

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Case No. S-1-SC - 36375

STATE OF NEW MEXICO, ex rel. BENNETT J. BAUR,  
*In his capacity as*  
*Chief Public Defender of the*  
*New Mexico Public Defender Department,*  
Petitioner,

And,

CHARLES LOPEZ,  
Real Party in Interest

vs.

THE HONORABLE WILLIAM G. W. SHOBRIDGE,  
*In his capacity as District Court Judge*  
*Lea County, Fifth Judicial District*  
Respondent.

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**BRIEF OF *AMICUS CURIAE***  
**AMERICAN BAR ASSOCIATION**  
**IN SUPPORT OF PETITIONERS**

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**TABLE OF CONTENTS**

I. INTEREST OF THE *AMICUS CURIAE* .....1

II. SUMMARY OF THE ARGUMENT .....5

III. ARGUMENT.....6

    A. Attorneys with Excessive Workloads Cannot Provide Effective Assistance  
    of Counsel as Required under the Sixth Amendment .....8

    B. Courts Should Craft Relief from Excessive Public Defender Workloads  
    that Adequately Takes into Account the Conditions and Circumstances in the  
    Particular Jurisdiction .....13

IV. Conclusion .....20

**MANDATORY DISCLOSURES AND STATEMENT OF COMPLIANCE**

This *Amicus Curiae* brief was authored without assistance, consultation or input from counsel for either party. No party to this case, nor any other third party, made a monetary contribution intended to fund the preparation or submission of this brief. This brief complies with the requirements of NMRA Rule 12-320.

## TABLE OF AUTHORITIES

### Cases

<i>Frye v. Missouri</i> , 132 S.Ct. 1399 (2012) .....	8
<i>Holloway v. Arkansas</i> , 435 U.S. 475, 486, 486 n. 9 (1978) .....	16
<i>In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender</i> , 51 So. 2d 1130 (Fla. 1990).....	12
<i>Kerr v. Parsons</i> , 378 P.3d 1 (N.M. 2016).....	8
<i>Kuren v. Luzerne Cty</i> , 146 A.3d 715 (Pa. 2016).....	8
<i>Luckey v. Harris</i> , 860 F.2d 1012 (11 <sup>th</sup> Cir. 1988), <i>rev'd on other grounds Luckey v. Miller</i> , 976 F.2d 673 (11 <sup>th</sup> Cir. 1992).....	8
<i>McMann v. Richardson</i> , 397 U.S. 759 (1970) .....	8
<i>Padilla v. Kentucky</i> , 559 U.S. 356 (2010) .....	9
<i>Rompilla v. Beard</i> , 545 U.S. 374 (2005) .....	9
<i>State v. Waters</i> , 370 S.W.3d 592 (Mo. 2012) .....	8, 12
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....	8, 9

### Other Authorities

ABA Defense Function Standards .....	4, 10, 11
ABA Eight Guidelines of Public Defense Related to Excessive Workloads (2009) .....	passim
ABA Ethics Committee’s Formal Opinion 06-441 .....	passim
ABA Model Rules of Prof’l Conduct 1.16 .....	7
ABA Model Rules of Prof’l Conduct, R. 1.1 .....	9
ABA Model Rules of Prof’l Conduct, R. 1.3 .....	9, 11
ABA Model Rules of Prof’l Conduct, R. 1.7 .....	12
ABA Standards for Criminal Justice Providing Defense Services.....	3, 4, 13
ABA Ten Principles of a Public Defense Delivery System (2002).....	passim
Daniel J. Hall, <i>A Workload Assessment Study for the New Mexico Trial Court Judiciary, New Mexico District Attorneys’ Offices, and the New Mexico Public Defender Department</i> , 70-90 (NCSC 2007).....	7, 17
NM Comm’n Performance Standards, Standard 1.3 .....	10
NM Rules of Prof’l Conduct, R. 16-116.....	7
NM Rules of Prof’l Conduct, R. 16-101 .....	9, 10
NM Rules of Prof’l Conduct, R. 16-103 .....	9, 11
Norman Lefstein, <i>Securing Reasonable Caseloads: Ethics and Law in Public Defense</i> (ABA 2011) .....	15
<i>The Louisiana Project, A Study of the Louisiana Public Defender System and Attorney Workload Standards</i> (ABA 2017) .....	4, 17, 18, 19

