

TEXAS FAIR DEFENSE ACT IMPLEMENTATION

— REPORT NO. 1 —

QUALITY OF INITIAL COUNTY PLANS GOVERNING INDIGENT DEFENSE IN ADULT CRIMINAL CASES

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The Equal Justice Center
and
Texas Appleseed

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CENTER



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I. INTRODUCTION

In 2001 the Legislature rewrote Texas law on how and when lawyers must be appointed to represent poor people who are accused of crime. The Texas Fair Defense Act (FDA) emerged from concerns among the bench, bar, media, and public about the quality of justice available to people who cannot afford to hire their own attorneys.¹ The new law recognizes that public confidence in the fairness and accuracy of any criminal justice system is essential to respect for the law, and that all citizens benefit from quality criminal justice.

The FDA requires officials in each of Texas's 254 counties to adopt written procedures for promptly and fairly appointing indigent defense counsel.² Officials in nearly all counties have filed these "county plans," which now total over 6,000 pages. Thus, within weeks after taking effect on January 1, 2002, the FDA has succeeded in producing comprehensive information on how officials choose to meet their indigent defense responsibilities—information that has never before been available. This information, for the first time, enables Texans to evaluate where indigent defense reform is succeeding and where it is faltering.

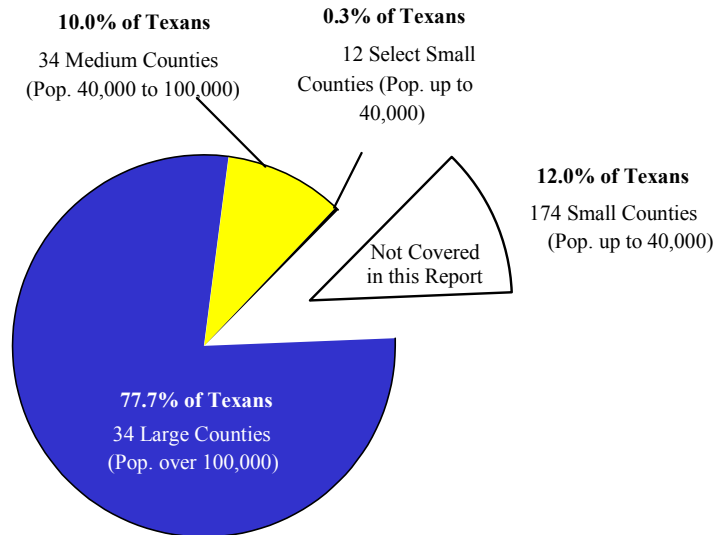
This report makes information in the voluminous county plans more accessible. It is designed to enable members of the Task Force on Indigent Defense, judges, local officials, and the public to quickly identify which county plans they may consult to evaluate what the FDA's impact has been and what it should be. Part II of this report describes necessary background on the evaluation methods used to produce the report. Part III distills many important trends among county plans by issue, county population, court level, and county resources. Part IV reports six evaluation scores for each county plan, and Part V provides a summary description of each plan.

The Equal Justice Center and Texas Appleseed hope that this report will stimulate further discussion of quality in county plans and serve as a valuable resource to the Task Force as it fulfills its statutory role of overseeing refinement of the plans.

II. EVALUATION METHODS

This report is based upon careful study of 95 county plans describing adult indigent defense procedures³ in 80 counties (separate district and county court plans were written in some counties). Just under 90% of Texans reside in these 80 counties. Included are county plans covering adult criminal cases submitted from the 68 Texas counties with populations above 40,000, and 12 plans that illustrate how officials in smaller counties have crafted plans that substantially comply with the FDA.⁴

Plans Reviewed for this Report Cover Almost 90% of Texas's Population

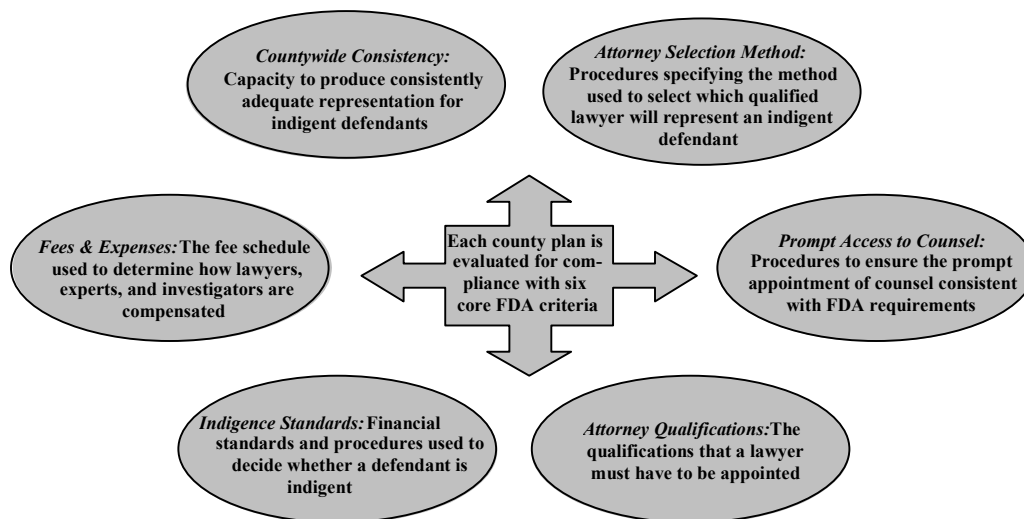


Four attorneys with expertise and longstanding involvement in the FDA's development spent over 1,000 hours conducting the evaluations contained in this report. They are Bill Beardall (Executive Director of the Equal Justice Center), Hanna Liebman Dershowitz (Legal Director of Texas Appleseed and former General Counsel to Senator Rodney Ellis), Raman Gill (former assistant defender in the Dallas County Public Defender's Office, currently a fellow at Texas Appleseed), and Jerome Wesevich (Litigation Coordinator and Criminal Justice Team Leader for Texas Rural Legal Aid). All four are available to answer questions about any evaluation below.

We have made every practical effort to evaluate each county plan in exactly the form it was submitted to Texas's Office of Court Administration (OCA), and to minimize subjectivity. To gauge the quality of county plans, we relied upon instructions that OCA provided to assist judges in fashioning their county plans. These OCA instructions identified five core issues⁵ that the FDA requires each county plan to address:

- Prompt access to appointed counsel;
- Fair and neutral methods for selecting attorneys;
- Qualifications for appointed counsel;
- Financial standards and procedures for determining whether a person is indigent; and
- Fees and expense for attorneys, experts, and investigators.

This report scores each plan on its compliance with FDA requirements as to each of these five issues. It also scores each plan on its capacity to produce consistently adequate representation for indigent defendants, since greater consistency was a crucial FDA objective.⁶



Each county plan is scored on each issue using the following scale:

- A Exceeds basic FDA requirements by adding recognized best practices;
- B Meets basic FDA requirements on balance;
- C Falls short of FDA requirements in minor respects;
- D Falls short of FDA requirements in major respects; and
- F Affirmatively contravenes core FDA requirements or omits them altogether.

Because the six issues evaluated in this report do not necessarily merit equal weight, averaging the six scores would risk misleading comparisons among county plans. Accordingly, we do not report overall average scores for each county plan.

Our evaluations are most useful for identifying how individual indigent defense practices may be improved across the state, and are much less useful for passing judgment on individual efforts in any county to date. There are two reasons for this. First, our evaluations are necessarily limited to the quality of the procedures as they are written in each county plan. Actual practices may well differ from the procedures described in the county plans. Second, OCA wisely instructed officials to adopt and report their initial county plans as “interim” plans, recognizing that FDA implementation is a work in progress, and ongoing refinements to county plans may be expected as a result of local amendment and Task Force action.⁸ Our evaluations do not reflect subsequent changes that may have already been made to some county plans, or improvements that may be adopted after this report’s publication date.

III. ANALYSIS OF TRENDS AMONG COUNTY PLANS

The overall conclusions from our review are very positive. A vast majority of county plans appear to be the product of substantial thought and collaboration. Most officials seem to have made genuine efforts to meet the FDA’s many requirements in good faith. Their work is commendable, especially considering that prior to the FDA, each of Texas’s 800-plus criminal trial courts usually set its own indigent defense policies, and formalized policies were rare.⁹

Especially considering the FDA’s complexity and the low standards that prevailed in many counties prior to its enactment,¹⁰ implementation has begun with a remarkably large and diverse array of good county plans. This bodes well for the anticipated pace of reform. Approximately one-third of the county plans may be considered good or very good examples of how officials in counties of widely varying demographics can successfully implement the FDA. Another third of the plans would have qualified as good or very good examples but for significant shortcomings in just one or two of the FDA’s core requirements. A final third of the county plans fall substantially short of what the FDA requires and would benefit from individual Task Force attention. The substandard plans in this last category cover two-fifths of all Texans, including people living in some of the state’s urban counties.¹¹

The Best County Plans
Bell (district & county courts)
Bexar (district courts only)
Collin (district & county courts)
Coke (district & county courts)
Concho (district & county courts)
Denton (county courts only)
El Paso (district & county courts)
Garza (county courts only)
Hale (district & county courts)
Harris (county courts only)
Harrison (district & county courts)
Hays (county courts only)
Hidalgo (district & county courts)
Johnson (district & county courts)
Lubbock (district & county courts)
Maverick (district & county courts)
Montgomery (district & county courts)
Potter (district & county courts)
Smith (county courts only)
Tarrant (district & county courts)
Travis (district & county courts)

A. Variations Among County Plans by Issue

Examination of how the county plans address each of the six core FDA issues provides a rich array of insights into best and worst practices, indigent defense trends, and the issues that most need attention. We believe this information will enable the Task Force to: (1) identify and encourage replication of the best practices; (2) assess and help rectify local policies that fall short of FDA requirements; and (3) prioritize among the many unresolved issues in need of Task Force attention.

1. Prompt Access to Counsel

The FDA promotes prompt access to counsel by specifying procedures and time limits for accepting requests for counsel, for decisions on counsel requests, and for attorney-client contact. There are several components to the FDA scheme for ensuring timely access to counsel: (1) law enforcement officers must present each arrested person to a magistrate within 48 hours after arrest; (2) magistrates must tell each person accused of crime how to request appointed counsel and provide an opportunity to do so; (3) magistrates must transmit requests for counsel to a judge or other appointing authority within 24 hours after receiving a request; (4) each appointing authority must determine indigence and appoint and notify counsel within one to three working days

(depending on county population) after receiving a request for counsel; and (5) appointed counsel must contact their clients within one working day after being appointed. The result should be that an arrested person has an opportunity to request appointed counsel within 48 hours after arrest, and see a defense attorney within a few days after requesting one.

The county plans we reviewed comply with the FDA's prompt access requirements more frequently and more thoroughly than they comply with any other core FDA reform. Over two-thirds of the county plans meet or exceed the FDA's prompt access requirements. Officials in many counties have adopted commendable procedures that enable accused people to access counsel promptly—sometimes even sooner than the FDA requires. These include:

- Procedures requiring officers to prepare the paperwork needed to establish probable cause before a person may be booked into the county jail, minimizing delayed reports as a cause of delayed initial post-arrest hearings (*e.g.*, Castro, Coke, Concho, Galveston, Hale, Harris, Johnson, Liberty, Polk, Rockwall, San Jacinto, Tom Green, and Trinity counties);¹²
- Procedures authorizing magistrates or administrators to immediately appoint counsel following the initial post-arrest hearing, which can result in access to counsel up to 96 hours faster than the FDA's outside limit (*e.g.*, Collin, Henderson, Smith, and Travis counties);
- Procedures requiring initial post-arrest hearings to be held within 24 hours or earlier after arrest, which is sooner than the FDA's 48-hour outside limit (*e.g.*, Anderson, Castro, Coke, Concho, El Paso, Galveston, Hale, Polk, San Jacinto, Smith, Tom Green, Trinity, Webb, and Williamson counties);
- Procedures requiring *immediate* transmission of counsel requests to the appointing authority, which is sooner than the FDA's 24-hour outside limit (*e.g.*, Archer, Bandera, Polk, San Jacinto, Trinity, and Williamson counties);
- Procedures requiring magistrates to request appointment of counsel for defendants whom they suspect of being mentally incompetent to request counsel for themselves (*e.g.*, Bastrop, Bell, Cochran, Coke, Concho, Dallas, Eastland, El Paso, Garza, Hardin, Hays, Hemphill, Hidalgo, Hockley, Maverick, Navarro, Potter, and Tom Green counties);
- Procedures requiring jailers to help facilitate prompt and efficient attorney-client communication (*e.g.*, Archer, Brazoria, El Paso, Harrison, Tom Green, Travis, and Webb counties); and
- Procedures requiring attorneys to certify that they have initiated prompt contact with each client (*e.g.*, Archer, Bexar (district courts), Brazoria, El Paso, Harrison, Hays (county courts), Potter, Parmer, Tom Green, Travis, and Webb counties).

Just as the prompt appointment provisions in these plans deserve to be highlighted as best practices, another tenth of the plans contain provisions that need to be highlighted as deficient so that they may be reconsidered. The principal deficiencies include:

- Failure to specify procedures needed to meet one or more of the FDA’s four specific timing elements;
- Procedures specifying time limits that exceed FDA maximums;¹³ and
- Procedures specifying that appointment of counsel may be delayed for *jailed defendants* until the initiation of “adversarial judicial proceedings” even though the FDA does not permit any delay beyond its specified time limits for people who are in custody.

A significant number of plans show that officials need the Task Force’s guidance on when “adversarial judicial proceedings” are initiated. Even when plans do not plainly misapply the FDA’s “adversarial judicial proceedings” language¹⁴ to jailed defendants, they often condition appointments on the commencement of “adversarial judicial proceedings” without defining this term. This absence of a definition is certain to cause great confusion in the administration of these plans and unconstitutional delay. The U.S. Supreme Court and Texas’s Court of Criminal Appeals define adversarial judicial proceedings throughout their cases interpreting the Sixth Amendment’s right to counsel. Our analysis of all Texas and federal law on this issue, which will be available to the Task Force, shows that adversarial judicial proceedings begin in Texas at the close of each Article 15.17 hearing where a magistrate accuses a person of a crime based on a sworn affidavit.¹⁵ The Task Force would eliminate significant confusion over some counties’ procedures for prompt appointment of counsel by providing guidance on when adversarial judicial proceedings begin.¹⁶

Finally, the Task Force could promote timely access to counsel by approving standardized forms for providing magistrate warnings and for recording counsel requests. Standardized forms ensure that complete information is available to the people who need it, facilitate cost-efficient translation into languages other than English, and promote efficiency in interpretation, all without limiting local choices for how to meet the FDA’s prompt appointment standards.

2. Attorney Selection Methods

The FDA requires each county plan to specify how an attorney will be selected for each case. The attorney selection method is fairly understood as the heart of each county plan because all other plan provisions must coordinate with it.¹⁷ The selection method is also the key to ensuring that appointments are allocated “among qualified attorneys in a manner which is fair, neutral and non-discriminatory,”¹⁸ an FDA requirement designed to safeguard the independence of appointed counsel and the integrity of the overall indigent defense system.

