

Recommendations and Victim Restitution

355.1 PURPOSE AND SCOPE

This Chapter will outline some general guidelines for making recommendations to the Court. Any recommendations made must be carefully considered to ensure they are lawful, appropriate and consistent with the totality of circumstances surrounding the individual case.

355.2 APPLICABILITY

This policy shall be applicable to all Department Employees.

355.3 GUIDE FOR DETERMINING RECOMMENDATIONS

Each service procedure manual provides service specific recommendations which are not listed in this policy section. Each officer shall be familiar with their service recommendations.

In determining an appropriate recommendation first determine the options provided for the offense(s), by checking the appropriate code (Penal, Vehicle and Health & Safety, etc.) section, or service procedure manual. When consulting the code section, use the Code for the year the crime was committed. Carefully check the end of each code section for cross references that may direct you to other related Code Sections for punishment, mandatory probation conditions and probation eligibility issues. If a penalty is not specified in a section relating to the offense, review the corresponding general penalty sections, e.g., PC18, PC19, PC 19.2, PC 19.8, PC 672, and 42000 and 42001 of the Vehicle Code.

355.4 CONTINUANCES

Continuances are usually requested when further information is needed before a recommendation can be made. The most common reason occurs when the offender fails to report for a probation interview. When requesting a continuance for an interview a determination and a recommendation should be made regarding the offender being placed in custody pending the next hearing or whether he is to be ordered to appear for an interview on a specific date and time.

355.4.1 CONTINUANCE FOR PSYCHOLOGICAL/PSYCHIATRIC EXAMINATION BY COUNTY FORENSIC DEPARTMENT

The County Mental Health (CMH) Department of Forensic Psychiatry provides diagnostic and consultative services to Probation.

- If the offender's offense(s) involved abuse or neglect of a child, a determination may be made regarding whether to recommend a psychological exam through CMH to determine the offender's need for counseling. See PC1203h.
- Any person convicted of any lewd or lascivious act upon a child under the age of 14 must have a psychological/psychiatric exam prior to being placed on probation. See PC288.1.

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355.5 PROBATION MODIFICATION

Proper notice is required if the probation officer is placing the matter on calendar. If the offender has sustained a new felony conviction/True Finding the supervision officer requests the offender's probation case be placed on calendar to be consolidated (to coincide) with sentencing/disposition with the new felony case.

355.6 FINES RECOMMENDATION

Some fines are mandatory by statute (e.g., restitution fines, drunk driving fines, etc.). The imposition of other (General Fund) fines is discretionary with the Court. Probation officers should recommend a General Fund Fine as one of the conditions of probation in appropriate cases.

Officers should strongly encourage probationers to make regular payments on any fine ordered by the Courts.

355.6.1 RESTITUTION FINES FOR ADULTS

When considering the amount of a restitution fine recommendation, the officer should follow the direction set forth in PC1202.4(b)(1) which directs that it be at least \$200 for offenses prior to 2012, \$240 for offenses occurring during 2012, \$280 for offenses occurring during 2013, and \$300 for all offenses occurring on or after 01/01/2014, but no more than \$10,000 on felonies; and one half that amount for the same time periods, but not more than \$1,000 on misdemeanors. The offender's ability to pay is not to be considered in imposing the mandatory minimum amounts.

355.6.2 RESTITUTION FINES FOR JUVENILES

- (a) **Per WIC 730.5:** When the court imposes a fine pursuant to Welfare and Institutions Code section 730.5, the court must make a finding that the youth has the financial ability to pay the fine. If the youth does have the financial ability to pay a fine, the court will not stay the fine. If it appears to Probation that the youth does not have the financial ability to pay or if the youth establishes that he/she does not have the financial ability to pay, the court will not impose the fine.
 1. In cases where the fine is imposed:
 - (a) For a misdemeanor, the 730.5 fine will be \$60.
 - (b) For a felony, the 730.5 fine will be \$126.
 2. These amounts include the penalty assessment pursuant to Penal Code section 1464 and the surcharge pursuant to Penal Code section 1465.7. The amounts will be reviewed annually.
- (b) **Per WIC 730.6:** It is the intent of the Legislature that a victim of conduct for which a youth is found to be a person described in Section 602 who incurs any economic loss as a result of the youth's conduct shall receive restitution directly from that youth.
 1. In every case where a youth is found to be a person described in Section 602, the court shall impose a restitution fine. The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense as follows:

