

VIRGINIA STATE CRIME COMMISSION

2016 Annual Report:

Restitution: Collection

Practices and Extension

of Probation



Restitution: Collection Practices and Extension of Probation

Executive Summary

During the Regular Session of the 2016 General Assembly, Delegate Robert B. Bell introduced House Bill 605 (HB 605). The bill as introduced required an automatic extension of probation if a defendant failed to pay restitution or complete community service as ordered by the court. A substitute version of HB 605 was introduced and enacted into law. The substitute version extended the statute of limitations for the issuance of process against a defendant for failure to pay restitution from one year to three years.

The House Courts of Justice Committee sent a letter requesting that the Crime Commission review the subject matter of HB 605 as introduced, including an analysis of the automatic extension of probation for failure to pay restitution. The Executive Committee of the Crime Commission authorized a broad review of the topic of restitution, including an examination of current methods for payment and collection, as well as extension of probation.

In order to address the study mandate, staff collected available literature and research, gathered and analyzed data from numerous local and state entities, completed a review of Virginia restitution statutes, reviewed restitution statutes and practices of other states, and met with numerous stakeholders involved in the restitution process in Virginia. Staff also developed and disseminated a survey to clerks of court for all circuit, general district, juvenile and domestic relations, and combined district courts. The response rate was high; 95% (306 of 321) of courts responded. Finally, staff surveyed other states' Departments of Corrections' Deputy Directors to gain insight into how restitution was handled across the nation and received a 63% (31 of 49) response rate.

According to *Black's Law Dictionary*, restitution involves the return or restoration of a specific thing to its owner, or compensation for a wrong or loss caused to another. Restitution can be ordered for a variety of legal reasons, the most common being tort (a civil remedy involving a monetary dispute), contract (a civil remedy involving a dispute over the terms of or a breach of a contract), or criminal (a quasi-civil remedy for the damages or loss caused by a crime). Staff focused the study on criminal restitution.

An enormous amount of restitution goes uncollected in Virginia. As of November 8, 2016, the total outstanding restitution owed to victims was \$406,697,471 for all courts across the Commonwealth. Data was not readily available to determine the total number of orders issued, the number of defendants ordered to pay, or the number of victims owed restitution.

The criminal restitution process begins at sentencing when the court determines the amount of restitution owed and the terms of payment. Restitution is to be paid to the clerk and disbursed by the clerk as directed by the court. If the defendant is unable to pay restitution in full within 30 days of sentencing, he must enter into a deferred payment or installment plan. The payment of restitution may be ordered as a condition of the defendant's suspended sentence, probation, or both.

Virginia law differentiates between non-delinquent and delinquent restitution. Non-delinquent restitution includes sums which the defendant has paid or is paying in compliance with the terms of a deferred payment or installment plan. Delinquent restitution includes sums which the defendant has failed to pay as required by a court order. Such delinquent restitution can include sums which have not been paid in full by a date specified by the court or sums which have not been paid in accordance with the terms of a deferred payment or installment plan. If a defendant fails to pay restitution within 41 days of the due date ordered by the court, the restitution is considered to be delinquent and is forwarded to collections. It is the duty of the Commonwealth's Attorney to institute proceedings for the collection of delinquent restitution. The Commonwealth's Attorney can undertake collections through his own office, or may contract with a private attorney or collections agency, a local governing body, a county or city Treasurer, or the Department of Taxation to engage in collections on his behalf.

Separate and apart from the collections process, the court may impose various sanctions upon a defendant for failure to pay restitution. The court may revoke the defendant's suspended sentence or probation, hold the defendant in contempt of court, or suspend the defendant's driving privilege.

The court also has the authority to increase or decrease the length of a defendant's probation or to modify or revoke any condition of probation. Virginia law does not allow for an automatic extension of probation. The court may modify the defendant's probation only after a hearing following reasonable notice to the defendant and the attorney for the Commonwealth. If the period of probation exceeds the period of the suspended sentence, then the terms of probation become unenforceable after the period of the suspended sentence expires.

Staff found that the restitution process is fragmented and inconsistent in Virginia, which in turn leads to inequitable treatment of victims and defendants across the Commonwealth. Staff identified four specific categories of need within the restitution process, including:

- Uniformity within the restitution process;
- Collection of restitution;
- Monitoring of restitution compliance; and,
- Disbursement of restitution.

In response to these needs, staff identified many legislative and administrative changes that could be made to improve the overall functionality and efficiency of the restitution process. The Crime Commission reviewed the findings and recommendations of the study at its November meeting. Staff presented the following recommendations and policy options at the December meeting:

Recommendation 1: Virginia Code § 19.2-305.1 should be amended to require the Office of the Executive Secretary of the Supreme Court to develop a form order for restitution to be entered at the time of sentencing.

The Crime Commission unanimously endorsed Recommendation 1.

Recommendation 2: Virginia Code § 19.2-305.1 should be amended to require that the form order developed by the Office of the Executive Secretary of the Supreme Court should be completed in part by the Commonwealth's Attorney, or his designee, prior to sentencing and should be entered by the court at the time of sentencing.

- If the Commonwealth's Attorney is not involved in the prosecution, then the court or clerk shall complete the form.
- A copy of this form order should be provided to the defendant, without the victim's contact information, at sentencing.
- A copy of this form order should be provided to the victim(s), free of charge, upon request of the victim(s).
- This form will provide vital information for clerks to collect and distribute restitution.

The Crime Commission unanimously endorsed Recommendation 2.

Recommendation 3: Virginia Code § 19.2-305.2 should be amended to clarify that the docketing of a criminal restitution order as a civil judgment does not prohibit criminal or contempt enforcement of that restitution order.

The Crime Commission unanimously endorsed Recommendation 3.

Recommendation 4: Virginia Code § 19.2-305.1 should be amended to allow for both the defendant and the Commonwealth's Attorney to seek modification of the terms of payment of restitution in the event that a defendant's ability to pay changes.

- The Commonwealth's Attorney should notify the victim of any proceedings to modify the restitution order.

The Crime Commission unanimously endorsed Recommendation 4.

Recommendation 5: Virginia Code § 19.2-305.1 should be amended to specify that the court shall not order the defendant to pay restitution directly to the victim or through the defendant’s counsel.

The Crime Commission made no motion on Recommendation 5.

Recommendation 6: Virginia Code §§ 19.2-305.1, 19.2-305.2, and 19.2-354 should be amended to allow the court discretion to order a defendant who is unable to pay restitution the option to perform community service at the rate of the state minimum wage in lieu of restitution, provided that such community service is with the consent of the victim, the victim’s estate, or the victim’s agent, and the Commonwealth’s Attorney.

Recommendation 6 was defeated by a majority vote of the Crime Commission.

Recommendation 7: The Department of Taxation Court Debt Collections Office should explore the possibility of accepting payments for delinquent restitution and upgrading current software to allow for a more streamlined approach to the collection of restitution. Additionally, the Office of the Executive Secretary of the Supreme Court, Department of Taxation, Department of Motor Vehicles, Department of Corrections, and Department of Criminal Justice Services should develop recommendations for enhancing the collection of restitution and to report findings and recommendations to the Chairman of the Crime Commission by November 1, 2017. The Commonwealth’s Attorneys’ Services Council and the Indigent Defense Commission will also be included in this group.

- May require legislation if funding is provided for new software.
- May require an amendment to Virginia Code § 19.2-349 to encompass all Commonwealth’s Attorneys and collection agents.

The Crime Commission unanimously voted to send a letter request to the Office of the Executive Secretary of the Supreme Court that a restitution work group be formed for Recommendation 7.

Recommendation 8: Virginia Code §§ 19.2-303, 19.2-304, 19.2-305, 19.2-305.1, and 19.2-306 should be amended to specify who is responsible for monitoring compliance with the payment of restitution. Such amendments should include:

- If restitution is ordered, the defendant should be placed on indefinite supervised probation until all restitution is paid in full;

- The Department of Corrections or the local probation office should be responsible for monitoring compliance with the restitution order;
- For misdemeanor cases, as an alternative to probation, the court may instead schedule a review hearing to determine compliance with the restitution order;
- If supervision services are not available in the locality, then the court shall schedule a review hearing to determine compliance with the restitution order;
- The court should be required to conduct a hearing upon notice from the probation officer that the defendant is not in compliance with restitution payments;
- The court should verify with the clerk of court that all restitution has been paid before releasing the defendant from supervised probation; and,
- A provision allowing the court to release the defendant from supervised probation, upon the defendant's motion and under special circumstances, after consideration of the amount owed and paid, payment history, and the defendant's future ability to pay. The Commonwealth's Attorney should notify the victim of any request by the defendant for release from supervision.

The Crime Commission unanimously endorsed Recommendation 8.

Recommendation 9: The General Assembly should authorize funding for the Office of the Executive Secretary of the Supreme Court to allow for circuit courts to accept online payments. The amount of funding required is \$150,000.