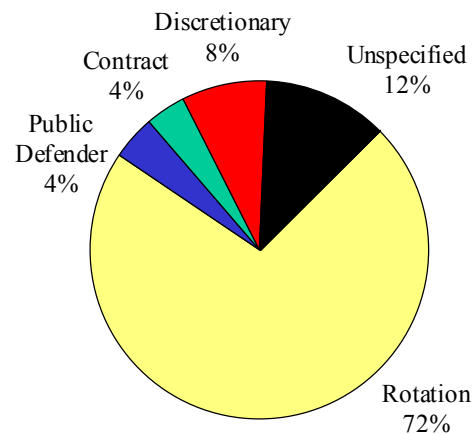
The FDA specifies three options for selecting counsel: (1) a standard rotation system in which lawyers are selected based on the order that their names appear on lists of qualified attorneys; (2) a public defender office whose employees represent indigent defendants exclusively;¹⁹ and (3) an “alternative program” that meets additional FDA requirements²⁰ and may consist of a rotation

system with broader or narrower exceptions than those listed in the FDA, a contract defender system in which private lawyers agree to represent specific groups of defendants under specific contract terms, or a combination of appointment methods.²¹ Unless officials affirmatively choose another selection method, they are to use as a default the standard rotation system described in the FDA itself.²²

Our review of county plans indicates that the majority of appointments in Texas will now be made on a rotation basis from lists of qualified counsel. This is a sea change from pre-FDA practice, when most Texas judges exercised unlimited discretion to assign any lawyer whom the judge considered appropriate, without safeguards against conflicts of interest, favoritism, or appointment of under-qualified counsel.²³ Emergence of rotation as the primary counsel selection method advances the capacity of appointed attorneys to serve as independent and zealous advocates for their clients, but the following descriptions of trends in each observed selection method indicate that much work remains to be done on this issue.

a. Rotation Systems. The FDA’s standard rotation system is incorporated into more than half of the county plans we reviewed. It is likely now the most commonly chosen method for appointing counsel in Texas. More important, the FDA’s standard rotation system was accepted in counties of widely varying population, from Bexar County to Hemphill County, suggesting that it is a workable solution in a variety of different local circumstances. Several additional county plans adopt modified rotation systems that appoint counsel by rotating or random assignment, but depart from one or more of the FDA’s standard rotation procedures. Together, standard and modified rotation plans are found in almost three-quarters of the plans. Good quality rotation systems were adopted in Bell, Bexar (district courts), Collin, Harris (county courts), Harrison, Hidalgo, Lubbock, Maverick, Montgomery, Tarrant, Travis, and Walker counties. Many of the rotation systems incorporate best practices such as:

County Plans Overwhelmingly Favor Rotation As Their Primary Attorney Selection Method



- Procedures limiting discretion to skip the next lawyer on lists of qualified counsel (*e.g.*, Anderson, Angelina, Castro, Fisher, Hale, Hood, Mitchell, Nolan, and Tom Green counties);
- Procedures completely eliminating discretion to skip the next lawyer on lists of qualified counsel, resulting in a streamlined rotation system (*e.g.*, Bexar (district courts), Collin, Harrison, Henderson, Lamar, Nacogdoches, Tarrant (district courts), and Travis counties);

- Procedures specifying administration of rotating appointments by someone other than the judge presiding over the case on the merits, like a professional appointments administrator, a magistrate, or a rotating appointments judge (*e.g.*, Bexar (district courts), Harris (county courts), Hidalgo, and Travis counties); and
- Procedures prohibiting appointed counsel from making campaign contributions to judges (some Harris County district courts).²⁴

Some rotation plans relax the FDA’s standard rotation procedures in ways that can severely compromise neutrality in the selection process including:

- Procedures allowing unlimited departures from rotation lists without any record being made of the reason for each departure;
- Procedures allowing a judge to replace an appointed lawyer without good cause; and
- Failure to specify key procedures needed to operate a rotation system, including what orders are needed to appoint, who makes the appointment, what appointment lists are used, who decides when and how to skip lawyers in the rotation, the consequences of a lawyer being skipped, and how many appointments can be given at once to each lawyer.

b. Public Defender Systems. The FDA specifically defines “public defender” as a governmental entity or nonprofit corporation that employs lawyers to represent indigent clients.²⁵ The FDA authorizes officials to create a public defender program in any county. Public defenders currently represent indigent adult defendants in only five counties: Colorado, Dallas, El Paso, Webb, and Wichita. All five operated prior to the FDA’s enactment. Officials in a number of other counties have expressed interest in meeting their indigent defense needs with a public defender program, but none have done so to date. This is at least in part because guidance on how to establish a public defender office has been scarce, and time to do so has been limited.²⁶

Officials in El Paso and Webb counties adopted procedures that allow for seamless integration of public defender and private attorney selection procedures. Increased independence, efficiency, and professionalism result from the fact that El Paso’s institutionalized Public Defender Office appears as every other name on all appointment lists used in the County and therefore conducts 50% of all indigent defense work. The most common shortcoming among public defender plans is that they omit key details describing how the public defender program is funded and selected, and what measures are used to assure that public defender employees are qualified to provide the representation that they undertake. We urge the Task Force to address these issues as part of its mandate to “develop policies and standards ... governing the organization and operation of a public defender consistent with recognized national policies and standards.”²⁷

c. Contract Defender Systems. Just four county plans we reviewed adopt contract defender systems as their primary attorney selection method. The U.S. Department of Justice recently issued a report outlining recommended procedures that enable local jurisdictions to deliver adequate indigent defense services through private lawyers who are under contract with courts or counties.²⁸

Unfortunately, none of the contract attorney plans meets the minimum standards for attorney selection required under the FDA, let alone the level of substance or detail recommended in the Justice Department report. The county plans adopting contract defender systems typically involve a single judge selecting one small group of attorneys for appointment to nearly all cases in that judge's court. This carries a grave risk of violating the FDA requirement that appointments be allocated among qualified attorneys in a manner that is fair, neutral, and non-discriminatory. Selecting attorneys this way also violates the FDA unless the "attorneys appointed ... are approved by a majority of the judges" who try criminal cases in the county.²⁹

To achieve minimal compliance, a contract attorney plan should describe an open application process in which all the essential contract terms are published so that qualified counsel can fairly apply and compete and so that there is a basis for gauging the quality of representation available under the contract. The plan should also provide a formal mechanism for contract attorneys to be selected or approved by a majority of the criminal court judges or by an independent hiring body subject to approval by a majority of the judges. The contract counsel plans we reviewed did not include these safeguards and exhibited one or more of the following deficiencies:

- Procedures for contract attorney selection that essentially make the attorneys at-will employees hired by and serving at the pleasure of the judge before whom they practice, creating a serious potential conflict of interest for contract attorneys;
- Failure to specify the most basic contract terms, including the qualifications required of each contract attorney, the number and types of cases covered by the contract, how much the attorney will be paid, the period of the contract, or grounds for contract termination;
- Failure to specify how the court or county will cover common litigation costs incurred by defense counsel, including support staff, investigators, and expert services;
- Failure to specify what happens to cases pending when the contract ends, or worse, specifying that contract attorneys must complete these cases without compensation; and
- Procedures specifying that relatively inexperienced contract lawyers will provide representation only until a defendant enters a plea, after which the defendant may be assigned a more experienced contract attorney, likely violating FDA provisions governing counsel replacement and responsibilities of appointed counsel.³⁰

The potential of inadequately designed contract defender systems to produce substandard representation merits careful Task Force attention. We urge the Task Force to assist in the development of revised contract defender plans pursuant to its authority to "develop ... standards for providing indigent defense services under a contract defender program consistent with recognized national policies and standards."³¹

d. Discretionary Systems. Several county plans retain judges' unlimited discretion to assign any lawyer whom the judge considers appropriate for a case. The FDA demonstrates an unequivocal

intent to move away from purely discretionary systems by requiring a combination of objective attorney qualifications and neutral attorney selection methods. It remains to be seen whether a purely discretionary system could ever meet these FDA requirements. Officials in the vast majority of counties read the FDA to require them to move beyond discretionary systems, and they did so. The Task Force is uniquely situated to help officials identify and implement appropriate alternatives to discretionary systems regardless of county demographics.

e. Mixed Systems. County plans that rely primarily on a public defender office or on contract attorneys typically also specify a backup appointment method, usually rotation, to cover conflicts and excess caseloads. In four county plans, however, these mixed systems apparently are used to circumvent the FDA's requirement for countywide indigent defense plans that are adopted by the judiciary working together as a whole. These questionable plans preserve for each individual court the autonomy to establish a counsel selection method just for that court, independent of the others in the county.

The distinction between appropriate and questionable mixed systems is whether all courts in the county use the same mix of appointment methods. The FDA explicitly allows a county plan to employ a "combination" of counsel appointment methods, but in that case it also requires two-thirds of judges to approve the actual combination methods that are used to make all appointments in the county. A county plan violates this latter requirement to the extent that it effectively delegates to each judge the authority to choose an appointment method only for that judge's own court without meaningful oversight and approval from at least two-thirds of the judges. A few plans attempt this by specifying a menu of possible attorney selection methods and then allowing each individual judge to choose among the methods at any time and in any combination the judge chooses. The other judges merely ratify *pro forma* one another's individual choices. This strategy results in a patchwork of different plans that only pretends to be a "countywide" system. The complexity and inconsistency inherent in this approach undermines the quality of indigent defense and contravenes the FDA's letter and spirit.

Counsel selection methods carry greater potential to impact the quality and consistency of indigent defense than any other FDA reform. One of the most important challenges facing the Task Force will be to decide how to encourage local adoption of attorney selection methods that will safeguard the independence of counsel and promote consistent justice, while discouraging those methods that too easily lend themselves to plea mill practices, judicial favoritism, and apparent conflicts of interest.

3. Attorney Qualifications

The FDA's attorney qualification requirements are closely tied to the FDA's attorney selection requirements. In most counties, strong attorney qualification procedures are crucial to the county's ability to maintain an attorney selection method that is fair, neutral, and non-discriminatory. For example, if the judges in a county are careful to ensure that the first degree felony list includes only attorneys actually qualified to handle such cases, then they can allow the rotation list to neutrally assign attorneys to handle first degree felonies, confident that any attorney appointed from that list will provide competent representation.

There are two components to the FDA's required attorney qualification scheme. First, the procedures must specify objective qualifications that attorneys must meet to be eligible for appointment. Most county plans meet this requirement by specifying some combination of previous criminal practice experience, prior trial experience, and annual continuing legal education obligation. The vast majority of county plans establish appointment lists that are graduated based on the seriousness of offenses.³² The objective qualifications required to be eligible for each list increase with the seriousness of the offense category.

The second component of the FDA's attorney qualification scheme is a requirement that each attorney applying to be on an appointment list be approved by a majority of the judges who try criminal cases at that court level (*i.e.*, felony level or misdemeanor level). This majority approval requirement serves two important functions: (1) it ensures that an attorney who has the paper qualifications for a given appointment list also has the actual skill and knowledge, in the opinion of a majority of the judges, to handle cases of that complexity and seriousness; and (2) it serves as a safeguard preventing an individual judge from favoring an attorney whom most other judges believe to be unqualified.³³

Even though these formal qualification requirements are an entirely new feature of indigent defense procedures in almost all Texas courts, most county plans do a fairly good job of implementing them. Plans demonstrating solid attorney qualification provisions include those adopted for Bell, Bexar (district courts), Collin, Dallas (district courts), Harris (county courts), Harrison, Hays (county courts), Hidalgo, Johnson, Kaufman (district courts), Lubbock, Maverick, Montgomery, Potter, Rockwall, San Patricio, Tarrant, Travis, and Walker counties. Many county plans feature noteworthy provisions that help ensure access to qualified counsel, including:

- Procedures requiring attorneys to try as lead counsel four or more felony jury cases to verdict before they may be appointed to represent an indigent defendant who is charged with a first degree felony³⁴ (*e.g.*, Archer, Castro, Cochran, Collin, Eastland, Fort Bend, Grimes, Hidalgo, Hockley, Johnson, Maverick, Tarrant, and Travis counties);
- Procedures requiring attorneys to try one or more misdemeanor cases to verdict before they may be appointed to represent an indigent defendant charged with a misdemeanor, thus preventing inexperienced attorneys from beginning to practice their litigation skills in cases where clients face up to a year in jail (*e.g.*, Aransas, Cochran, Collin, Denton, Eastland, Ellis, Garza, Harris, Hidalgo, Hockley, Johnson, Maverick, San Patricio, Tarrant, and Travis counties);

- Procedures requiring attorneys to meet special qualification requirements to represent people whose cases demonstrate a need for specialized training, including persons with severe mental disabilities, DWI cases, and drug cases (*e.g.*, Bell, Comal (county courts), and Fort Bend counties); and
- Procedures requiring in-depth interviews by judges, formal tests, or other formal qualification reviews of each attorney who applies for appointments (judges in Travis County have the most sophisticated plan provisions to accomplish this; other examples are Dallas (district courts using a point system), Ellis (district courts using interviews), Harris (district courts using tests), and Victoria (district courts using interviews) counties).

Many other plans plainly fail to meet the FDA's qualification requirements. Deficiencies include:

- Failure to specify objective attorney qualifications for some or all cases, a problem particularly prevalent among plans that retain discretionary attorney selection;
- Procedures deeming every lawyer in the county to be qualified to represent indigent defendants with the exception of lawyers who swear in writing that they are incompetent to do so, or whom judges affirmatively find to be incompetent;
- Procedures allowing a lawyer to be deemed qualified even when less than a majority of the judges have approved of the lawyer's qualifications; and
- Procedures specifying bulk, grandfathering, or other *pro forma* approval of attorney qualifications without judicial consideration of each attorney's actual qualifications.

The attorney qualification provisions raise a few further issues for Task Force consideration. Foremost, particularly in sparsely populated counties, inexperienced lawyers are sometimes deemed objectively qualified to represent defendants who face penalties up to life in prison. This is of critical concern in the majority of Texas counties, where one judge acting alone satisfies the FDA's majority approval requirement. Officials in smaller counties do face greater difficulty finding lawyers with the skills needed to provide adequate indigent defense services. This problem is sufficiently serious that the Task Force should initiate a formal study to determine what measures are necessary to help sparsely populated counties fully comply with the FDA. Regional public defender offices merit exploration as one such option that could avoid having inexperienced lawyers assigned to serious cases.

Second, Task Force guidance is needed on how to ensure the qualifications of attorneys who are private contract defenders.³⁵ The FDA is clear that all contract attorneys must meet specified objective qualifications and be approved by a majority of judges who try criminal cases at the court level at which the contract attorney is going to practice.³⁶ At present, many county plans adopting contract defender systems tend to be conspicuously vague about necessary objective qualifications for contract attorneys. Nor are there usually any clear specifications in the plans as to how attorney qualifications will be appropriately matched to cases. This problem is exacerbated by the fact that under many contract attorney plans, each individual judge seems to set separate contract attorney

qualifications rather than doing so as part of a consistent plan adopted by the judges acting collectively. Moreover, most contract attorney plans appear to allow each individual judge to hire and fire that judge's own contract attorneys without requiring meaningful approval by a majority of the other judges. This defeats the purpose of the majority approval requirement and essentially turns the contract attorney into an at-will employee of the hiring judge, lacking the professional independence necessary to guarantee quality legal assistance and faithful representation of the client's interests. Particularly careful attention should be given to the objective qualifications and majority approval of contract attorneys, in view of the fact that they have such a close relationship with a single judge, they lack formal access to supervision, and they must be fully qualified to handle the most severe cases they may be assigned under the contract.

