

PROPOSED STATEMENT OF DECISION APPROVED TEST CLAIM

Penal Code Sections 1000.93, 1000.94 and 1000.95
Penal Code Sections 273.5, subdivisions (e), (f), (g), (h) and (i)
Penal Code Section 1203.097

As Repealed, Added or Amended by Chapters 183/92, 184/92, 28X/94, 641/95

Domestic Violence Treatment Services – Authorization and Case Management

Executive Summary

On March 26, 1998, the Commission partially approved this test claim with a 6-0 vote.

The test claim legislation provides that if an accused is convicted of a domestic violence crime and granted probation as part of sentencing, the defendant is required to successfully complete the batterer's treatment program as a condition of probation.

The Commission determined that probation *is a penalty* for conviction of a crime. The successful completion of probation is required before the unconditional release of the defendant. If the defendant fails to successfully complete the batterer's treatment program, the test claim legislation subjects the defendant to further sentencing and incarceration.

Since the legislature changed the penalty for domestic violence crimes by changing the requirements for probation, the Commission determined that the "crimes and infractions" disclaimer in Government Code section 17556, subdivision (g), applies to this claim. Based on the plain and ordinary meaning of the words used by the Legislature, the Commission concluded that subdivision (g) applies to those activities required by the test claim legislation that are directly related to the enforcement of the statute which changed the penalty for a crime.

Non-Reimbursable Activities

Accordingly, the Commission concluded that the following activities are directly related to the enforcement of the test claim statute and, thus, are *not* reimbursable pursuant to Government Code section 17556, subdivision (g):

- Referring the defendant to an appropriate alternative batterer's program if the original program is unsuitable. (Pen. Code, § 1203.097, subd. (a)(9).)

- Monitoring the defendant's progress in the batterer's program, receiving and reviewing reports of violation, and reporting such findings to the court. (Pen. Code, § 1203.097, subd. (a)(10)(A)(B).)
- Requesting a hearing for further sentencing when the defendant is not performing satisfactorily in the assigned program, is not benefiting from the program, has not complied with the condition of probation, or has engaged in criminal conduct. (Pen. Code, § 1203.097, subd. (a)(12).)
- Providing information obtained from the investigation of the defendant's history to the batterer's treatment program upon request. (Pen. Code, § 1203.097, subd. (b)(1).)
- Investigating the defendant's history to determine the appropriate batterer treatment program, determining which community program would benefit the defendant, and reporting such findings to the court. (Pen. Code, § 1203.097, subd. (b)(1).)
- Assessing the defendant after the court orders the defendant to a batterer's program. The following factors are to be assessed: social, economic and family background; education; vocational achievements; criminal history; medical history; substance abuse history; consultation with the probation officer; and verbal consultation with the victim, if the victim desires to participate. (Pen. Code, § 1203.097, subd. (b)(3).)
- Determining the amount, means, and manner of restitution to the victim or battered women's shelter.

Reimbursable Activities

The Commission concluded that the activities listed below are *not* directly related to the enforcement of the test claim statute under Government Code section 17556, subdivision (g), and, therefore, are reimbursable:

- Administration and regulation of the batterer's treatment programs (Pen. Code, § 1203.097, subds. (c)(1), (c)(2), and (c)(5)) offset by the claimant's fee authority under Penal Code section 1203.097, subdivision (c)(5)(B).
- Providing services for victims of domestic violence. (Pen. Code, § 1203.097, subd. (b)(4).)
- Assessing the future probability of the defendant committing murder. (Pen. Code, § 1203.097, subd. (b)(3)(I).)

Staff Recommendation

Based on the foregoing, staff recommends that the Commission approve the attached Proposed Statement of Decision which accurately reflects the Commission's decision.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Penal Code Section 273.5, Subdivisions (e), (f), (g), (h) and (i); Penal Code Sections 1000.93, 1000.94 and 1000.95; and Penal Code section 1203.097 as added, amended or repealed by Chapter 183, Statutes of 1992; Chapter 184, Statutes of 1992; Chapter 28X, Statutes of 1994; and Chapter 641, Statutes of 1995

And filed on November 13, 1996

By the County of Los Angeles, Claimant.

