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**FY19 Budget Request for the Law Offices of the Public Defender
(Agency 280)**

Introduction

The Law Offices of the Public Defender (LOPD) is the largest law firm in New Mexico, with nearly 200 LOPD public defenders and 150 contract defenders representing criminal defendants in 70,000 new cases each year. LOPD was created in response to the U.S. Supreme Court's 1963 decision in Gideon v. Wainwright that guarantees indigent defendants receive the right to counsel in criminal cases. Justice Black explains the premise of equality before the law that led to the Court's holding in Gideon:

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards *designed to assure fair trials* before impartial tribunals in which *every defendant stands equal before the law*. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Both the Federal and New Mexico Constitutions require that the State of New Mexico adequately fund indigent defense in order to ensure equality before the law.

The citizens of New Mexico have striven to ensure that indigent defense is independent from political pressures and more adequately funded. In 2012, the New Mexico Constitution was amended to add Article VI, Section 39 which created an independent Public Defender Department along with a Public Defender Commission (hereinafter Commission) to provide oversight and set performance standards for public defense.

LOPD has offices in eight of the thirteen Judicial Districts (First, Second, Third, Fifth, Eighth, Ninth, Eleventh, and Twelfth). In over 24,500 cases annually, contract defenders provide representation in the 20 counties where LOPD does not have an office and in cases statewide where LOPD has a conflict of interest because it represents a co-defendant, alleged victim, or witness in another case.

Due to the sheer volume of cases there is a significant shortage of attorneys and support staff. Consequently, many indigent clients in New Mexico do not receive effective assistance of counsel. In recent years, the Legislature and Governor have attempted to respond to this shortage, by increasing LOPD's budget. From FY2013 to FY2018 LOPD's budget was increased 20.8 percent from \$40.4 million to \$48.8 million. This represents a down payment towards ensuring constitutionally adequate indigent defense, but only begins to address the serious deficit caused by multiple decades of underfunding indigent defense in New Mexico.

LOPD and the Commission recognize two fundamental yet contradictory points:

1. **There are funding limitations.** The Commission and the LOPD submitted budget requests for FY15 and FY16 that show the estimated needs for indigent defense, if conducted properly, but these requests amounted to huge increases, between 90 and 100 per cent over the previous budget. While those requests are good faith estimates, the Commission and LOPD are aware that those increases are not likely given the state's economy and other factors. The money is not available

to meet all needs and the agency must do what it can to spend responsibly and to prioritize needs.

2. **The LOPD and the Commission cannot fulfill their constitutional obligations without adequate funding.** Just as there are limits to funding, there are limits on the work that can be done if it is to meet constitutional requirements. There are only so many hours in a day that can be devoted to proper representation. Without significant, sustained increases— aimed at expanding the LOPD budget by nearly 90%— both public and contract defenders will be ethically and constitutionally required to take legal steps to alert courts of their inability to adequately defend their clients. In FY2017, the LOPD took steps by filing motions to withdraw in counties facing a crisis with attorneys overburdened with critically high caseloads. Litigation on these crises continues.)

The LOPD and the Commission are committed to improving indigent defense by increasing the number of public defenders, ensuring that indigent clients have representation at all constitutionally mandated stages, including felony first appearances, misdemeanor custody arraignments, grand jury, preliminary hearings, and pre-trial detention hearings, improving the representation of juvenile clients; increasing the pay for contract defenders; and substituting alternate defenders (state-employed conflict defenders) for contract defenders in locations where LOPD contract defenders are not available or overloaded with cases.

LOPD will also continue to advocate for reforms in the criminal justice system which could focus the use of resources for many agencies and the courts in a manner which would allow LOPD to work more efficiently and effectively. This move, however, cannot be accomplished overnight and will not reduce the demands of the system for an indefinite time. Furthermore, accomplishing reform requires participation by all criminal justice partners.

Current Systemic Weaknesses in Indigent Defense

Due to the shortage of attorneys and support staff, many indigent clients in New Mexico are not receiving effective assistance of counsel.