We believe the Task Force should give similar attention to development of qualification standards for public defender offices.³⁷ The current county plans adopting public defender systems are all vague about necessary qualifications for attorneys employed by the public defender and about how these attorneys' qualifications will be matched to the seriousness of the cases they are assigned. A good public defender office should guarantee appropriately qualified attorneys through measures such as: management of attorney assignments, training and supervision of attorneys, and assignment of appropriately experienced co-counsel when necessary. Caseload standards often prove to be an important safeguard against underfunding and overloading of public defender offices.

4. Indigence Standards and Procedures

Prior to FDA enactment, few Texas counties had any consistent, objective standards for measuring whether a defendant is indigent. Whether a person is too poor to hire a lawyer is ordinarily not a close question for those who remain in jail, unable to afford a bond. But for defendants who do bond out of jail pending trial, determinations as to whether a defendant is indigent historically have varied widely from one county to the next and even from one courtroom to the next. The result has often been highly subjective determinations by courts and court coordinators without reference to any yardstick applied equally to all defendants in the county, and without any guarantee of consistent treatment. Some courts have just routinely denied indigent defense counsel to defendants who are able to make bond. Some courts have even had a practice of threatening to revoke bond and incarcerate defendants who had bonded out but contended they could not afford to hire counsel. The FDA addressed this set of problems by adding a new requirement that county plans specify "procedures and financial standards for determining whether a defendant is indigent. The procedures and standards shall apply to each defendant in the county equally, regardless of whether the defendant is in custody or has been released on bail."³⁸

Many county plans feature sound financial standards and procedures that can serve as useful models because they speed the appointment process, save court time, and promote accuracy and equality in indigence determinations. These include:

- Standards specifying a multiple (usually 125% or 150%) of the federal poverty guidelines combined with asset limits as a floor below which any defendant is considered indigent (e.g., Bastrop (district courts), Bell, Castro, Cochran, Coke, Collin, Concho, Eastland, El Paso, Fisher, Garza (county courts), Hale, Hays (county courts), Hemphill, Hidalgo,

Hockley, Maverick, Mitchell, Navarro, Nolan, Potter, Smith, Tarrant, Tom Green, Travis, and Williamson counties);

- Standards specifying that a person is indigent if net monthly income, after expenses, falls below a specified dollar amount (*e.g.*, Bexar and McLennan counties);
- Standards specifying that eligibility for certain means-tested public benefits programs is sufficient proof of indigence (*e.g.*, Bastrop (district courts), Bell, Cochran, Coke, Collin, Concho, Eastland, El Paso, Fisher, Hemphill, Hidalgo, Hockley, Mitchell, Nolan, Potter, Smith, Tom Green, and Travis counties); and
- Procedures specifying that money needed for bail is a legitimate expense to be weighed against income in determining indigence, which recognizes that in close cases where a defendant can afford bail or an attorney but not both, the county will have to pay for either incarceration or an attorney (*e.g.*, Anderson and Henderson counties).

However, our review revealed that the authors of almost half of all county plans had significant difficulty implementing the new FDA provision requiring financial standards that are applied equally countywide. The chief obstacle seems to be a widespread misunderstanding about what the FDA means by “financial standards” that “apply to each defendant in the county equally.” Roughly 44 of the plans we reviewed do not actually state any financial standard that can be used to determine whether a defendant is indigent. Most of these plans instead simply list, from the statute, the various types of financial *evidence* that may be considered during the indigence inquiry (*e.g.*, defendant’s income, outstanding obligations, necessary expenses), without specifying any objective *standard* for making indigence decisions based on this evidence. The evidence list has been in the Code of Criminal Procedure for decades, long before the FDA. The innovation required by the FDA is adoption of an objective amount of money or resources to serve as the standard for determining indigence, whether by creating a presumption or a conclusive determination. A large number of plans have not yet done this.

While the most widespread indigence problem by far is the exclusive reliance on an evidence list to meet the FDA’s equality provisions, a few plans have additional noteworthy shortcomings related to indigence, including:

- Failure to specify any procedures for who will determine indigence, how the decision will be made, when the decision will be made, or how it will be recorded;
- Explicit consideration of a person’s ability to make bail in determining indigence; and
- Explicit consideration of a person’s ability to borrow money in determining indigence.

5. Fees and Expenses for Attorneys, Experts, and Investigators

The FDA requires procedures for paying attorneys, experts, and investigators in accord with a fee schedule published in each county plan. Almost all county plans contain complete fee schedules. This alone is a significant advance after the prior law requiring fee schedules often went unheeded during the 15 years that it appeared at article 26.05(b) of the Texas Code of Criminal Procedure. The county plans' fee structures are extraordinarily diverse, providing the Task Force with a broad array of useful information on this issue.

Many plans improve upon the FDA's minimum requirements with model procedures, including:

- Procedures specifying that attorneys will be paid an hourly rate for every hour actually worked as long as reasonable professionals would objectively agree that the work was needed for a qualified criminal defense attorney to represent the client (*e.g.*, Castro, Coryell, Ellis (county courts), Grayson, Hale, Harrison, Kaufman, Maverick, Montgomery, Tarrant, Van Zandt, and Wise counties);
- Procedures specifying reasonably high fee levels combined with strong attorney qualification standards to attract fully qualified defense attorneys (*e.g.*, Castro, Hale, Harrison, and Wise counties); and
- Procedures specifying how defense counsel may reliably access experts and investigators when needed, including *ex parte* hearings, automatic approval of minimal costs, and review standards (*e.g.*, Castro, Fisher, Harrison, Mitchell, and Nolan counties).

Several substandard fee provisions also merit Task Force attention. Foremost is a prior approval requirement for all expert and investigator fees. Before the FDA, prior approval was always required by law.³⁹ The FDA changed prior law, unequivocally stating that in noncapital criminal cases, expert and investigator "expenses incurred without prior approval shall be reimbursed" when reasonable and necessary.⁴⁰ This change recognizes that legitimate needs may arise for counsel to consult an investigator or expert before disclosing the expected results to a judge or prosecutor at a preapproval hearing. Even so, roughly half of the county plans retain the old prior approval requirement for all expert and investigator expenses, often compounding the deficiency by capping expert and investigator expenses.

Other troubling but less common deficiencies include:

- Procedures that bar payment for necessary services like jail interviews, even though the FDA requires these interviews and they can often save money by speeding dispositions;
- Procedures that place unrealistic limits on compensable time for all pretrial attorney work, for example, allowing only 10 to 15 hours to conduct all investigation, research, discovery, motions, and trial preparation for cases regardless of offense level;
- Procedures specifying fee ranges so broad (*e.g.*, "\$30 to \$90 per hour") that they arguably

circumvent any meaningful statement of the actual fee rate the attorney can expect to be paid;

- Procedures specifying fee rates as low as \$15 per hour, which forces attorneys to choose between subsidizing the defense they are appointed to provide, or else furnishing substandard representation; and
- Procedures specifying that attorneys will be compensated more for securing a guilty plea than a dismissal, often creating a perverse incentive to do less work for more money and to steer some defendants into inappropriate guilty pleas.

Finally, the issue of attorney overhead costs will likely require ongoing Task Force attention. The FDA provides little specificity as to reasonable fee amounts; attorney fees must simply be “reasonable ... taking into consideration reasonable and necessary overhead costs and the availability of qualified attorneys willing to accept the stated rates.”⁴¹ In adopting many county plans, local officials used the opportunity to provide a rare increase in attorney fees. However, the Task Force will have the first opportunity to gauge the extent to which these newly published fees meet the FDA’s overhead cost benchmark. The State Bar’s Standing Committee on Legal Services to the Poor in Criminal Matters has assembled extensive data on this issue, as have others on local, regional, state, and national levels.⁴² Current estimates are that the first \$25 to \$50 paid to a lawyer for each hour of work goes entirely to overhead, depending on where the lawyer works and how much of the attorney’s work is considered “billable hours.” The attorney fees established in some county plans barely cover overhead, if at all, and many of those counties have predictably experienced difficulty attracting qualified counsel to accept appointments.

6. Countywide Consistency

Perhaps the most remarkable FDA achievement so far is the dramatic increase in consistency among indigent defense standards and procedures at the county and state levels. Extraordinary inconsistency among and within counties was one of the principal ills the statute was enacted to cure. With few exceptions, the county plans show that judges worked together to promote consistent standards and procedures within each county. Considered as a whole, the county plans demonstrate that consistency among indigent defense policies is achievable within every county, even if some variations are still warranted among different regions of the state.

Half of all the county plans we reviewed demonstrated good or very good consistency, particularly with regard to attorney qualifications, attorney selection, determination of indigence, and compensation of counsel. In Bell, Bexar (district courts), Coke, Collin, Concho, Eastland, El Paso, Hidalgo, Johnson, Potter, Tarrant, Travis, Webb, and Wichita counties, provisions governing attorney selection, attorney qualifications, and indigence combined to produce exemplary consistency. Nearly every county plan made substantial improvements in the internal consistency

and coordination of indigent defense administration. Where plans scored low on consistency, it was usually because of their excessive reliance on unlimited judicial discretion in administering core indigent defense functions.

Though the FDA permits misdemeanor and felony judges in each county to adopt separate plans, judges in more than 200 of the state's 254 counties chose to adopt a combined plan covering all adult courts in the county. Officials in more than 80 of the state's 254 counties chose to participate in multi-county plans, which may mark the beginning of a new era of regional cooperation on indigent defense.

Well over half of all county plans appear to be based on one or another of several sample plans that were circulated and studied widely during the fall of 2001 when counties were devising their plans. Many officials adopted a pick-and-choose approach to the various provisions in the available sample plans, adopting modifications as deemed necessary. But overall, this process has already contributed to a significant improvement in statewide consistency and standardization among the various counties. Much credit is due to the several organizations and institutions representing the judiciary and county officials for their diligent educational efforts in forums, presentations, discussions, and written materials.

Four of the county plans we reviewed—Ector, Harris district courts, Nueces district courts, and Starr district courts—overlooked the statutory requirement that countywide systems be adopted and approved by a majority of the judges. Instead they essentially delegated to each individual judge the authority to fashion his or her own separate attorney selection method and qualifications. In these cases, majority approval amounts to little more than a majority agreement to let each judge go his or her own way. This approach perpetuates the old system of fragmenting indigent defense policy among the different courts, and it thwarts the development of consistent justice within each county, a central goal of the Fair Defense Act.⁴³

B. Other Variations Among County Plans

1. Variations Among County Plans by Population

Particularly on the issues of selection, qualifications, and fees, FDA implementation presents unique challenges in rural counties, which typically have fewer qualified lawyers, fewer resources, and greater distances to travel. Our review of county plans does indicate that as county population decreases, counties are more likely to have had difficulty fashioning a strong initial FDA plan. However, our review also shows that exceptionally good plans can be found in counties of all sizes. In adopting policies and standards, the Task Force should tailor rules to address the special circumstances of smaller counties. At the same time, there are many measures that smaller counties

can take to improve indigent defense without relaxing standards. For example, the Task Force can help officials in smaller counties know what additional options they already have for meeting their indigent defense needs. The Task Force can disseminate among small counties information about small county plans like the ones we found that have adopted very positive procedures. The Task Force can sponsor professional education programs targeted specifically for rural defense practitioners and judges and dealing both with criminal defense practice and with indigent defense administration.

The Task Force can also help small counties explore the option of establishing a multi-county public defender program—an option that is specifically authorized in the FDA and has proven successful in rural areas in some other states. A good public defender program is designed to address some of the very obstacles rural counties are facing: developing and maintaining a pool of qualified attorneys; coordinating schedules; handling some of the purely administrative burdens that otherwise fall on judges; and delivering services in a cost-efficient manner. Many rural counties have expressed some interest in the viability of this option, but lack the resources to test whether this is a practical alternative for them. Among other things, the Task Force could help develop and support a pilot regional public defender program to serve several rural counties. This would generate information and experience that counties need to make informed decisions about this FDA option.

Good Plans in Small Counties	
County	Population
Hale	36,602
Hockley	22,716
Eastland	18,297
Zavala	11,600
Dimmit (D.Ct.)	10,248
Parker	10,016
Castro	8,285
Garza (Cnty. Ct.)	4,872
Concho	3,966
Coke	3,864
Cochran	3,730
Hemphill	3,351

2. Variations by Court Level

In the vast majority of county plans we reviewed, the quality of indigent defense services does not vary substantially between the county and district courts in each county. In fact, over 200 counties are now covered by combined county and district court plans that provide overlapping, if not identical indigent defense standards for all courts in each of these counties. In most counties where separate county plans were adopted for county and district courts, the quality of the plans was similar. Close scrutiny is warranted in each of the few counties where the quality of a county court plan differs greatly from the quality of a district court plan, because the factors that bear most directly on the capacity to fully comply with the FDA should be very similar for county and district courts in a given county (i.e. resources, available qualified attorneys, caseloads, relationships with magistrates and law enforcement officials, and socioeconomic status of people accused of crime).

3. Variations by County Resources

Notwithstanding substantial population differences, several of Texas’s poorest counties are covered by some of its best county plans, including El Paso, Hidalgo, Maverick, Webb, and Zavala counties. This at least indicates that officials in these counties are admirably committed to compliance with

the FDA, and do not consider it impossibly burdensome even with their low tax bases. Nevertheless, improving indigent defense over the long term is likely to be especially challenging in those counties with the fewest resources. When all counties submit FDA reports in September 2002, the Task Force will have the best data yet on per-capita indigent defense expenditures for each county. We believe that it is important for the Task Force to determine whether poorer counties are bearing more than their fair share of the burden generated by the constitutional right to counsel. In addition, we urge that the Task Force consider local county resources as a factor in the distribution formulas for indigent defense grants to counties and other future resource allocations. For present purposes, the significance of model plans from poorer counties is that the will to excel is present there. Still, the county plans are just the first step on the road to reform. These poorer counties deserve strong support to ensure their commendable plans are able to produce practical improvements.

While the focus of this report is refinement of the current county plans, we emphasize that some improvements cannot be made or maintained without additional funding. Fortunately, the FDA initiates a modest state indigent defense funding program, and it also appears to have inspired some counties to increase their indigent defense budgets. While the allocation of these new resources is a positive development, additional state funding will ultimately be needed to follow through on the advances that local officials have begun. Even with its new funding commitment, Texas remains near the bottom of per capita indigent defense expenditures in the United States. Certainly money does not guarantee adequate representation, but it is equally certain that representation is compromised when necessary resources are unavailable and that Texas counties still bear a disproportionate share of the financial burden. As this report demonstrates, local officials have by and large risen to meet the initial challenge put to them by the State. The State should respond by providing increased financial support to the counties that have made such a commendable start.

IV. SCORES FOR COUNTY PLANS

The following chart lists the scores for each county plan we reviewed, which include all plans submitted by counties with populations of 40,000 and above and 12 small counties that exemplify good indigent defense procedures adopted in some of the smaller counties.

