

Proposed “Ohio Victim’s Rights and Restitution Act”

From: Ohio Victim Witness Association (draft 6-4-09)

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1) Summary – Move definitions of “Victim Advocate” and “crime victim service organization” from ORC 2305.236 to ORC 2930 and reflect the role of Victim Advocates in more than only court hearings. (Underlined portion is deleted and CAPITALIZED language is added):

2930.01(X) “Victim Advocate” means a person from a crime victim service organization who provides support and assistance for a victim of a crime during court CRIMINAL AND ADMINISTRATIVE proceedings and recovery efforts related to the crime. “Crime victim service organization” means any organization that is not organized for profit and that is organized and operated to provide, or to contribute to the support of organizations or institutions organized and operated to provide, services and assistance for victims of crime.

2) Summary – Strengthen the right of victims to notice by substituting “shall” language. (Underlined portion is deleted and CAPITALIZED language added):

“2930.08 If a motion, request, or agreement between counsel is made in a case and the motion, request, or agreement might result in a substantial delay in the prosecution of the case, the prosecutor in the case, to the extent practicable and if the victim has requested notice AND HAS PROVIDED CURRENT CONTACT INFORMATION pursuant to division (B) of section 2930.03 of the Revised Code, SHALL INFORM the victim that the motion, request or agreement has been made and that it might result in delay. If the victim objects to the delay the prosecutor shall inform the court of the victim's objections, and the court shall consider the victim's objections in ruling on the motion, request or agreement.

3) Summary – Victims will be allowed oral and written Victim Impact Statements. A few Ohio judges have denied the right of victims to present both a written and oral Victim Impact Statement. What a victim wants to document for the judge and prosecutor in a written statement may be substantially different than what the victim wants to say in court in the presence of the offender. (CAPITALIZED language is added):

“2930.14 Before imposing sentence upon, or entering an order of disposition for, a defendant or alleged juvenile offender for the commission of a crime or specified delinquent act, the court shall permit the victim of the crime or specified delinquent act to SUBMIT A WRITTEN STATEMENT PRIOR TO THE SENTENCING OR DISPOSITION PROCEEDING AND make an ORAL statement DURING THE SENTENCING OR DISPOSITION PROCEEDING. ...”

4) Summary – Victims will be notified and be able to provide a victim impact statement prior to the granting of judicial or early release, sealing or expungement, and be notified of the results of those hearings. Currently, judges are not required to inform victims of decisions or to inform victims of sealing/expungement requests being considered or the results. (Underlined portion is deleted and CAPITALIZED language added.)

2930.17 In determining whether to grant a judicial release to a defendant from a prison term pursuant to section 2929.20 of the Revised Code ... or in determining whether to grant a judicial release or early release ..., OR IN DETERMINING WHETHER TO GRANT THE SEALING OR EXPUNGEMENT OF A CRIMINAL OR DELINQUENCY RECORD, the court shall NOTIFY THE PROSECUTOR REGARDING SAID CONSIDERATIONS AND HEARINGS NO LESS THAN TEN WORKING DAYS PRIOR TO SAID CONSIDERATIONS AND HEARINGS IN ORDER THAT

TIMELY NOTICE CAN BE PROVIDED TO VICTIMS WHO HAVE REQUESTED NOTICE AND WHO MAINTAIN CURRENT CONTACT INFORMATION WITH THE PROSECUTOR OR THEIR DESIGNEE, AND THE COURT SHALL permit a victim of a crime ... to make a VICTIM IMPACT statement, in addition to any other statement made under this chapter, concerning... The victim may make the statement in writing or AND orally, at the court's VICTIM'S discretion. THE COURT SHALL NOTIFY THE PROSECUTOR PROMPTLY REGARDING THE DECISIONS AND/OR RESULTS OF SUCH CONSIDERATIONS AND/OR HEARINGS. THE COURT SHALL NOT RELEASE AN OFFENDER FROM CUSTODY UNTIL THE CUSTODIAN AGENCY HAS BEEN SENT A JOURNAL ENTRY REGARDING THE JUDICIAL RELEASE DECISION.