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- (a) If the youth is found to be a person described in Section 602 by reason of the commission of one or more felony offenses, the restitution fine shall not be less than one hundred dollars (\$100) and not more than one thousand dollars (\$1,000). A separate hearing for the fine shall not be required.
 - (b) If the youth is found to be a person described in Section 602 by reason of the commission of one or more misdemeanor offenses, the restitution fine shall not be less than fifty dollars (\$50) and shall not exceed one hundred dollars (\$100). A separate hearing for the fine shall not be required.
2. The restitution fine shall be in addition to any other disposition or fine imposed and shall be imposed regardless of the youth's inability to pay.
 3. The youth shall bear the burden of demonstrating a lack of his or her ability to pay.

355.6.3 DRUNK DRIVING FINES

Officers must recommend at least the minimum fine amount established by the judicial district in which the matter is heard.

355.7 RESTITUTION TO VICTIMS

It is Probation's policy to recommend the full dollar amount of the victim's economic loss regardless of the offender's ability to pay. However, the officer must recommend payments that are within the offender's or his/her parent/legal guardian if the offender is a minor, ability to pay. If during the probation period, the offender is unable to pay the total restitution ordered because he/she lacked the ability to pay that amount, the supervision officer can, if the law permits, extend probation to provide additional time for offender to pay. People v. Cookson (1991) 54 Cal.3d 1091. Probation officers also have the option of completing an Order for Victim Restitution document, which the Court will sign and will be fully enforceable by a victim as if the order were a civil judgment. The Juvenile Field Services Order for Victim Restitution is the JV-790 (see JFS procedure manual for additional instructions), and the AFS Order for Victim Restitution is the CR-110.

355.7.1 STATUTORY REQUIREMENT

Section PC1202.4(f) {formerly PC1203.04} requires the Court to impose restitution in every case where the victim suffered economic losses as a result of offender's "conduct" and where offender is granted probation or sentenced to prison unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record. The restitution order must "identify the losses to which it pertains, and shall be enforceable as a civil judgment" [PC1202.4(h)].

355.7.2 HARVEY WAIVERS

Restitution can be imposed with or without a "Harvey" waiver. The only situation in which restitution cannot be imposed is if a charge is dismissed based upon insufficiency of the evidence or lack of evidence.

355.7.3 JUVENILE COURT RESTITUTION STATUTE (WIC 202(F))

- (a) WIC 202(f) states that in order to hold the offender accountable or restore the victim or community. The Juvenile Court may, as appropriate:

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1. Direct the offender to complete a victim impact class.
 2. Participate in victim offender conferencing subject to the victim's consent.
 3. Pay restitution to the victim or victims.
 4. Make a contribution to the victim restitution fund after all victim restitution orders and fines have been satisfied.
- (b) Probation will recommend the full amount of restitution. As a general rule, all payments will be made through Revenue and Recovery. In an appropriate case, the court may order that restitution be paid directly to the victim unless there is a specific objection. Payments will be applied first to victim restitution, then to fines, and then to any other fees that may be due to the county.
- (c) When the victim is willing to participate with the youth in a victim/offender mediation program and the court finds that it would be appropriate, the court will order the parties to participate in such a program. The court will order restitution in addition to ordering the mediation program. If the mediation program is successfully completed, the court will issue a new order amending the amount of restitution as agreed in the mediation.

355.7.4 IF NONE OR PARTIAL RESTITUTION IS BEING REQUESTED

Where the victim suffered a loss but none or partial restitution is being recommended because of "clear and compelling and extraordinary reasons," these reasons must be fully explained in the Evaluation Section of the probation report and will need to be placed on the record during the Court hearing. Note that the offender's inability to pay is not a compelling and extraordinary reason.

355.7.5 VICTIM CONTACT PROCEDURES

- (a) Determine the name and address of the victim(s) through Court and/or law enforcement documents. Victims noted on a petition for all charges with the exception of those charges Dismissed due to Insufficient Evidence, are considered victims for restitution purposes.
- (b) The casework Probation Officer shall send a victim letter to advise each victim(s) of his/ her rights and to request information for the disposition hearing. In cases where the victim is under the age of 18 years old, the victim letters will be sent to the parents of the victim.
- (c) The casework Probation Officer shall follow-up the victim letter with a telephone call in order to obtain the victim restitution information prior to the disposition hearing. The Probation Officer shall also advise the victim of the date, time and place of all hearings.
- (d) If the victim has not responded to the victim letter or the telephone calls, the Investigation Probation Officer shall prepare a Second Notice Victim Letter prior to the disposition hearing.
- (e) Document all efforts in contacting the victim(s) in the case Contact Log.
- (f) Include all available victim restitution information in the Victim's Statement section of the investigators court report.
 1. If complete restitution information is received, the Probation Officer shall recommend the amount requested by the victim.