Core Fair Defense Act Issues

- Prompt access to appointed counsel;
- Fair and neutral methods for selecting attorneys;
- Qualifications for appointed counsel;
- Financial standards and procedures for determining whether a person is indigent; and
- Fees and expense for attorneys, experts, and investigators.

Significance of the Scores

- A Exceeds basic FDA requirements by adding recognized best practices;
 B Meets basic FDA requirements on balance;
 C Falls short of FDA requirements in minor respects;
 D Falls short of FDA requirements in major respects;
 F Affirmatively contravenes core FDA requirements or omits them altogether; and
 I Incomplete (see summary descriptions of county plan).

Additional county plan detail may be found in Part V: Summary Description of County Plans.

County	Court		Population	Scores					
	Dist	Cty		Prompt Access to Counsel	Attorney Selection Method	Attorney Qualifications	Indigence Standards	Fees & Expenses	Countywide Consistency
Anderson	X	X	55,109	B	A	C	D	C	C
Angelina	X	X	80,130	B	B	A	F	C	B
Bastrop	X		57,733	A	D	C	A	B	C
Bastrop		X	57,733	D	A	C	D	D	C
Bell	X	X	237,974	A	A	B	A	A	A
Bexar	X		1,392,931	A	A	A	B	B	A
Bexar		X	1,392,931	B	A	C	C	D	B
Bowie	X	X	89,306	C	D	D	D	C	D
Brazoria	X	X	241,767	A	B	C	D	C	C
Brazos	X	X	152,415	C	B	C	D	C	C
Cameron	X	X	335,227	A	D	D	D	F	C
Castro	X	X	8,285	B	A	C	B	A	A
Cherokee	X	X	46,659	B	B	C	D	B	C
Cochran	X	X	3,730	A	B	A	A	B	A
Coke	X	X	3,864	A	B	C	A	C	B

County	Court		Population	Scores					
	Dist	Cty		Prompt Access to Counsel	Attorney Selection Method	Attorney Qualifications	Indigence Standards	Fees & Expenses	Countywide Consistency
Collin	X		491,675	A	B	B	A	B	B
Collin		X	491,675	A	A	A	A	B	A
Comal	X		78,021	B	D	D	D	C	D
Comal		X	78,021	C	B	D	D	C	C
Concho	X	X	3,966	A	B	C	A	C	B
Coryell	X	X	74,978	C	C	B	D	A	C
Dallas		X	2,218,899	F	D	C	D	D	D
Dallas	X		2,218,899	D	B	A	F	C	C
Denton	X		432,976	C	C	B	B	C	C
Denton		X	432,976	B	C	A	B	B	B
Dimmit	X		10,248	A	B	A	A	A	A
Eastland	X	X	18,297	A	B	A	B	C	B
Ector	X	X	121,123	D	F	C	D	D	D
El Paso	X	X	679,622	A	A	C	A	C	A
Ellis	X		111,360	B	C	C	D	C	C
Ellis		X	111,360	A	B	C	D	B	C
Fort Bend	X	X	354,452	C	D	A	B	C	C
Galveston	X	X	250,158	B	B	B	D	C	C
Garza		X	4,872	A	B	A	A	C	B
Grayson	X	X	110,595	D	C	D	D	A	D
Gregg	X	X	111,379	C	C	F	F	F	D
Guadalupe	X		89,023	C	D	D	D	D	D
Guadalupe		X	89,023	C	C	D	D	D	D
Hale	X	X	36,602	A	A	C	C	B	B
Hardin	X	X	48,073	B	C	D	D	C	D
Harris	X		3,400,578	A	D	C	D	B	D
Harris		X	3,400,578	A	B	A	D	B	B
Harrison	X	X	62,110	B	B	B	D	A	B
Hays	X		97,589	B	D	D	D	C	D
Hays		X	97,589	A	B	B	A	B	B
Hemphill	X	X	3,351	A	B	C	A	C	B
Henderson	X	X	73,277	B	A	C	D	C	C
Hidalgo	X	X	569,463	A	B	B	A	B	A
Hockley	X	X	22,716	A	B	A	A	C	B
Hood	X	X	41,100	C	B	C	D	C	C
Hunt	X	X	76,596	C	B	D	D	B	C
Jefferson	X		252,051	B	B	C	D	C	B
Jefferson		X	252,051	C	D	B	D	C	B
Johnson	X	X	126,811	A	B	A	B	C	A
Kaufman	X		71,313	C	B	B	C	B	B
Kaufman		X	71,313	C	B	C	C	B	B

County	Court		Population	Scores					
	Dist	Cty		Prompt Access to Counsel	Attorney Selection Method	Attorney Qualifications	Indigence Standards	Fees & Expenses	Countywide Consistency
Kerr	X	X	43,653	B	D	D	D	C	D
Lamar	X	X	48,499	B	C	C	D	C	C
Liberty	X	X	70,154	B	D	B	D	C	C
Lubbock	X	X	242,628	B	B	B	B	B	B
Maverick	X	X	47,297	A	B	A	A	B	B
McLennan	X	X	213,517	B	C	B	B	C	B
Midland	X	X	116,009	B	D	C	D	C	C
Montgomery	X	X	293,768	B	B	B	C	A	B
Nacogdoches	X	X	59,203	B	A	D	C	C	B
Navarro	X	X	45,124	B	C	C	A	B	B
Nueces	X		313,645	B	D	D	F	C	D
Nueces		X	313,645	D	C	C	C	C	C
Orange	X	X	84,966	C	B	D	D	C	C
Parker	X		88,495	D	B	B	D	C	B
Parker		X	88,495	D	B	B	D	C	B
Parmer	X	X	10,016	A	B	A	A	B	A
Polk	X	X	41,133	A	F	D	D	C	D
Potter	X	X	113,546	A	B	B	A	B	A
Randall			104,312	I	I	I	I	I	I
Rockwall	X	X	43,080	A	B	B	D	C	B
Rusk	X	X	47,372	B	D	D	D	F	D
San Patricio	X		67,138	C	B	B	D	D	B
San Patricio		X	67,138	C	B	A	D	D	C
Smith	X		174,706	A	D	D	A	C	C
Smith		X	174,706	A	B	C	A	B	B
Starr	X		53,597	I	I	I	I	I	I
Starr		X	53,597	I	I	I	I	I	I
Tarrant	X	X	1,446,219	B	B	B	B	B	A
Taylor	X	X	126,555	B	D	D	D	C	D
Tom Green	X	X	104,010	B	B	C	A	F	B
Travis	X	X	812,280	B	A	A	A	B	A
Val Verde	X	X	44,856	C	D	C	B	B	C
Van Zandt	X	X	48,140	B	B	D	D	A	B
Victoria	X	X	84,088	C	B	D	D	D	C
Walker	X	X	61,758	B	B	B	D	C	B
Webb	X	X	193,117	A	A	C	B	C	A
Wharton	X	X	41,188	C	B	F	C	D	C
Wichita	X	X	131,664	B	A	C	C	C	A
Williamson	X	X	249,967	A	C	C	A	B	B
Wise	X	X	48,793	B	D	C	A	A	C
Zavala	X		11,600	A	B	A	A	A	A

V. SUMMARY DESCRIPTIONS OF COUNTY PLANS

Anderson County – district and county courts

The plan adopts a standard FDA rotation system to appoint counsel. A Counsel Coordinator appoints the next attorney from lists that are graduated according to the seriousness of the offense unless the accused has already been appointed counsel in another case. No previous trial or criminal practice experience is required for misdemeanors, or for state jail or third degree felonies. The plan does not specify objective financial *standards* for determining whether a defendant is indigent; it sets out a subjective standard for indigence by which the Counsel Coordinator determines whether the accused's net financial resources and income are insufficient to enable him or her to obtain qualified counsel, support his or her family, and post bond. The fee schedule consists largely of low, flat rate attorney fees. The plan fails to allow compensation for reasonable and necessary expenses for investigators and experts without prior approval.

Angelina County – district and county courts

The plan adopts a standard FDA rotation system to appoint counsel. The magistrate conducting the probable cause hearing determines indigence and appoints the next attorney from appointment lists that are graduated according to the seriousness of the offense. The magistrate departs from the rotation order only after making a finding of good cause on the record. The plan fails to set out any indigence standards.

Bastrop County – district courts

The plan adopts a discretionary assigned counsel method. Counsel selection is entirely at the discretion of the appointing judge, who is not identified in the plan. Qualified counsel include all those currently providing indigent defense services in Bastrop County's district courts as well as those who meet objective criteria, including five jury trials to verdict. No procedure is specified for attorneys to be approved by a majority of judges. Counsel is automatically requested for people suspected to have mental incapacity. Indigence is presumed upon demonstrated eligibility for common public assistance programs or if available income is below 125% of the federal poverty guidelines.

Bastrop County – county courts

The plan adopts a standard FDA rotation system administered by the sole County Court at Law judge. The plan does not include any objective qualifications other than the requirements that appointed attorneys have practiced law for two years and attend at least 75 percent of all dockets. While the presence of attorneys at each docket promotes prompt attorney contact with clients, the plan does not include a provision requiring that accused persons be brought before a magistrate within 48 hours. Nor does it ensure that attorney requests are always forwarded to the appointing authority within 24 hours of the request. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry. In determining whether

an accused is indigent, the judge is permitted to consider family resources and the ability of the accused person to obtain a loan. No attorney fee rates are specified except those for a guilty plea. The plan fails to permit compensation for reasonable and necessary expenses for investigators and experts without prior approval.

Bell County – district and county courts

The plan adopts a standard FDA rotation system under which the attorney is administratively selected using seven lists, all with objective criminal law requirements: misdemeanor, juvenile, mental illness, third degree felony, first degree felony, capital felony, and appellate. A counsel administrator is assigned to ensure prompt access to counsel, even when counsel isn't requested until after the Article 15.17 hearing, and even if the accused is mentally incompetent or does not speak English. Indigence is presumed upon demonstrated eligibility for common public assistance programs or if available income is below 125% of the federal poverty guidelines. The indigence determination includes carefully drafted partial indigence provisions. However, bail creates a rebuttable presumption of non-indigence requiring a second request for counsel.

Bexar County – district courts

A standard FDA rotation system is used to appoint attorneys from appointment lists that are graduated according to the seriousness of the offense. After pretrial services enters the defendant's financial data into a computer program, the computer assigns appointments in rotating order from the qualification list appropriate to the charged offense. The plan promotes quality representation by requiring substantial trial and criminal law experience for state jail felonies, third degree felonies, and second degree felonies, and by requiring board certification or both substantial trial and criminal law experience for first degree and 3(g) felonies. The plan provides positive procedures to ensure prompt access to counsel by notifying counsel of the appointment at the same time the computer makes the appointment. The plan also provides that each defendant be given a postcard that he or she can mail to the Criminal District Courts Administration if the defendant has not been contacted by his or her appointed attorney within a specified time frame. Indigence is established if the defendant's net income, after expenses, falls below \$716 per month (equal to 100% of the federal poverty rate for a single person—though the standard does not adjust for family size as the federal guidelines do).

Bexar County – county courts

A standard FDA rotation system is used to appoint attorneys from a single misdemeanor appointment list. After pretrial services enters the defendant's financial data into a computer program, the computer assigns appointments in rotating order from the qualification list appropriate to the charged offense. Indigence is established if the accused's net income, after expenses, falls below \$716 per month (equal to 100% of the federal poverty rate for a single person—though the standard does not adjust for family size as the federal guidelines do). However, the plan also provides a "Plan B" to determine indigence, which seems to indicate that a person whose net income is above \$200 per month should be able to hire counsel and is therefore not eligible for an appointed attorney. No trial experience or criminal law experience is required for attorneys on the

appointment list, only nominal CLE in criminal law. Attorneys must submit documentation that they contacted their clients in a timely fashion. The fee schedule specifies very low attorney fee rates with low caps on allowable hours of work (though the caps can be overridden with judicial approval).

Bowie County – district and county courts

This plan does not specify an attorney selection method. Attorneys are appointed from appointment lists that are separated into a misdemeanor list and a single felony list. No previous trial or criminal practice experience is required to handle misdemeanors and only one year of criminal law experience is required to handle felonies, including first and second degree felonies. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry.

Brazoria County – district and county courts

This plan adopts a standard FDA rotation system. Attorneys are appointed from graduated lists with specific qualification standards for each level, although neither trial experience nor criminal law experience is required to qualify for misdemeanor appointments. This plan promotes prompt access to counsel by requiring each lawyer to confirm, within 72 hours of receiving notice of the appointment, that he or she has made a reasonable effort to contact his or her client by the end of the first working day after the appointment was made. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry.

Brazos County – district and county courts

This is an alternative plan using a standard FDA rotation system. Appointments for those in custody are made from the appropriate list by a single justice of the peace (JP), with limited exceptions. Appointments for those who post bond before the JP makes an appointment are made by the assigned court only after a charging instrument has been filed. There are only two appointment lists: one for all misdemeanors and one for all felonies. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry. In a thoughtful introduction, the plan explains the previous system and how it will change under this plan.

Cameron County – district and county courts

Counsel is appointed through an alternative program using full-time contract attorneys, hired by and serving at the pleasure of each individual judge, to represent defendants at the post-indictment and post-information stage. At the pre-indictment/pre-information stage, all defense counsel are appointed by the current designated appointments judge, a role that rotates among all the judges. Attorneys are selected from two graduated appointment lists: one list for pre-indictment/pre-

information representation and a second list for post-indictment/post-information representation. The plan fails to specify objective attorney qualifications. The plan apparently allows each individual judge to devise his or her own attorney assignment procedures and selection criteria for contract attorneys. The post-indictment/post-information contract attorneys and the contracts themselves are to be approved by a majority of judges. The plan does not include standards for determining indigence nor a fee schedule.

Castro County – district and county courts

The plan adopts a standard FDA rotation system to appoint counsel. The trial judge appoints the next attorney from lists that are graduated according to the seriousness of the offense, unless, as should be noted on the record, there is good cause to skip the next attorney. The plan does not require trial experience for misdemeanors and does not require trial experience for felonies if the attorney has criminal law experience. Attorneys are compensated on the basis of an hourly rate that differs for out-of-court time and in-court time.

Cherokee County – district and county courts

The plan adopts a standard FDA rotation system. Attorneys are appointed from lists that are graduated according to the seriousness of the offense, but no previous trial or criminal practice experience is required for misdemeanors, or for state jail or third degree felonies. The plan sets out only a subjective inquiry for indigence by which the trial court judge determines whether the accused's net financial resources and income are insufficient to enable him or her to obtain qualified counsel, support his or her family, and post bond.

Cochran County – district and county courts

The plan adopts a standard FDA rotation system. Attorneys are appointed from lists that are graduated according to the seriousness of the offense. Each tier sets out appropriate standards that attorneys must meet in order to qualify for appointments. The plan provides positive procedures to ensure the prompt appointment of counsel by requiring counsel to confirm, within 72 hours of receiving notice of the appointment, that he or she has made a reasonable effort to contact his or her client by the end of the first working day after the appointment was made. Accused persons are presumed indigent if they have demonstrated eligibility for common public assistance programs, if they are incarcerated or residing in a mental health facility, or if their income falls below 125% of the federal poverty guidelines. The plan provides financial standards that acknowledge indigence above the eligibility floor and also includes standards for partial indigence.

