

RESTITUTION ENFORCEMENT
MARICOPA COUNTY

A Practical Approach to Assure Restitution to Victims

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I. THE IMPORTANCE OF RESTITUTION FOR VICTIMS OF CRIME

As a victim of crime one learns that justice is not always as swift, severe, or certain as we learned in our civics class. Criminal and juvenile justice professionals, crime victims and victim service providers, and offenders and their advocates all share frustration about how restitution is ordered, collected, distributed, and monitored. While victims expect, very reasonably, that an order of restitution will be honored and collected upon, many justice system officials, adhering to the old saying, "you can't squeeze blood from a turnip," believe their program resources are better spent on other endeavors.

Most crime victims are very concerned about how they can recover from their economic loss suffered as a result of a crime. Victims' rights groups have long advocated that, at the very least, victims must be treated fairly. In 1998, the Department of Justice, Office for Victims of Crime (OVC) recommended (a) that victims be notified about the time and location of charging, pretrial hearings, plea negotiations, trial, and sentencing, (b) that they have the right to meaningful consultation regarding all important case decisions, (c) that they have the right to be heard in major court proceedings, (d) that they receive information about their rights in a form that they can understand, and (e) that orders of restitution should be mandatory.¹ The way crime victims are treated within the criminal justice system is of paramount importance and ensuring that the "system" does not forget about restitution after sentencing is of incredible value to victims. Restitution Court is one way that lets victims in Arizona know the right to "prompt

¹ (Office for Victims of Crime, Department of Justice (1998). *New directions from the field: Victims' rights and services for the 21st century*. Washington, DC: U.S. Department of Justice.)

restitution”² is more than just words written on paper and that the court plays a role not only in ordering restitution but in facilitating its collection.

Often criminal restitution is only thought of for victims of financial fraud, investment scams, or embezzlement; however, restitution is ordered in almost all types of crime, including homicide, sexual assault, domestic violence and other violent crimes. Restitution is a fundamental need of crime victims. Its importance for victims with respect to financial as well as psychological recovery from the aftermath of crime is paramount. However, restitution holds offenders accountable, and, when paid, helps offset the economic loss experienced by the victim who is left with medical bills, funeral costs and other expenses. In some cases a murder takes away the primary breadwinner, leaving no way to even pay rent.

Victims of financial crime often experience anger due to the betrayal of someone that they put their trust and judgment in, along with their lost investment. Victims can feel frustrated, depressed, guilty, embarrassed, and even develop health problems. Violent crime victims have real losses in terms of funeral expenses, travel to/from court, time off work, medical expenses, counseling, lost wages, etc. For some violent crime victims restitution may also be seen as “symbolic” as the loss of someone’s life, dignity, safety, or physical injuries that can never be replaced. With restitution, the message is sent to the victim that the victim's loss is officially recognized by the court and that responsibility for that loss is squarely placed where it belongs: on the offender. It is also important for victims to have the Judge, the “gatekeeper” of justice, acknowledge and confirm that the economic loss faced by the victim did occur and that a judgment is ordered. However, it should not be minimized that restitution when paid does help offset the economic loss of paying for things like medical expenses, funeral cost, property damage, counseling and so forth.

² See Ariz. Const. art. 2, § 2.1(A)(8).

Congress, in passing the federal Mandatory Victims Restitution Act of 1996³, intended to “ensure that the loss to crime victims is recognized, and that they receive the restitution that they are due” as well as “to ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society.”⁴ Unfortunately, we need to do more and do it better and that is what restitution court does.

All criminal justice system partners must be accountable to one another and, most imperatively, to the crime victim. Issues that arise with offender non-payment or late payment should be shared with the victim, within the confines of confidentiality. Communication needs to flow freely from and to the prosecutor, court and probation department. Restitution is an area where it is most inappropriate to "pass the buck." The concept of crime as an offence against the state, and it's attendant administration of justice, have resulted in a host of economic and psychological problems for crime victims, and most importantly in perceptions of injustice. The victim is the only person in the entire criminal justice system process that did not choose to be there, and the victim is the one with the most at stake. Victims should never be surprised by a system that is designed to provide them justice.