Representation at all Critical Stages. The Constitution requires that indigent defendants be represented at every “critical stage” to receive adequate representation:

- **Initial appearances.** In almost every county in New Mexico, both LOPD offices and contract defenders cannot represent clients at misdemeanor custody arraignments and felony first appearances in Magistrate Courts. Contract defenders are not assigned to cases until the end of these hearings, so clients often attempt to plead guilty without advice of counsel and struggle to request conditions of release without the benefit of counsel. Sometimes defendants make statements that harm their cases, complicating the path to justice. Lack of representation at misdemeanor custody arraignments and felony first appearances results in unnecessary jail time, excessive bail or damage to the defendant’s case.
- **Grand Jury.** Many defendants are not represented at grand jury proceedings. Despite the fact that New Mexico law provides the right to counsel at grand jury, frequently, LOPD is not informed of the proceeding until after an indictment is brought. Even when made aware, attorneys often have too little notice or time to adequately prepare for grand jury issues that might dispose of the case. Addressing issues in a case at the grand jury stage may save resources for all criminal justice partners.
- **Preliminary Hearing.** Preliminary Hearing is a critical stage with a right to counsel. Due to the crush of time to conduct numerous preliminary hearings during a single docket, defendants are not always properly represented. Hearings are unnecessarily waived or conducted with inadequate preparation. Again, this contributes to inefficiencies, making it impossible to reach an early and appropriate resolution for some cases.
- **Pre-trial Detention Hearings and custody decisions.** Bail determinations are not always properly pursued. Though ethically obligated to advocate for reasonable bail, counsel often must choose which cases to dedicate precious attorney time and resources. Attorney work to prepare for a pre-trial detention hearing does not translate to the same work necessary to prepare the case for trial. Due

to recent rule changes, attorneys are forced to drop current case preparation to prepare and appear at pre-trial detention hearings.

- **Pre-trial motions and discovery.** Legal issues such as suppression motions or discovery issues are sometimes not pursued even though they are necessary in a case. Consequently, issues that might dispose of a case efficiently are not pursued and the case continues through the system, and sometimes through to the appellate system.

Juvenile representation. Indigent juvenile representation in New Mexico is sporadic in quality and coverage:

- Juvenile clients are often represented by public or contract defenders who are untrained in juvenile law and adolescent psychology.
- Juvenile cases often require more time than adult felonies and misdemeanors, but both public and contract defenders have caseloads that are so high that juvenile clients receive little attention.

Meet and Plea Representation:

- High caseloads result in some clients meeting their public or contract defender for the first time in court when they are offered the state's plea bargain. "Meet and plea" representation is representation in name only because the necessary investigation and case evaluation is missing thus depriving the client of the constitutional right to counsel.

Low Pay for Contract Defenders. New Mexico's underfunded hybrid model of providing indigent defense, using contract defenders as the sole public defenders in 20 of New Mexico's 33 counties, has resulted in a number of critical problems:

- Low flat rates of \$180 to \$750 per case force contract defenders to run a volume practice, taking as many cases as possible, in order to stay in business, often without the capacity to provide adequate representation to all clients.
- The pay structure for contract defenders is so low that in FY2016 LOPD released a Request for Proposal (RFP) for additional contract defenders for Eddy and Lea counties and received only one proposal.
- Attorneys with too many cases are unable to give sufficient time to each case, forcing attorneys to select which cases will receive effective assistance

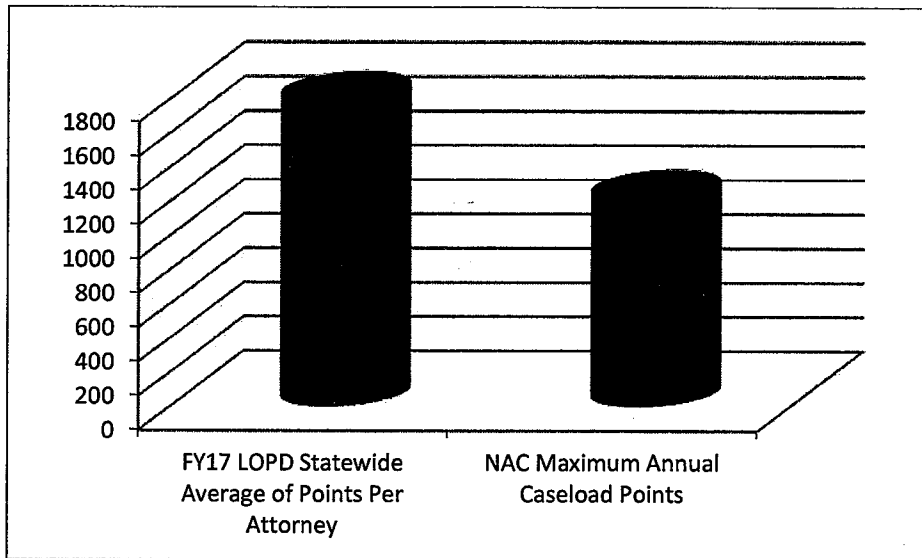
of counsel and depriving many other clients of a constitutionally adequate defense.

