

Meeting the Legal Needs of

Human Trafficking

Victims: *An Introduction for Domestic
Violence Attorneys & Advocates*



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Preface

The American Bar Association is pleased to provide you with *Meeting the Legal Needs of Human Trafficking Victims: An Introduction for Domestic Violence Attorneys & Advocates*, which we hope will serve as an important and timely resource for you in your practice representing human trafficking victims. This publication was developed pursuant to a generous grant from the ABA Enterprise Fund, as part of a collaborative effort by several ABA entities aiming to provide attorneys with leadership and training to better represent victims of human trafficking.*

Human trafficking and domestic violence are crimes which occur at alarming rates in the United States. Notably, there is also a high co-occurrence of these crimes. Many victims of human trafficking are also victims of domestic violence and many victims of domestic violence have also been trafficked. However, the legal needs of, and remedies available to, victims of domestic violence and human trafficking can be distinct. As a result, it is imperative that attorneys who represent victims of domestic violence are able to identify if their clients are trafficking victims as well, and be familiar with the range of legal remedies available to human trafficking victims as well as the relevant resources in their communities.

The impetus for the creation of this publication came from the many domestic violence attorneys who contacted the ABA Commission on Domestic Violence seeking information about human trafficking and wanting to ensure that they were providing comprehensive legal assistance to their clients.

Like domestic violence cases, human trafficking cases are often complex and multi-dimensional. This guide serves as an overview of the unique issues and remedies which are often present in such cases, and is not intended to be comprehensive. We have included references to many other resources on related topics throughout.

Through this guide, we hope to support your efforts to serve a very vulnerable population in desperate need of high-quality legal assistance. We applaud you for the heroic work that you do on their behalf.

Regards,

Karen Mathis & Laura Stein

Honorary Co-Chairs

American Bar Association Civil Legal Remedies for Human Trafficking Victims Project

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*The ABA Enterprise Fund collaborating entities are the Commission on Domestic Violence, Commission on Immigration, Rule of Law Initiative, Center on Pro Bono, Commission on Youth at Risk, Section of Individual Rights and Responsibilities, and the Center for Human Rights.

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For six years, Jean was the Survivor Services Department Director for Boat People SOS, a national Vietnamese community-based organization. Jean led the development and implementation of the Community Against Domestic Violence and Victims of Exploitation and Trafficking Assistance Programs. She supervised the legal and social service staff, conducted outreach and education within the Vietnamese community, and provided training and technical assistance to service providers around the country. Jean coordinated the filing of T visa applications for over 200 human trafficking victims in the *U.S. v. Kil Soo Lee* garment factory case, in collaboration with over 40 attorneys in more than 20 states. All applications were approved.

Jean graduated from the Georgetown University Law Center and was awarded a Women's Law and Public Policy Fellowship to serve as the VAWA Attorney at Ayuda in Washington D.C. in 2000. During her fellowship year, Jean represented over 50 battered immigrant women, edited the 4th edition of Ayuda's VAWA Manual, and developed a pro bono project for the representation of battered immigrant women. Jean also holds a B.A. in Sociology and Anthropology from Bryn Mawr College.

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Prior to working at WEAVE, Elizabeth spent three years as a Skadden Fellow and Staff Attorney at CASA of Maryland, working on the civil and immigration aspects of human trafficking cases, litigating in state, federal, and immigration courts. She focused particularly on trafficked domestic workers, and their exploitation by diplomats. Before law school, Elizabeth spent several years working on African policy and development issues with Catholic Relief Services, the World Bank and the United Nations Development Program, throughout Africa. Elizabeth received a law degree *magna cum laude* from Georgetown University Law Center, a Masters in Public Affairs from Princeton University, and a B.A. in African Studies from Carleton College.

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Introduction

What Will I Learn From This Guide?

It is our hope that as a result of reviewing this guide, you will be better able to:

- ▶ Recognize trafficking victims among your existing domestic violence caseload;
- ▶ Identify the key civil legal remedies and other issues that you will need to explore in order to effectively assist human trafficking victims; and
- ▶ Identify and use other resources to pursue specific legal remedies and secure social services and other benefits for your clients.