Additionally, restitution is important to crime victims because it assists victims in recovering economic losses that result from criminally injurious conduct. It is a vital part of the criminal justice system because it offers victims a sense of justice and holds offenders accountable for their crimes. Payment of restitution promotes the active participation of both offenders and victims in the justice process. It shifts the focus of justice system interventions and makes them victim-centered rather than offender-centered. Restitution is important mechanisms for helping offenders understand the full impact of their criminal behavior on their victims. Through restitution programs, offenders have

³ Pub. L. 104–132, title II, subtitle A (§201 et seq.), 110 Stat. 1227 (1996).

⁴ S. Rpt. No.104-179, at 24 (1995).

opportunities to learn new social and vocational skills and therefore are better prepared to lead a pro-social lifestyle when they complete their period of supervision by the justice system. In the context of Restorative Justice, the work of offenders and justice personnel focuses on ameliorating the harm done to victims as a result of the offender's criminal behavior. The offender is accountable for restoring the victim and community as much as possible to their pre-offense condition. Restitution is a primary tool used for accomplishing this goal. Payment of restitution promotes the active participation of both offenders and victims in the justice process. Effective monitoring, enforcement and **collection** procedures are necessary, however, to accomplish all of these objectives.

Restitution no doubt is an important part of ensuring the perpetrator is held accountable and responsible and we must do a better job of collecting and enforcing restitution. As Steve Twist, a prominent victim's rights attorney said in his testimony in 2003 before the United States Senate in support of a crime victims' rights amendment, "Perhaps some would prefer it if crime victims just remained invisible. Perhaps we are so numbed by decades of crime and violence we simply choose to look away, to pass by on the other side of the road. But in America, when confronted with great injustice, great hope abides." Victims of crime hope that more programs like restitution court will be implemented throughout our great country so that victims are never invisible.

II. PROBATION FINANCIAL COMPLIANCE UNIT

Maricopa County Adult Probation Department has a Financial Compliance Unit (FINCOM), which is composed of a sworn probation officer supervisor and a team of collectors. The team is composed of professionally trained personnel who attempt to collect delinquent court ordered obligations including restitution. Pursuant to a Supreme Court Administrative Order any probationer who is delinquent on his/her obligations more than sixty (60) days is referred to the

financial compliance unit. The sentencing judge is notified by a memorandum which outlines the delinquency and causes as well as recommended remedial actions.

The Financial Compliance Unit uses the same techniques to remedy the delinquencies as are used by commercial bill collection agencies. If the delinquencies are not resolved within the next sixty (60) to ninety (90) days the matter is referred to the Superior Court for enforcement.

III. RESTITUTION COURT

ARS 13-810 provides:

B. In addition to any other remedy provided by law, including a writ of execution or other civil enforcement, if a defendant who is ordered to pay restitution defaults in the payment of the restitution or of any installment as ordered, the clerk of the court that imposed the restitution shall notify the prosecutor and the sentencing court on a monthly basis. **The court, on motion of the prosecuting attorney, on petition of any person entitled to restitution pursuant to a court order or on its own motion, shall require the defendant to show cause why the defendant's default should not be treated as contempt** and may issue a summons or a warrant of arrest for the defendant's appearance.

The cases are prescreened by the Adult Probation/Financial Compliance Unit. The FINCOM supervisor then reviews all referred cases using the following criteria in order to determine which cases are appropriate.

The first factor to be considered is the payment history of the probationer. In reviewing the appropriateness of a referral, the probationer should be at least six months delinquent in his payments. When reviewing the payment history it is important to determine if the probationer has established a pattern of willful non compliance. This is the standard that is required under Arizona law for a finding of contempt. In addition to the payment history, attention is paid to the

defendant's attitude, cooperation and the nature of the offense for which they are on probation.

These factors can be determined by asking such questions as:

- Is the probationer willing to make life style changes?
- Is the probationer cooperating in providing the needed financial documentation?
- Does the probationer understand and realize the need for compliance with the Court's financial orders?

Another factor which is given high priority is who is the victim? Private victims, especially those that have "opted in" are given top priority. In Arizona, when victims have "opted in" they are legally required to receive notice of specific events and actions that have occurred or could occur in the case. They have the guaranteed right to be heard by the Court prior to the Court issuing rulings.

