

# **A practical approach to obtaining restitution orders**

**Utah Prosecution Council Fall Conference October 2016**

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**Note: These materials are for discussion purposes only  
and are not legal advice.**

**(revised August 10, 2016)**

# Practical

“Of or concerned with the **actual doing** or use of something rather than with theory and ideas...

(Of an idea, plan, or method) **likely to succeed** or be **effective in real circumstances**; feasible...

*Adjective, British and world English definitions*

*[http://www.oxforddictionaries.com/us/definition/american\\_english/practical](http://www.oxforddictionaries.com/us/definition/american_english/practical)*

# Presentation overview

- **Why prosecutors should lean in.**
- **Restitution legal standards, elements and definitions.**
- **Timing.**
- **A practical approach: five steps, five case events, five templates.**
- **Q & A period as time allows.**

# **Presentation overview- scope**

**These materials focus on obtaining restitution orders.**

**Enforcing restitution orders warrants a separate presentation.**

# Five steps

1. Punch
2. Prove
3. Negotiate
4. Adjudicate
5. Enforce (Enforcement is not covered in depth in this presentation.)

# Five case events

1. **Prosecutor receives new case.**
2. **Plea offer.**
3. **Change of plea hearing.**
4. **Time between COP hearing and sentencing during which PSR is prepared**
5. **Sentencing**

# Five templates

## (Proposed templates are suggestions)

- **Attachment 1 Proposed victim's declaration of damages.**
- **Attachment 2 Proposed restitution agreement.**
- **Attachment 3 Defendant's Financial Declaration for Restitution with documents supporting all answers.**  
available online at the Utah Court's website by going to:  
<http://www.utcourts.gov/howto/criminallaw/restitution.html>
- **Attachment 4 Proposed restitution motion pleadings.**
- **Attachment 5 Proposed prosecutor's worksheet for analyzing Defendant's Financial Declaration**



# On leaning in- so much is owed to so many

As of February 5, 2016, **\$12,611,793.93** was the total restitution trust balance due in **1404 cases** pending in Third District Court, Salt Lake County, West Jordan and Salt Lake City Departments. Excluded are cases in which ordered restitution payments are collected by Adult Probation and Parole and Utah Office of State Debt Collection.

*Source: restitution trust account reports provided by George Braden georgeb@utcourts.gov, office of the Utah State Court Administrator. For duties of the court administrator see U.C.A. 78A-2-107 (2008). “ The Clerk of the Court shall:...reconcile accounting ledgers to bank statements, maintain and serve as custodian of trust accounts and perform such other accounting duties also as assigned by the court executive;...” Utah Rules of Judicial Administration Rule 3-302(2)(L). See Court accounting manual (July 11, 2016) at <https://www.utcourts.gov/nxt/gateway.dll?f=templates&fn=default.htm&q=&uq=1&x=&up=1>*

# On leaning in- rights of victims

- Victims enjoy statutory rights to be notified of, attend and be heard at important proceedings; **to seek restitution**; have a speedy adjudication of restitution. *Utah Constitution Article I, Sec, 28; U.C.A. 77-37-1 et seq., as amended; State v Brown, 2014 UT 48, ¶18.*
- Victims are **entitled to the assistance of prosecutors** who must honor and protect the rights of victims. *State v Casey, 2002 UT 29, ¶33.*

# On leaning in- duty of prosecutors to notify victims

- (1) **Within seven days of the filing of felony criminal charges** against a defendant, the prosecuting agency shall provide an initial notice to reasonably identifiable and locatable victims of the crime contained in the charges, except as otherwise provided in this chapter.
- (2) The initial notice to the victim of a crime shall provide information about electing to receive notice of subsequent important criminal justice hearings listed in Subsections 77-38-2(5)(a) through (f) and rights under this chapter.
- (3) **The prosecuting agency shall provide notice to a victim of a crime:**
  - (a) for the important criminal justice hearings, provided in Subsections 77-38-2(5)(a) through (f), which the victim has requested; and
  - (b) for restitution requests to be submitted as provided in Subsection 77-38a-302(5)(d).
- (4) (a) The responsible prosecuting agency may provide initial and subsequent notices in any reasonable manner, including telephonically, electronically, orally, or by means of a letter or form prepared for this purpose. *U.C.A. 77-38-3 (2016)*

# On leaning in- duty of prosecutors to inform court at change of plea

**(1) *At the time of entry of a conviction or entry of any plea disposition of a felony or class A misdemeanor, the attorney general, county attorney, municipal attorney, or district attorney shall provide to the district court:***

**(a) *the names of all victims, including third parties, asserting claims for restitution;***

**(b) *the actual or estimated amount of restitution determined at that time; and***

**(c) *whether or not the defendant has agreed to pay the restitution specified as part of the plea disposition.***

**(2) *In computing actual or estimated restitution, the attorney general, county attorney, municipal attorney, or district attorney shall:***

**(a) *use the criteria set forth in Section 77-38a-302 for establishing restitution amounts; ...***

**(3) *If charges are not to be prosecuted as part of a plea disposition, restitution claims from victims of those crimes shall also be provided to the court. See U.C.A. 77-38a-202(2011)***

