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OPINION	:	No. 11-706
of	:	June 21, 2013
KAMALA D. HARRIS Attorney General	:	
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THE HONORABLE DAVID HOLLISTER, DISTRICT ATTORNEY OF PLUMAS COUNTY, has requested an opinion on the following question:

Is a county's district attorney required to pay over to the county treasurer the processing fees that his or her office collects for processing bad checks in connection with a bad-check diversion program?

CONCLUSION

A county's district attorney is required to pay over to the county treasurer the processing fees that his or her office collects for processing bad checks in connection with a bad-check diversion program.

ANALYSIS

Under Penal Code section 476a, it is unlawful to make, draw, utter, or deliver any check, draft, or money order, "willfully, with intent to defraud" and with the knowledge that sufficient funds are not available to pay the amount specified in the instrument.[1] In 1985, the Legislature enacted a precomplaint diversion program[2] that county district attorneys may use as an alternative to prosecuting those persons suspected of committing such "bad-check" offenses.[3] This bad-check diversion program "may be conducted by the district attorney or by a private entity under contract with the district attorney."[4]

When a bad-check case is referred for diversion, a notice must be sent to the person alleged to have written the bad check, informing him or her of the date and amount of the bad check, the payee's name, the date before which the suspected violator must contact a designated person (typically, the merchant or other alleged victim to whom the check was written), and the penalty imposed for issuing a bad check.[5] In an appropriate case, the district attorney and the suspected bad-check writer may enter into a written agreement to forego formal prosecution on the suspected offense pending the suspect's fulfillment of certain additional requirements including the completion of a violator's education class and the making of full restitution to the victim.[6] The suspected violator may not be required to admit his or her guilt as a prerequisite for placement in diversion,[7] and his or her statements (and any information derived from such statements) made in connection with determining diversion eligibility or while participating in the program are inadmissible "in any action or proceeding."[8]

At issue here is an administrative component of this bad-check diversion program. Specifically, we are asked about the handling and/or retention of any fees that the district

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[1] *Id.*, subd. (a); *see Del Campo v. Kennedy*, 517 F.3d 1070, 1072 (9th Cir. 2008).

[2] *See* 1985 Stat. ch. 1039 § 1.

[3] "For purposes of this [diversion program], 'writing a bad check' means making, drawing, uttering, or delivering any check or draft upon any bank or depository for the payment of money where there is probable cause to believe there has been a violation of [Penal Code] Section 476a." Pen. Code § 1001.60.

[4] Pen. Code § 1001.60.

[5] Pen. Code § 1001.63.

[6] *See* Pen. Code § 1001.64.

[7] Pen. Code § 1001.66.

[8] Pen. Code § 1001.67.

attorney may collect from the suspected violator for the bad check or bad checks that the district attorney processes in connection with such a program. In this regard, Penal Code section 1001.65(a) provides as follows:

> A district attorney may collect a processing fee if his or her office collects and processes a bad check. The amount of the fee shall not exceed fifty dollars ($50) for each bad check in addition to the actual amount of any bank charges, including the returned check fee, if any, incurred by the victim as a result of the offense.

As part of his or her restitution—i.e., in addition to the face value of the bad check—the bad-check victim is entitled to the return of any monies expended for bank charges (including returned check fees of up to $15 per check) that he or she has incurred as a result of the particular bad check(s).[9] But what happens to the separate processing fees of up to $50 per bad check that the district attorney is permitted to collect under Penal Code section 1001.65(a)? We are asked whether the district attorney must deposit the funds derived from these processing fees with the county treasurer, or whether some other disposition or arrangement—such as placing these funds in a dedicated account maintained by the district attorney's own office—might be permitted.

First, we consult Government Code sections 26503 and 26504, which appear in an article of the Government Code relating to county district attorneys and entitled "Duties as Public Prosecutor."[10] Section 26503 provides that the "district attorney shall deliver receipts for money or property received in his official capacity and file duplicates with the county treasurer," and section 26504 states that "[o]n the first Monday of each month, or at more frequent intervals . . . , the district attorney shall account for all money received by him in his official capacity and pay it over to the treasurer upon a deposit permit issued by the auditor."

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[9] *See* Pen. Code § 1001.64(b)("'restitution' means the face value of the bad check or bad checks and any bank charges, as described in Section 1001.65"); Pen. Code § 1001.65(c) ("[i]f the district attorney elects to collect any fee for bank charges incurred by the victim pursuant to this section, including any fee charged for a returned check, that fee shall be paid to the victim for any bank fees that the victim may have been assessed [, in an amount not to] exceed fifteen dollars ($15) per check.").

[10] *See* Govt. Code §§ 26500-26509.

Of course, in construing the meaning and coverage of a statute (or statutes), our primary task is to determine the Legislature's intent.[11] In doing so, we "look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose."[12] If there is no ambiguity in the statute's text, "we may presume that the Legislature meant what it said and the statute's plain language governs."[13] In fact, where the statutory language is clear and unambiguous, "further construction or interpretation is generally both unnecessary and inappropriate."[14] In this case, we find that the critical statutory terms are clear and unambiguous, so we will adhere to their plain meaning.

Both Government Code sections 26503 and 26504 are mandatory statutues. Under these provisions, the district attorney (1) "*shall* deliver receipts for money or property received in his [or her] official capacity and file duplicates with the county treasurer,"[15] and (2) "*shall* account for all money received . . . in his [or her] official capacity and pay it over to the treasurer . . . ."[16] It is well established that the word "shall" ordinarily connotes a mandatory duty, rather than a merely permissive option.[17] And, although the word "shall" may, in some special circumstances, be interpreted as permissive rather than mandatory, such a construction is not available when it would render a statutory command ineffective, meaningless, or absurd.[18]

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[11] *Freedom Newsps., Inc. v. Orange Co. Employees Ret. Sys.*, 6 Cal. 4th 821, 826 (1993).