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2. If no restitution information is received, the Probation Officer can recommend that the matter is "To Be Determined" (TBD) at a later date. To Be Determined (TBD) recommendations should be utilized only as a final alternative.
 3. If only partial restitution information is received, the Probation Officer can recommend that the matter be scheduled for a restitution hearing.
- (g) The Probation Officer shall contact the Probation Department's Restitution Specialist on all crimes of violence to determine if the victim has made an application with the Victims' Compensation Program. If the Victims' Compensation Program has made payments to the victim, the casework Probation Officer shall identify the Victim Compensation and Government Claims Board claim number and recommend that the offender be liable for the full amount paid by the program.
- (h) The San Diego District Attorney's Office Victim Assistance Program (858)694-4595 can also be contacted for assistance with Victim(s) Compensation.
- (i) Cases involving multiple offenders: Officers, when faced with a multiple offender case involving restitution, may consider the option of recommending that each co-offender be held "jointly and severally" liable for the total loss (while fixing each offender's fractional share of the total). Joint and Several Liability establishes the legal accountability that may be apportioned among two or more parties. Therefore, the fractional portion is ordered to be paid as a condition of probation, but ultimately the offender can be held responsible for the unpaid balance if the victim pursues civil process.
- (j) If a multiple offender case is assigned to different probation officers, the assigned probation officers must coordinate the information in their court reports. If the District Attorney's charging document is the same (dates, victims, etc.) for each offender, the amount of victim restitution recommended for every companion should be the same (i.e. In Vandalism cases, offender A and offender B committed vandalism to the same victim; however, if the District Attorney's charging document for both offenders differ, the restitution amount may also differ). The Probation Officer assigned for each offender must contact each other, determine who will take the lead for gathering victim restitution, who will verify the victim data contained in the District Attorney's charging document, to make sure the counts documented match as to which offender committed the particular count, and/or writing the victim section of the report. The officers shall also discuss the recommended dispositions and if the recommendations differ, the reasons for the differing dispositions are logical (i.e.: one offender is more sophisticated or has a substantial criminal/delinquent history). Only one of the assigned officers should contact the victim(s) if the disposition hearing(s) for all the co-offenders are on or near the same date. This same officer will be responsible for collecting victim letter responses, receipts, and any other information related to restitution and make copies to distribute to the other officers. One victim information section should be written and used in all investigation court reports with appropriate adjustments/counts made as necessary. The same dollar amount of restitution for a particular count of restitution as noted on the District Attorney's charging document must be the same for each offender that is listed for that particular count. If victim information is received after the court hearing, then an ex parte report should be written for each offender with the same information. Each officer will be responsible for updating PCMS victim information for their case.

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355.7.6 APPRISE VICTIMS OF RESTITUTION AMOUNT REQUESTED

Victim(s) (or next of kin or surviving family member) should be apprised of the officer's recommendation regarding restitution and of the hearing date, in case they want to appear at the hearing to present their alternative to the officer's recommendation.

355.7.7 FIXED AMOUNT IN REPORT

The amount of restitution should always be fixed by the Court in the Probation Order or in the Abstract of Judgment. If the Court orders that restitution be determined by the Probation Officer, the officer must, after obtaining the restitution data, submit a Supplemental Report to Court containing the data and a recommendation for a modified order fixing (or deleting the condition if there is no loss to victim) the restitution and a payment schedule.

355.8 RESTITUTION TO INSURANCE COMPANIES

Restitution should only be ordered to an insurance company in rare instances where the insurance company is the direct victim of a crime (e.g. insurance fraud). This issue has been addressed by the California Supreme Court in the case of People v. Birkett, (1999) 21 Cal.App.4th 2266. The Supreme Court held that only direct victims are entitled to restitution and that insurance companies are not considered to be direct victims by virtue of the fact that they have a contractual responsibility to reimburse criminal victims for their losses. Furthermore, criminal victims are entitled to restitution for the full amount of losses regardless if they recoup their losses from another source unless that source is the State Restitution Fund. The issue of a victim reimbursing an insurance company for a loss that was the subject of a criminal restitution order is a civil matter that is covered by contractual agreement between the victim and the insurance company.