The Crime Commission endorsed Recommendation 9 by a majority vote.

Recommendation 10: The General Assembly should provide additional resources to the Department of Corrections to support the monitoring of restitution and the extension of probation.

The Crime Commission made no motion on Recommendation 10.

Recommendation 11: The Office of the Executive Secretary for the Supreme Court, in coordination with other stakeholders involved in the restitution process, should develop best practice guidelines for managing the restitution process. The guidelines should address such practices as:

- Developing a local plan for the collection, monitoring and disbursement of restitution;
- Addressing repeat offenders;
- Handling joint and several restitution orders;

- Determining how payments are applied when the defendant owes fines, costs and restitution;
- Addressing issues surrounding micro-checks for restitution;
- Issues involving collections when the victim is a large corporation or insurance company;
- How to handle unclaimed restitution;
- Options for locating the victim for disbursement;
- Availability of payment options, including credit and debit cards and online payment;
- Feasibility of developing a uniform payment schedule for restitution, similar to the child/spousal support model; and,
- Defining when a case is closed for purposes of collection and monitoring.

If the Court later determines that some of these items would be better addressed by legislation they will notify Crime Commission staff.

The Crime Commission unanimously voted to send a letter request for Recommendation 11.

Recommendation 12: The Office of the Executive Secretary for the Supreme Court should provide training to clerks and judges on the best practice guidelines for managing the restitution process.

The Crime Commission unanimously voted to send a letter request for Recommendation 12.

Recommendation 13: The Department of Criminal Justice Services should convene representatives from the Virginia Victim Assistance Network, the Criminal Injuries Compensation Fund, Commonwealth's Attorneys' Offices, and any other interested stakeholders, to develop an informational brochure for victims to explain restitution and the victim's role in the restitution process.

The Crime Commission unanimously voted to send a letter request for Recommendation 13.

Recommendation 14: The Office of the Executive Secretary of the Supreme Court should enhance their Financial Accounting System (FAS) to allow clerks the ability to generate a payment notice, as is the practice with fines and costs, along with any other capabilities that would enhance the management of restitution.

The Crime Commission unanimously voted to send a letter request for Recommendation 14.

Policy Option 1: Virginia Code § 19.2-358 could be amended to remove the court's authority to impose up to a \$500 fine for a defendant's failure to pay a fine, costs, forfeiture, restitution or penalty.

The Crime Commission unanimously endorsed Policy Option 1.

Policy Option 2: Virginia Code § 19.2-349 could be amended to require the court to notify the Commonwealth's Attorney if a defendant who owes restitution has not made any payments within 90 days after his account was sent to collections. Virginia Code § 19.2-349 could be amended to require the clerk to send a list every 90 days to the Commonwealth's Attorney of all defendants who owe restitution, including the amount ordered and balance due.

The Crime Commission unanimously endorsed Policy Option 2.

Legislation was introduced in both chambers during the Regular Session of the 2017 General Assembly for Recommendations 1, 2, 3, 4, and 8, and Policy Options 1 and 2. Due to the unanticipated budget shortfall, the budget amendment for Recommendation 9 was not included in the final state budget.

Delegate Robert B. Bell introduced House Bill 1855, which was an omnibus bill encompassing Recommendations 1, 2, and 3, and Policy Options 1 and 2. Delegate Robert B. Bell also introduced House Bill 1856 that dealt with the supervised probation requirements of Recommendation 8. Delegate Charniele L. Herring introduced House Bill 2083 in regard to the modification of the terms of payment of restitution pursuant to Recommendation 4.

Companion bills to all of the House of Delegates legislation were introduced in the Senate. Senator Mark D. Obenshain introduced Senate Bills 1284 and 1285, which were identical to House Bills 1855 and 1856, respectively. Senator Jennifer L. McClellan introduced Senate Bill 1478, which was identical to House Bill 2083.

House Bill 2083 was left in the House Courts of Justice Committee. Senate Bill 1478 failed to report from the Senate Courts of Justice Committee.

The General Assembly passed House Bills 1855 and 1856 and Senate Bills 1284 and 1285. The Governor returned all four bills to the General Assembly with recommended amendments. The House of Delegates voted to reject the Governor's amendments to House Bill 1856. The Senate voted to reject the Governor's amendments to Senate Bill 1285. The Governor ultimately vetoed both House Bill 1856 and Senate Bill 1285. The General Assembly accepted the Governor's amendments to House Bill 1855 and Senate Bill 1284. Both of those bills were passed and signed by the Governor.

Background

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The House Courts of Justice Committee sent a letter requesting that the Crime Commission review the subject matter of HB 605 as introduced, including an analysis of the automatic extension of probation for failure to pay restitution. The Executive Committee of the Crime Commission authorized a broad review of the topic of restitution, including an examination of current methods for payment and collection, as well as extension of probation.

In order to address the study mandate, staff collected available literature and research, gathered and analyzed data from numerous local and state entities, completed a review of Virginia restitution statutes, reviewed restitution statutes and practices of other states, and met with numerous stakeholders involved in the restitution process in Virginia. Staff also developed and disseminated a survey to clerks of court for all circuit, general district, juvenile and domestic relations, and combined district courts. The response rate was high; 95% (306 of 321) of courts responded.² Finally, staff surveyed other states' Departments of Corrections' Deputy Directors to gain insight into how restitution was handled across the nation and received a 63% (31 of 49) response rate.

According to *Black's Law Dictionary*, restitution involves the return or restoration of a specific thing to its owner, or compensation for a wrong or loss caused to another.³ Restitution can be ordered for a variety of legal reasons, the most common being for a tort (a civil remedy involving a monetary dispute), contract (a civil remedy involving a dispute over the terms of or a breach of a contract), or criminal (a quasi-civil remedy for the damages or loss caused by a crime). Staff focused the study on criminal restitution.⁴

¹ 2016 Va. Acts ch. 718.

² The breakdown of response rate by court was as follows: 98% (118 of 120) of circuit courts; 91% (71 of 78) of general district only courts; 96% (74 of 77) of juvenile and domestic relations only courts; and, 93% (43 of 46) of combined district courts.

³ *Restitution, Black's Law Dictionary* (9th Ed. 2009).

⁴ Note that many of the Virginia Code sections which reference restitution also include provisions relating to fines, costs, forfeitures or other monetary penalties. Staff distinguished criminal restitution from these other monetary obligations for purposes of this study.

Restitution Process

Overview of Process

In Virginia, the criminal restitution process begins at sentencing when the court determines the amount of restitution owed and the terms of payment.⁵ At or before the time of sentencing, the court shall receive and consider any plan submitted by the defendant for repaying restitution.⁶ The restitution plan shall include the defendant's home address, place of employment and address, social security number and bank information.⁷ If the court finds the restitution plan to be reasonable and practicable under the circumstances, then it may consider probation or an appropriate suspension of the sentence.⁸ The defendant shall make restitution while on probation, work release or following his release from confinement based upon the restitution plan he submitted or a reasonable and practical plan devised by the court.⁹

When suspending the imposition or execution of a sentence, the court may “require the defendant to make at least partial restitution to the aggrieved party or parties for damages or loss caused by the offense” as a condition of the suspended sentence.¹⁰ The court may also order the payment of restitution as a condition of the defendant's probation.¹¹

For any person convicted of a violation of any provision in Title 18.2 on or after July 1, 1995, the court shall order such person to “make at least partial restitution for any property damage or loss caused by the crime or for any medical expenses or expenses directly related to funeral or burial incurred by the victim or his estate as a result of the crime.”¹² If a crime resulted in property damage or loss, no person shall be placed on probation or have his sentence suspended unless such person shall make at least partial restitution for such property damage or loss.¹³

If a defendant who has not previously been convicted of a felony enters a plea of not guilty to a misdemeanor property offense under Articles 5, 6, 7 and 8 of Chapter 5 of Title 18.2, and the court finds facts sufficient to justify a finding of guilt, the court may defer further proceedings, place the defendant on probation and may order restitution for losses caused.¹⁴

⁵ Va. Code § 19.2-305.1(D) (2016).

⁶ Va. Code § 19.2-305.1(C) (2016).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Va. Code § 19.2-303 (2016).

¹¹ Va. Code § 19.2-305(B) (2016).

¹² Va. Code § 19.2-305.1(B) (2016).

¹³ Va. Code § 19.2-305.1(A) (2016).

¹⁴ Va. Code § 19.2-303.2 (2016).