- Clients in the 13 counties that have LOPD offices have the benefit of an integrated defense team with paralegals, investigators, social workers, and other staff assisting public defenders with their cases. Contract defenders normally only request additional funding when a case is likely to be tried or includes a mental health issue, leaving other cases without the same level of support.
- In many of the rural counties, contract defenders must commute from Albuquerque or Santa Fe, taking time and resources to do so. The pay structure for contract defenders is not sustainable, especially in those counties without LOPD offices and rural locations far from the concentrations of attorneys in Albuquerque and Santa Fe.

Excessive Workloads. The systemic problems with contract defense in the hybrid model are exacerbated by the excessive workloads carried by many in-house LOPD attorneys:

- The New Mexico Sentencing Commission's FY2016 report determined that LOPD required 313 line attorneys and 226 support staff to provide adequate indigent defense in the thirteen counties where there are currently offices.
- As of July 31, 2017, LOPD has 190 line attorneys handling full caseloads, 7 limited practitioners awaiting bar exam results who will become attorneys once admitted to the bar, 7 administrators with law degrees, and 158 support staff, a deficit of 116 attorneys and 68 support staff per the Sentencing Commission. This understaffing results in substantial underrepresentation of many clients.
- The 1973 National Advisory Commission on Criminal Justice Standards and Goals (NAC) states maximum annual newly assigned caseload standards for public defenders as: 150 felony cases, 400 misdemeanor case, 200 juvenile cases, or 25 appeals.
- In FY2017, LOPD attorneys handled an average total of 342 cases, specifically 140 felony, 16 juvenile, and 187 misdemeanor cases each. This figure includes all cases assigned July 1, 2016 through June 30, 2017.

- In order to assess a full attorney caseload with mixed types of cases, NAC provides a point value for each type of case as: 8 points per felony case, 3 points per misdemeanor case, 6 points per juvenile case.
- The average LOPD caseload calculates to 1772 points per attorney, which far exceeds beyond the NAC maximum 1200 points in a year.



- Even the NAC caseload maximums have been criticized in multiple states as being too high to provide the effective assistance of counsel across a system. As noted in U.S. Department of Justice pleadings in Wilbur v. City of Mount Vernon, “caseload limits are no replacement of a careful analysis of a public defender’s *workload*, a concept that takes into account all of the factors affecting a public defender’s ability to adequately represent clients, such as the complexity of cases on a defender’s docket, the defender’s skill and experience, the support services available to the defender, and the defender’s other duties”
- When LOPD attempts to ease excessive caseloads by “overflowing” office cases to contract defenders the problem is often simply transferred to those contractors who might not be in a position to improve the representation.
- The workload for both public and contract defenders is exacerbated by long hours spent traveling to court and jail in rural New Mexico.

- In FY2018, LOPD is following the lead of public defenders in Missouri, Texas, Colorado, and a dozen other states to pursue a workload study and eventually institute time-keeping for attorneys and staff to measure actual work time spent each day on each case. This will increase efficiency and allow LOPD to identify situations where attorneys are being assigned too many cases to allow for the effective assistance of counsel.
- LOPD requires a substantial increase in attorneys and staff to ensure that effective assistance of counsel is provided in the counties where offices exist.

