

# Post-Conviction Advocacy for Survivors of Human Trafficking: A Guide for Attorneys

## *The Survivor Reentry Project*

American Bar Association

Commission on Domestic & Sexual Violence



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## How to Use This Guide

The crime of human trafficking occurs throughout and across the United States. With increased awareness of the prevalence and characteristics of human trafficking, many state governments and law enforcement officials now recognize that victims are not consistently or accurately identified. Instead, “authorities often fail to properly screen and identify victims of human trafficking when they detain or arrest criminal suspects. This can result in a second victimization when victims are punished for their engagement in the crimes their traffickers forced them to commit.”<sup>1</sup> The approach of treating victims as criminals also increases the prevalence of human trafficking by allowing perpetrators to use the threat of criminalization as a way to coerce victims.

Victims are then saddled with the heavy burden of a criminal record for crimes resulting from having been trafficked. While there are various efforts currently underway in some jurisdictions to reform and prevent this phenomenon, across much of the country trafficking survivors still confront the long lasting impact of their own prior criminalization.

Many victims of human trafficking in the United States remain unidentified because they fear coming forward. This fear is based, in part, on the current treatment of many victims of human trafficking as criminals in our legal system. The criminal legal system fails to correctly identify them, largely because of resource constraints, lack of training, and systemic inflexibility. The U.S. Department of State’s Trafficking in Persons (TIP) report notes:

Compounding the injustice, a criminal record can have a profoundly negative effect on victims throughout their lives—for example, a survivor of sex trafficking who cannot rent an apartment because of prior arrests for prostitution; or an individual forced by a criminal gang to steal or sell drugs who cannot get a job due to the resulting criminal record. Even if a trafficking victim never faces charges, or if charges are dropped, arrest records and stigma remain, affecting where victims live, their employment opportunities, and how others perceive them.<sup>2</sup>

In response, New York State enacted landmark legislation<sup>3</sup> in 2010 that provides post-conviction relief to survivors. The law allows survivors to seek a court order vacating the criminal convictions that were entered against them as a result of their trafficking into prostitution. Many other states have now enacted similar laws.

Vacatur laws create an opportunity for certain trafficking survivors to correct past injustices and eliminate debilitating obstacles. It is important to recognize the limitations of the majority of existing laws – many limit relief to only certain crimes *and/or* the relief is available only to sex trafficking victims. Yet, vacatur laws represent a significant step forward in recognizing the harmful impact of criminalization on survivors of human trafficking. Although many laws currently limit relief to survivors of trafficking into prostitution only, they demonstrate the beginning of a paradigm shift that will hopefully continue to evolve to encompass relief for survivors of all forms of trafficking and to more fully prevent their criminalization in the first place.

This guide serves as a roadmap for practitioners, such as public defenders, legal services lawyers and pro bono attorneys, and other stakeholders who will be representing trafficking survivors in vacatur proceedings. This non-state-specific manual provides general information for lawyers who are new to post-conviction relief practices and/or working with trafficking survivors. In this guide you will find an introduction to post-conviction practice for survivors of human trafficking, basic definitions of important concepts and elements contained in typical vacatur laws, important filing considerations for motion practice, and best practices for

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<sup>1</sup> US DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 2016 26 (June 2016), <http://www.state.gov/documents/organization/258876.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> See N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2016).

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employing a trauma-informed and survivor-centered approach to client interviewing and representation, along with other best practices for advocates.

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## A Note About Language and Word Choice

- **Vacatur.** Recognizing tremendous nuance in state criminal law and practice, this guide attempts to familiarize attorneys with general concepts and best approaches. In an effort to keep language consistent throughout, we will use “vacatur” to refer to post-conviction efforts to clear, vacate, expunge, or seal criminal records pertaining to arrests caused as a result of being trafficked. See chart in Section II for additional information.
- **Victim/Survivor/Client.** These terms also reflect significant nuance. For ease of reference, this guide will use all three to refer to individuals who were trafficked. In accordance with the approach of the Federal Strategic Action Plan on Services for Victims of Human Trafficking, “victim” has legal implications within the criminal legal process and generally means an individual who has suffered harm because of criminal conduct. “Victims” also have specific rights within the criminal process.<sup>4</sup> Law enforcement agencies often use the term “victim” as part of their official duties. “Survivor” is a term used by many in the services field to recognize the strength it takes to continue on a journey toward healing in the aftermath of a traumatic experience.<sup>5</sup> Client is used when describing the scope of representation and the attorney-client relationship. All of these terms “are intended to honor those who have suffered, or are suffering, the effects of being trafficked.”<sup>6</sup>
- **Pronouns.** This guide utilizes gender-neutral pronouns “they/them” wherever possible. It is worth noting that human trafficking does not only impact one gender alone. Furthermore, best practice dictates avoiding assumptions about your client’s gender identity and preferred names/pronouns, and instead ascertaining this information from clients directly at the outset of representation. For example, clients may be transgender, in the process of transitioning genders, or have fluid gender identities.

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<sup>4</sup> See, e.g., Crime Victims’ Rights Act, 18 U.S.C. § 3771(a); Victims’ Rights and Restitution Act, 42 U.S.C. § 10607 (e)(2)(A); Trafficking Victims Protection Act, 22 U.S.C. § 7102(14) & (15).

<sup>5</sup> Federal Strategic Action Plan on Services for Victims of Human Trafficking in the United States 2013-2017, at 8, available at <http://www.ovc.gov/pubs/FederalHumanTraffickingStrategicPlan.pdf>.

<sup>6</sup> *Id.*

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- **Minors.** The legal definition of a “minor” varies by state and context. This guide uses “minor” to refer to persons under the age of 18. However, it is imperative that practitioners identify the applicable state law definition of minors in their jurisdiction and utilize accordingly. Furthermore, some states offer specific relief to minor victims. This is an area that varies greatly across jurisdictions, and also depends on the intersection of juvenile justice, criminal and family law, which is highly state-specific.
  - **Labor/Sex Trafficking.** Wherever possible, this guide differentiates between labor and sex trafficking. Overwhelmingly, as states have passed vacatur laws, they have done so with the primary goal of addressing convictions stemming from trafficking into commercial sex and prostitution. Therefore, these laws may not apply to convictions relating to trafficking into other forms of labor. This guide attempts to highlight this throughout, but, where unspecified, consider the primacy of sex trafficking in state vacatur laws.

### Location of Appendices

The appendices to this guide are available online to reduce bulk and ensure they are kept as current as possible. Please visit [www.ambar.org/srp](http://www.ambar.org/srp) to access the most recent version.



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# I. Introduction to Trafficking and Post-Conviction Practice

## A. What Is Human Trafficking?

Human trafficking occurs when power, violence or coercion is used to control victims for the purpose of commercial sex acts or other labor or services.<sup>7</sup> Human trafficking is a crime under international law, federal law, and in almost every state, although there are slight variations in each law's definition. Federal trafficking law recognizes two types of severe forms of human trafficking, commonly known as sex trafficking and labor trafficking.

**Common misconception: Trafficking is a crime of movement.** In fact, the law does not require any movement or crossing of jurisdictional boundaries for trafficking to occur. The "harm" that results from human trafficking is exploitation of another. "Human trafficking occurs when an individual's freedom is curtailed and labor or other services are extracted by another individual, often, but not always, for financial or material gain."<sup>8</sup> It is important for advocates and stakeholders to remember that clients who have not been transported across international, state, or county borders may still be trafficking victims.<sup>9</sup>

### 1. Federal Law: The Trafficking Victims Protection Act (TVPA)

Many, if not most, state vacatur laws allow relief for victims of trafficking who meet the definition in the TVPA.

**Sex Trafficking.** The recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purposes of a commercial sex act in which the commercial sex act is induced by **force, fraud, or coercion**, or in which the person induced to perform such an act has not attained 18 years of age.<sup>10</sup>

**Labor Trafficking.** "The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of **force, fraud or coercion** for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery."<sup>11</sup>

- **Defining force, fraud or coercion:**\* All labor trafficking and sex trafficking of adults requires force, fraud, or coercion.<sup>12</sup>
  - ◆ **Force** refers to physical assaults, sexual assaults, beatings, and isolation and/or confinement;
  - ◆ **Fraud** refers to false or deceptive offers of employment, education, romance, marriage or a better life, and/or debt bondage;

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<sup>7</sup> JEAN BRUGGEMAN & ELIZABETH KEYES, AMERICAN BAR ASSOCIATION, MEETING THE LEGAL NEEDS OF HUMAN TRAFFICKING VICTIMS: AN INTRODUCTION FOR DOMESTIC VIOLENCE ATTORNEYS & ADVOCATES, AT 9 (AMANDA KLOER ET AL. EDS., 2009).

<sup>8</sup> *Id.*, at 9.

<sup>9</sup> *Id.*

<sup>10</sup> Under federal law this definition is called a "severe form of human trafficking," for purposes of this guide we will use "sex trafficking" to refer to this definition. See 22 U.S.C § 7102 (9)(A).

<sup>11</sup> Under federal law this definition is called a "severe form of human trafficking," for purposes of this guide we will use "labor trafficking" to refer to this definition. See 22 U.S.C § 7102 (9)(B).

<sup>12</sup> 22 U.S.C § 7102.



- ◆ **Coercion** predominantly consists of threat of serious harm to the victim, the victim’s family or other loved ones, psychological abuse/manipulation designed to create dependency (otherwise known as “trauma bonding”), use, or exploitation of dependency on, controlled substances,<sup>13</sup> and/or threatened abuse of legal or immigration systems.

\*These lists are not exhaustive.

**Note:** the definition of “serious harm” is broad, it means: “any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services [or commercial sexual activity] in order to avoid incurring that harm.”<sup>14</sup>

## Case Profiles

The notion of what constitutes force, fraud or coercion extends beyond physical violence, assault and/or unlawful imprisonment. In addition, victims may be vulnerable for a whole host of reasons, including manipulation of addiction to controlled substances and the belief in seemingly irrational threats.

For example in **United States v. Fields**, a Florida case, a trafficker was convicted after testimony showed that he recruited and enticed women to engage in prostitution by (1) proposing to advertise their prostitution services online, (2) driving them to their prostitution locations, and (3) offering them drugs, money, and a place to live if they prostituted for him.

After he recruited victims, the trafficker manipulated their drug addictions to prescription pills in order to deepen his control and increase his profit. He would withhold pills to make victims engage in prostitution, relying on the threat of withdrawal sickness if they did not comply. Many victims explained that the withdrawal sickness was so severe that it caused the victims to want to die. As part of his exploitation, the trafficker isolated victims “to preclude them from obtaining drugs elsewhere and to render them dependent on him and subservient to his demands.” Notably, the trafficker seized on the victims’ specific vulnerability. In upholding his conviction and sentence, the 11th Circuit noted that “[t]he victims’ drug addictions rendered them particularly susceptible to Field’s selling and dispensing of controlled substances.” *United States v. Fields*, 625 F. App’x 949, 953 (11th Cir. 2015).

Traffickers may use threats that seem irrational to others but are coercive to the victim. For example in **United States v. Alzanki**, the victim was compelled to engage in domestic work up to fifteen hours a day. The victim, who was from Sri Lanka, was forbidden to leave the house, go out on the porch or even look out of the window. The trafficker threatened her by telling her that police in the United States would shoot her on sight if she left the house. The trafficker, who was ultimately convicted of holding the victim in involuntary servitude, also threatened the victim, on almost a daily basis, with deportation, death or serious harm should she disobey him. *United States v. Alzanki* 54 F.3d 994 (1st Cir. 1995).

<sup>13</sup> See, e.g., *United States v. Fields*, 625 F. App’x 949 (11th Cir. 2015).

<sup>14</sup> 18 U.S.C. §§ 1589 & 1591.

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## B. Who Are the Victims of Human Trafficking?

There is no single profile for trafficking victims. Trafficking impacts people of all genders, sexes, ages, abilities, socioeconomic backgrounds, and immigration statuses.<sup>15</sup> However, traffickers frequently target marginalized populations as well as individuals with particular vulnerabilities. For example, women with histories of abuse and economic deprivation have a higher susceptibility to victimization, as do LGBT individuals or people with disabilities who face exclusion and discrimination.<sup>16</sup>

Human trafficking is caused and exacerbated by structures of socioeconomic disparity, limited employment opportunities, lack of a living wage, education inequality, and discrimination based on gender, sexuality, class, and race.<sup>17</sup> Victims may be trafficked for a few days or weeks, or may remain in a trafficking situation for years.<sup>18</sup> Either way, victims of trafficking face long-lasting consequences from their exploitation.

**Common misconception: Victims of human trafficking will immediately ask for help or assistance and will self-identify as a victim of a crime.** In reality, victims of human trafficking often do not immediately seek help or self-identify as victims of a crime. In fact a client may never self-identify as a victim, however self-identification is not required to obtain relief. There are a variety of reasons for this, including a lack of trust, self-blame, or specific restrictions imposed by traffickers regarding how to behave when talking to law enforcement or social service providers. Even when telling their stories in interviews, for example, victims might defend their actions as their own choice or autonomy. It is important to avoid making a snap judgment about who is or is not a trafficking victim based on a first encounter. No one can consent to being trafficked, a person can consent to a situation but not to having their rights violated. As described below, continued trust building and patient, trauma-informed interviewing practices are necessary to learn a person's full experience and ascertain what a victim has gone through.<sup>19</sup>

### 1. Where Does Human Trafficking Occur?

Human trafficking is a pervasive phenomenon that cuts across various industries throughout the United States and around the world. Unfortunately, there exists a dearth of accurate data measuring prevalence or other patterns of human trafficking. Often, purported statistics conflate various legal terms, and can simply reflect where law enforcement resources are deployed as opposed to the wide spectrum of labor sectors and geographic areas where trafficking occurs. Notwithstanding, human trafficking victims have been identified in cities, suburbs, and rural areas in all 50 states and Washington, D.C. and reports of specific incidents of trafficking span jurisdictions and settings.<sup>20</sup>

- **Sex trafficking** occurs in a wide variety of venues within the broader commercial sex trade, including (but not limited to) *brothels, escort agencies, massage businesses, strip clubs, and street prostitution*, as well as in *tourism and hospitality industries*. Sex trafficking can be facilitated through *internet* sites that feature online ads for erotic and escort services.
- **Labor trafficking** occurs in diverse settings as well, including (but not limited to) *human smuggling, drug smuggling, sales industry, peddling and begging, domestic work, hospitality services, agricultural work, garment and textile industries, and industries dependent on manual labor*.

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<sup>15</sup> *The Victims*, NAT'L HUMAN TRAFFICKING RES. CTR., <https://traffickingresourcecenter.org/what-human-trafficking/human-trafficking/victims> (last visited July 28, 2016).

<sup>16</sup> THE HUM. TRAFFICKING PRO BONO LEGAL CTR., TRAFFICKING OF PERSONS WITH DISABILITIES IN THE U.S. (April 2016), <http://www.htprobono.org/wp-content/uploads/2016/04/Trafficking-of-Persons-With-Disabilities-in-the-United-States-04.12.2016.pdf>.

<sup>17</sup> *Id.*

<sup>18</sup> *Sex Trafficking*, POLARIS PROJECT, <https://polarisproject.org/sex-trafficking> (last visited July 28, 2016).