# On leaning in- duty of prosecutors to request restitution at sentencing

“(d) (i) The **prosecuting agency shall submit** all requests for complete restitution and court ordered restitution to the court **at the time of sentencing if feasible, otherwise within one year after sentencing.**

(ii) **If a defendant is placed on probation** pursuant to Section 77-18-1:

**(A) the court shall determine complete restitution and court ordered restitution; and**

**(B) the time period for determination of complete restitution and court ordered restitution may be extended by the court upon a finding of good cause, but may not exceed the period of the probation term served by the defendant.**

(iii) **If the defendant is committed to prison:**

**(A) any pecuniary damages that have not been determined by the court within one year after sentencing may be determined by the Board of Pardons and Parole; and**

**(B) the Board of Pardons and Parole may, within one year after sentencing, refer an order of judgment and commitment back to the court for determination of restitution.**  
*U.C.A. 77-38a-302(5) (2016).*

# Restitution- legal standards, elements, and definitions



# Legal standards- standard of appellate review

An appellate court will not disturb a trial court's restitution order unless it exceeds that prescribed by law or the trial court otherwise abused its discretion, and a trial court will be deemed to have abused its discretion only if no reasonable person would take the view adopted by the trial court. *State v Ludlow*, 2015 UT App 146, ¶5

# Legal standards- evidence and standard of proof

- The rules of evidence do not apply to sentencing proceedings which include restitution proceedings. URE 1101(c )(3); *State v. Weeks, 2002 UT 98, ¶ 16.*
- Due process requires sentencing to be based upon accurate and reasonably reliable information. *State v Gomez, 887 P.2d 853,854 (Utah 1994).*
- Violations of probation and abeyance conditions must be proved by a preponderance of the evidence. *Layton City v Stevenson, 2014 UT 37, ¶ 2.*

# Legal standards- procedural fairness at sentencing

- [A] defendant is entitled to due process protections during sentencing to prevent procedural unfairness....  
Fundamental principles of procedural fairness in sentencing require that a defendant have the right to examine and challenge the accuracy and reliability of the factual information upon which his sentence is based....  
Accordingly, factual information upon which a sentence is based must be disclosed to a defendant, except in the rare case where disclosure of the information would jeopardize the life or safety of third parties... (citations omitted) *State v Gomez, 887 P.2d 853, 854-55 (UT 1994)*

# Legal standards- Defendant's rights to make specific objections and to a hearing

“If the defendant objects to the ***imposition, amount, or distribution*** of the restitution, the court shall allow the defendant ***a full hearing*** on the issue.”

***U.C.A. 77-38a-302(4) (2016) Effective 5/10/2016***

Elements- six elements are required for a valid and enforceable restitution order

1. Defendant's criminal activities
2. Resulting in
3. Pecuniary damages
4. to a crime victim
5. Total dollar amount of ***complete restitution***
6. Total dollar amount of ***court-ordered restitution and conditions of payment***

# Elements- Is this a case in which restitution must be ordered? Legal test Criminal Code

“When a person is ***convicted of criminal activity that has resulted in pecuniary damages***, in addition to any other sentence it may impose, the court ***shall order*** that the defendant make restitution to the victims, ***or for conduct for which the defendant has agreed*** to make restitution as part of a plea agreement.” *U.C.A. 76-3-201(4)(a) (2015)*.

# Elements- Is this a case in which restitution must be ordered? Crime Victims Restitution Act

“When a defendant is ***convicted of criminal activity that has resulted in pecuniary damages***, in addition to any other sentence it may impose, the court ***shall order*** that the defendant make restitution to victims of crime as provided in this chapter, or for conduct for which the defendant has agreed to make restitution as part of a plea disposition.” *U.C.A. 77-38a-302(1) (2016)*.

# **Elements- Is this a case in which restitution must be ordered? Litmus test**

**As a result of Defendant's crimes did:**

- Somebody die?**
- Somebody receive medical care?**
- Somebody miss work or lose income?**
- Somebody's property damaged, destroyed, or lost?**

# Definitions- defendant's criminal activities

As used in this chapter:

(1) “**Conviction**” includes a:

(a) **judgment** of guilt;

(b) a **plea of guilty**; or

(c) a **plea of no contest**.

(2) “**Criminal activities**” means:

(a) any offense of which the defendant is **convicted**; or

(b) **any other criminal conduct for which the defendant admits responsibility to the sentencing court** with or without an admission of committing the criminal conduct. U.C.A. 77-38a-102 (2016) *Effective 5/10/2016*; see also U.C.A. 76-3-201(1) (2015)

# Definitions- “resulting in”

Utah has adopted a modified "but for" test to determine causation: (1) the damages would not have occurred but for the conduct underlying the defendant's conviction, and (2) the causal nexus between the criminal activities and the loss is not too attenuated either factually or temporally. *State v Brown, 2009 UT App 285, ¶ 11.*

# Definitions- elements of the offense to which defendant pled guilty alone used to establish causation

Given that defendant entered a guilty plea only to the receiving stolen property charge, she cannot be held to answer for all damages resulting from the burglary. *State v Mast, 2001 UT App 402, ¶ 18.*

# Definitions- “pecuniary damages”

“Pecuniary damages” means *all demonstrable economic injury, whether or not yet incurred, including those which a person could recover in a civil action arising out of the facts or events constituting the defendant’s criminal activities and includes the fair market value of property taken, destroyed, broken, or otherwise harmed, and losses including lost earnings, including those and other travel expenses reasonably incurred as a result of participation in criminal proceedings, and medical and other expenses*, but excludes punitive or exemplary damages and pain and suffering.