Coke County – district and county courts

The plan adopts a standard FDA rotation system. Attorneys are appointed from lists that are graduated according to the seriousness of the offense, but no previous trial or criminal practice experience is required for misdemeanors and state jail felonies. The plan provides positive procedures to ensure the prompt appointment of counsel, including magistration within 24 hours for those arrested on a misdemeanor charge. Accused persons are presumed indigent if they have demonstrated eligibility for common public assistance programs or if their income falls below 125% of the federal poverty guidelines. The plan also provides financial standards that acknowledge indigence above the eligibility floor.

Collin County – district courts

This plan adopts a standard FDA rotation system. Appointments are made from graduated appointment lists available on the Internet. Attorneys must meet fairly rigorous qualifications to be placed on any of the four appointment lists. This plan promotes the prompt appointment of counsel by requiring that magistrates appoint attorneys at the initial probable cause hearing (“arraignment”) with exceptions only for capital cases and for those cases where “the magistrate can reasonably ascertain that the case is presently assigned to a district court.” This plan enhances consistency by setting out specific indigence standards. Accused persons are presumed indigent if they have demonstrated eligibility for common public assistance programs, if they are incarcerated or residing in a mental health facility, or if their income falls below 125% of the federal poverty guidelines. Moreover, the plan includes financial standards that acknowledge indigence above the basic eligibility floor and also includes standards for determining a defendant to be partially indigent.

Collin County – county courts

This plan adopts a standard FDA rotation system. Attorneys are appointed from one list, which is posted on the Internet. Attorneys must be board certified or they must both have practiced law for at least two years and participated in at least three misdemeanor trials as either first or second chair. This plan promotes prompt and quality representation by requiring attorneys to meet the fairly rigorous standards previously noted and by requiring that the magistrate appoint counsel at the initial probable cause hearing (“arraignment”). This plan enhances consistency by setting out specific indigence standards. Accused persons are presumed indigent if they have demonstrated eligibility for common public assistance programs, if they are incarcerated or residing in a mental health facility, or if their income falls below 125% of the federal poverty guidelines. Moreover, the plan includes financial standards that acknowledge indigence above the basic eligibility floor and also includes standards for determining a defendant to be partially indigent. Appointed attorneys can choose to be paid by hourly rates, fixed rates, or a combination of hourly and fixed rates.

Comal County – district courts

This plan is adopted as an alternative program using a discretionary assigned counsel method to appoint attorneys. Judges choose any lawyer whom they subjectively deem qualified for a case.

The plan specifies that “appointments will be made reasonably and impartially among qualified attorneys” without any guidelines or procedures to ensure that this will be achieved. The plan contains no objective attorney qualification criteria other than bar membership and eight hours of CLE over an unspecified time period. Otherwise, attorney qualifications are entirely a subjective determination by the judges. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry. The minimum \$30 hourly fee may be insufficient to account for attorney overhead costs as required by the FDA.

Comal County – county courts

This is an alternative program using a standard system of rotation. There are two appointment lists—one for attorneys approved for all misdemeanor appointments and the other for attorneys approved only for defendants out on bond and for offenses not specifically excluded; however, the plan fails to provide any objective qualification standards for either list. Attorneys are appointed from these two lists in the order in which their names appear with exceptions that include a finding on the record that the accused requires an attorney with specialized skills because of the accused’s mental illness or mental retardation. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry. The plan fails to allow compensation for reasonable and necessary expenses for investigators and experts without prior approval.

Concho County – district and county courts

The plan adopts a standard FDA rotation system. Attorneys are appointed from lists that are graduated according to the seriousness of the offense, but no previous trial or criminal practice experience is required for misdemeanors and state jail felonies. The plan provides positive procedures to ensure the prompt appointment of counsel, including magistration within 24 hours for those arrested on a misdemeanor charge. Accused persons are presumed indigent if they have demonstrated eligibility for common public assistance programs or if their income falls below 125% of the federal poverty guidelines. The plan also provides financial standards that acknowledge indigence above the eligibility floor.

Corvell County – district and county courts

This plan appoints counsel using a standard FDA rotation system. The prompt appointment provisions improperly exclude weekends from the 24-hour period in which the request for appointment must be transmitted to the appointing authority. Attorneys are required to document that they have initiated prompt initial contact with their clients. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry. Indigent defendants who are acquitted may be required to reimburse costs of counsel – a practice that is improper under the law. The plan includes an improper provision allowing *capias pro fine* or contempt for non-payment of assessed costs at the judge’s discretion without a hearing. Attorney

fee rates are hourly with reasonable ranges. Expert and investigator fees are not capped and are appropriately compensated either with prior approval or without prior approval if reasonable and necessary.

Dallas County – district courts

This plan adopts an alternative program for all district courts using both a modified rotation system and a public defender. For any given case the assigned court can use a public defender, or it can choose an attorney from the master list or from the individual court's list. The plan does not define how often the public defender will be used, or how the public defender will be assigned to courts or cases. The plan also omits key details describing how the public defender program is funded and selected and what measures are used to assure that public defender attorneys are qualified to provide the representation they are assigned. When using the attorney lists, if an attorney is on the master list, each individual court must accept the attorney onto its own list if the attorney requests to be on that court's list. If using the master list, a court will pull as many names off the master list as it has appointments to make on a given day; the court exercises unlimited discretion in matching the drawn names to the cases that day. If a court chooses to use its own individual list, the court will select an attorney from among the next five names on the court's list, but the court cannot bypass an attorney at the top of the list more than three times. This plan includes four qualification tiers graduated by seriousness of the offense, with sub-tiers for Spanish-speaking attorneys. It promotes quality representation by using a creative point system to specify various combinations of experience, training, and certification that each attorney must have in order to qualify for each tier. The plan does not include provisions requiring that accused persons be brought before a magistrate within 48 hours of their arrest, that an attorney request must be transmitted to the appointing authority within 24 hours of being made, and that an attorney must be appointed within one working day of receiving the request for counsel. This plan does not set out any standards for determining indigence.

Dallas County – county courts

This plan adopts an alternative program by which each court appoints counsel off its own list on a discretionary ad hoc basis, uses a public defender, or uses a combination of the two. The courts also maintain a master list comprised of attorneys who meet minimum specified qualifications. Attorneys who are on the approved master list must be included on any individual court list upon an attorney's request to the court. The plan indicates that attorneys may also be appointed from the master list, but does not indicate how this appointment method is integrated with the other methods. Nor does the plan define how often the public defender will be used, or how the public defender will be assigned to courts or cases. The plan also omits key details describing how the public defender program is funded and selected and what measures are used to assure that public defender attorneys are qualified to provide the representation they are assigned. Although the plan provides that attorneys are to be appointed in a "fair, neutral and non-discriminatory manner," the plan provides no details about how this will be accomplished. There are no provisions for the prompt appointment of counsel in this plan. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry. Attorneys are compensated on the

basis of hourly rates for appeals and fixed daily rates for everything else. The range of the fixed daily rates is broad; for example attorneys can be compensated anywhere from \$200 to \$1,000 per jury trial day.

Denton County – district courts

An alternative plan is adopted using a system where private counsel in two tiers are selected by the judge essentially on a discretionary basis, but giving some weight to the next attorney on the list. The judges are supposed to first use discretionary “best efforts to match any special needs of the defendant (e.g., the defendant speaks a foreign language) or special requirements of a case to the abilities of a particular attorney on the appropriate appointment list. . . . Where no circumstances . . . indicate the appointment of a particular attorney, the appointing judge should appoint the next attorney [from the appropriate appointment list].”

Denton County – county courts

This plan adopts a rotation system, but allows for discretionary exceptions where special circumstances warrant. Qualification standards are good with special attention to the language proficiency and interpreter issues. Accused persons are presumed indigent if they have demonstrated eligibility for common public assistance programs or if their income falls below 100% of the federal poverty guidelines.

Dimmit County – district courts

The plan adopts a standard FDA rotation system. Attorneys are appointed from lists that are graduated according to the seriousness of the offense. Each tier sets out appropriate standards that attorneys must meet in order to qualify for appointments. The plan provides positive procedures to ensure the prompt appointment of counsel by requiring counsel to confirm, within 72 hours of receiving notice of the appointment, that he or she has made a reasonable effort to contact his or her client by the end of the first working day after the appointment was made. Accused persons are presumed indigent if they have demonstrated eligibility for common public assistance programs, if they are incarcerated or residing in a mental health facility, or if their income falls below 125% of the federal poverty guidelines. The plan provides financial standards that acknowledge indigence above the eligibility floor and also includes standards for partial indigence. Attorneys are compensated on the basis of a straight hourly fee for time reasonably expended, as recommended by the Texas State Bar and ABA standards.

Eastland County – district and county courts

This plan adopts a standard FDA rotation system. Strong trial requirements are included as objective qualification criteria for all cases from misdemeanors (two trials required) to first degree felonies (eight trials required). The plan includes detailed rules for prompt appointment of counsel, including automatic requests for people who demonstrate mental disability. Indigence is presumed upon demonstrated eligibility for common public assistance programs or if available income is below 125% of the federal poverty guidelines, but the financial data questionnaire requests

information on ability to borrow money. Attorneys are paid \$400 for a felony guilty plea and \$150 for getting a felony case dismissal. Prior approval is required for all expert and investigator costs. The plan contains an especially thorough set of forms for its implementation.

Ector County - district and county courts

Each judge is permitted to adopt an individual attorney assignment system, a system using long-term contract attorneys, a system using limited-term contract attorneys, or any combination of such systems. Each judge also is permitted to individually determine many of the specific terms and procedures for his or her own system. The plan fails to report what actual procedures and methods have been devised by each judge. The plan sets out graduated appointment lists but it is unclear how those lists are to be used in each judge's separate system. A majority of judges must approve each attorney on the misdemeanor and first degree felony lists, but it is unclear whether a majority of judges must approve each attorney's placement on any of the other lists. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry. Compensation rates appear to be highly discretionary incorporating extremely wide fee ranges and failing to specify when hourly versus flat fees are to be used.

El Paso County – district and county courts

The El Paso Council of Judges designates one appointing judge or administrator to make all appointments from one of three lists: a capital felony list, a murder list, and a general list that covers all other charged offenses. Appointment is made by a standard FDA rotation system, except that El Paso's Public Defender appears as every other name on each list so that it is responsible for half of all appointments. Efforts are made to have each lawyer represent that lawyer's previous clients. All El Paso attorneys are placed on the general list pursuant to a federal court order, but they may be removed from the list for good cause, by a majority vote of the judges, or if they cease practicing law. There are, however, no experience requirements to be on that list. A jail magistrate assures prompt responses to counsel requests and helps the sheriff facilitate safe and efficient communications between attorneys and clients in jail. Attorneys are automatically requested for mentally incompetent people who are accused of crime. Accused persons are determined indigent if they have demonstrated eligibility for common public assistance programs or if their income falls below 150% of the federal poverty guidelines.

Ellis County – district courts

This plan adopts a modified rotation system. All lawyers who accept retainers for private criminal cases in the county are placed either on List One (attorneys who wish to accept appointments) or List Two (attorneys who do not wish to be appointed but may be required to accept an appointment at the discretion of the judge). Appointments are made in order from List One until case volume leads the judge to believe that appointments from List Two are necessary. To be appointed, an attorney must meet a minimum experience requirement of two felony jury trials. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely sets out the types of financial *evidence* that may be considered as part of the indigence inquiry.

Ellis County – county courts

This plan adopts a modified rotation system for appointment of counsel. Appointments are made from a list of lawyers who practice criminal law in the county and “indicat[e] a preference to be appointed to misdemeanor criminal cases.” Appointments are by rotation with discretionary exceptions. The system promotes efficiency by enabling defendants to speak with a lawyer immediately upon request, and not later than a four-day limit specified in the local rules. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely sets out the types of financial *evidence* that may be considered as part of the indigence inquiry.

Fort Bend County – district and county courts

This plan does not specify an attorney selection method. The plan promotes quality representation by including graduated lists with fairly detailed qualification standards for each level. Even misdemeanors are graduated into four levels, with very detailed necessary experience noted for each level. The range of attorney fees for misdemeanors fluctuates depending on the misdemeanor level.

Galveston County – district and county courts

This plan adopts a standard FDA rotation system for appointment of non-capital trial counsel, allowing the judge to choose among the first three names on the list; however, a discretionary assigned counsel system is used for appeals and capital cases. Lawyers are carefully assigned to lists and sifted into the proper level according to experience. In addition to attorneys assigned to individual cases, two or three attorneys are assigned by rotation to serve a week-long term, providing representation to indigent defendants at the daily jail docket. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry.

Garza County – county courts

The plan adopts a standard FDA rotation system. Attorneys on the appointment list are required to have both trial and criminal law experience. The plan provides positive procedures to ensure the prompt appointment of counsel, including a provision by which each appointed attorney must provide the court a written acknowledgment confirming that he or she has made a reasonable effort to contact his or her client by the end of the first working day after the date of the appointment. Accused persons are presumed indigent if they have demonstrated eligibility for common public

assistance programs, if they are incarcerated or residing in a mental health facility, or if their income falls below 125% of the federal poverty guidelines. The plan provides financial standards that acknowledge indigence above the eligibility floor and also includes standards for partial indigence.

Grayson County – district and county courts

The method of appointment appears to be a modified rotation system with appointments from a single list in the order on the list “unless otherwise ordered” by the Judge presiding in the case. The plan does not require trial experience or criminal law experience to be on the list. This plan allows for accused persons to be brought before a magistrate within 72 hours instead of the requisite 48 hours; it also has no provision requiring counsel to be appointed within three days of receipt of the appointment request. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry. There are no fee caps, although the plan fails to allow compensation for reasonable and necessary expenses for investigators and experts without prior approval.

Gregg County – district and county courts

This plan adopts a standard FDA rotation system but gives no details on how it will be implemented and by whom. The plan fails to set out attorney qualification standards, an indigence standard, or a fee schedule.

Guadalupe County - district courts

This plan adopts an alternative program using a discretionary assigned counsel method. Attorneys are appointed from a single appointment list for all felonies. The list automatically includes all attorneys who received appointments in 2001. The only objective qualifications for new attorneys wishing to be placed on the felony list is bar membership and good standing and one year criminal practice experience. In addition, the attorney needs approval from only one of the judges. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry. The fee schedule includes a low fee for trial and does not specify fees for certain attorney services, including contact with defendant, investigation, or dismissal. The plan fails to allow compensation for reasonable and necessary expenses for investigators and experts without prior approval.

Guadalupe County - county courts

The plan uses an undefined rotation system to appoint counsel from a single appointment list for misdemeanors. The list automatically includes all attorneys who received appointments in 2001. The only objective qualification for new attorneys wishing to get on the list is bar membership and good standing. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be

considered as part of the indigence inquiry. No attorney fee rates are specified in the plan other than “initial court hearing and plea - \$50.”