<sup>19</sup> *Myths & Misconceptions*, NAT'L TRAFFICKING RES. CTR., <https://traffickingresourcecenter.org/what-human-trafficking/myths-misconceptions> (last accessed July 28, 2016).

<sup>20</sup> *Id.*

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## 2. Who Are the Traffickers, and How Do They Operate?

Traffickers range from sole operators, to loose-knit networks, to highly sophisticated criminal organizations that operate internationally.<sup>21</sup> Traffickers can initiate romantic relationships with their victims before forcing or manipulating them into prostitution or work. Traffickers can lure victims with false promises of a job or a pathway to citizenship. Parents or other family members can also be traffickers who facilitate the victim's entry into commercial sex or other types of labor. A common trafficking tactic is to socially isolate victims and trap them into cycles of dependency.

### Case Example: *Labor Trafficking*

In July 2015 the large marine service corporation Signal International was found, in a civil lawsuit, to have engaged in labor trafficking.<sup>22</sup> Part of Signal's business was building large offshore drilling rigs, many of which were damaged during Hurricane Katrina. To repair these structures *Signal hired skilled laborers from India under the H-2b guest worker visa program with the false promise of a well-paying job and pathway to citizenship.* Beyond compensating these workers well *below the minimum wage*, Signal also housed them in *unconscionable conditions.* "The workers were forced to live in double-wide trailers with up to 24 other men. The trailers were guarded at all times and the workers were subject to inspection upon entry and exit."<sup>23</sup> Signal is now bankrupt after paying over \$30 million in restitution fees to these trafficking survivors following a class action lawsuit.

### Case Example: *Sex Trafficking*

Human trafficking can also occur on a smaller (though no less nefarious) scale. For example, many victims of sex trafficking are exploited by their intimate partners through abusive patterns of power and control. "The modus operandi of intimate-partner traffickers is usually a mixture of rewards and punishments—gifts and protestations of love followed by verbal slurs and beatings."<sup>24</sup> In a 2011 New York vacatur case demonstrating *intimate partner trafficking*, a domestic violence victim's husband lured her from the Dominican Republic to the U.S. by falsely promising that the abuse would cease and that he would help her obtain immigration status. Feeling that immigrating to the United States would improve the lives of her children she agreed. When she arrived in the U.S., however, he physically abused her, raped her, imprisoned her against her will, and ultimately exerted control over her entire life. The victim's husband forced her to engage in illegal activities, including prostitution, and took all of her income to support his drug addiction.<sup>25</sup> The court found that the victim's experience qualified her for vacatur relief and vacated the criminal convictions on her record.<sup>26</sup> Traffickers instill fear and exploit vulnerability in their victims while convincing them that they are lawbreakers and thus, unable to go to the authorities for help or protection.

## C. Why is Post-Conviction Relief for Survivors of Human Trafficking Necessary?

### 1. Arrests of Trafficking Victims

Different policing strategies, for example those that prioritize a high volume of arrests for low-level offenses, increase the likelihood that victims of trafficking will come into contact with the police by virtue of their own arrest. For sex trafficking victims these crimes are frequently prostitution charges, but may also include other charges such as weapons, drugs, financial crimes, and identity theft. Labor traffickers, like sex traffickers, can

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<sup>21</sup> *Who Are Human Traffickers?* HUMAN RIGHTS FIRST (June 10, 2014), <http://www.humanrightsfirst.org/resource/who-are-human-traffickers>.

<sup>22</sup> See *David v. Signal Int'l LLC*, No. 08-CV-1220-SM-DEK (E.D. La. 2015).

<sup>23</sup> Radha Desai, *Landmark Human Trafficking Case Ends Bankruptcy for Signal International, Inc.*, HUMAN RIGHTS FIRST (July 24, 2015), <http://www.humanrightsfirst.org/blog/landmark-human-trafficking-case-ends-bankruptcy-signal-international-inc>.

<sup>24</sup> Dorchen A. Leidholdt, *Human Trafficking and Domestic Violence: A Primer for Judges*, 52 JUDGES' JOURNAL 16 (2013), [http://www.americanbar.org/publications/judges\\_journal/2013/winter/human\\_trafficking\\_and\\_domestic\\_violence\\_a\\_primer\\_for\\_judges.html](http://www.americanbar.org/publications/judges_journal/2013/winter/human_trafficking_and_domestic_violence_a_primer_for_judges.html).

<sup>25</sup> See *People v. G.M.*, 922 N.Y.S.2d 761 (N.Y.C. Crim. Ct. 2011).

<sup>26</sup> *Id.* at 766.

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also benefit from forcing a victim to commit illegal acts such as selling or cultivating drugs or, commonly at the U.S. border, forcing individuals to be drug mules or bring people into the country illegally. Additionally, other common offenses for labor trafficking can include possession of false identification documents, financial crimes, or other minor offenses such as trespassing. Minors who are trafficked are often charged with status offense such as truancy and running away.

## **2. The Criminal Legal System Does Not Identify Victims at Time of Arrest and Prosecution**

Trafficking victims are routinely arrested, detained, prosecuted, convicted, and, in some cases, incarcerated or deported, without ever being identified as victims.

### **a. The Systems Are Overwhelmed, Overburdened, and Fail to Consider Individual Circumstances**

Law enforcement, prosecutors, judges, and defense attorneys often lack sufficient knowledge about the dynamics of human trafficking. In addition, the criminal legal system itself is ill-equipped to identify victims or offer them resources or assistance if so identified. There is a premium placed on resolving cases quickly, usually by way of plea bargaining, in an attempt to address the constant stream of cases entering the criminal legal system. Foreign national victims face an additional risk since immigration status is severely impacted by criminal legal involvement.

### **b. Victims Often Do Not Disclose During the Arrest Process**

Even where screening systems have been implemented, “a variety of factors—including trauma, language barriers, fear of authorities or fear of retribution—can impede victim identification upon arrest.”<sup>27</sup> Many victims harbor significant distrust of law enforcement, don’t view the police as being on their side or able to help, or believe that nothing will come out of reporting their situation. Victims, both foreign national and U.S. citizen, may also have had previous negative experiences with law enforcement and the criminal legal system.

### **c. Conflict Between Trafficking and Existing Criminal Laws**

As states have passed human trafficking laws, conflicts arise with preexisting criminal laws. In sex trafficking cases the conflict usually involves laws criminalizing prostitution. States rarely address this by integrating the legal frameworks. As a result, victims of sex trafficking can be simultaneously considered criminals under the prostitution law and victims under the trafficking law. When confronted with this tension, law enforcement officials may be more likely to label victims as criminals, largely due to the longstanding history of criminalizing prostitution, as well as the newness of and unfamiliarity with human trafficking laws. This approach may also occur in situations where law enforcement identifies a victim, but believes that the use of the criminal legal system is the only way to provide victims access to services. In some instances, law enforcement utilizes the criminal system as a way to detain victims to keep them away from traffickers and/or ensure they remain accessible in an ongoing investigation.

A similar conflict occurs in labor trafficking cases where victims are compelled to commit crimes such as drug smuggling or human smuggling. States may have laws classifying these individuals as victims but they enter the criminal legal system as criminals.

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<sup>27</sup> Suzannah Phillips et al., *Clearing the Slate: Seeking Effective Remedies for Criminalized Trafficking Victims*, CITY UNIV. N.Y. SCH. L. 3 (Fed. 24, 2014), <http://www.law.cuny.edu/academics/clinics/iwhr/publications/Clearing-the-Slate.pdf>.

### 3. The Weight of Criminal Charges

Survivors of human trafficking deal with the dual issues of criminalization and stigma long after they escape exploitation.<sup>28</sup> Many survivors have lengthy records because they have been arrested and cycled through the criminal legal system multiple times for crimes that were the direct result of their traffickers' force, fraud, or coercion.<sup>29</sup>

Criminal charges create high barriers to employment, safe housing, education, financial assistance, and other key components of stability and independence. In 2016, the National Survivor Network published a survey of their members that showed that 90% of respondents had criminal convictions on their record and that, as a result, 80% had faced barriers with employment and 50% with housing.<sup>30</sup> Criminal records can even be used by the trafficker against the survivor; for example, in instances where they have children in common, traffickers have pointed to the survivor's record as evidence of unfit parenting in custody disputes.<sup>31</sup>

Prostitution-related convictions, drug offenses and crimes that meet the definition of a "crime of moral turpitude"<sup>32</sup> also present specific dangers to foreign-born survivors who have previously adjusted or attempt to adjust their citizenship status. Non-citizens may be denied initial or return entry to the U.S. if immigration officials have reason to suspect they are entering for the purposes of prostitution, which can be based on arrest or conviction records. Convictions may also bar foreign national victims from a variety of forms of immigration relief.

Equally important, a criminal record serves as a constant reminder of past abuse and a source of tremendous shame. Survivors often face the tragic dilemma of explaining to a potential employer or housing manager the source of their arrest or conviction and therefore must choose between sharing their trafficking experience or simply walking away from an opportunity. Many survivors choose not to have to relive this experience. There is an urgent need for reliable post-conviction relief across the nation to alleviate the impact of the collateral consequences of criminal records for survivors of human trafficking.<sup>33</sup>

**"It's almost like walking on eggshells. I have aspirations. I'm looking to get an advanced degree...I want to go as far as I can go. And it's almost scary, because I'm thinking I'm going to hit [the convictions] and it's going to just knock me back down...I really just want to put it behind me. People in my life today have no idea of where I've been. And I'd like to keep it that way. It's none of their business."**

*– A survivor speaking about her convictions*

<sup>28</sup> See Melissa Broudo & Sienna Baskin, *Vacating Criminal Convictions for Trafficked Persons*, SEX WORKERS PROJECT (Urban Justice Center, New York, N.Y.), Aug. 2012, <http://sexworkersproject.org/downloads/2012/20120422-memo-vacating-convictions.pdf>.

<sup>29</sup> See, e.g., *People v. Gonzalez*, 927 N.Y.S.2d 567 (N.Y. Crim. Ct. 2011).

<sup>30</sup> See National Survivors Network Member Survey On the Impact of Criminal Arrest and Detention on Survivors of Human Trafficking (January 2016), available at: <http://nationalsurvivornetwork.org>.

<sup>31</sup> Kate Mogulescu & Katherine Mullen, Testimony before the City of New York Comm. on Women's Issues and the Comm. on Public Safety 8: *Over-sight: Combatting Sex Trafficking in NYC: Examining Law Enforcement Efforts—Prevention and Prosecution* (October 19, 2011); see also Kate Mogulescu, *The Public Defender as Anti-Trafficking Advocate, An Unlikely Role: How Current New York City Arrest and Prosecution Policies Systematically Criminalize Victims of Sex Trafficking*, 15 CUNY L. REV. 471, 474 (2012).

<sup>32</sup> Many offenses are deemed a crime of moral turpitude (CMT) for immigration law purposes. Such crimes may impact a victim's eligibility for immigration relief. Figuring out whether a crime is a CMT may require in-depth analysis. Such crimes generally require intent to cause great bodily harm, defraud, or permanently deprive an owner of property, or in some cases to act with lewd intent or recklessness.

<sup>33</sup> Broudo & Baskin, *supra* note 28, at 1.

## D. Vacatur Statutes: A National View

In 2010, New York became the first state to pass a law specifically allowing survivors of sex trafficking to vacate prostitution convictions that were a direct result of being trafficked.<sup>34</sup> This groundbreaking legislation granted many sex trafficking victims an opportunity to rebuild their lives and move beyond their trafficking experience.<sup>35</sup> While advocates in New York still face hurdles in the implementation and expansion of the law, the vacatur remedy has proven “instrumental in empowering [sex] trafficking survivors to have greater autonomy over their lives and to successfully reintegrate into society, free from the stigma of a criminal record.”<sup>36</sup> This law became a model for legislation in other states including Connecticut, Florida, Hawaii, Illinois, Maryland, Mississippi, Montana, Nevada, New Jersey, North Carolina, Ohio, Oklahoma, Vermont, Washington, and Wyoming.<sup>37</sup>

Notably, as vacatur laws have begun to proliferate, several states have taken a far more comprehensive approach and moved away from the narrow approach of New York’s law in restricting vacatur to prostitution offenses. States passing vacatur laws more recently have broadened the reach to include offenses other than prostitution.<sup>38</sup> This trend reflects the growing understanding of the ways in which victims of trafficking face arrest, and the need for more complete and robust post-conviction relief.

### Why Is Vacatur Important? Stakeholder Perspectives

- ◆ “[Vacatur] is designed as a form of relief for an acknowledged group of victimized individuals”
  - Judge
- ◆ “You are basically trying to right a historical wrong. The criminal justice system has identified these people as criminals when they should have been looking at them as victims. Your job as a prosecutor is to do justice and to correct the historical wrongs that were not as well understood as they are today.”
  - Prosecutor
- ◆ “I had not considered the emotional impact of the client reading words of validation and justice. It was honestly more important to the client to know she had been recognized and her story believed by the court. As a lawyer for 18 years or so, this is absolutely the best thing I have ever done.”
  - Post-conviction attorney

<sup>34</sup> See N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2016).

<sup>35</sup> *Id.* at 10.

<sup>36</sup> Suzannah Phillips et al., *Clearing the Slate: Seeking Effective Remedies for Criminalized Trafficking Victims*, CITY UNIV. N.Y. SCH. L. 3 (Fed. 24, 2014), <http://www.law.cuny.edu/academics/clinics/iwhr/publications/Clearing-the-Slate.pdf>.

<sup>37</sup> See CONN. GEN. STAT. ANN. § 54-95c (2013); FLA. STAT. ANN. § 943.0583 (2015); HAW. REV. STAT. ANN. § 712-1209.6 (2012); 725 ILL. COMP. STAT. ANN. 5/116-2.1 (2013); MD. CODE ANN., CRIM. PROC. § 8-302; MISS. CODE ANN. § 97-3-54.6 (2013); MONT. CODE ANN. § 46-18-608 (2015); NEV. REV. STAT. ANN. § 176.515 (2015); N.J. STAT. ANN. § 2C:44-1.1 (2013); N.C. GEN. STAT. ANN. § 15A-1416.1 (2013); OHIO REV. CODE ANN. § 2953.38 (2012); OKLA. STAT. ANN. tit. 22, § 19c (2013); VT. STAT. ANN. tit. 13, § 2658 (2012); WASH. REV. CODE ANN. § 9.96.070 (2014); WYO. STAT. ANN. § 6-2-708 (2013).

<sup>38</sup> See, e.g., N.D. CENT. CODE § 12.1-41-14 (2015).

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## E. Examples of Successful Advocacy

Since 2010 the New York law has helped numerous survivors, both foreign nationals and U.S. citizens, vacate their convictions. These vacated convictions have spanned from prostitution and drug charges, to weapons possession, to disorderly conduct and even convictions that the survivor incurred after escaping their trafficker.<sup>39</sup>

Across the country, the practice is starting to take shape. Cases have brought documented success, and relief, to sex trafficking survivors in Maryland,<sup>40</sup> Illinois,<sup>41</sup> New Jersey<sup>42</sup> and Ohio.<sup>43</sup> In certain parts of Florida and Pennsylvania, advocates have also fought for and won post-conviction relief. The Survivor Reentry Project is committed to the growth of this area of advocacy and survivor empowerment.

