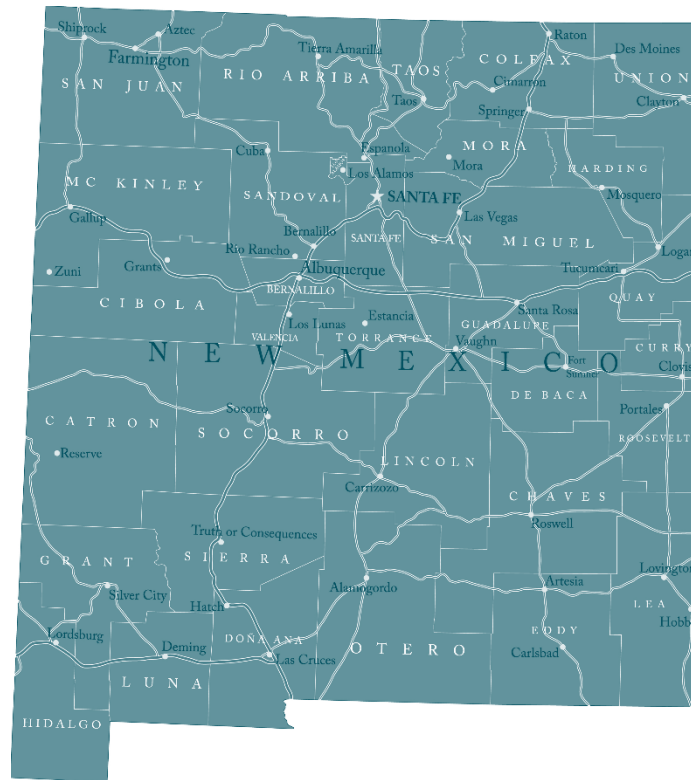


# The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency



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# **The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency**

A FOLLOW UP TO THE FINDINGS IN:  
“The New Mexico Project – An Analysis of  
The New Mexico Public Defense System  
and Attorney Workload Standards”

Published January 2022

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# The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency Introduction

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## INTRODUCTION

While New Mexico was the sixth state to undergo a workload assessment as reported in *The New Mexico Project – An Analysis of The New Mexico Public Defense System and Attorney Workload Standards*,<sup>1</sup> it is the first state to seek this degree of formality in navigating a solution to the very serious problem of excessive public defense workloads. *The New Mexico Project* workload study defined the crisis — the state’s public defenders have three times the number of cases they can ethically handle. This five-year plan proposes steps to avert this crisis. Additionally, with this five-year plan, the state is now better positioned to take advantage of proposed federal legislation under consideration to support the constitutionally mandated – and costly – service of public defense.

The cost of effective defense is substantial, but the costs of an overburdened defense are even greater. Attorneys are forced to triage their cases, often forgoing critical steps required in providing reasonably effective assistance of counsel. Time spent with one client is time taken away from another client with similarly urgent needs. Attorneys face immense stress knowing they cannot provide the services they are ethically bound to provide, prompting a cycle of burnout, staffing shortages and more excessive workloads. Amid this, defendants can lose wages, employment, housing, children, pets, progress on addiction and much more while their case works its way through the court. Many may take a plea just to get out of jail or to hasten the process. The state, which funds the public safety system at higher and higher levels, risks expensive legal exposure over this constitutional failure.

This plan builds off analysis, methods, and conclusions in *The New Mexico Project*, published January 2022 by the American Bar Association Standing Committee on Legal Aid and Indigent Defense (ABA SCLAID) and Moss Adams LLP (Moss Adams) on behalf of the New Mexico Law Offices of the Public Defender (LOPD). Its analysis comprised two prongs: the calculation of the average amount of time New Mexico attorneys should spend on Adult, Juvenile and Appellate criminal cases in order to meet minimum standards for representation, and the application of these New Mexico-specific metrics to the current LOPD caseload. The “should” metrics were determined using the well-established Delphi method, described herein. Applying New Mexico’s Delphi panel results to the state’s historical caseloads identified a significant deficiency of attorney time needed to provide the “reasonably effective assistance of counsel pursuant to prevailing professional norms” as set out in *Strickland v. Washington*.<sup>2</sup>

- A very conservative analysis of the Delphi data showed that based on average annual caseload, the state needs an *additional* 602 full-time attorneys – more than twice its current level - to meet the standard of reasonably effective assistance of counsel guaranteed by the Sixth Amendment.

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<sup>1</sup> Moss Adams LLP on behalf of ABA’s Standing Committee on Legal Aid and Indigent Defendants, *The New Mexico Project, An Analysis of the New Mexico Public Defense System and Attorney Workload Standards* (2022), available at [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/lis-sclaid-moss-adams-nm-proj.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lis-sclaid-moss-adams-nm-proj.pdf).

<sup>2</sup> *Strickland v Washington*, 466 U.S. 668, 690 (1983).

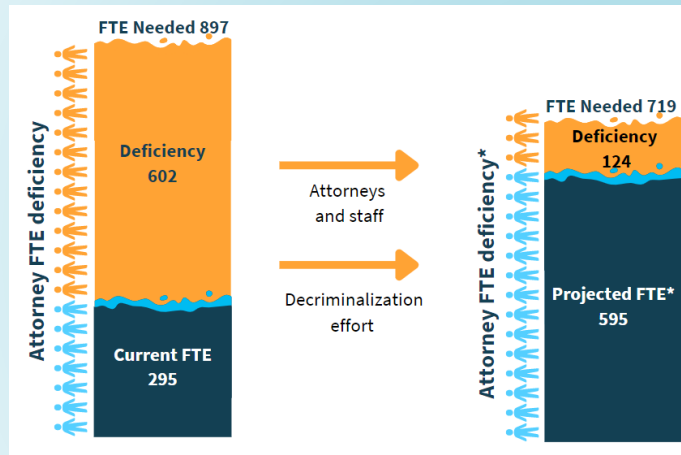
# The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency Executive Summary

## EXECUTIVE SUMMARY

As serious as the excess workload burden is and as long as it has taken to develop, the remedy cannot be simple and will not be immediate. LOPD, like similarly situated public defense agencies across the nation, cannot simply hire its way out of the problem. This report proposes tackling New Mexico’s verified resource deficiency from two sides:

- **Supply side factors** — adding to and reallocating resources within LOPD
- **Demand side factors** — reducing the caseload through decriminalization of non-violent crimes with no victim and sentencing reform

Ultimately, by adding additional attorney resources and reducing the average caseloads through the decriminalization process, as outlined herein, the current attorney deficiency would be reduced from the current 602 Full Time Equivalent (FTE) attorneys to 124 FTE attorneys, as shown in the next graph.



\*Projected based on five-year plan

### Supply Side Factors – Staff and Attorney Needs

LOPD is requesting funding for a five-year plan to fund additional FTE needed attorneys and support staff. This five-year plan increases LOPD’s budget from 0.39% to 0.77% of the entire state budget by Year 5, increasing from the FY23 \$64.2M general fund appropriation to \$157.4M by FY28.

