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# The power of victim restitution in civil cases

Trial lawyers know the importance of having a criminal conviction admitted in a civil case. Significant time and effort are put into having the conviction admitted into evidence. Within the criminal justice system there is another set of powerful tools for a trial lawyer which is less well known. These tools are the rights of crime victims. If a deep pocket defendant has been convicted of a crime related to the civil claims (or charges have been filed and conviction is likely), the plaintiff's lawyer should know which impact tools are available to the victim.

## Who is the "victim"?

It is important to understand who can be the crime victim. A trial lawyer representing the wife in a wrongful death case might assume that the husband who was run over and killed was the only victim. This is wrong. For the purposes of victims' rights and restitution, "victim" includes not only the harmed person, but family members as well. (Pen.Code, § 1202.4(k)(3)(A).) The brothers, sisters, wives and children of the person actually harmed are also victims entitled to the full panoply of victims' rights. So the lawyer representing the wife in this example is representing a crime victim entitled to all the rights that come with that status. Corporations can also be victims.

One important tool is the right of a crime victim to a statement of assets. In a civil case, detailed asset information about a deep pocket defendant may only be available after a judgment. It is rarely available during settlement discussions, when even the wealthiest defendant may complain about lack of liquid assets to pay.

In a criminal case, after a defendant is convicted, the victim is entitled to an asset statement on a Judicial Council form (CR-115) at the time of sentencing. (Pen.Code, § 1202.4(l)(5) - (7).) If the conviction is achieved early in the civil case, the trial attorney can have important asset information which may be crit-

ical in helping him or her evaluate and settle the case. Even late in the case, this information may be vital to enforcement of a judgment.

## Show me the money!

Trial lawyers know it is one thing to have a right to information and quite another to obtain the information. In civil cases it often seems there is a great deal of judicial patience with defendants who fail to answer discovery about their assets. Even after a judgment there may be rounds of enforcement proceedings and motions to compel in an attempt to extract full information. Not surprisingly, the delay of civil litigation often allows creative defendants to do "estate planning" over a course of years. This "estate planning" almost always involves hiding assets in offshore shell corporations.

Trial lawyers will find there is a world of difference between judicial patience with civil case gamesmanship and what occurs in a criminal courtroom in which a defendant has just been convicted. Criminal courts generally will not brook much delay in full disclosure from a defendant and that includes the statutorily mandated asset disclosure.

When a defendant is on probation, there is a second reason full and prompt asset disclosure is likely. Once on probation, a violation of any court order – including an order to make full asset disclosure – can result in revocation of probation. Most criminal defense attorneys will wisely advise their clients not to test the bounds of the court's patience for the simple reason that revocation of probation means the defendant goes to jail, so even opposing (criminal) counsel will usually instruct their clients to make full and accurate disclosure of assets.

Another tool available when a restitution order for the victim has been entered and not paid is special interrogatories (Judicial Council Form CR-200) to discover assets. These interrogatories can be served once a year while

any restitution is unpaid. Again, these must be answered in the context of the criminal case and have the same incentives to accuracy as apply to the asset statement.

The final asset discovery tool available to victims is the power of prosecutors to conduct a debtor examination of the defendant to discover assets available to pay restitution. (Pen.Code, § 1202.4(h).) It is possible for a client to have a district attorney probing for assets.

## Impact on net recovery

The next important aspect of victims' rights for the trial lawyer is that these rights may make an immense increase in a client's net recovery. A victim may recover restitution for the attorneys' fees incurred in his or her civil case against the defendant. (*People v. Pinedo* (1998) 60 Cal.App.4th 1403, 1406 [71 Cal.Rptr.2d 151] (DUI); *People v. Maheshwari* (2003) 107 Cal.App.4th 1406 [132 Cal.Rptr.2d 903] (conversion).) An example will make the financial impact of this right clear.

Assume you represent a female crime victim (e.g., DUI) and she is on a 40 percent contingency. If she were to recover a total of \$1 million comprised half each of economic (therapy, lost support) and non-economic (emotional distress) damages, your firm will receive about \$400,000 as their contingent fee. If she knows of her restitution right, she can go to criminal court and get an order that the convicted defendant pay her \$200,000 of that contingency fee (that portion based on economic losses). That means your client's net recovery of \$600,000 (\$1 million less the \$400,000 contingency fee) will increase by 33 percent to \$800,000. If this is not done, the other \$200,000 will remain in the defendant's pocket.

If your firm billed at an hourly rate, under this scenario the victim would be

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entitled to recover 50 percent of the amount she paid to your firm from the defendant.

