

RESOLUTION 02-12-2013

DIGEST

Criminal Law: Eliminate Mandatory Batterer's Program

Amends Penal Code section 1203.097 to eliminate the requirement that defendants complete a one-year batterer's program and to allow court discretion to order completion of a shorter appropriate counseling program.

RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Penal Code section 1203.097 to eliminate the requirement that defendants complete a one-year batterer's program and to allow court discretion to order completion of a shorter appropriate counseling program. This resolution should be disapproved because the currently-required batterer's program is in fact appropriate for those who commit domestic violence and are granted probation.

Penal Code section 1203.097 became operative in 2007 and lays out a set of requirements for granting probation to defendants convicted of crimes against a spouse, child, or others as laid out in Family Code section 6211. These requirements include successful completion of a batterer's program or another appropriate counseling program designated by the court, for a period of not less than one year, and including weekly sessions of a minimum of two hours class time duration. The author of this resolution concedes that "[i]n most cases, imposition of the mandated 52 week long batterer's program is warranted and consistent with the severity of the underlying facts of the offense." The author asserts, however, that in some cases the year-long program is excessive, such as when one is convicted of "making an annoying telephone call to a former girlfriend."

The example demonstrates a lack of understanding of domestic violence, which is typically a pattern of coercive and controlling behavior that can escalate over time. The suggestion that a person would actually be convicted due to one, single "annoying telephone call" is without basis in fact. It may be that ultimately there is a plea bargain to a less serious offense, but typically there is abundant other abusive behavior. It is critically important that perpetrators of domestic violence actually receive this important, year-long, educational course.

Further, given that nearly all crimes in California have related mandatory sentencing guidelines, to exempt domestic violence from the guidelines indicates that our State takes these types of transgressions less seriously, which should not be the case.

Another problem with the resolution is that it does not give the court guidelines as to what is an "appropriate" counseling program, or what would be an appropriate length of time for

counseling. The exceptions are likely to swallow the rule of a 52 week long mandatory batterer's program.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to amend Penal Code section 1203.097, subdivision 1203.097(a)(6)(A) to read as follows:

1 § 1203.097

2 (a) If a person is granted probation for a crime in which the victim is a person defined in
3 Section 6211 of the Family Code, the terms of probation shall include all of the following:

4 (1) A minimum period of probation of 36 months, which may include a period of
5 summary probation as appropriate.

6 (2) A criminal court protective order protecting the victim from further acts of violence,
7 threats, stalking, sexual abuse, and harassment, and, if appropriate, containing residence
8 exclusion or stay-away conditions.

9 (3) Notice to the victim of the disposition of the case.

10 (4) Booking the defendant within one week of sentencing if the defendant has not already
11 been booked.

12 (5) (A) A minimum payment by the defendant of five hundred dollars (\$500) to be
13 disbursed as specified in this paragraph. If, after a hearing in open court, the court finds that the
14 defendant does not have the ability to pay, the court may reduce or waive this fee. If the court
15 exercises its discretion to reduce or waive the fee, it shall state the reason on the record.

16 (B) Two-thirds of the moneys deposited with the county treasurer pursuant to this section
17 shall be retained by counties and deposited in the domestic violence programs special fund
18 created pursuant to Section 18305 of the Welfare and Institutions Code, to be expended for the
19 purposes of Chapter 5 (commencing with Section 18290) of Part 6 of Division 9 of the Welfare
20 and Institutions Code. The remainder shall be transferred, once a month, to the Controller for
21 deposit in equal amounts in the Domestic Violence Restraining Order Reimbursement Fund and
22 in the Domestic Violence Training and Education Fund, which are hereby created, in an amount
23 equal to one-third of funds collected during the preceding month. Moneys deposited into these
24 funds pursuant to this section shall be available upon appropriation by the Legislature and shall
25 be distributed each fiscal year as follows:

26 (i) Funds from the Domestic Violence Restraining Order Reimbursement Fund shall be
27 distributed to local law enforcement or other criminal justice agencies for state-mandated local
28 costs resulting from the notification requirements set forth in subdivision (b) of Section 6380 of
29 the Family Code, based on the annual notification from the Department of Justice of the number
30 of restraining orders issued and registered in the state domestic violence restraining order
31 registry maintained by the Department of Justice, for the development and maintenance of the
32 domestic violence restraining order databank system.