The Virginia Code mandates that the court order restitution for specified offenses, including:

- A juvenile adjudicated delinquent of a violation of Virginia Code §§ 18.2-51, 18.2-51.1, 18.2-52, 18.2-53, 18.2-55, 18.2-56, 18.2-57, 18.2-57.2, 18.2-121, 18.2-127, 18.2-128, 18.2-137, 18.2-138, 18.2-146, or 18.2-147; or for any violation of a local ordinance adopted pursuant to Virginia Code § 15.2-1812.2;¹⁵
- Removal of an electronic or radio transmitting device from certain animals;¹⁶
- Fraudulent conversion or removal of leased personal property;¹⁷
- Killing or injuring police animals;¹⁸
- Damaging or destroying a research farm product;¹⁹
- Identity theft;²⁰
- Property damaged, destroyed, or otherwise rendered unusable as a result of methamphetamine production;²¹
- Damage to the Capitol, state property in Capitol Square or property assigned to Capitol Police;²²
- A defendant convicted of an offense under Virginia Code §§ 18.2-374.1, 18.2-374.1:1, or 18.2-374.3;²³ and,
- Larceny of timber.²⁴

The court shall specify the amount of restitution and terms of payment in the judgment order.²⁵ Pursuant to statute, restitution is to be paid to the clerk and disbursed by the clerk as directed by the court.²⁶ The methods of repayment can vary by court.²⁷

When ordering restitution pursuant to Virginia Code §§ 19.2-305 or 19.2-305.1, the court may order interest at the statutory rate, which shall accrue from the date of loss or damage unless another date is specified.²⁸ The statutory rate of interest is six percent annually.²⁹

When a defendant is ordered to pay restitution and cannot do so within 30 days of sentencing, the court shall require the defendant to enter into a deferred payment

¹⁵ Va. Code § 16.1-278.8(B) (2016).

¹⁶ Va. Code § 18.2-97.1 (2016).

¹⁷ Va. Code § 18.2-118(D) (2016).

¹⁸ Va. Code § 18.2-144.1 (2016).

¹⁹ Va. Code § 18.2-145.1(B) (2016).

²⁰ Va. Code § 18.2-186.3(E) (2016).

²¹ Va. Code § 18.2-248(C1) (2016).

²² Va. Code § 19.2-305.1(B2) (2016).

²³ Va. Code § 19.2-305.1(E1) (2016).

²⁴ Va. Code § 55-334.1(A) (2016).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *See* Va. Code § 19.2-353.3 (2016). District court clerks shall accept personal checks and credit or debit cards in lieu of money for all fees, fines, restitution, forfeitures and penalties. Circuit court clerks shall accept personal checks and may, in their discretion, accept credit or debit cards.

²⁸ Va. Code § 19.2-305.4 (2016).

²⁹ Va. Code § 6.2-302(A) (2016).

or installment plan.³⁰ The court may authorize the clerk to establish and approve the conditions of all deferred or installment payments and such conditions shall be posted in the clerk's office and on the court's website if available.³¹ As a condition of such deferred or installment payments, the defendant shall promptly notify the court of any change of mailing address.³² When the court authorizes a deferred payment or installment plan for the defendant, the clerk shall provide notice to that defendant that he could be fined and imprisoned under Virginia Code § 19.2-358, or that his driver's license could be suspended under Virginia Code § 46.2-395, for failure to maintain payments as ordered.³³

Failure to Pay Restitution

The court may impose various sanctions upon a defendant for failure to pay restitution. The court may revoke the defendant's suspended sentence or probation,³⁴ hold the defendant in contempt of court,³⁵ or suspend the defendant's driving privilege.³⁶

Revocation Proceedings

If a court has suspended the imposition or execution of a sentence, the court may revoke that suspended sentence for any cause it deems sufficient that occurred during the period of suspension set by the court or during the probation period.³⁷ If a probation or suspension period was not set by the court, then the court may revoke the suspension for any cause it deems sufficient which occurred during the maximum period for which the defendant could have been sentenced to imprisonment.³⁸

The defendant's unreasonable failure to abide by a restitution plan shall result in the revocation of probation or the imposition of the suspended sentence.³⁹ The court shall conduct a hearing relating to the revocation of probation or the imposition of a suspended sentence before taking such action.⁴⁰

The court may not conduct a hearing to revoke the suspended sentence unless the court issues process to notify the defendant or compel his appearance before the court.⁴¹ If the violation is for failure to pay restitution, process shall be issued within three years of the expiration of the period of probation or of the period of the

³⁰ Va. Code § 19.2-354(A) (2016).

³¹ *Id.*

³² *Id.*

³³ Va. Code § 19.2-354(D) (2016).

³⁴ Va. Code § 19.2-306 (2016).

³⁵ Va. Code § 19.2-358 (2016).

³⁶ Va. Code § 46.2-395 (2016).

³⁷ Va. Code § 19.2-306(A) (2016).

³⁸ *Id.*

³⁹ Va. Code § 19.2-305.1(E) (2016).

⁴⁰ *See* Va. Code §§ 19.2-304, 19.2-305.1(E) and 19.2-306 (2016).

⁴¹ Va. Code § 19.2-306(B) (2016).

suspension of the sentence.⁴² If no period of probation or suspension was set by the court, such process shall be issued for restitution violations within three years after the expiration of the maximum period for which the defendant could have been sentenced to imprisonment.⁴³ The defendant may waive notice and service of process, and if so waived, the court may proceed to determine if the defendant violated the terms of the suspended sentence.⁴⁴

If the court finds good cause to believe that the defendant has failed to pay restitution as ordered, then the court shall impose punishment against the defendant for violation of the terms of the suspended sentence.⁴⁵ If the court originally suspended the imposition of the sentence, the court shall revoke the suspension and may impose whatever sentence could have been originally imposed.⁴⁶ If the court originally suspended the execution of the sentence, then the court shall revoke the suspension and the original sentence shall be in full force and effect.⁴⁷ The court may suspend all or some of this sentence and may place the defendant on probation under terms and conditions.⁴⁸ If the court finds no cause to revoke or suspend a sentence or probation, then any further hearing to do so based solely on the allegation for which the original hearing was held is barred.⁴⁹

*Contempt Proceedings*⁵⁰

If a defendant defaults in the payment or any installment payment of restitution, the court may, on its own motion or the motion of the Commonwealth's Attorney, order the defendant to show cause why he should not be jailed or fined for nonpayment.⁵¹ A show cause is not required prior to issuing a *capias* if the court had previously entered an order to appear on a date certain in the event of nonpayment.⁵²

Upon a finding of nonpayment, the court may find the defendant in contempt and may impose a sentence of confinement of not more than 60 days or a fine not to exceed \$500.⁵³ The defendant may present evidence to show that his default was not attributable to an intentional refusal to obey the court or to make a good faith effort to obtain the funds.⁵⁴

⁴² *Id.* Note that the three year statute of limitations for failure to pay restitution became effective July 1, 2016, as a result of the enactment of HB 605 during the Regular Session of the 2016 General Assembly.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Va. Code § 19.2-306(C) (2016).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Va. Code § 19.2-306(D) (2016).

⁵⁰ See *Porter v. Commonwealth*, 65 Va. App. 467, 778 S.E.2d 549 (Va. Ct. App. 2015). If restitution was ordered as part of a defendant's suspended sentence or probation, the failure to pay restitution can be enforced through either Va. Code §§ 19.2-306 or 19.2-358, as the two are not mutually exclusive. A significant difference between the two statutes is that there is no statute of limitations for the enforcement of a violation of Va. Code § 19.2-358.

⁵¹ Va. Code § 19.2-358(A) (2016).

⁵² *Id.*

⁵³ Va. Code § 19.2-358(B) (2016).

⁵⁴ *Id.*

If it appears to the court that the defendant's default was excusable, the court may allow additional time for payment, reduce the amount due or the installment due, or may remit the unpaid portion in whole or in part.⁵⁵ If the court sentences the defendant to confinement, the court may provide in its order that payment of the amount in default will entitle the defendant to release from confinement.⁵⁶ Additionally, after entering the order for contempt for nonpayment, the court may at any time reduce the sentence for good cause shown, including payment of the amount owed.⁵⁷

*Suspension of Driving Privilege*⁵⁸

Any person who drives a motor vehicle on the highways in Virginia is deemed to have consented, as a condition of such driving, to pay all lawful monetary obligations assessed against him, including restitution, for violation of the laws of the Commonwealth.⁵⁹ If a person fails or refuses to pay, or if he fails to make deferred or installment payments as ordered, the court shall suspend his privilege to drive a motor vehicle on the highways of Virginia.⁶⁰ The person's license shall remain suspended until all monetary obligations are paid in full.⁶¹ However, if the person pays a reinstatement fee to DMV and enters into a deferred payment or installment payment agreement that is acceptable to the court, his driver's license shall be restored.⁶² If a person does not have a Virginia driver's license, or is a nonresident, the court may order as part of the conviction that the person not drive a vehicle in Virginia "...for a period to coincide with the nonpayment of the amounts due."⁶³

Restitution Payment Status

Virginia law differentiates between two types of restitution in the criminal context: non-delinquent and delinquent. Non-delinquent restitution includes sums which the defendant has paid or is paying in compliance with the terms of a deferred payment or installment plan. Delinquent restitution includes sums which the defendant has failed to pay as required by a court order. Such delinquent restitution can include sums which have not been paid in full by a date specified by the court or sums which have not been paid in accordance with the terms of a deferred payment or installment plan.

