

August 20, 2019

VIA CERTIFIED MAIL AND EMAIL

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**RE: NOTICE OF INTENT TO SUE FOR VIOLATIONS OF PENAL CODE §§1203.1b,
1203.1d**

To the Los Angeles County Board of Supervisors and the Los Angeles County Probation Department,

I represent All of Us or None-Los Angeles/Long Beach Chapter (“AOUON”). It has come to our attention that the Los Angeles County Probation Department (“the Department”) and the Los Angeles County Board of Supervisors (“Board”) are in violation of the laws regulating imposition and disbursement of probation-related costs.

These laws have long made it clear that, if the defendant’s ability to pay does not exceed the amount of court-ordered fines and fees, the Department cannot assess *any* probation-related costs, including cost of probation services (“COPS”) and cost of conducting investigation and/or preparing a report (cost of investigation or report, or “CIR”). These laws contemplate that, with

few exceptions, the defendant who complies with the Department's payment schedule should have no criminal justice debt at the end of her probation.

However, this is rarely the case. The Department routinely charges the full amount of COPS and CIR to indigent defendants regardless of their ability to pay. As a result, indigent defendants leave probation with thousands of dollars in court-ordered debt even after making all payments as required under their probation terms and conditions. Further, the Board ignores the statutory mandate to disburse victim restitution *before* reimbursing itself for probation costs.

Below, I explain the relevant laws, followed by the Department and the Board's policies and practices that violate them. Finally, on behalf of my client, I propose a number of fixes that the Department and the Board should immediately implement. While my client is ready and willing to discuss ways to work with the Department and the Board to address these concerns, please note that we will promptly seek the court's intervention if the Department or the Board fails to confirm, on or before **September 20, 2019**, the implementation of meaningful changes in its respective policy and practice consistent with our proposal and sufficient to address the past and ongoing harms that the Department and the Board's violations have caused and continue to cause.

RELEVANT LAWS

Court-ordered Fines and Fees

There are many different fines and fees that a court may order an individual under the Department's supervision to pay. For purposes of this letter, they are as follows:

- Restitution: victim restitution ordered by the court pursuant to Penal Code §1202.4(f) to be distributed directly to victim
- State surcharge: state surcharge ordered pursuant to Penal Code §1465.7 to be distributed to the state General Fund
- Fine, penalty assessment, and restitution fine ordered pursuant to Penal Code §1202.4(b)
- Other reimbursable costs, such as: legal assistance fee pursuant to Penal Code §987.8, booking fee pursuant to Government Code §29550.1, court security fee pursuant to Penal Code §1465.8, and so forth.
- Probation costs:
 - Cost of probation supervision, conditional sentence, or term of mandatory supervision ("COPS")
 - Cost of conducting a preplea/presentence investigation and preparing a preplea/presentence report pursuant to Penal Code §1203.7 or §1203.9 ("CIR")

- Cost of processing a request for interstate compact supervision pursuant to Penal Code §§11175 to 11179

Some, but not all, of these fines and fees are made part of probation terms and conditions. Specifically, payment of restitution fines and orders imposed pursuant to Penal Code §1202.4 are a condition of probation, and any portion of a restitution order that remains unsatisfied once the probation period ends is subject to collection. *See* Penal Code § 1202.4(m). However, probation costs are not material terms of probation.

Finally, with limited exceptions (notably including the direct victim restitution and state surcharge), “all fines collected by [the Department] as a condition of the granting of probation or as a part of the terms of probation, shall be paid into the county treasury and placed in the general fund for the use and benefit of the county.” Penal Code §1203.1(k).

Penal Code §1203.1d: Priorities of Determination and Disbursement

In terms of determining what must be paid by the defendant following conviction, Penal Code §1203.1d makes it clear that the court’s determination of “fines and penalty assessments” comes first. Determination of victim restitution comes next. Other reimbursable costs, which include probation costs such as COPS and CIR, are to come last.

The order of disbursement to be followed by the Board is slightly different. In case of installment payments by the defendant, restitution must be disbursed first (directly to the victim); state surcharge is disbursed second (to the state General Fund); fines, penalty assessments, and restitution fine are disbursed third; and any other reimbursable costs are disbursed last. Probation costs come last in both determination and disbursement.

In disbursing money paid by a defendant, there is no apportionment authorized between items of different priorities. Under subdivision (b)(3), apportionment of payments is permitted among “fines, penalty assessments, and restitution fines ordered pursuant to subdivision (b) of Section 1202.4,” items which all have the same priority of disbursement. There is no other provision for apportionment of disbursement. Disbursement should not be made to items of lower priority, unless all items of higher priority have been paid in full.

Penal Code § 1203.1b: “Ability to Pay” Determination

Subdivision (a) of Penal Code §1203.1b describes how to calculate the amount of probation costs to be imposed on a defendant. The defendant must have the “ability to pay” this amount, considering all relevant factors as well as all other court-ordered fines and fees.