33 (ii) Funds from the Domestic Violence Training and Education Fund shall support a
34 statewide training and education program to increase public awareness of domestic violence and
35 to improve the scope and quality of services provided to the victims of domestic violence. Grants
36 to support this program shall be awarded on a competitive basis and be administered by the State

37 Department of Public Health, in consultation with the statewide domestic violence coalition,
38 which is eligible to receive funding under this section.

39 (6) Successful completion of a batterer's program, as defined in subdivision (c), or if none
40 is available, another appropriate counseling program designated by the court, for a period not
41 less than one year with periodic progress reports by the program to the court every three months
42 or less and weekly sessions of a minimum of two hours class time duration. The defendant shall
43 attend consecutive weekly sessions, unless granted an excused absence for good cause by the
44 program for no more than three individual sessions during the entire program, and shall complete
45 the program within 18 months, unless, after a hearing, the court finds good cause to modify the
46 requirements of consecutive attendance or completion within 18 months.

47 (A) The court in the interests of justice may relieve a defendant from completion of a
48 batterer's program as defined in subdivision (a)(6) and instead order completion of an
49 appropriate counseling program of lesser duration in lieu thereof.

50 (7)(A)(i) The court shall order the defendant to comply with all probation requirements,
51 including the requirements to attend counseling, keep all program appointments, and pay
52 program fees based upon the ability to pay.

53 (ii) The terms of probation for offenders shall not be lifted until all reasonable fees due to
54 the counseling program have been paid in full, but in no case shall probation be extended beyond
55 the term provided in subdivision (a) of Section 1203.1. If the court finds that the defendant does
56 not have the ability to pay the fees based on the defendant's changed circumstances, the court
57 may reduce or waive the fees.

58 (B) Upon request by the batterer's program, the court shall provide the defendant's arrest
59 report, prior incidents of violence, and treatment history to the program.

60 (8) The court also shall order the defendant to perform a specified amount of appropriate
61 community service, as designated by the court. The defendant shall present the court with proof
62 of completion of community service and the court shall determine if the community service has
63 been satisfactorily completed. If sufficient staff and resources are available, the community
64 service shall be performed under the jurisdiction of the local agency overseeing a community
65 service program.

66 (9) If the program finds that the defendant is unsuitable, the program shall immediately
67 contact the probation department or the court. The probation department or court shall either
68 recalendar the case for hearing or refer the defendant to an appropriate alternative batterer's
69 program.

70 (10)(A) Upon recommendation of the program, a court shall require a defendant to
71 participate in additional sessions throughout the probationary period, unless it finds that it is not
72 in the interests of justice to do so, states its reasons on the record, and enters them into the
73 minutes. In deciding whether the defendant would benefit from more sessions, the court shall
74 consider whether any of the following conditions exists:

75 (i) The defendant has been violence free for a minimum of six months.

76 (ii) The defendant has cooperated and participated in the batterer's program.

77 (iii) The defendant demonstrates an understanding of and practices positive conflict
78 resolution skills.

79 (iv) The defendant blames, degrades, or has committed acts that dehumanize the victim
80 or puts at risk the victim's safety, including, but not limited to, molesting, stalking, striking,
81 attacking, threatening, sexually assaulting, or battering the victim.

82 (v) The defendant demonstrates an understanding that the use of coercion or violent
83 behavior to maintain dominance is unacceptable in an intimate relationship.

84 (vi) The defendant has made threats to harm anyone in any manner.

85 (vii) The defendant has complied with applicable requirements under paragraph (6) of
86 subdivision (c) or subparagraph (C) to receive alcohol counseling, drug counseling, or both.

87 (viii) The defendant demonstrates acceptance of responsibility for the abusive behavior
88 perpetrated against the victim.

89 (B) The program shall immediately report any violation of the terms of the protective
90 order, including any new acts of violence or failure to comply with the program requirements, to
91 the court, the prosecutor, and, if formal probation has been ordered, to the probation department.
92 The probationer shall file proof of enrollment in a batterer's program with the court within 30
93 days of conviction.