Remarkably, this same rule applies if the client has already signed a settlement and a release to the defendant and his or her insurer. A civil release cannot abrogate this right in a criminal case. “[I]here is no reason that a release of civil liability should release a restitution obligation. . .” (*People v. Bernal* (2002) 101 Cal.App.4th 155, 163 [123 Cal.Rptr.2d 622].) The outcome is not changed even if the settlement contains a clause that each party is to bear its own attorneys’ fees. In fact, that clause might be helpful in a subsequent restitution proceeding because it would establish that the victim is out of pocket his or her fees, an important element of proof in recovering restitution.

For recovery of civil fees in criminal restitution a critical determination is which part of the fees were expended on “economic” recovery and which on “non-economic.” This is critical because victim restitution is only related to economic harm. (Pen.Code, §§1202.4(f).) (*People v. Short* (2008) 160 Cal.App.4th 899 [73 Cal.Rptr.3d 154].) Only those fees related to recovery of past, present and future economic damages are recoverable. A declaration by the trial lawyer with specific references to time spent on economic issues and pleadings related to those issues is essential. Civil Code section 1431.2(b) contains definitions of economic and non-economic damages which are helpful in understanding the distinction between the two:

(1) . . . “economic damages” means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.

(2) . . . “non-economic damages” means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of con-

sortium, injury to reputation and humiliation.

With these definitions in mind, the appropriate declaration can be prepared to support a restitution order for that portion of fees (contingent or hourly) which related to recovery of economic damages.

### Enforcing payment

The procedure for recovering even hundreds of thousands of dollars in victim restitution (such as fees) is in stark contrast to a civil trial. No discovery, no depositions, proof may be made by declaration and live witnesses are not required. A restitution hearing can be put on calendar within weeks in most criminal courts. Most hearings take less than an hour, if appropriate preparation and briefing has been done. Often criminal defense counsel file little or no written opposition and call no witnesses. One reason that the defense rarely calls a witness is that the defense witness with the most information is usually the criminal defendant – and defense counsel are loathe to put the newly convicted defendant on the stand.

Once restitution has been ordered, whether for attorneys’ fees or anything else (it is all the same under the criminal law), additional tools are available to enforce payment. Asset disclosure was mentioned above. If the defendant is on probation, that condition by itself is a powerful tool. When the court grants probation and orders the defendant to make restitution, timely payment is a condition of probation. (Pen. Code, §§1202.4(m), 1203(j).) Willful failure to pay restitution can result in revocation of probation and imprisonment. (Pen. Code, §§1203(j), 1205(b); *People v. Lawson* (1999) 69 Cal.App.4th 29, 39 [81 Cal.Rptr.2d 283].) This remedy makes all the civil sanctions in the world look timid. It is the rare deep pocket defendant who would elect to go to prison rather than pay.

The criminal system even has its own garnishment procedures. If the trial court determines that the defendant has the ability to pay restitution, it must enter a separate order for income deduction once

restitution has been determined. (Penal Code §1202.42.) The strong starting point for this procedure is the mandatory entry of a deduction order.

The income deduction order is stayed when issued and the stay remains in effect as long as the defendant pays restitution as ordered. (Pen. Code, §1202.42(b).) If the county agency responsible for collecting restitution, usually the probation department, learns that the defendant has failed to make payments as required, it must begin procedures for lifting the stay. (*Ibid.*) If the stay is lifted, the defendant’s employer will be required to deduct the amount specified in the income deduction order from the defendant’s paycheck and send it to the clerk of court. Judicial Council Form CR-118, Information Regarding Income Deduction Order, is an optional form that can be used to provide notice to the defendant of the effect of the income deduction order. Judicial Council Form CR-119, Income Deduction Order, is an optional form that can be used to provide notice to the defendant’s employer of its obligations under Penal Code section 1202.42.

There is even a law making transfer of assets by a defendant to avoid payment of restitution a crime. (Pen. Code, § 155.5.)

### Who pays?

It is all well to go into criminal court and recover fees, but who pays for the fees incurred in that effort? The fees incurred in the restitution hearing may also be recovered as restitution. (Pen. Code, §1202.4(f)(3)(H).) As to procedure, the lawyer representing the victim files a declaration supporting an award of the fees incurred in preparing for the hearing. The lawyer can even estimate the fees for the hearing and fees for reasonable expected future work – yes, fees not even billed! Future professional fees are appropriately part of restitution. (*People v. Giordano* (2007) 42 Cal.4th 644, 658 [68 Cal.Rptr.3d 51].) In other words, the fees incurred at the hearing can be included in the pleadings seeking the fees from the civil case.