⁵⁵ Va. Code § 19.2-358(C) (2016).

⁵⁶ Va. Code § 19.2-358(B) (2016).

⁵⁷ *Id.*

⁵⁸ See *Driven Deeper Into Debt: Unrealistic Repayment Options Hurt Low-Income Court Debtors* (2016). *Legal Aid Justice Center*. Retrieved from: <https://www.justice4all.org/wp-content/uploads/2016/05/Driven-Deeper-Into-Debt-Payment-Plan-Analysis-Final.pdf>. This report claims that 1 in 6 Virginia drivers has a suspended driver's license due to failure to pay fines and court costs. Crime Commission staff attempted to obtain data from the Virginia Department of Motor Vehicles in regard to the number of driver's licenses suspended solely for failure to pay restitution, however that data was not readily available.

⁵⁹ Va. Code § 46.2-395(A) (2016).

⁶⁰ Va. Code § 46.2-395(B) (2016).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

Non-Delinquent Restitution

Staff requested data for non-delinquent restitution. Table 1 shows the total non-delinquent restitution assessed and paid in fiscal years 15 and 16. The total amount accounts for principle only as interest and fees are not included. While Table 1 must be interpreted with caution, it can be said that *at least* 9 to 10% of restitution assessed in the past two fiscal years was paid within that same fiscal year. The collection percentage is likely higher than this due to the “joint and several” amounts being double-counted in the data. However, due to programming issues, it is unable to be determined exactly how much of the “joint and several” amount is overstated in the total assessed.

Table 1: Total Non-Delinquent Restitution Assessed and Paid, FY15-FY16

Fiscal Year	Total Assessed*	Total Paid**	Collection %
FY15	\$42,957,547	\$3,742,926	9%
FY16	\$39,524,666	\$3,791,320	10%

Source: Office of the Executive Secretary-Supreme Court of Virginia, Department of Judicial Services.
 **Total Assessed* is overstated due to joint and several orders. ** *Total Paid* is the principle amount assessed and paid on during that fiscal year, not amounts paid regardless of when assessed. As such, collection percentages must be interpreted with extreme caution.

Table 2 on the next page provides the breakdown of the total amount of restitution assessed and paid in FY16 broken down by type of court. Not surprisingly, circuit courts have the least amount paid within the same fiscal year (around 6%) as compared to the general district and juvenile and domestic relations (J&DR) courts, which have a 36% and 41% collection percentage respectively.

Table 2: Total Non-Delinquent Restitution Assessed and Paid by Type of Court, FY16

Type of Court	Total Assessed*	Total Paid**
Circuit Courts	\$34,940,874	\$2,068,994
General District Courts	\$3,292,694	\$1,186,963
J&DR Courts	\$1,291,098	\$535,362
TOTAL	\$39,524,666	\$3,791,320

Source: Office of the Executive Secretary-Supreme Court of Virginia, Department of Judicial Services.
 * *Total Assessed* is overstated due to joint and several orders. ** *Total Paid* is the principle amount assessed and paid on during that fiscal year, not amounts paid regardless of when assessed. As such, collection percentages must be interpreted with caution.

Delinquent Restitution

The clerk of every circuit and district court must submit a monthly report of all fines, costs, forfeitures and penalties, including restitution, that is delinquent more than 30 days, to the judge of his court, the Department of Taxation, the State Compensation Board and the Commonwealth's Attorney.⁶⁴ The Executive Secretary of the Supreme Court shall submit this report on behalf of any clerks who participate in the Supreme Court's automated information system.⁶⁵

If a defendant fails to pay restitution within 41 days of the due date ordered by the court, the restitution is considered to be delinquent and is forwarded to collections. The Commonwealth's Attorney has the duty to institute proceedings for collection of all fines, forfeitures, penalties and restitution.⁶⁶ The Commonwealth's Attorney and the clerk may agree to a process to commence collection 30 days after judgment if the defendant has not entered into an installment payment agreement.⁶⁷

The Commonwealth's Attorney shall determine whether it would be impractical or uneconomical for his office to engage in such collection.⁶⁸ If the Commonwealth's Attorney does not undertake such collection, he shall contract with one of the following to engage in such collection activities:

- a private attorney or private collection agency;
- a local governing body;
- the county or city Treasurer; or,
- the Department of Taxation.⁶⁹

⁶⁴ Va. Code § 19.2-349(A) (2016).

⁶⁵ *Id.*

⁶⁶ Va. Code § 19.2-349(B) (2016).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

If the Commonwealth's Attorney does engage in such collection, he shall abide by the procedures established by the Department of Taxation and the Compensation Board.⁷⁰ If the Commonwealth's Attorney contracts with another party for such collection, then such a contract shall be in accordance with such terms and conditions as may be established by guidelines promulgated by the Office of the Attorney General, the Executive Secretary of the Supreme Court, the Department of Taxation and the Compensation Board.⁷¹

Various means exist under Virginia law to collect upon unpaid debts. Such methods include: garnishment of wages,⁷² liens on property,⁷³ levy of property,⁷⁴ withholding of the individual's state tax refund,⁷⁵ and withholding of the individual's lottery winnings.⁷⁶ Treasurers have also been granted certain authority under the Virginia Code in regard to assessing liens and conducting distress seizure of personal property.⁷⁷ Additionally, defendants serving a term of incarceration on work release, non-consecutive days, or electronic monitoring are required to remain compliant with restitution payments as a condition of participation in these programs.⁷⁸

The fee to any private attorney or collection agency is paid on a contingency fee basis out of the amount of proceeds collected.⁷⁹ However, no private attorney or collection agency shall be paid a fee for amounts collected by the Department of Taxation under the Setoff Debt Collection Act (§ 58.1-520 et seq.).⁸⁰ A local Treasurer engaging in collections may also collect an administrative fee.⁸¹ Only Treasurers who were collecting on a contingency fee basis as of January 1, 2015, may contract to continue receiving compensation on such a contingency basis.⁸²

When restitution becomes delinquent and is sent to collections, then the amount owed shall be increased by a 17% rate.⁸³ The party collecting the restitution is limited to collecting a portion of this increased rate as compensation for collection of the delinquent restitution.⁸⁴ For example, assume that a defendant owed \$100 in restitution and that sum became delinquent. When that amount is referred to collections, the 17% increased rate would make a total of \$117 subject to collection.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Va. Code §§ 8.01-511 through 8.01-525 (2016).

⁷³ Va. Code §§ 8.01-501 through 8.01-505 (2016).

⁷⁴ Va. Code §§ 8.01-487 through 8.01-500 (2016).

⁷⁵ Va. Code §§ 58.1-520 through 58.1-535 (2016).

⁷⁶ Va. Code § 58.1-4026 (2016).

⁷⁷ Va. Code §§ 58.1-3940 through 58.1-3962 (2016).

⁷⁸ Va. Code § 19.2-354(B) (2016). *See also* Va. Code § 53.1-131 (2016).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *See* Master Guidelines Governing Collection of Unpaid Delinquent Court-Ordered Fines and Costs Pursuant to Virginia Code § 19.2-349 (2015). *State Compensation Board*. Retrieved from: <http://www.scb.virginia.gov/docs/guidelinesfinesandfees.pdf>

⁸³ *Id.*

⁸⁴ *Id.*

Because the collection is for delinquent restitution, a collecting agent would be limited to receiving compensation for a portion of the \$17 increase, but not for a portion of the \$100 in restitution owed to the victim.

The Executive Secretary of the Supreme Court of Virginia may, at the direction of the Committee on District Courts or at the request of a circuit court clerk, enter into an agreement with the DMV to authorize the DMV to receive payment of any delinquent fines, costs, forfeitures, and penalties, including any court-ordered restitution of a sum certain, on behalf of a district or circuit court.⁸⁵ However, the DMV is not authorized to establish an installment payment plan or to receive partial payment of the full amount imposed by the court.⁸⁶ The DMV may impose a processing fee for this transaction.⁸⁷

As seen in Table 3, the large majority, 74% (238 of 321), of delinquent restitution was referred to the Department of Taxation for collection, followed by the Commonwealth’s Attorneys, private attorneys, and Treasurer’s Offices.

Table 3: Collection Agents for Delinquent Restitution, FY16

Collection Agent	Total Courts	% of Total
Department of Taxation	238	74%
Commonwealth’s Attorneys	35	11%
Private Attorneys	29	9%
Treasurer’s Offices	19	6%
TOTAL	321	100%

Source: State Compensation Board.

Staff requested data for delinquent restitution from the State Compensation Board. Unlike the data for non-delinquent restitution, the “Total Collected” column in Table 4 includes amounts collected on restitution assessed in *any* given fiscal year. Because of this, the “Collection %” column must also be interpreted with caution. A further note of caution is that any comparison between the data provided for delinquent restitution and non-delinquent restitution must be discouraged due to the “joint and several” over counting issue referenced earlier. Additionally, the “Total Collected” column in Table 4 and “Total Paid” column in Table 1 are defined differently between the two sources of data.