FY2019 Measures to Address Some of the Systemic Weaknesses

In FY2019, LOPD is going to take five actions to further the process of strengthening New Mexico's indigent defense system. First, LOPD will earmark money for a workload study which requires time-keeping for both attorneys and staff and adopt the procedures of the Missouri Study, a process adopted by public defenders in fifteen states including Colorado and Texas. This will enable LOPD to accurately estimate the resources needed for every type of case and to identify inefficiencies in the system.

Second, LOPD will begin an Alternate Defender Pilot Project in counties where it is difficult to find and keep contract defenders. This model uses state-employed public defenders, rather than private contract lawyers, to provide representation in cases where LOPD has a conflict of interest. These alternate defenders may be full-time or part-time employees. The alternate defenders will be a separate division of LOPD, screened off from the other attorneys in the department to avoid conflicts of interest. The plan is to hire a Managing Attorney of the Alternate Public Defender to coordinate this project. Additionally, several current LOPD attorneys will be transferred to become alternate defenders with statewide practices allowing LOPD to conflict out some serious cases and appeals to attorneys who are paid a salary rather than a flat or hourly rate.

Third, LOPD will identify counties that currently do not have an LOPD office and evaluate which resources will facilitate determination of eligibility for

indigent defense, the appointment of a contract defender, and collection of the application fee necessary for LOPD's automation fund. These fees are now unevenly collected in counties where LOPD does not have an office. This model has been piloted in Valencia County and works well. It provides for a better blending of LOPD services in counties where we only have contract defenders.

Fourth, LOPD will identify courts that do not currently have an LOPD attorney or contract defender providing representation at misdemeanor custody arraignments, first appearances, and grand jury. This will allow LOPD to find solutions to begin providing such representation.

Finally, LOPD will continue to work closely with criminal justice system partners and other interested parties to identify potential changes in the criminal code as well as local practices that will reduce the number of unnecessary low-level criminal charges. For example, it is absolutely unnecessary to have jail time as a possible sanction for failure to insure a motor vehicle. Sanctions of this nature clog the courts and jails as well as the dockets of prosecutors and defenders. Civil penalties offer fully adequate remedies for many infractions.

FY2019 Budget Request

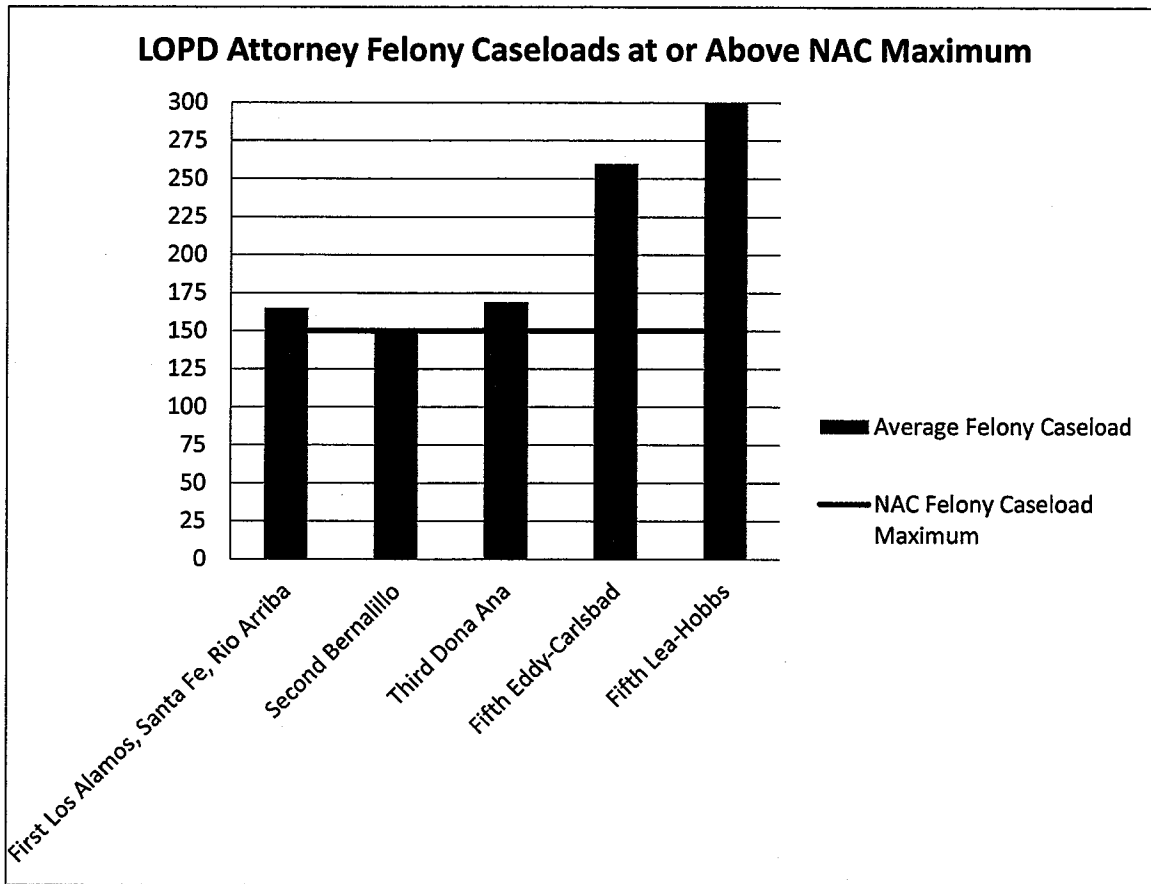
While the Commission and LOPD recognize the dire situation in public finance in New Mexico, LOPD must continue to alert the Legislature to the true cost of meeting its constitutional obligation of providing effective assistance of counsel. Those needs include at least 116 additional attorneys and 68 additional support staff as well as a payment structure for contract counsel that fairly compensates contract attorneys and incentivizes constitutionally adequate representation in every case. These resources are necessary to provide adequate representation and prevent future litigation for failure to adequately fund indigent defense.