Once a case is found to be appropriate for Restitution Court, it is placed on the pending list for assignment to one of the two Court divisions that conduct the hearings. In order to prioritize the cases on the pending list a scoring sheet has been developed. For this sheet the following factors are scored and given a numerical value:

- Type and number of victims
- Number of months delinquent
- Amount of restitution owed
- Amount delinquent
- Cooperation with FINCOM
- Class of felony

After screening by FINCOM, the Court receives a list of delinquent criminal defendants. The Court has the assigned courtroom Clerk of the Court prepare an Order to Show Cause minute entry. These are transmitted to the assigned Probation Officers through FINCOM. The assigned PO gives the Order to Show Cause to the defendant and directs, in writing, the defendant to appear in court.

The Probation Department prepares a case summary showing the amount of delinquency, the payment history and related issues. Again, this hearing is a Civil Contempt Hearing and not a Probation Revocation Hearing. In light of the screening process, how the probationer is doing generally on probation is not the issue.

ARS 13-810 provides:

C. At any hearing on the order to show cause the court, the prosecuting attorney or a person entitled to restitution may examine the defendant under oath concerning the defendant's financial condition, employment and assets or on any other matter relating to the defendant's ability to pay restitution.

D. If the court finds that the ***defendant has willfully failed to pay*** a fine, a fee, restitution or incarceration costs or ***finds that the defendant has intentionally refused to make a good faith effort to obtain the monies required for the payment***, the court shall find that the default constitutes contempt ...

1. Order the defendant incarcerated in the county jail until the fine, fee, restitution or incarceration costs, or a specified part of the fine, fee, restitution or incarceration costs, is paid.

The hearing consists of two issues: A.) Are the records of the Clerk of Court/Adult Probation Department correct? If there are any issues of payments made and not credited properly, the matter is continued to next date and client is directed to meet with the Financial Compliance team to resolve the issues. Errors in the records to date have not been an issue. Most issues are resolved

quickly and generally reflect payments made at the Clerk of the Court's office on the way up to court.

Illustration case: Defendant had receipts claiming payments totaling approximately \$9,000.00. When reviewed and the defendant was confronted she admitted the receipts were forgeries.

B.) Is their willingness to pay and/or ability to pay or whether the defendant has made a good faith effort to obtain the money? Here, the court conducts an examination. Defendants are required to bring in records including W-2, tax returns, and/or wage information. The questions center around employment and which bills and/or personal obligation the defendant pays.

The general format is:

1. Do you rent or own residence – is payments current?
2. Do you own an automobile – own? Lien? Is payment current?
3. Do you have cable or satellite? NFL, MLB or Hockey Package?
4. What are your utilities – Are they current?
5. How many cell phones? (Virtually everyone has at least one.)

If the defendant is paying the above bills, the ability to pay is apparent and established. It is then the burden of the defendant to prove inability to pay. The question then is: Why has defendant not paid restitution? Usual response, Restitution is not a priority. If the issue is unemployment or underemployment, the Court orders the Probation Department provide the documentation of job search efforts.

If the court finds defendant willfully refused to pay or failed to make a good faith effort to obtain money to pay restitution as ordered, the court orders defendant incarcerated pursuant to ARS 13-810 D (1) and sets a purge amount at the

amount of the delinquencies. Remember, the key to civil contempt is the defendant has keys to jail cell – he or she just needs to pay the purge.

Illustration case continued: The defendant's delinquency was approximately \$10,900.00. The purge amount was set, and the defendant was taken into custody. The purge was paid within 24 hours.

After any tour in Family Court, experience with delinquent child support payments tells a judge to attempt to collect all of the delinquencies and set a review hearing in about 7 days. Too often you set a purge and the defendant has sufficient cash in his pocket to pay. If a defendant actually brings cash to pay any purge, the courtroom deputy sheriff is more than willing to walk the defendant to the first floor and have him make a payment and bring a receipt back.

If the court has a question about the ability to pay, the court continues the hearing and directs the Adult Probation Department to do a financial assessment looking at a standard of living and ability to reduce it and/or any job search issues.

Illustration case: The defendant moved into a smaller apartment, sold her car and took the bus to work and cancelled cable TV and was actively looking for a second job. The victim was so impressed that defendant reduced her lifestyle the victim agreed to reduce the monthly payment from \$1,000.00 per month to \$500.00 per month.