#### BUDGET IMPACTS

|   | Year 0        | Year 1               | Year 2                | Year 3                | Year 4                | Year 5                |
|---|---------------|----------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| LOPD Operating Budget Trend                         | \$ 64,294,500 | \$ 67,027,016        | \$ 69,875,664         | \$ 72,845,380         | \$ 75,941,309         | \$ 79,168,815         |
| Additional annual attorney FTE                      |               | 60                   | 60                    | 60                    | 60                    | 60                    |
| Additional annual core staff FTE                    |               | 90                   | 90                    | 90                    | 90                    | 90                    |
| Cost to fund additional attorney FTE                |               | \$ 8,730,120         | \$ 17,460,240         | \$ 26,190,360         | \$ 34,920,480         | \$ 43,650,600         |
| Cost to fund additional core staff FTE              |               | 6,934,230            | 13,868,460            | 20,802,690            | 27,736,920            | 34,671,150            |
| <b>Total Funding Needs by Year</b>                  |               | <b>\$ 82,691,366</b> | <b>\$ 101,204,364</b> | <b>\$ 119,838,430</b> | <b>\$ 138,598,709</b> | <b>\$ 157,490,565</b> |
| <b>Additional budget to be requested from State</b> |               | <b>\$ 15,664,350</b> | <b>\$ 31,328,700</b>  | <b>\$ 46,993,050</b>  | <b>\$ 62,657,400</b>  | <b>\$ 78,321,750</b>  |

# The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency Executive Summary

## Demand Side Factors – Effects of Decriminalization on Caseload

New Mexico could decide to legislate and decriminalize certain charges to reduce the demand on the public defense system. Reducing the demand for public defense via reduced case filings would in turn reduce the need for additional attorneys.

Assuming that any legislative decriminalization effort focuses on misdemeanor charges which are non-violent with no victim, this simulation shows a caseload reduction of about 30% and a reduction in needed attorneys by 15%, or 133 fewer attorneys needed over five years. The chart below simulates the effect of a decriminalization effort on New Mexico caseloads and thus attorney workload.

### ESTIMATED ANNUAL WORKLOAD

| Case Type  | [1]<br>Delphi Hours Per Case | [2]<br>Total Estimated Annual Caseload | [2]<br>Total Hours by Case Type | [5]<br>Decriminalization - Reduction in Caseload | Revised Annual Caseload       | Revised Hours    | [6]<br>FTE Reduction |
|--|------------------------------|--|---------------------------------|--|-------------------------------|------------------|----------------------|
| Traffic and Other Minor Crimes   | 7.60                         | 10,696                                 | 81,290                          | (5,134)  | 5,562                         | 42,271           | 19                   |
| DWI  | 21.70                        | 5,345                                  | 115,986                         | -  | 5,345                         | 115,987          | -                    |
| Drug Crimes, Property Crimes, Status Offenses                                  | 32.53                        | 19,347                                 | 629,357                         | (6,238)  | 13,109                        | 426,436          | 98                   |
| Crimes Against Person (Adult Victim)   | 50.67                        | 12,643                                 | 640,620                         | (43)   | 12,600                        | 638,442          | -                    |
| Child Pornography Cases  | 126.50                       | 53                                     | 6,705                           | -  | 53                            | 6,705            | -                    |
| Child Abuse / Child Sex Crimes (Not including CARD or Child Pornography Cases) | 177.36                       | 1,300                                  | 230,568                         | -  | 1,300                         | 230,568          | -                    |
| Murder (including CARD)  | 391.03                       | 185                                    | 72,340                          | -  | 185                           | 72,341           | -                    |
| Probation Violations   | 5.17                         | 8,003                                  | 41,375                          | (6,308)  | 1,695                         | 8,763            | 16                   |
| <b>Total Adult Criminal</b>  |                              | <b>57,572</b>                          | <b>1,818,241</b>                | <b>(17,723)</b>                                  | <b>39,849</b>                 | <b>1,541,513</b> | <b>133</b>           |
| <b>Total Juvenile</b>  |                              | <b>2,432</b>                           | <b>46,836</b>                   | <b>-</b>   | <b>2,432</b>                  | <b>46,836</b>    | <b>-</b>             |
| <b>GRAND TOTAL</b>   |                              | <b>60,004</b>                          | <b>1,865,077</b>                |  | <b>42,281</b>                 | <b>1,588,349</b> | <b>133</b>           |
|  |                              | <b>Hours</b>                           | <b>2,080</b>                    |  |                               | <b>2,080</b>     |                      |
|  |                              | <b>FTEs needed [3]</b>                 | <b>897</b>                      |  | <b>FTEs needed [3]</b>        | <b>764</b>       |                      |
|  |                              | <b>FTEs have [4]</b>                   | <b>295</b>                      |  | <b>FTEs have [4]</b>          | <b>295</b>       |                      |
|  |                              | <b>FTE deficiency</b>                  | <b>602</b>                      |  | <b>Revised FTE deficiency</b> | <b>469</b>       |                      |

[1] Results from The New Mexico Project Adult Criminal Panel  
 [2] Average statewide opened cases by type for FY2019 through Q3 FY 2021  
 [2] Delphi Hours Per Case x Estimated Annual Caseload  
 [3] Hours divided by 2,080  
 [4] Average FTE from The New Mexico Project  
 [5] Average caseload recommended to be decriminalized by type  
 [6] Change in hours divided by 2,080

**Caseload reduction** 30%  
**FTE need reduction** 15%



# The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency Background

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## BACKGROUND

The Sixth Amendment guarantees anyone facing criminal charges the right to a speedy and public trial by an impartial jury and legal counsel. With its 1963 decision in *Gideon v. Wainwright*, the Supreme Court ruled that anyone charged with a serious crime had a “fundamental” right to counsel, no matter their ability to pay.<sup>3</sup> Because many of the people charged with crimes cannot afford a private attorney, it was necessary to establish and fund public defender agencies to meet the Sixth Amendment requirements. At issue is whether the number of public defenders in New Mexico (including contractors) is able to meet the requirement for reasonably effective assistance of counsel.

In 1983, in *Strickland v Washington*<sup>4</sup> the Supreme Court held that lawyers are required to provide “reasonably effective assistance of counsel pursuant to prevailing professional norms” to their clients. Importantly, the Court then specifically cited the ABA Defense Function Standards<sup>5</sup> as guides to determining what is reasonable. *Id.* At 690. The Court later emphasized that these Standards are “valuable measures” of such prevailing norms.<sup>6</sup> Importantly, for purposes of both the *The New Mexico Project* and this study, Standard 4-6.1(b) provides that lawyers “should not recommend to a client acceptance of a disposition offer (plea) until appropriate investigation and study of the matter has been **completed** (emphasis added).”<sup>7</sup>

### Overview of the New Mexico Public Defense System

New Mexico enacted the New Mexico Public Defender Act in 1973 to meet the state’s constitutional obligations to provide counsel to indigent persons charged with crimes in New Mexico state courts. The Act provided for a Public Defender structure with state appropriated funding and centralized administration.

The New Mexico Public Defender Commission is an independent body that was established by Section 39 of the New Mexico Constitution and is responsible for appointing the Chief Public Defender for LOPD and providing “guidance to the chief public defender in the administration of the department and the representation of indigent persons.”<sup>8</sup> LOPD, in turn, is responsible for establishing and maintaining the public defense system for all judicial districts in New Mexico.

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<sup>3</sup> Available at <https://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-gideon-v-wainwright>.

<sup>4</sup> *Strickland v Washington*, 466 U.S. 668, 690 (1983).

<sup>5</sup> American Bar Association, *Criminal Justice Standards for the Defense Function (Defense Function Standards)* (4th ed. 2015) at Standard 4-1.1 (a) (“These Standards are intended to address the performance of criminal defense counsel in all stages of their professional work.”), available at [https://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/).

<sup>6</sup> *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010).

<sup>7</sup> These standards are the result of a lengthy process that began in 1964, and, importantly, they “are the result of the considered judgment of prosecutors, defense lawyers, judges and academics who have been deeply involved in the process.” Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 *Crim. J.* 10 (2009).