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**“There really is hope. There’s people that care for you. You don’t have to live in that shame or guilt anymore.”<sup>44</sup>**

*– A survivor in Ohio reflecting when leaving court after obtaining vacatur*

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<sup>39</sup> See, e.g., *People v. L.G.*, 972 N.Y.S.2d 418 (N.Y.C. Crim. Ct. 2013) (vacating convictions for disorderly conduct and criminal possession of a weapon in the fourth degree, along with prostitution charges).

<sup>40</sup> See Carrie Johnson and Evie Stone, *Little-Known Laws Help Sex Trafficking Victims Clear Criminal Records*, NAT’L PUB. RADIO (Feb. 24, 2015), <http://www.npr.org/2015/02/24/388716830/little-known-law-helps-sex-trafficking-victims-clear-criminal-records>.

<sup>41</sup> Annie Sweeney, *Cook County court clears sex trafficking victim of prostitution record*, CHICAGO TRIBUNE (Aug. 23, 2013), [http://articles.chicagotribune.com/2013-08-23/news/ct-met-prostitution-trafficking-adoption-20130823\\_1\\_dreamcatcher-foundation-brenda-myers-powell-abusive-pimps](http://articles.chicagotribune.com/2013-08-23/news/ct-met-prostitution-trafficking-adoption-20130823_1_dreamcatcher-foundation-brenda-myers-powell-abusive-pimps).

<sup>42</sup> Tim Darragh, *New York woman first to clear her criminal past using N.J. trafficking law*, NJ.COM (Jun. 24, 2015), [http://www.nj.com/news/index.ssf/2015/06/new\\_york\\_woman\\_first\\_to\\_clean\\_her\\_criminal\\_past\\_us.html](http://www.nj.com/news/index.ssf/2015/06/new_york_woman_first_to_clean_her_criminal_past_us.html).

<sup>43</sup> *Human Trafficking Victim Becomes First To Have Record Erased*, 10TV.com (Aug. 10, 2013), <http://www.10tv.com/content/stories/2013/08/09/columbus-human-trafficking-victim-record-erased.html>.

<sup>44</sup> *Id.*

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## II. Trafficking Vacatur Laws: Legal Elements and Burdens of Proof

More than half the states in the U.S. have enacted laws that allow victims to vacate, expunge, or seal prior convictions for prostitution-related offenses. Because these statutes differ in important ways, it is crucial that practitioners become familiar with the specific statutory requirements of their jurisdiction. In addition, practitioners must recognize cases in which clients have convictions in multiple jurisdictions and confer with local experts in the other jurisdictions when mapping out vacatur strategy. This section provides a general overview.

The majority of trafficking vacatur statutes address sex trafficking and share certain basic similarities. Each state imposes specific requirements that a trafficking survivor must meet in order to be eligible for vacatur, expunction, or sealing. This section introduces those elements and the applicable burdens of proof most commonly encountered in laws providing post-conviction relief for trafficking victims.

### Vacatur, Expungement, and Sealing Defined

**Vacatur** is a form of relief that, in theory, effectively *undoes a conviction*: in most instances, it returns the movant to the position they were in when originally facing prosecution. Some states mandate dismissal of the accusatory instrument upon vacatur, and others require a separate proceeding to accomplish that final step. Once vacated and dismissed, all records of the conviction are deleted, because the conviction itself no longer exists as a matter of law. Arrest records may remain, and may need to be expunged or sealed separately.

An **expunged conviction** is removed from the movant's criminal record. However, the conviction itself is not undone, and the finding of guilt is not voided. Practically, expungement (or, in many jurisdictions, "expunction") relieves clients of many collateral consequences of the conviction—for example, an expunged conviction does not appear in a background check.

Although a **sealed conviction** remains on the movant's record, the conviction *cannot be seen or accessed without an order from the court*. Also called nondisclosure, the sealed conviction may be accessible to law enforcement or government agencies, but it does not appear in standard background checks or to members of the public.

*For the sake of brevity, this guide uses the term "vacatur" to refer to all three of these forms of relief.* However, since there is significant variance from state to state, please note that these general definitions are illustrative only. Additionally, many clients and other stakeholders use the terms interchangeably. Practitioners must ascertain the terminology and specific legal parameters of the relief available in their jurisdiction.

In most states, people convicted of offenses can also seek a pardon, which in limited instances is granted by the Executive Branch of government and can restore many of the rights impacted by the conviction. This is a separate executive and/or administrative proceeding that does not involve the court system.



## A. Legal Elements

The statutes under which a trafficking victim may seek post-conviction relief tend to impose four main requirements.

1. **Eligible Offenses:** Are your client's convictions for arrests or offense charges covered by the statute?
2. **Status as a Trafficking Victim:** Does your client meet the statutory definition of a trafficking victim?
3. **Nexus to Trafficking:** Can you show a nexus between the trafficking and the convictions imposed?
4. **Timeliness:** Will you file the motion in the time the statute allows?

### 1. Convictions eligible for relief

First, most vacatur statutes enacted specifically for trafficking victims only allow for relief for certain convictions. Each state differs in the specific convictions to which its trafficking vacatur statute applies. However, these statutes tend to define eligible convictions in *one or more* of the following three ways.

#### a. All Offenses

A small number of states make relief available for any conviction, for any offense, that meets the other statutory requirements. In Wyoming, for example, vacatur may be granted for any conviction, so long as "the defendant's participation in the offense is found to have been the result of having been a victim."<sup>45</sup> Idaho also has adopted this approach, as its statute applies to convictions for prostitution and "any other offense determined by the court to be appropriate," so long as a coercion defense is available to the charge.<sup>46</sup>

#### b. Specific Category of Offenses

Many trafficking vacatur statutes apply only to convictions within certain categories of offenses. These categories typically take one of several forms:

- **Prostitution-related offenses.** In addition to convictions for prostitution itself, many statutes also allow vacatur of prostitution-related offenses.<sup>47</sup> In some states, this phrase has a specific definition assigned either in the vacatur statute itself<sup>48</sup> or elsewhere in the criminal code.<sup>49</sup> But a state also might use such a phrase without a more specific definition. For example, New Jersey's statute applies to "related offenses" or convictions stemming from "similar local ordinance(s) in addition to the traditional prostitution and loitering charges."<sup>50</sup> This allows attorneys to more broadly argue that their client's convictions qualify as prostitution-related, and thus are eligible to be vacated.<sup>51</sup>

<sup>45</sup> WYO. STAT. ANN. § 6-2-708(c) (2013).

<sup>46</sup> IDAHO CODE ANN. § 67-3014(2) (2015).

<sup>47</sup> See, e.g., OKLA. STAT. ANN. tit. 22, § 19c (2013) (allowing expungement of convictions for any "prostitution-related offense").

<sup>48</sup> See, e.g., N.M. STAT. ANN. § 30-52-1.2(A) (2013) (allowing for sealing of convictions for "crimes arising out of the actions of someone charged with human trafficking").

<sup>49</sup> See, e.g., N.H. REV. STAT. ANN. § 645:2 (2014) (defining certain specific crimes under the heading, "Prostitution and Related Offenses").

<sup>50</sup> N.J. STAT. ANN. § 2C:44-1.1(a)(1) (2013).

<sup>51</sup> For example, Oklahoma's statute offers relief for convictions of "prostitution-related" offenses but does not actually define this term. See OKLA. STAT. ANN. tit. 22, § 19c (2013).

- **Non-violent offenses.** Some states restrict relief to non-violent offenses only. Montana,<sup>52</sup> Kentucky,<sup>53</sup> and most recently California,<sup>54</sup> are such states. In general, this still allows vacatur to be applied very broadly as, for example, in Kentucky, the only offenses ineligible for relief are capital offenses, felonies involving the death of the victim, and certain rape and sodomy charges.<sup>55</sup>
- **All offenses except.** Some states offer relief for convictions of all crimes, with certain specific exceptions. For instance, Florida does not allow for vacatur of a conviction that would render the defendant a “[h]abitual violent felony offender.”<sup>56</sup> More simply, New Mexico allows vacatur of any conviction except homicide.<sup>57</sup>

### c. Specific Offenses

Many trafficking vacatur statutes are even more specific and expressly delineate the specific conviction charges to which they apply, and many apply only to prostitution. For example, Delaware’s statute explicitly applies to “a person convicted of prostitution, loitering or obscenity,”<sup>58</sup> and in Michigan, relief is available for convictions for soliciting to commit prostitution, or admitting to a place for purpose of prostitution.<sup>59</sup>

### d. Other Appropriate Action

Finally, it is extremely important to note that some post-conviction laws for trafficking survivors also allow the court to take additional action beyond what the statute specifically describes. Under this approach, laws authorize additional action if the court deems it appropriate. Currently, a handful of states allow for this approach. As of 2016, these states include California, Delaware, Illinois, Nevada, New York, and North Carolina.<sup>60</sup>

These broad catchall provisions can, in certain instances, expand the scope of relief available to survivors of trafficking victims. For example, in some instances, convictions for *other* crimes committed as a result of being trafficked may be eligible for vacatur, even if the crime is not expressly listed in the statute.<sup>61</sup>

## 2. Status as a Trafficking Victim

*Second*, trafficking-specific post-conviction relief only applies to victims of human trafficking. This means an attorney has to show that their client meets the statutory definition of a trafficking victim in order for the client to merit post-conviction relief.

States tend to define victims of human trafficking using one, or a combination, of the following methods.

- **Victims of state trafficking crimes.** First, many states include within their definitions of human trafficking victims anyone who has been a victim of certain state human trafficking crimes, such

<sup>52</sup> See MONT. CODE ANN. § 46-18-608 (1) (2014).

<sup>53</sup> See KY. REV. STAT. ANN. § 529.160(1) (West 2014) (citing KY. REV. STAT. ANN. § 17.165 (West 2007) (defining “violent crime”).

<sup>54</sup> See CA. PENAL CODE § 236.14 (enacted September 26, 2016).

<sup>55</sup> See KY. REV. STAT. ANN. § 529.160(1) (West 2014) (citing KY. REV. STAT. ANN. § 17.165 (West 2007) (defining “violent crime”).

<sup>56</sup> See FLA. STAT. § 943.0583 (c)(3) (2013) (citing FLA. STAT. § 775.084(1)(b) (2012) (defining “[h]abitual violent felony offender”).

<sup>57</sup> N.M. STAT. ANN. § 30-52-1.2(A)(2) (2013) (restricting relief to convictions “for a non-homicide crime”).

<sup>58</sup> DEL. CODE ANN. tit. 11, § 787(j)(1) (2015).

<sup>59</sup> MICH. COMP. LAWS ANN. § 780.621 (2015).

<sup>60</sup> See, e.g., CAL. PENAL CODE § 236.14; DEL. CODE ANN. tit. 11, § 787(j)(1) (2015); 725 ILL. COMP. STAT. ANN. 5/116-2.1 (2013); NEV. REV. STAT. § 176.515(7)(b) (2015); N.Y. CRIM. PROC. LAW § 440.10(6); N.C. GEN. STAT. § 15A-1416.1(c) (2013).

<sup>61</sup> See, e.g., *People v. L.G.*, 972 N.Y.S.2d 418, 439–440 (N.Y. Crim. Ct. 2013) (holding that New York’s trafficking vacatur statute applies to non-prostitution offenses if the offense is the result of the defendant having been a victim of trafficking).

as crimes of “human trafficking,” “sexual servitude,” “sex trafficking,” and the like. Here, a statute may include one crime<sup>62</sup> or several.<sup>63</sup>

- **Victims as defined by the Trafficking Victims Protection Act (TVPA).** Second, the majority of state vacatur statutes also allow relief for victims of trafficking who meet the definition in the federal Trafficking Victims Protection Act (TVPA).<sup>64</sup>

## TVPA 22 U.S.C. § 7102(9)-(10)

**“[S]evere forms of trafficking in persons”** means—

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

(B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

**“[S]ex trafficking”** means the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act.

### 3. Nexus to Crimes Charged

*Third*, a trafficking victim also must show a nexus between the convictions for which they seek vacatur, and their status as a trafficking victim. Depending on the state, this requirement will most likely take one of the following forms:

- **Result of (or direct result of) human trafficking.** By far, the most common nexus requirement is showing that a client’s conviction arose as a “result of”<sup>65</sup> or “direct result of”<sup>66</sup> human trafficking. Generally, these phrases are not further defined.
- **Other nexus requirements.** A few states’ statutes use other phrases to describe their nexus requirements. In New Mexico, for example, a movant must show that their convictions “ar[ose] out of the actions of someone charged with human trafficking.”<sup>67</sup> Kansas’s statute makes relief available for offenses committed “under coercion caused by the act of another.”<sup>68</sup> Florida offers post-conviction relief for crimes “committed or reported to have been committed as a part of the human trafficking scheme of which the person was a victim or at the direction of an operator of the scheme.”<sup>69</sup>

<sup>62</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-907.01(A) (2015) (allowing vacatur only for victims of the specific crime of sex trafficking).

<sup>63</sup> See, e.g., N.C. GEN. STAT. § 15A-1416.1(b)(1) (2013) (listing having been a victim of the state-law crimes of human trafficking or sexual servitude as a permissible form of evidence showing victim status).

<sup>64</sup> See, e.g., N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2016).

<sup>65</sup> E.g., N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2016); MISS. CODE ANN. § 97-3-54.6(5) (2013); VT. STAT. ANN. tit. 13 § 2658(b) (2012).

<sup>66</sup> E.g., KY. REV. STAT. ANN. § 529.160(1) (West 2014); MICH. COMP. LAWS § 780.621(4) (2015).

<sup>67</sup> N.M. STAT. ANN. § 30-52-1.2(A) (2013).

<sup>68</sup> 2016 Kan. Sess. Laws 685.

<sup>69</sup> FLA. STAT. § 943.0583 (c)(3) (2013).

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## 4. Timeliness

Fourth, many states require a trafficking victim to file a motion for post-conviction relief within a certain period of time. These statutory requirements tend to use very similar language. The vast majority of states have adopted the language of New York’s statute, which requires vacatur motions to be filed

*with due diligence, after the defendant has ceased to be a victim . . . or has sought services for [trafficking] victims . . . , subject to reasonable concerns for the safety of the defendant, family members of the defendant, or other victims . . . that may be jeopardized by the bringing of such motion, or for other reasons consistent with the purpose of this paragraph.*<sup>70</sup>

A substantively similar alternative to the phrase “due diligence” is to require vacatur motions to be filed “within a reasonable time.”<sup>71</sup> Some other states require that victims file vacatur motions *within a specific period of time, subject to safety concerns.*<sup>72</sup> Finally, several states impose *no timing requirement at all.*<sup>73</sup>

It is important to note that in practice, judges commonly interpret these timing requirements broadly: they recognize that trafficking victims often struggle for years before they are willing and able to escape their traffickers and work with an attorney to clear their criminal records. Additionally, they may recognize a gap in time where the victim is unaware of the possibility of relief or of the availability of services. In short, timing requirements should rarely prevent an otherwise eligible client from moving for post-conviction relief.

Although case-dependent, common arguments an attorney can make around timeliness of filing include: that a survivor was not aware of the relief available to them; that the trauma the survivor experienced has caused ongoing struggles which impact their ability to disclose their history and participate in a legal proceeding, that they could not find a lawyer to represent them in the vacatur process *pro bono* and could not afford to hire an attorney.