## **I. INTEREST OF THE *AMICUS CURIAE***

The American Bar Association (“ABA”), as *amicus curiae*, respectfully submits this brief in support of Petitioners. In resolving this matter, the ABA urges the Court to consider the ethical and professional obligations of the legal profession that require all lawyers, including public defenders, to provide competent and diligent representation to each of their clients.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its more than 400,000 members come from all 50 states and other jurisdictions. They include attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors and law students.<sup>1</sup>

Since its founding in 1878, the ABA has advocated for the ethical and effective representation of all clients, including indigent defendants. In 1908, the ABA adopted<sup>2</sup> its first Canons of Professional Ethics, setting out the duties owed

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<sup>1</sup> Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

<sup>2</sup> ABA policy is set by the ABA’s House of Delegates, a 500-member policymaking body. Recommendations may be submitted to the House of Delegates by ABA delegates representing states and territories, state and local bar

by lawyers to their clients. Continually revised and updated over the years, they are now the ABA Model Rules of Professional Conduct (“ABA Model Rules”).

In 1913, the ABA created the entity now known as the ABA Standing Committee on Ethics and Professional Responsibility (“ABA Ethics Committee”), which publishes formal ethics opinions on professional and judicial conduct. In 1920, the ABA created the entity now known as the Standing Committee on Legal Aid and Indigent Defendants (“ABA SCLAID”), which was charged with investigation and analysis of the administration of justice as it affects the poor and the promotion of remedial measures to assist them in realizing and protecting their rights.

Through these two entities, the ABA has worked to ensure that public defenders can provide effective assistance of counsel to their indigent clients. In 2002, the ABA adopted its Ten Principles of a Public Defense Delivery System (“ABA Ten Principles”), developed by ABA SCLAID.<sup>3</sup> Created as a “practical guide for government officials [and] policymakers,” the ABA Ten Principles “constitute the fundamental criteria necessary to design a system that provides

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associations, affiliated organizations, sections and division, ABA members and the Attorney General of the United States, among others. Recommendations that are adopted by the House of Delegates become ABA policy. *See* ABA General Information, available at <http://www.abanet.org/leadership/delegates.html>.

<sup>3</sup> ABA Ten Principles, available at [www.indigentdefense.org](http://www.indigentdefense.org) (last visited June 1, 2017).

effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.” *Id.* at Introduction.

Principle 5 requires that a public defender’s workload be “controlled to permit the rendering of quality representation.” *Id.* at Principle 5.

In 2006, the ABA Ethics Committee issued Formal Opinion 06-441, stating that public defenders have an affirmative ethical duty to reduce excessive caseloads. ABA Ethics Committee, *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation*, Formal Ethics Opinion 06-441 (“ABA Formal Opinion 06-441”). In 2009, the ABA adopted the ABA Eight Guidelines of Public Defense Related to Excessive Workloads. The ABA Eight Guidelines are a “detailed action plan” for public defense programs and their attorneys, “when they are confronted with too many persons to represent and are thus prevented from discharging their responsibilities under professional conduct rules.” *Id.* at Introduction.

The ABA has also worked to improve the quality of representation of indigent criminal defendants by concretely defining the obligations of defense counsel. The ABA was the first organization to recognize the need for standards for the provision of criminal defense services, adopting in 1967 the ABA Standards

for Criminal Justice Providing Defense Services (now in its third edition).<sup>4</sup> The ABA continues to refine its Standards for Criminal Justice, which define the practice standards for every lawyer in the criminal justice context, and include the ABA Defense Function Standards.<sup>5</sup>

Three documents resulting from the ABA's work in the fields of legal ethics and indigent defense bear directly on the issue before this Court: (1) ABA Formal Opinion 06-441;<sup>6</sup> (2) the ABA Eight Guidelines;<sup>7</sup> and (3) *The Louisiana Project, A Study of the Louisiana Public Defender System and Attorney Workload Standards* (ABA 2017).<sup>8</sup> Relying on the lessons learned in its 100-year history of working to improve quality representation generally, and its 90-year history of working for

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<sup>4</sup> ABA Standards for Criminal Justice Providing Defense Services (3rd Ed. 1992), available at <http://ww.abanet.org/crimjust/standards> (last visited May 22, 2017).

<sup>5</sup> ABA Defense Function Standards (4<sup>th</sup> Ed. 2015), available at <http://ww.abanet.org/crimjust/standards> (last visited May 22, 2017).