<sup>8</sup> New Mexico Constitution, available at <https://nmonesource.com/nmos/c/en/item/5916/index.do#fragment//BQCwHzgiBcwMYgK4DsDWszlQewE4BUBTADwBdoByCgSgBplTTCIBFRQ3AT0otoKLC4EbDtyp8BQkAGU8pAELcASgFEAMioBqAQQByAYRW1SYAEbRS2ONWpA>.

# The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency Background

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## New Mexico Rules of Professional Conduct

All lawyers in New Mexico are required to abide by the New Mexico Rules of Professional Conduct.<sup>9</sup> The Rules not only address the responsibilities of lawyers in representing a particular client, but also concern when a lawyer is not permitted to represent a client or must withdraw. Pertinent and identical rules in the New Mexico Rules of Professional Conduct and the ABA's Model Rules of Professional Conduct<sup>10</sup> applicable to this study include the following:

- Rule 16-101. Competence: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
- Rule 16-103. Diligence: A lawyer shall act with reasonable diligence and promptness in representing a client.
- Rule 16-107. Conflict of Interest: Current Clients: (a) Except as provided in paragraph B of this rule, a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  - (1) the representation of one client will be directly adverse to another client; or
  - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- Rule 16-116. Declining or Terminating Representation:
  - (a) Except as stated in Paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
    - (1) the representation will result in violation of the Rules of Professional Conduct or other law...
  - (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests...<sup>11</sup>

An ABA Ethics Opinion interprets these ethical rules to require public defenders to limit workloads to ensure that they can represent each client with the competence and diligence required.<sup>12</sup>

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<sup>9</sup> New Mexico Rules of Professional Conduct, *available at* <https://nmonesource.com/nmos/nmra/en/item/5699/index.do#!fragment//BQCwhgzIBcwMYgK4DsDWszlQewE4BUBTADwBdoByCgSgBplTTCIBFRQ3AT0otokLC4EbDtyp8BQkAGU8pAELcASgFEAMioBqAQQByAYRW1SYAEbRS2ONWpA>.

<sup>10</sup> New Mexico first adopted the ABA Model Rules of Professional Conduct in 1986.

<sup>11</sup> Guideline 6 of the ABA Eight Guidelines of Public Defense Related to Excessive Workloads provides in pertinent part that in such cases, in addition to moving to withdraw from representation in certain cases, a lawyer should also move to suspend new case assignments and request that charges against those clients the lawyer can no longer represent be dismissed due to the failure of the government to provide effective assistance of counsel as required by federal and state law. *Available at* [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_eight\\_guidelines\\_of\\_public\\_defense.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.pdf).

<sup>12</sup> ABA Ethics Committee, Formal Ethics Opinion 06-441, Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation, *available at* [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_ethics\\_opinion\\_defender\\_caseloads\\_06\\_441.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ethics_opinion_defender_caseloads_06_441.authcheckdam.pdf).

# The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency Background

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The Rules of Professional Conduct also place responsibility on supervising attorneys to ensure that the rules are followed within their organization.

Rule 16-501: Responsibilities of partners, managers and supervisory lawyers.

**A. Necessary measures.** A partner in a law firm and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

**B. Compliance with rules.** A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

**C. Responsibility for other lawyer's violations.** A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The Commentary to this Rule provides that it “applies to lawyers who have managerial authority over the professional work of a firm . . . includ[ing] . . . lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or governmental agency.” It requires, among other things, that the “lawyers with managerial authority . . . make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interests . . . and ensure that inexperienced lawyers are properly supervised.”<sup>13</sup> At LOPD, this responsibility falls to the Chief Public Defender, other supervising attorneys, and, in the case of establishing appropriate procedures, the New Mexico Public Defender Commission (Commission).

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<sup>13</sup> This is consistent with the ABA Eight Guidelines of Public Defense Related to Excessive Workloads. Guideline 4 provides: “Persons in Public Defense Provider programs who have management responsibilities determine, either on their own initiative or in response to workload concerns expressed by their lawyers, whether excessive lawyer workloads are present” Guideline 5 then requires the provider program to take “prompt actions . . . to avoid workloads that either are or are about to become excessive.”

# The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency Background

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## Overview of Caseload Control Efforts

Heeding its ethical and legal obligations to address excessive work and caseloads, LOPD has continuously worked to confront these issues. In 2006, the New Mexico Public Defender Department, was studied by the National Center for State Courts as part of a judicial workload assessment. It was found at that time to be in a 20% staff attorney deficiency. The toll of chronic case and workloads led the department to declare an ethical crisis and file a caseload refusal action in Lea County in 2017. In *State of New Mexico, ex rel Bennett J. Baur and Charles Lopez v. The Honorable William G. W. Shoobridge*, LOPD asserted that public defense attorneys in the county were unable to meet their professional obligation and competency and diligence due to excessive caseloads. During oral argument, the Supreme Court suggested the LOPD needed to improve its available data to demonstrate that the caseloads were excessive. The court declined to intervene, but LOPD pursued and was granted legislative funding to improve data keeping. That data informed *The New Mexico Project*. The data continues to inform conversations with the New Mexico Public Defender Commission and department leaders about guidelines for and implementation of future caseload control actions.

As attorneys, public defenders have an ethical obligation to take action when excessive workloads threaten to violate the constitutional rights of clients or the New Mexico Rules of Professional Conduct. In the past, the LOPD has sought remedies for excessive workloads, including filing motions to withdraw from cases in areas in which workloads far surpassed any semblance of reasonably effective assistance of counsel. Despite these actions, workloads in many parts of the state remain at levels that demand an ongoing systemic response.

# The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency Attorney FTE Impact

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## ATTORNEY FTE IMPACT

As calculated in *The New Mexico Project*, New Mexico's criminal case filings handled by public defenders requires 897 FTE attorneys, but reported a total of only 295 filled FTE attorneys, including public defender positions and contract attorneys. Hiring and expansion will be necessary, but these steps alone are unlikely to resolve the significant resource deficiency at hand. Sufficient core support staff and decriminalization simulations demonstrate the potential to reduce demand for additional attorneys. Together the supply (hiring) and demand (decriminalization) strategies aim to reduce the resource deficiency in New Mexico.

## Additional Resources to Support Workload

### *Hiring Additional Attorney FTE*

To meet the extreme needs highlighted by *The New Mexico Project* workload study, LOPD should aim to achieve a conservative goal of hiring 300 qualified staff public defenders (about half of the current deficiency) in addition to attracting an enhanced pool of contract attorneys over a five-year period. However, consistent with the national economic landscape, LOPD is facing staffing and retention challenges. The average FTE has dropped from 295 to 280 between the third quarter of FY2021 and the fourth quarter of FY2022. A continued focus on funding and filling additional attorney FTE is paramount.

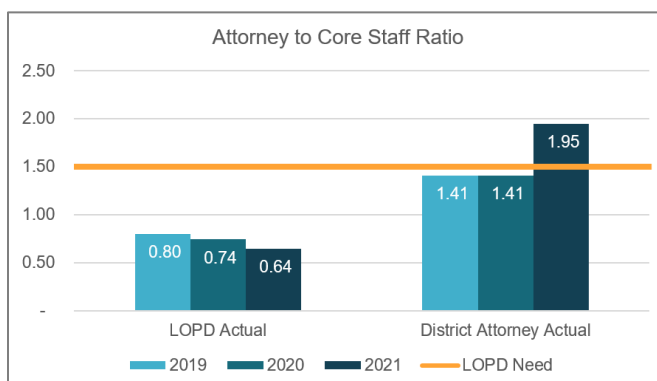
### *Reallocation of Attorney Time to Core Support Staff*

Any increase in attorney FTE must be accompanied by additional core support staff, such as secretaries, paralegals, investigators, and social workers. With sufficient levels of core support staff, they can absorb some duties from attorneys, freeing attorneys up to spend more time on case-specific work. Administrative tasks for core support staff include administrative telephone calls, reviewing/organizing discovery and case-related materials, client/family communications, and scheduling appointments.