## B. Burdens of Proof

As a general rule, in the trafficking vacatur context, the movant for post-conviction relief is assigned the burden of proof. Usually, the state rules of criminal procedure will dictate the specific burden that applies. The vast majority of states require proof by a preponderance of the evidence.<sup>74</sup> In a couple of states, proof by clear and convincing evidence is required.<sup>75</sup>

### 1. Official Documentation: Creating a Presumption

In many states, submitting particular types of documentary evidence of a survivor’s status as a trafficking victim creates an *evidentiary presumption that shifts the burden of proof to the government*. States that follow this approach most often borrow the relevant language from New York’s trafficking vacatur statute:

*[O]fficial documentation of the defendant’s status as a victim of trafficking, compelling prostitution or trafficking in persons at the time of the offense from a federal, state or local government agency shall create a presumption that the defendant’s participation in the offense*

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<sup>70</sup> N.Y. CRIM. PROC. LAW § 440.10(1)(i)(i) (McKinney 2016) (emphasis added).

<sup>71</sup> *E.g.*, IDAHO CODE ANN. § 67-3014(4) (2015).

<sup>72</sup> *See, e.g.*, HAW. REV. STAT. § 712-1209.6(2)(c) (2015) (imposing a time requirement of six years after a survivor ceases to be a victim of human trafficking, subject to reasonable safety concerns).

<sup>73</sup> *See, e.g.*, MICH. COMP. LAWS § 780.621(7) (2015) (permitting motions “at any time following the date of the conviction to be set aside”).

<sup>74</sup> *See, e.g.*, AR. CODE ANN. § 16-90-1412(C) (West 2015); ID. CODE ANN. § 67-3014(10) (West 2015); COLO. REV. STAT. § 24-72-706(c) (2014).

<sup>75</sup> *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-907.01(A) (2015); FLA. STAT. ANN. § 943.0583 (c)(5) (2013) (imposing the clear and convincing standard for cases in which the movant does not produce official documentation of his or her victim status).

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*was a result of having been a victim of sex trafficking . . . , but shall not be required for granting a motion under this paragraph.*<sup>76</sup>

This clause shifts the burden of proof and thus makes it easier for survivors who have been officially confirmed or certified as victims of trafficking by a government agency to obtain post-conviction relief. However, it is important to note that regardless of whether a state's law creates a presumption, no state's statute *requires* official documentation in order to grant relief.

For further discussion of issues and best practices relating to official documentation and other documentary evidence, see *infra* Part IV.

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<sup>76</sup> N.Y. CRIM. PROC. LAW § 440.10(1)(i)(ii) (McKinney 2016) (emphases added). *See also, e.g.*, N.D. CENT. CODE ANN. § 12.1-41-14(2) (2015) (same); 18 PA. CONS. STAT. § 3019(e) (2014) (same); VT. STAT. ANN. tit. 13 § 2658(e) (2011) (same).

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## III. Filing Considerations: When and How to File for Relief

This section explains, from an attorney's perspective, when, where, and how to move for post-conviction relief on behalf of a trafficking victim. After describing the general process by which these motions are filed, this section then introduces the components of a motion, explains the purposes and goals of each motion section, and offers practical advice about effective strategies for obtaining vacatur of a client's trafficking-related convictions.

### A. When to File for Post-Conviction Relief

#### 1. After Obtaining the Client's Full Criminal Record

Clients commonly do not remember each and every one of their prior arrests or convictions. Furthermore, they may not be clear as to the specific outcomes of the cases they do remember, as often being a defendant in a criminal proceeding is confusing, overwhelming, and quick. However, it is necessary to obtain a client's entire criminal/fingerprint record in order to accurately assess what is on their record, whether each conviction may qualify for relief under a trafficking vacatur statute, and also to anticipate and address any issues that the full criminal record may raise during the trafficking vacatur process.

For this reason, it is critical to obtain a client's *full criminal record* by means of a thorough *fingerprint check*. Avoid using a commercial background check service; they are often unreliable and furnish incomplete information. Instead, it is recommended that you submit an Identity History Summary Request to the FBI,<sup>77</sup> as well as an inquiry to the relevant state criminal legal agencies. The FBI background check is essential; a state level inquiry only may not provide you with the full picture.

It is also essential that any state-specific criminal history inquiries be based on fingerprints, not merely a name or birth date search. This is because clients may have utilized different names and/or other biographical information when arrested, either at the direction of the trafficker, or in an attempt to minimize the consequences of the arrest. Clients may not remember all of the names or other information they provided to the police upon arrest. *The safest, and most consistent, way to ascertain a complete criminal history is through a fingerprint record.*

Where a client's criminal history reveals arrests and/or convictions in more than one jurisdiction, it is best to plan the sequencing of vacatur efforts and also coordinate representation from the outset. This allows consideration of specific procedural requirements that may impact the ability to file in more than one place simultaneously, or may dictate the sequence of filing. See Multi-Jurisdictional Vacatur Practice box *infra*. Additionally, planning representation from the beginning avoids duplicating efforts and exposing clients to repetitive fact gathering that can be difficult enough one time through.

#### *Interpreting the FBI Identification Record*

Once you have obtained a complete fingerprint history, it is important to extract and organize the information contained in the results. An FBI identification record, often referred to as a "rap sheet," is a listing of certain information taken from fingerprint submissions retained by the FBI in connection with arrests and, in some instances, includes information taken from fingerprints submitted in connection with federal employment, naturalization, or military service.<sup>78</sup> Information that can be gleaned from the FBI report includes – arrest date, original arrest charge, the name of the agency or institution that submitted the fingerprints to the FBI,

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<sup>77</sup> As of July 2016, this FBI request costs \$18. For more information, search online for "FBI Identity History Summary Checks" or visit the FBI's website. *Identity History Summary Checks*, FBI, <https://www.fbi.gov/services/cjis/identity-history-summary-checks> (last visited July 29, 2016).

<sup>78</sup> C.F.R. § 16.31.

and the disposition of the arrest (if known to the FBI).<sup>79</sup> Often, specific disposition information may not be ascertained from the FBI fingerprint record and may require follow up with the jurisdiction itself.

The amount of information states report to the FBI varies. Therefore, the FBI fingerprint record is a critical first step, but may not contain all necessary information. From the report, however, you will have enough information about the arrest to contact local courts or law enforcement agencies and ascertain final disposition information – which will dictate whether it is an arrest record that needs to be sealed, or whether the arrest resulted in a conviction which needs to be vacated. Not every arrest results in a conviction (a finding of guilt). However, arrests that do not result in convictions are not automatically sealed in every state. Convictions are never automatically sealed or expunged.

All FBI criminal records follow a similar format. Each arrest is assigned a number, or a cycle. Each cycle includes the **1. arrest date**; **2. reporting agency**; and **3. arrest charge**. Where available, the cycle will also provide the disposition or outcome of the arrest, and the name used by the person arrested. This will not always be included.

USFPID09Z  
PART 2

- FBI IDENTIFICATION RECORD - FBI NO-7

1-ARRESTED OR RECEIVED 2002/11/16 SID- NY1.  
AGENCY-POLICE DEPARTMENT NEW YORK (NY0303000)  
3 NAME USED-L  
CHARGE 1-PL 240.37 03 A M 0 LOIT PROST 4099 01

COURT-NYCPD-HOUSING NEW YORK (NY03030B3)  
CHARGE-LOIT PROSTITUTION OFFENSE 2ND  
SENTENCE-  
CONVICTED UPON PLEA OF GUILTY SENT TIME SERVED

Finally, clients may have open warrants, either recent or from long ago. Clients may or may not be aware that these warrants exist and are active. If this situation arises, practitioners who do not normally practice criminal defense should consult with a local public defender or criminal attorney on best ways to handle clearing a warrant and the specific risks this might entail. There may be a way to vacate the warrant without the client having to appear. If the client has to appear, criminal defense attorneys can help plan around potential risks and local practice.

## 2. When your Client is Ready to Go Through the Process

As in most areas of the law, the more evidence an attorney can marshal in support of a post-conviction motion on behalf of a trafficking victim, the more likely that motion will succeed. In the trafficking context, this often requires attorneys to convey their clients' personal experiences as trafficking survivors—in other words, to work with their clients to present parts of their life stories to a prosecutor or judge. Like many trauma victims, survivors of trafficking commonly struggle to discuss past trauma. It is common for victims to take years or longer before they are willing, or able, to work with an attorney to seek relief from their trafficking-related convictions.

<sup>79</sup> *Id.*

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Clients have experienced victimization by traffickers who wielded power and control over them and their lives. It is critical for attorneys to let their clients decide whether and when to challenge their convictions. Otherwise, even the best-intentioned attorney may subject a client to what can amount to a trying, draining, or even re-traumatizing legal process. Many clients have experienced multiple victimizations such as child abuse, sexual abuse, dating or domestic violence, and extensive violence. For those clients, the trafficking they have experienced may not have been their worst trauma. Furthermore, clients may not prioritize post-conviction relief for a variety of reasons.

An attorney working with a trafficking survivor should explain the potential benefits, and the possible challenges, of pursuing vacatur and the specific evidence and testimony the client would have to provide. The attorney should then work with the client to decide whether they are prepared to commit to the vacatur process. The attorney and client should discuss what forms of support the client has available and consider identifying additional forms of support. See Sections V and VIII below.

Finally, attorneys should also be mindful of the timeliness requirements contained in many states' trafficking vacatur statutes. For an introduction to these requirements, see *supra* Part II.A.4.

### **3. With Prosecutorial Consent, Where Possible**

Once your client decides to proceed, the most powerful support that your motion can have is the consent of the prosecutor, or, at a minimum, the lack of strong prosecutorial objection. Judges most often will grant relief if you submit your client's motion with the prosecutor's consent. For this reason, it is important to gather as much evidence as possible before bringing a trafficking vacatur motion to the prosecutor.

Best practice involves approaching a prosecutor with a genuine interest in collaboration. Many prosecutors care deeply about victims of crime accessing justice and will be open to learning more about your client and their experience. However, most professionals, no matter what their role, become defensive if approached with blame or if they feel attacked. Instead, attempt to explain what you have learned about your client that their office would not, and could not, have known at the time of the initial prosecution. Identify what might be most helpful to them as they advocate for your client within their own office.

The most demanding and important stage in any trafficking vacatur litigation is gathering testimonial and documentary evidence strong enough to convince a prosecutor and judge—who typically disfavor vacating, expunging, or sealing convictions—that your client deserves post-conviction relief. Section IV below, discusses in detail specific kinds of evidence you may find useful.



## Note: Confidentiality Clauses and Agreements

The primary purpose of vacating a client's trafficking-related convictions is to empower them to move beyond their criminal record. Therefore, it would be counterproductive if the vacatur process *itself* caused the client's information and status as a trafficking victim to be made public. In addition, there may be significant safety risks if the fact of a survivor's filing is publicly disclosed. In cases where confidentiality is important to the client, it is important to work with prosecutors, judges and court clerks to ensure that details like the client's name, criminal history, trafficker's information, and experiences with trafficking—all which may be included in a trafficking vacatur motion—do not enter the public record.

Attorneys will need to explore whether the documents can be filed under seal, so that they will not be part of any public record. In New York, for example, attorneys filing post-conviction motions utilize § 50-b of the state Civil Rights Law which prohibits public inspection of court files containing identifying information about victims of sex offenses.

If the filed motion or petition will be publicly discoverable, the client's personal information should be redacted in all public court documents. The attorney also should request that the judge shield the client's personal information from any published decisions in the case.

## B. How to File a Trafficking Vacatur Motion

Generally, a trafficking vacatur motion will include affidavits, affirmations, or other documentary evidence, and a legal brief.<sup>80</sup> Trafficking vacatur motions typically will be filed in the court in which the client was convicted of the offense(s) for which vacatur is sought. As with other trial or post-conviction motions, vacatur pleadings are filed on notice to the prosecutor, followed by proof of service with the court.

### 1. Procedures and Logistics

More specifically, the precise procedural and formatting requirements for a trafficking vacatur motion will vary by state:

#### a. States with Applicable Procedural Rules

Some state vacatur statutes for trafficking victims have specific procedural rules for filing. For example, in New York, the trafficking specific relief is placed in the same section as other grounds for collateral attacks on convictions. In those states, the mechanics of a trafficking vacatur filing is the same as other post-conviction motions and may be set forth in the state's applicable rules of criminal procedure.

Consult those procedural rules for guidance about formatting and submitting motions, and service and notice requirements.

#### b. States Without Specific Procedural Rules

In some states, the laws offering vacatur relief for trafficking survivors are not found in the post-conviction sections and the laws themselves are silent as to filing procedure. Accordingly, an attorney bringing a motion or petition for trafficking vacatur might consider reaching out to the prosecutor, the court, or the clerk of court to work out acceptable filing practices; and/or following the formatting and filing procedures used in states with well-established trafficking vacatur practices—such as New York.

<sup>80</sup> For templates and sample language for these documents, see Appendices, available at [www.ambar.org/srp](http://www.ambar.org/srp).

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Attorneys should contact the Survivor Reentry Project directly for guidance about best practices for filing trafficking vacatur motions in a jurisdiction that lacks applicable procedural rules.

### **Note: Multi-Jurisdictional Vacatur Practice**

Many clients have trafficking-related arrests or convictions in multiple jurisdictions. Unfortunately, these clients will generally have to file a separate motion in each jurisdiction where they have been convicted of a vacatur-eligible crime.

There often is no formal procedural mechanism for one court or prosecutor to take notice of another's findings that a client is eligible for relief under a trafficking vacatur statute. However, judges and prosecutors tend to respect their colleagues' findings and judgment. A client who has already had relief granted in one jurisdiction under a trafficking vacatur statute therefore is more likely to earn relief in other jurisdictions (assuming their motions are based on similar facts).

It is important to determine if the order of filing will impact a client's eligibility in one of the respective places that a motion will be filed and then make a plan for addressing the convictions. A complex multi-jurisdictional approach can be difficult for the attorney to figure out and potentially even harder for the client to understand. Attorneys must explain in clear terms the strategy and appropriately manage client expectations. For example, Florida's vacatur law requires that the client have no other motions for similar relief pending at the time of filing. Other states may allow for general expungement or sealing of certain charges, even if a client initially is ineligible, once charges have been vacated elsewhere.

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## IV. Best Practices: Constructing Client Narratives and Gathering Corroborating Evidence

This section provides strategies for approaching and organizing a vacatur motion and, most importantly, how to work with the client so that they are both informed about the process and also an active collaborator in its formulation. The main goal of the motion itself is to capture the client’s narrative through compelling evidence. You should aim for the most complete narrative possible, comprised of humanizing and educational details that will help depict the client’s experience of victimization while also demonstrating their resilience. Each step of creating the motion requires conversation with the client to discuss how the information attained will be used and who will have access to it. Further, while the approaches described here demonstrate the way advocates who have successfully handled these cases have approached the motion process, the format and practice will develop differently across jurisdictions. It is imperative that practitioners consult state criminal procedure law and local filing rules to confirm basic requirements and tailor the practice accordingly.