5) Summary – Victims will have standing to enforce their rights, have the right to file motions through their attorney or prosecutor. Ohio lacks a significant victim rights enforcement process, leaving victims without any recourse and remedy if their rights are violated. (Underlined portion is deleted and CAPITALIZED language is added):

2930.19. Prosecutor's duty to seek compliance; effect of violations; conflicting statutes; incarcerated victims.- ENFORCEMENT AND LIMITATIONS

(A) In a manner consistent with the duty of a prosecutor to represent the interests of the public as a whole, a prosecutor shall seek compliance with this chapter on behalf of a victim, a member of the victim's family, or the victim's representative. IN ANY COURT PROCEEDING INVOLVING AN OFFENSE AGAINST A CRIME VICTIM, THE COURT SHALL ENSURE THAT THE CRIME VICTIM IS AFFORDED THE RIGHTS PROVIDED BY CONSTITUTION, STATUTES, RULES, AND OTHER LAWS OF THIS STATE. THE VICTIM OR THEIR REPRESENTATIVE SHALL HAVE STANDING IN TRIAL AND APPELLATE COURTS TO ASSERT AND ENFORCE THE RIGHTS OF A VICTIM PROVIDED IN LAW. AT THE REQUEST OF THE VICTIM THE PROSECUTING ATTORNEY, IN THE PROSECUTOR'S DISCRETION, ALSO HAS SUCH STANDING.

- (1) THE PROSECUTOR SHALL ADVISE THE CRIME VICTIM THAT THE CRIME VICTIM OR THEIR REPRESENTATIVE CAN SEEK THE ADVICE OF AN ATTORNEY WITH RESPECT TO THE RIGHTS ENUMERATED IN LAW.
- (2) UPON THE FILING OF A NOTICE OF APPEARANCE COUNSEL FOR THE VICTIM SHALL BE SERVED COPIES OF ALL PLEADINGS AND ORDERS THAT INVOLVE A VICTIM'S RIGHT ENUMERATED IN LAW. IF PRESENT, LEGAL COUNSEL FOR THE VICTIM SHALL HAVE THE RIGHT TO ATTEND ALL BENCH CONFERENCES AND IN CHAMBER MEETINGS AND SESSIONS WITH THE TRIAL COURT THAT INVOLVE A VICTIM'S RIGHTS.
- (3) IF THE COURT DENIES THE VICTIM'S RIGHTS RELIEF SOUGHT, THE VICTIM MAY PETITION THE COURT OF APPEALS OR THE SUPREME COURT FOR A WRIT OF MANDAMUS OR INJUNCTIVE RELIEF TO BE PROVIDED FORTHWITH. IN NO EVENT SHALL PROCEEDINGS BE STAYED OR SUBJECT TO A CONTINUANCE OF MORE THAN TEN DAYS FOR PURPOSES OF ENFORCING THIS CHAPTER, AND STAYS AND CONTINUANCES PURSUANT TO THIS CHAPTER SHALL NOT SUPERCEDE THE DEFENDANT'S SPEEDY TRIAL RIGHTS. IF THE COURT OF APPEALS OR SUPREME COURT DENIES THE RELIEF SOUGHT, THE REASONS FOR THE DENIAL SHALL BE CLEARLY STATED ON THE RECORD IN A WRITTEN OPINION.

(B) The failure of a public official or public agency to comply with the requirements of this chapter does not give rise to a claim for damages against that public official or public agency, except that a public agency as an employer may be held responsible for a violation of section

2930.18 of the Revised Code.

(C) The failure of any person or entity to provide a right, privilege, or notice to a victim under this chapter does not constitute grounds for declaring a mistrial or new trial, OR for setting aside a conviction. sentence, adjudication, or disposition, or for granting post conviction release to a defendant or alleged juvenile offender.

(D) If there is a conflict between a provision in this chapter and a specific statute governing the procedure in a case involving a capital offense, the specific statute supersedes the provision in this chapter.

(E) If the victim of a crime is incarcerated in a state or local correctional facility or is in the legal custody of the department of youth services, the victim's rights under this chapter may be modified by court order to prevent any security risk, hardship, or undue burden upon a public official or public agency with a duty under this chapter.