*U.C.A. 77-38a-102(6) (2016) Effective 5/10/2016*

# Definitions- “pecuniary damages”

- “Pecuniary damages” means *all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant’s criminal activities and includes the money equivalent of property taken, destroyed, broken, or otherwise harmed, and losses including earnings and medical expenses. U.C.A. 76-3-201(1)(c) (2015) .*

# Definitions- pecuniary damages as damages recoverable in a civil action

“Because the cost of the code R examination [of a rape victim] could not be recovered by the SLCPD in a civil action against defendant, the SLCPD has not sustained pecuniary damages as defined by our statute and therefore is not a victim.” *State v Depaoli, 835 P.2d 162, 164 (UT 1992)*

# Definitions- personal injury damages

In tort cases, special damages are usually synonymous with pecuniary loss. Medical and hospital expenses, as well as loss of earnings and diminished capacity to work, are regarded as special damages in personal-injury cases.” *General damages 22 Am Jr.2d Damages § 46.*

One whose interests of personality have been tortuously invaded is entitled to recover damages for past or prospective

- (a) bodily harm and emotional distress [i.e. general damages];
- (b) loss or impairment of earning capacity;
- (c) reasonable medical and other expenses; and
- (d) harm to property or business caused by the invasion.

*Rst 2d Torts § 924 (2011)*

# Definitions- trespass to chattels damages

One who commits a ***trespass to a chattel*** is subject to liability to the possessor of the chattel if, but only if,

(a) he dispossesses the other of the chattel, or

(b) the chattel is impaired as to its condition, quality, or value, or

(c) the possessor is deprived of the use of the chattel for a substantial time, or

(d) bodily harm is caused to the possessor. *Rst 2d Torts § 218 Liability to Person in Possession*

# Definitions- civil cause of action for conversion

The Utah Supreme Court has ***defined the tort of conversion*** as an act of willful interference with a chattel, done without lawful justification by which the person entitled thereto is deprived of its use and possession. *Neff v. Neff*, 2011 UT 6, ¶15.

# Definitions- fair market value as the measure of damages for the tort of conversion

*State v Ludlow, 2015 UT App 146* analyzed **the amount of restitution ordered in a theft case** by referring to the rules for measuring damages recoverable for **the tort of conversion** of personal property.

Where stolen property is not destroyed but is recovered, it is valued at its fair market value at the time and place where the alleged crime was committed. *State v Carter, 707 P.2d 656, 662 (UT 1985)*.

# Definitions- fair market value, the worth of a thing is the price it will bring

***Fair market value has been defined*** as “what the owner could expect to receive, and the amount a willing buyer would pay to the true owner for the stolen item.” *State v Logan*, 563 P.2d 811, 813 (Utah 1977).

Fair market value is ***not the equivalent of replacement cost*** or the price at which someone would sell under urgent necessity. *State v Gorlick*, 605 P.2d 761, 762 (Utah 1979); *State v Slowe*, 728 P.2d 110, 112 (UT 1986)

# Definitions- measure for retail dealer victim is wholesale price

“[T]he market value of goods taken from a retail dealer should generally be based on wholesale value, and “[d]amages for the profits that the . . . retail dealer would normally anticipate from a sale are not ordinarily allowed” unless the retailer can demonstrate certainty regarding lost profits, such as by demonstrating that he was unable to obtain substitutes to satisfy his customers.” (citation omitted, footnote omitted) *State v Irwin, 2016 UT App 2016, ¶ 8.*

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# Definitions- measure of restitution for loss of property is flexible

***The measure of damages is flexible, allowing trial courts to fashion an equitable award to the victim. State v Corbitt, 2003 UT App 417 ¶14.*** A new vehicle's purchase price rather than the insurance company's valuation of the vehicle stolen two weeks after the victim purchased the truck new was appropriate for determining the amount of restitution. [i.e. market value is not an iron rule for measuring damages for loss of property]

# **Definitions-use value may be the measure of damage where there is no market for lost or destroyed property**

**In *Territory v McGrath*, 17 P. 116, 117-118 (1888), the stolen property was a number of books containing court reporter's transcription of witness testimony. The Supreme Court of the Territory of Utah held that where there is no commercial competition for a thing, and hence no market, the thing's "use value" may be employed as the standard to measure value.**

# Definitions- “restitution”

“Restitution” *means full, partial, or nominal payment for pecuniary damages to a victim*, and payment for expenses to a governmental entity for extradition or transportation and as further defined in Title 77, Chapter 38a, Crime Victims Restitution Act. *U.C.A. 76-3-201(1)(d) (2015).*

“Restitution” means full, partial, or nominal payment for pecuniary damages to a victim, including *prejudgment interest*, the accrual of *interest from the time of sentencing, insured damages*, reimbursement for payment of a reward, and payment for expenses to a governmental entity for extradition or transportation and as may be further defined by law. *U.C.A. 77-38a-102(11) (2016) Effective 5/10/2016*

# Definitions- “complete restitution” and “court ordered restitution”

(2) In determining restitution, the court shall determine complete restitution and court-ordered restitution.