Hale County – district and county courts

This plan adopts a standard FDA rotation system, only allowing attorneys to be skipped upon a finding of good cause stated on the record. Objective qualifications are stated in years’ experience or number of trials. Magistrates are notified of each arrest within 16 hours, hearings in misdemeanors are conducted within 24 hours of arrest, and no person may be booked into jail without paperwork needed to show probable cause. Indigence is presumed if income is below the federal poverty guidelines, but the form requesting counsel inquires whether money can be borrowed to hire counsel. The fee schedule sets forth straight hourly fees of \$75 for out-of-court work and \$100 for in-court work, with prior approval required for out-of-court time exceeding 10 hours.

Hardin County – district and county courts

This plan appears to adopt a standard FDA rotation system, but critical details necessary to operate a rotation system are omitted. The plan simply says that “[t]he Court responsible for the appointment of counsel shall appoint counsel on a rotating basis, as described in Article 26.04(a),” without specifying which court is responsible for the appointment, how many lists will be maintained, who maintains the lists, or skipping criteria. The plan includes no objective qualification requirements other than bar membership and no procedure for approval of each attorney’s competence by a majority of judges. Indigence provisions are unclear, and they contain no means of applying countywide financial standards nor procedures for determining indigence. Counsel is paid \$50 per hour to prepare for up to four hours for a misdemeanor trial or guilty plea, and \$50 per hour to prepare for up to 15 hours for a felony trial or guilty plea.

Harris County - district courts

The district courts established an alternative program consisting of a complex patchwork of different plans, with each of the 22 criminal district judges choosing his or her own method for appointing counsel. Each judge is permitted to adopt a rotation system, a system using long-term contract attorneys, a system using limited-term (daily or weekly) contract attorneys, or any combination of these systems. Each judge also is permitted to individually determine many of the specific terms and procedures for his or her own system. The result is a collection of at least 16 distinct systems for appointment of counsel. Three district judges appear to rely primarily on a modified discretionary assignment of individual counsel, five rely mainly on long-term contract attorneys, and one relies mainly on short-term contract attorneys. The remaining 13 judges each submitted plans that call for a mix of appointment methods that is too undefined to clearly categorize. The overall plan and the judges’ individual plans generally set high attorney qualification standards graduated according to the seriousness of offense, but the qualifications vary from court to court and it is unclear how the qualification standards apply under each of the various attorney assignment methods. The plan requires a majority of judges to approve some attorneys for placement on some appointment lists, but not on other lists. The plan does not specify financial

standards for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry. Good procedures for prompt access to counsel are described only partially in the district court plan but the remainder are described in the county court plan.

Harris County – county courts

This is an alternative plan for all county courts using a system of random assignments of attorneys for the week from a pool of attorneys with relatively demanding qualifications. Attorneys in the pool get assigned for a maximum of one week in each four-week cycle. The judge has limited ability to ask for another random assignment or hand-pick an attorney from the pool. There are caseload limits. The provisions ensuring prompt access to counsel are very explicit and elaborate. The plan does not specify objective financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry.

Harrison County – district and county courts

This plan adopts a standard FDA rotation system drawing from six lists using good qualification standards. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry. Among the list of evidentiary factors, this formulation appropriately excludes resources of friends or relatives “except insofar as the friends or relatives live with or otherwise defray the household or other expenses of the accused.” The fee schedule sets forth “presumptively reasonable” set fees based on pleas, with the ability to obtain hourly rates in some cases and in writs and other matters of \$75-\$100. The plan sets forth an unusually thorough and accurate treatment of expert and investigator services. It also exhorts prosecutors to aid efficiency and cost savings by bringing charges and trying cases promptly.

Hays County – district courts

This plan adopts an alternative program using a discretionary assigned counsel system by which each judge maintains his or her own list of qualified attorneys and appoints attorneys on a discretionary basis. To be on any court's list, an attorney must be approved by a majority of the judges. The plan provides no objective qualifications other than a minimum CLE requirement. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry.

Hays County – county courts

This plan adopts a standard FDA rotation system administered by the two County Court at Law judges or their designees. The plan requires that appointed attorneys practice in the area of criminal law for at least one year, although the plan does not require any trial experience. The magistrate enters a request for counsel for any accused the magistrate has cause to believe is not mentally

competent to request counsel. The plan provides positive procedures to ensure the prompt appointment of counsel by requiring counsel to confirm, within 72 hours of receiving notice of the appointment, that he or she has made a reasonable effort to contact his or her client by the end of the first working day after the appointment was made. Accused persons are presumed indigent if they have demonstrated eligibility for common public assistance programs, if they are incarcerated or residing in a mental health facility, or if their income falls below 125% of the federal poverty guidelines. Attorneys are compensated on the basis of a straight hourly fee for time reasonably expended, as recommended by the Texas State Bar and ABA standards.

Hemphill County – district and county courts

The plan adopts a standard FDA rotation system. Attorneys are appointed from lists that are graduated according to the seriousness of the offense. The plan provides positive procedures to ensure the prompt appointment of counsel by requiring counsel to confirm, within 72 hours of receiving notice of the appointment, that he or she has made a reasonable effort to contact his or her client by the end of the first working day after the appointment was made. Accused persons are presumed indigent if they have demonstrated eligibility for common public assistance programs, if they are incarcerated or residing in a mental health facility, or if their income falls below 125% of the federal poverty guidelines. The plan provides financial standards that acknowledge indigence above the eligibility floor and also includes standards for partial indigence.

Henderson County – district and county courts

This plan adopts a standard FDA rotation system administered by the Counsel Coordinator, who appoints the next attorney on the list unless the defendant has already been appointed counsel in another case. Attorneys are appointed from lists graduated according to the seriousness of the offense, although no criminal law or trial experience is required for third degree felonies, state jail felonies, or misdemeanors. The plan's indigence standard is vague and subjective; specifically, the plan provides that the accused is indigent if his or her net financial resources and income are insufficient to post bond, hire qualified counsel, and support the accused and his or her family. The plan fails to allow compensation for reasonable and necessary expenses for investigators and experts without prior approval.

Hidalgo County – district and county courts

This plan adopts a standard FDA rotation system. Attorneys are appointed from lists graduated according to the seriousness of the offense. Magistrates are ordered to take necessary corrective actions to ensure that law enforcement officers present arrested persons to a magistrate in a timely manner. Defendants are presumed indigent if they have demonstrated eligibility for common public assistance programs or if their income falls below 125% of the federal poverty guidelines.

Hockley County – district and county courts

This plan adopts a standard FDA rotation system. Strong trial requirements are included as objective qualification criteria for all cases from misdemeanors (two trials required) to first degree

felonies (eight trials required). The plan includes detailed rules for the prompt appointment of counsel, including automatic requests for people who demonstrate mental disability. Accused persons are presumed indigent if they have demonstrated eligibility for common public assistance programs or if their income falls below 125% of the federal poverty guidelines. Judges retain discretion to decide whether to pay attorneys \$90 per hour or “a fixed rate for certain proceedings,” which is not specified in the plan.

Hood County – district and county courts

The plan adopts a standard FDA rotation system. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry. Also, the indigence form improperly considers bail and improperly considers whether the defendant can borrow money from friends and family to pay for an attorney. The plan fails to allow compensation for reasonable and necessary expenses for investigators and experts without prior approval.

Hunt County – district and county courts

This is an alternative program using a modified system of rotation. There is only one appointment list, which is not graduated at all, even between misdemeanors and felonies. The appointing judge appoints attorneys in the order they appear on this single county appointment list unless the attorney is unavailable or the seriousness of the crime dictates skipping to the next name. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry. Attorneys are compensated on the basis of hourly fees with minimum fees set for pleas. The plan fails to allow compensation for reasonable and necessary expenses for investigators and experts without prior approval.

Jefferson County – district courts

A modified rotation system is used to appoint two attorneys each week to handle all appointments that week. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry. The plan’s fee schedule only allows a maximum of \$500 for preparation of a felony trial, and then only with court approval. The plan also fails to allow compensation for reasonable and necessary expenses for investigators and experts without prior approval.

Jefferson County – county courts

Attorneys are appointed from appointment list(s), but no selection method is specified. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry. The plan fails to allow compensation for reasonable and necessary expenses for investigators and experts without prior approval.

Johnson County – district and county courts

This plan adopts a standard FDA rotation system for appointing counsel. Despite very good attorney qualifications for all levels, it is possible for an attorney with little appellate experience to be assigned to handle an appeal. The plan notes that attorneys may gain experience by sitting as uncompensated second chair in trials. The plan provides positive procedures to ensure the prompt appointment of counsel, including magistration within 24 hours instead of the statutory maximum of 48 hours. The plan also requires probable cause affidavits to be filed at book-in, and misdemeanor information (formal charging documents) must be filed by 5 p.m. on the third working day after arrest or the person is released.

Kaufman County – district court

This is an alternative plan using a modified system of rotation. The appointing judge appoints attorneys in the order they appear on this single county appointment list unless the attorney is unavailable or the seriousness of the crime dictates skipping to the next name. This plan includes graduated lists with specific objective qualifications at each level, although no trial experience is required for state jail felonies or probation revocations. No specific indigence standards are set out in the plan. The federal poverty guidelines are attached to plan, but there is no requirement in the plan that these guidelines be used to determine indigence.

Kaufman County - county courts

This is alternative program using a modified system of rotation. The appointing judge appoints attorneys in the order they appear on this single county appointment list unless the attorney is unavailable or the seriousness of the crime dictates skipping to the next name. There are two misdemeanor lists, one for attorneys qualified to handle class A misdemeanors, the other for attorneys qualified to handle class B misdemeanors. Attorneys on the class B list are not required to have any criminal law or trial experience. Attorneys are appointed from one of these two lists in the order they appear on the list unless the attorney is unavailable or the seriousness of the crime dictates skipping to the next name. The plan provides for compensation on the basis of hourly fees, but fails to allow compensation for reasonable and necessary expenses for investigators and experts without prior approval.

Kerr County – district and county courts

This is an alternative program using a discretionary assigned counsel method. There is only one appointment list, which is not graduated at all, even between misdemeanors and felonies and there are no specified qualification standards set out in the plan. Judges appoint attorneys from the single list based on the location of the hearing, the availability of the attorney, and the complexity of the case. Although the plan states that appointments are to be made “reasonably and impartially,” it does not set out the procedures to ensure that appointments are reasonably and impartially made. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry.

Lamar County – district and county courts

This plan adopts a standard FDA rotation system. The plan sets out the same Lead Counsel qualifications for misdemeanors as it does for all non-capital felonies. The plan defines Novice Counsel as an attorney who has been licensed less than two years and who has tried and actively participated in fewer than three criminal jury trials to verdict and also provides that Lead Counsel will be appointed to train Novice Counsel. The plan provides that an indigent defendant is entitled to a new appointed attorney if the first appointed attorney does not interview the accused within 48 hours of being appointed, not including Saturdays, Sundays, or holidays. The plan fails to set out any indigence standards.

Liberty County – district and county courts

This plan does not specify a selection method. The plan includes appointment lists that are graduated according to the seriousness of the offense. Although each court has a Counsel Coordinator who, among other things, maintains the lists of qualified attorneys and rotation schedule of appointed attorneys, the rotation system is not specifically set out as the selection method adopted by this plan. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry. The plan fails to allow compensation for reasonable and necessary expenses for investigators and experts without prior approval.

Lubbock County – district and county courts

The plan appoints counsel from a computer-generated list using a standard FDA rotation system, administered by court coordinators. A unified system for computerized recording of all appointment and fee data is used for purposes of meeting upcoming reporting requirements.

Maverick County – district and county courts

This plan adopts a standard FDA rotation system with a magistrate performing the appointments. The plan provides for graduated lists with excellent qualification standards. Accused persons are presumed indigent if they have demonstrated eligibility for common public assistance programs, if

they are incarcerated or residing in a mental health facility, or if their income falls below 125% of the federal poverty guidelines. The plan provides financial standards that acknowledge indigence above the eligibility floor and also includes standards for partial indigence. Fees are \$50 per hour for all in-court and out-of-court work. The plan sets forth compliance with all prompt appointment requirements.

McLennan County – district and county courts

This is a modified system of rotation with minimal, basic qualifications for attorneys. Although appointments are normally made on a rotating basis, each judge retains unrestrained discretion to depart from rotation based on the facts of the case, the special needs of the defendant, or the special qualifications of the attorney. Indigence is established if the net income, after expenses, falls below \$716 per month (equal to 100% of the federal poverty rate for a single person—though the standard does not adjust for family size as the federal guidelines do). The plan fails to allow compensation for reasonable and necessary expenses for experts without prior approval.

Midland County – district and county courts

This plan does not specify an attorney selection method. The plan provides for graduated lists, but no objective qualifications are specified for misdemeanors, state jail felonies, or third degree felonies other than a minimum CLE requirement to maintain active status in the plan; however, attorneys wishing to qualify for second and first degree felonies must have extensive criminal jury trial experience. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry. The plan fails to allow compensation for reasonable and necessary expenses for investigators and experts without prior approval.

Montgomery County – district and county courts

This plan adopts a standard FDA rotation system. The plan provides for graduated lists and objective qualifications are specified for each list. The plan's indigence standards and procedures are unclear, although they are ambiguously implied in the indigence form. The plan provides one hourly rate range for all services in misdemeanor cases and another hourly rate range for all services in felony cases. There are no flat fees and no fee caps.

Nacogdoches County – district and county courts

This plan adopts a standard FDA rotation system. This plan promotes consistency by assigning indigence determinations and appointments to a Counsel Coordinator. The plan does not include objective qualifications in misdemeanor cases other than a minimum CLE requirement. No trial experience is necessary on the felony level if an attorney has at least two years of legal experience with at least 20 percent of his or her practice in criminal law matters. Although a fee schedule is set out in the plan, the trial judge can depart up or down from this schedule in “exceptional circumstances.” The plan fails to allow compensation for reasonable and necessary expenses for investigators and experts without prior approval.

Navarro – district and county courts

This plan adopts a modified rotation system to appoint defense counsel. Attorneys are appointed from lists that are graduated according to the seriousness of the offense, although trial experience is not required for state jail felonies or misdemeanors. The appointing judge can vary the plan's basic rotation at his or her discretion to assure that all attorneys on each list have a similar number of appointments and to account for workload, competency level, and other factors the judge deems relevant. Accused persons are presumed indigent if they have demonstrated eligibility for common public assistance programs or if their income falls below 100% of the federal poverty guidelines. The plan also provides financial standards that acknowledge indigence above the eligibility floor. Attorneys are compensated on the basis of a straight hourly fee for time reasonably expended, as recommended by Texas State Bar and ABA standards.

Nueces County – district courts

The plan adopted by four of the five criminal district judges establishes an alternative program under which each district court apparently devises and runs its own separate rotation system. The plan does not specify objective attorney qualifications other than minimum CLE requirements nor does it specify that attorneys on the appointment list be approved by a majority of the judges. The plan appears to leave it to each court to establish its own appointment list(s), its own attorney qualification standards, and its own rotation procedures for selection of attorneys. Standards and procedures for determining whether a defendant is indigent are not addressed. Any individual judge is permitted to opt out of this plan. (Note: The fifth criminal district judge did submit a separate plan "opting out" of the plan established by the other criminal district judges. This opt out plan is more specific than the majority plan with respect to attorney qualifications, appointment lists, and attorney selection method, but further increases the lack of consistency among the courts overall.)

