

1 SENATE BILL 321

2 **52ND LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2015**

3 INTRODUCED BY

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10 AN ACT

11 RELATING TO INDIGENT DEFENSE; AMENDING THE INDIGENT DEFENSE ACT  
12 AND THE PUBLIC DEFENDER ACT TO MAKE THE REQUIREMENTS OF THOSE  
13 ACTS CONGRUENT; REQUIRING THE PUBLIC DEFENDER DEPARTMENT TO  
14 MAKE DETERMINATIONS OF INDIGENCY; ALLOWING FOR A HEARING TO  
15 CONTEST A DETERMINATION OF NON-INDIGENCY; PROVIDING FOR  
16 REIMBURSEMENTS FOR SERVICES UNDER THE PUBLIC DEFENDER ACT TO BE  
17 PAID TO THE PUBLIC DEFENDER CLIENT REIMBURSEMENT FUND.

18  
19 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

20 SECTION 1. Section 31-15-7 NMSA 1978 (being Laws 1973,  
21 Chapter 156, Section 7, as amended) is amended to read:

22 "31-15-7. CHIEF PUBLIC DEFENDER--GENERAL DUTIES AND  
23 POWERS.--

24 A. The chief is responsible to the commission for  
25 the operation of the department. It is the chief's duty to

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1 manage all operations of the department and to:

2 (1) administer and carry out the provisions of  
3 the Public Defender Act with which the chief is charged;

4 (2) exercise authority over and provide  
5 general supervision of employees of the department; and

6 (3) represent and advocate for the department  
7 and its clients.

8 B. To perform the chief's duties, the chief has  
9 every power implied as necessary for that purpose, those powers  
10 expressly enumerated in the Public Defender Act or other laws  
11 and full power and authority to:

12 (1) exercise general supervisory authority  
13 over all employees of the department;

14 (2) delegate authority to subordinates as the  
15 chief deems necessary and appropriate;

16 (3) within the limitations of applicable  
17 appropriations and applicable laws, employ and fix the  
18 compensation of those persons necessary to discharge the  
19 chief's duties;

20 (4) organize the department into those units  
21 the chief deems necessary and appropriate to carry out the  
22 chief's duties;

23 (5) conduct research and studies that will  
24 improve the operation of the department and the administration  
25 of the Public Defender Act;

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1 (6) provide courses of instruction and  
2 practical training for employees of the department that will  
3 improve the operation of the department and the administration  
4 of the Public Defender Act;

5 (7) purchase or lease personal property and  
6 lease real property for the use of the department;

7 (8) maintain records and statistical data that  
8 reflect the operation and administration of the department;

9 (9) submit an annual report and budget  
10 covering the operation of the department together with  
11 appropriate recommendations to the commission and, upon  
12 approval by the commission, to the legislature and the  
13 governor;

14 (10) serve as defense counsel under the Public  
15 Defender Act as necessary and appropriate;

16 (11) formulate a fee schedule for attorneys  
17 who are not employees of the department who serve as counsel  
18 for indigent persons under the Public Defender Act;

19 (12) adopt a standard to determine indigency;

20 (13) ~~[provide for the collection of]~~ collect a  
21 reimbursement from each person who has received legal  
22 representation or another benefit under the Public Defender Act  
23 after a ~~[determination is made]~~ court order is issued stating  
24 that the person ~~[was not indigent according to the standard for~~  
25 ~~indigency adopted by the department]~~ is to make reimbursements

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1 for the services provided pursuant to Section 31-16-7 NMSA  
2 1978. Any amounts recovered shall be paid to the state  
3 treasurer for credit to the public defender client  
4 reimbursement fund and shall not revert to the general fund;  
5 and

6 ~~[(14) require each person who desires legal~~  
7 ~~representation or another benefit under the Public Defender Act~~  
8 ~~to enter into a contract with the department agreeing to~~  
9 ~~reimburse the department if a determination is made that the~~  
10 ~~person was not indigent according to the standard for indigency~~  
11 ~~adopted by the department; and~~

12 ~~(15)]~~ (14) certify contracts and expenditures  
13 for litigation expenses, including contracts and expenditures  
14 for professional and nonprofessional experts, investigators and  
15 witness fees, but not including attorney contracts, pursuant to  
16 the provisions of the Procurement Code."