### A. Creating a Timeline

Because vacatur motions are necessarily backward looking, it is critical to understand the chronology of events in a client’s experience. Often, starting work with a client by creating a timeline together helps organize the narrative, identify gaps and hone in on potential corroboration. Therefore, a good first exercise with a client is to make a timeline that features the arrests/convictions that will be the subject of the motion, placing them in the larger context of the client’s life. The timeline is then a tool throughout the process, and helps orient both the client and attorney. In certain cases you may not need to start this process from scratch. Some clients will have previously worked with professionals to create all or part of such a timeline, for example if your client has completed an application for immigration relief based on the trafficking, submitted a victim impact statement and/or underwent a psychosocial evaluation. It is important to reference these documents both to minimize re-traumatizing clients and to ensure the consistency of facts in the public record.

Moments to ask the client about when constructing the timeline include: *important landmarks* (birth of children, world events); *arrest history* (including even sealed cases, unrelated arrests, and arrests of relevant individuals); *educational accomplishments*; or *sobriety*. These moments (if applicable) will help the client link together a sequence of important details in order to convey a fuller personal narrative for the affidavit. *Remember that the client controls the content of the ultimate affidavit.*

#### Client Affidavit Outline

1. Pre-trafficking (background, context, specific vulnerability)
2. Trafficking (victimization and nexus to convictions)
3. Post-trafficking (connection to services, educational/professional accomplishments or aspirations, obstacles caused by convictions)

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In order to turn the timeline of the client’s narrative into a compelling affidavit, it may be helpful to further separate the timeline into three periods: *pre-trafficking*, *trafficking*, and *post-trafficking*. These periods may be repeated as victims sometimes move between being trafficked to not being trafficked, and then being exploited again. Attorneys should seek corroboration of facts included in any of the three periods. It is important to note that in most states, the only *required* evidence/pleading will pertain to the period of trafficking itself. However, to the extent the client is comfortable, it can be useful to include facts about the periods before and after trafficking to complete the narrative and present a fuller picture. Particularly when filing one of the first motions for relief in a specific jurisdiction, a thorough affidavit may be valuable and/or necessary to educate prosecutors and judges about the complicated dynamics of trafficking.

In this way, it is worth exploring with the client whether to include facts that explain or contextualize what rendered them vulnerable to trafficking and/or what has happened in their lives since escaping the trafficking situation. These periods may include sensitive information and their content must be controlled by the client’s comfort.

Additionally, when representing non-citizens, it is critical to consult with an immigration attorney to ensure that the additional facts included will not cause any adverse consequences in subsequent immigration proceedings. For clients who have not previously had immigration representation, it is essential to contact an immigration attorney to see if there are any forms of immigration relief for which they may be eligible.

## 1. Gathering Corroborating Evidence

Most critical is corroboration of your claim that your client’s participation in the offense that led to a conviction is a result of human trafficking. This evidence can include first-hand accounts, official documentation, and other corroborating evidence. If possible, these categories should not be seen as mutually exclusive; the most successful motions will likely utilize all three forms of corroboration to the extent that they are available. However, it is important to remember, and remind other stakeholders, that vacatur can also be granted on a client’s sworn statement or testimony alone.<sup>81</sup>

### a. Firsthand Accounts

One key way to demonstrate that your client has experienced trafficking is to communicate the client’s story in her or his own words. You may communicate a first-hand account of your client’s trafficking experience by preparing a *client affidavit* in support of your motion. Some states require a sworn statement from the client.

As described in detail in Section VI, however, constructing a written narrative with your client requires a *trauma-informed, survivor-centered* approach. Attorneys and counselors have stressed that it is often difficult for survivors to overcome the *anxiety, fear, and even shame* associated with sharing their experience, especially when speaking to lawyers or other professionals they barely know. You should therefore refer to Section VI with respect to maintaining a *safe and transparent space, empowering and respecting* your client so that they feel as comfortable as possible while jointly creating the affidavit.

## B. Official Documentation

Aside from your client’s first-hand account, most state laws place great weight on official documentation indicating that they were a victim of human trafficking. Depending upon the state in which you file the motion, official documentation is either:

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<sup>81</sup> *People v. Gonzalez*, 927 N.Y.S.2d 567 (N.Y. Crim. Ct. 2011).

- Not required, but **creates a presumption that** the underlying crime was committed as a result of victimization<sup>82</sup>
- Not required, but **persuasive** and considered favorably;<sup>83</sup> or
- Not required, but imposes a less stringent **burden of proof**.<sup>84</sup>

Although official documentation is helpful in this way, many human trafficking victims will simply not have it. This should not, on its own, prevent the filing of a vacatur motion.

## 1. What Constitutes Official Documentation?

The term “official documentation” is typically defined as “documentation from a state, local or tribal government agency indicating that the defendant was a victim at the time of the offense.”<sup>85</sup> At this point, the types of governmental documentation that fall within this definition are not clear, and may vary between states.

At the very least, the term includes documents from **immigration officials or other law enforcement that have certified your client as a victim of human trafficking for the purposes of immigration status or public benefits**. Because these documents embody an agency’s prior determination that your client was trafficked, they are valuable even if they do not create a presumption in your state.

The following types of documents have/ likely will meet the statutory requirement for “official documentation” that creates the presumption of victimization:

*Law enforcement certification* related to federal immigration proceedings available to trafficking victims:

- A **T-Visa**,<sup>86</sup> or T-1 non-immigrant visa, provides four-year legal immigration status, work authorization, and the opportunity to apply for lawful permanent residence for applicants who have proven that they are:
  - ◆ a victim of a severe form of trafficking;
  - ◆ physically present in the U.S. on account of trafficking;
  - ◆ cooperating or have cooperated with law enforcement in the investigation of the trafficking; **and**
  - ◆ likely to suffer extreme hardship if removed (deported).

In the vacatur context, a T-1 Visa approval notice from USCIS, a sample of which is included in Appendix 1, would be considered official documentation.

- A **U-Visa**,<sup>87</sup> specifically a U-1 visa, similarly provides 4-year legal immigrant status for applicants who have been the victims of certain specified crimes and have cooperated in the investigation and prosecution of those crimes. Unlike the T-Visa, the U-1 visa **requires a certification** from a law enforcement agency that the petitioner cooperated with law enforcement in investigating the crime. U-1 visas are awarded to individuals who are victims of a variety of crimes, only trafficking related crimes qualify as official documentation for vacatur requests.

<sup>82</sup> See, e.g., N.Y. CRIM. PROC. LAW § 440.10(1)(i)(ii) (McKinney 2016); N.D. CENT. CODE ANN. § 12.1-41-14(2) (2015); 18 PA. CONS. STAT. § 3019(e) (2014); VT. STAT. ANN. tit. 13 § 2658(e) (2011). See also *supra* Section II.

<sup>83</sup> See, e.g., CAL. PENAL CODE § 236.14 (2016); 725 ILL. COMP. STAT. ANN. 5/116-2.1 (2013); MD. CODE ANN., CRIM. PROC. § 8-302 (2011); NEV. REV. STAT. ANN. § 176.515 (West 2015).

<sup>84</sup> See FLA. STAT. § 943.0583 (c)(5) (2013).

<sup>85</sup> KY. REV. STAT. ANN. § 529.160(c) (West 2014).

<sup>86</sup> See TVPA, 22 U.S.C. § 7105 (2015); 8 U.S.C. § 1101(T) (2014); BRUGGEMAN & KEYES, *supra* note 7, at 24

<sup>87</sup> See 8 U.S.C. § 1101(U) (2014); BRUGGEMAN & KEYES, *supra* note 7, at 25.

- ◆ In the vacatur context, the law enforcement certification, Form I-918 Supplement B, together with the U Visa approval notice from USCIS, showing a connection to a trafficking related crime, would be considered official documentation. Samples of these documents are included in Appendix 1.
- **Form I-914, Supplement B (Declaration of Law Enforcement Officer for Victim of Trafficking in Persons)** provides *certification* that the victim has *complied* with reasonable requests from law enforcement for assistance in their trafficker’s investigation and prosecution.
- **Form I-918, Supplement B (U Nonimmigrant Status Certification)** provides certification that the individual has been a victim of a specified criminal activity and has been helpful in the investigation or prosecution of the crime. If the specified crime is a trafficking related crime this would qualify as official documentation.
- **Continued Presence**<sup>88</sup> (CP) is a temporary immigration status granted to an individual who has been identified as a victim of a severe form of human trafficking and who is a potential witness in a trafficking investigation or prosecution. Only federal law enforcement officials or federal prosecutors may submit CP applications. CP allows otherwise undocumented victims to remain in the U.S. as long as they continue to cooperate with law enforcement, and provides access to some benefits and employment authorization.
- **Certification Letters** from the *Department of Health and Human Services or analogous state agencies* that certify a survivor as a victim of human trafficking eligible to receive *public benefits* as provided by federal and state anti-trafficking laws, samples of which are included in Appendix 1.
- **Records of federal or state court proceedings** which demonstrate that the defendant was a victim of human trafficking:
  - ◆ State and federal court orders for damages to survivors, pursuant to both federal<sup>89</sup> and state<sup>90</sup> anti-trafficking laws that create civil causes of action for victims of human trafficking;
  - ◆ Orders vacating/sealing/expunging arrests or convictions in other states or jurisdictions pursuant to trafficking specific post-conviction statutes;
  - ◆ Traffickers’ criminal court records;
  - ◆ Subpoenas issued to the client as a witness for the prosecution of the trafficker;
  - ◆ Notifications from a victim notification system.

## Be Creative

If it is not clear whether documentation is “official documentation” that creates the presumption, you should *first make the argument that it does. Argue for a broad interpretation of the text and cite the remedial purposes of the statute, supported by legislative history when available.* Even if that fails, you should still include the documentation in support of your case as an alternative means of corroboration.

*For example, one attorney has attempted to certify the lead detective on the case of his client’s trafficker as an expert in order to establish official documentation. Another attorney has successfully established a thank-you letter from an Assistant United States Attorney for cooperating in the investigation of a trafficker as official documentation.*

<sup>88</sup> See Trafficking Victims Protection Act of 2000 (TVPA), 22 U.S.C. § 7105(E) (2015); *Continued Presence: Temporary Immigration Status for Victims of Human Trafficking*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Aug. 2010), available at <https://www.ice.gov/doclib/human-trafficking/pdf/continued-presence.pdf>.

<sup>89</sup> Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA), Pub. L. No. 108-193, 117 Stat. 2875 (codified in scattered sections of 8, 18, and 22 U.S.C.).

<sup>90</sup> See *Fact Sheet on State Anti-Trafficking Laws from US PACT [Policy Advocacy to Combat Trafficking]*, CENTER FOR WOMEN POLICY STUDIES (Jan. 2010), available at <http://www.centerwomenpolicy.org/programs/trafficking/facts/documents/FactSheetonStateAntiTraffickingLawsJanuary2010.pdf>.

## Convictions When Your Client Was a Minor

If your client was considered a minor in your state at the time of their arrests and/or convictions, it may ease the evidentiary burden. Therefore, it is important to consider their age early in the vacatur process. There are several different scenarios in which your client's age can have great import:

Your client may have been too young to be prosecuted as an adult, but misrepresented their age at the time of arrest. If you can prove that your client was under the age of criminal responsibility at the time of their arrest and conviction, you may be able to bring a jurisdictional challenge to the conviction.

- ◆ The TVPA provides that where a minor less than 18 years of age is induced to perform a commercial sex act it constitutes a severe form of trafficking in persons. Therefore, minors are *per se* victims of a severe form of sex trafficking under federal law, even without force, fraud or coercion. The TVPA may be explicitly referenced in your state's vacatur law.
- ◆ For example, New York's law allows for vacatur for trafficking victims as defined by either New York's or federal trafficking law. Thus, even though New York's state trafficking law requires proof of force, fraud, or coercion, even when minors are involved, someone with a conviction from when they were a minor in New York would be eligible for vacatur by relying on the federal definition based on the fact of their age at the time of arrest/conviction alone. In that instance, they would not need to make a showing of force, fraud, or coercion for the conviction to be vacated.

For more detailed consideration of these additional legal issues, see *infra*, Section VII.

## C. Other Corroborating Evidence

For a number of reasons, not every survivor will have official documentation to create a presumption that they committed the offense as a result of being a victim of human trafficking. Survivors who are U.S. citizens do not qualify for the certifications that the immigration process confers, and many survivors of any type never report their victimization. Two types of survivors, in particular, often lack official documentation: older survivors and survivors whose traffickers have not yet been investigated.

- **Survivors whose trafficking occurred several years ago.** Many of the avenues through which survivors currently prove that they were victims of human trafficking – law enforcement certifications under federal and state-anti-trafficking laws – were not available to survivors who were trafficked years before these laws were enacted.
- **Survivors whose traffickers have not yet been identified, arrested, or prosecuted.** Many "official" documents that would support a vacatur motion rely upon the criminal legal system's investigation, arrest, or conviction of a trafficker. In many cases, unfortunately, law enforcement agents do not investigate the crime, let alone arrest or prosecute the traffickers.

In filing any motion to vacate on the basis of human trafficking, but especially with respect to circumstances without official documentation, best practice is to include any sort of documentation from your client's life that establishes common features of human trafficking such as medical records that establish injuries sustained, photographs of your client with the trafficker, letters the trafficker sent your client from jail, credit reports that show accounts a trafficker opened in your client's name.

You should approach the *totality of your client's story* as a potential record of information that can support your claim. Every basic question – *who, what, where, why* – will yield *places, people, and interactions* from which you can attempt to collect corroboration.

## Examples of Potential Corroboration

Background/Vulnerability	Trafficking	Post-Trafficking
Child Welfare Records	Official Documentation (T-Visa, HHS Certification, Continued Presence, State Certification)	Diplomas/Degrees/Certifications
School Records	Arrest records of trafficker or of other involved individuals (Irrespective of charge/client involvement)	Letters from Service Providers, Community or Religious Leaders, Colleagues, or Record of Volunteerism
Mental Health History	Medical Records, Tattoos, Scars	Employment, Financial, or Educational Hardship (rejection letters)
Family Arrest/Violence History	Newspaper Articles	Licensing Regulations – specific bars to employment
Articles about country/state/ area of origin	Photographs	

The following list is adapted from the Chicago Alliance Against Sexual Exploitation’s (CAASE) Illinois-specific Litigation Guide,<sup>91</sup> and offers examples of potential corroboration in cases involving the commercial sex industry:

- **Email, text, or voice mail records** between the petitioner, the trafficker, and/or customers that reveal aspects of the sex trade such as *behavior patterns, meeting times, amounts*, or examples of the trafficker exerting *force, fraud, or coercion* over the petitioner
- **Internet listings, print advertisements, or business cards** used to promote the petitioner for commercial sex
- **Police reports or hospital records** of injuries suffered by the petitioner
- **Financial records** showing profits from the commercial sex trade, *hotel stays*, or employment in indoor venues such as *massage parlors strip clubs, or escort services*
- **Testimony or affidavits** from those with *firsthand knowledge* of the petitioner’s involvement in the commercial sex trade such as *johns, family members, hotel workers, and other women trafficked by the same person* or group who trafficked the petitioner
- **Branding** or other **tattoos** on the petitioner that identified him or her as having a pimp
- Court records of **convictions, arrests, or prior investigations** against the identified trafficker, whether or not relating to trafficking activity
- **Sworn statements** from medical or legal providers, law enforcement, clergy or victim services providers from whom your client has sought assistance with respect to their trafficking. These victim

<sup>91</sup> See LYNNE JOHNSON, CHI. ALLIANCE AGAINST SEXUAL EXPLOITATION, LITIGATION GUIDE: JUSTICE FOR VICTIMS OF SEX TRAFFICKING CRIMES ACT 12 (Dec. 2011).