⁸⁵ Va. Code § 19.2-349.1 (2016).

⁸⁶ *Id.*

⁸⁷ *Id.*

Table 4: Total Delinquent Restitution Assessed and Collected, FY15-FY16*

Fiscal Year	Total Assessed	Total Collected	Collection %
2015	\$28,613,642	\$5,306,040	19%
2016	\$33,993,646	\$5,852,399	17%

Source: State Compensation Board. * FY16 data accurate as of September 16, 2016.

Note: Assessments of restitution in a fiscal year are limited to assessments made in that fiscal year, however collections of restitution in a fiscal year may contain amounts collected for prior year assessments. As such, collection percentages must be interpreted with extreme caution.

Table 5 illustrates the total delinquent restitution assessed and collected by type of court. Again, not surprisingly, circuit courts collect at a lower percentage due to the high assessment amounts as compared to what is typically assessed in district courts. Yet, circuit courts comprised 87% (\$5,087,233 of \$5,858,399) of what was collected overall in FY16.

Table 5: Total Delinquent Restitution Assessed and Collected by Type of Court, FY16*

Type of Court	Total Courts	Total Assessed	Total Paid	Collection %
Circuit Courts	120	\$31,035,690	\$5,087,233	16%
General District Courts	78	\$1,186,342	\$274,926	23%
J&DR Courts	77	\$859,298	\$256,387	30%
Combined District Courts	46	\$912,317	\$233,852	26%
TOTAL	321	\$33,993,646	\$5,852,399	17%

Source: State Compensation Board. * FY16 data accurate as of September 16, 2016.

Note: Assessments of restitution in a fiscal year are limited to assessments made in that fiscal year, however collections of restitution in a fiscal year may contain amounts collected for prior year assessments. As such, collection percentages must be interpreted with extreme caution.

Finally, Table 6 on the next page shows the total delinquent restitution assessed and collected by type of collection agent. Although the Department of Taxation collected at a lower percentage, that agency also handles the vast majority of courts and their efforts comprised 55% (\$3,254,033 of \$5,852,399) of what was collected overall in FY16.

Table 6: Total Delinquent Restitution Assessed and Collected by Collection Agency, FY16*

Collection Agent	Total Courts	Total Assessed	Total Collected	Collection %
Department of Taxation	238	\$22,913,673	\$3,254,099	14%
Commonwealth’s Attorneys	35	\$2,937,314	\$775,325	26%
Private Attorneys	29	\$4,292,672	\$1,234,024	29%
Treasurer’s Offices	19	\$3,849,987	\$588,951	15%
TOTAL	321	\$33,993,646	\$5,852,399	17%

Source: State Compensation Board. * FY16 data accurate as of September 16, 2016.

Note: Assessments of restitution in a fiscal year are limited to assessments made in that fiscal year, however collections of restitution in a fiscal year may contain amounts collected for prior year assessments. As such, collection percentages must be interpreted with extreme caution.

Criminal Injuries Compensation Fund⁸⁸

If restitution is ordered and the victim cannot be located or identified, the clerk of court shall forward any such restitution payments to the Criminal Injuries Compensation Fund (CICF) for the benefit of crime victims.⁸⁹ Prior to forwarding such payments, the clerk shall record the name of the victim(s), the last known address of the victim(s), and amount of restitution owed.⁹⁰ The administrator of the CICF shall reserve a sufficient amount in the fund to make prompt payment to the victim upon request of the victim.⁹¹ The CICF shall be reimbursed through the restitution collected for payments it made on behalf of a victim.⁹²

The total amount of unclaimed restitution received by CICF is illustrated in Table 7:

Table 7: Total Unclaimed Restitution Received by CICF, CY14-CY16*

	CY14	CY15	CY16
Total Unclaimed Restitution	\$706,759	\$670,623	\$634,853

Source: CICF Case Management System. *CY16 is through November 3, 2016.

⁸⁸ As of January 1, 2017, this fund is referred to as the Virginia Victims Fund (officially Criminal Injuries Compensation Fund).

⁸⁹ Va. Code § 19.2-305.1(F) (2016).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Va. Code § 19.2-305.1(G) (2016).

Table 8 illustrates the other sources of monies receivable by CICF, including CICF collections from offenders, restitution received by the courts and forwarded to CICF, and the Department of Taxation's Setoff Debt Collection Program.

Table 8: Total CICF Collections, CY14-CY16*

Source of Monies Received	CY14	CY15	CY16
CICF Collections <i>Monies received directly from offenders</i>	\$126,080	\$119,667	\$104,318
Restitution <i>Monies received by courts and forwarded to CICF</i>	\$237,948	\$235,968	\$215,087
State Taxation Setoff Debt Collection Program	\$132,152	\$151,074	\$147,888
TOTAL	\$496,180	\$506,709	\$467,293

Source: CICF Case Management System. *CY16 data is through November 3, 2016.

Restitution as a Civil Judgment

A restitution order from the court may be docketed as a civil judgment pursuant to the provisions of Virginia Code § 8.01-446 based upon a written request of the victim.⁹³ The judgment may be enforced by the victim in the same manner as a judgment in a civil action.⁹⁴

A restitution order docketed pursuant to Virginia Code § 19.2-305.2 has the same force and effect as a specific judgment for money.⁹⁵ The docketed order shall state that "...it is an order of restitution in a specific amount in favor of a named party, against a named party, with that party's address, if known, and it shall further state the time from which the judgment bears interest."⁹⁶

Based on survey findings to clerks, docketing restitution orders in criminal cases as civil judgments was primarily a circuit court phenomenon. Specifically, 43% (50 of 116) responding circuit court clerks indicated that this was a common practice in their court. Of the courts that docket restitution orders, survey findings indicated that most of these orders appeared to be docketed at the time of criminal sentencing on the original charge.

⁹³ Va. Code § 19.2-305.2(B) (2016).

⁹⁴ *Id.*

⁹⁵ Va. Code § 8.01-446 (2016).

⁹⁶ *Id.*

Other States

Staff reviewed other states in order to identify whether they had identified unique methods to handle the collection of restitution. Staff identified a variety of practices in other states, including:

- Designate a statewide agency or a centralized approach to handle all aspects of restitution;⁹⁷
- Suspend any recreational licenses or other state privileges for failure to comply;⁹⁸
- Prohibit expungement of records if any restitution remains unpaid;⁹⁹
- Statutorily require substantial garnishment of inmate wages;¹⁰⁰
- Thoroughly investigate financial disclosures;¹⁰¹
- Transfer restitution owed to victim’s estate;¹⁰²
- Create a restitution lien against the defendant’s property;¹⁰³
- Docket all restitution orders as civil judgments;¹⁰⁴
- Automatically generate bills and reminder letters to defendants;¹⁰⁵
- Use kiosk machines across the state for payments;¹⁰⁶ and,
- Statutorily require a determination of the defendant’s ability to pay when establishing the terms of payment.¹⁰⁷

Extension of Probation and Completion of Sentence

Extension of Probation

As introduced during the Regular Session of the 2016 General Assembly, House Bill 605 deemed that failure to pay restitution or complete community service would result in the automatic extension of probation until all payments were made and community service was performed. The question that arose regarding this legislation was whether probation can be automatically extended in this manner. Virginia law does not allow for such an automatic extension of probation.

In Cook v. Commonwealth, the Virginia Supreme Court found that “fundamental fairness requires a judicial hearing of a summary nature for the probation period to be extended, since increasing the period of probation has the effect of extending the

⁹⁷ Vt. Stat. Ann. tit. 13, § 5362 (2016).

⁹⁸ Vt. Stat. Ann. tit. 13, § 7043 (m)(2)(D) (2016).

⁹⁹ See Iowa Code § 907.9(4)(b) (2017). See also Kan. Stat. Ann. § 38-2312(e)(2) (2017).

¹⁰⁰ Cal. Penal Code § 2085.5 (c) and (d) (Deering 2016). See also https://victimsofcrime.org/docs/restitution-toolkit/fl_ca-restitution-guide.pdf?sfvrsn=2

¹⁰¹ Cal. Penal Code § 1202.4 (f)(11) and (h) and § 1203(j) (Deering 2016).

¹⁰² Mich. Comp. Laws Serv. § 780.766 (7) (LexisNexis 2016).

¹⁰³ See Ariz. Rev. Stat. § 13-806 (LexisNexis 2017). See also Fla. Stat. Ann. § 960.292 (LexisNexis 2017).

¹⁰⁴ Minn. Stat. § 611A.04 (2017).