(a) “**Complete restitution**” means restitution necessary to compensate a victim for **all losses caused by the defendant**.

(b) “**Court-ordered restitution**” means the restitution the court having criminal jurisdiction **orders the defendant to pay** as a part of the criminal sentence. *U.C.A. 77-38a-302 (2016) Effective 5/10/2016*

# Definitions- “complete restitution” Dollars the victim lost

(b) In determining the **monetary sum** and other conditions for **complete restitution**, the court shall consider **all relevant facts**, including:

(i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;

(ii) the cost of necessary medical and related professional services and devices relating to physical or mental health care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(iii) the cost of necessary physical and occupational therapy and rehabilitation;

(iv) the income lost by the victim as a result of the offense;

(v) the individual victim’s reasonable determinable wages that are lost due to theft of or damage to tools or equipment items of a trade that were owned by the victim and were essential to the victim’s current employment at the time of the offense; and

(vi) the cost of necessary funeral and related services if the offense resulted in the death of a victim. *U.C.A. 77-38a-302(5)(b) (2016)*

# Definitions- “court-ordered” restitution. Dollars the Defendant must pay and **terms**

(c) In determining the **monetary sum and other conditions for court-ordered** restitution, the court shall consider:

(i) the factors listed in Subsections (5)(a) and (b);

(ii) ***the financial resources of the defendant, as disclosed in the financial declaration described in Section 77-38a-204;***

(iii) the burden that payment of restitution will impose, with regard to the other obligations of the defendant;

(iv) ***the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;***

(v) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and

(vi) other circumstances that the court determines may make restitution inappropriate. *U.C.A. 77-38a-302(5)(c) (2016)*

## Definitions- “crime victim”

**“Victim” means any person or entity, including the Utah Office for Victims of Crime, who the court determines has suffered pecuniary damages as a result of the defendant’s criminal activities. (b) “Victim” may not include a codefendant or accomplice. *U.C.A. 77-38a-102(14) (2015).***

# Definitions- secondary crime victims, insurers

**“Restitution” is defined to include “insured damages.”  
*U.C.A. 77-38a-102(11) (2016).***

**Insurers who pay injured victims as required by the insurance contract may have a civil cause of action for subrogation against the wrongdoer.**

# Definitions- secondary crime victims, the Utah Office for Victims of Crime

(1) A reparations award may not supplant restitution as established under Title 77, Chapter 38a, Crime Victims Restitution Act, or as established by any other provisions.

(2) The court may not reduce an order of restitution based on a reparations award.

(3) If, due to reparation payments to a victim, the Utah Office for Victims of Crime is assigned under Section 63M-7-519 a claim for the victim's judgment for restitution or a portion of the restitution, the office may file with the sentencing court a notice of restitution listing the amounts or estimated future amounts of payments made or anticipated to be made to or on behalf of the victim. The Utah Office for Victims of Crime may provide a restitution notice to the victim or victim's representative prior to or at sentencing. The amount of restitution sought by the office may be updated at any time, subject to the right of the defendant to object... *U.C.A. 63M-7-503 (2015)*

# Timing



# Timing- case events are associated with self-imposed and legal deadlines

1. **Prosecutor receives new case. (s. imp.)**
2. **Plea offer. (s. imp.)**
3. **Change of plea hearing. (legal)**
4. **Time between COP hearing and sentencing during which PSR is prepared. (legal)**
5. **Sentencing. (legal)**

# Timing- case events are associated with both self-imposed and legal deadlines

1. **Prosecutor receives new case. (s. imp.)**
2. **Plea offer. (s. imp.)**
3. **Change of plea hearing. (legal)**
4. **Time between COP hearing and sentencing during which PSR is prepared. (legal)**
5. **Sentencing. (legal)**

Timing- two case events fix ***critical***  
legal and practical deadlines

**Change of plea hearing-** victim's declaration of damages and signed and approved restitution agreement must on the the written record.

**Sentencing-** prosecutor must request and judge must make all restitution determinations and orders at sentencing if feasible. Practical timeliness directs prosecutor to create feasibility and avoid delay.

# Timing- at COP hearing prosecutor must inform judge of all restitution details, agreements, and claims

**(1) *At the time of entry of a conviction or entry of any plea disposition of a felony or class A misdemeanor, the attorney general, county attorney, municipal attorney, or district attorney shall provide to the district court:***

**(a) the names of all victims, including third parties, asserting claims for restitution;**

**(b) *the actual or estimated amount of restitution determined at that time; and***

**(c) *whether or not the defendant has agreed to pay the restitution specified as part of the plea disposition.***

**(2) In computing actual or estimated restitution, the attorney general, county attorney, municipal attorney, or district attorney shall:**

**(a) use the criteria set forth in Section 77-38a-302 for establishing restitution amounts; ...**

**(3) If charges are not to be prosecuted as part of a plea disposition, restitution claims from victims of those crimes shall also be provided to the court. See U.C.A. 77-38a-202(2011)**

**Timing- at COP hearing judge must determine and defendant must accept all plea agreement terms**

**“The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:...(6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, **what agreement has been reached...**” *U.R.Cr.P. 11(e)*.**

# Timing- at COP hearing judge must order defendant to provide a financial declaration

(2) (a) The court ***shall order the defendant as part of the presentence investigation to: (i) complete a financial declaration*** form described in Section 77-38a-204 (b) The ***willful failure or refusal of the defendant*** to provide all or part of the requisite information ***shall constitute a waiver*** of any grounds to appeal or seek future amendment or alteration of the restitution order predicated on the undisclosed information. *U.C.A. 77-38a-203(2)(2013)*.