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The next question is which attorney should conduct the restitution hearing on behalf of the victim/plaintiff. Part of the answer may lie in the typical fee agreement. The usual fee agreement only applies to civil litigation. It would not fall within most such agreements for the civil lawyer to do (or to be paid to do) anything in a criminal case. Another part of the answer may be found in whether the civil trial lawyer is qualified to handle the criminal restitution proceeding. If a restitution hearing is outside of the fee agreement and the trial attorney is not comfortable handling it, then an experienced restitution attorney should be found. Since the fees of that attorney will be recovered as restitution, engaging such an attorney should have no effect on the existing hourly or contingent fee agreement.

The relation of trial lawyers to victims' rights is analogous to the relation between a trial lawyer and tax matters. Good trial lawyers are aware of tax impact, warn the client that tax consequences may make a significant difference and may suggest or recommend the engagement of a CPA. Similarly, a trial lawyer should be aware of the tremendous impact victim restitution rights may have on both the conduct of civil litigation and net recovery. Trial attorneys should alert their victim/clients to these rights.

Beyond the tax analogy, there is another important reason why trial lawyers should let their crime client know about restitution rights. Proposition 9 made the right to a separate lawyer in criminal cases a constitutional right for victims. (Cal. Const., art. I, §28(c)(1).) Trial lawyers with crime victim clients should make their clients aware of this right, and, when appropriate, explain that a civil trial lawyer is not the same as a criminal-restitution lawyer. Explaining this is prudent for the lawyer and the client.

Many civil trial lawyers voted for or against Proposition 9. Imagine a client discovering that several hundred thousand dollars were left with the tortfeasor/criminal defendant which could have been recovered in restitution.

The client says she thought her trial attorney was her attorney for restitution

— her constitutional right. She believed this because of the many discussions about the impact of the criminal conviction on her claims. She also believed her trial attorney represented her on all her claims against the defendant — no one told her it was just some of the claims. The trial lawyer would have to explain that, yes, he or she voted for or against Proposition 9, but had no idea that the Proposition made the right to representation in victim restitution proceedings a constitutional right. The attorney would have to explain that, although they repeatedly talked about the criminal conviction, the attorney was not the client's restitution attorney. Certainly an awkward conversation at best.

Many trial attorneys who learn of these powerful rights may wish that they had learned of them some time ago, when, for example, a specific case had settled. This leads to an amazing aspect of victim restitution. Victim restitution rights cannot be lost by the passage of time. The criminal court must retain jurisdiction to hear a victim's claim for restitution. (Pen. Code, §§1202.4(f), 1202.46.) This means that even cases which settled earlier, which meet the requirements of a criminal conviction and a deep pocket defendant, may merit re-examination. It is the rare client who feels that the attorneys' fees paid — whether hourly or contingent — were trivial. It is the sensitive trial lawyer who keeps this in mind. This amazing feature also means that attorneys who did not know about and failed to advise their clients of these rights still have the chance to correct the situation.

### Adopting the "best practices"

Trial lawyers should adopt some best practices about victims' rights. When they take a case involving a potential (or actual) criminal conviction, they should advise the client of his, her or its (corporations can be victims) rights to restitution counsel. The fee agreement should be explicit, as it may be on tax issues, as to whether the trial lawyer is or is not doing any victim restitution work. If there is a deep pocket defendant, the trial lawyer should carefully consider how victims' rights may

strengthen the case and increase the net recovery for the client. If the case can be strengthened (e.g., through asset information) or there is a chance to increase the client's net recovery, a victims' rights lawyer should be consulted as soon as possible. Language in a civil settlement can make a big difference in the amount of fees which a victim can recover in restitution, so a victims' rights lawyer should be on board prior to mediation and settlement conferences. It is often possible to get points included in the initial handshake outline of an agreement (such as how much of a settlement is for economic damages and how much is for non-economic damages) which may be difficult to add after the initial agreement, even during the drafting stages. Failure to include this split in the handshake agreement may preclude putting it in the final written agreement, making it harder (or impossible) for the client to maximize her fee recovery in a subsequent restitution hearing.

Finally, these best practices should include considering past cases, both settled and tried, involving criminal convictions. These cases may merit examination to determine if the client is out of pocket significant fees and a good chunk of this money is sitting in the pocket of a criminal. Even if it is felt that this after the fact review is outside the scope of engagement, a firm should consider whether the client should be advised of his or her rights to a possible additional recovery and referred to victims' rights counsel.

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