

STATE OF NEW HAMPSHIRE

2024-2025

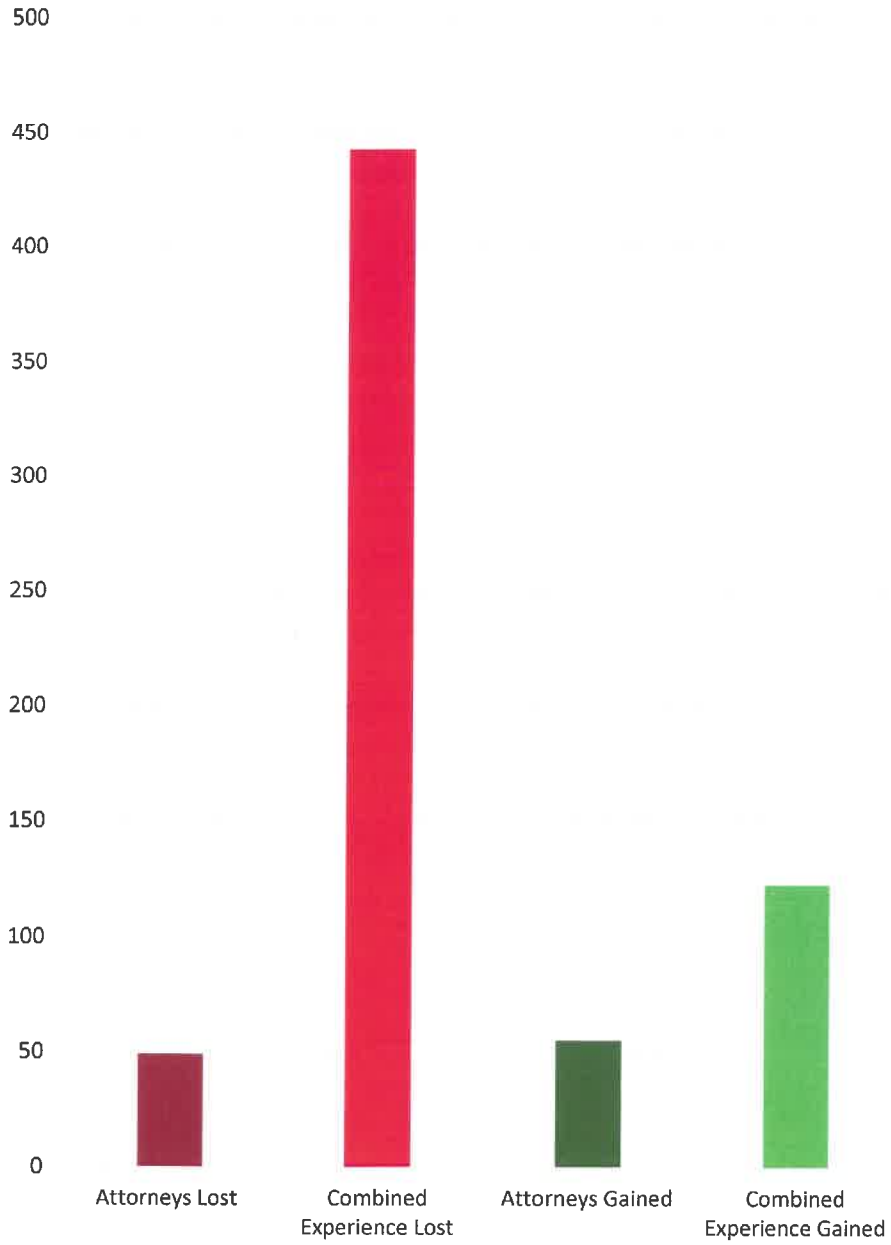


Judicial Council

Mission Statement

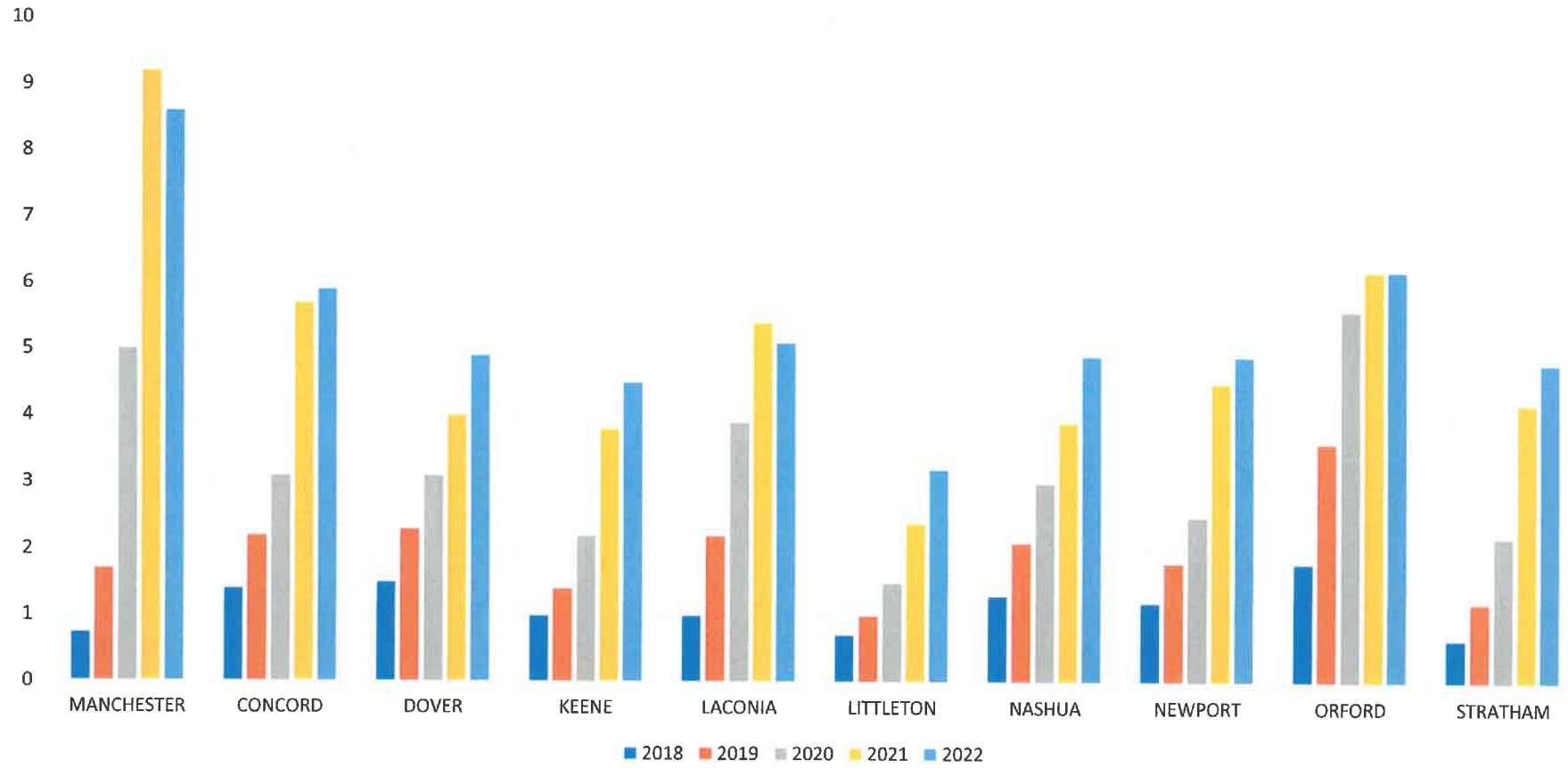
To oversee the delivery of effective legal representation to indigent NH residents in criminal, child protection and guardianship court proceedings and to engage in public/private partnerships for civil legal services.

**Impact of Public Defender Departures
Since Issuance of March 13, 2020
Executive Order 2020-04***



*An order declaring a state of emergency due to Novel Coronavirus (COVID-19)

Data Size per Office (TB) 2018 - 2022



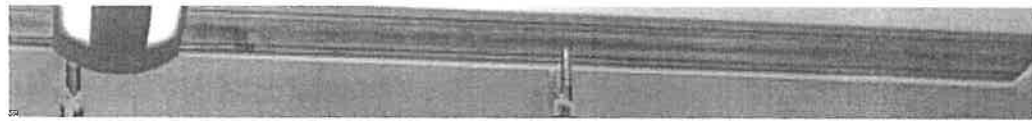
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CONCORD MONITOR

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N.H. Supreme Court task force addresses shortage of public defenders



By [SCOTT MERRILL \(/byline?byline=By SCOTT MERRILL \)](#)

NH Bar News

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The so-called “Great Resignation” that continues to affect businesses and organizations across the country has hit New Hampshire Public Defender — essentially the state’s largest law firm — where 32 attorneys have departed over the past 15 months.