<sup>6</sup> ABA Formal Opinion 06-441, 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) (last visited June 1, 2017).

<sup>7</sup> ABA Eight Guidelines, available at [www.indigentdefense.org](http://www.indigentdefense.org) (last visited June 1, 2017).

<sup>8</sup> The Louisiana Project available at [www.indigentdefense.org](http://www.indigentdefense.org) (last visited June 1, 2017).

indigent defendants specifically, the ABA submits this brief to assist the Court in its consideration of this matter.

## **II. SUMMARY OF THE ARGUMENT**

All criminal defendants, regardless of their financial means, are entitled to effective assistance of counsel. To meet this Constitutional standard, ethical rules require attorneys to provide their clients with competent and diligent representation. An excessive caseload makes it impossible for even the most qualified and committed lawyer to provide competent and diligent representation to all of her clients all of the time. Inevitably, this results in a juggling act under which some clients at times do not receive effective assistance of counsel.

Petitioners have asserted that excessive caseloads prevent the Law Office of the Public Defender (“LOPD”) and its attorneys from providing all clients with the competent and diligent representation required by the New Mexico Rules of Professional Conduct and articulated in ABA professional standards. The court below found that LOPD is “chronically underfunded, understaffed and [has] caseloads that exceed National Advisory Commission on Criminal Justice Standards and Goals (NAC), and standards set by the New Mexico Public Defender Commission.” Under these circumstances, LOPD is not just permitted, but ethically required, to decline appointments.

Ultimately, courts must ensure that public defense providers and their lawyers are able to provide competent and diligent representation in accordance with their professional obligations and that the representation complies with the strictures of the Sixth Amendment. In determining appropriate relief for excessive public defender caseloads, reference to national caseload standards, while useful, is insufficient. Workload standards must take into account the practices and circumstances of the particular jurisdiction. A jurisdiction specific workload study is the most accurate way to set the appropriate workloads standards for LOPD. If such a workload study is not feasible, LOPD should be accorded substantial deference in determining the workload its attorneys can handle while meeting their Constitutional and ethical obligations. Accordingly, this Court should, under its power of superintending control, order lower courts to permit LOPD to decline appointments when LOPD deems necessary to provide effective assistance of counsel to its clients until such time as a workload study can be completed to determine the appropriate workload standard in New Mexico.

### **III. ARGUMENT**

This case comes before this Court because LOPD determined that its attorneys in Lea County had excessive caseloads and LOPD had no internal way of reallocating cases to correct the problem. Under these circumstances, LOPD was ethically required to seek to discontinue appointments and/or withdraw from cases

– and to take this corrective action in advance of representation. *See* NM R.P.C. 16-116(A)(1); ABA Model Rules 1.16(a)(1) (“A lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the representation will result in a violation of the rules of professional conduct or other law.”); ABA Eight Guidelines, Comment to Guideline 6 (“Continued representation in the face of excessive workloads imposes a mandatory duty to take corrective action in order to avoid furnishing legal services in violation of professional conduct rules.”); ABA Formal Opinion 06-441. If relief cannot be obtained from within the public defense provider by reassigning cases from one attorney to another, the provider should seek relief from the courts to protect their clients against Constitutional harm and their lawyers from ethical violations.<sup>9</sup> *See* ABA Eight Guidelines, Guideline 6 (“Public Defense Providers or

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<sup>9</sup> Excessive workloads are a longstanding problem for public defenders in New Mexico. In 2007, the Center for State Courts evaluated the workload of the trial courts, district attorneys and public defenders in New Mexico. *See* Daniel J. Hall, *A Workload Assessment Study for the New Mexico Trial Court Judiciary, New Mexico District Attorneys’ Offices, and the New Mexico Public Defender Department* (NCSC 2007) (“NCSC NM Workload Study 2007”), available at <https://nmsc.unm.edu/reports/2007/b.%20NMSC%202006-07%20Workload%20Final%20Report.pdf> (last visited May 26, 2017). The study concluded that the public defender department needed 40 additional full-time defenders and 45 additional support staff. *See id.* at 87-89. In *Kerr v. Parsons*, this Court observed that the Legislature has not funded public defense services at the amount deemed necessary by the independent public defense commission. 378 P.3d 1, 5-7 (N.M. 2016). These facts suggest that, while this case arises from Lea county, the caseload problem may impact many, if not all, LOPD offices.

lawyers file motions asking a court to stop the assignment of new cases and to withdraw from current cases, as may be appropriate, when workloads are excessive and other adequate alternatives are unavailable.”).