Note: Defendant's Financial Declaration for Restitution statutory form is available online at the Utah Courts. Go to <https://www.utcourts.gov/howto/criminalaw/restitution.html>

Point to ponder:

# Timing- change of plea hearing, agreed restitution amount may be left open

The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *State v. Gibson, 2009 UT App 108, ¶ 10*. The requirement that a guilty plea be entered knowingly and voluntarily does not require that the defendant be apprised of the exact amount that she will be required to pay in restitution. *Id. at ¶ 16*.

**Point to ponder:** Does “may” mean “should”?

# Timing- plea agreements may create contractual restitution deadlines

The Utah Supreme Court and the United States Supreme Court, have referred to plea agreements as contracts and have applied principles derived from contract law to plea agreements. *State v Patience*, 944 P.2d 381, 386 (Utah Ct. App. 1997).

“[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.” *Santabello v New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed. 427 (1971).

# Timing- defendant has remedies for the State's missing a plea agreement deadline

- A remedy for defendant is constitutionally required when the State reneges on a promise that formed the basis for a plea agreement. *Santobello v New York*, 404 U.S. 257, 262-63 (1971).
- When a plea agreement is breached by the prosecutor, the proper remedy is either specific performance of the plea agreement or withdrawal of the guilty plea both at the discretion of the trial judge. *State v Smit*, 2004 UT App 222, ¶ 17
- **Point to ponder:** Why would a prosecutor agree to “restitution to be determined within 90 days?” Where does “90 days” come from? What does “determine” mean?

# Timing- the PSR must include victim impact statement re damages

- “The department shall prepare a presentence investigation report in accordance with Subsection 77-18-1(5)...” *U.C.A. 77-38a-203(1)(a) (2013).*

“The presentence investigation **report shall include: (i) a victim impact statement according to guidelines set in Section 77-38a-203** describing the effect of the crime on the victim and the victim’s family; (ii) **a specific statement of pecuniary damages**, accompanied by a recommendation from the department regarding the payment of restitution with interest by the defendant in accordance with Title 77, Chapter 38a, Crime Victims Restitution Act. *U.C.A. 77-18-1(5)(b) (2015).*”

# Timing- before sentencing the victim must provide PSR author with evidence of pecuniary loss

*The **crime victim shall** be responsible to provide to the department upon request all invoices, bills, receipts, and other evidence of injury, loss of earnings, and **out-of-pocket loss**.... (c) The inability, failure, or refusal of the crime victim to provide all or part of the requested information shall result in the court determining restitution based on the best information available. *U.C.A. 77-38a-203(1)(b)(2013)**

**Point to ponder:** Should the prosecutor provide the PSR author with the victim's declaration of damages?

# Timing- before sentencing prosecutor must provide PSR author with evidence of pecuniary loss

The **prosecutor** and law enforcement agency involved **shall provide** all available victim information to the department upon request. The victim impact statement shall:....(ii) itemize any **economic loss** suffered by the victim as a result of the offense;...” *U.C.A. 77-38a-203(1)(a) (2013)*.

**Point to ponder:** What are the drawbacks of the prosecutor directly providing victim loss information to PSR author?

# Timing- at sentencing parties must object to object to restitution facts and recommendations in PSR

“(c) If the **defendant objects to the imposition, amount, or distribution of the restitution recommended in the presentence investigation, the court shall set a hearing date to resolve the matter.** (d) If any party *fails to challenge the accuracy of the presentence investigation report at the time of sentencing, that matter shall be considered to be **waived.*** U.C.A. 77-38a-203 (2) (2013).

**Point to ponder:** What may the prosecutor do to obtain the judge’s help in narrowing the scope of Defendant’s objections?

# Timing- at sentencing prosecutor must submit restitution requests and judge must order restitution if feasible

“(d) (i) The **prosecuting agency shall submit** all requests for complete restitution and court ordered restitution to the court at the time of **sentencing if feasible**, otherwise within one year after sentencing.