Just as the experiences of domestic violence and human trafficking victims overlap, so do the available remedies. Some civil and immigration remedies are available to victims of all forms of abuse, while others are available to only a portion who met certain requirements. Exploring these intersections will allow you to think more holistically and creatively about legal remedies and auxiliary services available to clients.

The Need for Competent Legal Representation in Civil Law Matters Involving Human Trafficking

The issue of human trafficking has begun to receive more and more attention in recent years. Laws specifically designed to prevent it from occurring, protect and support its victims, and hold perpetrators accountable have been enacted. As a result, new civil causes of action and social services are available to victims. Collaborations at the state, local, and federal levels within and among government agencies as well as service providers have emerged and have provided victims with enhanced community-wide safety nets.

Despite these advances the civil justice system is still inaccessible to many trafficking victims. They are largely unaware of the legal recourse and services available to them; psychological trauma, threats to their lives and safety, and lack of resources often prevent them from seeking help. Without assistance and support, victims who do manage to escape are at risk for being re-trafficked.

Because anti-trafficking laws are still relatively new, too few attorneys possess the depth of knowledge necessary to competently, safely, and holistically assist victims. In particular, lawyers must be prepared to plan for the safety of their clients, employees, and others.

Promoting the competence of domestic violence attorneys who represent victims of trafficking, and giving them the tools they need to identify victims among their clients will better enable victims to seek the justice that they deserve. That is our purpose and our goal in producing this guide.

As a Domestic Violence Attorney/ Advocate, Why Should I Learn About Human Trafficking?

There is much to be gained from cross-training attorneys and advocates working with victims of domestic violence and human trafficking. Serving an individual client through both a domestic violence and human trafficking lens increases the likelihood that the entirety of the client's needs will be addressed appropriately. Clients who have access to a larger field of experienced attorneys will be more likely to achieve a measure of justice. Similarly, attorneys who develop a larger, better-rounded skill set and diversify their daily work will be better equipped to provide the most

comprehensive and appropriate legal services to all of their clients. An added benefit for attorneys is broadening their expertise and professional development, which often leads to increased job satisfaction.

The Overlap of Domestic Violence and Human Trafficking

As an attorney or advocate serving victims of domestic violence, it is likely that you have already served trafficking victims, without you or your client necessarily framing the case as such. There are several common ways in which domestic violence and human trafficking overlap: there are individuals whose experience with domestic violence makes them vulnerable to traffickers; there are trafficking victims who are vulnerable to domestic violence upon their escape from trafficking; and there are the “intersection” cases which contain the elements of both domestic violence and human trafficking, occurring simultaneously.

In reading descriptions of these three types of situations, you may recognize some of your current or former clients. We encourage you to use this information with insights about prior cases you have handled in order to adapt your intake and screening tools to ensure that you identify these cases in the future.

People experiencing domestic violence are often vulnerable to traffickers, especially when economic abuse is part of the power and control dynamic in which a victim is caught. Many trafficking victims explain that they were willing to take a job abroad, or to accept unclear or risky employment conditions, as it was the only way to earn enough money to be able to care for their children without an abusive spouse’s economic support. Other victims recount that they were willing to accept the

risks because they already were facing great danger at home. Where abuse intersects with poverty, human trafficking is more likely to occur. This pattern of victimization will be easy for domestic violence attorneys familiar with the cycle of violence to recognize.

Similarly, trafficking victims are often vulnerable to domestic violence, especially if they escaped their trafficking situation unassisted or unsupported. Trafficking involves a deprivation of liberty, financial resources and independence, as well as emotional and physical abuse. Victims are often left in poverty with few marketable skills and greatly damaged self-esteem. Traffickers, like perpetrators of domestic violence, often use isolation to increase their power and control, leaving victims with no social network or support system. Trafficking victims who also lack legal immigration status are especially vulnerable to repeat victimization. A thorough discussion with a domestic violence client may reveal a past experience as a human trafficking victim, which may or may not have been previously recognized.

