

Restitution "TBD by the Probation Officer"

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Date : May 28, 2013

May a judge delegate to a probation officer the task of setting the amount of restitution owed to a victim? For several reasons, my standard answer to that recurring question is no.

The main reason for my answer is the restitution statutes themselves. The law says that restitution should be ordered "when sentencing a defendant," [G.S. 15A-1340.34\(a\)](#), and goes on to say that any documentation related to the restitution amount "shall be shared with the defendant before the sentencing hearing," [G.S. 15A-1340.35\(b\)](#). A post-sentencing determination by a probation officer does not follow that statutory chronology. More generally, the statutes consistently describe the restitution determination process as something to be done by "the court." The court may "delegate to a probation officer the responsibility to determine the payment *schedule*" for restitution and other monetary obligations, [G.S. 15A-1343\(g\)](#), but the restitution *amount* should be set by the court.

Allowing restitution to be set by a probation officer could raise several issues. First, the appellate courts have repeatedly told us that the restitution amount must be supported by evidence adduced at trial or at sentencing. *E.g.*, *State v. Elkins*, 210 N.C. App. 110, 126–27 (2011). A prosecutor's statement or a restitution worksheet, standing alone, is insufficient evidence. *State v. Wilson*, 340 N.C. 720 (1995). An amount set by a probation officer outside of court would seem to raise similar issues of proof.

Second, in determining the restitution amount, the court "shall take into consideration the resources of the defendant." [G.S. 15A-1340.36\(c\)](#). If the court orders partial restitution based on the defendant's inability to pay, it must "state on the record the reasons for such an order." *Id.* If the restitution amount is not set at sentencing the defendant may not have the requisite opportunity to present information about his or her inability to pay.

Third, allowing restitution to be set by anyone other than the judge could raise a constitutional concern about delegation of a core judicial function to a non-judicial officer. Our state courts have not explored that issue, but it comes up a lot in federal court. In *United States v. Johnson*, the Fourth Circuit held that determination of the restitution amount is a non-delegable judicial function. 48 F.3d 806, 809 (4th Cir. 1995). The court recognized the problem as a "difficult one" in light of the trial courts' need to "remain efficient" by relying on the support services of probation officers, *id.*, but then went on to collect cases from across the country reaching essentially the same conclusion. If it's a delegation problem in the federal system, where the probation officers actually work for the court, then it's arguably an even greater problem in our state system, where the officers fall under the executive branch. Our probation officers have broad delegated authority after Justice Reinvestment, but even those statutes make no mention of restitution.

None of this is to say that the judge may not ask for help in determining the proper restitution amount. The court may ask a probation officer to complete a presentence investigation of "any defendant," [G.S. 15A-1332\(b\)](#), and the court could limit the scope of that investigation to the sole issue of restitution. The probation officer must complete that investigation "promptly" and report back to the court orally or in writing.

In light of the concerns outlined above, I think the court should not order restitution "to be determined" by the probation officer. If more information is needed, the better practice is to continue sentencing on the issue of restitution, allowing the officer to investigate the issue and then report back to the court, which then sets the final amount.