94 (C) Concurrent with other requirements under this section, in addition to, and not in lieu
95 of, the batterer's program, and unless prohibited by the referring court, the probation department
96 or the court may make provisions for a defendant to use his or her resources to enroll in a
97 chemical dependency program or to enter voluntarily a licensed chemical dependency recovery
98 hospital or residential treatment program that has a valid license issued by the state to provide
99 alcohol or drug services to receive program participation credit, as determined by the court. The
100 probation department shall document evidence of this hospital or residential treatment
101 participation in the defendant's program file.

102 (11) The conditions of probation may include, in lieu of a fine, but not in lieu of the fund
103 payment required under paragraph (5), one or more of the following requirements:

104 (A) That the defendant make payments to a battered women's shelter, up to a maximum
105 of five thousand dollars (\$5,000).

106 (B) That the defendant reimburse the victim for reasonable expenses that the court finds
107 are the direct result of the defendant's offense.

108 For any order to pay a fine, to make payments to a battered women's shelter, or to pay
109 restitution as a condition of probation under this subdivision, the court shall make a
110 determination of the defendant's ability to pay. Determination of a defendant's ability to pay may
111 include his or her future earning capacity. A defendant shall bear the burden of demonstrating
112 lack of his or her ability to pay. Express findings by the court as to the factors bearing on the
113 amount of the fine shall not be required. In no event shall any order to make payments to a
114 battered women's shelter be made if it would impair the ability of the defendant to pay direct
115 restitution to the victim or court-ordered child support. When the injury to a married person is
116 caused, in whole or in part, by the criminal acts of his or her spouse in violation of this section,
117 the community property shall not be used to discharge the liability of the offending spouse for
118 restitution to the injured spouse, as required by Section 1203.04, as operative on or before
119 August 2, 1995, or Section 1202.4, or to a shelter for costs with regard to the injured spouse,
120 until all separate property of the offending spouse is exhausted.

121 (12) If it appears to the prosecuting attorney, the court, or the probation department that
122 the defendant is performing unsatisfactorily in the assigned program, is not benefiting from
123 counseling, or has engaged in criminal conduct, upon request of the probation officer, the
124 prosecuting attorney, or on its own motion, the court, as a priority calendar item, shall hold a
125 hearing to determine whether further sentencing should proceed. The court may consider factors,
126 including, but not limited to, any violence by the defendant against the former or a new victim
127 while on probation and noncompliance with any other specific condition of probation. If the

128 court finds that the defendant is not performing satisfactorily in the assigned program, is not
129 benefiting from the program, has not complied with a condition of probation, or has engaged in
130 criminal conduct, the court shall terminate the defendant's participation in the program and shall
131 proceed with further sentencing.

132 (b) If a person is granted formal probation for a crime in which the victim is a person
133 defined in Section 6211 of the Family Code, in addition to the terms specified in subdivision (a),
134 all of the following shall apply:

135 (1) The probation department shall make an investigation and take into consideration the
136 defendant's age, medical history, employment and service records, educational background,
137 community and family ties, prior incidents of violence, police report, treatment history, if any,
138 demonstrable motivation, and other mitigating factors in determining which batterer's program
139 would be appropriate for the defendant. This information shall be provided to the batterer's
140 program if it is requested. The probation department shall also determine which community
141 programs the defendant would benefit from and which of those programs would accept the
142 defendant. The probation department shall report its findings and recommendations to the court.

143 (2) The court shall advise the defendant that the failure to report to the probation
144 department for the initial investigation, as directed by the court, or the failure to enroll in a
145 specified program, as directed by the court or the probation department, shall result in possible
146 further incarceration. The court, in the interests of justice, may relieve the defendant from the
147 prohibition set forth in this subdivision based upon the defendant's mistake or excusable neglect.
148 Application for this relief shall be filed within 20 court days of the missed deadline. This time
149 limitation may not be extended. A copy of any application for relief shall be served on the office
150 of the prosecuting attorney.