Nueces County – county courts

This is an alternative plan with an undefined rotation list in each separate court, providing no specification on how assignments will be made from the lists. It appears that some appointments may be made by the magistrate if authorized by the court to which the case has been assigned. Any individual judge is authorized to opt out of any or all provisions of the plan and to develop his or her own procedures. Prompt appointment provisions are vague, and some key time constraints are impermissibly extended.

Orange County – district and county courts

This plan adopts a standard FDA rotation system. Indigence determinations and appointments are made by a judge or by the Office of Court Administration if the accused has been indicted or if there is at least one docketed misdemeanor; otherwise, the justice of the peace makes the indigence determinations and appointments. Appointments are made from a single, non-graduated appointment list. No distinction is drawn between misdemeanor and felony qualifications and the few specified qualifications may not ensure quality representation in more serious felony cases.

The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry.

Parker County – district courts

This is an alternative plan using a standard FDA rotation system. Core prompt appointment requirements are not adequately addressed. In addition, the plan does not require attorneys to contact bonded defendants within the specified time frame. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry.

Parker County – county courts

This is an alternative plan using a standard FDA rotation system. Each attorney is assigned three defendants per rotation. Core prompt appointment requirements are not adequately addressed. In addition, the plan does not require attorneys to contact bonded defendants within the specified time frame. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry.

Parmer County – district and county courts

The plan adopts a standard FDA rotation system. Attorneys are appointed from lists that are graduated according to the seriousness of the offense. Each tier sets out appropriate standards that attorneys must meet in order to qualify for appointments. The plan provides positive procedures to ensure the prompt appointment of counsel by requiring counsel to confirm, within 72 hours of receiving notice of the appointment, that he or she has made a reasonable effort to contact his or her client by the end of the first working day after the appointment was made. Accused persons are presumed indigent if they have demonstrated eligibility for common public assistance programs, if they are incarcerated or residing in a mental health facility, or if their income falls below 125% of the federal poverty guidelines. The plan provides financial standards that acknowledge indigence above the eligibility floor and also includes standards for partial indigence.

Polk County – district and county courts

The plan does not specify an attorney selection method. Attorneys are appointed from one list that does not appear to be graduated even between misdemeanors and felonies. The plan provides no objective qualification standards for attorneys other than a nominal CLE requirement and all competent attorneys licensed and practicing law within Polk, San Jacinto, or Trinity counties are included on the list unless they request to be taken off the list. The plan provides positive procedures to ensure prompt appointment of counsel, including filing the offense report and probable cause affidavit at the time the accused is booked into jail, and magistration the morning after arrest. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be

considered as part of the indigence inquiry. The plan fails to allow compensation for reasonable and necessary expenses for investigators and experts without prior approval.

Potter County – district and county courts

This is a standard FDA rotation system administered at any given time by one rotating district judge (felony appointments) and by both county court at law judges (misdemeanor appointments). This plan includes graduated lists with specific qualification standards for each level, although trial experience is not required to qualify for misdemeanor appointments. The plan promotes the prompt appointment of counsel by requiring counsel to confirm, within 72 hours of receiving notice of the appointment, that he or she has made a reasonable effort to contact his or her client by the end of the first working day after the appointment was made. This plan enhances consistency by setting out specific indigence standards. Accused persons are presumed indigent if they have demonstrated eligibility for common public assistance programs, if they are incarcerated or residing in a mental health facility, or if their income falls below 125% of the federal poverty guidelines. The plan provides financial standards that acknowledge indigence above the eligibility floor and also includes standards for partial indigence.

Randall County

No adult district or county plan was submitted.

Rockwall County – district and county courts

The plan adopts a standard FDA rotation system. Attorneys are appointed from lists that are graduated according to the seriousness of the offense, although trial experience is not required for state jail felonies, felony probation revocations, or misdemeanors. The plan provides positive procedures to ensure prompt appointment of counsel, including filing the offense report and probable cause affidavit at the time the accused is booked into jail, and magistration the morning after arrest. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry. The plan fails to allow compensation for reasonable and necessary expenses for investigators and experts without prior approval.

Rusk County – district and county courts

This plan does not specify an attorney selection method. The plan provides for graduated lists but no objective qualifications are specified other than a minimum CLE requirement. The plan does not

specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry. The plan refers to a fee schedule, but no fee schedule was submitted.

San Patricio County – district courts

This is an alternative plan using a standard FDA system of rotation across five counties with an administrator in each county. Only one level of felony qualification standards is used. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry. The plan includes a wide range of discretionary fees and the low end of the range is exceedingly low (\$20 per hour). The plan fails to allow compensation for reasonable and necessary expenses for investigators and experts without prior approval.

San Patricio County – county courts

This is an alternative plan using an undefined appointment method. Excellent qualification standards require three misdemeanor trials, including one jury trial, to be eligible. Attorneys from neighboring counties are invited to apply. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry. The plan includes a wide range of discretionary fees and the low end of the range is exceedingly low (\$20 per hour). The plan fails to allow compensation for reasonable and necessary expenses for investigators and experts without prior approval.

Smith County – district courts

An alternative program utilizes three full-time contract attorneys in each district court to represent all indigent felony defendants. The contract attorneys are selected by and serve month-to-month at the pleasure of each individual district judge. There is no indication whether the contract attorneys must be approved by a majority of judges. The plan does not specify criteria and procedures for selecting the contract attorneys. The plan specifies graduated attorney qualifications for first degree felonies, for second and third degree felonies, and for state jail felonies, but no previous trial or criminal practice experience is required for the attorneys handling state jail felonies. There is no indication how these qualification standards apply to selection or appointment of contract attorneys. The plan provides very positive procedures to ensure prompt appointment of counsel, including magistration within 24 hours of arrest, the presence of a felony and misdemeanor attorney at each Art. 15.17 hearing, and appointment of counsel at the Art. 15.17 hearing. Accused persons are presumed indigent if they have demonstrated eligibility for common public assistance programs, if they are incarcerated or residing in a mental health facility, or if their income falls below 125% of the federal poverty guidelines. The plan provides financial standards that acknowledge indigence above the eligibility floor and also includes standards for partial indigence. (Note: The district courts originally adopted the same rotation system used by the county courts, but later substituted an “interim emergency plan” using the contract attorney system instead of the rotation system to assign counsel. The district courts use the same procedures as the county courts to assure prompt

appointment of counsel and to determine indigence.)

Smith County – county courts

A modified rotation system, administered by a Counsel Coordinator, is used to appoint defense counsel. The plan specifies the same attorney qualifications for misdemeanors and state jail felonies, but no trial or criminal practice experience is required for either. There is no indication whether attorneys on the misdemeanor list must be approved by a majority of judges. The plan provides very positive procedures to ensure prompt appointment of counsel, including magistration within 24 hours of arrest, the presence of a felony and misdemeanor attorney at each Art. 15.17 hearing, and appointment of counsel at the Art. 15.17 hearing. Accused persons are presumed indigent if they have demonstrated eligibility for common public assistance programs, if they are incarcerated or residing in a mental health facility, or if their income falls below 125% of the federal poverty guidelines. The plan provides financial standards that acknowledge indigence above the eligibility floor and also includes standards for partial indigence.

Starr County – district courts

No countywide plan was submitted. Two very different plans were submitted by each of the two district judges. One is of distinctly better quality than the other, but there is no indication that the judges have agreed upon any common procedures.

Starr County – county courts

No plan was submitted.

Tarrant – district and county courts

This is an alternative plan using a combination of rotation and discretionary assigned counsel appointment systems. The Coordinator of Attorney Appointments assigns each attorney on the felony lists one defendant per rotation and each attorney on the misdemeanor list five jailed defendants per rotation. The county court judges handle the appointments for persons charged with misdemeanors who are not in custody, appointing counsel on a discretionary basis from the approved misdemeanor appointment list. The plan promotes quality representation by providing excellent qualification standards, although the plan is not clear as to whether a majority of judges must approve each attorney's qualifications. Accused persons are presumed indigent if their household income falls below 125% of the federal poverty guidelines and their liquid assets do not exceed \$15,000. The plan also provides financial standards that acknowledge indigence above the eligibility floor.

Taylor County – district and county courts

This plan does not specify an attorney selection method. Attorneys are appointed from appointment lists that are graduated according to the seriousness of the offense, but no previous trial or criminal practice experience is required, even for serious felonies. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry.

Tom Green County – district and county courts

This is a standard FDA rotation system administered by the county and district court judges. This plan includes graduated lists with specific qualifications, although trial experience is not required for state jail felonies, felony motions to revoke, or misdemeanors. The county's magistrate warning form allows for admonitions to be given either in person or by closed circuit television. This plan requires that persons charged with misdemeanors are presented to a magistrate within 24 hours and also requires the magistrate to enter a request for counsel for any accused persons the magistrate has cause to believe is not mentally competent to request counsel. Accused persons are presumed indigent if they have demonstrated eligibility for common public assistance programs or if their income falls below 125% of the federal poverty guidelines. The plan also provides financial standards that acknowledge indigence above the eligibility floor. Although the plan refers to a fee schedule, no fee schedule was submitted.

Travis County - district and county courts

The plan uses a standard FDA rotation system administered by the Court Administration Office to appoint counsel. Appointment lists are graduated according to the seriousness of the offense and incorporate substantial objective qualifications. In addition, the plan requires that each attorney be approved by a majority of the criminal court judges for placement on each of the appointment lists. The plan also spells out the factors that the judges consider. The plan adopts very good standards and procedures for determining whether a defendant is indigent, including basic eligibility standards keyed to 150% of the federal poverty guidelines. The initial indigence determination and recommendation is administered by pretrial services. These are exceptionally well integrated and consistent procedures, in part due to the centralized administration of appointments and indigence determinations.

Val Verde County – district and county courts

This plan does not specify an attorney selection method. The plan includes graduated lists with specific objective qualifications at each level, although no trial experience is required for state jail felonies or misdemeanors. The plan's fee schedule sets out hourly rates for felonies and indicates that rates for misdemeanors will be hourly, although no rate is specified. No rates for appeals are included in the plan.

Van Zandt County – district and county courts

The plan adopts an alternative program that uses a standard FDA rotation system to appoint counsel. Attorneys are appointed from appointment lists that are graduated according to the seriousness of the offense, but little previous trial or criminal practice experience is required, even for serious felonies. The plan does not specify financial *standards* for determining whether the defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered in the indigence inquiry. Attorneys are compensated on the basis of a straight hourly fee for time reasonably expended, as recommended by Texas State Bar and ABA standards.

Victoria County – district and county courts

This multi-county plan uses a system of rotation with one felony list and one misdemeanor list. It is unclear whether the rotation is from a central list or if each judge uses a separate rotation list. The pre-FDA panel of attorneys is grandfathered in, and there are no specific objective qualifications other than residence in the covered counties. Attorneys are supposed to tell the judge if they are not qualified to take all cases, but the judges have pure discretion over whom to place on the lists. Any new additions to the list for felonies must meet with each judge personally and be approved by a majority, or, for misdemeanors, in a county with only one county judge, by only that judge. There is no specific standard set forth to determine indigence, but the plan's recitation includes an admonition to "consider" the federal poverty guidelines. Fees are remarkably low (e.g., \$200 total fixed rate for a felony trial or \$30-\$55 per hour for out-of-court time).

Walker County – district and county courts

This plan adopts a standard FDA rotation system (except for appeals). Attorneys are appointed from lists that are graduated according to the seriousness of the offense. Attorneys on the felony lists must either be board certified or have a combination of criminal law and trial experience, but attorneys on the misdemeanor list need only have 10 hours of CLE. The plan does not specify financial *standards* for determining whether a defendant is indigent; the plan merely recites from the statute the types of financial *evidence* that may be considered as part of the indigence inquiry.

Webb – district and county courts

Seventy-five percent of cases are handled by a public defender program. Twenty-five percent of cases are assigned to private counsel by a designated appointing judge, using a standard FDA rotation system. Private attorneys are appointed from a capital murder list, a murder list, and a general list for all other felonies. All licensed attorneys in the county are placed on the general list unless an order is entered finding that the attorney is not qualified. Placement on the general list does not require approval by a majority of judges. The plan fails to allow compensation for reasonable and necessary expenses for investigators and experts without prior approval. The plan omits key details describing how the public defender program is funded and selected, how attorneys

with the public defender are assigned to cases, what quantity and types of cases they are assigned, and what measures are used to assure that public defender attorneys are qualified to provide the representation they are assigned.

Wichita County – district and county courts

A public defender system is used to appoint counsel in all cases, except where conflicts exist. A standard FDA rotation system is used to appoint private counsel where the public defender has a conflict. The plan omits key details describing how the public defender program is funded and selected, how attorneys with the public defender are assigned to cases, what quantity and types of cases they are assigned, and what measures are used to assure that public defender attorneys are qualified to provide the representation they are assigned.

Wharton County – district and county courts

This is a standard FDA rotation system administered by an Indigent Defense Coordinator who is designated to make indigence determinations and initial attorney appointments. The plan does not specify objective attorney qualifications. The plan's fee schedule does not include any rates for trials; only fees for pleas are set out. Prior approval is *not* required for experts and investigators under this plan.

Williamson County – district and county courts

The plan adopts a standard FDA rotation system for felonies, but does not specify an appointment system for misdemeanors. The plan's prompt appointment procedures move more quickly than the statutory requirements and provide for thorough advice and immediate notice to appointed attorneys. Accused persons are presumed indigent if their income falls below 125% of the federal poverty guidelines.

Wise County – district and county courts

This plan does not specify a selection method. The plan includes appointment lists that are graduated according to the seriousness of the offense, although state jail felonies, misdemeanors and probation revocation hearings do not require any trial experience. Attorneys are to be appointed from these lists, although the plan does not specify who will make selections or how attorneys will be selected. Accused persons are presumed indigent if their income falls below 125% of the federal poverty guidelines. The plan also provides financial standards that acknowledge indigence above the eligibility floor. Attorneys are compensated on the basis of a straight hourly fee for time reasonably expended, as recommended by the Texas State Bar and ABA standards.

Zavala County – district courts

The plan adopts a standard FDA rotation system. Attorneys are appointed from lists that are graduated according to the seriousness of the offense. Each tier sets out appropriate standards that attorneys must meet in order to qualify for appointments. The plan provides positive procedures to

ensure the prompt appointment of counsel by requiring counsel to confirm, within 72 hours of receiving notice of the appointment, that he or she has made a reasonable effort to contact his or her client by the end of the first working day after the appointment was made. Accused persons are presumed indigent if they have demonstrated eligibility for common public assistance programs, if they are incarcerated or residing in a mental health facility, or if their income falls below 125% of the federal poverty guidelines. The plan provides financial standards that acknowledge indigence above the eligibility floor and also includes standards for partial indigence. Attorneys are compensated on the basis of a straight hourly fee for time reasonably expended, as recommended by the Texas State Bar and ABA standards.

