

## **An ACLU-PA Guide to the Imposition of Costs and Restitution in ARD and other Diversionary Programs**

Diversionary programs, including Accelerated Rehabilitative Disposition (“ARD”), are important tools to rehabilitate defendants who have committed comparatively minor offenses while eliminating the need for costly and time-consuming trials or other court proceedings. Because ARD is a statewide program, and the most common diversionary program in Pennsylvania, this Guide focuses on it. However, the constitutional principles that govern costs and restitution in ARD also apply to other diversionary programs, such as Philadelphia’s Accelerated Misdemeanor Program. We intend this guide to help attorneys and judges understand the law governing the financial aspects of diversionary programs.<sup>1</sup>

### **The financial obligations of ARD must be tailored to the defendant’s ability to pay.**

Defendants who participate in ARD can be required to pay costs and restitution, but not a fine.<sup>2</sup> A defendant may not be denied participation in ARD based on the inability to pay costs or restitution. Therefore, the trial court must reduce or waive those financial obligations if a defendant is unable to pay.<sup>3</sup>

**Restitution:** Restitution in ARD is not mandatory, as it “may be imposed with respect to probation after conviction of a crime.”<sup>4</sup>

- The restitution associated with ARD is limited to the defendant’s ability to pay that restitution—and it cannot exceed the defendant’s ability to pay, regardless of the victim’s loss.<sup>5</sup>
- This limitation comes from 42 Pa.C.S. § 9754(c)(8), which only allows restitution as a condition of probation that the defendant “can afford to pay.”<sup>6</sup>
- If the defendant cannot afford to pay restitution, it must be reduced or waived. Otherwise, the court violates the defendant’s constitutional rights to due process and equal protection if he cannot receive the benefits of ARD due to his indigence.<sup>7</sup>

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<sup>1</sup> How to determine whether the defendant is “able to pay,” as well as specific guides on the financial aspects of sentencing, contempt, and probation/parole, are the subject of separate ACLU-PA Guides.

<sup>2</sup> Pa.R.Crim.P. 316.

<sup>3</sup> *Commonwealth v. Melnyk*, 548 A.2d 266, 268 (Pa. Super. Ct. 1988) (district attorney could not prevent a defendant from participating in ARD because she lacked the ability to pay restitution).

<sup>4</sup> Pa.R.Crim.P. 316.

<sup>5</sup> As the Superior Court has explained, when the payment of restitution is a condition of probation—the type of restitution called for by Rule 316 and ARD—the amount of that restitution can only be imposed after considering the defendant’s ability to pay that restitution. 42 Pa. Cons. Stat. § 9754(c)(8) (authorizing restitution as a condition of probation “in an amount he can afford to pay”); *Melnyk*, 548 A.2d at 268. *See also Commonwealth v. Holmes*, 155 A.3d 69, 86-87 (Pa. Super. Ct. 2017) (en banc) (opinion of four judges) (under § 9754, the court “must determine what amount of restitution a defendant can afford to pay”).

<sup>6</sup> *Id.* *See also Melnyk*, 548 A.2d at 268.

<sup>7</sup> *Melnyk*, 548 A.2d at 272 (preventing a defendant from participating in ARD due to indigence would “deprive the petitioner of her interest in repaying her debt to society without receiving a criminal record simply because, through no fault of her own, she could not pay restitution. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment”).

- As with restitution imposed as a condition of probation, the obligation to pay restitution expires when ARD is completed.<sup>8</sup>

**Costs:** The conditions of ARD “may include the imposition of costs”— but such costs are not mandatory.<sup>9</sup>

- The intent of the Supreme Court in creating ARD was to “permit qualified individuals who are indigent to participate in the ARD program without payment of costs or charges.”<sup>10</sup>
- Although certain statutes impose costs on ARD participants, those provisions must be read *in pari materia* with Rule 316 such that a defendant is liable for costs only if he can afford them.<sup>11</sup> In other words, Rule 316 creates an indigence exception to any condition that a defendant pay costs, and it means that no costs are “mandatory.”
- The court should consider the defendant’s ability to pay costs at the hearing to admit the defendant into ARD, as it is at that point that the court imposes the “conditions of the program,” which “may include the imposition of costs.”<sup>12</sup>
- There is also a constitutional limitation that requires reducing or waiving costs if the defendant cannot afford them and the failure to pay would either prevent the defendant from entering into or completing ARD.<sup>13</sup>

**Defendants who cannot afford costs or restitution cannot be prevented from receiving the benefits of ARD.**

The Superior Court’s opinion in *Commonwealth v. Melnyk*, 548 A.2d 266 (Pa. Super. Ct. 1988) leaves no doubt that indigent defendants must be allowed to participate in ARD even if they have “no ability to pay” despite making a bona fide effort to do so.<sup>14</sup>

- Defendants cannot be denied admission to or graduation from ARD because they are unable pay costs or restitution.<sup>15</sup>

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<sup>8</sup> This is the same outcome as for restitution imposed as a condition of probation under § 9754(c)(8). *See Commonwealth v. Karth*, 994 A.2d 606, 610 (Pa. Super. Ct. 2010); *Commonwealth v. Holmes*, 155 A.3d 69, 86-87 (Pa. Super. Ct. 2017) (en banc) (opinion of four judges).