There must always be appropriate funding for the task to be undertaken, in this case adequate representation of defendants. If additional representation is

required commensurate funding must follow. Conversely, if fewer funds are available less representation can be undertaken.

This FY2019 budget request does not reflect the total amount necessary to meet statutory and constitutional obligations but is simply a recognition of budget realities. It is also a recognition of the need to seek other avenues of relief as described herein if adequate funding is not available.

The next step in adequately meeting the State's constitutional obligations is the immediate addition of at least 25 attorneys to reduce the workload/caseload levels to nationally acceptable maximum levels of no more than 150 felonies or 400 misdemeanors per attorney. These levels are simply a cap, not the proper standard for determining constitutionally effective assistance of counsel. That determination is made by evaluating whether an attorney is able to do the legal work that is necessary for professional representation, a standard that cannot be met in most cases when caseloads are at the maximum. Public and contract defenders in New Mexico continue to struggle with caseloads well over these caps, inevitably leading to wrongful convictions and improper sentences because the defender was unable to properly provide factual and legal defenses. One example is in the LOPD Hobbs office which maintains one of the highest attorney caseloads statewide. The following is the average number of cases assigned to attorneys in various offices one fiscal year:



Some caseloads amount to double or triple the recommended maximum caseload. These numbers of clients are physically impossible to legally and ethically represent.

In addition to staff positions, the payment structure for contract defenders must be reformed to include hourly rates in order to ensure that contract defenders are not financially forced to take too many cases at once thus providing ineffective assistance of counsel.

In the likely event that the needs described are not met through the budget process and the workloads are not reduced to acceptable levels, the Commission and LOPD will take steps to ensure that each client is afforded constitutionally-adequate representation. These steps might take a number of forms including declining representation of cases, bringing motions to dismiss cases for failure to provide an adequate defense or pursuing litigation concerning the failure of the system to provide adequate counsel.

The Commission and LOPD recognize that the government budget process requires that specific dollar amounts be requested. Unfortunately, partial increases in funding, while helpful, will not alleviate LOPD's legal and ethical requirement to take the steps described above. We are informed by the State that the funds are not available to adequately fund indigent defense. We wish to maximize the number of dollars received so that as many clients can be served as possible. A twelve percent increase would be only a partial solution and would not provide the funds necessary to provide constitutional representation. Thus, the Commission and LOPD will need to continue taking other measures to protect the rights of clients and fulfill our constitutional obligation.

