Systems. The Texas Fair Defense Act eliminated the state requirement that individual counties must have specific legislative authorization to create a public defender program. The Commissioners Court of any county may appoint a governmental entity or nonprofit corporation to serve as a public defender; similarly, two or more counties are authorized to make a regional appointment. The appointing commissioners specify the duties of the public defender, the types of cases suitable for appointment, and the courts in which the public defender is required to appear. The commissioners have discretion to appoint a public defender for a specific term or to require that the defender serve at the pleasure of the commissioners court. The bill provides mechanisms for soliciting proposals for the establishment of defenders' offices and what those proposals must contain.[32]

Contract Defenders Systems. In addition to the default rotation system or a public defender model, the Texas Fair Defense Act allows judges to develop an alternative program for appointing counsel. To do so, several basic requirements must be met. The alternative program must be approved by two-thirds of the misdemeanor or felony judges and also by the presiding administrative regional judge.

The alternative program may use a single method for appointing counsel or a combination of methods. As with the rotational assigned counsel system, the alternative program must ensure that all appointed lawyers meet specific objective qualifications. Each attorney must be approved by majority of the judges. Lastly, the alternative program must be

[32] Included in the proposal *must* be (1) budget figures (2) descriptions of each personnel position (3) maximum caseload figures (4) personnel training provisions (5) anticipated overhead costs, and (6) policies for the use of investigators and experts.

approved by the commissioners court if either of two circumstances is present: (1) if the program obligates the county by contract; or (2) if it creates a new position that causes an increase in the expenditure of county funds.

Prompt Appointment

The point at which defense counsel enters a criminal prosecution is a key feature of the new statute. The Fair Defense Act keys timing of the appointment of counsel to county size. In counties having less than 250,000, in population, counsel shall be appointed within three working days of the defendant's request, assuming that adversarial proceedings have been initiated. In counties having populations more than 250,000, the time for appointment is narrowed to one working day.

Bringing the arrested person before a magistrate is the event that triggers the appointment of counsel process. The Texas Fair Defense Act requires that an arrested person must be brought before a magistrate within forty-eight hours of arrest. At that appearance the arrested person is given the right to request appointment of counsel. If the defendant requests appointed counsel, then the magistrate must either appoint counsel immediately if authorized to do so under the county system, or transmit the request to the appointing authority within twenty-four hours. The authority, in turn, must then appoint counsel within one working day from the receipt of that request in larger counties, and within three working days of the receipt of request in smaller counties.[33]

[33] Thus as a rule of thumb, counsel would be appointed within four working days of arrest in larger counties, and within six working days of arrest in smaller counties. As with other portions of the Texas Fair Defense Act, the critical division of county size is the population figure of 250,000. This represents a marked increase in the timeliness of appointment from current Texas practices discussed earlier for most jurisdictions in Texas. Exceptions currently exists, such as Harris County and Lubbock County, both of which typically provide for appointment of counsel within twenty-four to forty-eight hours of arrest. In many other parts of Texas, however, counsel is not

The process changes for defendants released on bond. If the defendant is released on bail before counsel is appointed, then the Texas Fair Defense Act does not require appointment of counsel until the defendant's first court appearance or "when adversarial judicial proceedings are initiated", whichever occurs first.[34]

Marked considerations are also implicated in a different way for persons arrested without a warrant and detained in jail. If a magistrate has not found probable cause within a twenty-four hour period for misdemeanors or a forty-eight hour period for felonies, then the person must be released on bond.

In terms of the Texas Fair Defense Act, "prompt appointment" also means prompt consultation between appointed counsel and indigent defendant. The Act provides that appointed defense attorneys must make a reasonable effort to contact their clients within one working day of appointment. [35] The requirement of prompt consultation is not merely an aspirational guideline. Attorneys failing to do so face specific statutory sanctions. For example, they may be removed from the case. And, for attorneys who intentionally and repeatedly violate this requirement, the remedy may be removal from the pool for appointments in *any* cases.

** Accurate and Efficient Criteria for Determining Indigent Status*

The county-wide indigent defense procedures established under the Texas Fair Defense Act must include financial standards for determining indigency; the standards must be based on the defendant's specific financial circumstances. Significantly, the defendant's ability to post

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appointed to indigent felony defendants until an indictment is returned and the defendant arraigned. FAIR DEFENSE REPORT, 29-30.