NO. CSM – 96-281-01

DOMESTIC VIOLENCE TREATMENT SERVICES – AUTHORIZATION AND CASE MANAGEMENT

PROPOSED STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7.

(Presented for adoption on April 23, 1998)

PROPOSED STATEMENT OF DECISION

This test claim was heard by the Commission on State Mandates (Commission) on March 26, 1998, during a regularly scheduled hearing. Mr. Leonard Kaye appeared for the County of Los Angeles. Mr. James Apps appeared for the Department of Finance. Mr. Jim Wright appeared as a witness for the County of Los Angeles.

At the hearing, evidence both oral and documentary was introduced, the test claim was submitted, and the vote was taken.

The law applicable to the Commission's determination of a reimbursable state mandated program is Government Code section 17500 et seq. and section 6, article XIII B of the California Constitution and related case law.

The Commission, by a vote of 6 to 0, partially approved this test claim.

BACKGROUND

The Domestic Violence Diversion Program Was a Pretrial Program Designed to Avoid Conviction of the Accused Batterer.

In 1979 and 1980, the Legislature established procedures for the diversion of persons arrested for misdemeanor domestic violence offenses prior to the determination of guilt or innocence. The diversion program created an alternative to criminal prosecution and conviction of the accused batterer. The accused was required to enroll in, and complete, a batterer's treatment program. If the accused successfully completed the batterer's program, he/she could avoid prosecution and conviction.

In part, the diversion program required county probation departments to perform an investigation to determine: 1) if the accused would benefit from diversion; and, if so, 2) in which community program the accused should be placed. The program also required county probation departments to monitor the progress of the divertee and return the divertee to court if he/she was not benefiting from the program or if he/she was later convicted of any violent crime.

In *County of Orange v. State Board of Control*,¹ the court reversed the State Board's determination that the diversion program was not a reimbursable state mandated program. The State Board found that the diversion program fell within the exclusion for legislation that changed the penalty of a crime. The court disagreed, stating, "probation is an alternative sentencing device imposed after conviction, while diversion is a pretrial program designed to avoid conviction." The court ruled that participation in the diversion program is not a penalty because it occurs prior to a determination of guilt or innocence.

The decision in *County of Orange* allowed counties to claim reimbursement for investigating the accused batterer, making recommendations to the court regarding diversion, and monitoring the progress of the divertee in the treatment program.

In July 1993, the Legislature added sections 1000.93, 1000.94 and 1000.95 to the Penal Code. These provisions require county probation departments to administer and regulate domestic violence batterer's treatment programs and perform other related case management duties for domestic violence diverttees and their victims. On July 21, 1994, the Commission determined that these added Penal Code sections imposed a reimbursable state mandated program.

The Test Claim Legislation Eliminated the Pretrial Diversion Program and Transformed it into a New Penalty Imposed Upon the Batterer After Conviction.

In 1995, the Legislature eliminated the diversion program as a pretrial option for an accused batterer and transformed the batterer's treatment program into a condition of probation, if part of the punishment and sentencing following conviction included probation. The new law subjects all domestic violence arrestees to criminal prosecution and conviction because the Legislature recognized that, "domestic violence is a serious and widespread crime. . . . Between two and four million American women are beaten

¹ *County of Orange v. State Bd. of Control* (1985) 167 Cal.App.3d 660, 663.

annually by their husbands or boyfriends . . . and domestic violence is the second leading cause of injury to women aged 15 to 44 years. . . .” Furthermore, the Legislature stated, “[Pre-trial] [d]iversion programs for perpetrators of domestic violence . . . are inadequate to address domestic violence as a serious crime.” (Emphasis added.)