LOPD can not countenance spreading thinner resources that already do not provide effective counsel; it must instead limit its work to providing adequate assistance of counsel to as many clients as responsibly possible. The Commission and LOPD have already taken steps necessary to decline to represent some clients in Lea and Lincoln Counties due to inadequate funding, and will be required to continue to take steps to have defendants' cases removed from the system so that the needs of the remaining clients can be ethically met.

The Commission and LOPD will work to use resources responsibly but that responsibility always must include protection of the constitutional rights of clients.

The Commission and LOPD request a budget increase of 2 percent to the base budget and a 10.5 percent expansion increase as described below:

Expansion Request 1 – 200s/400s Categories – 25 Attorneys and 1 Staff FTE to Reduce Public Defender Caseloads to the Maximum National Advisory Committee Level and Strive to Meet Performance Standards Promulgated by the Commission

It is critical to add attorneys to the indigent defense system, because attorney caseloads are too high to provide effective assistance of counsel in every case. Even operating at the maximum national caseload standards is too high to sustain, but even meeting these maximums would be lower than the status quo for LOPD and will improve representation and efficiencies of justice.

Based on FY2017 caseloads, the increased need for attorney FTEs is as follows: 2 appellate/habeas, 2 Santa Fe/Rio Arriba, 5 Albuquerque, 2 Las Cruces, 1 Carlsbad, 3 Hobbs/Lovington, 1 Roswell, 2 Aztec/Farmington, 2 Clovis/Portales, 1 Gallup, 2 Alamogordo, and 2 Ruidoso. The request for an additional staff FTE is provide a statewide eligibility manager tasked with further standardizing and providing training statewide on eligibility procedures and improving communication with courts in areas without an LOPD office, which does directly affect caseloads. The cost for this expansion will be \$1,654,900 in the 200s category, \$75,000 in the 300s category, and \$209,100 in the 400s category. The total request for this expansion is \$1,939,000.

Expansion Request 2 – 200s/300s/400s Categories – 8 Associate Trial Attorneys, 2 Senior Secretaries, 3 Senior Paralegals, and 2 Investigators and \$200,000 to Meet Constitutional Obligations in Recent Bail Reform Requiring Defense Representation at Additional Pre-trial Detention Hearings

In addition to constitutional, ethical, statutory, and court rule requirements, recently established bail reform has created a new responsibility for the department. The new constitutional amendment and associated bond rule allows district attorneys to file a motion requesting that the court detain a defendant charged with a felony pending trial. The new rule requires the court to set a hearing on the motion within 5 days of filing. Counsel is required to represent defendants at the pre-trial detention hearings.

Approximately 100 hearings are held monthly in the Second Judicial District alone. This additional workload requires additional attorneys and staff to prepare and represent clients at the hearings. Approximate preparation time is based on the type of charge and criminal history, however, at a very basic level, the hearing itself requires due process and lasts from one to three hours. Attorney support includes paralegal assistance, investigation and social worker involvement. This new increase in workload is not reflected in the agency's documentation of attorney caseloads but is additional work required to properly defend and advocate for clients under constitutional mandates. Additional funds are a critical need. The cost for this expansion will be \$962,100 in the 200s category, \$122,000 in the 400s category to include equipment and travel for employees, and \$200,000 in the 300s

category to assign contract defenders to cases in areas without LOPD offices. The total request for this expansion is \$1,284,100.

Expansion Request 3 - 200s/400s Categories – 1 Managing Attorney, 5 Trial Attorneys, 1 Senior Secretaries, 2 Paralegal, and 1 Investigator for Alternate Defender Office

Using Alternate Defenders in addition to Contract Defenders in some locales will over time result in an estimated \$600,000 in savings in the 300s category to be used to partially fund Expansion Request 3. The cost for seven additional positions constitutes an expansion request of \$502,200 in the 200s category and \$25,000 in the 400s category. The total request for this expansion is \$527,200. In FY2017, LOPD transferred 3 FTE and additional resources as the first step in developing the Alternate Public Defender program; however, the FY2017 budget cut constricted any additional transfer of resources.