Many probationers express a desire to enter into an agreement to bring their accounts up to date especially after watching a contempt hearing for another defendant. If the court finds that the defendant is willing to enter into an agreement to pay current orders and additional amounts towards the delinquencies, the court will accept the agreement on the record, enter it into the clerk's minutes and continue the matter. The court will continue matter for a

review hearing in one to four months to assure compliance with the agreement. If there is compliance with the agreement the defendant graduates from Restitution Court and is returned to his probation officer. The Court generally congratulates the defendant but gently reminds them if they get behind by 3 months they will be right back in court. The vast majority of matters are resolved through a voluntary agreement to bring their accounts into compliance. In the late winter and spring, voluntary tax intercepts are good tools to resolve delinquencies and generally tax intercepts are part of the voluntary agreements.

When working through the calendar, the court generally first calls those matters where the defendants have paid all of their delinquencies, and those matters where the defendant is in full compliance with a voluntary agreement. After congratulating them on compliance, they are discharged from court monitoring. This shows the entire group the **reward for compliance**.

Next, the court conducts the hearings where it is pretty clear the defendant has willfully refused to pay or failed to make a good faith effort to obtain the money to pay. If the defendant is in contempt, he is taken into custody immediately and a purge set. This demonstrates the **consequences for willful failures to pay**.

Once the perimeters are set, most of the following cases result in voluntary agreements where the defendant immediately suggest a solution, i.e., "Will \$1,000.00 keep me out of jail for 1 month?" or "I can pay \$500.00 today." and "I would like one of these agreements." The Court has found it interesting that the major consequence to the defendant is inconvenience. The defendants complain: "I have to go to court once a month which means I have to explain to my boss at my job once a month why I am gone **again!**"

Most defendants found in contempt were released within 72 hours. To date only a few people found in contempt remained in custody more than 72 hours. For those who remain in custody, the Court holds a review hearing some 7- 30 days

later. Generally, at those hearings, the defendant is released with a promise to pay under a voluntary agreement. Additionally, those defendants who are remanded to custody or remain in custody are given work release privileges, and the Court is often amazed at how quickly employment is obtained, and the number of hours defendants work while on work release. Generally work release is 12 hours per day 6 days a week, if the defendant has work available 6 days a week.

The costs to date are minimal. The judges volunteers 2 hours of calendar time. The Adult Probation Department sends the supervisor from FINCOM and usually 2 staff members. Obviously, this would be done on a usual work day so it is no cost to Adult Probation. Summaries provided to the court are just part of the usual records maintained by Financial Compliance.

The Superior Court is using **current legislation** to enforce court order obligations. The procedures used are streamlined since the court is using **civil contempt** and not Probation Revocation proceedings. There is no obligation to provide court appointed counsel to defendants, and since the proceedings are initiated upon court's own motion, a prosecutor is not required. As one can see, 15 – 18 hearings can be done in 1 ½ hours. Rarely does the calendar last 2 hours.

The only obstacle faced by Maricopa County was institutional inertia – “not the way we do things.” Maricopa County Adult Probation Department had a good track record in collecting court ordered costs. There was an institutional reluctance to commence probation revocation proceedings based solely on financial issues, such as:

- Such proceedings are time consuming.
- Lawyers are mandated and expensive.

- If defendant is incarcerated pending hearing revocations proceeding, there are additional costs.
- Judges are reluctant to take on additional work on their calendar especially since there is a dedicated Probation Revocation Center in Maricopa County Superior Court which processes probation violation matters.
- Individual probation officers do not view themselves as collection agents and typically, are slow to deal with delinquencies and sending memorandums to the judges after substantial delinquencies accumulate.

Obstacles were overcome when one judge volunteered to do a dedicated calendar one day per month. After the Program was operating a second judge volunteered a second day. Training by Adult Probation to the officers concerning collection and Restitution Enforcement Court has been done. More importantly, the Superior Court received cooperation from Adult Probation, and especially FINCOM.

IV. PROGRAM IMPACT

In 36 months, the Program has collected approximately \$500,000.00 in delinquent restitution payments. Generally there are 5 to 6 new cases each month.

Cases where defendants have paid substantial payments to avoid contempt findings include payments of \$10,000.00, \$9,500.00, \$5,600.00, \$3,500.00 and a number of payments between \$1,000.00 and \$2,500.00. A number of times defendants paid off entire restitution balance just to avoid returning to Arizona and/or Phoenix. Recently one person paid \$5,600.00 to avoid returning to Phoenix and another paid \$3,600.00 despite the fact the purge was \$900.00 because he did not want to ever come back to Restitution Enforcement Court.