[34] Determining precisely when "adversarial judicial proceeding" have been initiated becomes a critical issue. The United States Supreme Court and the Texas Court of Criminal Appeals have indicated in past cases that adversary proceedings are initiated by arraignment before a magistrate. Based on these holdings, counties may find it both efficient and less litigation-likely, to use the same four or six day time line even for bonded defendants.

[35] Specifically, the Act provides that appointed attorneys shall "make every reasonable effort to contact the defendant not later than the end of first working day after the date on which the attorney is appointed and to interview the defendant as soon as practicable after the attorney is appointed. . . ."

bail may not be considered as a factor apart from the defendant's actual financial circumstances.[36] In addition to modifying how "bond ability" is used as a condition indicating indigency, the Act also amends how spousal income can be considered. Only spousal income that is available to the defendant is a permissible factor in making the indigency determination.[37]

These two seemingly modest amendments and additions to the existing statute concerning the determination of indigency have the potential for profound, far reaching impact. Use of the term "spousal funds that are available to the defendant" is a narrowing of the prior language of the statute which spoke in terms of "spousal income."[38] Under current Texas practices, bail is the most common criteria used to determine whether an individual is appointed an attorney.[39]

The Texas Fair Defense Act also provides that once an indigency determination has been made by the court, there is a presumption of continued indigency. That presumption lasts for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances takes place.

* *Compensation and Timely Payments*

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[36] This provision modifies Article 26.04 of the Texas Code of Criminal Procedure. One significant addition to that statutory provision is the limitation on how a defendant's ability to post bond is considered by the court or the court's designee. That ability may only be considered under this Act to the extent "that it reflects a defendant's financial circumstances as measured by the considerations listed in this sub-section."

[37] Available spousal income joins other more traditional factors such as the defendant's income, source of income, assets, property owned, outstanding obligations, necessary expense, and number and age of dependants.

[38] This narrowing was recommended by the Texas Bar Standard, Standard 1.1. It recognizes that for certain offenses, particularly those involving family members of the defendant or spouse, spousal income should not be considered because it would not be "available to the defendant". Examples include cases in which the defendant is charged with criminal conduct either involving the spouse or a member of the spouse's household, such as the attempted murder of the spouse or the sexual assault of a child.

[39] As noted in the commentary to Texas Bar Standard 1.1: "there are many instances where an individual can afford bail, but cannot afford an attorney. The individual should not placed in a position of choosing between his job, place of residence, family, etc., on one hand and obtaining an attorney."

The new statute adds teeth to existing provisions of the Texas Code of Criminal Procedure concerning payment for services rendered. Judges in each county are required to adopt an appointed attorney fee schedule. The schedule must state reasonable rates "taking into consideration reasonable and necessary overheard costs and the availability of qualified attorneys willing to accept the stated rates." [40]

Attorneys are required to complete an itemized form for payment, which is in turn submitted to the judge presiding over the proceeding. If the judge disapproves an attorney's fee request, then the judge must make written findings stating both the amount actually approved and the reason for disapproving the requested amount. If the original voucher is rejected, the attorney submitting the voucher is given an appeal mechanism to the presiding judge of the administrative region. The Act also provides a mechanism for removing an attorney from the pool of lawyers eligible for appointment if a false claim is submitted.[41]

Left unchanged by the Texas Fair Defense Act is the provision in Article 26.05 that among the services to be reimbursed are "reasonable and necessary time spent out of court on the case". It differs from the reality of current practices in some Texas jurisdictions, however.[42]

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[40] The fee schedule must provide either fixed rates or minimum and maximum hourly rates. Inclusion of "reasonable and necessary overhead cost" is a new addition to Texas law, as is "the availability of qualified attorneys willing to accept" the stated rates. These provisions are consistent with Texas Bar Standard 6. The Commentary to that Standard notes that studies conducted by the Legal Services to the Poor in Criminal Matters Committee revealed that the failure of the present system to provide reasonable compensation was "the single most important cause of appointed attorney's dissatisfaction and dysfunctional behavior." The Commentary further notes that many times the amount of payment to appointed counsel did not cover that attorney's overhead expenses. When overhead costs are not covered, perforce the rate of compensation provides no remuneration for counsel. Thus, not only is counsel not being paid for the work performed on behalf of the indigent defendant, counsel is, in effect, funding the system out of his or her own pocket.

[41] The removal mechanism contemplated by the statute involves a decision by the majority of the judges of the county courts and statutory county courts, or the district courts, as appropriate, that try criminal cases in the county. It also provides for a hearing on an allegation that appointed counsel submitted a claim for legal services not in fact performed by the attorney.