New Hampshire Public Defender contracts with the state of New Hampshire to provide representation to indigent clients in criminal, juvenile and involuntary commitment proceedings throughout the state.

“We’re losing an attorney every two weeks,” said NHPD Executive Director Randy Hawkes. “We try to find competent lateral hires but it’s difficult.

“The job market is favorable for anyone looking right now and the pay rates for private practice far and away outstrip public defender pay scales.”

Attorney salaries at NHPD start at \$53,000 with a cap of \$86,900 after 11 years. Lateral hires allow attorneys to come in from other firms at the same pay rate they were receiving.

By comparison, Hawkes said the starting salary at New Hampshire county attorneys’ offices is \$67,000 and that attorneys at Committee for Public Counsel Services (the Massachusetts version of NHPD) also start at \$67,000.

“There’s been an outflux, if you will, across our southern border,” he said.

Sarah Blodgett, director of the New Hampshire Judicial Council, which provides funding for the Public Defender, the Indigent Defense Fund and the Contract Attorney Program, said the council recently received \$900,000 in federal funding for the next two years that can be used for lateral hires.

“Randy has been aggressively recruiting lawyers from across the country to come to Public Defender’s office and has had some success,” she said. “And now we have this pot of money, but as Randy said, we’re competing with better salaries and frankly easier jobs. This is a hard job.”

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Supreme Court Task Force

In September, New Hampshire Supreme Court Chief Justice Gordon MacDonald requested that a task force be formed and chaired by Justice Patrick Donovan to address NHPD's attrition problem, which has led to approximately 2,000 criminal cases in the Circuit Court without appointed counsel.

The task force, made up of attorneys and judges from around the state, released a report with recommendations on Oct. 27.

The report states that NHPD and county attorneys across the state are confronting "dangerously high caseloads" and recommends increased recruitment efforts, early case resolution, a scheduling pause, public awareness, training and mentoring, rule changes that would allow pro hac vice (allowing attorneys from outside jurisdictions to represent indigent clients), and additional funding.

"This problem is significant. Ultimately, more resources are needed by the public defender's office and the county attorneys' offices across the state," Justice Donovan said. "The private bar needs to step in as well."

In August, Superior Court Judge John C. Kissinger e-mailed more than 20 attorneys asking for their help in what he referred to as "a crisis in securing representation for indigent criminal defendants in Merrimack County." 5

According to the task force report, Judge Kissinger has successfully recruited private practitioners to accept cases in Merrimack County, and one task force recommendation includes investigating how to secure malpractice coverage for retired practitioners willing to accept cases pro bono.

High caseloads, low pay

NHPD's contract establishes case limits of 70 open cases per attorney and allows the program to limit the intake of new cases when those levels have been reached.

Hawkes said NHPD caseloads have exceeded contractual limits statewide for more than two years.

In August, before the new lawyers started, there were only 123 attorneys on staff who averaged 91 open cases each. This is 30 percent above the maximum set by NHPD's state contract.

Today a quarter of all public defenders in the state have more than 100 open cases.

“The new lawyers are all very intelligent, capable, committed lawyers who will become excellent public defenders. But we cannot give them 80 or 90 cases on day one. There is a learning curve, and caseloads must be developed over time,” Hawkes said.

Another factor that keeps attorney caseloads high is attrition. When experienced attorneys leave an office, Hawkes explained, that office must absorb the cases the departing attorney leaves behind.

“As caseloads have risen, public defenders have gone above and beyond their obligations because they don’t want defendants to go unrepresented. But burgeoning caseloads have taken a toll on our staff,” he said. “Public Defender has seen unprecedented attrition over the past year and a half.”

Prior to the pandemic, Hawkes said about 10 to 12 attorneys left NHPD.

“Unfortunately, the situation today is a challenge for us at a time when we need every able body in the indigent defense system we can maintain,” he said. “It’s particularly troubling when we lose experienced attorneys. The criminal justice system, not only public defenders but prosecutors — it behooves the entire system to retain experienced people because they know how to move cases and they work well together.”

Hawkes explained that the departure of experienced NHPD attorneys presents the “doubly painful” issue of remaining caseloads.

“When our experienced counsel leave, they often have over a hundred cases that have to be absorbed by the remaining attorneys in that office,” he said. “And this exacerbates the caseload crisis.”