First, consistent with section 1203.1d, determination of probation costs occurs after the determination of restitution, fines, and assessment. That is, the Department should determine whether the defendant has the ability to pay “all or a portion” of the probation costs *after* “taking into account any amount that the defendant is ordered to pay in fines, assessments, and

restitution.” While the statute prohibits this amount from exceeding the actual average cost of various probation services, there is no prohibition against the Department *not* imposing any probation costs at all.

Under subdivision (e) of section 1203.1b, the defendant’s ability to pay means “the overall capability of the defendant to reimburse” probation costs and includes her present financial position, reasonably discernible future financial position (but no more than one year in the future), likelihood of obtaining employment within one year, and any other relevant factors.

Next, for the purpose of CIR, the Department develops a payment schedule based on income and approved by the presiding judge of the Los Angeles County Superior Court (hereinafter “CIR schedule”). The Department may also “determine the amount of payment and the manner in which the payments shall be made to the county” for all probation costs. Subdivision (d) of section 1203.1b explicitly allows the Department to order payments on a monthly basis. Under subdivision (h), the county can charge a fee up to \$75 for the processing of installment payments to the Department. An installment plan must be “reasonable and compatible with the defendant’s financial ability.” Penal Code §§1203.1b(b)(2), 1203.1d(a).

Following the Department’s assessment, the defendant must be informed of her right to a hearing on the costs imposed unless the person *knowingly and intelligently* waives that right. Penal Code §1203.1b(a).

VIOLATIONS

The Department Does Not Make the Required “Ability to Pay” Determination.

The Department violates Penal Code §1203.1b in two distinct but related ways. First, the Department violates subdivision (e) by exclusively relying on the number of dependents and gross monthly income to calculate a defendant’s *monthly* ability to pay, thereby disregarding all other factors specified by the statute to determine her “overall capability to reimburse” probation costs. Second, as a matter of policy, the Department does not reduce the amount of probation costs imposed on a defendant on the basis of her ability to pay or in consideration of any court-ordered fines, assessments, and restitution, in violation of subdivision (a).

As an example, let us consider a hypothetical case. For an individual with one dependent and less than \$1,170 in gross monthly income, the Department determines that her *monthly* ability to pay is \$10, based *exclusively* on the CIR schedule. Attachment 1. Even without taking into account any other factors under subdivision (e), the Department’s own standard (though flawed) shows that her overall capability to reimburse three-year probation costs should be no more than \$360 total (*i.e.* \$10/month x 36 months), and the Department cannot impose probation costs exceeding \$360 without violating subdivision (a).

The law, however, does not stop there.

Under subdivision (a), the Department must also take into account the defendant's other fines and fees when determining her ability to pay "all or a portion" of probation costs. Therefore, if the court-ordered fines and fees exceed, or equal, \$360 (as they often do), there is no statutory basis for the Department to determine that the defendant has the ability to pay *any* portion of the probation costs.

However, even for this defendant with the *monthly* ability to pay only \$10, the Department imposes its full CIR and COPS amounts. For the fiscal year 2016-2017, the Department calculated the CIR to be \$768 and the COPS to be \$145 per month. Attachment 2. Based on these amounts, the Department would impose the full \$5,988, *in addition to* the existing fines and fees. Simple math tells us that, even disregarding other fines and fees as well as any interest, it would take this defendant nearly 50 years to pay the probation costs imposed on her in full. A 50-year payment schedule is not "reasonable and compatible" with the indigent defendant's ability to pay.

The Department Routinely Coerces Defendants to Waive Their Right to an Ability to Pay Hearing.

The Department also routinely coerces individual defendants to sign a waiver for an ability to pay hearing. For example, the Department routinely and falsely threatens defendants with revocation of probation and subsequent incarceration, should they refuse to waive their right to a hearing. This is a clear violation of the defendant's statutory right to a hearing, and any waiver so obtained cannot constitute "a knowing and intelligent waiver."

The Board Does Not Respect the Priority of Disbursement.

Finally, in violation of Penal Code §1203.1d, the Board or its agents do not properly disburse (or credit) payments made by individual defendants. Instead of disbursing the payments in the order of victim restitution; state surcharge; other fines, penalty assessments, and restitution fines; and *lastly* disbursing probation costs, the Board or its agents routinely disburse probation costs *first* or simultaneously with the higher priority items. The statute does not authorize the Board to disburse portions of a defendant's installation payments to reimburse probation costs before all other court-ordered fines and fees are satisfied in full.