(ii) If a defendant is placed on probation pursuant to Section 77-18-1:

(A) **the court shall determine** complete restitution and court ordered restitution; and

(B) **the time period for determination of complete restitution and court ordered restitution may be extended by the court upon a finding of good cause, but may not exceed the period of the probation term served by the defendant.** (iii) If the defendant is committed to prison(A) any pecuniary damages that have not been determined by the court within one year after sentencing may be determined by the Board of Pardons and Parole; and(B) the Board of Pardons and Parole may, within one year after sentencing, refer an order of judgment and commitment back to the court for determination of restitution. *U.C.A. 77-38a-302(5) (2016).*

**Point to ponder:** What can prosecutors do to establish feasibility to order restitution at sentencing?

# Timing- statutory deadline for judge to order restitution is jurisdictional .

***State v Poole*, 2015 UT App 220** vacated a restitution order. At sentencing the district court ordered defendant as a condition of probation to pay restitution in an unspecified amount. More than one year after sentencing the district ordered defendant to pay restitution in a specified amount. The court of appeals held that the district court lacked jurisdiction to order restitution more than one year after sentencing as required by the former *U.C.A. 77-38a-302(5)(d)(i)* (2013). *Id.* at ¶¶ 18-20.

# Timing- at sentencing defendant enjoys due process right to procedural fairness

[A] defendant is entitled to due process protections during sentencing to prevent procedural unfairness....

Fundamental principles of procedural fairness in sentencing require that a defendant have the right to examine and challenge the accuracy and reliability of the factual information upon which his sentence is based....

Accordingly, factual information upon which a sentence is based must be disclosed to a defendant, except in the rare case where disclosure of the information would jeopardize the life or safety of third parties... (citations omitted) *State v Gomez*, 887 P.2d 853, 854-55 (UT 1994)

# Timing- where sentence fixes amount of court ordered restitution, double jeopardy protections may prohibit further amounts

Depending on the circumstances, the Double Jeopardy Clause prohibition against multiple punishment *could* render unlawful a post-sentencing amended restitution order increasing the restitution amount ordered in the original sentence where the defendant has developed a legitimate expectation of finality in his original sentence. *State v Rodrigues, 2009 UT 62, ¶ 36.* (criminal non-support.)

- **Point to ponder:** Should plea agreement and sentencing order be framed to leave open future amounts?

# A practical approach- five steps, five case events, five templates



# Five steps

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5. Enforce (Enforcement is not covered in depth in this presentation.)

# Five case events

1. **Prosecutor receives new case.**
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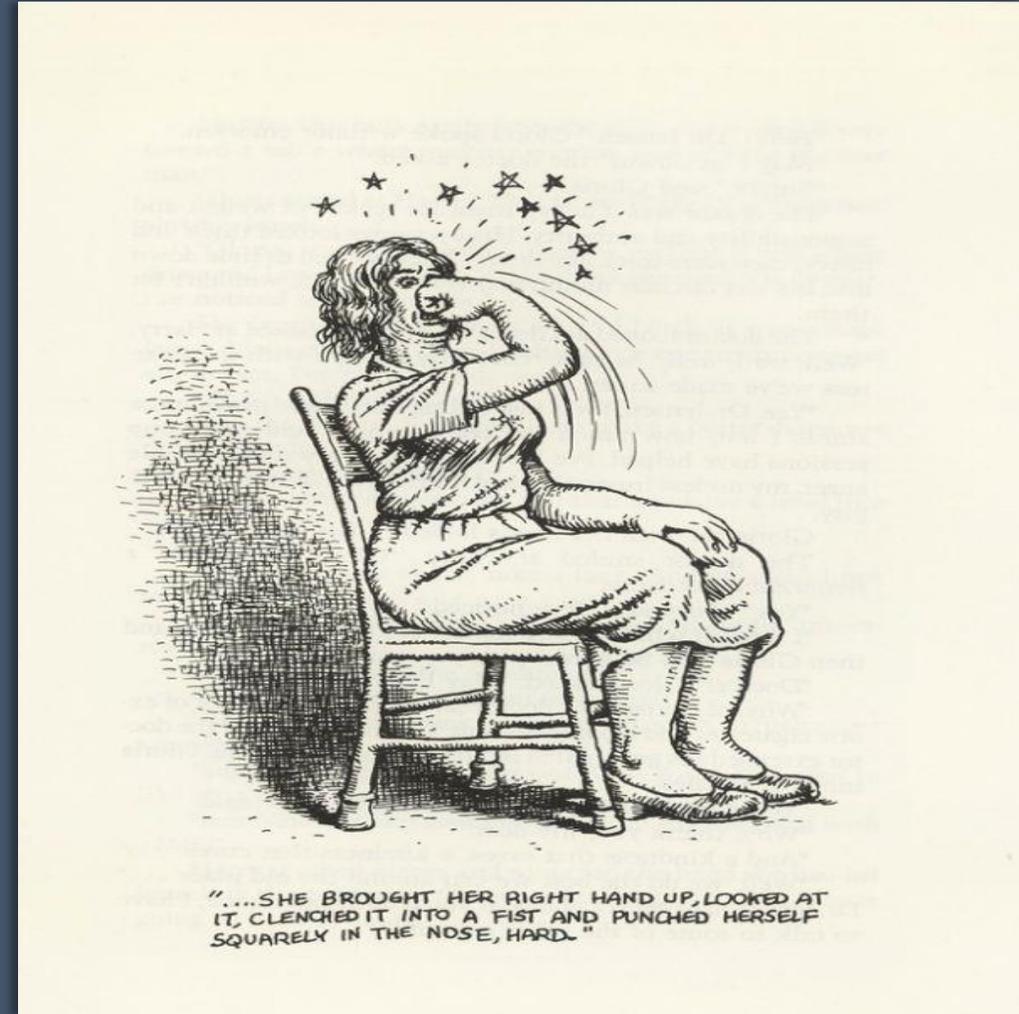
# Step 1-Punch

What to do? Punch yourself in the face. Then review investigative material and apply litmus test to determine whether case has restitution potential.