6) Summary – Victims will have the right to restitution through collection and payment in a comprehensive and timely manner (new ORC Section 2930.20). Not having a restitution right is a violation of cultural and religious teachings around the world. It is a universal human belief that a thief or attacker should repay the victim for their losses. Currently, clearly documented restitution reports may be ignored by prosecutors, and judges do not have to order any restitution or enforce a restitution order. Restitution must be considered a reimbursement rather than a penalty and allow for post-sentencing adjustments without double jeopardy incurring. (This section is entirely new, and the name of a state in parenthesis is where that particular concept is currently in law.)

2930.20 MANDATORY RESTITUTION. The criminal court shall order full restitution the victim or victims as part of the disposition of a criminal charge or juvenile delinquency proceeding against the offender if the offender is convicted, found delinquent or agrees to pay restitution. “Victim” is defined in this section as including any person or entity paid and/or due reimbursement, including but not limited to: immediate family members; individuals; non-profit organizations; businesses; insurance companies, and; government. Restitution shall include: damage or loss caused directly or indirectly by the defendant’s offense and damage or loss related to the defendant’s criminal episode, scheme, conspiracy or pattern.

A) Preservation of Assets

- 1) Prosecutors may petition the court to enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property which may be necessary to satisfy an anticipated restitution order if, in the prosecutor's judgment, there is a substantial likelihood that a conviction will be obtained and restitution will be ordered.
- 2) Upon receiving the petition the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any action necessary to preserve the availability of property which may be necessary to satisfy an anticipated restitution order. Any order is good for up to 90 days, and may be renewed. The court shall preserve the availability of property under the following criterion:
 - a) The prosecutor demonstrates that there is a substantial likelihood that the property with respect to which the order is sought appears to be necessary to satisfy an anticipated restitution order under this chapter;
 - b) That provision of notice would jeopardize the availability of the property to satisfy any restitution order or judgment, and;
- 3) A hearing concerning an order entered under this section shall be held as soon as

possible, and prior to the expiration of the temporary order.

B. Determination of Restitution

- 1) The State shall present evidence relevant to the issue of restitution, but does not represent persons who have suffered pecuniary damages. (Arizona)
- 2) The court shall determine the full restitution by a preponderance of the evidence. (Florida) The court may modify the amount, on its own motion or on the motion of the prosecuting attorney, the victim(s), or the defendant. If a motion is made for modification of a restitution order, the victim shall be notified of that motion at least seven days prior to the proceeding held to decide the motion. (California)
- 3) The court shall consider a victims request that no restitution be ordered or a reduced amount be ordered and a victims request that the defendant make restitution by means other than the payment of money. (Alaska)
- 4) Restitution shall be ordered for any related economic losses. The existence of a policy of insurance covering the victim's loss shall not absolve the defendant of the obligation to pay restitution. (Idaho)
- 5) The court shall not, in ordering the amount of restitution, consider the defendant's ability to pay restitution. (Alaska)
- 6) In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts (Utah). The court shall determine restitution based upon a reasonable relationship to the victim's loss (Ohio-State v. Marbury, (1995) Cuyahoga App. No. 67929, 104 Ohio App. 3d 179, 661 N.E.2d 271; 1995 Ohio App. Lexis 2097). The court shall order restitution for medical and related professional services and devices relating to physical or mental health care. The court shall order restitution for a victim who was deprived of property and the value it could have incurred during that time including lost wages. When restitution is received by the court, or any portion thereof, and is un-payable to the victim, that restitution shall be ordered to be paid to a third party, including but not limited to a crime victim service organization or the Ohio Victim Compensation Fund.
- 7) The court shall determine the amount of restitution prior to, at the time of, or at a delayed sentencing hearing specific to determining the restitution. Should additional information or obligations be submitted subsequent to adjudication, the court shall consider such a motion by preponderance of the evidence and amend the restitution order accordingly.