[42] For example, in Harris County, home of the fourth largest city in the United States, the official fee schedule, in effect in the year 2001, categorically prohibits payments to attorneys for out of court work such as routine jail visits, interviews, or telephone calls. Fair Defense Report, 35.

** Guaranteed Access to Necessary and Sufficient Support Services*

The Texas Fair Defense Act clarifies and strengthens an attorney's ability to obtain reimbursement for reasonable and necessary expenses related to investigation and expert witnesses. These provisions are applicable to assigned counsel. Different provisions of the Texas Fair Defense Act apply to counties choosing a public defender delivery system model.[43]

** Data Gathering and Monitoring*

Significantly, the Texas Fair Defense Act creates a centralized reporting system for the collection of local county data on indigent defense practices and spending. Centralized data gathering has been a critical component absent in past Texas practice. The information required includes both the total amount expended by the county in providing indigent defense services as well as an analysis of that amount. The analysis is characterized by court cases for which a private attorney is appointed, cases for which a public defender is appointed, cases involving indigent juveniles, and fees paid for support services such as investigation expenses, expert witnesses, and other related litigation costs. Information submitted under this new requirement of the Texas Government Code is compiled by the Office of Court Administration of the Texas judicial system and forwarded to the Task Force on Indigent Defense.

Additionally, annually each county is required to submit by January 1 a copy of all formal and informal rules and forms describing indigent defense practices in that county. Also required is the schedule of fees used by the county to pay appointed counsel. This data gathering effort represents the first such attempt in Texas.

** Other Significant Provisions*

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[43] The Texas Fair Defense Act requires that proposals for a public defender's office include policies regarding the use of licensed investigators and other expert witnesses. The Act also provides that the public defender may directly employ licensed investigators as part of the office staff.

The Texas Fair Defense Act also addresses, in separate sections, specific requirements for counsel appointed in capital murder cases. It adopts new state-wide attorney qualification standards for death penalty cases, including minimum experience requirements. In addition to establishing a specific level of trial experience prior to appointment in a capital case,[44] the Act requires annual continuing legal education devoted to capital defense.[45]

The new amendments also require that when the prosecution is seeking the death penalty, two attorneys must be appointed for the defense.

Monitoring attorney qualifications for death penalty appointments under these amendments to Article 26.052 of the Texas Code of Criminal Procedure is handled by a local selection committee. That committee is charged with conducting an annual review to ensure that each listed attorney satisfies both the experience and education requirements necessary to meet the statutory minimum.

Examining the Impact of the Fair Defense Act

As the previous section makes clear, the Fair Defense Act is a sweeping reform of all aspects of the indigent defense system. The FDA brings the promise of advancing Texas significantly forward toward the ideal indigent defense system by offering reforms in each of the

[44] The experience requirement contemplates attorneys with at least five years of experience in criminal litigation, having tried to a verdict as lead defense counsel a "significant number " of felony cases. These must include homicide trials and other trials for offenses punishable as either first or second degree felonies or capital felonies. Additionally, counsel must have trial experience in the use of and challenges to mental health or forensic expert witnesses, as well as experience investigating and presenting mitigating evidence at the punishment phase of a death penalty prosecution.

[45] Specifically, the statute provides that not later than the second anniversary from the time an attorney is placed on the death penalty appointment list, and each year thereafter, the lawyer must present proof that he or she has successfully completed the minimum continuing legal education requirements for the State of Texas, including a course or other form of training relating to the defense of capital cases. The sanction for failing to provide this information is removal from the list of qualified attorneys. Texas currently requires 15 hours of continuing legal education annually, three hours of which must be in ethics.

critical areas previously identified as shortcomings of the pre-FDA system. To determine whether the FDA is living up to its promise, we turn to the opinions of two groups who have direct contact with indigents charged with criminal offenses. In 2003, after the initial year of implementation of the Fair Defense Act, the State Bar of Texas mailed a survey to all criminal defense attorneys in the state of Texas. A similar survey was mailed to all prosecutors in 2004.[46] The purpose of these surveys was to determine whether the Fair Defense Act was having the desired effect and to determine if the perceptions of the indigent defense system had improved since the implementation of the Fair Defense Act.

For the purposes of this paper, we are interested in determining the FDA's impact on six areas: (1) satisfaction with the process of determining who is indigent; (2) timely contact with the assigned client; (3) consistency of appointment plans within the same jurisdiction; (4) improved compensation for lawyers working as assigned counsel; (5) defense lawyer access to appropriate special services; and (6) similar standards of justice for retained and indigent clients. Examining these topics will allow us to determine if the FDA has been effective in obtaining its legislative goals.