**A. ATTORNEYS WITH EXCESSIVE WORKLOADS CANNOT PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL AS REQUIRED UNDER THE SIXTH AMENDMENT**

All individuals charged with crimes have a constitutional right to the effective assistance of counsel.<sup>10</sup> *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970); *Strickland v. Washington*, 466 U.S. 668 (1984). In a claim for prospective relief, the question is whether indigent defendants face a substantial or unreasonable risk of ineffective assistance of counsel. *See Luckey v. Harris*, 860 F.2d 1012 (11<sup>th</sup> Cir. 1988), *rev'd on other grounds Luckey v. Miller*, 976 F.2d 673 (11<sup>th</sup> Cir. 1992); *Kuren v. Luzerne Cty*, 146 A.3d 715, 743 (Pa. 2016). When determining what constitutes effective assistance of counsel, courts must look to prevailing norms. *See Frye v. Missouri*, 132 S.Ct. 1399, 1408 (2012) (“Though the standard for counsel’s performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides.”); *Strickland*, 466 U.S. at 690.

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<sup>10</sup> As observed by the Missouri Supreme Court in *State v. Waters*, “while the ethical rules do not supplant ‘a trial judge’s obligation to protect a defendant’s Sixth Amendment rights,’ they do ‘run parallel to’ that duty.” 370 S.W.3d 592, 608 (Mo. 2012).

ABA standards are guides in determining prevailing norms, and, in turn, what constitutes effective assistance of counsel. *See Padilla v. Kentucky*, 559 U.S. 356, 367 (2010) (recognizing ABA standards as “valuable measures of the prevailing professional norms of effective representation.”); *see also Strickland*, 466 U.S. at 688 (“Prevailing norms of practice as reflected in the American Bar Association . . . are guides to determin[ing] what [performance of counsel] is reasonable.”); *Romilla v. Beard*, 545 U.S. 374, 387 (2005).

The rules of professional conduct safeguard the right to effective assistance of counsel by requiring all attorneys—including public defenders—to provide competent and diligent representation to each client. NM. R.P.C. 16-101, 16-103; ABA Model Rules 1.1, 1.3.<sup>11</sup> Competence requires not only legal knowledge and skill, but the “*thoroughness and preparation* reasonably necessary for the representation.”<sup>12</sup> NM R.P.C. 16-101 (emphasis added); ABA Model Rules 1.1. An

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<sup>11</sup> Although the New Mexico Rules of Professional Conduct control in the present case, the rules pertinent to the issues before this Court are identical to the ABA Model Rules. *See, e.g.*, NM R.P.C. 16-101 & ABA Model Rule 1.1. (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”); NM R.P.C. 16-103 & ABA Model Rule 1.3 (“A lawyer shall act with reasonable diligence and promptness in representing a client.”).

<sup>12</sup> LOPD Performance Standards similarly require counsel “to work with the Department to make sure that counsel has available sufficient time, resources, knowledge and experience to offer representation consistent with these standards in a particular matter.” New Mexico Public Defender Commission and the Law

essential element of competence is “adequate preparation.” *Id.* at Comment 5.

There are “no exceptions” for lawyers who represent indigent defense clients. *See* ABA Formal Opinion 06-441 (“The obligations of competence, diligence, and communication . . . apply equally to every lawyer.”).

In addition to the ethical requirements applicable to all lawyers, the ABA’s Defense Function Standards set forth the substantive standards by which all criminal defense lawyers should practice. *See, e.g.*, ABA Defense Function Standard 4-1.1(a) (“These Standards are intended to address the performance of criminal defense counsel in all stages of their professional work.”). The standards guide defense counsel to investigate the facts (Standard 4-4.1); research the law (Standard 4-4.6); communicate with clients (Standards 4-3.1, 4-3.3, 4-3.9, 4-5.1, 4-5.4); negotiate with prosecutors (Standards 4-6.1, 4-6.2, 4-6.3); file appropriate motions (Standards 4-3.2, 4-7.11, 4-8.1); and prepare for court (4-4.6). Defense attorneys should perform these tasks regardless of whether the case proceeds to trial or is resolved by guilty plea. *See id.* at 4-4.1, 4-6.1(b).