C. Payment of Restitution

- 1) Monies received from the defendant shall be applied first to satisfy the restitution order entered by the court and then payment of any restitution arrears. (Arizona)
- 2) If there is more than one victim of a crime, the court shall give priority to victims who are not organizational, insurance or governmental entities when ordering restitution (Minnesota), and pay restitution in the following priorities of payment: individuals, non-profit organizations, businesses, insurance recovery, and lastly to government entities.
- 3) Restitution shall be paid immediately and in full. (Florida) If the court determines that restitution is inapplicable or inappropriate when victims' losses have been requested or are known, the court shall make the reasons for the decision part of the court record. The court may grant permission for the payment to be made within a specified period of time or in

specified installments. If the defendant fails to make one or more payments required under this section, the victim or the state on the victim's behalf may enforce the total amount remaining under the order of restitution. (Alaska) At sentencing or any time prior to the termination of the restitution obligation, the court may impose special payment directions upon the defendant or modify such directions. This court may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments. The length of time over which scheduled payments are established shall be the shortest time in which full payment reasonably can be made. In-kind payments may be in the form of the return of property, replacement of property, or, if the victim agrees, services rendered to the victim or a person or organization other than the victim.

The court may direct the defendant to repatriate any property that constitutes proceeds of the offense of conviction, or property traceable to such proceeds. The court may direct the defendant to surrender to the victim(s) named in the restitution order, any interest of the defendant in any non-exempt asset. The court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property for restitution. (Letter from Professor Paul Cassell to Dennis Hastert and Vice-President Dick Cheney regarding federal: Proposed Improvement on Restitution Act Sec. 102. Amendments to 18 U.S.C. 3664(f)(5))

- 4) Except for federal law, the restitution obligation is not subject to discharge in bankruptcy, whether voluntary or involuntary, or to any other statutory or common-law proceeding for relief against creditors. (Florida)
- 5) When restitution is ordered, the restitution order shall be a judgment against the defendant which may be collected by the court or victim by garnishment or other execution as on judgments in civil cases. (Ohio)
- 6) In the event that a court ordered restitution obligation (e.g. counseling, medical bills) has been awarded to the victim/claimant by the Ohio Victim Compensation Fund, that restitution amount shall be paid to the Ohio Victim Compensation Fund. (Ohio-Revised Code 2743.72 (E)) In the event of the death of the victim or the defendant, the remaining restitution amount shall be paid to the Victim Compensation Fund. (Minnesota)
- 7) An order of restitution under this section does not limit any civil liability of the defendant arising from the defendant's conduct. (Alaska)
- 8) An order of restitution made under this section is a condition of the defendant's sentence and, in cases in which the court suspends all or a portion of the defendant's sentence; the order of restitution is a condition of the suspended sentence. (Alaska)
- 9) Any monies that are owed by this state to a person who is under a restitution order shall be assigned first to discharge the restitution order, including any tax refund that is owed to the defendant. (Arizona) When the court imposes or modifies payment directions the court may consider any substantial resources from any source, including inheritance, settlement or other judgment, to be applied to any outstanding restitution obligation. (Letter to Dennis Hastert and Dick Cheney from Professor Paul Cassell re: changes to Restitution Act. Sec. 102. Amendments to 18 U.S.C. 3664(f)(6)).
- 10) When a person's means of identification or financial information was used without that person's authorization in connection with a conviction for any crime, the sentencing court

may issue such orders as are necessary to correct a public record that contains false information resulting from any violation of such laws. (Colorado)

- 11) Notwithstanding any law, rule or regulation to the contrary, for the purposes of ensuring the payment of restitution the court shall retain jurisdiction over the offender until the amount of restitution ordered has been paid in full or until the completion of their term of probation, parole, or post release control. The court shall:
 - a. Monitor the payment of the restitution to assure that payment is being made;
 - b. Hold a hearing if restitution is not being paid as ordered to determine why the restitution is not being paid;
 - c. Institute sanctions against the defendant if the restitution is not being paid and no good reason exists;
 - d. Not release the defendant early from probation, supervision, or post release control until restitution has been paid in full, or until an equivalent number of hours of community service have been performed in circumstances when the defendant is indigent. (Delaware)

- 12) The court shall authorize that funds and property confiscated at the time of arrest are to be applied to any restitution order(s), if the confiscated money or resources are not obligated by prior law.