Has the FDA Improved the Process of Determining Indigent Status? The FDA requires that each county adopt published standards for determining whether an individual is indigent and therefore entitled to public supported legal representation. It would be tempting to believe that the mere fact that published standards are now required would result in less ambiguity in the system and, therefore, greater support on the behalf of defense lawyers and prosecutors. Results from our surveys, however, show virtually no change in the satisfaction levels for lawyers and

[46] Surveys were mailed to 3,231 defense lawyers and 1038 responses were received for a 32.1% response rate. Surveys were mailed to 2400 prosecutors and 903 responses were received for a 37.6% response rate.

prosecutors from before the FDA to after its implementation as it pertains to the process of determining indigent status.[47]

Prior to /Since the implementation of the Fair Defense Act, how satisfied were/are you with the method of determining the defendant's indigent status in your jurisdiction?

	Attorneys		Prosecutors	
	Prior To FDA	Since FDA	Prior To FDA	Since FDA
Very Satisfied	21.2%	25.3%	22.1%	17.8%
Somewhat Satisfied	32.9%	34.1%	25.4%	28.4%
Neither Satisfied nor Dissatisfied	22.4%	21.4%	32.4%	29.1%
Somewhat Dissatisfied	15.1%	10.6%	13.0%	15.1%
Very Dissatisfied	8.5%	8.6%	7.1%	9.7%

Has the FDA Resulted In Timely Visits with Assigned Clients? As noted above, the Fair Defense Act requires that lawyers assigned to represent indigents make prompt contact with their jailed client. Prior to the FDA, it was not uncommon to hear stories of individuals who sat in jail for days, weeks, or even months without talking to their assigned lawyer. The FDA was designed to address this situation. Since prosecutors are not directly involved in this aspect of the statue, we will only examine the response from defense attorneys who were asked how quickly they make contact with their clients and in what form. In excess of 85% of criminal defense lawyers responding indicated that they contact their client within 24 hours. At least this aspect of the FDA appears to have accomplished its intended goal.

[47] Since the surveys administered following the implementation of the FDA are interested in whether the law has been effective, respondents were asked to recall their experiences prior to the FDA. We recognize that there are limitations to these sorts of questions. We do not, however, know whether individuals are more likely to have favorable or unfavorable memories of the past. We suspect there is a mixture in our sample. We draw some comfort in the accuracy of these recalled opinions in that the pattern of responses is similar to those surveys that were administered pre-FDA and were, therefore, not recall data.

The Fair Defense Act requires that attorneys appointed to represent defendants contact those defendants within 24 hours of receiving notice of the appointment. How do you do that?

	Attorneys
I make a personal visit (to the jail or in the office)	60.6%
I send a fax to the jail	19.6%
I telephone the defendant (in jail or elsewhere)	5.5%
I send an investigator or assistant to make a personal visit	1.2%
I do it as soon as I can, but, generally, I don't take extra steps to do so within the 24 hours.	13.0%

Has the FDA Resulted in Consistency of Appointment Plans Within the Same Jurisdiction? One of the chief concerns with the system of representing indigents prior to the Fair Defense Act was that the process was entirely judge based and, consequently, there was little consistency or oversight from court to court. Within the same county, lawyers may be the darling of one judge and receive favorable appointments and compensation while being given poor assignments and little compensation in a courtroom down the hallway. The FDA attempted to rectify the tremendous ad hoc nature of the previous system by requiring that all counties submit plans that would apply to all courts in that jurisdiction. There was tremendous latitude in creating the plan, however, the judges of each county had to agree to a common appointment process, a common process for determining indigent status, and so forth. There is reason to believe that this requirement of the FDA may be the first time that judges in many jurisdictions became aware of the procedures used by their colleagues.

The question before us is whether the FDA had the intended outcome of bringing consistency to the appointment process. As the data in the box below indicate, the results in this area have been dramatic. Prior to the FDA, approximately one-third of the respondents indicated that they worked in a jurisdiction with written standards for determining if a lawyer was qualified to handle indigent criminal cases. Following the implementation of the FDA, over two-

thirds of the respondents report being aware of written attorney qualifications. Similar increases are evident in the questions which ask if the same appointment method was used in all courts in the respondent's jurisdiction pre- and post-FDA. Both defense lawyers and prosecutors report nearly a twenty percent increase in reporting a common method of appointment for all courts in the same jurisdiction. Likewise, both groups report an increase in the use of established lists of qualified attorneys which would be used for appointment purposes. Clearly, the FDA has had the desired effect of brinbing increased commonality and consistency to the appointment process.

