

Executive Summary

Giving Timbre To Gideon's Trumpet: Evaluating the Administration and Effectiveness of Legal Representation for Texas' Indigent Criminal Defendants

Michael K. Moore
Department of Political Science
University of Texas at Arlington
Arlington, Texas 76019
mmoore@uta.edu
817-272-7422

Allan K. Butcher, Magistrate
Criminal District Courts
Tarrant County, Texas
akbutcher@tarrantcounty.com
817-884-2998

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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 hailed the FDA as "the most significant piece of indigent defense legislation passed by any state in the last twenty years" (Beardall, 2003). 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 even months without legal representation as had been the case in some of the State's 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 obtained. 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 quality of representation and, thereby, increase the "fairness" of the system. In fact, the Act's process improvements, while of some intrinsic value, 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 three primary groups involved in the courtroom - criminal defense attorneys, prosecutors, and judges. Our analysis seeks to answer whether the FDA has been effective at obtaining its process and representational goals. At the outset, it is important for us to acknowledge that the data we rely on are impressionistic (public opinion polls) and that one's view of effectiveness may depend on the role one plays in the criminal justice system.

Indigent Criminal Defense in Texas Prior to the Fair Defense Act

According to surveys conducted by the State Bar of Texas Committee on Legal Services to the Poor in Criminal Matters, the process of representing indigent criminal defendants in Texas prior to the Fair Defense Act was haphazard, lacked rigor and was fraught with all sorts of problems. The State Bar of Texas conducted state-wide surveys of criminal defense lawyers, prosecutors, and judges in the years leading up to the passage of the Fair Defense Act.¹ The results of these surveys painted a picture of a

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The survey to criminal defense attorneys (1995) was distributed to a sample of 3000 individuals and received a response rate of 46%. The survey of prosecutors (1997) was distributed to all prosecutors in

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 briefly examining representative survey results related to five key aspects of the indigent criminal defense system.

Who qualified as an indigent? One of the 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. Survey responses prior to the FDA from defense attorneys, 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 may have required proof of financial means. Not surprising, this lack of clarity caused some substantial numbers of lawyers, prosecutors, and judges 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 tended to be 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%	
	n= 1304	n= 1071	n= 457
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%
	n= 1303	n= 1072	n= 460

How were 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 by 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%), had contributed to his or her 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 the attorney had a reputation for moving cases, regardless of the quality of his or her work (46.4%). What is striking about these responses is that concern for the quality of legal representation or the qualifications of the lawyer appear to be absent.

the state (n=1,942) and received a response rate of 57%. The survey of judges (1998) 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.

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%	
	n= 1303	n= 1082	n= 431

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%
	n= 1312	n= 1080

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%
	n= 1296	n= 1072	n= 441

Was attorney compensation sufficient? Perhaps the most fundamental issue facing all indigent criminal representation systems is funding. Prior to the FDA, the issue manifested 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 about 30% of their normal billing rate. Thus, in effect, the attorney was helping to subsidize the indigent criminal defense system in a manner not expected of any judge, prosecutor, or, for that matter, any citizen of the state. Not surprising, substantial numbers of defense lawyers and prosecutors believed that the then-current 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%
	n=1300	n=1075	n=452

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%
	n=1308	n=1076	n=450

Did 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.). Prior to the FDA, when the county 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 deny spending 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 access to support services they had needed to represent their clients and that over thirty percent (31%) of all requests they had made for such services, had been denied. Substantial numbers of prosecutors and judges concurred that this situation was problematic. Approximately one in four prosecutors and judges (22.9% for prosecutors and 26.7% for judges) believed that defense lawyers did not receive the services they needed and roughly thirty percent believe that these denials sometimes prevented the defense lawyer from providing quality legal representation (32.8% for prosecutors and 29.5% for judges).

Did indigents receive fair representation? Until this point, the questions had focused on the **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 was, most would agree, the most important question. While process issues should not be dismissed, if, at the end of the day, a flawed process resulted in equal justice, then most observers would be satisfied. If, on the other hand, the standard of justice was different for indigent and non-indigent, then we had reason to be concerned.

Unfortunately, the surveys of lawyers, prosecutors, and judges administered prior to the FDA indicated that there was reason to believe that the brands of justice differed for indigents and non-indigents. 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 were the same lawyers that one might have hired 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 and 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%
	n=1281	n=1075	n=450

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%
	n= 600		n=325	

Examining the Impact of the Fair Defense Act

As the findings reported 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 and lawyer assignment 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. Most 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 Texas.

The Fair Defense Act (2001) was designed to correct the major ills that existed in the Texas indigent criminal defense system.¹ The Equal Justice Center noted that prior to the enactment of the FDA, Texas had no indigent defense system.² 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 funding³ (2002, 1). For a state with so many identifiable problems, any reform was necessarily regarded as a step forward. The question of interest here is whether the FDA did, in fact, improve the indigent defense system in Texas.