As a result, even if the defendant makes payments sufficient to cover all court-ordered fines and fees, the Board or its agents do not credit her with the full payment toward these fines and fees. The Board's violation of the law makes it appear that the defendant failed to meet material terms and conditions of her probation, leading to long-term collateral impacts on her economic stability and access to post conviction reliefs such as Penal Code §1203.4. *See, e.g., People v. Covington* (2000) 82 Cal. App. 4th 1263. In addition, both the victim and the state General Fund are unlawfully deprived of payments ordered by the court and authorized under the law.

DEMANDS

The Department and the Board must not only bring current policies and practices into compliance with these laws, but take actions to remedy the past harms caused by its violations over the years.

1. For all existing and future probationers:
 - a. The Department must determine the overall amount that an individual defendant has the ability to pay over the probation period, taking into account *all* of the factors specified in Penal Code §1203.1b, and subtract the court-ordered fines and fees from this amount *before* determining the probation costs to be imposed.
 - b. The Board must implement, or direct its agents to implement, a disbursement process that applies all installment payments made by an individual defendant according to the priorities specified in Penal Code §1203.1d.
 - c. The Department must prominently include on a form to waive the right to a hearing under Penal Code §1203.1b (such as the form PROB 1361 or a similar form) the explicit instruction that exercising the right to an ability to pay hearing cannot lead to adverse consequences such as revocation of probation and incarceration.
2. For all past probationers with probation ending within the past 10 years:
 - a. The Department must re-calculate the portion of probation costs that each past probationer would have been able to pay under the new policy and procedure compliant with the laws, along with the correct payment schedule.
 - b. The Board must re-disburse installment payments made by each past probationer in compliance with the priorities specified in Penal Code § 1203.1d.
 - c. For those past probationers who 1) made the correct installment payments based on the correct ability to pay determination; 2) made sufficient installment payments to pay in full all items with a higher priority than COPS under Penal Code § 1203.1d; and 3) had a civil judgment entered for any remaining balance for any fines and fees (including but not limited to COPS), the Department must petition the court to vacate the civil judgment for the remaining balance, if any.
 - i. For those past probationers described in (2)(c) above, the Department and/or the Board must return all overpayments with interest.
 - ii. For those past probationers who do not meet the requirements in (2)(c) above, the Department must petition the court to modify the civil judgment to reflect the correct amount, if any.
 - d. The Department and the Board must update all records in accordance with the revised calculations and disbursements.

- e. To the extent that any incorrect information was provided to a third party regarding the above, the Department and the Board notify the third party of the correction promptly after the re-calculation and re-disbursement are completed.
3. The Department and the Board must suspend all collection efforts, including but not limited to any efforts undertaken by a third party agency (such as GC Services and Franchise Tax Board), if any, until re-calculation and re-disbursement have been completed for the respective defendant.
4. The Department and the Board must provide a regular, ongoing training to all relevant personnel to strictly comply with the revised policies and practices.

Please note that we will seek judicial intervention unless you provide us with proof of substantially completing the above requested actions **on or before September 20, 2019.**

Very truly yours,



Joshua E. Kim

Litigation Attorney

A New Way of Life Reentry Project

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323-563-3575

ATTACHMENT 1



County of Los Angeles Probation Department
Information Systems Bureau
Adult Probation System (APS)
Defendant Assets and Expenses (DFAE) screen Analysis
September 21, 2017



The following documents the calculations on the DFAE screen in APS.

A. DFAE – Page 1

- **EMP, PHONE/EXT, ADDR, CA** - These fields can be manually data entered by user or if it already exists on the Defendant Address Data (DFAD) screen, the system will automatically populate it.
- **MONTHLY INCOME Section** – Users manually data enter values into the following fields. If no data, then fields will be blank.
 - a. WAGES/SALARY – user manual data entry
 - b. WELFARE/GENERAL RELIEF – user manual data entry
 - c. SSI – user manual data entry
 - d. SPOUSE'S INCOME – user manual data entry
 - e. OTHER INCOME – user manual data entry
 - f. **TOTAL MONTHLY INCOME: GROSS**
 - This is a calculated field and processed as follows:

$$f \text{ (Total Monthly Income)} = a + b + c + d + e$$

B. DFAE – Page 2

- **EXPENSES/DEBTS Section** – Users manually data enter values into the following fields. If no data, then fields will be blank.
 - a. RENT/MORTG – user manual data entry
 - b. LOAN PYMTS – user manual data entry
 - c. CAR PYMTS – user manual data entry
 - d. INSURANCE – user manual data entry
 - e. UTILITIES – user manual data entry
 - f. OTHER EXP – user manual data entry
 - g. **TOTAL EXP:**
 - This is a calculated field and processed as follows:

$$g \text{ (Total Exp)} = a + b + c + d + e + f$$

C. DFAE – Page 3

- **NO. DEPENDENTS** = Total number of entries for this field
- **ASSETS Section** – Users manually data enter values into the following fields. If no data, then fields will be blank.
 - a. HOUSE – user manual data entry
 - b. BANK ACCOUNTS – user manual data entry
 - c. PERSONAL PROP – user manual data entry
 - d. **TOTAL ASSETS:**
 - This is a calculated field and processed as follows:

$$D \text{ (Total Assets)} = a + b + c$$



County of Los Angeles Probation Department
Information Systems Bureau
Adult Probation System (APS)
Defendant Assets and Expenses (DFAE) screen Analysis
September 21, 2017