17 SECTION 2. Section 31-15-12 NMSA 1978 (being Laws 1973,  
18 Chapter 156, Section 12, as amended) is amended to read:

19 "31-15-12. EXPLANATION OF RIGHTS--WAIVER OF COUNSEL--  
20 APPLICATION FEE--INDIGENCY DETERMINATION.--

21 A. If any person charged with any crime or a  
22 delinquent act that carries a possible sentence of imprisonment  
23 appears in any court without counsel, the judge shall inform  
24 ~~[him]~~ the person of ~~[his]~~ the person's right:

25 (1) to confer with the district public

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1 defender; and

2 (2) if [~~he~~] the person is financially unable  
3 to obtain counsel, to be represented by the district public  
4 defender at all stages of the proceedings against [~~him~~] the  
5 person.

6 B. Following notification of any person under  
7 Subsection A of this section, the judge shall notify the  
8 district public defender and continue the proceedings until the  
9 person has applied with the district public defender.

10 C. A person shall pay a nonrefundable application  
11 fee of ten dollars (\$10.00) at the time the person applies with  
12 the public defender for representation. The fee shall be  
13 deposited in the public defender automation fund. The public  
14 defender shall determine if the person is indigent and unable  
15 to pay the fee [~~subject to review by the court. When the~~  
16 ~~person remains in custody and is unable to pay the fee, the~~  
17 ~~court may waive payment of] and may waive the fee.~~

18 D. Peace officers shall notify the district public  
19 defender of any person not represented by counsel who is being  
20 forcibly detained and who is charged with, or under suspicion  
21 of, the commission of any crime that carries a possible  
22 sentence of imprisonment, unless the person has previously  
23 appeared in court upon that charge.

24 [~~E. Any person entitled to representation by the~~  
25 ~~district public defender may intelligently waive his right to~~

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1 ~~representation. The waiver may be for all or any part of the~~  
2 ~~proceedings. The waiver shall be in writing and countersigned~~  
3 ~~by a district public defender.]"~~

4 SECTION 3. A new section of the Public Defender Act is  
5 enacted to read:

6 "[NEW MATERIAL] COUNSEL NOT SUBJECT TO LIABILITY.--An  
7 attorney assigned or contracted with to perform services under  
8 the Public Defender Act or the Indigent Defense Act shall not  
9 be held liable in any civil action with respect to performance  
10 or nonperformance of such services."

11 SECTION 4. Section 31-16-2 NMSA 1978 (being Laws 1968,  
12 Chapter 69, Section 59, as amended) is amended to read:

13 "31-16-2. DEFINITIONS.--As used in the Indigent Defense  
14 Act:

15 A. "detain" means to have in custody or otherwise  
16 deprive of freedom of action;

17 B. "expenses", when used with reference to  
18 representation, includes the expenses of investigation, other  
19 preparation and trial;

20 C. "needy person" means a person who, at the time  
21 [~~his~~] the person's need is determined by the court, is unable,  
22 without undue hardship, to provide for all or a part of the  
23 expenses of legal representation from available present income  
24 and assets; and

25 D. "serious crime" includes a felony and any

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1 misdemeanor or offense [~~which~~] that carries a possible penalty  
2 of confinement [~~for more than six months~~] in any prison or  
3 jail."