As recognized by the court below, LOPD lawyers in Lea County likely are providing effective assistance to their clients when they focus on particular cases.

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Offices of the Public Defender, *Performance Standards for Criminal Defense Representation*, Standard 1.3 (2016), available at <http://www.lopdm.us/pdf/2016PerfStand.pdf> (last visited June 1, 2017). Standard 1.3 further requires attorneys with excessive caseloads to report the problem to a supervisor and supervisors, in turn, to report problems they cannot resolve to the Chief Public Defender. *See id.*

However, a lawyer with too many clients and pending cases simply cannot comply with her ethical duties or perform all of the functions in the practice standards for all of her clients all of the time. *See* ABA Eight Guidelines, Guideline 1 (“[I]f workloads are excessive, neither competent nor quality representation is possible.”). The public defenders are in a classic Catch-22: competent work for one client inevitably results in unreasonable delay or lack of work for other clients. “For example, the failure of lawyers to interview clients thoroughly soon after representation begins and in advance of court proceedings, as necessary, is often due to excessive workloads.” *See id.* at Comment, Guidelines 1. Because an excessive workload creates a grave risk of injury for clients, the rules of professional conduct require lawyers to limit their workloads. *See* NM R.P.C. 16-103, Comment 2; ABA Model Rule 1.3, Comment 2 (“A lawyer’s workload must be controlled so that each matter can be handled competently.”). *See also* ABA Defense Function Standard 4-1.8(a) (Lawyers “should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client’s interest in independent, thorough or speedy representation, or has significant potential to lead to the breach of professional obligations.”); ABA Ten Principles of a Public Defense Delivery System (2002) (“ABA Ten Principles”), Principle 5 (“Defense counsel’s workload is controlled to permit the rendering of quality representation.”).

Additionally, when an excessive number of cases forces a lawyer to choose among the interests of clients, depriving some if not all of them of full competent and diligent defense services or imposing unconscionable delays on some clients, the situation constitutes a concurrent conflict of interest. *See* ABA Eight Guidelines, Comment to Guideline 1, citing *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 51 So. 2d 1130, 1135 (Fla. 1990). While the lawyer may be able to provide effective assistance of counsel and meet her ethical obligations with regard to some clients, doing so forces the lawyer to sacrifice effective assistance owed to her other clients and compliance with her ethical duties. In this situation, “[t]he representation of one client [is] directly adverse to another client.” ABA Model Rule 1.7(a)(2). Excessive caseloads create a substantial risk that clients will receive ineffective assistance of counsel. *See Waters*, 370 S.W.3d at 606-607.

**B. COURTS SHOULD CRAFT RELIEF FROM EXCESSIVE PUBLIC DEFENDER WORKLOADS THAT ADEQUATELY TAKES INTO ACCOUNT THE CONDITIONS AND CIRCUMSTANCES IN THE PARTICULAR JURISDICTION**

Ultimately, the obligation rests with the courts to ensure that public defense providers and their lawyers are able to provide competent and diligent representation in accordance with their professional obligations and that the representation complies with the strictures of the Sixth Amendment. *See, e.g.*, ABA Providing Defense Services Standards, 5-5.3(b) (“Courts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations”); ABA Eight Guidelines, Comment to Guideline 7. When excessive workloads prevent public defenders from complying with ethical and Constitutional standards, the workloads must be reduced.<sup>13</sup>

The ABA Ten Principles provide that “[n]ational caseload standards should in no event be exceeded.” ABA Ten Principles, Commentary to Principle 5. While

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<sup>13</sup> A court has the discretion to determine how the workload is reduced, whether by dismissal of cases or by assignment of cases elsewhere. However, assignment to other lawyers within the public defense provider, without the additional remedy of increased positions or resources, may simply relocate rather than resolve the ethical issue. *See* ABA Eight Guidelines, Comment to Guideline 5 (noting that reassignment to other attorneys “may not be a feasible alternative . . . if funds are not available to compensate the lawyers”). It is the obligation of the court to craft a remedy that ensures that all clients represented by the public defense provider have access to an attorney capable of complying with ethical and Constitutional standards.

national standards are a useful point of reference, alone they are insufficient to determine the appropriate workload for a jurisdiction. *See id* (citing the National Advisory Commission on Criminal Justice Standards and Goals (“NAC”), Standard 13.12, which set numeric caseload limits). Indeed, in ABA Formal Opinion 06-441, the Association concluded that “[a]lthough such standards may be considered, they are not the sole factor in determining if a workload is excessive. This determination depends not only on the number of cases, but also on such factors as case complexity, the availability of support services, the lawyer’s experience and ability and the lawyer’s nonrepresentational duties.” ABA Formal Opinion 06-441. In other words, while a caseload above the applicable NAC standard is necessarily excessive,<sup>14</sup> a caseload below the NAC standards can also be excessive.