The Fair Defense Act is intended to be a sweeping reform of all aspects of the indigent defense system. The FDA brings the promise of advancing Texas significantly toward the ideal indigent defense system by offering reforms in each of the 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 the three 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. Similar surveys were mailed to all prosecutors in 2004 and to judges in 2006.² The purpose of these surveys was to determine whether the Fair Defense Act

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Surveys were mailed to 3,231 defense lawyers and 1038 responses were received for a 32% response rate. Surveys were mailed to 2400 prosecutors and 903 responses were received for a 37.6% response rate. Surveys were mailed to 686 judges and 369 were returned for a 53.79% response rate.

was having the desired effect and to determine if the perceptions of the indigent defense system had improved since the implementation of the FDA.

To these ends, we examined 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, prosecutors, and judges from before the FDA to after its implementation as it pertains to the process of determining indigent status.³ It is somewhat noteworthy that judges appear to be marginally more dissatisfied, most likely due to a perceived loss of discretion and autonomy.

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		Judges	
	Prior To FDA	Since FDA	Prior To FDA	Since FDA	Prior To FDA	Since FDA
Very Satisfied	21.2%	25.3%	22.1%	17.8%	41.2%	35.2%
Somewhat Satisfied	32.9%	34.1%	25.4%	28.4%	33.1%	38.7%
Neither Satisfied nor Dissatisfied	22.4%	21.4%	32.4%	29.1%	15.2%	10.0%
Somewhat Dissatisfied	15.1%	10.6%	13.0%	15.1%	7.7%	11.7%
Very Dissatisfied	8.5%	8.6%	7.1%	9.7%	2.8%	11.4%
	n=970	n=947	n=756	n=764	n=323	n=341

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 statute, we will only examine the response from defense attorneys who were asked how quickly they make contact with their clients and in what form and judges who should monitor this process. In excess of 85% of criminal defense lawyers responding indicated that they contact their client within 24 hours. Of note is the fact that one in five judges does not know how, or presumably if, the assigned counsel contacts their clients in a timely fashion. If we take the defense lawyers at their word, at least this aspect of the FDA appears to have accomplished its intended goal.

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Since the surveys administered following the implementation of the FDA were interested in whether the law has been effective, respondents were asked to recall their experiences prior to the FDA. This approach to the questions was required because we do not have a panel sample and respondents have changed from the pre-FDA surveys. 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 recall 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	Judges
I make a personal visit (to the jail or in the office)	60.6%	32.6%
I send a fax to the jail	19.6%	7.9%
I telephone the defendant (in jail or elsewhere)	5.5%	8.5%
I send an investigator or assistant to make a personal visit	1.2%	1.5%
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%	21.1%
Don't Know		22.3%
Combination of above responses		6.2%
	n=820	n=341

Note: Judges survey provided for "don't know" option which did not exist for attorneys survey

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 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 hall. The FDA attempted to rectify the tremendous ad hoc nature of the previous system by requiring that all counties submit a plan that would apply to all courts in that jurisdiction. There was tremendous latitude in creating the plan, however, the judges 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 indicates, 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 three-quarters 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 respondents jurisdiction pre- and post-FDA. Defense lawyers, prosecutors, and judges report nearly a twenty percent increase in reporting a common method of appointment for all courts in the same jurisdiction. Likewise, all three 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 bringing 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		Judges	
	Prior To FDA	Since FDA	Prior to FDA	Since FDA	Prior to FDA	Since FDA
Yes	35.9%	85.2%	34.3%	77.2%	38.2%	93.1%
No	51.6%	6.3%	29.0%	4.4%	55.6%	5.7%
I don't recall	12.5%	8.5%	36.6%	18.4%	6.2%	1.2
	n= 991	n=1002	n= 816	n=826	n= 340	n= 350

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		Judges	
	Prior To FDA	Since FDA	Prior to FDA	Since FDA	Prior to FDA	Since FDA
Yes	41.5%	62.9%	37.8%	64.1%	54.1%	74.5%
No	46.8%	22.8%	52.6%	19.3%	27.8%	11.0%
Other responses	3.5%	2.8%	9.6%	4.1%	18.1	14.5%
	n=978	n=976	n=696	n=739	n=283	n=290

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		Judges	
	Prior To FDA	Since FDA	Prior to FDA	Since FDA	Prior to FDA	Since FDA
Yes	55.6%	88.3%	48.4%	85.1%	69.9%	95.3%
No	33.4%	4.5%	22.8%	2.9%	24.7%	4.4%
I don't recall	11.0%	7.2%	28.8%	12.0%	5.4%	0.3%
	n=979	n986	n=810	n=828	n=336	n=343

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, defense attorneys are only marginally more satisfied and prosecutors and judges actually show a decrease in their overall satisfaction levels. 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%). Judges show a more dramatic drop in overall approval dropping from eighty-five percent to seventy-three percent approval. 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 able to safeguard the defendant's rights quicker and more effectively. The decrease in judges' satisfaction levels is more readily explained by the perceived decrease in their autonomy and their ability to appoint whomever they selected.