4 SECTION 5. Section 31-16-3 NMSA 1978 (being Laws 1968,  
5 Chapter 69, Section 60) is amended to read:

6 "31-16-3. RIGHT TO REPRESENTATION.--

7 A. A needy person [~~who is being detained by a law~~  
8 ~~enforcement officer, or who is under formal charge of having~~  
9 ~~committed, or is being detained under a conviction of, a~~  
10 ~~serious crime~~] is entitled to be represented by an attorney to  
11 the same extent as a person [~~having his own~~] who is able to  
12 retain counsel and to be provided with the necessary services  
13 and facilities of representation, including investigation and  
14 other preparation. The attorney, services and facilities and  
15 expenses and court costs shall be provided at public expense  
16 for needy persons. Any law enforcement and prosecution  
17 generated discovery in the prosecution of the criminal case  
18 shall be provided to the needy person at no charge to the  
19 defendant or the attorney representing the defendant.

20 B. A needy person entitled to representation by an  
21 attorney under Subsection A of this section is entitled to be:

22 (1) counseled and defended at all stages of  
23 the matter beginning with the earliest time when a person  
24 [~~providing his own~~] who is able to retain counsel would be  
25 entitled to be represented by an attorney;

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1 (2) represented in any appeal or review  
2 proceedings; and

3 (3) represented in any other postconviction  
4 proceeding that the attorney or the needy person considers  
5 appropriate unless the court in which the proceeding is brought  
6 determines that it is not a proceeding that a reasonable person  
7 with adequate means would be willing to bring at [~~his own~~]  
8 personal expense.

9 C. A needy person's right to a benefit under this  
10 section is unaffected by [~~his~~] the needy person's having  
11 provided a similar benefit at [~~his own~~] personal expense, or by  
12 [~~his~~] having waived it, at an earlier stage."

13 SECTION 6. Section 31-16-4 NMSA 1978 (being Laws 1968,  
14 Chapter 69, Section 61) is amended to read:

15 "31-16-4. NOTICE OF RIGHT TO REPRESENTATION.--

16 A. If a person who is being detained by a law  
17 enforcement officer, or who is under formal charge of having  
18 committed, or is being detained under a conviction of, a  
19 serious crime is not represented by an attorney under  
20 conditions in which a person having [~~his own~~] counsel would be  
21 entitled to be so represented, the law enforcement officers  
22 concerned, upon commencement of detention, or the court, upon  
23 formal charge, as the case may be, shall clearly inform [~~him~~]  
24 the person detained or charged of the right of a needy person  
25 to be represented by an attorney at public expense and, if the

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1 person detained or charged does not have an attorney, notify  
2 the district court concerned that ~~[he]~~ the person detained or  
3 charged is not so represented.

4 B. Upon commencement of any later judicial  
5 proceeding relating to the same matter, the presiding officer  
6 shall clearly inform the person so detained or charged of the  
7 right of a needy person to be represented by an attorney at  
8 public expense.

9 C. If the district court determines that the person  
10 is entitled to be represented by an attorney at public expense,  
11 ~~[it]~~ and the public defender is unavailable to provide  
12 representation, the court shall promptly assign an attorney who  
13 shall represent the person in accordance with the terms of  
14 ~~[his]~~ the assignment."

15 SECTION 7. Section 31-16-5 NMSA 1978 (being Laws 1968,  
16 Chapter 69, Section 62) is amended to read:

17 "31-16-5. DETERMINATION OF INDIGENCY.--

18 A. The determination of whether a person covered by  
19 Section ~~[60 of the Indigent Defense Act]~~ 31-16-3 NMSA 1978 is a  
20 needy person shall be deferred until ~~[his]~~ the person's first  
21 appearance in court or in a ~~[suit]~~ hearing for payment or  
22 reimbursement under Section ~~[66 of the Indigent Defense Act]~~  
23 31-16-7 NMSA 1978, whichever occurs earlier. ~~[Thereafter, the~~  
24 ~~court concerned shall determine, with respect to each~~  
25 ~~proceeding, whether he is a needy person.]~~

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1           B. The public defender department shall establish  
2 the indigency of a person eligible for representation. In  
3 determining whether a person is a needy person and the extent  
4 of ~~[his]~~ the person's inability to pay, ~~[the court concerned~~  
5 ~~may consider such]~~ factors such as the nature of the charges,  
6 income, property owned, outstanding obligations and the number  
7 and ages of ~~[his]~~ the person's dependents may be considered.  
8 Release on bail does not necessarily prevent ~~[him]~~ the person  
9 from being a needy person. In each case, the person shall,  
10 subject to the penalties for perjury, certify in writing or by  
11 other record material factors relating to ~~[his]~~ the person's  
12 ability to pay as the court prescribes.