Prior to/Since the implementation of the Fair Defense Act, did/does your county have published or otherwise known standards for the determination of attorneys qualified for appointments?

	Attorneys		Prosecutors	
	Prior To FDA	Since FDA	Prior to FDA	Since FDA
Yes	35.9%	85.2%	34.3%	77.2%
No	51.6%	6.3%	29.0%	4.4%
I don't recall	12.5%	8.5%	36.6%	18.4%

Prior to/Since the implementation of the Fair Defense Act, did/does the judges in your jurisdiction use the same method for appoint lawyers in indigent criminal matters?

	Attorneys		Prosecutors	
	Prior To FDA	Since FDA	Prior to FDA	Since FDA
Yes	41.5%	62.9%	37.8%	64.1%
No	46.8%	22.8%	52.6%	19.3%
There is only one judge in my jurisdiction	3.5%	2.8%	9.6%	4.1%

Prior to/Since the implementation of the Fair Defense Act, did the judge(s) in your jurisdiction have an established list of attorneys deemed qualified to take appointments?

	Attorneys		Prosecutors	
	Prior To FDA	Since FDA	Prior to FDA	Since FDA
Yes	55.6%	88.3%	48.4%	85.1%
No	33.4%	4.5%	22.8%	2.9%
I don't recall	11.0%	7.2%	28.8%	12.0%

What is perhaps most interesting about this aspect of the FDA, is that despite apparently achieving the intended goal of increasing consistency in the appointment process, both defense lawyers and prosecutors do not appear to be markedly more satisfied with the process. Prior to

the FDA, fifty-two percent of defense lawyers and fifty-eight percent of prosecutors were either very satisfied or somewhat satisfied with the ad hoc appointment process. Following the FDA, defense lawyers report a modest increase in satisfaction (57.9%) and prosecutors are actually less satisfied (50.2%). Our data do not provide us with a systematic answer to this puzzling finding. We have, however, heard that some defense lawyers feel that they no longer receive the same number of appointments because the work is more evenly distributed or they are no longer deemed qualified to take certain cases. It is possible that the explanation for the drop in prosecutor satisfaction is that defense counsel are assigned more quickly and prosecutors have fewer opportunities to speak to the defendant prior to the arrival of legal counsel.

Prior to/Since the implementation of the Fair Defense Act (January 1, 2002), how satisfied were/are you with the method of appointment counsel in indigent cases in your jurisdiction?

	Attorneys		Prosecutors	
	Prior to FDA	Since FDA	Prior to FDA	Since FDA
Very Satisfied	23.7%	25.7%	32.4%	20.3%
Somewhat Satisfied	29.1%	32.2%	25.6%	29.7%
Neither Satisfied nor Dissatisfied	17.0%	15.5%	27.9%	23.7%
Somewhat Dissatisfied	15.5%	13.4%	10.1%	17.9%
Very Dissatisfied	14.7%	13.2%	3.9%	8.4%

Has the FDA Improved Compensation for Lawyers Working as Assigned Counsel? Many experts believe that the primary explanation for why assigned counsel provide lower levels of legal representation to their indigent clients, is the lower level of compensation provided by the county or state. The ability of the lawyer, after all, can be dismissed as an explanation for differences since the same lawyer represents both retained and assigned clients in an ad hoc judge assigned system. This behavior, while unfortunate, is certainly understandable. The criminal defense lawyer is the only person in the process asked to subsidize the criminal justice

process. Law enforcement officials, prosecutors, and judges all receive the same level of compensation regardless of whether the defendant is indigent or not. Furthermore, in Texas, assigned counsel rates were roughly one-third the rate criminal defense lawyers would bill their retained clients. The state has long required counties to have a 'fee schedule' however, these schedules were out-of-date and not adhered to in many jurisdictions. The FDA set about to correct this situation by requiring the use of fee schedules and by requiring that the wage paid to criminal defense attorneys be brought closer in-line with the prevailing private criminal wage in the jurisdiction. Respondents to our surveys report greater use of fee schedules post-FDA. Defense attorneys and prosecutors, however, differ substantially over whether the current rate

Prior to/Since the implementation of the Fair Defense Act, did/do the courts in your jurisdiction have an established attorneys' fee schedule?