The ultimate measure of what constitutes competent and diligent representation, Hawkes continued, is “whether an attorney has sufficient time to meet with all clients, review all discovery (including audio and video evidence), conduct all necessary investigation, consult with experts when necessary, file appropriate motions and conduct pretrial litigation, attend all pretrial conferences and other hearings, explore diversion or treatment options, negotiate with prosecutors and prepare adequately for trial.”

Contract and assigned cases

Robin Melone, a criminal defense attorney and president of the New Hampshire Association of Criminal Defense Lawyers, as well as a task force member, described the NHPD, which represents approximately 85 percent of cases coming through the system, as a crucial first line of defense.

When the NHPD cannot take cases because of conflicts of interest, she continued, cases get pushed to the Judicial Council for assignment.

The two mechanisms for assigning cases through the Judicial Council are contract and assigned cases.

Contract cases allows an attorney to take a certain number of units of wage each fiscal year in exchange for a flat fee per case. If, at the end of the year, the attorney doesn't complete his or her contracted units, he or she is required to pay the money back.

The reimbursement rate for fiscal year 2021 was set by the Judicial Council at \$300 per unit.

A Class A felony case, which includes serious crimes such as murder or sex crimes, equals 8.3 units, or \$2,490. Misdemeanor cases are one unit, or \$300.

The other form of contracting through the Judicial Council includes assigned cases.

These often include conflict cases involving situations where Public Defender is unable to accept co-defendants in a criminal case.

In a situation like this, attorneys who have agreed to be assigned cases work for \$60 an hour for most cases and \$100 for Felony 1 crimes.

Melone has taken both contract and assigned cases as a criminal defense attorney and said she understands the difficulties that can arise for attorneys in terms of time, money, and work.

She believes the discussion about money and public defenders has often been seen as awkward but that it remains a reality that needs to be addressed.

"If attorneys in bankruptcy or real estate or other practices talk about money, it's not a problem. But because criminal defense is considered a passion and a drive for most people who do it, talking about money becomes a gauche and inappropriate thing to do," she said. "But I think that people can both love the law and also be businesspeople, you know. I don't do this for charity."

Melone said she thinks public defenders need to be paid better for their time, adding that this is one of the keys to keeping a viable Public Defender's office in the state, but that money is not the only issue.

"People don't do this for the money, but the financial piece is becoming more of an issue. Salaries have not been adjusted and I think we need to do everything we can to nurture and show value to the experienced attorneys that we have," she said.

Private criminal defense

Richard Guerriero, president of the New Hampshire Bar Association, is currently a private criminal defense attorney but spent 20 years at the Public Defender as its director of training.

While he's encouraged, the courts and the bar are working to solve the problems with the public defender shortage, ultimately, he believes the solution involves more funding.

"The private criminal defense bar must do all that it can to help, but volunteerism is only going to diminish the crisis, not solve it," he said. "You have to remember that contract and assigned counsel lose money at the current rates, so although everyone is stepping up to do more, it is a big ask, especially on the heels of the pandemic." 8

Guerriero said his firm has accepted as many contract and assigned counsel cases as they are able to, but they are at their limit and he worries that it will be very difficult for untrained volunteer attorneys to provide competent representation.

Maintaining balance

Strafford County Attorney Thomas Velardi said that Chief Justice MacDonald asked him to join the criminal defense task force to make it a multilateral collaborative effort.

One of the themes he continues to emphasize as part of the task force, and in his day-to-day work, is that the criminal justice system is "a gentle balance between prosecution bar, defense bar, and bench."

"Any time that suddenly becomes unbalanced with any one of those three legs of the stool, so to speak, you're going to have problems for the other two legs. It's simply unavoidable," he said. "I was very gratified that the chief justice asked me to join. My fellow county attorneys supported my joining the task force as president of

our association.”

Velardi said he found the meetings, chaired by Justice Donovan, to be productive. He echoed Hawkes’s concern regarding the lack of experience issue that comes with attrition.

“When you have a significant amount of attrition on either side of the bar, in order to replace those people who are likely to have more experience than the people replacing them, you have a steep curve to educate your opponent,” he said.

Velardi described the defense bar as the inverse of the prosecution bar and said, “One can’t thrive and survive without the other being healthy.”

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‘We are just treading water’: NH still struggling to ensure poor people have an attorney



By ANNMARIE TIMMINS (/byline?byline=By ANNMARIE TIMMINS)

New Hampshire Bulletin

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Late last year, several of New Hampshire's most experienced attorneys accepted an urgent invite to the state Supreme Court's conference room. The state Supreme Court justices, including Chief Justice Gordon MacDonald, made a big ask.