CASE STUDY

Carmen came legally to the United States to work as a housekeeper for a family of diplomats.¹ The husband sexually assaulted her, and the family only paid her \$50 a month. The wife yelled at her for the smallest perceived shortcoming and made Carmen work 12 hours each day. Carmen spoke little English and only left the house to go to religious services with the children of the family. She finally found someone at her church to talk to about her situation, a man in the choir, who offered her sympathy and found her a place to stay if she decided to leave. When she finally left, she moved in with his sister-in-law. They began dating within a few weeks, but he quickly became

¹ Throughout this guide, names and identifying details have been altered to preserve confidentiality.

violent toward her and said she owed him everything for his help in getting her away from the diplomats. By this time, however, Carmen knew other women at her church and was able to get help. Carmen was a human trafficking victim, whose trafficking made her vulnerable to the domestic violence that she encountered upon escape.

Finally, the most extensive form of overlap is the client who is being trafficked within an intimate partner relationship.² These situations are referred to as “intersection” cases, as they represent a direct intersection between domestic violence and human trafficking. While each case is unique, intersection cases share many characteristics. First, they involve intimate partner relationships. Second, they involve forced labor and/or commercial sex. Third, they are complicated. Often, there is a complex emotional relationship between the abuser/trafficker and the victim that can prevent her from seeking assistance, decrease the opportunities for support and assistance from her community, and cause confusion for law enforcement and benefits-granting agencies. The emotional ties and other complexities inherent in these cases are very familiar to domestic violence attorneys, and intersection cases are more common than many people realize.

CASE STUDY

Charu met her husband while they were both students at the University of Indiana.³ They married within months and Charu thought that she had found the traditional groom of her dreams, as he was living with his parents. However, it became shockingly clear to Charu, almost immediately, that what had been a love match for her was going to be nothing more than exploitative housekeeping for this family. Her mother-in-law forced her to do all the family’s cooking, laundry and cleaning. Charu had studied accounting, so her husband made her help for 10 hours a day in his small business, without compensation. He also forced himself on her sexually, including once immediately after she suffered a miscarriage. Twice, he struck her with such force that she fell on the floor. He told her that he would tell her family that she was a lazy, infertile whore if she complained or found outside employment. Charu was a victim of human trafficking within her intimate partner relationship.

² “Intimate partner relationship” includes, for the purposes of this guide, any dating or marital relationship. Trafficking can also exist in other types of relationships including families and friendships, but this guide focuses on cases within a dating, marital or other intimate partner relationship. Many of the same remedies and services will be available for other types of relationships.

³ See *supra* note 1.

CHAPTER ONE

Identifying Potential Human Trafficking Cases

What is Human Trafficking?

Human trafficking involves a pattern of power and control used to extract labor or services, often, but not always, for financial or material gain. U.S. law, through the Trafficking Victims Protection Act (TVPA), defines trafficking as:

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 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.⁴

One of the most common misconceptions about human trafficking is that it is primarily a crime of movement. It is not. In fact, the law does not require any movement or crossing of jurisdictional boundaries for a trafficking crime to occur. Human trafficking is primarily a crime of exploitation. Human trafficking occurs when an individual's freedom is curtailed and labor or other services are extracted through force, fraud, or coercion by another individual. This is an important nuance to keep in mind when working with clients who have not been transported across borders, as they may still be trafficking victims.

Another important element to trafficking is the other party's gain; for a crime of trafficking to occur, one

person must materially benefit from the exploitation of another by receiving something of value. While traffickers often benefit from the money that they earn from the exploited labor of the victim, this component is fulfilled if anything of value is exchanged, such as food, drugs, goods, and labor.

CASE STUDY

Sally was born and raised just outside of Chicago, in a small middle-class suburb. Sally's mother died when she was 16, leaving her confused and angry at a difficult time. Sally's boyfriend, Tom, was 18 and already living on his own. Within a year Sally was living with Tom and helping to pay the bills with a part-time job at a convenience store. That winter, construction jobs were hard for Tom to find, and the couple were about to be evicted. Tom convinced Sally that she owed him for all of the months of rent he had paid. He told her that she could make some quick money by having sex with a few guys; that no one would need to know; that Tom would protect her. To get through it, Sally got drunk. The next time, she got high. Each time, Tom took all of the money. He said it was safer if she didn't have to handle the money. When Sally told Tom she wanted to stop hooking, he would hit her. Then he would get her high. Then he would remind her of those months after her mother

⁴ Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7102 (8) (2008).

died when he held her all night long while she cried. He told her that he loved her, but that they needed the money; that she owed him. Sally is a U.S. Citizen victim of domestic violence and trafficking. Tom is using emotional coercion and physical violence to enslave Sally, but since Sally is a minor these factors are not required for a criminal prosecution of Tom as a human trafficker. Sally may be eligible for a range of social and legal services, but will not need immigration services.