	Attorneys		Prosecutors	
	Prior To FDA	Since FDA	Prior to FDA	Since FDA
Yes	73.4%	82.4%	61.8%	73.5%
No	20.3%	5.4%	14.0%	5.3%
I don't recall	6.4%	12.2%	24.3%	21.3%

Prior to/Since the implementation of the Fair Defense Act, did/do you think that the current rates of compensation were sufficient to attract and retain qualified counsel for court appointed cases?

	Attorneys		Prosecutors	
	Prior To FDA	Since FDA	Prior to FDA	Since FDA
Yes	20.4%	28.2%	51.4%	52.9%
No	74.9%	60.7%	24.4%	24.7%
I don't recall	4.7%	6.7%	24.3%	22.4%

Prior to/Since the implementation of the Fair Defense Act, how satisfied were/are you with the system of compensating appointed counsel?

	Attorneys		Prosecutors	
	Prior To FDA	Since FDA	Prior to FDA	Since FDA
Very satisfied	6.8%	8.0%	18.3%	13.7%
Somewhat satisfied	23.0%	28.2%	20.1%	21.2%
Neither satisfied nor dissatisfied	15.5%	20.5%	46.1%	43.8%
Somewhat dissatisfied	27.1%	23.9%	10.9%	13.2%
Very dissatisfied	27.6%	19.4%	4.6%	8.1%

of compensation is sufficient to attract qualified counsel. Defense lawyers, while noting an increase post-FDA, still believe that wages are not sufficient (60.7%). In contrast, a

majority of prosecutors believe that the wages paid are sufficient to attract qualified counsel. Finally, it is worth noting that the implementation of the FDA has done little to improve the respondent's levels of satisfaction related to the issue of compensation. While defense lawyers and prosecutors hold differing viewpoints, the opinions of each group are relatively stable across the two periods. It appears that while the FDA has brought greater use of fee schedules and improved compensation, it has only resulted in modest gains in the ability to attract quality counsel and in levels of satisfaction related to compensation.

Has the FDA Provided Appropriate Special Services to Court Appointed Defense Lawyers? The final process question examines whether the FDA has improved defense counsels' access to special services. Defense lawyers and prosecutors responding to the survey show very small increases in their response to the question that asks whether they generally have

Prior to/Since the implementation of the Fair Defense Act, did/do you feel that you generally received the support services (i.e., investigators, psychologists, etc.) you needed to represent your indigent clients?

	Attorneys		Prosecutors	
	Prior to FDA	Since FDA	Prior to FDA	Since FDA
Yes	46.1%	49.7%	45.7%	53.1%
No	45.2%	30.0%	20.8%	15.0%
Don't recall or not sure	4.7%	10.2%	33.5%	31.9%
I refused court appointments	4.0%	10.1%	n/a	n/a

Since the implementation of the Fair Defense Act, has the availability of support services (to hire experts, investigators, psychologists, criminalists, etc) changed?	Attorneys	Prosecutors
Defense counsel's ability to access support services has dramatically increased	3.8%	3.5%
Defense counsel's ability to access support services has somewhat increased	19.3%	10.9%
Defense counsel's ability to access support services has remained the same	47.9%	46.8%
Defense counsel's ability to access support services has somewhat declined	2.2%	1.4%
Defense counsel's ability to access support services has dramatically declined	0.8%	0.4%
I don't know	26.0%	37.1%

the access to the support services they need to represent their indigent clients. A more compelling case can be made that the FDA has had a positive impact on the level of special services provided to defense lawyers by looking at the question that directly asks whether access

to services has changed since the implementation of the FDA. Over twenty percent of defense lawyers and over fifteen percent of prosecutors report that access to services has increased post-FDA. While the modal response to this question for both groups of respondents is that there has been no change in access, over one in four defense lawyers perceived an increase in the services needed to appropriately represent their indigent clients.

Has the FDA Resulted in Similar Standards of Justice for Retained and Indigent Clients? To this point, the questions examined have focused on process issues such as the process of appointment and compensation of assigned counsel. As noted earlier, while the process questions are important, the purpose of the FDA was to bring 'fairness' to the indigent criminal defense system. More specifically, the FDA was intended to remove the perceived disparity in representation quality between clients with retained and court appointed counsel. As reported earlier, prior to the FDA, defense lawyers, prosecutors and judges believed that the defendants with retained lawyers received better legal representation. The results from our surveys

Prior to/Since the implementation of the Fair Defense Act, did/do you believe that clients with retained counsel received better representation than clients who have court appointed lawyers?