COMMISSION FINDINGS

Issue 1: Which test claim provisions are not reimbursable because they fall under the exclusion for changing the penalty for a crime under Government Code section 17556, subdivision (g)?

Plain and Ordinary Meaning of Subdivision (g). Government Code section 17556, subdivision (g), provides that a test claim contains no “costs mandated by the state” if the Commission finds that:

“The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, *but only for that portion of the statute relating directly to the enforcement of the crime or infraction.*” (Emphasis added.)

The Commission noted that the first step in statutory interpretation is to look at the statute’s words and give them their plain and ordinary meaning. Where the words of the statute are unambiguous, they must be applied as written and may not be altered in any way. Where the words are ambiguous, the statute’s legislative history must be used to guide statutory interpretation. Generally, statutes must be given a reasonable and common sense construction designed to avoid absurd results.²

The “But Only” Modifier. Subdivision (g) contains the modifier, “but only for that portion of the statute relating directly to the enforcement of the crime or infraction.” It is first necessary to determine what portion of subdivision (g), the “but only” clause modifies. To avoid ambiguity, rules of grammar suggest that modifiers be placed next to the word they modify.³ Also known as the “last antecedent rule,” this construction is not followed when strict adherence to the rules of grammar would result in statutory interpretation that contravenes legislative intent.⁴

The Commission recognized that the “last antecedent rule” means the “but only” clause modifies only the third phrase in subdivision (g)—changed penalties for crimes or infractions. This application is in accordance with legislative intent. It would not make sense for the “but only” clause to modify the first phrase—the creation of new crimes or infractions—because reimbursement for those statutes is already provided for in article XIII B, section 6, subdivision (b), of the California Constitution.⁵ Similarly, it would not

² *Burden v. Snowden* (1992) 2 Cal.4th 556, 562; *People v. King* (1993) 5 Cal.4th 59, 69.

³ Strunk & White, *The Elements of Style* (3d ed. 1979) p. 30.

⁴ 67 Ops.Cal.Atty.Gen. 452, 454 (1984).

⁵ Section 6 of article XIII B of the Constitution provides: “[T]he Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (b) Legislation defining a new crime or changing an existing definition of a crime.”

make sense for the “but only” clause to modify the second phrase—the elimination of crimes or infractions-- because an eliminated crime cannot be enforced.

“The Enforcement of the Crime or Infraction.” Webster’s defines “**enforce**” as “to compel observance of (a law, etc.).”⁶ However, Black’s Law Dictionary defines “**enforcement**” as “[t]he act of putting something such as a law into effect; the execution of a law.”⁷ Black’s defines “**execution**,” in turn, as “[c]arrying out some act or course of conduct to its completion.”⁸

The word “**penalty**” is generally defined to mean some type of punishment.⁹

“**Punishment**,” in turn, includes “[a]ny fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime committed by him....”¹⁰ Finally, a “**sentence**” is “[t]he judgment formally pronounced by the court or judge upon the defendant after his conviction in a criminal prosecution, imposing the punishment to be inflicted, usually in the form of a fine, incarceration, or probation.”¹¹

Therefore, the Commission found that “**enforcement of the crime or infraction**” means to carry out to completion the “penalty” or “punishment” imposed by the statute. The completion of the enforcement process is the ultimate “sentencing” imposed upon the defendant, which includes probation. Subdivision (g), therefore, encompasses those activities that directly relate to the enforcement of the statute that changes the penalty for the crime from arrest through conviction and sentencing, including probation.

Exclusion for Changing the Penalty for a Crime. Probation is “the suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the community under the supervision of a probation officer.”¹² Nonetheless, the Commission noted that Penal Code section 1202.7 includes punishment as one of the primary considerations in granting probation:

“The Legislature finds and declares that the provision of probation services is an essential element in administration of criminal justice. The safety of the public, which shall be a primary goal through enforcement of court-ordered conditions of probation; the

⁶ Webster’s New World Dict. (3rd College ed. 1988) p. 450, col.1.