This Report Covers Plans in the Counties Listed Below

County	Population	County	Population
Harris	3,400,578	Angelina	80,130
Dallas	2,218,899	Comal	78,021
Tarrant	1,446,219	Hunt	76,596
Bexar	1,392,931	Coryell	74,978
Travis	812,280	Henderson	73,277
El Paso	679,622	Kaufman	71,313
Hidalgo	569,463	Liberty	70,154
Collin	491,675	San Patricio	67,138
Denton	432,976	Harrison	62,110
Fort Bend	354,452	Walker	61,758
Cameron	335,227	Nacogdoches	59,203
Nueces	313,645	Bastrop	57,733
Montgomery	293,768	Anderson	55,109
Jefferson	252,051	Starr	53,597
Galveston	250,158	Wise	48,793
Williamson	249,967	Lamar	48,499
Lubbock	242,628	Van Zandt	48,140
Brazoria	241,767	Hardin	48,073
Bell	237,974	Rusk	47,372
McLennan	213,517	Maverick	47,297
Webb	193,117	Cherokee	46,659
Smith	174,706	Navarro	45,124
Brazos	152,415	Val Verde	44,856
Wichita	131,664	Kerr	43,653
Johnson	126,811	Rockwall	43,080
Taylor	126,555	Wharton	41,188
Ector	121,123	Polk	41,133
Midland	116,009	Hood	41,100
Potter	113,546	Hale	36,602
Gregg	111,379	Hockley	22,716
Ellis	111,360	Eastland	18,297
Grayson	110,595	Zavala	11,600
Randall	104,312	Dimmit	10,248
Tom Green	104,010	Parmer	10,016
Hays	97,589	Castro	8,285
Bowie	89,306	Garza	4,872
Guadalupe	89,023	Concho	3,966
Parker	88,495	Coke	3,864
Orange	84,966	Cochran	3,730
Victoria	84,088	Hemphill	3,351

About the Equal Justice Center and Texas Appleseed

The **Equal Justice Center** is a non-profit, non-partisan public interest law center which uses legal advocacy to build greater fairness into our legal, social, and economic systems. EJC works with low-income groups and communities, public institutions, and the legal profession to achieve fair and equal treatment under the law. The focus of EJC's legal advocacy is on systemic reforms that empower low-income clients and community-based groups to use the legal system as a means to secure equality and fairness in both public policies and private practices. EJC executive director, Bill Beardall, was one of the principal researchers and authors of *The Fair Defense Report: Analysis of Indigent Defense Practices in Texas* (December 2000). In 2000-01 he led the Fair Defense Project, which advocated for indigent defense reforms eventually incorporated into the Texas Fair Defense Act.

Texas Appleseed is a non-profit public interest law center that engages the collaborative work of attorneys, academics, and civic leaders to achieve systemic reforms, promoting the equal administration of justice; improving the fair allocation of public resources; and advancing the cause of social, economic, and political equity. Texas Appleseed chooses specific projects in response to the needs of underrepresented Texas communities. On the projects, we serve as a focal point, or forum, for individual attorney and law firm involvement in fashioning solutions to social problems.

Texas Appleseed conducts its work by maintaining a small staff that leverages and expands its work by involving its Board of Directors and their firms along with other firms and organizations around the State. The Texas Appleseed Board of Directors comprises 17 members from notable firms and academic institutions. Texas Appleseed is one of 15 branches of the national Appleseed Foundation.

Endnotes

¹ Acts 2001, 77th Legislature, ch. 906.; Texas Appleseed Fair Defense Project, *The Fair Defense Report: Analysis of Indigent Defense Practices in Texas* (December 2000); State Bar of Texas Committee on Legal Services to the Poor in Criminal Matters, *Muting Gideon's Trumpet: The Crisis in Indigent Defense in Texas* (September 22, 2000); Editorial—*A Fair Chance for Criminal Defense*, Austin American-Statesman (April 6, 2001); Editorial—*A Legal Loophole: Texas Must Modernize Indigent Criminal Defense*, Houston Chronicle (February 28, 2001); Editorial—*Justice System Can be Fair*, Dallas Morning News (February 19, 2001); Editorial—*Justice for All: Texas Needs the Proposed Fair Defense Act*, El Paso Times (February 19, 2001); Editorial—*Justice for the Poor*, Fort Worth Star-Telegram (January 2, 2001); *Judges' Resolution Seeks Upgrade of Legal Defense for the Poor in Texas*, Fort Worth Star-Telegram (September 27, 2000); *The Cost of Poor Advice*, Time at 36 (July 5, 1999).

² TEX. CODE CRIM. P. art. 26.04(a) (West 2002).

³ This first report covers only indigent defense procedures applicable to adult, non-capital felonies and misdemeanors. We intend to issue future reports on local implementation of the Fair Defense Act focusing on the unique requirements for representation in capital and juvenile cases. We believe that each of these areas merits specific treatment in separate reports.

⁴ Some counties filed a combined plan covering indigent defense procedures in both the district courts (felonies) and the county courts (misdemeanors). Officials in other counties adopted and filed separate plans for the district and county courts, as permitted under the FDA. A few counties submitted multiple district court plans, a practice contrary to FDA requirements.

⁵ See *Texas Fair Defense Act: Instructions and Resources for Submitting Interim Plan*, at 1, ¶ 5 (Office of Court Administration, Oct. 5, 2001), available at http://www.courts.state.tx.us/fair_defense/forms.htm with the cover letter by the Honorable Sharon Keller, Task Force Chairperson and Presiding Judge of the Court of Criminal Appeals.

⁶ The importance of improving consistency was emphasized countless times during legislative debate and was even recognized in the Digest and Purpose of the bill, contained in the official record on the Senate Web site at www.capitol.state.tx.us:

Throughout the many criminal courts of Texas's 254 counties the variety of indigent defense systems result in a lack of uniformity in standards and quality of representation among those many indigent defense systems. S.B. 7 provides for added order, accountability, and quality control of the state's provisions relating to indigent defense.

See also Letter of Thomas R. Phillips, Chief Justice of the Supreme Court of Texas and Chair of the Texas Judicial Council, to all Members of the Task Force on Indigent Defense, February 20, 2002: "In cooperation with the Judiciary, the Legislature, the Executive Branch, and the Public, I hope that our ongoing efforts will provide the citizens of Texas with a fair, efficient, and *uniform* indigent defense system." (emphasis supplied).

⁷ A deficiency's characterization as minor or major reflects the likelihood and extent to which it may compromise the quality of representation.

⁸ *Texas Fair Defense Act: Instructions and Resources for Submitting Interim Plan*, at 1, ¶ 2 (Office of Court Administration, Oct. 5, 2001) ("The initial countywide plan to be submitted by counties to OCA on or before January 1, 2002 is being referred to as an 'interim plan.' As the Task Force develops policies and standards and is in a position to provide both technical and fiscal assistance, it may become necessary for some counties to revise their initial 'interim plan'").

⁹ The few formalized indigent defense plans that existed prior to the FDA were typically the result of litigation. See, e.g., *Weaver v. Boutwell*, A-87-CA-155 (W.D. Tex.) (Williamson Co.); *Sadlo, et al. v. Samaniego, et al.*, EP-85-CA-069 (W.D. Tex.) (El Paso Co.); *Baiza, et al. v. Warnock*, P-84-CA-40 (W.D. Tex.) (Pecos Co.); *Carrasco, et al. v. Casso, et al.*, M-94-3 (S.D. Tex.) (Hidalgo Co.).

¹⁰ See Texas Appleseed Fair Defense Project, *The Fair Defense Report: Analysis of Indigent Defense Practices in Texas* at 43-58 (December 2000) (reporting findings and recommendations from a 23-county on-site study of indigent defense representation in non-capital felonies and misdemeanors).

¹¹ Residents in some counties, including several of the largest, are covered by a good plan for one court level (i.e. county or district courts), but a substandard plan for the other court level.

¹² Wherever this report lists counties exemplifying positive practices, the list should not be considered exhaustive; the same positive practices may well be found in plans adopted in other counties that we have reviewed, as well as others that we have not reviewed.

¹³ For example, many county plans allow magistrates to transmit a defendant's request for counsel to the appointing judge within "one working day." The FDA unequivocally states that these requests must be transmitted *within 24 hours*. While we did not regard this widespread mistake to be so serious as to warrant a D score by itself, we believe the Task Force should require counties to correct this obvious error because it may improperly delay access to counsel by several days in some cases.

¹⁴ TEX. CODE CRIM. P. art. 1.051(j) (West 2002).

¹⁵ The issue of when adversary judicial proceedings begin under Texas's criminal procedure is essentially one of federal constitutional law. The Task Force has authority to address this issue as part of its mandate to ensure county plan compliance with the FDA. Case law supports the conclusion that adversary judicial proceedings begin no later than the conclusion of the Article 15.17 hearing at which an arrested person is accused of a crime based on a sworn criminal complaint (a complaint is an affidavit usually from a victim or police officer that precedes and is distinct from the formal charges—an "indictment" or "information"—that are prepared by a district or county attorney). Dicta in a few cases incorrectly suggests that adversary judicial proceedings do not begin in Texas until a prosecutor files an indictment against a defendant, even though this may take up to six months after the Article 15.17 hearing. Judges of Texas's Court of Criminal Appeals have written that authorities conflict and the legal question remains open. Our extensive analysis of the case law indicates: (1) long before any question of conflicting authority arose, the Court of Criminal Appeals repeatedly and consistently held that adversary judicial proceedings begin at the close of an Article 15.17 hearing at which a person has been accused of a crime based on a sworn complaint; (2) this holding is still required by U.S. Supreme Court precedent; and (3) all cases cited as conflicting contain only dicta or unsupported summary pronouncements on this issue.

¹⁶ Many County plans avoid the difficulty of pinpointing when "adversarial judicial proceedings" commence, by meeting the FDA's specified appointment time limits in *all* cases regardless of when adversary judicial proceedings are deemed to begin. However, a minority of plans recite FDA language allowing appointment of counsel to be delayed in a small subset of cases until adversary judicial proceedings have begun. The problem is that these latter plans either take legally incorrect positions, or no position at all, on what legal events actually mark the commencement of adversary judicial proceedings. This introduces unnecessary confusion, legal dispute, and delay into counsel appointment procedures. The only way for a county to ensure that it is routinely appointing counsel at the point when adversary judicial proceedings have been commenced is to require the appointment during or promptly after the Article 15.17 hearing before the magistrate, as the vast majority of counties have done.

¹⁷ Indeed, the Office of Court Administration's *Instructions and Resources for Submitting Interim Plan* begin by stating that "the primary matter to be addressed in crafting local indigent defense rules is the choice of one or more

attorney appointment methods.” *Id.* at 1-2.

¹⁸ TEX. CODE CRIM. P. art. 26.04(b)(6) (West 2002).

¹⁹ TEX. CODE CRIM. P. art. 26.04(f) and 26.044 (West 2002).

²⁰ Even an alternative program must still meet the FDA requirement of appointing attorneys in a “fair, neutral and non-discriminatory” manner and must include procedures to ensure that “appointments are reasonably and impartially allocated among qualified attorneys.” TEX. CODE CRIM. P. art. 26.04(a), (b)(6) and (g)(2)(D) (West 2002).

²¹ TEX. CODE CRIM. P. art. 26.04(g)-(h) (West 2002).

²² TEX. CODE CRIM. P. art. 26.04(a) (West 2002).

²³ One of the most common critiques of these discretionary assigned counsel systems was that they may compromise the attorney’s independence by making the attorney feel more beholden to the judge than to the client. *See, e.g.,* Elisa Long, *The Crisis in Indigent Criminal Defense in Texas*, 6 LBJ JOURNAL 43, 46 (Spring 1994).

²⁴ Some, but not all, of the Harris County district judges ban political contributions from appointed attorneys. Those judges that have adopted this policy ban contributions from some, but not all, of their appointed lawyers.

²⁵ In public discourse the term “public defender” is sometimes used to refer generically to any attorney appointed to represent indigent defendants. More often the term refers specifically to a governmental or nonprofit public defender program and the salaried attorneys employed by such a program. That is the usage adopted in the FDA which defines public defender to mean a governmental entity or nonprofit corporation: (1) operating under a written agreement with a governmental entity, other than an individual judge or court; (2) using public funds; and (3) providing legal representation and services to indigent defendants accused of a crime or juvenile offense....TEX. CODE CRIM. P. art. 26.044(a) (West 2002). Prior to the FDA, some of the private contract defender programs used in several Texas counties had been labeled public defenders. The FDA now clarifies the distinction by referring to the latter as contract defender programs.

²⁶ The FDA’s January 1, 2002 deadline for submitting interim county plans may have led officials to begin with less ambitious changes to their counsel selection methods. Establishing a strong public defender program would normally be expected to require many months of careful planning, preparation, and collaborative effort among the judiciary, the county commissioners court, court administrators, the defense bar, and others.

²⁷ TEX. GOV’T. CODE § 71.060(a)(6) (West 2002).

²⁸ *Contracting for Indigent Defense Services*, Indigent Defense Series #3, U.S. Dept. of Justice (Summer 2001).

²⁹ TEX. CODE CRIM. P. art. 26.04(g)(2)(A) and (B) (West 2002).

³⁰ *See* TEX. CODE CRIM. P. art. 26.04(j)(2) (West 2002).

³¹ TEX. GOV’T. CODE 71.060(a)(6) (West 2002).

³² For example: a list of attorneys qualified to handle misdemeanors; another list of attorneys qualified to handle state jail felonies and third degree felonies; a second degree felony list; and a first degree felony list.

³³ In counties with only one misdemeanor judge or one district judge, this majority approval requirement is inevitably less effective at fully serving these purposes. Nevertheless it does place even on the single judge a mandate to seriously

consider each attorney's actual capabilities and to systematically assign the attorney to an appropriate qualification list.

³⁴ In Texas, a first degree felony is punishable by up to life in prison. Tex. Penal Code § 12.32 (West 2002).

³⁵ The FDA specifically charges the Task Force with developing appropriate "standards for providing indigent defense services under a contract defender program consistent with recognized national policies and standards." Tex. Gov't Code § 71.060(7) (West 2002).

³⁶ TEX. CODE CRIM. P. art. 26.04(g)(2) (West 2002).

³⁷ The FDA charges the Task Force with developing appropriate standards in this area as well. Tex. Gov't Code § 71.060(6) (West 2002).

³⁸ TEX. CODE CRIM. P. art. 26.04(l) (West 2002).

³⁹ See TEX. CODE CRIM. P. art. 26.05(a) (West 2001).

⁴⁰ TEX. CODE CRIM. P. arts. 26.05(d), 26.052(h) (West 2002).

⁴¹ TEX. CODE CRIM. P. art. 26.05(c) (West 2002).

⁴² The State Bar has collected much useful indigent defense information including local data on attorney overhead cost, and has also published both its data and its recommended indigent defense standards. All of this information is available on the Internet at: <http://www.uta.edu/pols/moore/indigent/indigentdefense.htm>.

⁴³ For plans adopting a standard rotation system, the FDA requires that the plan be approved by a simple majority of the judges for the court level covered by the plan. Plans adopting an alternative program must be approved by a two thirds majority of the judges. In the Harris County district court plan, the required majority approved *some* outlines for attorney selection and qualifications, before leaving it to each judge to separately design the specifics of his or her own system. The Nueces County district court plan specifies that each judge will use some kind of rotation system, but then leaves it to each judge to individually choose the essential elements of his or her system.