	Attorneys		Prosecutors	
	Prior to FDA	Since FDA	Prior to FDA	Since FDA
Retained counsel always provided better representation	10.9%	9.5%	2.3%	2.3%
Retained counsel usually provided better representation	50.0%	46.9%	22.4%	28.9%
Retained and court appointed counsel typically provided the same quality of representation	33.1%	34.4%	49.6%	48.5%
Court appointed counsel usually provided better representation	1.7%	1.7%	7.7%	6.0%
Court appointed counsel always provided better representation	0.3%	0.1%	0.6%	0.7%
I have no opinion or no information	4.0%	7.5%	17.3%	13.6%

do not indicate that the FDA has had much impact on the disparity of representation. Sixty percent of defense lawyers report that prior to the FDA, retained clients usually or always

received better representation and following the FDA this number had dropped to fifty-six percent. Hardly the improvement the Act's authors would have hoped for. Prosecutors, on the other hand, actually believe that the disparity has grown marginally wider, although the modal response is that there is no difference in the quality of representation.[48]

While respondents to both surveys conclude that FDA did not remove representational disparity between retained and indigent clients, some evidence suggests the FDA may be achieving a measure of outcome success. Some defense lawyers and prosecutors report that assigned counsel are spending more time on their assigned matters as the result of the FDA. A fairly dramatic thirty percent of defense lawyers report that time devoted by assigned counsel has increased either "somewhat" or "greatly." The gain for prosecutors is more modest (14%).

Since the implementation of the Fair Defense Act, do you believe the time committed by defense counsel in appointed cases has:

	Attorneys	Prosecutors
Greatly increased	6.7%	3.1%
Somewhat increased	23.8%	10.9%
Remained about the same	49.7%	53.1%
Somewhat lessened	2.7%	3.5%
Greatly lessened	2.9%	1.8%
I have no opinion or no information	14.1%	27.5%

Since the implementation of the Fair Defense Act, do you believe the vigor displayed by defense counsel in representing their indigent clients has:

	Attorneys	Prosecutors
Greatly Increased	2.0%	0.9%
Somewhat increased	18.3%	4.8%
Remained about the same	63.1%	67.7%
Somewhat lessened	4.5%	3.5%
Greatly lessened	1.8%	1.6%
I have no opinion or no information	10.2%	21.6%

[48] This response from both prosecutors surveys has always struck the authors as inconsistent. On the one hand, prosecutors note that appointed defense counsel do not devote as much time to preparation, do not put on as vigorous defense, and are not as qualified as retained counsel. Despite these shortcomings, prosecutors maintain tht the quality of representation is not different and that judicial outcomes are not impacted by appointed defense lawyer behavior. It simply does not seem possible. It is as if prosecutors take the position that the system "works" despite the poor effort of assigned counsel.

Similarly, one in five defense lawyers report that the vigor of the defense offered by assigned counsel has either increased "somewhat" or "greatly" following the implementation of the FDA. Again, prosecutors notice a smaller difference (5.7%). These two findings are important since they speak to the effort devoted by defense counsel in meeting their representational obligations. It may be the case that retained clients still receive better representation, but a substantial number of defense counsel report having noticed the colleagues in the defense bar responding to the FDA with greater effort on behalf of their indigent clients.

The findings presented above suggest that the representational gap between retained and indigent clients may have narrowed. This would make some sense since the difference in representational quality for retained and indigent clients is not one of lawyer ability. Recall that in a judge assigned system, generally speaking, the same lawyers represent both assigned and retained clients. The difference between the cases, besides the defendant, is the economic incentive provided to the lawyer. In the case of retained clients, the economic incentive is a paying client who can afford the lawyer's services. In the case of the indigent client, the economic incentive is the level of compensation provided by the county. To the extent that the FDA has resulted in improved compensation levels, it seems logical to expect a corresponding improvement in legal representation. Defense lawyers and prosecutors were asked questions which directly ask whether they believe that representational quality improved as a result of the FDA. Fully one-third of defense lawyers and thirteen percent of prosecutors report that the quality of representation has improved "somewhat" or "greatly" since the implementation of the Fair Defense Act. More directly, fourteen percent of defense lawyers responded by noting that they have improved their personal representation following the implementation of the Fair Defense Act. For authors of the FDA, these findings are extremely encouraging and meet, at

least partially, the primary intent of the legislation. While the data reveal that representational differences persist between retained and indigent clients, it appears that the gap may have narrowed resulting in improved representation for indigent clients.