Using LOPD timekeeping insight garnered from *The New Mexico Project*, it is estimated that LOPD attorneys spend 14.95% of their time on non-casework tasks, including administrative tasks, such as hiring/recruiting, non-case specific meetings, organizational activities, training/CLE/professional development, supervision time, etc. While not all of these duties could be delegated to core support staff, LOPD could reallocate an estimated 10% of total attorney time currently spent on administrative tasks to core support staff. This amounts to 208 hours reallocated from attorney to core support staff annually, assuming sufficient core support staffing. With sufficient staffing, LOPD could see a reduction in the annual attorney FTE need by 45 FTE by Year 5.

# The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency Attorney FTE Impact

The necessary ratio of core support staff to attorneys is estimated to be 1.50 FTE per attorney. This is higher than the historical averages of Public Defender Core Support Staff to Public Defender Attorneys, which were 0.64 in 2021 and 0.80 in 2019, as shown in the chart below. The 1.50 represents the ratio necessary to support an additional attorney and is considered reasonable by LOPD in determining the additional cost of attorney FTEs throughout this report. This would also be a step toward parity with the attorney/staffing ratios of the district attorney offices across the state, which had 1.95 and 1.41 staff per attorney in 2021 and 2019, respectively.



## Reducing the Caseload and Attorney Time Needed on Cases

### *Decriminalization and Caseload*

Reducing the number of chargeable offenses and therefore the cases coming into the criminal legal system would reduce the demand for public defense in New Mexico. Working within LOPD’s case filing data, this simulation assumes the decriminalization of certain charges and calculates the caseload and workload effect of such a decriminalization effort.

The following parameters were used when determining which charge types would be included in the decriminalization simulation. First, charges had to be either a misdemeanor or petty misdemeanor that carries jail time. Second, charges had to be non-violent with an emphasis on cases with no victims. Based on these two parameters, five categories of charges were targeted, as shown in Table 1. Building in the assumption that during a decriminalization effort some charges within these categories would be reclassified, the analysis assumed 20% of the charges would remain in the criminal legal system. As shown in the following table, decriminalization would reduce the number of adult criminal cases assigned to LOPD in-house attorneys and contractors by 17,723 (or 31%).<sup>14</sup>

<sup>14</sup> The LOPD tracks case type by the most serious/dominant charge filed in the case making a temporary equivalency between the case and charge for this context.

**The New Mexico Public Defense System  
5-Year Plan to Reduce Representation Deficiency  
Attorney FTE Impact**

**Table 1: Estimated Number of Adult Criminal Cases That Can Be Decriminalized**

| Type of Crime                     | FY2019        | FY2020        | Q1-Q3 FY2021  | Total          | Annual Average |
|-----------------------------------|---------------|---------------|---------------|----------------|----------------|
| <b>Probation Violations</b>       | <b>8,449</b>  | <b>8,321</b>  | <b>4,915</b>  | <b>21,685</b>  | <b>7,885</b>   |
| Decriminalize - 80%               | 6,759         | 6,657         | 3,932         | 17,348         | 6,308          |
| <b>Drug Possession</b>            | <b>4,718</b>  | <b>4,916</b>  | <b>3,559</b>  | <b>13,193</b>  | <b>4,797</b>   |
| Decriminalize - 80%               | 3,774         | 3,933         | 2,847         | 10,554         | 3,838          |
| <b>Peace Officer Violations</b>   | <b>1,387</b>  | <b>1,139</b>  | <b>687</b>    | <b>3,213</b>   | <b>1,168</b>   |
| Decriminalize - 80%               | 1,110         | 911           | 550           | 2,571          | 935            |
| <b>Traffic Violations</b>         | <b>6,204</b>  | <b>3,947</b>  | <b>1,551</b>  | <b>11,702</b>  | <b>4,255</b>   |
| Decriminalize - 50%               | 3,102         | 1,974         | 776           | 5,852          | 2,128          |
| <b>Non-Violent Misdemeanors</b>   | <b>8,355</b>  | <b>10,205</b> | <b>6,261</b>  | <b>24,821</b>  | <b>9,026</b>   |
| Decriminalize - 50%               | 4,178         | 5,103         | 3,131         | 12,412         | 4,513          |
| <b>Remaining Caseload</b>         | <b>31,635</b> | <b>31,147</b> | <b>20,928</b> | <b>83,710</b>  | <b>30,440</b>  |
| <b>Total Adult Criminal Cases</b> | <b>60,748</b> | <b>59,675</b> | <b>37,901</b> | <b>158,324</b> | <b>57,571</b>  |
| <b>Total Decriminalization</b>    | <b>18,923</b> | <b>18,578</b> | <b>11,236</b> | <b>48,737</b>  | <b>17,723</b>  |
| <b>% of Cases</b>                 | <b>31%</b>    | <b>31%</b>    | <b>30%</b>    | <b>31%</b>     | <b>31%</b>     |

It should be noted that the number of criminal cases filed in New Mexico's Criminal District courts had been increasing until COVID-19 commenced. The drop in 2020, as shown above, was due to a decline in arrests by law enforcement and criminal case filings. It is not clear the extent to which there will be a "rebound" in subsequent years, but based on national data one can expect an increase.

# The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency Attorney FTE Impact

## ***Decriminalization and Workload***

After mapping the considerations above to the data used in *The New Mexico Project*, the LOPD annual workload would be affected as follows:

### **ESTIMATED ANNUAL WORKLOAD**

| Case Type  | [1]                   | [2]                             | [2]                      | [5]                                       |                               |                  | [6]           |
|--|-----------------------|---------------------------------|--------------------------|---|-------------------------------|------------------|---------------|
|  | Delphi Hours Per Case | Total Estimated Annual Caseload | Total Hours by Case Type | Decriminalization - Reduction in Caseload | Revised Annual Caseload       | Revised Hours    | FTE Reduction |
| Traffic and Other Minor Crimes   | 7.60                  | 10,696                          | 81,290                   | (5,134)                                   | 5,562                         | 42,271           | 19            |
| DWI  | 21.70                 | 5,345                           | 115,986                  | -   | 5,345                         | 115,987          | -             |
| Drug Crimes, Property Crimes, Status Offenses                                  | 32.53                 | 19,347                          | 629,357                  | (6,238)                                   | 13,109                        | 426,436          | 98            |
| Crimes Against Person (Adult Victim)   | 50.67                 | 12,643                          | 640,620                  | (43)                                      | 12,600                        | 638,442          | -             |
| Child Pornography Cases  | 126.50                | 53                              | 6,705                    | -   | 53                            | 6,705            | -             |
| Child Abuse / Child Sex Crimes (Not including CARD or Child Pornography Cases) | 177.36                | 1,300                           | 230,568                  | -   | 1,300                         | 230,568          | -             |
| Murder (including CARD)  | 391.03                | 185                             | 72,340                   | -   | 185                           | 72,341           | -             |
| Probation Violations   | 5.17                  | 8,003                           | 41,375                   | (6,308)                                   | 1,695                         | 8,763            | 16            |
| <b>Total Adult Criminal</b>  |                       | <b>57,572</b>                   | <b>1,818,241</b>         | <b>(17,723)</b>                           | <b>39,849</b>                 | <b>1,541,513</b> | <b>133</b>    |
| <b>Total Juvenile</b>  |                       | <b>2,432</b>                    | <b>46,836</b>            | <b>-</b>                                  | <b>2,432</b>                  | <b>46,836</b>    | <b>-</b>      |
| <b>GRAND TOTAL</b>   |                       | <b>60,004</b>                   | <b>1,865,077</b>         |   | <b>42,281</b>                 | <b>1,588,349</b> | <b>133</b>    |
|  |                       | <b>Hours</b>                    | <b>2,080</b>             |   |                               | <b>2,080</b>     |               |
|  |                       | <b>FTEs needed [3]</b>          | <b>897</b>               |   | <b>FTEs needed [3]</b>        | <b>764</b>       |               |
|  |                       | <b>FTEs have [4]</b>            | <b>295</b>               |   | <b>FTEs have [4]</b>          | <b>295</b>       |               |
|  |                       | <b>FTE deficiency</b>           | <b>602</b>               |   | <b>Revised FTE deficiency</b> | <b>469</b>       |               |
|  |                       |                                 |                          |   | <b>Caseload reduction</b>     | <b>30%</b>       |               |
|  |                       |                                 |                          |   | <b>FTE need reduction</b>     | <b>15%</b>       |               |