Crushing caseloads had driven a mass exodus of public defenders, leaving 185 criminal defendants too poor to hire an attorney facing incarceration with no one to defend them. Would the lawyers around the table take some of those cases for as little as \$60 an hour, a fraction of the \$350 to \$450 hourly rate their firms typically charge? And regardless of how much time and staff each case took, their payment would be capped at \$1,400 for a misdemeanor and \$4,100 to \$8,000 for felonies.

All said yes. One, Michael Ramsdell, a former criminal prosecutor now at Sheehan Phinney, delayed his retirement to take several. While this mitigated the crisis, it has not resolved it. Legal advocates say it is now time for lawmakers to step in and fulfill their constitutional obligation to provide indigent clients facing incarceration a free lawyer.

The state Supreme Court, New Hampshire Judicial Council and New Hampshire Public Defender program say it's critical the state increase the hourly rates and caps on payments and make permanent the temporary pay raises public defenders received.

Raising the rates and caps is estimated to cost \$3.6 million annually according to the New Hampshire Judicial Council, which oversees the indigent defense program. Without the increase, recruiting and retaining lawyers for indigent defendants will remain a challenge, legal advocates said. Making the temporary pay raises to public defenders permanent is estimated to cost \$2.3 million annually.

“Right now we are just treading water,” said Supreme Court Justice Patrick Donovan, who is heading up the court's Criminal Defense Task Force, formed a year ago to address the crisis. “We need more resources. We need more attorneys to start taking these cases. But people can't afford to take these cases and make a living because you are not just losing money with that case but also losing money on other cases that you can't accept while doing that case.”

Asked about increasing the hourly rate increases, Gov. Chris Sununu's chief of staff, Jayne Millerick, said he has already supported additional funding for indigent defense and “remains committed to the exceptional New Hampshire indigent defense program and the outstanding attorneys that work tirelessly to represent their clients. Given that the assigned attorneys rates haven't increased for decades, Governor Sununu is supportive of this process moving forward to seek additional funds from the legislature for the proposed hourly rate increases.”

His position on making the temporary pay raises to public defenders permanent remains a question.

“The Governor is not yet prepared to make long-term financial commitments through general funds relative to the request by the state's public defender program, given economic uncertainty,” his office said in an email.

But it is legislators who must first agree to include increases in the state budget.

One, Rep. Bob Lynn, a Windham Republican member of the House Fiscal Committee, said he'd be open to budget increases but would want specifics, including the extent the state is relying on contract attorneys, which sign agreements with the state to take cases at reduced rates. He would also want to know how the proposed hourly payment compares the going rate for attorneys.

"I understand the importance of the entire indigent defense program," said Lynn, a retired superior court judge. "Sixty dollars an hour seems pretty low for an attorney's compensation. I could be proven wrong on that, but I would be surprised."

Republican Rep. Karen Umberger of Kearsarge who serves as chairwoman of the Joint Legislative Fiscal Committee and the House Fiscal Committee, both of which make funding decisions for the indigent defense program, said she also supported the increases. "We as a state, in my opinion, cannot let this go on for much longer," she said.

A safety net sidelined

Poor criminal defendants whose charges carry a possible jail or prison sentence have long received free, state-funded legal representation one of the three ways.

The New Hampshire Public Defender program typically takes about 85% of indigent cases, declining only those where it has a conflict of interest. Fourteen percent of the remaining cases are primarily sent to contract attorneys who sign annual agreements with the state to take indigent cases at \$60 to \$100 an hour, depending on the severity of the charges. The last 1% are given to non-contract lawyers that can be persuaded to take the case regardless of the payout, said Sarah Blodgett, executive director of the New Hampshire Judicial Council, which oversees the state's indigent defense program.

The pandemic and increasing complexity of cases flipped that equation after public health concerns and crushing caseloads drove 49 public defenders to resign between 2020 and 2022, taking with them 450 years of legal experience, said Tracy Scavarelli, director of legal services at the state's Public Defender

Program. Temporary pay increases have helped the program bring on 44 new attorneys, but they are far less experienced, with a combined 87 years of experience, meaning other lawyers in the program must devote some of their time to training them.

Meanwhile, eight contract attorneys did the same, Blodgett said.