13           C. ~~[To the extent that a person covered by Section~~  
14 ~~60 of the Indigent Defense Act is able to provide for an~~  
15 ~~attorney, the other necessary services and facilities of~~  
16 ~~representation and court costs, the court may order him to~~  
17 ~~provide for their payment.]~~ A person shall have the right to  
18 challenge the public defender department's determination of  
19 non-indigency at a hearing before the judge presiding over the  
20 person's case."

21           SECTION 8. Section 31-16-7 NMSA 1978 (being Laws 1968,  
22 Chapter 69, Section 64) is amended to read:

23           "31-16-7. RECOVERY FROM DEFENDANT.--

24           ~~[A. The district attorney may, on behalf of the~~  
25 ~~state, recover payment or reimbursement, as the case may be,~~

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1 ~~from each person who has received legal assistance or another~~  
2 ~~benefit under the Indigent Defense Act:~~

3 ~~(1) to which he was not entitled;~~

4 ~~(2) with respect to which he was not a needy~~  
5 ~~person when he received it; or~~

6 ~~(3) with respect to which he has failed to~~  
7 ~~make the certificate required by Section 62B of the Indigent~~  
8 ~~Defense Act and for which he refuses to pay. Suit must be~~  
9 ~~brought within six years after the date on which the aid was~~  
10 ~~received.~~

11 ~~B. The district attorney may, on behalf of the~~  
12 ~~state, recover payment or reimbursement, as the case may be,~~  
13 ~~from each person other than a person covered by Subsection A~~  
14 ~~who has received legal assistance under the Indigent Defense~~  
15 ~~Act and who, on the date on which suit is brought, is~~  
16 ~~financially able to pay or reimburse the state for it according~~  
17 ~~to the standards of ability to pay applicable under the~~  
18 ~~Indigent Defense Act but refuses to do so. Suit must be~~  
19 ~~brought within three years after the date on which the benefit~~  
20 ~~was received.~~

21 ~~G. Amounts recovered under this section shall be~~  
22 ~~paid to the state treasurer for credit to the state general~~  
23 ~~fund.]~~

24 A. At the conclusion of the case of a person who  
25 has received legal assistance or another benefit under the

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1 Indigent Defense Act or the Public Defender Act, the judge may  
2 require a hearing to determine the defendant's ability to pay  
3 all or part of the assistance or benefit provided by the public  
4 defender or other assigned counsel. The public defender or  
5 other assigned counsel may make representations at the hearing  
6 regarding the person's ability to pay for the assistance or  
7 benefit.

8 B. Reimbursement as determined by the court at the  
9 conclusion of the person's case shall be deemed a civil  
10 judgment issued by the judge and filed with the county clerk  
11 and enforceable as any other civil judgment.

12 C. Any amounts recovered shall be paid to the state  
13 treasurer for credit to the public defender client  
14 reimbursement fund and shall not revert to the general fund."

15 SECTION 9. Section 31-16-10 NMSA 1978 (being Laws 1968,  
16 Chapter 69, Section 67) is amended to read:

17 "31-16-10. COUNSEL NOT SUBJECT TO LIABILITY.--[No] An  
18 attorney assigned or contracted with to perform services under  
19 the Indigent Defense Act or the Public Defender Act shall not  
20 be held liable in any civil action [respecting his] with  
21 respect to the performance or nonperformance of such services."