⁷ Black’s Law Dict. (6th ed. 1990) p. 528, col.2.

⁸ Black’s Law Dict. (6th ed. 1990) p. 568, col. 1.

⁹ Black’s Law Dict. (6th ed. 1990) p. 1133, col.2, (defining “penalty” as “[a]n elastic term with many different shades of meaning; it involves the idea of punishment, corporeal or pecuniary, or civil or criminal”); Webster’s New World Dict. (3rd College ed. 1988) p. 998, col.1 (defining “penalty” as “a punishment fixed by law, as for a crime or breach of contract” or “any unfortunate consequence or result of an act or condition.”)

¹⁰ Black’s Law Dict. (6th ed. 1990) p. 1234, col. 1.

¹¹ Black’s Law Dict. (6th ed. 1990) p. 1362, col. 2.

¹² Pen. Code, § 1203, subd. (a).

nature of the offense, the interests of justice, *including punishment*, reintegration of the offender into the community, and enforcement of conditions of probation; the loss to the victim; and the needs of the defendant shall be the primary considerations in the granting of probation.” (Emphasis added.)

In addition, the successful completion of probation is required before the unconditional release of the defendant. If the convicted defendant does not successfully complete probation, the defendant is subject to further sentencing and incarceration.¹³

The Commission found that the purpose of the test claim legislation is to “treat domestic violence as a serious crime.” Accordingly, the Legislature eliminated diversion as an option in domestic violence cases and subjected all persons arrested for a domestic violence offense to prosecution and conviction. If probation is granted as part of the sentence, the defendant is now required to successfully complete a batterer’s treatment program as a condition of probation. If the defendant does not satisfactorily complete the batterer’s treatment program, Penal Code section 1203.097, subdivision (a)(12), expressly provides that the defendant is subject to further sentencing and incarceration.

The Commission found that the activities of a county’s probation department under the previous, reimbursable pretrial diversion program and under the new post-conviction batterer’s treatment program share many similarities. However, under *County of Orange*, the similarity between pretrial diversion and probation “does not affect the basic distinction between the two [P]robation is an alternative sentencing device imposed after conviction, while diversion is a pretrial program designed to avoid conviction.”¹⁴

Based on the foregoing, the Commission found that probation is a penalty for the conviction of domestic violence and that the completion of the batterer’s treatment

¹³ Penal Code section 1203.2 provides authority to revoke probation and impose further sentencing, including incarceration, if the defendant violates *any* term of probation. Section 1203.2 provides, in pertinent part, the following:

“(a) At any time during the probationary period of a person released on probation under the care of a probation officer pursuant to this chapter, or of a person released on conditional sentence or summary probation not under the care of a probation officer, if any probation officer or peace officer has probable cause to believe that the probationer is violating any term or condition of his or her probation or conditional sentence, the officer may, without warrant or other process and at any time until the final disposition of the case, rearrest the person and bring him or her before the court or the court may, in its discretion, issue a warrant for his or her rearrest. Upon such rearrest, or upon the issuance of a warrant for rearrest the court may revoke and terminate such probation if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation officer or otherwise that the person has violated any of the conditions of his or her probation”

“.....”

“(c) Upon any revocation and termination of probation the court may, if the sentence has been suspended, pronounce judgment for any time within the longest period for which the person might have been sentenced.”

¹⁴ *Supra*, 167 Cal.App.3d at 663.

program as a condition of probation is subject to the exclusion in Government Code section 17556, subdivision (g).

CONCLUSION TO ISSUE 1:

Based on the foregoing analysis, the Commission determined that the activities listed below are directly related to the enforcement of the test claim statute which changed the penalty for defendants convicted of a domestic violence offense. Accordingly, the following activities fall under Government Code section 17556, subdivision (g), and, therefore, are not reimbursable.