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

FDA	Attorneys		Prosecutors		Judges	
	Prior to FDA	Since FDA	Prior to FDA	Since FDA	Prior to FDA	Since
Very Satisfied	23.7%	25.7%	32.4%	20.3%	61.3%	
39.3%						
Somewhat Satisfied	29.1%	32.2%	25.6%	29.7%	24.8%	34.7%
Neither Satisfied nor Dissatisfied	17.0%	15.5%	27.9%	23.7%	8.8%	6.9%
Somewhat Dissatisfied	15.5%	13.4%	10.1%	17.9%	3.3%	12.1%
Very Dissatisfied	14.7%	13.2%	3.9%	8.4%	1.8%	6.9%
	n=973	n=976	n=789	n=801	n=331	n=346

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, prosecutors and judges, however, differ substantially over whether the current rate 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 and an overwhelming majority of judges believe that the

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		Judges	
	Prior To FDA	Since FDA	Prior to FDA	Since FDA	Prior to FDA	Since FDA
Yes	73.4%	82.4%	61.8%	73.5%	85.2%	95.4%
No	20.3%	5.4%	14.0%	5.3%	14.8%	4.6%
I don't recall	6.4%	12.2%	24.3%	21.3%		
	n=992	n=993	n=808	n=818	n=331	n=347

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		Judges	
	Prior To FDA	Since FDA	Prior to FDA	Since FDA	Prior to FDA	Since FDA
Yes	20.4%	28.2%	51.4%	52.9%	65.2%	71.7%
No	74.9%	60.7%	24.4%	24.7%	29.5%	24.1%
I don't recall	4.7%	6.7%	24.3%	22.4%	5.3%	4.2%
	n= 984	n=983	n=808	n=814	n=322	n=336

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

	Attorneys		Prosecutors		Judges	
	Prior To FDA	Since FDA	Prior to FDA	Since FDA	Prior to FDA	Since FDA
Very satisfied	6.8%	8.0%	18.3%	13.7%	33.3%	27.0%
Somewhat satisfied	23.0%	28.2%	20.1%	21.2%	33.3%	42.2%
Neither satisfied nor dissatisfied	15.5%	20.5%	46.1%	43.8%	10.0%	12.0%
Somewhat dissatisfied	27.1%	23.9%	10.9%	13.2%	15.9%	12.3%
Very dissatisfied	27.6%	19.4%	4.6%	8.1%	4.4%	5.0%
Don't Know					3.1%	1.5%
	n=977	n=948	n=781	n=794	n= 328	n= 341

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 respondents level of satisfaction related to the issue of compensation. While defense lawyers, prosecutors, and judges 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 the fee schedule 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 counsel's 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 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 judges and over fifteen percent of prosecutors report that access to services has increased post-FDA. While the modal response to this question for all three groups of respondents is that there has been no change in access, over one in four defense lawyers perceives an increase in the services needed to appropriately represent their indigent clients.

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		Judges	
	Prior to FDA	Since FDA	Prior to FDA	Since FDA	Prior to FDA	Since FDA
Yes	46.1%	49.7%	45.7%	53.1%	62.5%	72.9%
No	45.2%	30.0%	20.8%	15.0%	18.0%	12.7%
Don't recall or not sure	4.7%	10.2%	33.5%	31.9%	19.5%	14.4%
I refused court appointments	4.0%	10.1%	n/a	n/a	n/a	n/a
	n=977	n=978	n=798	n=808	n=328	n=347

Since the implementation of the Fair Defense Act, has the availability of support services (to hire experts, investigators, psychologists, criminalists, etc) changed?

	Attorneys	Prosecutors	Judges
Defense counsel's ability to access support services has dramatically increased	3.8%	3.5%	5.0%
Defense counsel's ability to access support services has somewhat increased	19.3%	10.9%	14.4%
Defense counsel's ability to access support services has remained the same	47.9%	46.8%	66.6%
Defense counsel's ability to access support services has somewhat declined	2.2%	1.4%	0.9%
Defense counsel's ability to access support services has dramatically declined	0.8%	0.4%	0.0%
I don't know	26.0%	37.1%	13.2%
	n=969	n=808	n=341

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 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 following the implementation of the FDA confirm our earlier results and, unfortunately, 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 and judges 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.⁴

While respondents to both surveys conclude that FDA did not remove representational disparity between retained and indigent clients, there is some evidence that suggests the FDA may be achieving some outcome success. Some defense lawyers, prosecutors, and judges 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 and judges report that time devoted by assigned counsel has increased either *Asomewhat* or *Agreatly*. The gain for prosecutors is more modest (14%). Similarly, twenty-percent of defense lawyers and fifteen percent of judges report that the vigor of the defense offered by assigned counsel has either increased *Asomewhat* or *Agreatly* 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 and judges report having noticed the defense bar responding to the FDA with greater effort on behalf of indigent clients.

