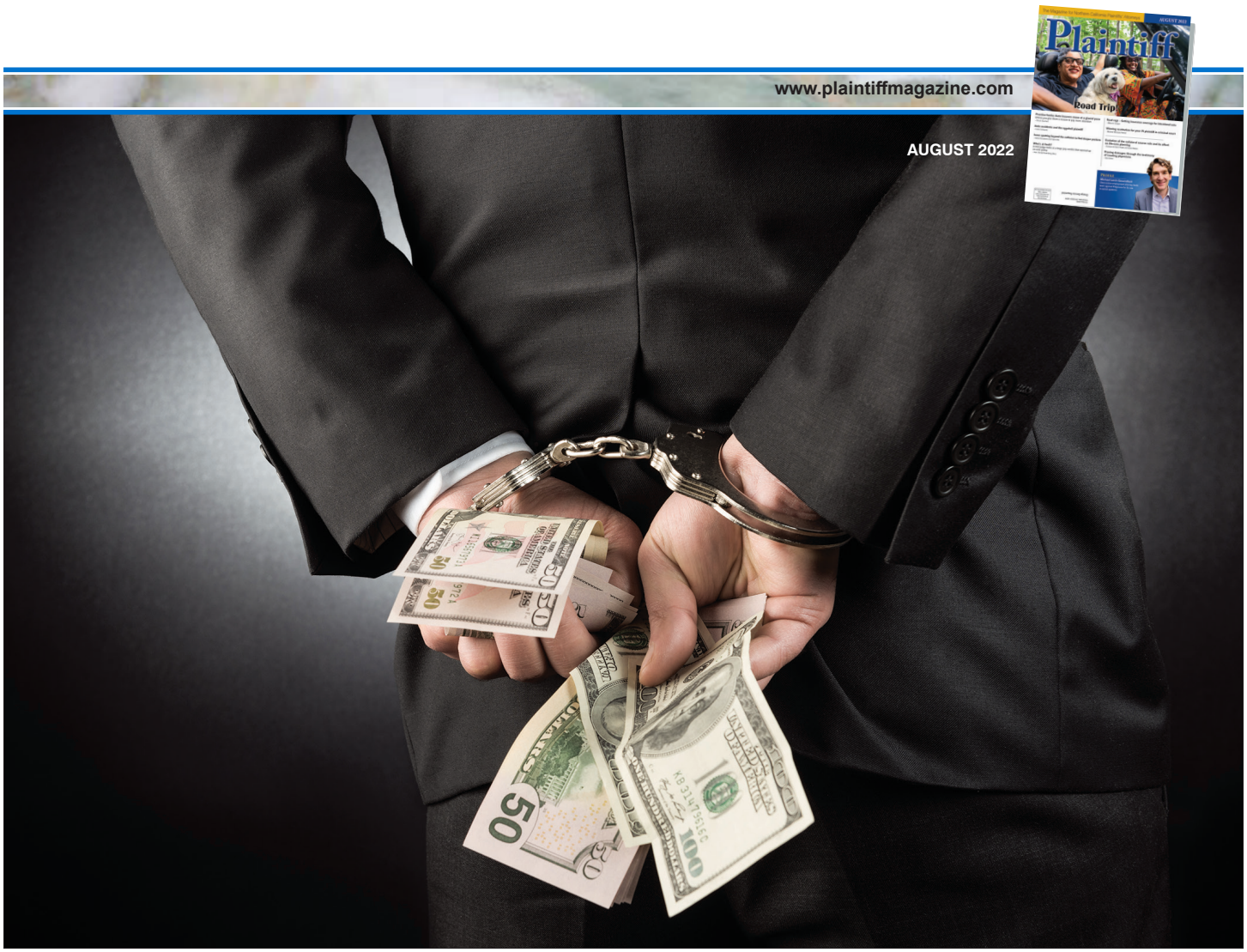


Advocating for PI plaintiffs in criminal court

A guide to winning restitution in the criminal courts, including attorney's contingency fees

By Melanie Meneses Palmer

As personal-injury attorneys, we meet our clients at the worst time in their lives. We navigate them through the complexities of the legal system and the insurance claims process – shouldering the burden to give them the mental and emotional space they need to recover and heal. When civil and criminal jurisdiction intersect on a case, we can (and should) continue this role in the companion criminal matter. Your objectives in both legal arenas are the same: 1) secure a financial recovery that adequately compensates your client, and 2) hold wrongdoers accountable.