- Referring the defendant to an appropriate alternative batterer's program if the original program is unsuitable. (Pen. Code, § 1203.097, subd. (a)(9).)
- Monitoring the defendant's progress in the batterer's program, receiving and reviewing reports of violation, and reporting such findings to the court. (Pen. Code, § 1203.097, subd. (a)(10)(A)(B).)
- Requesting a hearing for further sentencing when the defendant is not performing satisfactorily in the assigned program, is not benefiting from the program, has not complied with the condition of probation, or has engaged in criminal conduct. (Pen. Code, § 1203.097, subd. (a)(12).)
- Providing information obtained from the investigation of the defendant's history to the batterer's treatment program upon request. (Pen. Code, § 1203.097, subd. (b)(1).)
- Investigating the defendant's history to determine the appropriate batterer treatment program, determining which community program would benefit the defendant, and reporting such findings to the court. (Pen. Code, § 1203.097, subd. (b)(1).)
- Assessing the defendant after the court orders the defendant to a batterer's program. The following factors are to be assessed: social, economic and family background; education; vocational achievements; criminal history; medical history; substance abuse history; consultation with the probation officer; and verbal consultation with the victim, if the victim desires to participate. (Pen. Code, § 1203.097, subd. (b)(3).)
- Determining the amount, means, and manner of restitution to the victim or battered women's shelter.¹⁵

¹⁵ The County of Los Angeles contends that the test claim legislation requires additional duties imposed on probation departments to inquire, determine, recommend and report the amount, means, and manner of restitution payments due the domestic violence victim and/or battered women's shelter. Penal Code sections 273.5, subdivision (h), and 1203.097, subdivision (a)(11), provide that the court may order, as a condition of probation, the payment of restitution to the victim and/or a battered women's shelter based on the defendant's ability to pay.

¹⁵ However, the Commission found that neither section 273.5 nor 1203.097 require probation departments to perform any activities with regard to restitution.

Issue 2: Which test claim provisions are reimbursable because they fall outside the exclusion for changing the penalty for a crime under Government Code section 17556, subdivision (g)?

The Commission further determined that the following activities are *not* directly related to the enforcement of the test claim statute because they do not directly penalize the defendant for the crime. The Commission found that these activities fall outside the reimbursement exclusion of Government Code section 17556, subdivision (g):

- Administration and regulation of the batterer’s treatment programs. (Pen. Code, § 1203.097, subds. (c)(1), (c)(2), and (c)(5).)
- Providing services for victims of domestic violence. (Pen. Code, § 1203.097, subd. (b)(4).)
- Assessing the *future* probability of the defendant committing murder. (Pen. Code, § 1203.097, subd. (b)(3)(I).)

Therefore, the Commission continued its inquiry to determine whether the provisions listed above constitute a state mandated program under article XIII B, section 6. In order for a statute that is the subject of a test claim to impose a state mandated program, the statutory language must direct or obligate an activity or task upon local governmental entities. Further, the required activity or task must be new or it must create an increased or higher level of service. To determine if a required activity is new or creates an increased or higher level of service, a comparison must be undertaken between the test claim legislation and the legal requirements in effect immediately prior to the enactment of the test claim legislation.¹⁶

Administration and Regulation of the Batterer’s Treatment Programs. Under the test claim legislation, county probation departments continue to administer the batterer’s treatment program for probationers as they did under the domestic violence diversion program. The specific requirements governing the administration and regulation of the batterer’s treatment program under the diversion program (Chapter 221, Statutes of 1993) have now been incorporated and recodified into the probation provisions of Penal Code section 1203.097, subdivision (c).¹⁷

¹⁶ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

¹⁷ The specific requirements of Penal Code section 1203.097, subdivision (c), are:

- To refer defendants only to batterer’s programs that follow specified standards. (Pen. Code, § 1203.097, subd. (c)(1).)
- To design and implement an approval and renewal process for batterer’s programs with the input from criminal justice agencies and domestic violence victim advocacy programs. (Pen. Code, § 1203.097, subd. (c)(1).)
- To regulate or monitor batterer’s programs by providing for the issuance of a provisional approval if the program is in substantial compliance with applicable laws and regulations. If the program is not in substantial compliance with standards set by the department, the probation department shall provide

Penal Code section 1203.097, subdivision (c)(5), provides that county probation departments have the sole authority to approve the issuance, denial, suspension, or revocation of batterer's treatment programs for domestic violence probationers. County probation departments carry out a basic governmental function by performing these activities, thus providing a service to the public. Such activities are not imposed on state residents generally. Therefore, the Commission found that the statute directs or obligates an activity or task upon local governmental entities.