	Attorneys		Prosecutors		Judges	
	Prior to FDA	Since FDA	Prior to FDA	Since FDA	Prior to FDA	Since FDA
Retained counsel always provided better representation	10.9%	9.5%	2.3%	2.3%	2.7%	2.6%
Retained counsel usually provided better representation	50.0%	46.9%	22.4%	28.9%	26.4%	32.7%
Retained and court appointed counsel typically provided the same quality of representation	33.1%	34.4%	49.6%	48.5%	59.0%	57.5%
Court appointed counsel usually provided better representation	1.7%	1.7%	7.7%	6.0%	4.3%	2.9%
Court appointed counsel always provided better representation	0.3%	0.1%	0.6%	0.7%	0.3%	0.3%
I have no opinion or no information	4.0%	7.5%	17.3%	13.6%	7.3%	4.0%
	n=992	n=992	n=813	n=818	n=329	n=346

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 representation is not one of lawyer ability. Recall that in a judge assigned system, generally speaking, the same lawyers represent both assigned and retained clients. For the lawyer, the difference between the cases, besides the defendant, is the economic incentive provided to him. 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, prosecutors, and judges were directly asked whether they believe that representational quality improved as a result of the FDA. One-third of defense lawyers, thirteen percent of prosecutors, and one-quarter of judges report that the quality of representation has improved

⁴

The responses from both prosecutor and judges surveys have 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 that 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.

Asomewhat@ or Agreatly@ 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 time committed by defense counsel in appointed cases has:

	Attorneys	Prosecutors	Judges
Greatly increased	6.7%	3.1%	7.1%
Somewhat increased	23.8%	10.9%	24.6%
Remained about the same	49.7%	53.1%	55.8%
Somewhat lessened	2.7%	3.5%	4.6%
Greatly lessened	2.9%	1.8%	1.4%
I have no opinion or no information	14.1%	27.5%	6.4%
	n=994	n=817	n=346

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	Judges
Greatly Increased	2.0%	0.9%	1.2%
Somewhat increased	18.3%	4.8%	13.8%
Remained about the same	63.1%	67.7%	70.6%
Somewhat lessened	4.5%	3.5%	7.8%
Greatly lessened	1.8%	1.6%	1.7%
I have no opinion or no information	10.2%	21.6%	4.9%
	n=990	n=821	n=347

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

	Attorneys	Prosecutors	Judges
Greatly improved	3.1%	1.2%	2.6%
Somewhat improved	30.5%	12.1%	22.8%
There has been no change	46.3%	53.2%	51.9%
Somewhat worsened	8.7%	10.9%	13.3%
Greatly worsened	2.5%	3.7%	3.7%
I have no opinion or no information	8.9%	19.0%	5.8%
	n=993	n=820	n=347

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%
	n= 904

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. Too often 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 quite possible that the judge would decline to 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 often 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, prosecutors, and judges 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 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 and judges believe that retained clients still receive better representation.

On balance the news is very positive. All three 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 judges and sixteen percent of prosecutors report that the Act has either *Asomewhat* or *Agreatly* improved legal services. While lawmakers would undoubtedly have liked 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	Judges
Greatly improved	4.2%	1.5%	5.8%
Somewhat improved	32.6%	14.6%	30.0%
No noticeable change	41.5%	48.3%	46.9%
Somewhat worse	8.0%	9.7%	10.5%
Quite a bit worse	2.9%	3.4%	3.2%
I don't know	10.8%	22.5%	3.5%
	n=992	n=815	n=343

We would be remiss if we did not acknowledge at least two shortcomings of the results reported here. First, the findings presented here are entirely descriptive and do not answer the *why*-question. We have reported, for example, that defense lawyers, prosecutors, and judges 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. Secondly, 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, prosecutors, and judges differ, for example, on the level of compensation that is appropriate for appointed attorneys. Defense lawyers obviously have a vested interest in increasing the compensation, while judges feel pressure from elected county commissioners to control costs, and, to be fair, prosecutors may not be in a position to know the actual level or compensation or the costs associated with running a defense practice. To address this last issue, data drawn from court records is 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. This, however, appears to be the only means of moving beyond the impressions of participants in the judicial system.

Despite these shortcomings, it seems safe to conclude that the FDA has provided both important process and system outcome improvements. By several yardsticks, the Fair Defense Act appears to have improved indigent criminal defense in Texas and provided sound to Gideon's Trumpet. 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.