¹⁰⁵ See Arizona Code of Judicial Administration § 5-205(D)(1). See also <https://www.azcourts.gov/courtservices/Consolidated-Collections-Unit/FARE>

¹⁰⁶ See <http://courts.delaware.gov/aoc/osce/locations.aspx>

¹⁰⁷ Cal. Penal Code § 1202.42 (a) (Deering 2016).

restraints on the probationer's liberty...."¹⁰⁸ Similarly, Virginia Code § 19.2-304 requires that the court conduct a hearing and provide reasonable notice to the defendant and the attorney for the Commonwealth prior to increasing or decreasing the length of probation or modifying or revoking any condition of probation. Both Virginia case law and statutory law require that the court provide notice and conduct a hearing prior to extending a defendant's term of probation.

Probation may also be extended if the defendant is found to have violated the terms of his suspended sentence or probation following notice and a hearing.¹⁰⁹ If the court finds good cause to believe that the defendant violated the terms of his suspended sentence, the court shall revoke the suspended sentence and may again suspend all or part of the sentence and place the defendant on probation.¹¹⁰ When extending a defendant's probation, it is important to note that if the period of probation exceeds the period of the suspended sentence, then the terms of probation become unenforceable after the period of the suspended sentence expires.¹¹¹

Completion of Sentence

Another question that arose from the original version of House Bill 605 was what punishment is available if the defendant has served the entire sentence originally imposed. If a court imposed and suspended the execution of a sentence, then the court is limited to revoking and imposing the term of the original sentence which remains in effect.¹¹² When the defendant has served the entire sentence originally imposed, the court cannot impose any additional punishment for violation of the terms of the suspended sentence or probation under Virginia Code § 19.2-306. If a sentence exceeds the maximum punishment allowable under law, then the excessive portion of the sentence is invalid.¹¹³

While the court may not impose any additional sentence under Virginia Code § 19.2-306 once the defendant has served his entire sentence, the court may still punish the defendant for contempt for failure to pay restitution as ordered pursuant to the provisions of Virginia Code §19.2-358. The failure to pay restitution can be enforced through either Virginia Code § 19.2-306 or 19.2-358, as the two are not mutually exclusive.¹¹⁴ Furthermore, there is no statute of limitations for a violation of Virginia Code § 19.2-358.¹¹⁵

¹⁰⁸ 211 Va. 290, 292-293, 176 S.E.2d 815, 817-818 (Va. 1970).

¹⁰⁹ Va. Code § 19.2-306 (2016).

¹¹⁰ Va. Code § 19.2-306(C) (2016).

¹¹¹ See Hartless v. Commonwealth, 29 Va. App. 172, 510 S.E.2d 738 (Va. Ct. App. 1999).

¹¹² Va. Code § 19.2-306(C) (2016).

¹¹³ Deagle v. Commonwealth, 214 Va. 304, 305, 199 S.E.2d 509, 510-511 (Va. 1973).

¹¹⁴ Porter v. Commonwealth, 65 Va. App. 467, 778 S.E.2d 549 (Va. Ct. App. 2015).

¹¹⁵ *Id.*

Other States

Staff reviewed the laws of other states to determine whether those sovereignties allowed for an extension of probation if a defendant failed to pay restitution. Staff identified 24 other states that allow for some form of extension of probation. Those 24 states include: Arizona,¹¹⁶ Arkansas,¹¹⁷ California,¹¹⁸ Colorado,¹¹⁹ Delaware,¹²⁰ Idaho,¹²¹ Illinois,¹²² Iowa,¹²³ Kansas,¹²⁴ Kentucky,¹²⁵ Louisiana,¹²⁶ Maryland,¹²⁷ Minnesota,¹²⁸ Montana,¹²⁹ New Mexico,¹³⁰ North Carolina,¹³¹ North Dakota,¹³² Oklahoma,¹³³ Oregon,¹³⁴ Texas,¹³⁵ Utah,¹³⁶ Washington,¹³⁷ Wisconsin,¹³⁸ and Wyoming.¹³⁹

Key Findings

An enormous amount of restitution goes uncollected in Virginia. As of November 8, 2016, the total outstanding restitution owed to victims was \$406,697,471 for all courts across the Commonwealth.¹⁴⁰ The breakdown of this amount by type of court was as follows:

- \$391,292,962 owed in circuit courts;
- \$7,607,724 owed in general district courts; and,
- \$7,796,785 owed in juvenile and domestic relations courts.

Data was not readily available to determine the total number of orders issued, number of defendants ordered to pay, or the number of victims owed restitution.

¹¹⁶ Ariz. Rev. Stat. § 13-902 (LexisNexis 2016).

¹¹⁷ Ark. Code Ann. § 5-4-205(f) (2016).

¹¹⁸ Cal. Penal Code §§ 1203 through 1203.3 (Deering 2016).

¹¹⁹ Colo. Rev. Stat. § 16-18.5-105(3)(d)(III) (2016).

¹²⁰ Del. Code Ann. tit. 11, §§ 4104, 4105, 4204, and 4333 (2016).

¹²¹ Idaho Code Ann. § 20-222 (2017).

¹²² 730 Ill. Comp. Stat. Ann. 5/5-6-2(e) (LexisNexis 2016).

¹²³ Iowa Code § 910.4(1)(b) (2016).

¹²⁴ Kan. Stat. Ann. § 21-6608(c)(7) (2017).

¹²⁵ Ky. Rev. Stat. Ann. §§ 532.033(8) (2017) and 533.020(4) (2017).

¹²⁶ La. Code Crim. Proc. Ann. art. 894.4 (2016).

¹²⁷ Md. Code Ann. Crim. Proc. § 6-222 (b) and (c) (LexisNexis 2016).

¹²⁸ Minn. Stat. § 609.135 Subd. 1a. and Subd. 2(g) (2017).

¹²⁹ Mont. Code Ann. § 46-18-203(7)(a)(iii) and (iv) (2017).

¹³⁰ N.M. Stat. Ann. § 31-17-1(H) (LexisNexis 2016).

¹³¹ N.C. Gen. Stat. §§ 15A-1342(a) and 15A-1344(d) and (f) (2016).

¹³² N.D. Cent. Code § 12.1-32-07(1) (2016).

¹³³ Okla. Stat. Ann. tit. 22, §§ 991b and 991f(B) (2017).

¹³⁴ Or. Rev. Stat. §§ 137.010(4), 137.540(9), and 161.685(5) (2016).

¹³⁵ Tex. Code Crim. Proc. Ann. art. 42A.751 through 42A.753 (2017).

¹³⁶ Utah Code Ann. § 77-18-1(10)(a)(ii)(A) (LexisNexis 2016).

¹³⁷ Wash. Rev. Code Ann. § 9.94A.753(4) (LexisNexis 2016).

¹³⁸ Wis. Stat. § 973.09(4)(c) (2016).

¹³⁹ Wyo. Stat. Ann. § 7-9-109 (2017).

¹⁴⁰ The figure accounts for principle amount owed for all non-delinquent and delinquent restitution. The figure is a “snapshot” of what was owed on the stated date as the total amount owed fluctuates daily based on payments ordered and payments disbursed to victims.

Study findings indicated that the restitution process is fragmented and inconsistent in Virginia, which in turn leads to inequitable treatment of victims and defendants across the Commonwealth. Staff identified four categories of need within the restitution process, including:

- Uniformity within the restitution process;
- Collection of restitution;
- Monitoring of restitution compliance; and,
- Disbursement of restitution.

Uniformity

Courts within the same jurisdiction can engage in different practices when ordering, collecting, monitoring, and enforcing restitution. The vast majority of courts receive and distribute non-delinquent restitution payments; however, there is wider variation in the number of courts that establish payment plans and monitor compliance with such payment plans.

Payment plans vary widely by court in terms of how such plans are established, structured, and enforced.¹⁴¹ A new rule from the Supreme Court of Virginia took effect on February 1, 2017, in order to address this issue.¹⁴²

No statewide standardized form order exists for courts to utilize when ordering restitution, and thus the amount due, the terms of payment, and the defendant's obligations can be unclear. Only 40% (120 of 302) of responding courts indicated that a standardized order was used when ordering restitution in criminal cases.

Additionally, many stakeholders lack the resources necessary to perform their duties in regard to the collection, monitoring and distribution of restitution. For example, a significant number of clerks' offices are very small with 26% (52 of 201) of district courts having three or fewer full-time employees.¹⁴³ Based on survey findings, only 10% (32 of 305) of responding clerks indicated that their office had a position dedicated solely to the receipt, distribution, or monitoring of restitution. While it would be optimal to have one person in each locality dedicated to overseeing restitution, a lack of resources creates an impediment to such a practice. Additional training needs to be provided to clerks and judges regarding the restitution process.

Finally, additional resources need to be made available to both victims and defendants. There is no standardized informational resource available to victims to

¹⁴¹ See *Driven Deeper Into Debt: Unrealistic Repayment Options Hurt Low-Income Court Debtors*, pgs. 10-16 (2016). *Legal Aid Justice Center*. Retrieved from: <https://www.justice4all.org/wp-content/uploads/2016/05/Driven-Deeper-Into-Debt-Payment-Plan-Analysis-Final.pdf>

¹⁴² Rule 1:24 of the Rules of the Supreme Court of Virginia (2017). Note that many of the provisions of this Rule were codified or preempted by the passage of House Bill 2386 during the Regular Session of the 2017 General Assembly (2017 Va. Acts ch. 802).