[12] *Dyna-Med, Inc. v. Fair Empl. & Hous. Commn.*, 43 Cal. 3d 1379, 1386-1387 (1987).

[13] *People v. Snook*, 16 Cal. 4th 1210, 1215 (1997).

[14] 92 Ops.Cal.Atty.Gen. 30, 32 (2009); *see Diamond Multimedia Sys., Inc. v. Super. Ct.*, 19 Cal. 4th 1036, 1047 (1999); *Williams. v. Super. Ct.*, 92 Cal. App. 4th 612, 620-621 (2001).

[15] Govt. Code § 26503, emphasis added.

[16] Govt. Code § 26504, emphasis added.

[17] *Common Cause v. Bd. of Supervisors*, 49 Cal. 3d 432, 443 (1989); *see People v. Heisler*, 192 Cal. App. 3d 504, 506-507 (1987); *Hogya v. Super. Ct.*, 75 Cal. App. 3d 122, 133 n. 8 (1977); *Cannizzo v. Guarantee Ins. Co.*, 245 Cal. App. 2d 70, 73 (1966); 92 Ops.Cal.Atty.Gen. at 32; *see also Webster's New International Unabridged Dictionary* 2085 (3d ed., Merriam-Webster 2002) (the word "shall" is "used in laws, regulations, or directives to express what is mandatory").

[18] *People v. Heisler*, 192 Cal. App. 3d at 506-507; *Governing Bd. v. Felt*, 55 Cal. App.

In this instance, to interpret the word "shall" as used in the cited statutes to be merely permissive would nullify the apparent purpose of these statutes, which plainly require the district attorney to provide a full accounting of all monies received in his or her official capacity, and transfer all such sums to the county treasurer. Such a reading is further compelled by language contained in closely-related Government Code section 26505, which makes reference to these mandatory duties and provides that "[i]f the district attorney refuses or neglects to so account for and pay over money received by him, he is liable for such refusal or neglect . . . [,]" and that in such circumstances the "county treasurer shall bring an action against him in the name of the county for the recovery thereof, ..." If the district attorney had the option of *not* accounting for and paying over the specified amounts, there would have been no occasion for the Legislature to impose the consequent liability, and to mandate the recovery actions, specified in Government Code section 26505.

Turning now to the terminology, used in both Government Code sections 26503 and 26504, regarding money and/or property received by the district attorney in his or her "official capacity," we think it is evident that the processing fees of up to $50 per bad check that are described in Penal Code section 1001.65(a) fall within this category. There is no indication in Penal Code section 1001.65 or anywhere else that the fees collected under that statutory authority would be exempt from the general requirement of Government Code sections 26503 and 26504 that they be accounted for and paid over to the county treasurer.

Finally, we note that these controlling statutes are in accord with, and in fact derive from, statutes enacted shortly after the adoption of the California Constitution in 1879.[19] In reliance on these authorities, the Supreme Court held in the 1901 case of *Kern County v. Fay* that the statutory attorney's fees collected by the district attorney for prosecuting certain foreclosure matters must be turned over to the county treasurer.[20] Although it had often been the practice "in the earlier history of the state" for county officials to compensate themselves via the fees they collected in the course of performing their duties, the court observed that the state constitution had instead prescribed that such officials receive a fixed salary as the full compensation for their services and that there be a strict accounting for all fees that county officers may collect.[21] In turn, the Legislature enacted laws that "completely changed" the manner of compensating county officers so

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3d 156, 161-163 (1976); *People v. Mun. Ct.*, 145 Cal. App. 2d 767, 775 (1956); 92 Ops.Cal.Atty.Gen. at 33.

[19] *See Kern Co. v. Fay*, 131 Cal. 547, 550-551 (1901).

[20] *Id.* at 551.

[21] *Id.* at 550.

that "[f]ees collected go to the treasury, and officers get flat salaries."[22] This rule—now contained in Government Code section 26503 and 26504—has stayed substantially the same in the many years that have passed.

We do not presume that a district attorney who proposes to keep a segregated bank account for bad-check processing fees would do so in order to illegally compensate himself or herself above and beyond his or her fixed salary. But with that said, the controlling and mandatory statutes simply do not afford the district attorney the option of holding the funds in question, regardless of his or her motives for doing so. For these reasons, we conclude that a county's district attorney is required to pay over to the county treasurer the processing fees that his or her office collects for processing bad checks in connection with a bad-check diversion program.[23]

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[22] *Id.*

[23] In an earlier opinion, we considered a proposed "worthless check" program in which the district attorney would collect the restitution amounts and any associated fees from the suspected violator. Under that arrangement, we observed that *all* of these amounts would have to be forwarded to the county treasurer under Government Code section 26503 and 26504 for proper disbursement. 63 Ops.Cal.Atty.Gen. 861, 865 (1980). By contrast, we are informed that the bad-check program under consideration here provides for the victim's full restitution directly from the violator as a condition of participation in diversion. *See* Pen. Code § 1001.64(b). In other words, the only funds that the district attorney collects, or "receives in his official capacity," under the present program are the processing fees of up to $50 per check specified in Penal Code section 1001.65(a), and it is these funds, therefore, that must be forwarded to the county treasurer.