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service organizations may include *private clinicians, community mental health centers, domestic violence agencies, rape crisis centers, court diversion programs, transitional supportive housing programs, or substance abuse treatment centers.*

## D. Eliciting Client Narratives

As explained in more detail in Section IV, survivors may still struggle to provide specific information about what has happened to them. Some may simply not know or remember, which is perfectly understandable and foreseeable. Others may fear that disclosing information about their trafficker will threaten their safety, or may simply cope with their past abuse by withdrawing, or may feel culpable for their actions even if they were compelled. Interviewing survivors also always presents the risk of causing additional trauma – which both *harms the client* and hampers the goal of *eliciting useful information*.

In order to address these concerns, you should incorporate the trauma-informed strategies outlined in Section V, including:

- *Empowering* your client during your meetings
  - ◆ Allowing time for client to ask questions
  - ◆ Engaging in collaborative decision-making
- *Creating a safe space*
  - ◆ Maintaining a comfortable environment
  - ◆ Making stress-reducing techniques available
  - ◆ Being sensitive to the number/gender of people in a room
- *Prioritizing transparency*
  - ◆ Explain the *purpose and goals* behind your questions (“*I’m asking this because . . .*”)
  - ◆ Explain *where* information is going or to with *whom* it will be shared
- *Normalizing* the circumstances for your client
  - ◆ “*Many other people we have worked with have also experienced . . .*”
  - ◆ “*A lot of people who have been through similar circumstances often . . .*”
  - ◆ “*I can imagine many reasons why someone would . . . what were yours?*”

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**“Getting over that which you cannot personally understand is a hard concept and that’s what you have to start with.”**

– *Prosecutor*

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**“Traumatic memories are scattered.”**

– *Counselor/Advocate*

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Survivors **may not process and store memories** in the same, linear manner as individuals who have not experienced such trauma in their lives. Attorneys should therefore utilize the strategies in Section V that **facilitate memory reconstruction** and help clients create their **timelines**.

- Be mindful and sensitive to the time this may require. Survivors might not tell their story in a linear way. Time provides the attorney an opportunity to develop a more nuanced understanding of the client's situation. Attorneys who have handled trafficking-related vacatur cases report that it usually takes several interviews before even the broad parameters of the story are known and settled.
- To put the best case forward, lawyers may be inclined to include in the motion particularly brutal or violent incidents. However, this cannot come at a client's expense. Once you reach these events with the client, discuss why it might be helpful to include in the motion. Transparency and explanation are key. Best practices empower the client as a collaborator, and give the client the *right to say no*.

**Tip 1: Start with the arrest(s)**, and work your way back.

- ◆ Your client's arrest(s) is/are the most *concrete, tangible*, and relevant orienting fact that you can easily pin down.

**Tip 2:** Identify other **orienting dates** in your client's life to build a chronology around.

- ◆ For example, if your client has children, you might ask if an incident occurred before or after their kids were born.
- ◆ Major world events can also help a client sort and position their own memories and experience.

**Tip 3:** If your client provides conflicting information, point out the conflicts in a non-accusatory way, as this can stem from trauma. Ensure that your client feels as if you are assisting them to sort out the facts and don't feel as though they are lying.

## V. Best Practices: Building a Survivor-Centered and Trauma-Informed Approach

In addition to the legal background needed to represent survivors in vacatur cases, it is equally important to know and understand that survivors of human trafficking have experienced unique trauma. This can impact your interaction and relationship with your client. It is important to always consider the level of detail needed to complete the legal task. In some cases, practitioners can attempt to elicit too much information and cause harm to the client. Also it is important to remember that what you as the attorney think is the most traumatizing piece of information may not, in fact, be the thing that is most traumatizing to the client. The following sections describe best practices for navigating the attorney-client relationship.

### A. Trauma-Informed Approach

Social workers and service providers working with trafficking survivors endorse a “trauma-informed” approach to advocacy in this field. This method is crucial to framing all client interaction and setting the general tone and direction of their cases.

*“Traumatic events are extraordinary, not because they occur rarely, but rather because they overwhelm the ordinary human adaptations to life. Unlike commonplace misfortunes, traumatic events generally involve threats to life or bodily integrity, or a close personal encounter with violence and death. They confront human beings with the extremities of helplessness and terror, and evoke the responses of catastrophe.”*

– Judith Herman<sup>92</sup>

#### Checklist: Meeting the Client

- Meet face-to-face** early in the process to build trust.
- Explain** your role and the legal proceedings carefully, clearly, and often. Manage expectations by clearly stating what the law can and cannot do for your client, the timeframe, and likelihood/outcome. If you are unsure of any of these things let the client know.
- Plan** what you want to accomplish in each client meeting. Be clear about what you will be asking of your client ahead of time.
- Consider** what level of detail is actually necessary for the case. Then stop.
- Create a non-threatening environment** by using neutral and inclusive language, allowing silence and being tolerant of non-responsiveness.
- Assess** your client’s abilities to make sure your representation takes into account your client’s strengths and limitations.
- Anticipate and respond to** your client’s questions. When you don’t know the answer, be clear about that as well and make clear you will attempt to learn the answer.

<sup>92</sup> JUDITH HERMAN, TRAUMA AND RECOVERY 33 (1992).

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## 1. What is Trauma-Informed Representation?

It is a “human centered” approach that is focused on empowering the client. The aim is to place and sustain power and control in the hands of the client and mitigate any feelings of shame and secrecy that can result from the client’s experience. The trauma-informed approach values the multidisciplinary needs of the client and utilizes the expertise and experience of other trauma-informed service providers. Fundamentally, this approach recognizes survivors of trafficking as survivors of acute trauma and provides clients with resources to manage and treat that trauma as they go through the vacatur process.

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**“It’s important to remind yourself at all times that your client is in charge of the case. It’s not okay to coerce the client into doing something different than what they want to do. I should not be taking the power, even if they want to give it to me.”**

– Post-conviction Attorney

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## B. Meeting with the Client

When meeting with clients who have experienced trauma, it is important to keep in mind several aspects of your interactions.

### 1. Who You Bring to the Table

- Where possible, collaborate with mental health providers or other service providers to support your client after difficult experiences and/or recounting difficult experiences.
- Seek assistance and guidance from legal practitioners who have experience working with victims of various crimes and trafficking survivors specifically.
- Many trafficking survivors have not had access to legal assistance. In helping your client with the vacatur process, you may discover other unmet legal needs. Consider conducting a comprehensive legal assessment of the client at the beginning of the case and referring the client to other legal service providers to meet any other unmet needs if you cannot handle issues other than vacatur yourself. CAST (Coalition to Abolish Slavery & Trafficking) offers technical assistance on the comprehensive legal needs of trafficking victims. Practitioners can reach CAST at [info@castla.org](mailto:info@castla.org).

### 2. What You Ask Your Client

- Ask yourself: is this detail necessary? At times, detail will be required, but might not need to be repeated, which can be difficult for some clients.
- Ask your client about preferred forms of communication (text, phone, email etc.).
- Let your client know they can take breaks whenever needed.
- Be flexible with respect to the order in which you raise subjects with your client and the linear or non-linear nature of their response.
- Pay attention to the phrasing of questions and what you are actually asking. As an exercise, think of a difficult experience in your life. What question(s) would you have trouble answering? What questions might make you feel more comfortable?
- Avoid overly visible reactions to information your client shares. What a client discloses something painful, or traumatic, avoid grimaces, wincing or sighs. Convey that you are hearing and listening through non-alienating body language.

## Question to Avoid

### *What is the worst thing that happened to you while trafficked?*

Attorneys report prosecutors or law enforcement officers asking this, or a similar question, in an interview context. Not only is the abruptness of a question like this striking, it does not allow for the natural development of the narrative or the attorney-client relationship.

### 3. Physical Spaces

- Create safe spaces for your client, physically, emotionally, and mentally. This includes both the waiting room and meeting room.
- Pay close attention to the interview or meeting place itself. Does it convey a sense of privacy? Of focus?
- Have water and tissues available.
- Consider sitting next to the client or around a table, rather than across a desk, to help lessen the power differential.
- Think through potential court appearances, if they will be required, or other meetings.
- Realize that you may be asking your client to return to a jurisdiction/territory, area, or even building where they haven't been since they were trafficked. Many survivors have a severe emotional reaction when they return to, for example, a court where they were prosecuted. If your client reports that it's difficult for them to go back to the courthouse, put this information in your client's statement so the court is aware of the trauma an appearance may trigger; the information might be helpful in explaining behavior in the courtroom or convincing a court to excuse a client's appearance.

### 4. Travel and Transportation Needs

- Consider that travel may be difficult for your client. Work with them to create a plan for travel and transportation, and, where possible, cover the costs of your client's transportation (metro/subway, bus, parking, etc.) for meetings and other case related events.
- Try to limit the amount of times clients need to appear in court. Request that your client's appearance be excused unless absolutely necessary (if it is a hardship for the client to travel to court).
- Many clients will have convictions in multiple jurisdictions. Attempt to coordinate scheduling and encourage communication among jurisdictions to make the process less burdensome on your client.

## Note: Language Access and Working with Interpreters

- ◆ For clients who are more comfortable communicating in a language other than that spoken by the attorney, use an interpreter for every communication.
- ◆ Prioritize the use of an independently certified interpreter, preferably one who has been trained in working with survivors of trauma.
- ◆ Do not have a family member, friend, or any other unqualified individual serve as interpreter.
- ◆ Ask your interpreter to be a cultural interpreter for you. Empower the interpreter to let you know if you are doing anything culturally inappropriate for the client.
- ◆ Have a pre-session with the interpreter (10-15 minutes) before the client is scheduled to arrive to review confidentiality, ensure there is no conflict of interest, ensure the interpreter is prepared for the subject matter of the meeting and ensure that the interpreter is available to join you in greeting the client.
- ◆ Sometimes conflict or tension arises between the client and the interpreter **or** an interpreter may seem to be interpreting only part of what is said **or** inserting their own facts.
  - Address this promptly!
  - Avoid idiomatic speech and over-simplification.
- ◆ Maintain eye contact with the client, not the interpreter. Use and have the interpreter repeat in the first-person (i.e. “Where were you when...” **not** “Ask her where she was when...”)
- ◆ Make sure everything is interpreted – **refrain from** side discussions that your client cannot understand or participate in.
- ◆ Have a post-session with the interpreter to debrief and identify challenges with the interpretation, thus avoiding having any side conversation during the client session.

## C. Do’s and Don’ts of Working with Trafficking Survivors

### 1. Do:

- Understand that there are different levels of trauma.
- Understand that there are many other ways that people experience oppression (such as, poverty, racism, sexism, transphobia, etc.) and that these ways can significantly contribute to a client’s trauma.
- Empathize with what the client has gone through and how their experiences impact the way they think, act, and behave.
- Acknowledge that people are complicated. Avoid judgments, and give the client ample time to describe the facts of their life before you make a legal determination.
- Seek to understand your own trauma and the ways in which it might affect you, the attorney. Be as authentic as possible with your client.
- Maintain healthy boundaries. Remember that you are the legal provider; you are not the client’s mental health provider, caseworker, or personal friend.

“Trust, grace, space, control” is a useful mantra to keep in mind and help make the client comfortable and in control.”

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- Discuss your client's *rights* as a crime victim. Explain what it means to have rights within our legal system.

## 2. Don't:

- Expect your client's experience to fall neatly and quickly into categories.
- Pathologize or label your client. Use the language your client uses and be guided by your client's experience, perception and explanation. Explain the distinction between identifying as a victim and having access to certain legal remedies based on victim status.
- Assume your client sees their trafficker as a villain. Relationships are complicated. Clients may interpret and understand behavior you identify as trafficking and criminal with a different lens. The trafficker may be the parent, spouse, sibling, trusted friend, or relative of the client and may have met needs that no one else did. For many reasons, clients may not be comfortable with labeling traffickers as such. Take cues from your client in this way, and discuss/explore rather than label/assume. Ask you client how to refer to the trafficker.
- Act in any way that would reinforce shame in your client or secrecy in your interaction. Just as power and control are hallmarks of human trafficking, shame and secrecy are hallmarks of trauma.
- Call authorities or discuss a client's case with a prosecutor or judge without a client's knowledge and clear consent. Make sure that clients know exactly what is being submitted to the court and have had an opportunity to review and approve every part of the filing.
- Have a meeting without first explaining to the client who will be present, and what you hope to accomplish.

### Best Practices: Client Relationships

- ◆ Pay attention to *signs of how your client is feeling* (escalating anxiety, anger, fatigue, confusion, etc.).
- ◆ Give the client an opportunity to *take a break*.
- ◆ Ensure that *supportive service providers* (such as a social worker or therapist) are aware of the meeting and available so that the client can have the opportunity to work with them directly and immediately after.
- ◆ Recognize and accept that it can be difficult to maintain consistent contact with clients struggling with instability, substance abuse, health problems, or poverty in their lives. When they reappear, it is important *not to shame or chastise* but rather, *to express that you are glad to reconnect and come up with a plan* for maintaining future contact.
  - Similarly, if you become busy on other cases or emergencies, communicate that to your client and indicate when you will be able to return to and focus on their case.

## The Difficulty of Identifying as a Victim

Many clients may not identify as victims of human trafficking.

- ◆ They may see their own agency in events, even where you see victimization. It can be hard to align that view with the “victim” narrative necessary to meet the legal standard.
- ◆ The client’s reasons for engaging in prostitution, or other labor, may not seem to the client as “forced,” even if the circumstances indicate force and coercion.
- ◆ They may have been told that they are not victims, especially if they have had negative help-seeking experiences in the past.

Although you may view your client’s trafficker as the perpetrator of a crime, they may not. Often times, complicated emotional relationships underlie trafficking. Clients may still have loyalty to, or even sympathy for, traffickers, notwithstanding the passage of time or the victimization they experienced. Some may resist casting another person as a villain in their history for a variety of reasons, including personal philosophy and/or religion. In addition, the trafficker may not be the person who has treated your client the worst in his or her life. The trafficker may have provided things that others have never given them. The trafficker may be a family member, friend, loved one, or a person to whom the client owes a debt of gratitude.

It is vital to discuss this with your client and work together to find the right tone and balance for their narrative. It is possible to utilize your client’s voice authentically while still matching their experience to the elements required to be proven by law.

The best practice is to explain to, and explore with, the client why and how they qualify as a victim. Review the applicable law together.

*“I know you may not identify as a trafficking victim, and that’s okay, but we have discussed why you qualify as a victim under the law. Are you okay if I use this language?”*

Take time to explain. Give the client the opportunity to react. Provide information and then allow the client to decide what to do with it.

*“Here is the experience the law says qualifies for vacatur. Do you think any of your experiences should qualify for vacatur?”*

Explain legal terms like “trafficker” or “coercion.” Don’t assume this legal vocabulary has meaning or context. After working through together, you may be able to include in the narrative/affidavit your client’s reflection on what this means and how this makes them feel now, in the present.