Expansion Request 4 – 200s/300s/400s Category –Pilot Project to Pay Hourly Rates to Contract Defenders in Serious Violent Cases and Double and Triple Flat Rate Payments to Contractors in Counties with Limited or Overburdened Contract Attorneys

Total request for this expansion is \$946,900. LOPD requests an additional \$650,000 for FY2019 to develop a project to pay contract attorney hourly rates to appropriately compensate defenders for their time. LOPD has earmarked \$400,000 in FY2018 to pilot an hourly rate program for capital cases. Providing hourly rates of \$85 for attorney time and \$35 for staff time up to the Commission's established cap of \$30,000 per case (excluding expert witness costs) will improve representation. Currently, these contract defenders must work many hours for free on serious cases due to the \$5,400 flat fee. This inability to adequately and fairly pay for the work done creates a situation where cutting corners may be necessary and where skilled lawyers are reluctant to contract with LOPD.

LOPD will limit the type of eligible cases and cease the hourly wage project when allocated money is expended. We expect to use the data from these specific types of cases to assess additional funding needs to further expand the program as needed. Therefore, LOPD requests \$650,000 in additional funding for FY2019. While New Mexico should pay these rates in all cases, it is critical we start paying them now in at least some of the most serious cases.

LOPD has ongoing challenges with finding contract defenders to handle cases in outlying counties such as Lea, Eddy, Chaves, and Lincoln. One obstacle is that contract defenders that accept cases in rural areas require extensive travel time for hearings, case preparation, and client visits. In FY2016, LOPD decided to offer double and triple of current flat rates in order to secure contract defenders for clients without counsel in specific counties. Due to the \$1.5 million dollar cut to the FY2017 budget, these increased payments were strictly limited. As a result, there was increased difficulty in assigning cases and an avoidable delay in providing counsel and case resolution in these counties. In order to address the shortage of contract defenders in these counties, LOPD requests \$250,000 for double and triple payments to contract defenders in designated counties.

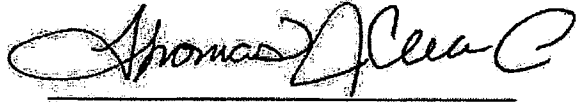
The cost for this expansion will be \$41,300 in the 200s category for 1 FTE to manage the hourly rate tracking and payments, \$5,600 in the 400s category to include equipment for employees, \$250,000 for double and triple flat payments and \$650,000 for hourly rates in the 300s category.

Expansion Request 5 – 400s Category –Development of Training Program and Materials to Improve Client Services Statewide and Improve Employee Retention

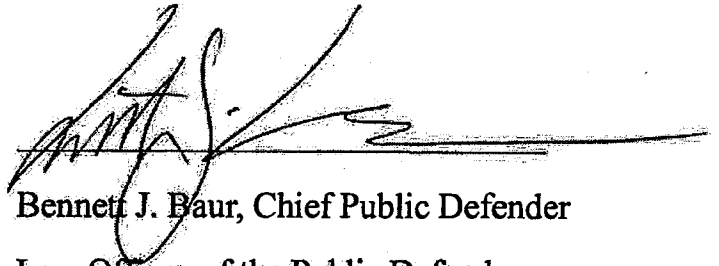
LOPD is dedicated to improving client services and increasing productivity and efficiency statewide. To that end, LOPD plans to provide more structured training to attorneys and staff. LOPD currently holds a variety of training options statewide, including an annual conference. However, dedicating specific funds to develop a statewide attorney training program will help prepare our newest attorneys for the practice of indigent defense. We expect that focusing on expanding the training offered to attorneys and staff will lead to improved representation for clients, increased retention and gains in productivity and efficiency. LOPD also values and wants to invest in providing training options to assisting our staff in building long term careers with the department.

The total cost of this expansion will be \$150,000 in the 400s with \$60,000 to pay for registrations, and \$90,000 for training materials, travel, per diem, and associated costs of attending trainings and seminars.

Respectfully submitted,

A handwritten signature in cursive script, reading "Thomas Joseph Clear III", written over a horizontal line.

Thomas Joseph Clear III, Chair
Public Defender Commission

A handwritten signature in cursive script, reading "Bennett J. Baur", written over a horizontal line.

Bennett J. Baur, Chief Public Defender
Law Offices of the Public Defender