

INFORMATION FOR SERVICE MEMBERS REGARDING THE AVAILABILITY OF THE PUBLIC DEFENDER WHEN CHARGED WITH A CRIME*

When a service member is charged with a crime off the installation, whether misdemeanor or felony, the effective assistance of counsel is very important. Experienced counsel can often mean a vast difference between the plea bargain a service member will receive with assistance compared to without the assistance of counsel, even if the crime the service member is charged with is rather minor.

When considering obtaining assistance of counsel the first alternative a service member should consider is the Public Defender's office. The Public Defender is appointed by the court as counsel for a party charged with a crime. The crime must include the possibility of jail time at sentencing. The party must be determined to be what is legally described as "indigent". The party receives the assistance of the Public Defender at no cost to the service member (or in a few instances very little cost) and is funded by the State.

California has, for the most part, a highly regarded and well funded Public Defender system. California's Public Defenders system is relatively unique in comparison with other states. First, most of the Public Defenders are not overloaded with cases and have extensive trial and court experience which is good for service members if they obtain the assistance of the Public Defender.

Second, one of the main differences between California's system as compared with other states is that California Public Defender offices are all set up at the county level. Each county has its own individually funded and organized Public Defender's Office. This means the ability for a service member to obtain the services of the Public Defender can vary depending on the county in which the service member is charged with a crime.

Third, the evaluative means and determination of who is legally "indigent" and who is not is much more flexible in California than in other states. The elements that affect this flexibility are as follows:

The political make-up of the county makes an enormous difference as to whether a service member can receive assistance through the Public Defender's office. The more conservative the county the less funding the Public Defender's office will receive and therefore tighter financial requirements will exist for the service member to qualify for assistance. The size of the county and the financial resources are also important elements. Smaller or less wealthy counties have tighter budgets and therefore less accessibility to the assistance of the Public Defender's office.

Sometimes the ability to obtain the assistance of the Public Defender's office is easy, other times rather difficult. For example, in Sacramento County the accessibility of the Public Defender's assistance is open to literally anyone who simply says they can't afford

an attorney. San Diego County requires a rather lengthy financial aid form to be filled out and evaluated by a panel that works for the County Public Defender's office. The ability to obtain assistance in San Diego is quite restrictive. Those two Counties are the extremes. Surrounding counties of the Presidio such as **Monterey**, Santa Cruz, San Benito, San Jose, Fresno etc. are in between those two extremes.

In one of these less extreme counties, if a service member is charged with a crime he or she will have an initial appearance at Court called an arraignment. At the arraignment, the service member will be asked by the judge, "Do you have the funds to afford an attorney"? If the service member says he does not, he will be appointed and referred to the Public Defender's office. As a general rule the surrounding counties of the **Presidio of Monterey** use a salary or resources of \$1500.00 a month net income for the individual, not the family as a whole, as a basic barometer of who qualifies for the assistance and who does not. This barometer would disqualify the vast majority of service members for assistance from the Public Defender's office. The elements that allow for the barometer to be adjusted include current debt to income ratio and property of the service member, the number of dependents the service member has, whether the service member owes child support, and the seriousness of the crime the service member is charged with.

If a service member making \$4000.00 a month were to do a debt to income analysis and, after subtracting all bills, food and necessities, nothing is left over each month or the service member is upside down, the Public Defender's assistance would still remain a viable possibility. But, if this same service member also had \$20,000.00 equity that could be drawn from a home the service member owns, the service member would not qualify, even under the same debt to income analysis that was upside down. In other words, one with significant debt and little savings but with untapped credit resources might not qualify for public defender assistance.

A service member making \$3000.00 a month with two dependents would also be a viable candidate for the assistance of the Public Defender. Child support payments are deducted from the salary the service member makes and then the new salary figure is considered accurate.

In California a person charged with a DUI could hire a private attorney for around \$1,000.00 to handle the case. If charged with a felony possession of a controlled substance it would cost between \$3500.00 and \$15,000.00 to hire a private attorney. If charged with rape it would cost between \$35,000.00 and \$80,000.00 to hire a private attorney. Murder would cost approximately \$150,000.00 to hire a private attorney. A service member making \$1800.00 a month and charged with a DUI will not be approved to receive the assistance of the Public Defender's office unless he is bankrupt, owns no property, has no credit available, and/or has dependents and/or child support responsibilities. A service member making \$1800.00 a month and charged with a more serious offense could receive the assistance of the Public Defender's office because of the lack of the ability to afford a private attorney even without such serious financial burdens. The criteria is the present availability of funds to hire private counsel.

If a service member lies to the court or to the court through the Public Defender's office in regards to the service member's financial situation, the repercussions are criminal in nature and the state can collect any money for the time the service member used from the Public Defender's office.

Given the fact that California has a flexible Public Defender system, a service member should be encouraged in attempts to receive the services and assistance of the Public Defender but should keep in mind that, given the financial stability of many service members, the Public Defender will often times not be available for the service member.

***Authored by reservist 1LT Marc Wuthrich while performing annual training at the Presidio of Monterey Office of Staff Judge Advocate, July 2005**