When? **ASAP upon receiving a new case.**

What templates to use? **None. Yet.**

Why? As a reminder that sooner is better than later. Victims are waiting. You have duties.



# Step 2- Prove

What to do? Identify and personally contact potential restitution crime victims from investigative materials. Identify and contact secondary victims. Obtain from each victim, and then e-file and disclose written declaration of damages with supporting documentation.

What template to use?

**Attachment 1 Proposed victim's declaration of damages**

When? **ASAP after receiving new case**

Why? Victims deserve a phone call and must consent to restitution requested. Early written proof from victims is gold.



# Attachment 1-Crime victim declaration

Attachment 1 Crime victim declaration of damages and request for restitution  
"A practical approach to obtaining restitution orders"  
These materials are for discussion purposes only and are not legal advice.

## CRIME VICTIM'S DECLARATION OF DAMAGES AND REQUEST FOR RESTITUION

**IMPORTANT:** Complete and sign this form, attach supporting the documentation you have, and return as soon as possible to \_\_\_\_\_.  
"Pecuniary damages" as used below includes all demonstrable economic injury, whether or not yet incurred, including those which a person could recover in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the fair market value of property taken, destroyed, broken, or otherwise harmed, and losses including lost earnings, including those and other travel expenses reasonably incurred as a result of participation in criminal proceedings, and medical and other expenses. See *U.C.A. 77-38a-102(6) (2016)*. If you have questions please contact \_\_\_\_\_.

Case: State of Utah v. \_\_\_\_\_, Defendant.

Court # \_\_\_\_\_ DA# \_\_\_\_\_

Defendant's criminal activities charged: \_\_\_\_\_

Date(s) of criminal activities: on or about \_\_\_\_\_

Name of crime victim \_\_\_\_\_

1. I am the above named crime victim or authorized representative of the victim. To date, the crime victim sustained "pecuniary damages" as defined above in the reasonable amount of \$\_\_\_\_\_ as the result of Defendant's criminal activities. I request the Court to order Defendant to pay restitution in that amount for my benefit.

2. I have *attached* the supporting documentation I currently have.

3. Below is my brief explanation of the pecuniary damages. (Note: Please explain if somebody else paid for any the damages. For your example an insurance company, the Utah Office for Victims of Crime, a government entity or program, etc.. Attach additional sheets if needed)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

I declare solemnly and under criminal penalty of the State of Utah for knowingly making a false written statement as provided by U.C.A. 78B-5-705 (2008) that I am over the age of 18 years, and that this declaration is true and correct to the best of my knowledge and belief.

Dated \_\_\_\_\_, 2016. \_\_\_\_\_

Signature

# Step 3- Negotiate

What to do? Extend restitution offer using templated form. If restitution agreement is reached: at COP hearing file written restitution agreement on record. If no agreement, then prepare for adjudication: at COP orally request an order that Def promptly file and provide AP&P with financial declaration; and after COP hearing promptly email victim's declaration to AP&P and promptly file restitution motion.

What templates to use? As appropriate **Attachment 1 Proposed victim's declaration of damages (above); Attachment 2 Proposed restitution agreement; Attachment 3- Def's financial declaration; Attachment 4 Proposed restitution motion pleadings.**

When? **Make rest. offer ASAP after receiving signed declaration of damages from victim. If deal is reached, file rest agreement at COP hearing. If no deal reached, file written motion promptly after COP hearing.**

Why? Using written agreement avoids legal error and keeps prosecutor in control. Concluding restitution by negotiation serves practical timeliness.



# Attachment 2- Restitution agreement

**RESTITUTION AGREEMENT**

State v. \_\_\_\_\_, Ct # \_\_\_\_\_ DA# \_\_\_\_\_

Defendant and Plaintiff agree and stipulate as a part of their plea agreement in this case to the following restitution terms, and jointly move the Court for its restitution order and judgment incorporating this agreement. That each of the crime victims below has sustained pecuniary damages to date in at least the principal amounts below as the result of Defendant's criminal activities in this case. That Defendant agrees to pay and to be ordered to pay court ordered restitution equal to complete restitution for the benefit of the victims below in the principal amounts below plus judgment interest by installment payments of at least \$\_\_\_\_\_ each month due by the end of the month. That unless otherwise ordered payments shall be made to the clerk and Defendant shall keep the clerk advised at all times of Defendant's physical residence address and phone number. That Defendant may be ordered in the future to pay additional restitution amounts for pecuniary damages sustained by the victims in the future as a result of Defendant's s criminal activities. That Defendant's full compliance with this restitution agreement shall be required as a material condition of any probation or abeyance. That the Court shall have ongoing jurisdiction in this case to enforce payment of required restitution amounts until all required amounts have been paid in full. That the entirety of U.C.A. 77-38a-101, et seq. as amended shall apply to and control this agreement. That this agreement shall become effective upon acceptance by the Court.