¹⁴³ Source: Office of the Executive Secretary-Supreme Court of Virginia. It is also important to note that, according to OES, 88% of district court clerks make below \$47,476, which would have made overtime available to full-time salaried clerks pursuant to new rules under the Fair Labor Standards Act effective December 1, 2016. Those rules were delayed as a result of an injunction issued by a federal district court in Texas in November 2016.

explain restitution and their role in the process. Likewise, defendants need to be clearly advised of the amount of restitution which they owe and with clear instructions on how to pay such restitution in accordance with the court order. For example, reports suggest that communication with the defendant at the beginning of the collections process about how much they owe and the terms of payment, along with follow-up procedures such as providing informational letters on a regular basis to the defendant, are amongst the best practices for collecting court ordered monetary obligations.¹⁴⁴

Collection

The process for the collection of restitution varies amongst courts, even though the Virginia Code requires that the clerk of court collect all non-delinquent restitution.¹⁴⁵ Payment options available to defendants, including payments online or with a credit or debit card, are limited and can vary amongst the courts. Most circuit courts do not have the ability to accept online payments due to lack of funding for a statewide system similar to the online payment system used for general district courts. Many courts still do not allow a defendant to pay restitution with a credit or debit card. In addition to these issues, innovative bill collection strategies are not being utilized for the collection of restitution.

According to one study, the average recovery rate achieved by collection agencies across a wide array of industries in 2011 was 16.5% with a median of 12.8%.¹⁴⁶ As suggested by Tables 1 and 4, data showed that efforts to collect restitution in Virginia have proven to be more successful after the restitution becomes delinquent and is forwarded to collections.

Monitoring

The Virginia Code provision regarding delinquent restitution specifies that the attorney for the Commonwealth is “...to cause proper proceedings to be instituted for the collection and satisfaction of all...restitution.”¹⁴⁷ Confusion exists in practice because this provision does not explicitly specify who is responsible for monitoring a defendant’s compliance with restitution payments. Because the Code is unclear as to who bears this responsibility, numerous stakeholders advised that the victim is often left to notify the court or Commonwealth’s Attorney when the victims are not receiving restitution payments.

¹⁴⁴ See Current Practices in Collecting Fines and Fees in State Courts: A Handbook of Collection Issues and Solutions, Second Edition, pgs. 23-26 (2009). *National Center for State Courts*. Retrieved from: <http://www.flccoc.org/collections/NCSC/NCSCCurrentPracticesInCollections.pdf>

¹⁴⁵ Va. Code § 19.2-305.1(D) (2016).

¹⁴⁶ 2012 Agency Benchmarking Survey, pg. 19. *Association of Credit and Collection Professionals International*. Retrieved from: <https://www.acainternational.org/assets/industry-research-statistics/2012-benchmarking-survey.pdf>. This survey measured performance in the collection of various delinquent debts, including bank and finance, commercial, credit card and retail, government, health care—both hospital and non-hospital, property management, student loans, telecommunications and utilities, and other miscellaneous debts.

¹⁴⁷ Va. Code § 19.2-349(B) (2016).

Additionally, there is difficulty in monitoring and tracking restitution that was ordered as joint and several and restitution that was docketed as a civil judgment. Confusion also exists in practice over whether the docketing of a restitution order as a civil judgment prohibits the court from using its criminal or contempt powers to sanction a defendant for failure to pay that restitution. Finally, literature exists suggesting that defendants should remain on some type of probation to better ensure compliance with restitution payments.¹⁴⁸

Disbursement

When a defendant pays restitution, clerks often experience difficulty forwarding the payment to the victim. Such difficulties are attributable to various reasons, including: the clerk never received contact information for the victim, the clerk received contact information but the victim relocated, or the clerk forwarded the payment via check to the victim but the check was never cashed. When these difficulties arise, clerks often lack the time and resources to identify a current address for the victim.

Additionally, some localities order the defendant to pay restitution directly to the victim, which creates monitoring issues and the potential for unwanted contact between the victim and the defendant. On a final note, the Virginia Code allows for community service in lieu of fines and costs,¹⁴⁹ but no such option exists for defendants who are unable to pay restitution.

Summary and Conclusion

During the Regular Session of the 2016 General Assembly, Delegate Robert B. Bell introduced HB 605. The bill as introduced required an automatic extension of probation if a defendant failed to pay restitution or complete community service as ordered by the court. A substitute version of HB 605 was introduced and enacted into law.¹⁵⁰ The substitute version extended the statute of limitations for the issuance of process against a defendant for failure to pay restitution from one year to three years.

¹⁴⁸ See Commonwealth Court Collections Review (2013). *Auditor of Public Accounts*. Retrieved from: <https://www.justice4all.org/wp-content/uploads/2014/12/APA-Report-CourtsAccountsReceivableSR2012.pdf>; see also Making restitution real: Five case studies on improving restitution collection (2011). *National Center for Victims of Crime*. Retrieved from: http://www.victimsofcrime.org/docs/restitution-toolkit/e4_making-restitution-real.pdf; see also Restitution in Pennsylvania: Task Force final report (2013). *Pennsylvania Office of the Victim Advocate*. Retrieved from: http://victimsofcrime.org/docs/default-source/restitution-toolkit/restitution-taskforce_final-report-2013.pdf?sfvrsn=2; see also Ruback, R.B., Gladfelter, A.S., & Lantz, B. (2014). Paying restitution: Experimental analysis of the effects of information and rationale. *Criminology & Public Policy*, 13(3), 405-436; see also Spridgeon, D.C. (2016). Best practices for collecting fines and costs. *Institute for Court Management*. Retrieved from: <http://www.ncsc.org/~media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2016/Best%20Practices%20for%20Collecting%20Fines%20and%20Costs.ashx>

¹⁴⁹ Va. Code § 19.2-354(C) (2016).

¹⁵⁰ 2016 Va. Acts ch. 718.

The House Courts of Justice Committee sent a letter requesting that the Crime Commission review the subject matter of HB 605 as introduced, including an analysis of the automatic extension of probation for failure to pay restitution. The Executive Committee of the Crime Commission authorized a broad review of the topic of restitution, including an examination of current methods for payment and collection, as well as extension of probation.

In order to address the study mandate, staff collected available literature and research, gathered and analyzed data from numerous local and state entities, completed a review of Virginia restitution statutes, reviewed restitution statutes and practices of other states, and met with numerous stakeholders involved in the restitution process in Virginia. Staff also developed and disseminated a survey to clerks of court for all circuit, general district, juvenile and domestic relations, and combined district courts. The response rate was high; 95% (306 of 321) of courts responded. Finally, staff surveyed other states' Departments of Corrections' Deputy Directors to gain insight into how restitution was handled across the nation and received a 63% (31 of 49) response rate.

Study findings indicated that the restitution process is fragmented and inconsistent in Virginia, which in turn leads to inequitable treatment of victims and defendants across the Commonwealth. Staff identified four categories of need within the restitution process, including:

- Uniformity within the restitution process;
- Collection of restitution;
- Monitoring of restitution compliance; and,
- Disbursement of restitution.

Staff identified many legislative and administrative changes that can be made to improve the overall functionality and efficiency of the restitution process. The Crime Commission reviewed the findings and recommendations of the study at its November meeting. Staff presented the following recommendations and policy options at the December meeting:

Recommendation 1: Virginia Code § 19.2-305.1 should be amended to require the Office of the Executive Secretary of the Supreme Court to develop a form order for restitution to be entered at the time of sentencing.

The Crime Commission unanimously endorsed Recommendation 1.

Recommendation 2: Virginia Code § 19.2-305.1 should be amended to require that the form order developed by the Office of the Executive Secretary of the Supreme Court should be completed in part by the Commonwealth’s Attorney, or his designee, prior to sentencing and should be entered by the court at the time of sentencing.

- If the Commonwealth’s Attorney is not involved in the prosecution, then the court or clerk shall complete the form.
- A copy of this form order should be provided to the defendant, without the victim’s contact information, at sentencing.
- A copy of this form order should be provided to the victim(s), free of charge, upon request of the victim(s).
- This form will provide vital information for clerks to collect and distribute restitution.

The Crime Commission unanimously endorsed Recommendation 2.

Recommendation 3: Virginia Code § 19.2-305.2 should be amended to clarify that the docketing of a criminal restitution order as a civil judgment does not prohibit criminal or contempt enforcement of that restitution order.

The Crime Commission unanimously endorsed Recommendation 3.

Recommendation 4: Virginia Code § 19.2-305.1 should be amended to allow for both the defendant and the Commonwealth’s Attorney to seek modification of the terms of payment of restitution in the event that a defendant’s ability to pay changes.