355.9 RESTITUTION AS PART OF A PRISON SENTENCE OR DJJ COMMITMENT

Section PC1202.4, as amended effective January 1, 2000, requires a Sentencing Court to order the defendant who is denied probation and committed to prison or DJJ to pay restitution to the victim if the victim(s) "suffered economic loss as a result of the defendant's criminal conduct." The Court must impose restitution in full unless there are compelling and extraordinary reasons for not doing so that is stated on the record.

This restitution order shall identify the losses to which it pertains and it shall be enforceable as a civil judgment. [See PC1202.4(i)]

355.9.1 FULLY REIMBURSE VICTIM

Such restitution shall, to the extent possible, be a dollar amount that is sufficient to fully reimburse the victim, or victims, for all determined economic losses incurred as a result of the offender's criminal conduct.

355.10 STATE RECOUPMENT OF RESTITUTION MONIES

The Victim Compensation Program is a State program designed to assist victims of violent crime to be reimbursed for expenses related to their victimization. This is typically for medical/dental expenses, counseling, wage loss due to injury, mental health counseling/rehabilitation or funeral/

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burial expenses. It is not designed to compensate victims for property loss. The Program is outlined in Sections 13950 - 13966 of the California Government Code and is funded through the Victims Compensation and Government Claims Board (VCGC) with money from the State Restitution Fund.

Restitution Fines ordered by the Court on felony and misdemeanor cases provide ongoing funding for this valuable program. PC§1202.4(f)(2) identifies the Restitution Fund as the recipient of restitution ordered deposited to the extent that the victim received assistance from the Victim Compensation Program. Officers should be aware that the VCGC Board has subrogation rights and is the only third party with such rights as outlined in PC§1202.4.

355.10.1 INVESTIGATION OFFICER RESPONSIBILITY

In conducting any presentence/predisposition investigation in a case involving a victim (except cases which involved only property losses) officers should ask victims if they were compensated by the Victims Compensation Program. The officer should then contact the Probation Department's Victim Restitution Specialist (619) 531-3934 to determine the amount which the Victim Compensation and Government Claims Board paid to the victim(s) or to the service provider on the victim's behalf. The officer should then recommend in the presentence/predisposition report/order that the offender reimburse the State Victims Compensation Program pursuant to PC1202.4(f). This restitution condition will usually be imposed in lieu of restitution to the actual victim; however, if the victim had other losses (e.g. property) for which (s)he was not compensated by the Restitution Fund, restitution to the victim may also be recommended. In the event that the victim's claim is in pending status, the officer should recommend restitution to the Victims Compensation Program in an amount to be determined.

355.11 JUVENILE COURT STATUTE (WIC 730.7)

In a case in which a youth is ordered to make restitution to the victim(s), or the youth is ordered to pay fines and penalty assessments under any provision of this code, a parent or guardian who has joint or sole legal and physical custody and control of the youth shall be rebuttably presumed to be jointly and severally liable with the youth in accordance with Sections 1714.1 and 1714.3 of the Civil Code for the amount of restitution, fines and penalty assessments so ordered, up to the limits provided in those sections. That person will also be named on the JV-790 at 1c. If the parent/guardian's liability is less than that of the youth, the liability limit for the parent/guardian will also be put on the JV-790 at 1c. The current liability limit can be found in Appendix B to the California Rules of Court. The relevant date is the date of the youth's offense.

1/1/01 = \$28,800

1/1/03 = \$30,700

1/1/05 = \$32,200

1/1/07 = \$34,700

2/18/09 = \$37,100

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355.12 DETERMINING ABILITY TO PAY AND FINANCIAL STATEMENTS

When Probation Officers recommend fine and restitution fine amounts, the offender's, or his/her parent/legal guardian if the offender is a minor, ability to pay needs to be considered before an amount is recommended to the Court. PC1202.4 requires the court to consider any relevant factors including, but not limited to, the offender's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the offender as a result of the crime, the extent to which any other person suffered any losses as a result of the crime and the number of victims involved.