151 (3) After the court orders the defendant to a batterer's program, the probation department
152 shall conduct an initial assessment of the defendant, including, but not limited to, all of the
153 following:

154 (A) Social, economic, and family background.

155 (B) Education.

156 (C) Vocational achievements.

157 (D) Criminal history.

158 (E) Medical history.

159 (F) Substance abuse history.

160 (G) Consultation with the probation officer.

161 (H) Verbal consultation with the victim, only if the victim desires to participate.

162 (I) Assessment of the future probability of the defendant committing murder.

163 (4) The probation department shall attempt to notify the victim regarding the
164 requirements for the defendant's participation in the batterer's program, as well as regarding
165 available victim resources. The victim also shall be informed that attendance in any program
166 does not guarantee that an abuser will not be violent.

167 (c) The court or the probation department shall refer defendants only to batterer's
168 programs that follow standards outlined in paragraph (1), which may include, but are not limited
169 to, lectures, classes, group discussions, and counseling. The probation department shall design
170 and implement an approval and renewal process for batterer's programs and shall solicit input
171 from criminal justice agencies and domestic violence victim advocacy programs.

172 (1) The goal of a batterer's program under this section shall be to stop domestic violence.
173 A batterer's program shall consist of the following components:

174 (A) Strategies to hold the defendant accountable for the violence in a relationship,
175 including, but not limited to, providing the defendant with a written statement that the defendant
176 shall be held accountable for acts or threats of domestic violence.

177 (B) A requirement that the defendant participate in ongoing same-gender group sessions.

178 (C) An initial intake that provides written definitions to the defendant of physical,
179 emotional, sexual, economic, and verbal abuse, and the techniques for stopping these types of
180 abuse.

181 (D) Procedures to inform the victim regarding the requirements for the defendant's
182 participation in the intervention program as well as regarding available victim resources. The
183 victim also shall be informed that attendance in any program does not guarantee that an abuser
184 will not be violent.

185 (E) A requirement that the defendant attend group sessions free of chemical influence.

186 (F) Educational programming that examines, at a minimum, gender roles, socialization,
187 the nature of violence, the dynamics of power and control, and the effects of abuse on children
188 and others.

189 (G) A requirement that excludes any couple counseling or family counseling, or both.

190 (H) Procedures that give the program the right to assess whether or not the defendant
191 would benefit from the program and to refuse to enroll the defendant if it is determined that the
192 defendant would not benefit from the program, so long as the refusal is not because of the
193 defendant's inability to pay. If possible, the program shall suggest an appropriate alternative
194 program.

195 (I) Program staff who, to the extent possible, have specific knowledge regarding, but not
196 limited to, spousal abuse, child abuse, sexual abuse, substance abuse, the dynamics of violence
197 and abuse, the law, and procedures of the legal system.

198 (J) Program staff who are encouraged to utilize the expertise, training, and assistance of
199 local domestic violence centers.

200 (K) A requirement that the defendant enter into a written agreement with the program,
201 which shall include an outline of the contents of the program, the attendance requirements, the
202 requirement to attend group sessions free of chemical influence, and a statement that the
203 defendant may be removed from the program if it is determined that the defendant is not
204 benefiting from the program or is disruptive to the program.

205 (L) A requirement that the defendant sign a confidentiality statement prohibiting
206 disclosure of any information obtained through participating in the program or during group
207 sessions regarding other participants in the program.

208 (M) Program content that provides cultural and ethnic sensitivity.

209 (N) A requirement of a written referral from the court or probation department prior to
210 permitting the defendant to enroll in the program. The written referral shall state the number of
211 minimum sessions required by the court.

212 (O) Procedures for submitting to the probation department all of the following uniform
213 written responses:

214 (i) Proof of enrollment, to be submitted to the court and the probation department and to
215 include the fee determined to be charged to the defendant, based upon the ability to pay, for each
216 session.

217 (ii) Periodic progress reports that include attendance, fee payment history, and program
218 compliance.

219 (iii) Final evaluation that includes the program's evaluation of the defendant's progress,
220 using the criteria set forth in subparagraph (A) of paragraph (10) of subdivision (a) and
221 recommendation for either successful or unsuccessful termination or continuation in the
222 program.