- The Commonwealth’s Attorney should notify the victim of any proceedings to modify the restitution order.

The Crime Commission unanimously endorsed Recommendation 4.

Recommendation 5: Virginia Code § 19.2-305.1 should be amended to specify that the court shall not order the defendant to pay restitution directly to the victim or through the defendant’s counsel.

The Crime Commission made no motion on Recommendation 5.

Recommendation 6: Virginia Code §§ 19.2-305.1, 19.2-305.2, and 19.2-354 should be amended to allow the court discretion to order a defendant who is unable to pay restitution the option to perform community service at the rate of the state minimum wage in lieu of restitution, provided that such community service is with the consent of the victim, the victim's estate, or the victim's agent, and the Commonwealth's Attorney.

Recommendation 6 was defeated by a majority vote of the Crime Commission.

Recommendation 7: The Department of Taxation Court Debt Collections Office should explore the possibility of accepting payments for delinquent restitution and upgrading current software to allow for a more streamlined approach to the collection of restitution. Additionally, the Office of the Executive Secretary of the Supreme Court, Department of Taxation, Department of Motor Vehicles, Department of Corrections, and Department of Criminal Justice Services should develop recommendations for enhancing the collection of restitution and to report findings and recommendations to the Chairman of the Crime Commission by November 1, 2017. The Commonwealth's Attorneys' Services Council and the Indigent Defense Commission will also be included in this group.

- May require legislation if funding is provided for new software.
- May require an amendment to Virginia Code § 19.2-349 to encompass all Commonwealth's Attorneys and collection agents.

The Crime Commission unanimously voted to send a letter request to the Office of the Executive Secretary of the Supreme Court that a restitution work group be formed for Recommendation 7.

Recommendation 8: Virginia Code §§ 19.2-303, 19.2-304, 19.2-305, 19.2-305.1, and 19.2-306 should be amended to specify who is responsible for monitoring compliance with the payment of restitution. Such amendments should include:

- If restitution is ordered, the defendant should be placed on indefinite supervised probation until all restitution is paid in full;
- The Department of Corrections or the local probation office should be responsible for monitoring compliance with the restitution order;
- For misdemeanor cases, as an alternative to probation, the court may instead schedule a review hearing to determine compliance with the restitution order;

- If supervision services are not available in the locality, then the court shall schedule a review hearing to determine compliance with the restitution order;
- The court should be required to conduct a hearing upon notice from the probation officer that the defendant is not in compliance with restitution payments;
- The court should verify with the clerk of court that all restitution has been paid before releasing the defendant from supervised probation; and,
- A provision allowing the court to release the defendant from supervised probation, upon the defendant's motion and under special circumstances, after consideration of the amount owed and paid, payment history, and the defendant's future ability to pay. The Commonwealth's Attorney should notify the victim of any request by the defendant for release from supervision.

The Crime Commission unanimously endorsed Recommendation 8.

Recommendation 9: The General Assembly should authorize funding for the Office of the Executive Secretary of the Supreme Court to allow for circuit courts to accept online payments. The amount of funding required is \$150,000.

The Crime Commission endorsed Recommendation 9 by a majority vote.

Recommendation 10: The General Assembly should provide additional resources to the Department of Corrections to support the monitoring of restitution and the extension of probation.

The Crime Commission made no motion on Recommendation 10.

Recommendation 11: The Office of the Executive Secretary for the Supreme Court, in coordination with other stakeholders involved in the restitution process, should develop best practice guidelines for managing the restitution process. The guidelines should address such practices as:

- Developing a local plan for the collection, monitoring and disbursement of restitution;
- Addressing repeat offenders;
- Handling joint and several restitution orders;
- Determining how payments are applied when the defendant owes fines, costs and restitution;
- Addressing issues surrounding micro-checks for restitution;
- Issues involving collections when the victim is a large corporation or insurance company;

- How to handle unclaimed restitution;
- Options for locating the victim for disbursement;
- Availability of payment options, including credit and debit cards and online payment;
- Feasibility of developing a uniform payment schedule for restitution, similar to the child/spousal support model; and,
- Defining when a case is closed for purposes of collection and monitoring.

If the Court later determines that some of these items would be better addressed by legislation they will notify Crime Commission staff.

The Crime Commission unanimously voted to send a letter request for Recommendation 11.

Recommendation 12: The Office of the Executive Secretary for the Supreme Court should provide training to clerks and judges on the best practice guidelines for managing the restitution process.

The Crime Commission unanimously voted to send a letter request for Recommendation 12.

Recommendation 13: The Department of Criminal Justice Services should convene representatives from the Virginia Victim Assistance Network, the Criminal Injuries Compensation Fund, Commonwealth's Attorneys' Offices, and any other interested stakeholders, to develop an informational brochure for victims to explain restitution and the victim's role in the restitution process.

The Crime Commission unanimously voted to send a letter request for Recommendation 13.

Recommendation 14: The Office of the Executive Secretary of the Supreme Court should enhance their Financial Accounting System (FAS) to allow clerks the ability to generate a payment notice, as is the practice with fines and costs, along with any other capabilities that would enhance the management of restitution.

The Crime Commission unanimously voted to send a letter request for Recommendation 14.

Policy Option 1: Virginia Code § 19.2-358 could be amended to remove the court's authority to impose up to a \$500 fine for a defendant's failure to pay a fine, costs, forfeiture, restitution or penalty.

The Crime Commission unanimously endorsed Policy Option 1.

Policy Option 2: Virginia Code § 19.2-349 could be amended to require the court to notify the Commonwealth's Attorney if a defendant who owes restitution has not made any payments within 90 days after his account was sent to collections. Virginia Code § 19.2-349 could be amended to require the clerk to send a list every 90 days to the Commonwealth's Attorney of all defendants who owe restitution, including the amount ordered and balance due.

The Crime Commission unanimously endorsed Policy Option 2.

Legislation was introduced in both chambers during the 2017 Session of the General Assembly for Recommendations 1, 2, 3, 4, and 8, and Policy Options 1 and 2. Due to the unanticipated budget shortfall, the budget amendment for Recommendation 9 was not included in the final state budget.

Delegate Robert B. Bell introduced House Bill 1855, which was an omnibus bill encompassing Recommendations 1, 2, and 3, and Policy Options 1 and 2. Delegate Robert B. Bell also introduced House Bill 1856 that dealt with the supervised probation requirements of Recommendation 8. Delegate Charniele L. Herring introduced House Bill 2083 in regard to the modification of the terms of payment of restitution pursuant to Recommendation 4.

Companion bills to all of the House of Delegates legislation were introduced in the Senate. Senator Mark D. Obenshain introduced Senate Bills 1284 and 1285, which were identical to House Bills 1855 and 1856, respectively. Senator Jennifer L. McClellan introduced Senate Bill 1478, which was identical to House Bill 2083.¹⁵¹

House Bill 2083 was left in the House Courts of Justice Committee. Senate Bill 1478 failed to report from the Senate Courts of Justice Committee.

The General Assembly passed House Bills 1855 and 1856 and Senate Bills 1284 and 1285. The Governor returned all four bills to the General Assembly with recommended amendments. The House of Delegates voted to reject the Governor's amendments to House Bill 1856. The Senate voted to reject the Governor's amendments to Senate Bill 1285. The Governor ultimately vetoed both House Bill 1856¹⁵² and Senate Bill 1285.¹⁵³ The General Assembly accepted the Governor's

¹⁵¹ Senator Jennifer McClellan was elected to the Senate of Virginia in January of 2017.

¹⁵² For an explanation of the veto, see <https://lis.virginia.gov/cgi-bin/legp604.exe?171+amd+HB1856AG>

¹⁵³ For an explanation of the veto, see <https://lis.virginia.gov/cgi-bin/legp604.exe?171+amd+SB1285AG>

amendments to House Bill 1855 and Senate Bill 1284. Both of those bills were passed and signed by the Governor.¹⁵⁴

Acknowledgements

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Auditor of Public Accounts (APA)

City/County Treasurers

Circuit Court Clerks

Commonwealth's Attorneys

Commonwealth's Attorneys' Services Council

Criminal Injuries Compensation Fund (Virginia Victims Fund)

District Court Clerks

Local Probation/Community Corrections

National Center for Victims of Crime

Office of the Executive Secretary of the Supreme Court

Office of the Secretary of Public Safety and Homeland Security

RevQ, A Columbia Ultimate Company

State Compensation Board

Virginia Community Criminal Justice Association

Virginia Court Clerks Association

Virginia Criminal Sentencing Commission

Virginia Department of Criminal Justice Services

Virginia Department of Corrections

Virginia Department of Juvenile Justice

Virginia Department of Motor Vehicles

Virginia Department of Social Services

Virginia Department of Taxation - Court Debt Collections Office

Virginia Department of Taxation - Setoff Debt Collection Program

Virginia Victim Assistance Network

Virginia Victim-Witness Assistance Programs

¹⁵⁴ 2017 Va. Acts ch. 786, 814.