355.13 PSYCHOLOGICAL / PSYCHIATRIC SERVICES - CMH FORENSIC DEPARTMENT

The County Mental Health Department of Forensic Psychiatry provides diagnostic and consultative services to Probation and the Courts. Typically, such services result from Court referrals to the Forensic Department for diagnostic examinations on offenders undergoing probation investigations, with the Probation Officer recommending the referral in order to obtain expert assistance on such issues as the offender's fitness for a particular sentence choice and his/her need for counseling or other treatment. Forensic staff is also available to Officers on a limited and informal basis for case consultations.

355.14 POLICY FOR TYPES OF REFERRALS ACCEPTED BY THE FORENSIC DEPARTMENT

While JFS Officers shall consult the JFS Procedure Manual for instructions in ordering mental health evaluations, the information below is provided for all employees:

355.14.1 INVESTIGATION OFFICERS

- (a) May refer offenders for psychological/psychiatric evaluation prior to sentencing/disposition. The psychological/psychiatric report may be made a part of the presentence/disposition investigation and its diagnosis, prognosis, and recommendations be considered in determining the Probation Officer's final recommendations to the Court.
- (b) May request consultation on a case. This may be done merely to obtain Forensic staff opinion regarding the need for a diagnostic examination.

355.14.2 SUPERVISION OFFICERS

- (a) May refer a probationer for a psychological/psychiatric evaluation but only if a probation investigation case is pending on the probationer or it has been ordered by the court as a condition of probation.
- (b) May seek consultation regarding a probationer's mental health, behavior problems, medication management, community resources as well as acute crisis issues.

355.15 AIDS TESTING AND EDUCATION FOR SPECIFIED OFFENDERS

In 1988, several pieces of legislation relating to bloodborne diseases including AIDS became law effective September 1988 or on January 1, 1989. Two of these laws, the Hart Bill (see PC1524.1), and Proposition 96, permit victims of crimes who fear that they have been exposed to AIDS (or

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other infectious diseases), to petition the Court for orders requiring the offender to be tested for AIDS, etc., with the victim and specified others to be notified of the test results. Another law (which added sections 7500-7552 to the Penal Code) provides requirements for AIDS testing of inmates in correctional facilities (or of persons who are placed under arrest) when officers or other inmates may have been exposed to the bodily fluids of the inmate, probationer or arrestee.

355.15.1 DOOLITTLE AND STRATHAM

Two additional AIDS-related laws, which became effective January 1, 1989, more directly impact the Adult Services Probation Officers' duties: The Stratham Bill and the Doolittle Bill require mandatory AIDS testing, AIDS Education, or both for persons convicted of or diverted for certain drug offenses, and for those convicted of certain sex offenses. Our job is to make appropriate recommendations with reference to testing and education and also as to the imposition of fees in lieu of the special fines permitted by the Stratham Bill (for the purpose of funding the AIDS Education program).

The Doolittle/Stratham Bills added Sections 1202.1, 1202.6 and Sections 1001.10 and 1001.11 to the Penal Code. They also amended various sections of the Health and Safety, Penal, and Business and Professions Codes to allow for a discretionary special fine to be imposed in cases involving specified sex and drug offense.

355.15.2 PENAL CODE 1202.1

Specifically, PC1202.1 requires defendants convicted of particular sex offenses (to be tested for AIDS within 180 days of the date of conviction/True Finding.

355.15.3 PENAL CODE 1202.6

Section PC1202.6 requires persons convicted of PC647(b) Prostitution to be tested for AIDS, and to receive AIDS education covering the "causes and consequences" of AIDS and, "if appropriate", the Court shall also order the offender into a drug counseling program.

355.15.4 PENAL CODE 1001.10

Section PC1001.10(b) requires offenders convicted/True Found or diverted for specified (drug-related offenses, as well as 647(a) (lewd act), PC647(b) (prostitution) and PC647(f) (intravenous use of controlled substance) to undergo AIDS education.

355.15.5 AIDS EDUCATION CLASS

A two hour class in AIDS education has been developed by the County Public Health Department which will satisfy the AIDS education requirement in these statutes. The class is offered by a number of service providers who also provide PC1000 drug programs. The offender must pay a fee to the provider in order to enroll in the class.

355.15.6 MANDATORY TESTING

If an offender has been convicted/True Found and referred for probation investigation in connection with any of the offenses listed in PC1202.1 or PC647(b), the Probation Officer must recommend AIDS testing pursuant to PC1202.1/PC1202.6 (whichever is appropriate). The testing

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should be recommended either as a condition of probation or as part of a sentence/commitment being recommended.