Losses of both people and experience forced the Public Defender Program to restrict the number of cases it accepted for the first time in about 25 years, Blodgett said. It cut its cases from nearly 28,000 in 2019 to about 14,800 this year.

Only juveniles, already incarcerated clients and people charged with a major crime such as homicide and sexual assault could count on getting a public defender, according to Scavarelli. The situation has improved since the pandemic's early days, she said, but some of the Public Defender Program's offices around the state continue to restrict new intakes; nearly 1,000 cases are on hold now, 712 in circuit courts and 282 in superior courts.

Those resignations and subsequent loss of legal experience triggered the crisis MacDonald and Donovan aimed to address in their August meeting with lawyers at the court. The state needed private attorneys to take nearly 1,400 indigent cases, a huge jump from the 244 cases sent to private attorneys the year before the pandemic.

The response was immediate.

Ramsdell, who pushed back his retirement, took several of the oldest cases. In one, the prosecutor dropped the charges against his client just before trial, replacing them with two lesser charges the client pleaded guilty to.

“The system only works if both the prosecution and defense are represented by capable attorneys because mistakes are made,” said Ramsdell. “Police officers and investigators by and large do a good job, but they don’t always get it right. We should never have someone who goes unrepresented solely because they can’t pay for a lawyer. That is a low threshold for a society we would want to live in.”

Michael Lewis, a former homicide prosecutor now at Rath, Young and Pignatelli, said he has taken about 20 cases.

“Anyone who has been a prosecutor and really has a sense of the system ... knows how important it is to have a check from the other side that is zealous and is focused entirely on the interest of the defendant who is being prosecuted by the government,” Lewis said. “You want the government, when it’s exerting that kind of authority over people, even in the worst cases, to be resisted and to be scrutinized.”

Raising the alarm and awareness

When indigent cases began piling up in September, MacDonald asked Donovan to form and lead the task force. Of seven recommendations it made in its October report called on the state’s legal advocates to raise awareness of the crisis. At the New Hampshire Judicial Council, Blodgett has taken that on in a big way, looking to Massachusetts and Vermont for lawyers willing to take on indigent cases and putting together a training on the particulars of New Hampshire law.

“I think people don’t understand how important (indigent defense is) until they know somebody who has a criminal charge and no lawyer,” she said.

The other recommendations include creative recruitment strategies (among them, asking retired lawyers to take cases), faster ways of resolving cases and more money for public defenders and contract attorneys to attract and retain both. Legal advocates have had some success with that last one.

The Executive Council voted in March to give the Public Defender Program an additional \$2.3 million to temporarily boost public defender salaries.

And other lawyers are now paid an additional \$100 if their client is incarcerated. But neither measure is a long-term solution, Donovan said.

Legal advocates say the state needs to make those temporary pay raises for public defenders permanent with state money.

And they want lawmakers to increase state funding to boost the hourly rate from \$60 to \$90 for misdemeanors and for felony cases from \$100 to \$125. (That is still lower than the \$158 an hour the federal government pays lawyers on federal indigent cases.)

Additionally, they want money to raise the payment caps for misdemeanors from \$1,400 to \$2,000 and the range for felony cases (\$4,100 to \$8,000) to \$5,500 to \$12,500.

Attorney Dave Vicinanza, an attorney at Nixon Peabody, which took about 30 indigent cases, said the increase in the hourly rate will be important. So will a public service pitch.

“There’s a special trust reposed in lawyers that goes beyond merely making a living, merely doing what you need to do for yourself,” he said. “I feel that lawyers should as a matter of professionalism be giving free time or reduced time for the good of the civil justice system.”

Ramsdell had two other no-cost solutions.

Allow attorneys to satisfy their continuing legal education requirements by taking indigent cases and prioritize those cases on the court docket. To avoid lost time, courts regularly schedule multiple hearings for the same time in the event a lawyer or defendant isn’t present. That can mean hours-long waits, especially problematic for lawyers agreeing to cut their hourly rates and reduce their time for other cases.

In one case, Ramsdell said he and a colleague forfeited \$9,000 in legal work after hitting the \$4,100 cap for a felony case.

“I believe if the court wants a similar effort by large firms (to take indigent cases) again, there are things the court could do that would make it easier on them to handle these cases,” he said.

Both ideas were among the recommendations of the task force but Donovan said he doesn’t anticipate enough support to move either forward.

If Ramsdell were making the pitch to other colleagues to take on cases, he’d start with this: A just society relies on everyone having a competent criminal defense, even if they can’t afford it.