- [1] Results from The New Mexico Project Adult Criminal Panel
- [2] Average statewide opened cases by type for FY2019 through Q3 FY 2021
- [2] Delphi Hours Per Case x Estimated Annual Caseload
- [3] Hours divided by 2,080
- [4] Average FTE from The New Mexico Project
- [5] Average caseload recommended to be decriminalized by type
- [6] Change in hours divided by 2,080

Reducing demand for public defense via the caseload reduction would in turn reduce the need for additional attorneys by 133 FTE. This results in reducing the projected FTE need by 15% over five years.



# The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency Attorney FTE Impact

## Impact on FTE

Ultimately, by adding additional attorney resources and reducing the average caseloads through a decriminalization process, the New Mexico public defense attorney deficiency would be reduced to 17% over five years, from a need of 602 to 124 FTE attorneys.

### ATTORNEY DEFICIENCY

|   | Year 0     | Year 1     | Year 2     | Year 3     | Year 4     | Year 5     |
|---|------------|------------|------------|------------|------------|------------|
| <b>STAFFING IMPACTS</b>   |            |            |            |            |            |            |
| Additional funded attorney FTE (annual)                               |            | 60         | 60         | 60         | 60         | 60         |
| Running total attorney FTE  |            | 60         | 120        | 180        | 240        | 300        |
| Additional funded core staff FTE (annual)                             |            | 90         | 90         | 90         | 90         | 90         |
| Running total core staff  |            | 90         | 180        | 270        | 360        | 450        |
| Estimated attorney FTE hours saved per core staff (10%)               |            | 208        | 208        | 208        | 208        | 208        |
| Attorney hours saved annually   |            | 18,720     | 37,440     | 56,160     | 74,880     | 93,600     |
| Annual attorney FTE need reduction (more available time for casework) |            | 9          | 9          | 9          | 9          | 9          |
| Running total attorney FTE need reduction                             |            | 9          | 18         | 27         | 36         | 45         |
| <b>DECRIMINALIZATION IMPACTS</b>                                      |            |            |            |            |            |            |
| Decriminalization - Annual FTE need reduction                         |            | -          | 50         | 48         | 20         | 15         |
| Running total FTE need reduction                                      |            | -          | 50         | 98         | 118        | 133        |
| <b>TOTAL IMPACT ON ATTORNEY DEFICIENCY</b>                            |            |            |            |            |            |            |
| Attorney FTE Need   | 897        | 888        | 829        | 772        | 743        | 719        |
| Projected FTEs  | 295        | 355        | 415        | 475        | 535        | 595        |
| Remaining Attorney FTE Deficiency at end of Year                      | <b>602</b> | <b>533</b> | <b>414</b> | <b>297</b> | <b>208</b> | <b>124</b> |
| Remaining Attorney Deficiency   | <b>67%</b> | <b>60%</b> | <b>50%</b> | <b>38%</b> | <b>28%</b> | <b>17%</b> |

**The New Mexico Public Defense System  
5-Year Plan to Reduce Representation Deficiency  
LOPD Budget Impact**

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**LOPD BUDGET IMPACT**

In order to execute this five-year plan, funding for LOPD will need to increase. Currently the LOPD budget is only 0.39% of the total State of New Mexico annual budget.

**LOPD Operating Budget Trend**

Over the past seven years the New Mexico legislature has increased funding for LOPD on an average of 4.25% per year (See Appendix B). The total LOPD operating budget for FY2023 is \$64.2 million. The LOPD Operating Budget Trend chart below builds off the FY2023 budget with annual average increases of 4.25%.

| <b>LOPD OPERATING BUDGET TREND</b> |                    |                     |
|------------------------------------|--------------------|---------------------|
| <b>Budget Year</b>                 | <b>Fiscal Year</b> | <b>Budget Trend</b> |
| Year 0                             | 2023               | \$ 64,294,500       |
| Year 1                             | 2024               | 67,027,016          |
| Year 2                             | 2025               | 69,875,664          |
| Year 3                             | 2026               | 72,845,380          |
| Year 4                             | 2027               | 75,941,309          |
| Year 5                             | 2028               | 79,168,815          |

**Cost to Fund Additional Attorney and Core Support Staff FTE**

The cost to fund one attorney FTE includes the attorney cost (salary, benefits, and operational costs) plus the costs of the administrative support personnel to support the attorney. Core support staff personnel costs are based on the average salary and benefits effective in July 2022.

Note that the cost of the attorney and core support staff FTE in the following chart are LOPD attorneys and are not broken down between LOPD and contract defenders. The total costs included both types of FTE – in-house and contractor – which is a conservative estimate, as the overall cost to support contract public defenders are generally higher as those types of FTE require other costs such as contract investigators, social workers, and transcriptionists. These extra costs for contractors are not included.

## The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency LOPD Budget Impact

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### FTE ATTORNEY AND CORE STAFF PERSONNEL COST

|  |     |    |                   |
|--|-----|----|-------------------|
| Average salary, effective July 2022                            | [1] | \$ | 84,726            |
| Benefits   | [2] |    | 34,738            |
| Recurring operational costs                                    | [3] |    | 9,343             |
| Non-recurring start up costs                                   | [4] |    | 4,500             |
| Attorney cost  |     |    | 133,307           |
| Administrative personnel - average salary, effective July 2022 |     |    | 50,811            |
| Additional personnel need per attorney FTE                     |     |    | 0.24              |
| Additional administrative cost                                 |     |    | 12,195            |
| Total additional cost per attorney FTE                         |     |    | <b>\$ 145,502</b> |
| Core staff personnel - average salary, effective July 2022     |     |    | \$ 54,643         |
| Benefits   | [2] |    | 22,404            |
| Total additional cost per core staff FTE                       |     |    | <b>\$ 77,047</b>  |

[1] Average salary of Public Defenders 2 - 5, effective July 2022 and includes impact of Geographic Differential Pay, which is eligible for certain locations.

[2] LOPD uses a benefit factor of 1.41 of salary for their internal expected benefit cost.

[3] Recurring operational costs include costs related to travel, supplies, telephone, HCM/SHARE allocations, subscriptions and dues, training, rent, and equipment. LOPD applies these costs to Public Defenders 2 - 5 position descriptions. Of casework attorneys as of December 31, 2021, 80% were within these positions, and therefore the total expected recurring operational cost per attorney for these positions (\$11,697) to be adjusted above to reflect 80% of this rate.