Moreover, the law in effect immediately prior to the enactment of the test claim legislation (Chapter 221, Statutes of 1993) did not require county probation departments to administer and regulate an approval process for batterer's treatment programs.

Therefore, the Commission found that the administration and regulation of batterer's treatment programs under the test claim legislation constitutes a new program or higher level of service.

Victim Services. Penal Code section 1203.097, subdivision (b)(4), requires the county probation department to attempt to contact the victim in order to: (1) notify the victim regarding the requirements for the defendant's participation in the batterer's program; (2) notify the victim of available victim resources; and, (3) inform the victim that participation in the batterer's treatment program is no guarantee that the perpetrator will stop the violence.

Prior to the enactment of the test claim legislation, county probation departments were not required to contact the victim regarding the defendant's attendance in the batterer's treatment program and the information described above. Therefore, the Commission found that the activity of contacting the victim constitutes a new program or higher level of service.

Assessing the Probability of the Defendant Committing a Future Murder. Penal Code section 1203.097, subdivision (b)(3), requires county probation departments to conduct an initial assessment of the defendant after the court orders the defendant to a batterer's program. Subparagraph (I) specifically requires the assessment of the future probability of the defendant committing murder."¹⁸

Prior to the enactment of the test claim legislation, county probation departments were not required to assess the future probability of the defendant committing murder after the

written notice. Thereafter, the probation department is required to review and approve all plans of correction filed by the program. (Pen. Code, § 1203.097, subd. (c)(2).)

- To approve and renew approval of a program by reviewing a written application and demonstration by the program that it possesses adequate administrative and operational capacity to operate a batterer's treatment program. (Pen. Code, § 1203.097, subd. (c)(5).)
- To conduct on-site reviews of the program, including monitoring of a session to determine that the program adheres to applicable statutes and regulations. (Pen. Code, § 1203.097, subd. (c)(5).)

¹⁸ With the exception of assessing the future probability of the defendant committing murder, staff notes that Penal Code section 1203.097, subdivision (b)(3), is identical to former Penal Code section 1000.95 (Chapter 221, Statutes of 1993.)

court ordered the defendant to a batterer's program. Therefore, the Commission found that this activity constitutes a new program or higher level of service.

CONCLUSION TO ISSUE 2:

The Commission concluded that the following test claim provisions are state mandated and reimbursable because they fall outside of Government Code, section 17556, subdivision (g):

- Administration and regulation of the batterer's treatment programs (Pen. Code, § 1203.097, subds. (c)(1), (c)(2), and (c)(5)),¹⁹ offset by the claimant's fee authority under Penal Code section 1203.097, subdivision (c)(5)(B).²⁰
- Providing services for victims of domestic violence. (Pen. Code, § 1203.097, subd. (b)(4).)
- Assessing the future probability of the defendant committing murder. (Pen. Code, § 1203.097, subd. (b)(3)(I).)

¹⁹ See *supra*, note 23.

²⁰ Penal Code section 1203.097, subdivision (c)(5)(B), provides fee authority to cover the costs of the administration and regulation of non-governmental batterer treatment programs. This provision provides the following:

“The probation department shall fix a fee for approval not to exceed two hundred fifty dollars (\$250) and for approval renewal not to exceed two hundred fifty dollars (\$250) every year in an amount sufficient to cover its cost in administering the approval process under this section. No fee shall be charged for the approval of local governmental entities.”