D. DFAE – Page 3

- **MO. GROSS INCOME** (Monthly Gross Income)- This comes from page 1 of data entry screens

- **MO. NET INCOME** (Monthly Net Income)

- **This is a calculated field and processed as follows:**

Monthly Gross Income - Monthly Expenses amount = **Monthly Net Income**

- **NO. DEPENDENTS** – Value is populated from page 2 of data entry screens

- **ABILITY TO PAY**

- **This is a calculated field that utilizes a pre-populated table within APS. The following is the calculation process.**

Take table 'Gross Income' match to the number of Dependents + 1 + Monthly Gross Income amount

And provide corresponding amount from the table and populate the Ability to pay field.

Note: If there is no corresponding amount the system will populate with the previous record found in the table which less than the actual gross income.

- **OVERRIDE AMOUNT**

- User can manually override the 'Ability to Pay' field if needed.
- This is tracked by User ID.

ATTACHMENT 'B'

NO OF DEPENDANTS	GROSS-INCOME-AMT	MAPP-AMT
1	1170.00	10.00
1	1308.00	21.00
1	1446.00	32.00
1	1584.00	43.00
1	1722.00	54.00
1	1860.00	65.00
1	1998.00	76.00
1	2136.00	87.00
1	2274.00	98.00
1	2412.00	109.00
1	2550.00	120.00
1	2688.00	131.00
1	2826.00	142.00
1	2964.00	153.00
1	3102.00	164.00
1	3240.00	175.00
1	3378.00	186.00
1	3516.00	197.00
1	3654.00	208.00
1	3792.00	219.00
1	3930.00	230.00
1	4068.00	241.00
1	4206.00	252.00
1	4344.00	263.00
1	4482.00	274.00
1	4620.00	285.00
1	4758.00	296.00
1	4896.00	307.00
1	5034.00	318.00
1	5172.00	329.00
1	5310.00	340.00
1	5448.00	351.00
1	5586.00	362.00
1	5724.00	373.00
1	5862.00	384.00
1	6000.00	395.00
1	6138.00	406.00
1	6276.00	417.00
1	6414.00	428.00
1	6552.00	439.00
1	6690.00	450.00
1	6828.00	461.00
1	6966.00	472.00
1	7104.00	483.00
1	7242.00	494.00
1	7380.00	505.00

ATTACHMENT 2

PROBATION DEPARTMENT DIRECTIVE

No.:	1399
Issued:	05/08/17
Post Until:	06/08/17

SUBJECT: NEW RATES FOR THE COST OF PROBATION SERVICES (COPS)

Penal Code Section 1203.1b authorizes that a defendant may be required to reimburse the Probation Department for all or a reasonable portion of the cost of probation services that are provided. The statute dictates the Probation Officer shall make an assessment of the defendant's ability to pay to determine the amount and manner a defendant will be required to pay for COPS.

The cost of probation services is calculated each fiscal year and approved by the Department of the Auditor Controller. The cost of probation services reflects the average cost of providing probation services. Effective May 8, 2017, the Adult Probation System (APS) has been updated to reflect the cost of probation services for fiscal year 2016 - 2017. Changes in the cost of probation services are as follows:

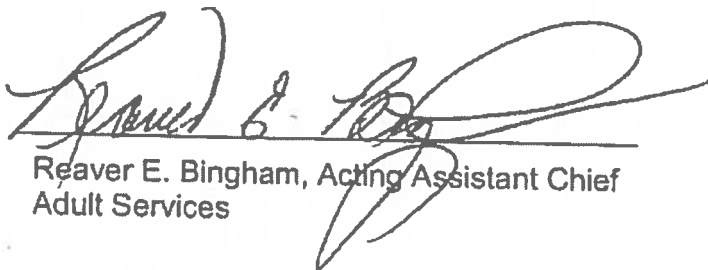
COPS RATES

The cost of conducting an investigation and preparing a court report is: **\$768.00**

The overall average monthly cost for adult supervision per probationer is: **\$145.00**

As part of the initial orientation, the Supervision Intake Team (SIT) deputy or Specialized Caseload deputy is to instruct the probationer regarding the current cost of probation services.

Questions or concerns regarding this Directive shall be directed to the Adult Consultant, at (562) 940-2525.



Reaver E. Bingham, Acting Assistant Chief
Adult Services