Since the implementation of the Fair Defense Act, do you believe the quality of representation for defendants with court appointed counsel has:

	Attorneys	Prosecutors
Greatly improved	3.1%	1.2%
Somewhat improved	30.5%	12.1%
There has been no change	46.3%	53.2%
Somewhat worsened	8.7%	10.9%
Greatly worsened	2.5%	3.7%
I have no opinion or no information	8.9%	19.0%

Since the implementation of the Fair Defense Act, do you believe that YOU have given better or worse representation to your appointed clients?

	Attorneys
Greatly better	2.7%
Somewhat better	11.4%
No different	84.7%
Somewhat worse	1.0%
Greatly worse	0.2%

Assessing the Effectiveness of the Fair Defense Act

Prior to the implementation of the Fair Defense Act, the situation for indigents charged in criminal matters was bleak. The defendant was faced with the prospect of remaining in jail in order to obtain counsel or posting bail to return to his or her family and job and forfeiting the right to a lawyer. The lawyer that was assigned might have been selected simply because he or she happened to be in the courtroom or was politically connected to the judge. If the case was complicated and required experts, it was unlikely that the judge would provide the necessary resources to mount an adequate defense. Moreover, most counties tended to compensate lawyers at a rate below the cost of their overhead so that they were, in effect, losing money by representing the indigent client. The result of these circumstances was a legal defense that

lacked vigor and preparation and was, by the admission of the defense bar, below the standards they provide their retained clients.

Efforts to correct this obviously unfair system were undertaken with the passage of the Fair Defense Act. The findings presented here indicate that the Fair Defense Act has had a substantial impact on improving the system. Defense lawyers and prosecutors report that representation is provided in a timely manner, appointment procedures have been standardized within criminal jurisdictions, fee schedules are widely publicized, compensation and access to special services have improved, and most importantly, the quality of legal representation has improved. What has not changed is the apparent level of satisfaction with various aspects of the system. Respondents do not appear to be more satisfied with the process of determining indigent status or how counsel are assigned to cases. Defense lawyers also remain convinced that compensation levels are too low to attract quality legal representation. Finally, a majority of defense lawyers and a substantial number of prosecutors believe that retained clients still receive better representation.

On balance the news is very positive. Both groups of respondents were asked a summative question which asked them to assess the overall impact of the FDA on the provision of legal services to the poor. Over one-third of defense lawyers and sixteen percent of prosecutors report that the Act has either "somewhat" or "greatly" improved legal services. While lawmakers would undoubtedly have welcomed higher levels of success, they should be pleased that the first serious effort at reform has accomplished so much in such a short time.

Overall, since the implementation of the Fair Defense Act, is the provision of legal services to the poor in your jurisdiction

	Attorneys	Prosecutors
Greatly improved	4.2%	1.5%
Somewhat improved	32.6%	14.6%
No noticeable change	41.5%	48.3%
Somewhat worse	8.0%	9.7%
Quite a bit worse	2.9%	3.4%
I don't know	10.8%	22.5%

We would be remiss if we did not acknowledge at least three shortcomings of the results reported here. First, noticeably absent from the post-FDA analysis are the opinions of judges who had more to 'lose' by passage of the FDA than any other party. We are in the process of correcting this shortcoming by surveying judges with an instrument similar to the one used for prosecutors and defense lawyers. Second, the findings presented here are entirely descriptive and do not answer the 'why' question. We have reported, for example, that defense lawyers and prosecutors have different opinions about whether the quality of representation has improved. We have not, however, provided an explanation as to why these groups hold different opinions. Finally, the findings reported here are based entirely on the perceptions of the respondents. There is every reason to believe that defense lawyers, prosecutors, and judges have unique and appropriate insight into the workings of the criminal justice system. However, as the findings indicate, the perceptions and opinions of these groups can be substantially different. It is not surprising that defense lawyers and prosecutors differ, for example, on the level of compensation. Defense lawyers obviously have a vested interest in increasing the level of compensation and, to be fair, prosecutors may not be in a position to know the actual level of compensation or the costs associated with running a defense practice. To address this last issue, data drawn from records are needed to supplement the impressionistic data presented here. Of

particular interest to the authors are data from court records that could address the issue of whether judicial outcomes are different for retained and indigent clients. These data are difficult to gather and the question of making comparisons across court cases is fraught with problems, however, this appears to be the only means of moving beyond the impressions of participants in the judicial system.

Despite these shortcomings, it seems safe to answer the question posed by the title of this paper with a qualified "yes." By several yardsticks, the Fair Defense Act appears to have improved indigent criminal defense in Texas. While much work remains to be done, the process of representing indigents seems to be more transparent and the outcomes of this process, while still divergent when compared to clients who retain counsel, are less so.