<sup>9</sup> Pa.R.Crim.P. 316(A).

<sup>10</sup> Pa.R.Crim.P. 316 Comment.

<sup>11</sup> 1 Pa.C.S. § 1932. *See Lohmiller v. Weidebaugh*, 469 A.2d 578, 581 (Pa. 1983) (statute and court procedural rule that “relate to the same subject matter . . . must be read *in pari materia* so that effect can be given to both” pursuant to 1 Pa.C.S. 1932). Thus, the court rule and statutes imposing costs must be read together so that effect is given to both. In addition, a specific provision—such as an individual statute imposing “mandatory” costs in ARD cases—prevails over the general provision in Rule 316 only if the two are irreconcilable. *Id.* at 1933. Such provisions are not irreconcilable if read as permitting costs to be reduced or waived based on indigence, which is the clear intent of the Supreme Court in the Comment to Rule 316.

<sup>12</sup> Pa.R.Crim.P. 316(A).

<sup>13</sup> *Melnyk*, 548 A.2d at 272 (explaining that “the State’s refusal to place appellant in the ARD program was fundamentally unfair and invidiously discriminated against appellant because of her economic status”).

<sup>14</sup> *Id.*

<sup>15</sup> Such denial would “deprive the petitioner her interest in repaying her debt to society without receiving a criminal record simply because, through no fault of her own, she could not pay restitution. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.” *Id.*

- The Commonwealth can seek to have a defendant removed from ARD for a violation only by either filing a motion with the court<sup>16</sup> or objecting to the defendant’s motion to complete ARD.<sup>17</sup>
- A defendant can only be removed from ARD for nonpayment if the court inquires into the reasons for the defendant’s nonpayment and determines that the defendant has willfully failed to pay.<sup>18</sup>
- The court has an obligation to “consider alternative conditions for admittance to and completion of the ARD program.”<sup>19</sup>
  - Alternatives to payment could include things like additional community service, taking GED or college classes, or participating in drug or alcohol treatment. The costs for any of those programs must also be waived if the defendant cannot afford them, as the defendant’s finances would otherwise still prevent him from completing ARD.
- As a result, a defendant who has completed the terms of ARD—even if he cannot afford to pay costs and restitution—must receive all benefits, including expungement.
  - As Rule 320 explains, when the judge “orders the dismissal of the charges,” the judge “also *shall* order the expungement.”<sup>20</sup>
  - Thus, no separate petition is required for the defendant to receive the expungement, and a court cannot have a policy that a defendant has “completed” ARD yet still owes costs or restitution that prevent him from receiving an expungement. If the charges are dismissed (upon successful completion of ARD), the court *must* simultaneously order an expungement.

Regardless of whether the court chooses to require participation in an appropriate non-financial alternative condition of ARD, the defendant cannot be required to pay money that he does not have.<sup>21</sup> To do so would undermine the “primary purpose” of ARD, which is “the rehabilitation of the offender.”<sup>22</sup>

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<sup>16</sup> Pa.R.Crim.P. 318(A).

<sup>17</sup> Pa.R.Crim.P. 319.

<sup>18</sup> This willful requirement comes from *Bearden v. Georgia*, 461 U.S. 660 (1983), which undergirds both *Melnyk* and the well-developed case law that prevents indigent defendants from having their probation revoked or extended due to nonpayment. *See, e.g., Commonwealth v. Dorsey*, 476 A.2d 1308, 1311 (Pa. Super. Ct. 1984) (*Bearden* requires that the court determine whether the defendant willfully failed to pay); *Commonwealth ex rel. Powell v. Rosenberry*, 645 A.2d 1328, 1331 (Pa. Super. Ct. 1994) (nonpayment is a technical violation only if the defendant willfully failed to pay). Review our legal guide on ability to pay for the relevant case law, available on [www.aclupa.org/finesandcosts](http://www.aclupa.org/finesandcosts).

<sup>19</sup> *Melnyk*, 548 A.2d at 272.

<sup>20</sup> Pa.R.Crim.P. 320(A) (emphasis added).

<sup>21</sup> *See Commonwealth v. Smetana*, 191 A.3d 867, 873 (Pa. Super. Ct. 2018) (“Although Appellant indicated that he could potentially borrow money from a sibling, the court failed to find—as our law requires—that he alone had the financial ability to pay the outstanding fines and costs such that imprisonment was warranted.”).

<sup>22</sup> Pa.R.Crim.P. Committee Introduction to Chapter 3. *See also Commonwealth v. Fuqua*, 407 A.2d 24, 26 (Pa. Super. Ct. 1979) (rehabilitative purpose of restitution is undermined if the defendant cannot afford to pay the restitution).