The NAC standards were not based on empirical study. *See* Norman Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense*,<sup>15</sup> 43-45 (ABA 2011) (*citing* National Advisory Commission on Criminal Justice Standards and Goals: Courts 276 (1973)). Indeed, the commentary to the standards

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<sup>14</sup> The court’s acknowledgment that LOPD is understaffed and its attorneys have caseloads that exceed the NAC standards alone should have been conclusive on the question of whether the caseloads are excessive.

<sup>15</sup> Available at [http://www.americanbar.org/content/dam/aba/publications/books/ls\\_sclaid\\_def\\_securing\\_reasonable\\_caseloads.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf).

notes that the standards would need to be adjusted based on the definition of case, the classification system of a jurisdiction and other local conditions, among other factors. *See id.*

Additionally, the NAC standards were established in 1973 and have never been updated. *See id.* at 43-44. The standards thus do not take into account many complicated aspects of today's criminal defense practice, including forensics and the heightened use of experts, sentencing practices like mandatory minimums and guidelines calculations, and the complicated collateral consequences facing each defendant. *See id.* at 44 n.95 (noting the impact of collateral consequences on public defense practice). For these reasons, simply ordering public defense attorneys to comply with the NAC standards is inadequate to resolve the ethical and Constitutional difficulties confronting the attorneys.

At the same time, courts should resist improper interference with public defender providers and their relationships with their clients. *See* ABA Eight Guidelines, Guideline 7; *see also* Comment to Guideline 7 (“While it is appropriate for judges to review motions asking that assignments be stopped . . . , courts should not undertake to micro-manage the operations of the defense programs.”). A court should not seek, for example, to regularly review the details of each public defender's cases to determine if a caseload is excessive and, if so, which cases should be transferred from that public defender. *See id.* Such an intrusive remedy

risks running afoul of the independence critical to defense function, as well as jeopardizing judicial independence. *See* ABA Ten Principles, Commentary to Principle 1.

For this reason, the assessment of LOPD regarding the workload of its attorneys should receive substantial deference. *See* ABA Eight Guidelines, Comment to Guideline 6 (Public defender “representations regarding workload should be accepted by the court.”). “Providers are in the best position to assess the workloads of their lawyers.” *Id.* at Comment to Guideline 7. Moreover, the providers are officers of the court. When they “address the judge solemnly upon a matter before the court, their declarations are virtually made under oath” and their representations “should be given the weight commensurate with the grave penalties risked for misrepresentation.” *Id.* (citing *Holloway v. Arkansas*, 435 U.S. 475 (1978)). The court should thus defer to LOPD to assess when an office requires caseload relief.

Alternatively, this Court may seek to establish jurisdiction-specific workload standards. The best way to ascertain the appropriate standards is through a jurisdiction-specific workload study, which set the appropriate workload limits for public defense attorneys under the particular conditions of their practice, providing clarity on when the public defense provider is entitled to caseload relief.

New Mexico previously undertook a workload study in 2007. *See* Daniel J. Hall, *A Workload Assessment Study for the New Mexico Trial Court Judiciary, New Mexico District Attorneys' Offices, and the New Mexico Public Defender Department*, 70-90 (NCSC 2007). Completed early in the development of methodologies for assessing workloads, the study was based on only a six-week period of timekeeping and used the NAC standards as guides. *See id.* at 78. Despite sanctioning workloads over the NAC standards for defenders representing accused juveniles and misdemeanants, the study concluded that the workloads of New Mexico public defenders were excessive. *See id.* at 87-89. The recommended workload standards were never adopted.

In recent years, ABA SCLAID has worked with experts in econometrics to employ the Delphi method to develop reliable, jurisdiction-specific, annual caseload numbers that are empirically based. The Delphi methodology was developed by the RAND Corporation in the 1960's to allow researchers to gather expert opinion and generate reliable consensus. *See The Louisiana Project* at Appendix D. It is used to develop standards in situations not easily reducible to numeric calculations and has been employed in a wide variety of disciplines including health care, education, information systems, transportation and engineering. *See id.* at 14 (citation omitted).