Because a victim of crime is not party to a criminal action, often victims find themselves lost in the criminal-justice system without much support. While many prosecutorial agencies have designated victims' rights advocates on staff, due to the sheer volume of their caseloads, prosecutorial agencies are often unable to provide victims with the level of attention they deserve. Therefore, your guidance through the criminal case will ensure that your client is treated with the respect and dignity to which each victim of crime is entitled under the California Constitution. Your involvement may also maximize the client's total financial recovery, particularly where the injuries greatly exceed the applicable insurance policy limits.

Inform and empower your client

Under article I, section 28, subdivision (b) of the California Constitution, victims of crime are granted enumerated rights, including:

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- The right to be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process (Cal. Const., art. I, § 28, subd. (b)(1).);
- The right, upon request, to reasonable notice of all public proceedings, and to be present at such proceedings (Cal. Const., art. I, § 28, subd. (b)(7).);
- The right to be heard, upon request, at any proceeding involving a post-arrest release decision, plea, sentencing, postconviction release decision, or any proceeding in which a right of the victim is at issue (Cal. Const., art. I, § 28, subd. (b)(8).);
- The right to provide information concerning the impact of the offense on the victim and the victim's family and any sentencing recommendations before the sentencing of the defendant (Cal. Const., art. I, § 28, subd. (b)(10).);
- The right to restitution. (Cal. Const., art. I, § 28, subd. (b)(13).) Restitution refers to the victim's right to recover *any* economic losses that s/he incurred as the result of defendant's criminal wrongdoing. The California Constitution declares "It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer." (Cal. Const., art. I, § 28, subd. (b)(13)(a).) The Constitution mandates that restitution be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss. (Cal. Const., art. I, § 28, subd. (b)(13)(b).)

Typically, victims of crime receive a pamphlet from the prosecutor's office informing them of these rights, but these pamphlets are often overlooked or discarded without much thought.

File appropriate notices

File a Request for Notice of All Proceedings and Notice of Intent to Request Restitution in the criminal action. These put the criminal court, the defendant, and the prosecutor on notice that the victim is aware of her constitutional rights and is prepared to exercise them at the appropriate time.

Work in conjunction with the prosecutor

It is the prosecutor's duty to ensure that a proper Restitution Order is made in every case. Your role as victim's counsel is not to usurp this responsibility, your role is to facilitate the prosecutor. There is no uniform method governing how courts and prosecutorial agencies approach victim advocacy and handle restitution matters. Therefore, it is important to introduce yourself to the prosecutor, inquire into how the assigned bench officer handles restitution, and confirm with the prosecutor how your office can assist with (1) keeping the victim informed throughout the proceedings, and (2) securing a Restitution Order that encompasses all the economic loss the victim suffered because of the defendant's conduct.

Prepare your client to make a victim-impact statement

Victims of crime have a constitutional right to provide an impact statement that must be considered by the court before a defendant is sentenced. (Cal. Const., art. I, § 28, subd. (b)(10).) Typically, this right is exercised at the sentencing hearing before the defendant is sentenced. The victim can make this statement in person at the sentencing hearing, or through a written statement provided to the court before the hearing.

Impact statements provide the victim with the opportunity to tell the court how the crime has impacted the victim's life emotionally, physically, spiritually, and financially. In instances where the victim feels the plea deal negotiated between the defendant and the prosecutor is too lenient, this is also the time for the victim to express that disappointment, frustration, and outrage. The criminal judge is not bound by the plea agreement between the prosecution and defense, and the judge can be persuaded as to why the proposed sentence should be rejected as inadequate. Courts routinely accept the terms agreed to between the prosecutor and defendant, but not always.

It is also worth emphasizing to the client that she has a constitutional right to address the court, on the record, at the hearing and to tell the court how the defendant's criminal acts have affected her life. This is her one opportunity to speak her piece before the defendant is sentenced. So, remind her not to feel rushed. If she needs to take a moment to collect herself, tell her she can take it. And if she feels that she cannot speak at the hearing, she can ask that someone else read her statement so that it is a part of the public record. In the author's experience, this emotional exercise has yielded more profound and positive effects on the victim's recovery than a high-value monetary settlement.

File a Request for Restitution

File a Request for Restitution for all economic losses, including your legal fees. After a defendant is sentenced, the court will set a restitution hearing. A defendant's sentence is invalid if the court refuses to issue a Restitution Order without a finding of compelling and extraordinary reasons. (Pen. Code, § 1202.46.) A defendant's inability to pay is not a compelling and extraordinary reason. (*Ibid*.)