[4] Non-recurring start up costs includes costs related to computer equipment and furniture, which are allocated to all new attorney FTE.

# The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency LOPD Budget Impact

## Impact on LOPD Operating Budget

In order to fund the necessary FTE level established by the analysis in adding resources and decriminalization efforts, which would bring the current need of 602 attorneys down to 124 attorneys by Year 5, the LOPD will certainly need budget increases on top of its current operating budget trend.

### BUDGET IMPACTS

|  | Year 0        | Year 1         | Year 2         | Year 3         | Year 4         | Year 5        |
|--|---------------|----------------|----------------|----------------|----------------|---------------|
| LOPD Operating Budget Trend                  | \$ 64,294,500 | \$ 67,027,016  | \$ 69,875,664  | \$ 72,845,380  | \$ 75,941,309  | \$ 79,168,815 |
| <i>Additional annual attorney FTE</i>        |               | 60             | 60             | 60             | 60             | 60            |
| <i>Additional annual core staff FTE</i>      |               | 90             | 90             | 90             | 90             | 90            |
| Cost to fund additional attorney FTE         | \$ 8,730,120  | \$ 17,460,240  | \$ 26,190,360  | \$ 34,920,480  | \$ 43,650,600  |               |
| Cost to fund additional core staff FTE       | 6,934,230     | 13,868,460     | 20,802,690     | 27,736,920     | 34,671,150     |               |
| Total Funding Needs by Year                  | \$ 82,691,366 | \$ 101,204,364 | \$ 119,838,430 | \$ 138,598,709 | \$ 157,490,565 |               |
| Additional budget to be requested from State | \$ 15,664,350 | \$ 31,328,700  | \$ 46,993,050  | \$ 62,657,400  | \$ 78,321,750  |               |

# The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency Other Considerations

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## OTHER CONSIDERATIONS

Below are considerations of potential areas for either cost reductions, reallocations, or supplements that may be considered but are not included at the core of the five-year plan given certain political and economic uncertainties.

### **Sentencing Reform**

Sentencing reform could also have an impact on the workloads carried by the public defense system. Specifically, the reclassification of certain non-violent felony cases to misdemeanor cases and the reclassification of misdemeanor level cases would have an impact on the number of hours required for adequate representation to indigent defendants by public defenders. This was not able to be quantified into attorney hours in relation to *The New Mexico Project*, but a positive impact to LOPD would be expected.

In New Mexico under NMSA § 30-1-6, a crime is a felony if the statute allows the court to sentence someone to life imprisonment or a prison sentence of one (1) year or more. The penalties for misdemeanors and petty misdemeanors are as follows: General Misdemeanors: more than six months but less than a year in jail, and/or a fine of up to \$1,000; and, Petty misdemeanors: a jail term of less than six months, and/or a fine of up to \$500.

There is also a "habitual offender" law that is designed to impose a harsher sentence on people convicted of a felony offense if their criminal records include one or more felony convictions in the previous 10 years. In New Mexico, one year is added to a sentence for a felony offense if the defendant has one prior felony conviction. Likewise, New Mexico law adds four years to a defendant's sentence if there are two prior felony convictions within the previous 10 years, and eight years to a defendant's sentence if the offender has three or more prior felony convictions.<sup>15</sup> Additionally, cases that include potential habitual offender enhancement would require significantly more public defender time. Though the impact of habitual offender law was not quantified for the purpose of this plan, this should be considered as the LOPD continues to analyze resource deficiency strategies.

### **Recent Trends in Criminal Case Filings**

This analysis within *The New Mexico Project* and in this report, was based on cases that were assigned to the LOPD from FY2019 through the third quarter of FY2021. It should be noted that in FY2020 and FY2021 there were decreases in cases assigned to the LOPD (see table on the following page). There was also a reduction in the number of criminal cases filed in the District Courts (see chart on the following page).

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<sup>15</sup> N.M. Stat. § 31-18-17 (2020).

# The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency Other Considerations

**Table 2: LOPD Total Case Assignments by Fiscal Year and Case Type**

| Fiscal Year | In- House |                                |          |             |                | Contractor |                                |          |             |                  | FY Total |
|-------------|-----------|--------------------------------|----------|-------------|----------------|------------|--------------------------------|----------|-------------|------------------|----------|
|             | Avg FTE   | Total Assignments by Base Type |          |             |                | FTE        | Total Assignments by Base Type |          |             |                  |          |
|             |           | Felony                         | Juvenile | Misdemeanor | In House Total |            | Felony                         | Juvenile | Misdemeanor | Contractor Total |          |
| FY2018      | 163       | 20,994                         | 2,179    | 25,923      | 49,096         | 117        | 11,825                         | 1,038    | 9,539       | 22,402           | 71,498   |
| FY2019      | 187       | 18,671                         | 1,847    | 23,862      | 44,380         | 119        | 12,136                         | 1,152    | 9,201       | 22,489           | 66,869   |
| FY2020      | 175       | 18,808                         | 1,596    | 22,950      | 43,354         | 112        | 13,097                         | 1,076    | 9,329       | 23,502           | 66,856   |
| FY2021      | 182       | 19,262                         | 905      | 20,482      | 40,649         | 113        | 12,931                         | 743      | 8,884       | 22,558           | 63,207   |
| FY2022      | 169       | 22,937                         | 896      | 20,862      | 44,695         | 111        | 12,995                         | 660      | 9,167       | 22,822           | 67,517   |

The type of charges that showed the largest decline were misdemeanor non-violent charges. Because most of the declines were misdemeanor charges that require far fewer hours of representation than the most serious charges or complex cases, one should not expect a 1 to 1 reduction in FTE needs based on the total number of reduced cases. Further there may be some “rebound” in the number of arrests and associated court filings. It is reasonable to assume that future demand on the LOPD, absent sentencing reform passed by the legislature, will return to FY2019 levels.

### Equal Defense Act

Introduced in February 2021, the Equal Defense Act of 2021 H.R.1408 (EDA)<sup>16</sup> directs the Department of Justice to award grants to state and local governments, tribal organizations, and public defender offices for public defense. If passed, recipients would use the grant for public defense, including establishing a data collection process, developing workload limits, satisfying compensation requirements, and providing training to those serving in public defense. The EDA appropriates \$250,000,000 annually for five fiscal years.

LOPD is well on its way to meeting the requirements established by the EDA, as currently outlined. The department has a robust data keeping system and has started down the path of implementing timekeeping to help measure actual working time spent on cases. This would enable LOPD to apply to utilize these funds to help address the public defender deficiency and protect the rights of defendants in criminal cases, including the right to counsel.

There would be some additional costs in the initial years, including dedicated personnel costs to continue their implementation of timekeeping efforts, additional data collection metrics, and costs to manage the grant; however, these costs are minimal compared to the current deficiency. LOPD should monitor the status of this bill to ensure they are in a positive position to receive these funds when and if they ever become available.

<sup>16</sup> H.R.1408 – Equal Defense Act of 2021, available at [https://www.congress.gov/bill/117th-congress/house-bill/1408#:~:text=Introduced%20in%20House%20\(02%2F26%2F2021\)&text=This%20bill%20establishes%20and%20modifies,defendants%20who%20cannot%20afford%20counsel\).](https://www.congress.gov/bill/117th-congress/house-bill/1408#:~:text=Introduced%20in%20House%20(02%2F26%2F2021)&text=This%20bill%20establishes%20and%20modifies,defendants%20who%20cannot%20afford%20counsel).)