Finally, people of all nationalities are trafficked, both within their own countries and/or to other “destination” countries. The TVPA created special remedies for trafficking victims who are non-U.S. Citizens or Lawful Permanent Residents (LPRs). These remedies include immigration options and social services.

CASE STUDY

Elizabeth lived with her abusive husband in Benin, and he denied her the money she needed to adequately provide for their children.⁵ Desperate to leave the violence and find a way to support her children, she responded to an ad that promised to place women in housecleaning agencies in the United States, where they would earn \$500 per week. She accepted the job, only to find herself trapped in involuntary servitude working in a restaurant in New York City for a man who failed to pay her, confiscated her documents, threatened to have her arrested if she complained, and denied

her any contact with the outside world, including her children in Benin. Elizabeth was a domestic violence survivor who was vulnerable to, and became a victim of, human trafficking.

Special services for trafficked youth, including U.S. citizens, were authorized by the Trafficking Victims Protection Reauthorization Act of 2005.⁶ Similar to the creation of the Violence Against Women Act (VAWA) self-petition process for battered immigrant women,⁷ specialized immigration remedies have been developed to prevent the use of immigration status as a weapon by traffickers. The specialized social services were made available because undocumented victims were not otherwise eligible to receive many public benefits. However, immigration or citizenship status is irrelevant to the definition of human trafficking. U.S. citizens of all ages may be trafficked in a variety of settings and may be eligible for a host of civil legal remedies and federal, state, and local social services (including food stamps, WIC and Medicaid).

A Note on Gender

Human trafficking, like domestic violence, affects all genders and ages within all types of relationships. In this guide, however, we will generally use female pronouns when speaking of clients because domestic violence providers are most likely to encounter female trafficking victims within their predominantly female client population.⁸ We note, however, that the type of labor or services for which victims are exploited is certainly gendered. Women and girls are more often trafficked for commercial sex, domestic servitude,

⁵ See *supra* note 1.

⁶ Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558, (codified in scattered sections of 18 and 22 U.S.C.).

⁷ See Chapter Two of this guide for a more comprehensive discussion of this remedy.

⁸ See, e.g., Bureau of Justice Statistics, Crime Data Brief, Intimate Partner Violence, 1993-2001, (2003) (reporting that 85% of victims of intimate partner violence are women, and 15% are men).

and garment factory work; whereas men and boys are more often trafficked for machine factory and farm labor. This guide, however, focuses on clients at the intersection of domestic violence and human trafficking where, in our experience, females are the majority of the victims. We in no way intend to minimize the reality that men can be, and are, victims of domestic violence and human trafficking, but for ease of reading we have selected this approach.

How Do I Identify Human Trafficking Victims Among My Clients?

Domestic violence attorneys have a unique opportunity to identify victims of human trafficking and to assist them in seeking legal relief.

First, it is important to educate yourself on the dynamics and circumstances common to human trafficking situations. Learn the definition and the warning signs and understand that human trafficking occurs in contexts other than those most often depicted by the media. For more general information about human trafficking, please see the resource section of this guide.

Second, review your intake forms and procedures. Consider adding some additional questions, such as those in the text box on this page.

Interview Questions

The following questions may be useful in screening your clients for human trafficking.

- Have you ever been forced to work?
- Did anyone ever threaten to hurt you or your family if you did not work?
- Did anyone force you to cook or to clean the house?
- Were you lied to about the kind of work you would be doing?
- Did anyone take your money?
- What would have happened if you did not give that person your money?
- What did you fear would happen if you left?
- Were you ever forced to do something sexual for your abuser or someone else?
- Have you been involved in commercial sex?
- Did you know others in the same kind of situation as you were in?
- Were you able to keep your identification documents with you, or did someone take them from you?