"[I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court *shall* require that the defendant make restitution to the victim … in an amount established by court order, based on the amount of loss claimed by the victim." (Pen. Code, § 1202.4, subd. (a). (Emphasis added.).) This right to restitution is protected by the California Constitution. (Cal. Const., art. I, § 28, subd. (b).)

"Restitution is 'intended to make the victim whole.'" (*People v. Grundfor* (2019) 39 Cal.App.5th 22, 30.) "The court's discretion in setting the amount of

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restitution is broad, and it may use any rational method of fixing the amount of restitution as long as it is reasonably calculated to make the victim whole." (*People v. Millard* (2009)175 Cal.App.4th 7, 26.) There is no requirement the restitution order be limited to the exact amount of the loss in which the defendant is actually found culpable, nor is there any requirement the order reflect the amount of damages that might be recoverable in a civil action. (*Ibid*.)

Penal Code section 1202.4, subdivision (f) provides a non-exhaustive list of economic losses that are recoverable in a Restitution Order, including:

- Stolen, damaged, or destroyed property (Pen. Code, § 1202.4, subd. (f)(3)(A).);
- Medical expenses (Pen. Code, § 1202.4, subd. (f)(3)(B));
- Mental health counseling expenses (Pen. Code, § 1202.4, subd. (f)(3)(C).);
- Lost wages if the victim was unable to work due to the crime (which includes court and travel time) (Pen. Code, § 1202.4, subd. (f)(3)(D)-(E).);
- Interest, at the rate of 10 percent per annum, that accrues as of the date of sentencing or loss, as determined by the court (Pen. Code, § 1202.4, subd. (f)(3)(G).);
- Actual and reasonable attorney's fees and other costs of collection accrued by a private entity on behalf of the victim (Pen. Code, § 1202.4, subd. (f)(3)(H).)

Recent caselaw on recovering attorney fees

In *People v. Marrero* (2021) 60 Cal.App.5th 896, 913, the court upheld a Restitution Order for recovery of the entire contingency fee paid by the victim to her personal-injury attorney in a companion civil action. "Since a victim will likely have to pay a contingent fee in any personal injury action resulting from the crime, evidence that the victim incurred the contingent fee is prima facie evidence of a loss entitling him to compensation." (*Id*. at 908.) The court found the Restitution Order was proper despite it being three times the hourly lodestar. "Taking all of the factors into account … the [lower] court awarded the victims restitution in the amount of $350,000 based on their attorney fees." (*Ibid*.)

Marrero also rejected the defense argument that fees for the recovery of economic damages could be separated from fees for the recovery of noneconomic damages. The court explained: "Because restitution is limited to economic losses, this limitation precludes recovery of attorney fees incurred solely to recover noneconomic losses. But a victim is not prohibited from recovering attorney fees if those fees are incurred to recover both economic and noneconomic losses. Because the Legislature has directed that a victim be 'fully reimburse[d]' for economic losses [citation], it would be improper to reduce the attorney fees incurred to obtain economic damages merely because those same attorney fees also led to the recovery of nonrecoverable damages (e.g., pain and suffering damages). Moreover, because of the strong public policy seeking to provide crime victims with direct restitution for all the 'losses they suffer' (Cal. Const., art. I, § 28, subd. (b)), when fees cannot be reasonably divided between the pursuit of economic losses as opposed to noneconomic losses, the victim is entitled to be fully reimbursed for all actual and reasonable attorney fees." (*Id*. at 906-07.)

Be prepared to argue against improper offsets

The California Legislature intended to require a criminal offender to make full restitution for all losses caused by the crime for rehabilitative and deterrent purposes and that such reparation should go entirely to the victim that the offender directly wronged, regardless of that victim's reimbursement from other sources. (*People v. Hove* (1999) 76 Cal.App.4th 1266, 1272.) Accordingly, the settlement of a civil action does not discharge a criminal defendant's responsibility to satisfy a Restitution Order. (*People v. Vasquez* (2010) 190 Cal.App.4th 1126, 1133 [explaining that a victim's right to sue a defendant for tortious conduct amounting to a crime and the state's right to impose a Restitution Order on a criminally convicted defendant are independent of one another].)