223 (P) A sliding fee schedule based on the defendant's ability to pay. The batterer's program
224 shall develop and utilize a sliding fee scale that recognizes both the defendant's ability to pay and
225 the necessity of programs to meet overhead expenses. An indigent defendant may negotiate a
226 deferred payment schedule, but shall pay a nominal fee, if the defendant has the ability to pay the
227 nominal fee. Upon a hearing and a finding by the court that the defendant does not have the
228 financial ability to pay the nominal fee, the court shall waive this fee. The payment of the fee
229 shall be made a condition of probation if the court determines the defendant has the present
230 ability to pay the fee. The fee shall be paid during the term of probation unless the program sets
231 other conditions. The acceptance policies shall be in accordance with the scaled fee system.

232 (2) The court shall refer persons only to batterer's programs that have been approved by
233 the probation department pursuant to paragraph (5). The probation department shall do both of
234 the following:

235 (A) Provide for the issuance of a provisional approval, provided that the applicant is in
236 substantial compliance with applicable laws and regulations and an urgent need for approval
237 exists. A provisional approval shall be considered an authorization to provide services and shall
238 not be considered a vested right.

239 (B) If the probation department determines that a program is not in compliance with
240 standards set by the department, the department shall provide written notice of the noncompliant
241 areas to the program. The program shall submit a written plan of corrections within 14 days from
242 the date of the written notice on noncompliance. A plan of correction shall include, but not be
243 limited to, a description of each corrective action and timeframe for implementation. The
244 department shall review and approve all or any part of the plan of correction and notify the
245 program of approval or disapproval in writing. If the program fails to submit a plan of correction
246 or fails to implement the approved plan of correction, the department shall consider whether to
247 revoke or suspend approval and, upon revoking or suspending approval, shall have the option to
248 cease referrals of defendants under this section.

249 (3) No program, regardless of its source of funding, shall be approved unless it meets all
250 of the following standards:

251 (A) The establishment of guidelines and criteria for education services, including
252 standards of services that may include lectures, classes, and group discussions.

253 (B) Supervision of the defendant for the purpose of evaluating the person's progress in
254 the program.

255 (C) Adequate reporting requirements to ensure that all persons who, after being ordered
256 to attend and complete a program, may be identified for either failure to enroll in, or failure to
257 successfully complete, the program or for the successful completion of the program as ordered.
258 The program shall notify the court and the probation department, in writing, within the period of
259 time and in the manner specified by the court of any person who fails to complete the program.
260 Notification shall be given if the program determines that the defendant is performing
261 unsatisfactorily or if the defendant is not benefiting from the education, treatment, or counseling.

262 (D) No victim shall be compelled to participate in a program or counseling, and no
263 program may condition a defendant's enrollment on participation by the victim.

264 (4) In making referrals of indigent defendants to approved batterer's programs, the
265 probation department shall apportion these referrals evenly among the approved programs.

266 (5) The probation department shall have the sole authority to approve a batterer's program
267 for probation. The program shall be required to obtain only one approval but shall renew that
268 approval annually.

269 (A) The procedure for the approval of a new or existing program shall include all of the
270 following:

271 (i) The completion of a written application containing necessary and pertinent
272 information describing the applicant program.

273 (ii) The demonstration by the program that it possesses adequate administrative and
274 operational capability to operate a batterer's treatment program. The program shall provide
275 documentation to prove that the program has conducted batterer's programs for at least one year
276 prior to application. This requirement may be waived under subparagraph (A) of paragraph (2) if
277 there is no existing batterer's program in the city, county, or city and county.

278 (iii) The onsite review of the program, including monitoring of a session to determine
279 that the program adheres to applicable statutes and regulations.

280 (iv) The payment of the approval fee.

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

285 (C) The probation department has the sole authority to approve the issuance, denial,
286 suspension, or revocation of approval and to cease new enrollments or referrals to a batterer's
287 program under this section. The probation department shall review information relative to a
288 program's performance or failure to adhere to standards, or both. The probation department may
289 suspend or revoke an approval issued under this subdivision or deny an application to renew an
290 approval or to modify the terms and conditions of approval, based on grounds established by
291 probation, including, but not limited to, either of the following:

292 (i) Violation of this section by any person holding approval or by a program employee in
293 a program under this section.