ABA SCLAIID has completed two public defender workload studies using the Delphi method: *The Missouri Project* and *The Louisiana Project*.<sup>16</sup> The method begins with a careful analysis of the jurisdiction and its criminal defense practice to identify the case types that exist in the jurisdiction and the case tasks required of defense counsel in each of the case types. *See id.* at 16. The methodology employs an expert panel of distinguished and experienced criminal defense lawyers, both private practitioners and public defenders, from the jurisdiction, who take a standards driven online survey on the amount of time required by public defenders to complete the various defense tasks necessary (e.g., interviewing clients, conducting investigations, preparing for hearings, etc.) to represent their clients in different types of cases (e.g., minor felony, violent felony, drug-related felony, sexual assault felony). *See id.* The questions posed of the Delphi panel are aimed at determining how much time a public defender needs to meet their ethical obligations to their client and comply with Constitutional norms. After the first survey iteration, the results of the panels are compiled and distributed to the panel, along with a second survey, permitting the panelists to revise their responses after considering the input of the other experts. *See id.* Finally, the expert panel is brought together in-person for a day-long meeting to reach consensus about the amounts of time required for the various tasks. *See id.* The resulting data shows the

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<sup>16</sup> Both studies are available at [www.indigentdefense.org](http://www.indigentdefense.org).

number of hours necessary for a public defender to represent a client charged with each case type. *See id.* The data can be compiled to generate workload standards, as well as compared to historical caseload and staffing data to quantify current deficiencies. *See id.*

The results of ABA SCLAID's Delphi studies substantiate concerns that the NAC standards can be too high for today's public defense practice. For example, the NAC standards set misdemeanor caseloads at 400 per year per attorney. In Louisiana, ABA SCLAID's Delphi study, taking into account the specific types of offense charged as a misdemeanor and what a lawyer is required to do in those types of case, concluded that the average low level misdemeanor case would require 7.94 hours of attorney time. *See* The Louisiana Project at 20. Based on a work year of 2080 hours (52 weeks, 40 hours per week), a full-time public defender in Louisiana can handle a maximum of 262 low level misdemeanors. *See id.* ABA SCLAID's Delphi studies thus confirm the assertion, established in ABA standards, that conditions in the jurisdiction must be taken into account when establishing appropriate workload limits. *See, e.g.,* ABA Ten Principles, Commentary to Principle 5; ABA Ethics Opinion 06-441.

If this Court seeks to remedy the excessive caseload of LOPD lawyers in Lea County by means of a caseload limit,<sup>17</sup> the ABA strongly urges that this Court not rely solely on the NAC standards, nor to utilize the 2007 workload study, which was based on the NAC standards. Rather, the ABA encourages the Court to take note of recent innovations in workload standards and employ a methodology that takes into account the conditions and specific case types in the jurisdiction, as well as the ethical and practice standards that are designed to ensure compliance with Constitutional norms, and relies upon the expertise of defense lawyers in establishing the time needed to provide effective assistance of counsel.

#### **IV. Conclusion**

For the foregoing reasons, *amicus curiae* the American Bar Association respectfully requests that the Supreme Court of New Mexico acknowledge the excessive workload of the public defenders in Lea County and carefully consider the ethical and professional obligations of the legal profession in crafting its remedy in this case. Under its power of superintending control, this Court should order lower courts to permit LOPD to decline appointments when LOPD deems necessary to provide effective assistance of counsel to its clients until such time as

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<sup>17</sup> As noted above, when an appropriate workload study cannot be undertaken, the courts should rely on the public defense provider to determine when workloads are manageable. *See* ABA Eight Guidelines, Comment to Guideline 7 (noting that “Providers are in the best position to assess the workloads of their lawyers”).

a workload study can be completed to determine the appropriate workload standards in New Mexico.

Respectfully submitted,

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#### Statement of Compliance

I hereby certify that the body of this Brief of *Amicus Curiae* complies with Rule 12-318(F)(2) NMRA and further that the same contains 4550 words as calculated by the Word Count function of Microsoft Word.

/s/ Paul M. Linnenburger  
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## CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief of *Amicus Curiae* was served by mail to the following on this 5<sup>th</sup> day of June 2017:

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