# The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency Appendix A: Methods Used by The New Mexico Project

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## METHODS USED BY THE NEW MEXICO PROJECT

This appendix summarizes key methods used in *The New Mexico Project*. Please refer to *The New Mexico Project* report for full details.

### Historical FTE

The FTE method was used in *The New Mexico Project*, which included a review of historical and current personnel employment data for attorneys and conversion of attorney personnel to full-time equivalents (FTEs). This allows for a comparison of total attorney time available, based on FTE and caseloads, to total attorney time at the system level, based on the Delphi panel results and caseloads. The study assumed each FTE spends 2,080 hours annually on case work. This was a very conservative measure because it assumes all hours are allocated to legal representation of clients, without considering continuing education requirements and other training, administrative tasks, vacation, sick leave, etc. In addition, it is not unusual for public defenders to work more than eight hours per day.

The study also captured only attorneys with caseloads, excluding any purely supervisory or administrative attorneys, such as the Chief Public Defender, the Deputy Chief Public Defenders, General Counsel and the Training and Recruitment Director. This was because the study measured only attorney time against work that should be performed by attorneys, assuming that those attorneys have access to adequate investigative, secretarial, and other support services.

### Historical Caseload

Historical case data was obtained primarily from LOPD's case management system, Justice Works defenderData™, which is utilized by various public defense agencies across the nation for tracking case information, and includes case filings and tracking by district, charge type, assigned attorney, attorney type, and client identifiers. This study analyzed all new public defense cases opened from July 1, 2018 through March 31, 2021. The annual caseload represented the average number of cases opened annually by fiscal year based on this data.

| STATEWIDE CASES OPENED BY TYPE |               |               |                |
|--------------------------------|---------------|---------------|----------------|
|                                | FY2019        | FY2020        | FY2021 Q1 - Q3 |
| Adult Criminal                 | 60,748        | 59,675        | 37,901         |
| Juvenile                       | 3,014         | 2,564         | 1,110          |
| Appeals                        | 423           | 331           | 216            |
| <b>Totals</b>                  | <b>64,185</b> | <b>62,570</b> | <b>39,227</b>  |

# The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency Appendix A: Methods Used by The New Mexico Project

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## The Delphi Method

The workload study applied the Delphi method, an iterative survey process developed by the RAND Corporation and used in a range of industries and professions. Within the legal system, examples of use of the Delphi method can be traced back decades, and the Delphi method is considered an appropriate methodology for weighted caseload studies.<sup>17</sup> Examples of these uses of Delphi were sponsored by both the National Association of Court Management and the National Center for State Courts.<sup>18</sup> These efforts were principally focused on assessing judicial and court support staff needs.<sup>19</sup> Additionally, the Delphi method has been implemented by ABA SCLAID and partner accounting and consulting firms in similar workload studies of public defense systems in other states, including Missouri,<sup>20</sup> Louisiana,<sup>21</sup> Colorado,<sup>22</sup> Rhode Island,<sup>23</sup> Indiana,<sup>24</sup> and Oregon.<sup>25</sup>

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<sup>17</sup> Norman Lefstein, *Securing Reasonable Caseloads: Ethics And Law Of Public Defense 140-51* (Am. Bar Assoc. 2011), *available at* [https://www.americanbar.org/content/dam/aba/publications/books/ls\\_sclaid\\_def\\_securing\\_reasonable\\_caseloads\\_supplement.pdf](https://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads_supplement.pdf)

<sup>18</sup> National Center for State Courts' reports, *available at* <http://www.ncsc.org>.

<sup>19</sup> Matthew Kleiman, Cythia Lee and Brian Ostrom, *Workload Assessment: A Data-driven Management Tool for the Judicial Branch* (National Center for State Courts 2013).

<sup>20</sup> RubinBrown on behalf of ABA's Standing Committee on Legal Aid and Indigent Defendants, *The Missouri Project, A Study of the Missouri Public Defender System and Attorney Workload Standards (2014)*, *available at* [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_pub\\_def\\_mo\\_workstudies\\_rept.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_pub_def_mo_workstudies_rept.pdf).

<sup>21</sup> Postlethwaite & Netterville, APAC on behalf of ABA's Standing Committee on Legal Aid and Indigent Defendants, *The Louisiana Project, A Study of the Louisiana Defender System and Attorney Workload Standards (2017)*, *available at* [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_louisiana\\_project\\_report.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.pdf).

<sup>22</sup> RubinBrown on behalf of ABA's Standing Committee on Legal Aid and Indigent Defendants, *The Colorado Project, A Study of the Colorado Public Defender System and Attorney Workload Standards (2017)*, *available at* [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_co\\_project.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_co_project.pdf).

<sup>23</sup> Blum, Shapiro & Company, P.C. on behalf of ABA's Standing Committee on Legal Aid and Indigent Defendants and The National Association of Criminal Defense Lawyers, *The Rhode Island Project, A Study of the Rhode Island Public Defender System and Attorney Workload Standards (2017)*, *available at* [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_ri\\_project.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ri_project.pdf).

<sup>24</sup> Crowe LLP on behalf of ABA's Standing Committee on Legal Aid and Indigent Defendants, *The Indiana Project, A Study of the Indiana Public Defense System and Attorney Workload Standards (2020)*, *available at* [https://www.americanbar.org/content/dam/aba/events/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_public\\_defense\\_indiana\\_project\\_report\\_july\\_2020.pdf](https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/ls_sclaid_public_defense_indiana_project_report_july_2020.pdf).

<sup>25</sup> Moss Adams LLP on behalf of ABA's Standing Committee on Legal Aid and Indigent Defendants, *The Oregon Project, An Analysis of the Oregon Public Defense System and Attorney Workload Standards (2022)*, *available at* [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls-sclaid-or-proj-rept.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-or-proj-rept.pdf).



# The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency Appendix A: Methods Used by The New Mexico Project

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An overview of the Delphi method, including use of the method in determining appropriate caseloads for public defense attorneys, is summarized below and further described in Appendix B of *The New Mexico Project*.<sup>26,27</sup>

The Delphi method's structured and reliable technique incorporates the input, feedback, and opinions of highly informed professionals to develop a reliable consensus on a specific issue. As a methodological strategy, the Delphi method is an iterative process of surveys given to a group of professionals, with structured feedback presented to the experts at set intervals.

The surveying practices applied can be either interviews or surveys that focus on fundamental questions of significance to the group participating.

To initiate the Delphi method, a group of experts provides individual, anonymous responses on a given topic based on their expertise and experience. Next, the professionals that responded to the initial survey are provided the same survey with peer response data from the initial round. This iterative process of alternating participants' independent assessments with other anonymous aggregated peer response data enables professional opinions to be converted into objective consensus opinion.

In *The New Mexico Project*, as in other ABA SCLAIID workload studies, the Delphi method was used to provide a reliable consensus of professional judgment on the time that *should be* required for a public defense attorney in New Mexico to provide reasonably effective assistance of counsel pursuant to prevailing professional norms. The Delphi process used in New Mexico relied upon the expertise of private practice attorneys, contract attorneys, and public defenders to develop a reliable consensus professional judgment of the amount of time defense counsel *should* expect to spend on a particular Case Tasks in particular Case Types with reference to both the Strickland standard and the ethical and substantive professional standards applicable to New Mexico, including:

- New Mexico Rules of Professional Conduct
- New Mexico Public Defender Commission and LOPD Performance Standards for Criminal Defense Representation
- ABA Criminal Justice Standards for the Defense Function
- IJA-ABA Juvenile Standards
- ABA Criminal Justice Standards on Criminal Appeals

In consultation with LOPD, ABA SCLAIID determined that three separate Delphi panels were needed in New Mexico, covering the three major areas of practice in which public defense

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<sup>26</sup> Moss Adams LLP on behalf of ABA's Standing Committee on Legal Aid and Indigent Defendants, *The New Mexico Project, An Analysis of the New Mexico Public Defense System and Attorney Workload Standards (2022)*, available at [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls-sclaid-moss-adams-nm-proj.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-moss-adams-nm-proj.pdf).