**“At that time, I didn’t know that I was the victim of a crime. It is hard for me to understand that even now. However, looking back, I see the way I was manipulated and controlled.”**



## What Do Attorneys Frequently Miss?

- ◆ Acknowledging why a client *doesn't want to talk* or is uncomfortable.
- ◆ Realizing that the client *is not lying*. Traumatic events are not remembered in the same way as other memories. Let the client know that it's okay not to be able to remember everything. Normalize the situation by explaining that it happens to a lot of people.
- ◆ *Recognizing the impact of trauma* and what it can do to someone and remembering the individual context of your client's life to understand behavior, choice and emotion.
- ◆ *Explaining* at every instance and each stage, what is going to happen and what information you hope to get from the client. The simple act of outlining what to expect can help alleviate an immense amount of the client's anxiety.
- ◆ Listening to and addressing the client's *concerns* about the process.
  - Survivor advocate and therapist

## D. Frequently Asked Questions

Many clients will have questions about the process from the outset. Even if clients don't specifically ask, it is easy to understand that many of them will be wondering:

- Q: What goes into a motion?
- Q: Will my trafficker know if I provide their name?
- Q: Will I have to appear in court?
- Q: How long will this whole process take?

Unfortunately, there are no definite answers and no guarantees, but practitioners can best combat these unknowns by:

- maintaining close communication with the client; and
- being as transparent as possible.

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## E. Overlap with Domestic and Intimate Partner Violence

### 1. The Reality

An identical power and control dynamic can be at the heart of both human trafficking and domestic violence.<sup>93</sup> Both abusers and traffickers use tactics that include isolation of the victim, physical and emotional abuse and threats, lack of access to resources, and threats to expose or not assist with the victim's immigration status. The experience of domestic violence itself can make an individual vulnerable to traffickers. Alternatively, the experience of being trafficked can make an individual vulnerable to domestic violence. Also, in some cases, domestic violence and human trafficking can occur simultaneously. For example, a sex trafficking victim may be in an intimate partner relationship with their trafficker. You may, in fact, recognize some of your current or former clients who exist at this intersection.

### 2. What You Can Do

- Understand that some clients, who may be experiencing or have experienced domestic violence at home, are willing to accept riskier working conditions or participate in other dangerous economies.
- Remember that trafficking victims can be especially vulnerable to repeat victimization by falling into domestic violence relationships *after* they've escaped their trafficking situation, especially if they lack emotional support and other resources.
- Use this information and insight to try to identify clients who fall at this intersection during the intake and screening of clients.
- Don't overlook the fact that the domestic abuser may, in fact, also be a trafficker.
- Consider referring clients to organizations with expertise in working with victims of domestic violence where appropriate. Organizations assisting domestic violence victims and resources for attorneys working with domestic violence victims can be found on the ABA's Commission on Domestic & Sexual Violence's website, [www.americanbar.org/groups/domestic\\_violence.html](http://www.americanbar.org/groups/domestic_violence.html).

## F. Working with Indigent Clients: Practical Considerations

A client's lack of resources may impact their participation in the case.

If a client seems unresponsive, try to create solutions with them:

- Call the client again if they have not called you back. Do not assume it means the client is not taking the case seriously, and do not become angry or take the client's non-response personally.
- Give a client multiple ways to reach you—for example, by phone, text, or email.
- Ensure that you also have multiple methods of contacting the client, as some clients may change phone numbers or struggle to maintain consistent phone service but many still have access to the internet and email.
- Whenever possible, respond when the client asks for help (but remember to stay within the scope of engagement).
- Make sure that it is safe for you to leave a message or voicemail on the client's telephone number (it may be shared with family members or intimate partners who do not know they are pursuing vacatur).
- Be mindful of mail and disclosing any confidential information if you need to mail a client to contact them.

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<sup>93</sup> Bruggeman & Keyes, *supra* note 7, at 9.

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A client's lack of resources also may impact *client appointments*. For example, a client may regularly be late to appointments or miss appointments altogether. Again, try to figure out *why* and offer solutions:

- Help clients to plan transportation and, where possible, cover costs of transportation both ways.
- Consider meeting your client somewhere more convenient for them than your office (but remember the setting must enable confidentiality).
- Explain how to get into your office building or meeting place. Talk through the directions to your office, including the security process and address solutions if a lack of identification is an issue for your client.
- It can be intimidating to come to a lawyer's office—at least the first time, welcome your client at the entrance and help her/him enter the building.
- Make sure any security personnel or other staff will address the client with appropriate pronouns. Anticipate any issues regarding required identification where government issued identification might not reflect your client's preferred name.
- Meet your client early for court appearances. Consider meeting at a designated location and traveling to the court together.
- Consider other accommodations that may be needed to make it easier for clients with disabilities to participate in meetings and attend court.
- Consider childcare needs, explain any available resources for meeting times and at the court.
- Understand work commitments; clients may be at the mercy of on-call scheduling and hourly employment and may be unable to afford missing work.
- Consider meeting outside of the traditional office hours if necessary.

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## VI. Resolution of Trafficking Vacatur Motions

A trafficking-related vacatur motion will likely be resolved in one of three ways. First, the court may resolve the motion on the papers and without appearances required, either with or without prosecutorial consent. Second, the court may issue its decision at or after a hearing during which the client does not testify, either verbally or by written order. Third, the court may issue its decision at or after an evidentiary hearing at which the client offers sworn testimony—especially if the prosecution contests a material fact.

### A. Meeting with the Prosecutor

How a specific motion will be resolved most likely will depend to a large extent on whether the motion earns *prosecutorial consent*. Note that while securing a prosecutor’s consent to a trafficking vacatur motion is mandatory in only a small number of states,<sup>94</sup> doing so will always greatly benefit your efforts to obtain post-conviction relief.

In some instances, your client’s affidavit, even when supported by documentation, may not be enough to convince a prosecutor that they were a victim of human trafficking, or that your client’s conviction was a direct result of that trafficking. In such cases, it is foreseeable that a prosecutor will request an in-person meeting with your client. If such a meeting happens, it is with the attorney present and involved. In **no** instance should a prosecutor meet or speak with your client without your knowledge or outside of your presence.

In deciding with a client whether to agree to this meeting, you should consider the risk of causing your client anxiety and even re-traumatization; the prosecutor is one of the most visible parts of a criminal legal system that has failed them. Moreover, prosecutors might ask questions that a client does not want to answer and may go beyond the scope of what you have presented in the affidavit. Prosecutors also can prioritize different objectives, such as pursuing active leads and investigations. A survivor might therefore be reluctant to meet with a prosecutor, or might be distrustful. For these reasons, you should consider carefully with your client how to respond to a meeting request.

If you decide that meeting with a prosecutor is helpful or necessary, you should do the following in order to minimize the risk of harmful consequences for your client:

1. **Fully explain** to your client the purpose and details of the meeting (who, what, where, why), as well as the risks (trauma, anxiety, etc.) of meeting with a prosecutor, in order to ensure that the client is as prepared as possible.
2. **Ensure** that the prosecutor is informed of the trauma that commonly afflicts trafficking survivors; the risk of re-traumatization attached to meeting with your client; and how this trauma may impact the client’s memory and responsiveness to questions.
3. **Agree** to a set of “ground rules” for the meeting.
  - a. **Date, time, place, duration.** Consider requesting to meet at a mutually convenient, comforting environment away from the prosecutor’s office.
  - b. **Types of questions and terms to use.** Consider asking the prosecutor to agree to confine questions to the issues most relevant to the motion, rather than questions about the trafficker or peripheral surrounding circumstances, which may not be necessary.
4. **Intervene** if questions seem inappropriate, either in tone or substance.

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<sup>94</sup> See, e.g., 18 PA. CONS. STAT. § 3019(d)(2)(ii) (2014); MD. CODE ANN., CRIM. PROC. § 8-302(b)(2) (LexisNexis 2011).

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5. **Monitor** the client's anxiety levels and *assess* whether the client needs to take a break or stop the interview altogether.
  6. **Suggest** that the client meet with a counselor or therapist after the meeting to process the experience.

## B. Prosecutorial Consent

When the prosecutor consents to a trafficking vacatur motion, the court may choose to resolve the motion on the papers—in other words, without conducting an evidentiary or motion hearing. However, because vacatur is an extraordinary remedy, the judge may still want to hear directly from a trafficking survivor before ruling on the motion, even if the motion is submitted on prosecutorial consent.

As with motions of other types, barring extraordinary or unusual circumstances, courts rarely will deny a trafficking vacatur motion where a prosecutor consents to the relief.

## C. Prosecutorial Opposition

Motions submitted without prosecutorial consent likely will require full briefing, a motion hearing, and/or an evidentiary hearing. However, in many jurisdictions, the motion can also be decided on the written submissions if there are no material facts in controversy. It also may take the court longer to resolve a contested than an uncontested motion.

## D. Testifying in Court

In especially difficult cases, when the prosecutor opposes a motion or a motion has little or no corroborating evidence, the judge might *hold an evidentiary hearing*.<sup>95</sup> Again, preparing your client for such a hearing is critical.

You should be *fully transparent*, explaining to your client the *purpose of the hearing* and the parts of their story that they should or will be expected to present. It is important to go over the questions you will ask your client as part of a direct examination as well as what questions to anticipate on cross-examination. Practice the direct testimony and conduct moot cross. Describe to the client the courtroom in which the hearing will be held and, where possible, allow them to view the courtroom in advance. Make sure they are familiar with all court rules and procedures.

You should *warn and prepare your client* that testifying in open court can cause a wide range of reactions and feelings, and you should *reassure your client* that it is common and acceptable to become emotional or experience some difficulty remembering precise details. You should explain that it is okay to say that they don't remember or that they need a break. You should also suggest to your client that they *meet with a therapist or counselor* at some point after the hearing for emotional support.

Many states have procedures that allow for the closing of a courtroom in certain instances.<sup>96</sup> If an evidentiary hearing is unavoidable in your case, explore with the court and prosecutor whether courtroom closure is possible. This will alleviate some of the anxiety for your client and will also protect against any safety issues that may arise from sworn testimony offered in an open or public courtroom.

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<sup>95</sup> See *People v. Gonzalez*, 927 N.Y.S.2d 567 (N.Y. Crim. Ct. 2011) (vacating more than eighty prostitution convictions of a movant who presented no corroborating evidence aside from her own testimony).

<sup>96</sup> Because of the individual and broader rights implicated in open and public court proceedings, the U.S. Supreme Court has explained that a courtroom closure must satisfy a four-part standard to comport with the requirements of the Sixth Amendment: “[1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced[; 2] the closure must be no broader than necessary to protect that interest[; 3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.” *Waller v. Georgia*, 467 US 39, 48 (1984).

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## VII. Additional Legal Issues

### A. Vacatur of Non-Statutory Offenses

In the words of one New York City court, “human trafficking victims are frequently arrested and charged for a variety of offenses based on actions which the victims were unwillingly coerced into committing by their traffickers.”<sup>97</sup> For example, sex trafficking victims are often arrested and charged with crimes **other than prostitution** committed as a direct result of human trafficking.

Some state vacatur laws explicitly authorize relief for non-prostitution offenses. Unfortunately, many state vacatur laws are limited to prostitution or prostitution-related offenses. However, courts have vacated such “non-prostitution” convictions even under statutes that restrict vacatur to specific offenses, utilizing clauses described above in Section II.A.iv. that authorize the court to take additional action.

If your state’s trafficking vacatur statute incorporates this type of clause, it is important to argue that as many of your client’s convictions as possible are eligible for relief. This requires evaluating the circumstances surrounding each of your client’s convictions and considering how it may have occurred as a result of your client’s trafficking.

The connection between trafficking and non-prostitution offenses may be less obvious at first. However, such situations are quite common<sup>98</sup> and there are many instances in which non-prostitution convictions should qualify for post-conviction relief.

#### 1. Examples of Charges That May Occur as a Result of Human Trafficking:

##### a. Theft Offenses (Larceny, Robbery, Burglary, etc.)

Trafficking victims often face physical violence if they do not earn enough money for their traffickers. In addition, traffickers commonly take for themselves all or almost all of the money earned by trafficking victims under their control. Finally, traffickers often coerce their victims into committing theft and other crimes on their behalf in order to avoid suspicion or arrest for the crime.

As a result, trafficking victims may steal either (1) at the specific direction of their trafficker; (2) in order to avoid punishment by traffickers, or (3) to obtain basic items necessities denied them by their trafficker.

##### b. Possession of Narcotics or Weapons

**Narcotics.** Some traffickers provide drugs to victims as a way to continue to coerce them to engage in specific conduct for their profit. Others exploit an already existing drug addiction as means of control. Traffickers also mandate that victims carry drugs for them when traffickers are involved in narcotics sales or use, or provide drugs to purchasers of sex while engaging in prostitution. In each of these instances, it is foreseeable that a victim may face arrest for drug related offenses.

Further, many trafficking victims endure an extensive amount of trauma in the form of interpersonal violence and abuse. Many turn to narcotics in order to cope with the trauma and other emotional difficulties caused by their victimization. Here too victims face arrest for possessing or using drugs, but their conduct is a direct result of having been trafficked.

**Weapons.** Victims of trafficking often carry weapons in order to protect themselves from physical and sexual assault. This is common among victims engaging in prostitution, who face an inordinate level of

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<sup>97</sup> *People v. L.G.*, 972 N.Y.S.2d 418, 438 (N.Y. Crim. Ct. 2013).

<sup>98</sup> See NAT’L SURVIVOR NETWORK, NATIONAL SURVIVOR NETWORK MEMBERS SURVEY IMPACT OF CRIMINAL ARREST AND DETENTION ON SURVIVORS OF HUMAN TRAFFICKING (2016).

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violence from purchasers of sex. This can range from small knives<sup>99</sup> to mace to other prohibited items that can be utilized in self-defense if a victim is attacked. Some traffickers even provide the weapons to their victims for use in these instances.

Finally, traffickers who are involved with the trade or possession of illegal weapons can utilize their victims to transport weapons so traffickers themselves can avoid detection and risk of criminal liability.

### **c. Loitering, Trespass, and Other Minor Offenses**

Sex trafficking victims often are arrested for crimes like loitering and trespass when they are engaging in commercial sex. Many states have distinct crimes of, for example, loitering with intent to commit prostitution. Attorneys should scrutinize every conviction of this type in search of a potential connection to the client's trafficking.

### **d. Assault and Related Crimes**

Like the crimes of theft or possession discussed above, violent crimes such as assault commonly arise as a result of sex trafficking. A client may have assaulted their trafficker, or a purchaser of sex, in self-defense but was too fearful to explain the circumstances when arrested and prosecuted.

This is particularly so given the stigma that surrounds involvement in the commercial sex industry. Many victims of violence know that if they report the crimes to the police, they will be disbelieved merely because they are involved in prostitution, or worse, subjected to additional violence. Traffickers often reiterate this notion, even if false, to prevent victims from reporting any crimes against them to law enforcement. Some trafficking victims, therefore, will have assault crimes on their record that are directly related to their trafficking victimization.

### **e. Trafficking Offenses Against Others**

Traffickers can coerce victims into helping run and operate their trafficking schemes. For example, a sex trafficker might coerce a victim to collect money from other trafficking victims, recruit other victims, post photos online of other victims, or enforce specific rules.