294 (ii) Misrepresentation of any material fact in obtaining the approval.

295 (6) For defendants who are chronic users or serious abusers of drugs or alcohol, standard
296 components in the program shall include concurrent counseling for substance abuse and violent
297 behavior, and in appropriate cases, detoxification and abstinence from the abused substance.

298 (7) The program shall conduct an exit conference that assesses the defendant's progress
299 during his or her participation in the batterer's program.

300 (d) An act or omission relating to the approval of a batterer's treatment programs under
301 paragraph (5) of subdivision (c) is a discretionary act pursuant to Section 820.2 of the
302 Government Code.

(Proposed new language underlined; language to be deleted stricken)

PROPOSER: Orange County Bar Association

STATEMENT OF REASONS

The Problem: Penal Code section 1203.097, subdivision (a)(6) requires the court impose completion of a mandatory 52 week long batterer's program upon any individual who has been granted informal probation if the underlying facts of the offense involve a victim listed in Family Code section 6211. (People v. Cates (2009) 170 Cal.App.4th 545.) The imposition of the extensive year long program is nondiscretionary and is without consideration of the nature or severity of the abuse or the actual charges for which defendant was convicted.

The Solution: In most cases, imposition of the mandated 52 week long batterer's program is warranted and consistent with the severity of the underlying facts of the offense. This is particularly true where defendant has been convicted of one or more felony offenses. However, there are a limited number of misdemeanor cases in which the defendant's criminal behavior simply does not merit the cumbersome, time-consuming, expensive year long program. For example, does every defendant who has been convicted of making an annoying telephone call to a former girlfriend, a misdemeanor, really need or benefit from a 52 week program? Surely not. In those exceptional cases, the court should have the discretion to order the completion of a more appropriate shorter counseling program such as anger management classes in lieu of the batterer's program. Clearly, in this time of limited available resources, both the community and the defendant are better served where the interests of justice are taken into account by the court.

CURRENT OR PRIOR RELATED LEGISLATION

None.

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RESPONSIBLE FLOOR DELEGATE: Alan J. Crivaro

COUNTER-ARGUMENT(S) TO RESOLUTION 02-12-2013

SAN DIEGO COUNTY BAR ASSOCIATION

Proponent argues the mandatory 1-year program is without consideration of the severity of abuse, is time consuming and expensive. However, no evidence proffered by Proponent to show that shorter programs would be adequate to address problems of domestic violence or that undefined "appropriate" counseling would be effective.

Proponent's suggestion of certain misdemeanor convictions being over punished by requiring completion of the 1-year batter's program is problematic. Proponent makes much of the example of a defendant being required to complete the current program after being convicted of a misdemeanor annoying phone call. However Proponent fails to mention that under Penal Code section 653m, the statute requires the phone calls be obscene or threatening to be actionable.

Thus proponent demonstrates the evil that the statute was designed to guard against; the unacknowledged prejudice of well meaning persons who are not expert in domestic violence or its treatment.

Domestic violence is often analyzed by experts as involving more than a single event – it is a cycle of interrelated events that establish the dominance of the “batterer” over the victim. A person who is not a part of the relationship will not see all of the cycle, indeed will only see that part of the cycle when it explodes into open violence, whether physical or verbal, of some sort. That is often so at odds with the social facade as to be almost unbelievable. It leads to the thought that the behavior is “an aberration” that can be safely ignored. It is that sort of expert insight that was brought to bear on the legislature in crafting this statute.

Section 1203.097 may not be a great statute with its level of regulatory detail and mandatory counseling. But its asserted flaws reflect the huge input of experts in crafting the statute. Much of fatal domestic violence is not preceded by a series of ever increasing in intensity bouts of physical violence; but by unseen cycles of escalation which can be purely verbal. Thus, just as in the driving under the influence statutes, crafting the statute to maximize public safety means that everyone is treated to a high level of treatment on the commission of the least of the qualifying offenses.