<sup>27</sup> See also *Use of the Delphi method in ABA SCALAIID Public Defense Workload Studies: A Report on Lessons Learned (2021)*, available at [https://www.americanbar.org/content/dam/aba/events/legal\\_aid\\_indigent\\_defendants/ls-sclaid-indef-delphi-method-lessons.pdf](https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/ls-sclaid-indef-delphi-method-lessons.pdf).

# The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency Appendix A: Methods Used by The New Mexico Project

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attorneys are utilized: (1) Adult Criminal; (2) Juvenile; and (3) Criminal Appeals (Appeals). These three panels correspond to the areas of specialization most often practiced by defense attorneys in New Mexico.<sup>28</sup>

The Delphi method's structured and reliable technique incorporates the input, feedback, and opinions of highly informed professionals to develop consensus on a specific question. *The New Mexico Project* consisted of three different Delphi panels: Adult Criminal, Juvenile and Appeals. Participants in each panel were selected based on their substantive expertise and experience in these areas. Participants included public defenders, contract attorneys, and private defense practitioners, and they were approved by independent Selection Panels.

Each Delphi area was sub-divided into Case Types and Case Tasks, and further divided by Resolution (e.g. plea/otherwise resolve v. go to trial). For each Case Task in each Case Type, participants are surveyed about the amount of time the task takes and the frequency with which it occurs.

The Delphi process in New Mexico consisted of two rounds of online surveys, taken independently. The second-round survey was completed only by those who participated in the first round and included a summary of the responses from the first round for second round participants to consider. A third survey was then conducted in a live group setting only by those who had completed the first and second survey rounds. These participants met over a series of days to review the results of the second survey and developed a professional consensus regarding the appropriate amount of time an attorney should spend on a series of case tasks for each case type to provide reasonably effective assistance of counsel pursuant to prevailing professional norms in the State of New Mexico.

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<sup>28</sup> Initial workload studies, such as the ones completed in Missouri and Louisiana, utilized a single Delphi panel. In later studies, it was noted that a single Delphi panel did not reflect the specialization that had developed in public defense practice. While the same attorney may represent clients in misdemeanor and felony cases, it is relatively rare that a trial defense attorney also takes appeals. As a result, many appellate attorneys participating in the single Delphi panel could only answer questions regarding one Case Type, e.g., appeals. Additionally, having only one or two Case Types in specialist areas, such as appeals or juvenile cases, did not reflect the complexity of these specialty practices. For example, a juvenile defender's caseload may range from status violations to serious assaults and even murder. Over the several ABA public defense workload studies, this recognition resulted in the number of Case Types increasing. For example, in the Colorado workload study, there were 18 Case Types, including three juvenile Case Types. This number of Case Types became difficult to manage. To address this problem, specialty Delphi panels, with separate surveys, were first utilized in Texas and proved not only more manageable, but also more reflective of current public defense practice.

## The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency Appendix A: Methods Used by The New Mexico Project

The result of the Delphi process is the consensus of the expert panel on the Frequency and Time needed to complete each Case Task in compliance with applicable standards, as well as Resolution – the percentage of cases that should plead/otherwise resolve v. go to trial. These consensus decisions are then used to calculate the Delphi result, the time needed for a public defense attorney to provide reasonably effective assistance of counsel to a client in an average case of this Case Type. See below for a description of the Case Types and Case Tasks used in the Adult Criminal panel.

| ADULT CRIMINAL   |   |
|--|---|
| Case Type  | Case Task                                       |
| Traffic and Other Minor Crimes   | Pre-Indictment Work                             |
| DWI  | Client Communication and Care                   |
| Drug Crimes, Property Crimes, Status Offenses                                  | Discovery/Case Preparation                      |
| Crimes Against Person (Adult Victim)   | Attorney Investigation/Attorney Interviews      |
| Child Pornography Cases  | Experts   |
| Child Abuse / Child Sex Crimes (Not including CARD or Child Pornography Cases) | Legal Research, Motions Practice, Other Writing |
| Murder (including CARD)  | Negotiations                                    |
| Probation Violations   | Court Preparation                               |
|  | Court Time                                      |
|  | Sentencing/Mitigation                           |
|  | Post Adjudication                               |

| ADULT CRIMINAL - CASE TYPE DEFINITIONS   |   |
|--|---|
| Case Type  | Description   |
| Traffic and Other Minor Crimes   | All criminal traffic cases and other minor cases, including disorderly conduct, nuisance, prostitution, resisting arrest, etc.  |
| DWI  | All categories of driving while intoxicated excluding vehicular homicide.   |
| Drug Crimes, Property Crimes, Status Offenses                                  | Including felony and misdemeanor drug cases, breaking and entering, larceny, embezzlement, fraud, shoplifting and status offenses such as felon in possession and failure to register.  |
| Crimes Against Person (Adult Victim)   | All crimes of violence with an adult victim including rape, sex assault, robbery, domestic violence, and all categories of battery and assault.   |
| Child Pornography Cases  | All child pornography cases with an actual victim.  |
| Child Abuse / Child Sex Crimes (Not including CARD or Child Pornography Cases) | Child abuse cases NOT INCLUDING Child Abuse Resulting in Death, which is included in the murder case type, and child sex crime cases NOT INCLUDING child pornography cases with an actual victim, which is its own case type. |
| Murder (including CARD)  | All types of murder cases (1st Degree, 2nd Degree, Voluntary Manslaughter and Involuntary Manslaughter), including Child Abuse Resulting in Death (CARD), including vehicular homicide.                                       |
| Probation Violations   | Probation violation cases.  |

**The New Mexico Public Defense System  
5-Year Plan to Reduce Representation Deficiency  
Appendix B: Historical Operating Budget Changes**

**Operating Budget**

| <b>Fiscal Year</b> | <b>Public Defender</b> | <b>Change</b> | <b>District Attorney</b> | <b>Change</b> | <b>Statewide</b>  | <b>Change</b> |
|--------------------|------------------------|---------------|--------------------------|---------------|-------------------|---------------|
| 2016               | \$ 48,388,400          |               | \$ 64,568,793            |               | \$ 11,921,657,019 |               |
| 2017               | 47,639,900             | -1.55%        | 62,823,845               | -2.70%        | 12,230,993,284    | 2.59%         |
| 2018               | 48,849,700             | 2.54%         | 64,518,100               | 2.70%         | 12,367,900,676    | 1.12%         |
| 2019               | 52,404,700             | 7.28%         | 72,623,872               | 12.56%        | 12,409,476,997    | 0.34%         |
| 2020               | 55,738,000             | 6.36%         | 80,463,100               | 10.79%        | 13,018,918,886    | 4.91%         |
| 2021               | 60,080,800             | 7.79%         | 85,622,300               | 6.41%         | 14,082,542,995    | 8.17%         |
| 2022               | 58,367,500             | -2.85%        | 81,914,900               | -4.33%        | 14,863,881,140    | 5.55%         |
| 2023               | 64,294,500             | 10.15%        | 90,935,100               | 11.01%        | 16,315,712,848    | 9.77%         |

**Average Change** 4.25%      **Average Change** 5.21%      **Average Change** 4.64%

Information obtained from <https://ssp3.sunshineportalnm.com/#budget>