In labor trafficking cases the trafficker may force victims to recruit other victims or, in cases involving foreign national victims, force victims to assist in smuggling victims into the United States. Some clients, therefore, may have been prosecuted for trafficking others, even though the convictions occurred while the client was being trafficked themselves, and as a result of their own victimization. In these cases, clients may qualify for relief depending on the scope of offenses covered by the vacatur statute in the state of conviction and the nexus of their conviction to their own victimization. Unfortunately, at the time of this writing, no remedy is available for convictions imposed as a result of federal prosecution.

## **B. Convictions That Occurred After Escaping Trafficking**

Each of the offenses described above may have occurred while the client was still under the control of a trafficker. However, even after clients have escaped trafficking, many continue to face arrest for conduct directly related to their trafficking. Attorneys should make every attempt to include these convictions in a vacatur motion, as a failure to do so leaves clients with an incomplete remedy and fails to take into account the difficulties faced by trafficking victims after escape.

For survivors who were trafficked into prostitution, it is common to continue engaging in prostitution, even after escaping a trafficker. This occurs for a variety of reasons. First, survivors of trafficking into prostitution

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<sup>99</sup> See John Caher, *Judge Vacates Trafficking Victim's Non-Prostitution Crimes*, N.Y. L. J., Aug. 20, 2013.

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experience an acute sense of alienation and stigma as a result of their involvement in commercial sex. Many feel unable to consider work in other economic sectors because of this stigma. Many have interrupted education histories, limited job experience and criminal records, all of which similarly hinder employment opportunities. Many survivors simply feel best able to take care of themselves in the immediate aftermath of trauma by continuing to do what they have been trained to do. Survivors report that their experience being trafficked into prostitution reinforced that commercial sex was all they were able to do - and all that they were good for.

There are fairly straightforward economic reasons why survivors may continue to face arrest even after leaving a trafficker. Many struggle with extreme poverty, lack of support, and scarcity of resources. Crimes committed at this point in a survivor's life – whether prostitution, theft, or other similar crimes – are still directly related to their victimization and should qualify for vacatur as well.

As described above, where survivors have developed or battled ongoing substance addiction, this too can lead to additional arrests after trafficking. Additional arrests for possession and use of controlled substances can be contextualized and, where a nexus to the trafficking experience is established, such convictions should also qualify for vacatur.

### C. Convictions as a Minor

It is common for victims of trafficking to have criminal histories that date back to when they were a minor, under the age of 18. Many victims misrepresent their age to the police and the courts when arrested, and report as older than they are, in order to avoid being identified as a missing child, returned to family or juvenile court, or bringing potential criminal liability to a trafficker that is profiting off their exploitation. Some victims may not even know their age or birthplace. Depending on the circumstance, the fact of your client's age at the time of arrest can create a more straightforward path to vacatur.

In particular, it is important to keep in mind that any minor engaging in prostitution is considered a victim of a severe form of sex trafficking under the TVPA.<sup>100</sup> It is also important to note that the age of criminal responsibility varies from state to state and can impact a client's legal recourse for arrests and convictions that occurred when they were a minor.

Thus, if a client was younger than the age of criminal responsibility, but misrepresented their age to the police/courts when arrested, resulting convictions can be challenged based on lack of jurisdiction.<sup>101</sup> Here, you may not need to argue that the client is a trafficking victim, but instead simply that the original trial court lacked jurisdiction over the client at the time of their prosecution, so the conviction must be nullified. Some states impose time limits as to when one can bring such a challenge.<sup>102</sup> In those instances, you may need to argue both that the client is a trafficking victim *and* that the court lacked jurisdiction to overcome procedural bars and explain a delay in bringing the motion.

Where a client is 16 or 17 years old and convicted in a state that treats 16 or 17 year olds as adults, the challenge to the conviction might come by virtue of the trafficking-related vacatur statute. However, in states that exempt minors from the force, fraud or coercion requirements or specifically incorporate the TVPA in their vacatur statute, the process is significantly less involved. In those jurisdictions, the client is a victim based on their involvement in commercial sex at an age younger than 18. There is no additional requirement that youth involved in commercial sex demonstrate force, fraud or coercion to be identified as victims of trafficking. Therefore, in those states, the burden of proof is significantly easier to meet, and a client need not be required to provide specific information about force, fraud or coercion to qualify for relief.

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<sup>100</sup> TVPA, 22 U.S.C. §7102(9)(a) (2015).

<sup>101</sup> See, e.g., N.Y. Crim. P. 440.10(1)(a).

<sup>102</sup> See, e.g., Fla. R. Crim. P. 3.850(b).



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## D. Relying on Facts Not Previously Disclosed to the Court

Some state trafficking vacatur statutes explicitly address the use in a vacatur motion of facts not disclosed to the trial court at the time of the original prosecution. Some states require that attorneys state in their motions why the facts the motions contain were not raised to the trial court before the client originally was convicted.<sup>103</sup>

These requirements most often are easily satisfied in practice, as there are many reasons why someone facing prostitution charges would not reveal that they were being trafficked. Victims often are hesitant to divulge the circumstances surrounding criminal charges due to the consequences of doing so—whether real or perceived.

For example, trafficked people may not have been aware that trafficking is a crime or that they are trafficking victims in the eyes of the law. Many people exploited in the commercial sex trade understand *themselves* to be the criminal offender; they may not believe that being trafficked enables them to present a legal defense. In addition, trafficking victims are threatened with harm if they implicate the trafficker in illegal activity. The trafficker may have even attended and observed court proceedings. As a final example, victims may have been promised release from jail if they pleaded guilty, or reasonably believed a guilty plea was their best option at the time. Trafficking victims often are met with skepticism by police officers, prosecutors, and the courts; they might simply not have seen any other option.

In short, the best explanation for a client's silence in trial court most likely will come from the client themselves. If a judge expresses skepticism about the reasons for a client's previous silence, consider calling an expert witness to testify about the wide-ranging impacts on victims of trauma in general, and human trafficking in particular. You may also access, and provide, transcripts of expert testimony from other trafficking proceedings around the country to avoid the cost of hiring an expert in a specific proceeding. These transcripts can provide helpful background information for a judge or prosecutor, and can help to persuade either as to why a victim may not have revealed facts regarding their victimization when initially prosecuted.

## E. Vacatur and Immigration

It is critical that attorneys take special care when representing non-citizens and naturalized citizens in vacatur proceedings. Best practice involves consulting with an immigration attorney who has specific expertise in representing survivors of trafficking in order to think through any potential immigration consequences as you work with your client to develop a narrative and filing.

While too specific and nuanced to fully explore here, significant questions exist as to how vacatur will be interpreted in the immigration context. For that reason, attorneys representing non-citizens in vacatur cases should work with immigration attorneys to make sure the content of all filed pleadings is reviewed with that specific lens. Furthermore, immigration attorneys can advise about the content of vacatur orders issued by the courts when successful, and can make sure attorneys representing trafficking survivors in the vacatur context are aware of any potential risks or issues.

## F. Utilizing General Vacatur, Expungement, and Sealing Laws

Separate and apart from human trafficking, several states provide a mechanism for individuals to expunge/seal previous arrests and/or convictions upon certain conditions. While these laws vary drastically from state-to-state, attorneys should explore any opportunities that these general vacatur laws may present for

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<sup>103</sup> See, e.g., 725 ILL. COMP. STAT. § 5/116-2.1(a)(1) (2013).

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clients.<sup>104</sup> Depending on the state-specific statute, these broader laws may cover arrests or convictions that occurred for a trafficking survivor before, during or after their trafficking experience. Occasionally, general expungement laws may apply to convictions or arrests that are not covered under a more narrow, human-trafficking specific statutes. Further, there may be instances where a survivor is eligible for expungement under both the general statute and a trafficking-specific law. Here, it is worth exploring what may offer the best remedy for your client as general expungement petitions usually require far less specific factual showing. Be sure to note the specifics of your state's general law, especially the timeliness requirements for filing motions.

## G. Arrests Not Resulting in Conviction

Attorneys should be aware that there may be additional steps that must be completed to seal arrests that did not result in convictions. In some states, arrests that aren't prosecuted are sealed by operation of law.<sup>105</sup> In others, this is not the case.<sup>106</sup> Furthermore, in certain jurisdictions, even once convictions themselves have been successfully vacated, a separate process must be followed to separately seal the arrest records.<sup>107</sup> Practitioners must ascertain, at the beginning of the vacatur process, what the specific rules are in the relevant jurisdictions and be sure to account for any additional steps required to seal all potential arrest and conviction records.

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<sup>104</sup> The National Association for Criminal Defense Lawyers maintains a comprehensive database of state expungement and sealing laws. See <https://www.nacdl.org/rightsrestoration/>.

<sup>105</sup> See, e.g., N.Y. Crim. P. § 160.50.

<sup>106</sup> See, e.g., Fla. Stat. § 943.059 (2015).

<sup>107</sup> See, e.g., 20 ILL. COMP. STAT. § 2630/5.2.(d) (2016).

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## VIII. Creating Collaborative Practice

Collaboration is essential to maintaining a successful practice of vacating convictions for survivors of human trafficking in your area. Each part of the vacatur process described above depends upon the combined efforts of multiple stakeholders. In particular, it is critical to create the broadest network of involved individuals, agencies, and organizations to assist survivors both before, during, and after vacatur. This helps to increase awareness of survivors' needs, and also fosters creative solutions to meeting those needs.

In doing so, you may discover opportunities for cross-training for different stakeholder groups. For example, many of those who work in the criminal legal system are unfamiliar with the phenomenon and dynamics of human trafficking. There may also be community-based organizations providing direct services locally who may be serving survivors of trafficking without even knowing. Similarly, there may be organizations that specifically serve survivors and victims, but aren't connecting with the particular group of clients you represent. Connecting different entities and working together is one of the keys to a robust vacatur practice.

### A. Working with Prosecutors

As discussed in several sections above, working with the prosecutor to gain consent to your motion before it even reaches the judge is, in most states, extremely helpful and persuasive, or, in a minority of states, required. Prosecutorial consent sends a message to the judge that even the party that sought your client's convictions in the first place no longer believes that those convictions are warranted.

In order to facilitate prosecutorial cooperation, you should:

- **Contact and work with the prosecutor's office's anti-trafficking bureau.** The prosecutor's office's anti-trafficking bureau, or a designated person that handles human trafficking cases at the office, will likely be the most responsive to your client's needs as a survivor of human trafficking, and more willing to join you in a motion for vacatur. If such anti-trafficking units do not exist in your local prosecutor's office, consider contacting the office's special victims unit or a prosecutor with a special victims background.
- **Ensure that the prosecutors are educated and informed.** Although many prosecutor offices have dedicated resources exclusively to anti-trafficking efforts, and some even have their own social workers that assist in their cases, you should speak to prosecutors about the nexus between criminal activity and human trafficking and how trauma impacts your specific client. You want to work with an office that is sensitive to both the story and the needs of your client as a survivor of human trafficking.
- **Give the prosecutors advance notice.** Regardless of whether your state requires prosecutorial consent, it can be helpful to notify the prosecutor's office in advance of filing your petition. You should give the prosecutor an idea of your client, the types of convictions for which you seek vacatur, and your client's history of trafficking. Relatedly, you can more generally approach the prosecutors before filing to assess the types of convictions the office is more likely to accept and/or oppose. Opening up the lines of communication is key.

### B. Behavioral Health Support: Social Workers, Therapists, and Counselors

For a successful vacatur practice, it is imperative to collaborate with social workers, therapists, counselors or other behavioral health specialists where possible. These clinicians best understand trauma-informed care on a case-by-case basis. As explained in Section V, lawyers should adopt a trauma-informed approach that recognizes a survivor's needs as a "whole person" with a broader history of trauma.

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In order to best integrate non-lawyer mental health specialists into client representation, consider the following:

- **Bring together an interdisciplinary support team from the inception of the case.** Where resources permit, work closely with a social worker or other behavioral health specialist to build a team for your client. Building trust takes time, but a team approach increases the likelihood that your client's experience will be positive. Therapists, counselors, or social workers can play an important role from the beginning of the representation. However, make sure to communicate this approach to the client and make sure they are comfortable proceeding in this way.
- **Be mindful of your limits.** Despite the best intentions and training, recognize that your role as a lawyer is limited and can be counterproductive. Your primary goal is to gather the information necessary to satisfy the necessary elements for vacatur outlined in Section II; this inevitably creates stress and anxiety for the survivor that sometimes makes it harder for them to cooperate.
- **Respect boundaries and roles.** Be aware that, at least in most instances, attorneys are not therapists, and it can harm both you and your client's best interests if you try to fill that role. Make clear to your client the distinct roles that every member of the team will play in addressing their needs. You want to avoid raising any expectations as to what you or the social worker can offer.

## C. Building a Larger Network

A comprehensive approach to working with survivors of trafficking means building the capacity to address the other conditions in their lives that caused by trauma or impacted by their past experience. For example, some survivors may be struggling with ongoing issues of domestic violence, homelessness, substance abuse, immigration, unemployment, and even basic safety.

**You should therefore identify, contact, and try to work closely with local social service organizations that provide services in these areas.** For example, there might be anti-human trafficking organizations and advocacy groups in your area that already provide holistic services. These networks provide invaluable resources to assist your client's needs before, during, and after the vacatur process. Even if such organizations do not exist in your area, tap into networks that address the needs of vulnerable populations more generally.

In addition to the behavioral health needs described above, many survivors will need to be connected to organizations specializing in the following areas:

### 1. Crisis Assistance

- Identify local shelter options for emergency situations. In particular, look for shelters designated for particular groups like victims of domestic violence, youth, or LGBT individuals.
- Refer U.S. citizen clients to public benefits intake offices for assistance with food stamps, cash assistance or other subsidies. For foreign national clients consult with an immigration attorney about eligibility for benefits.
- Domestic Violence organizations in your area have expertise in helping survivors of abuse and violence seek restraining orders/orders of protection, where appropriate.

### 2. Medical Care

- Identify organizations working to provide health insurance enrollment.
- Create a list of trauma-informed medical providers. Although these providers may not have specific experience working with trafficking survivors, they likely will have developed protocols and best practices for working with victims of violence and abuse.

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- Research organizations providing free assistance in areas not usually covered by insurance, such as dental work, tattoo removal, or other cosmetic procedures that address scarring or other physical manifestations of past abuse.

### 3. Employment Services

- Many survivors will have faced tremendous difficulty securing employment. Most often, this is because of their criminal record, which is the subject of the vacatur motion. However, other factors also can impact job readiness, including gaps in or incomplete education and employment history. Identify organizations or agencies that offer job training, interview preparation and other employment resources.

Building these relationships and collaborative practice is key for the survivors you represent. It also opens up opportunities for referrals and enhanced case identification. Many survivors, anti-trafficking organizations, and other community partners, are unaware that vacatur laws exist. Working closely with a variety of stakeholders who might come into contact with survivors on a regular basis puts your efforts on their radar. These organizations then can refer additional survivors for vacatur representation, which means more survivors will become aware of, and seek, this critical relief.

More information on the ABA's Survivor Reentry Project (SRP) can be found at: [www.ambar.org/srp](http://www.ambar.org/srp).

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