Crime victims and principal restitution amounts Defendant shall pay:

|                       |                 |
|-----------------------|-----------------|
| Crime victim #1 _____ | Amount \$ _____ |
| Crime victim #2 _____ | Amount \$ _____ |
| Crime victim #3 _____ | Amount \$ _____ |
|                       | Total \$ _____  |

Other terms: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dated \_\_\_\_\_, 2016.

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
Attorney for Defendant

\_\_\_\_\_  
Prosecutor, Attorney for Plaintiff

# Attachment 3 – Defendant’s financial declaration for restitution

\_\_\_\_\_  
My Name

\_\_\_\_\_  
Address

\_\_\_\_\_  
City, State, Zip

\_\_\_\_\_  
Phone

\_\_\_\_\_  
Email

\_\_\_\_\_

In the [ ] District [ ] Justice Court of Utah  
\_\_\_\_\_ County

Court Address \_\_\_\_\_

|                            |  |
|----------------------------|--|
| Prosecutorial Jurisdiction | <b>Financial Declaration for Restitution</b> |
| v.                         | Case Number _____                            |
| Defendant _____            | Judge _____                                  |

The following information is true, and I have omitted nothing that is relevant to my financial status.

(1) Employment  
[ ] I am unemployed because:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Financial Declaration for Restitution Approved Boards of Judges May 14, 2013 Page 1 of 7  
Revised April 7, 2015

# Attachment 4- State's restitution motion pleadings

Attachment 4 State's restitution motion pleadings  
"A practical approach to obtaining restitution orders"  
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**Templates for typical restitution motion pleadings appear below.**

**Page 2. STATE'S MOTION FOR RESTITUTION ORDER AND JUDGMENT**

**Page 4. RESTITUTION ORDER AND JUDGMENT**

**Page 7. STATE'S REQUEST TO SUBMIT FOR DECISION AND NOTICE OF PROPOSED RESTITUTION ORDER AND JUDGMENT**

**Page 9. STATE'S RESTITUTION JUDGMENT DEBTOR AND CREDITOR INFORMATION STATEMENT (NON-PUBLIC)**

# Step 4- Adjudicate

What to do? At sentencing: If agreement is reached, refer to agreement at sentencing and ask to submit a separate restitution order and judgment information statement. If no agreement reached, request ruling on your pending written motion filed after COP . If objection, ask judge to narrow issues and set evidentiary hearing date

What templates to use? **Attachment 4 Proposed restitution motion pleadings; Attachment 3 Defendant's Financial Declaration (if available); Attachment 5 Proposed prosecutor's worksheet for analyzing Def's declaration.**

When? **By written motion filed before sentencing. Supplement with oral request at sentencing.**

Why? Restitution orders, negotiated or litigated, are an adjudicative act. Statute directs and economy prefers that restitution be ordered at sentencing if feasible. Focus on the feasible not on reasons to delay. Restitution order recorded as civil judgment supports civil remedies when criminal remedies are no longer available. Restitution judgment information statement is necessary to furnish victim contact information to entity responsible for disbursing payments received.



# Attachment 5- Prosecutor's worksheet for analyzing Defendant's Declaration

Attachment 5 Prosecutor's worksheet for analyzing Defendant's Financial Declaration  
 "A practical approach to obtaining restitution orders"  
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State v \_\_\_\_\_ Ct# \_\_\_\_\_ DA# \_\_\_\_\_ Hrg date \_\_\_\_\_

| Item as shown                                       | Possible issues   | Documents |
|---|---|-----------|
| Dependents  | Voluntarily supporting others?  |           |
| Employment  | Voluntarily unemployed?<br>Impaired or disabled?  |           |
| Gross monthly income (GMI) shown<br>\$              | Voluntarily underemployed?<br><br>Hourly rate?  |           |
| Net monthly income (NMI) after<br>withholding<br>\$ | Inadequate hourly rate?<br><br>Proposed imputed hourly rate?  |           |
| Percentage withheld %                               | Hours worked?   |           |
| Proposed GMI \$                                     | Inadequate hours worked?  |           |
| Proposed NMI \$                                     | Proposed imputed hours?<br><br>Proposed imputed additional GMI?<br><br>Proposed imputed NMI?<br><br>Employment counselling, training? |           |

Note: These materials are privileged and non-discoverable as the prosecutor's work product.

# Step 5- Enforce

What to do? Send to victim SJC and restitution order with written explanation of victim's right to enforce with separate counsel seeking civil remedies. Identify the agency assigned to supervise probation and to receive and disburse payments of ordered restitution enforce restitution payments (Court? AP&P? Utah Office of State debt collection? BOPP?). Provide agency with copy of SJC, restitution order, and restitution judgment information statement. Next, determine what ongoing role the prosecutor will play in enforcement. Calendar deadlines affecting court's jurisdiction to enforce (eg. end of probation, end of PIA) Upon def's substantial default on required monthly payments, proceed by order to show to seek judicial relief.

What templates to use? None. Use relevant parts of written record.

When? Begin when restitution has been ordered

Why? Victim deserves to receive payment. Justice requires that defendant pay as ordered.



--End--