Offset based on a settlement paid by the defendant's insurer

A criminal defendant is entitled to offset a criminal Restitution Order by the amount paid in a civil settlement on his behalf (i.e., paid by his insurance provider) to his victim, but the defendant can only offset the amount of the settlement payment allocated to losses covered in the Restitution Order. (*People v. Bernal* (2002) 101 Cal.App.4th 155, 167-68.) In other words, offset is only proper where the Restitution Order includes losses covered by the civil settlement agreement. Therefore, where it can be shown that the victim's general and economic losses exceed the amount recovered in the civil settlement, offset of the full settlement value would be improper as that civil settlement necessarily includes compensation for the victim's general damages, which cannot be subject to a Restitution Order.

No offset for collateral sources

The dual purposes of deterrence and rehabilitation would be foiled if a criminal offender was relieved from the responsibility of making his victim whole simply because the victim had the foresight to purchase insurance coverage. (*In re Brittany L.* (2002) 99 Cal.App.4th 1381, 1387.) Victims frequently have health insurance coverage that covers some or all the victim's losses resulting from the defendant's criminal acts. Despite the victim having insurance, a court is required to order restitution to the victim in the full amount of the loss caused by the crime, regardless of whether the victim had purchased private insurance that covered all or some of the same losses. (*People v. Birkett* (1999) 21 Cal.4th 226, 235-237.) Victims are therefore

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entitled to full restitution for losses incurred, not merely the amount of their insurance deductible. (*In re Brittany L.*, 99 Cal.App.4th at 1386-90.)

Further, victims who are fully covered by insurance or other benefits such as Medicare are nevertheless entitled to full restitution for their medical expenses even when they have not paid for any of the medical expenses themselves. For example, if a crime victim is over 65 and covered by Medicare, this should not shield a criminal offender from a Restitution Order that requires payment of the full amount of the losses caused by the crime. Nor should payment of medical bills by Medi-Cal allow a criminal offender to escape responsibility for losses caused by his or her crime. (*People v. Hove* (1999) 76 Cal.App.4th 1266, 1272.) In such cases, the court has ordered restitution paid to the victim and left the issue of repayment under any insurance contract between the insurer and the insured victim. (*In re Brittany L.* (2002) 99 Cal.App.4th 1381, 1389; *People v. Sexton* (1995) 33 Cal.App.4th 64, 72, cited with approval in *People v. Birkett* (1999) 21 Cal.4th 226, 242.)

It is also important to note that while a criminal offender is not entitled to credit for any money paid by a victim's insurance carrier, restitution may only be for the amount actually paid by the insurance carrier or the benefit conferred. (*People v. Bergin* (2008) 167 Cal.App.4th 1166, 1170-72.)

After restitution is ordered

After the court orders restitution, record the Order for Restitution, reduce it to a judgment and record the abstract of judgment (Form CR-110/111 JV-790/791). A Restitution Order is enforceable as a civil judgment and is not dischargeable through bankruptcy. (Pen. Code, § 1214.) Record the Order, reduce it to a judgment and record the Abstract of Judgment with the County Recorder's Office where the defendant resides to put a lien on the defendant's real property. If the defendant sells or refinances real property in that county, the judgment acts as a lien on the title and should be paid from the selling property's escrow account.

Set reasonable expectations

While a defendant's inability to pay restitution is not a compelling and extraordinary reason that would justify the court's refusal to issue a Restitution Order (Pen. Code, § 1202.46), collection of restitution is limited by the defendant's financial circumstances. Generally, the court may order monthly restitution payments as a term of probation. The monthly payment amount is calculated based on the defendant's income and basic living expenses.

The court will never impose a monthly payment that is beyond the defendant's financial capabilities. As a result, victims may not receive the full amount of restitution ordered during the course of the defendant's probation. Unfortunately, depending on the solvency of the defendant, some victims may wait years before they receive any restitution at all. It is important to record the Order for Restitution and Abstract of Judgment in order to preserve the client's right to continue to seek satisfaction of that judgment, and have your client renew the judgment every 10 years.

Conclusion

As counsel, you can guide your clients through the criminal proceedings and provide the foundation upon which they process and understand the criminal case. This does not require an enhanced understanding of criminal proceedings. Instead, it may require occasional check-ins with the prosecutor to learn how the criminal case is proceeding and relaying that information to your client, in simple terms, so they stay informed. In doing this, you can broaden your client's opportunity to gain closure after both the civil and criminal proceedings have resolved.

[Note: Sample pleadings are available upon request to the author at palmer@kiesel.law.]

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