The criminal defendants have expressed a desire never to return because it is inconvenient and the court has a strict no tolerance policy.

The victims who have “opted in” appreciate that someone was actually enforcing restitution. In one case the victim agreed to a reduction in restitution payments. Others are thrilled that someone is finally holding the defendants accountable after years of non payment. The two judges continue to volunteer because the program benefits the victims and it holds defendants accountable.

V. COUNTY COLLECTIONS

In addition to this effort, Maricopa County has a dedicated County Collections Unit under the Department of Finance. This Unit aggressively enforces the Criminal Restitution Orders. Upon release from probation or community supervision/parole a Criminal Restitution Order is created, pursuant to A.R.S. 13-805, which provides:

- A. The trial court shall retain jurisdiction of the case for purposes of modifying the manner in which court-ordered payments are made until paid in full or until the defendant’s sentence expires. At the time the defendant completes the defendant’s period of probation or the defendant’s sentence or the defendant absconds from probation or the defendant’s sentence, the court shall enter both:
 1. ***A criminal restitution order in favor of the state for the unpaid balance, if any, of any fines, costs, incarceration costs, fees, surcharges or assessments imposed.***
 2. ***A criminal restitution order in favor of each person entitled to restitution for the unpaid balance of any restitution ordered.***

The Criminal Restitution Order is treated as a civil judgment with the exception that it does not expire and is not part of civil court. These Orders are enforced as liens and are filed with the County Recorder’s Office as well as the State and the

Department of Motor Vehicles. These liens prevent the transfer of ownership property (real or personal) out of the defendant's name until the Criminal Restitution Order is paid in full. Collections are also referred to private collection agencies to collect the debt and to initiate wage and non wage garnishments. Additionally, delinquent accounts are submitted to the Arizona Department of Revenue for the chance to intercept any Arizona state tax refunds or lottery winnings.

V. LESSONS LEARNED & WHERE DO WE GO FROM HERE

The success of this program resulted in changes in legislation in 2010 and 2012. Effective October 2011, Criminal Restitution Orders are filed on absconders and beginning in April 2013, the Criminal Restitution Order process for victim restitution will move from the back end of the process to the front end.

At the time the judge determines restitution the judge may sign a Criminal Restitution Order. A Criminal Restitution Order is treated as a civil judgment with exception it does not expire. The victim is entitled to the legal interest from the date the Order is signed. Just as with the current Criminal Restitution Order, the new Order may be filed with the Secretary of State and Motor Vehicle Department, creating liens on personal property and vehicles. They may be recorded with the county Recorder's Office as liens on real estate.

If someone wishes to start a similar program the following advice is offered:

1. Review all current statutes and see if a similar statute exists. If it exists why is it not being used?
2. What financial compliance programs exist within the community supervision (probation and/or parole) and can the court find a way to coordinate a program to develop a similar program?

3. Greater emphasis on training judges to be more sensitive to “enforcement” as opposed to just entering the original restitution order. A criminal restitution order is just a piece of paper unless there is enforcement of the obligation. Individual probation officers need training in collection of restitution. In many cases, the primary reason to grant probation initially is to collect restitution for the victim. If the defendant is not going to pay, why are we supervising him/her in the community?

In reviewing the type of cases that have come through Restitution Enforcement Court, the common factor is the underlying crimes, theft related offenses, including forgery, embezzlement, fraud schemes and artifice, and theft. After listening to the various explanations as to why they are not paying, it is clear that the defendants have manipulative personalities and are now manipulating the system. When faced with certain jail for contempt, the money to pay the delinquencies miraculously appears. Second, these individuals are not those making an effort but falling short each month. There is a major difference in the person who is paying consistently but less than the court ordered amount and the person who has just not paid anything in 18 months. Restitution Enforcement is designed to identify and hold accountable the latter category.

In conclusion, Arizona is a state which has a very strong tradition of victim’s rights. Under the the Arizona Constitution, Article II, Section 2.1 A(8), victims of crime are “entitled to receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury.” Restitution Enforcement Court is a valuable tool to assure “prompt restitution”. However, it is just one tool. Use of liens and garnishment are also effective tools. The key to effective restitution collection is coordination with all agencies USING ALL TOOLS: crime victim advocates, prosecutors, judges, probation officers and finally JUDGES WILLING TO ENFORCE THE ORDERS THEY ENTERED.