And for immigrant clients:

- How did you enter the United States?
- Were you able to keep your passport, visa or identification with you, or did someone take it from you?
- Were you working to pay off a smuggler or other debt?
- Were you free to find another job to pay the debt, or were you forced to work at a certain place?

Third, prepare yourself to represent trafficking victims, or to refer them to another attorney. The following chapters provide an overview of the legal remedies available to trafficking victims, some key practice pointers, and some important resources for practitioners representing trafficking victims. Whether you intend to represent trafficking victims yourself or refer them to others, you will need to develop a network of local resources. Victims will need access to legal, social service, medical and mental health providers who are familiar with human trafficking and who are willing and able to serve them. This area of the law is relatively new, so services can be difficult to find. Collaboration is essential. Fortunately, there are national resources available to provide technical assistance and to guide you to local organizations with expertise in social and legal services for trafficking victims. For more information about national and local resources, please see Chapter 4.

How Cultural Beliefs and Practices Can Affect Trafficking Case Recognition

Thuy's aunt introduced her to Thang, a Vietnamese man who had immigrated to the U.S.⁹ They corresponded by phone, mail and email for six months until Thang asked Thuy to marry him. Thuy was excited, but knew that her parents' permission was critical. Thang arrived in Vietnam and stayed with Thuy's family for two months. With Thuy's parents' approval, Thang and Thuy had a traditional Vietnamese engagement ceremony. Families and friends of the couple attended, including over 250 guests. As is common after an engagement ceremony, Thuy then moved in with Thang's family (an aunt and uncle who lived several hours away from Thuy's family in Vietnam) and lived there for four months while waiting for her visa. Once Thuy finally arrived in the U.S., she was excited to begin building a life with

Thang. However, Thang was not the loving suitor he had been while visiting Vietnam. He left Thuy living with a friend, claiming that he needed to finish preparing their marital home. She was forced to work in the friend's restaurant for 12 hours a day and was not paid. Thang would visit weekly and spend the night with Thuy. She believed it was her duty to repay the friend for her room and board and to show that she was a hard-working and obedient wife. Thang warned her that if she displeased him she would be returned to her family in Vietnam, a potent threat for a traditional Vietnamese woman. Thang threatened that he had sponsored Thuy and that he could have her deported. He pointed out that the Vietnamese engagement ceremony was meaningless to U.S. authorities and that if she did not please him he would not complete the marriage and Thuy's visa would expire. Thuy knew that her family would be devastated if she returned home from the U.S. without a husband. Since the entire community had attended her engagement ceremony, if she returned they would believe that she was a bad woman and worthless as a wife. The government had removed her from her family's household registration when she moved to the U.S. If she returned, she would face discrimination in housing, schooling, and employment.

Thuy is a victim of trafficking within her intimate partner relationship, but this may be a difficult case to present for criminal prosecution or immigration relief. Since Thuy is not married to her abuser, she is not eligible for a VAWA self-petition, although this wouldn't be a bar for the U or T visa. Because she was not enslaved through force or threats of force, but rather through cultural factors unique to her community, immigration and law enforcement officials may not recognize human trafficking without extensive education and advocacy.

⁹ See *supra* note 1.

The Special Complexities of Intersection Cases

Recognizing cases and clients that raise issues related to both domestic violence and human trafficking is critical and these cases are complex. These cases may present as either pure trafficking or pure domestic violence cases or even simple wage and hour cases. As is common for domestic violence victims, clients may be unwilling to describe their relationship, uncomfortable or emotionally unable to discuss the abuse in detail, or unaware that the abuse is unlawful. The legal requirements for relief may not coincide with the elements of the relationship that were most painful for the client and the words she uses to express them. Cultural beliefs (held by the client, advocate, law enforcement officer or prosecutor) about the role of women in relationships also can serve to camouflage these cases.

The existence of an intimate partner relationship, especially marriage,¹⁰ generally leads advocates, attorneys, and law enforcement to assume an abusive or exploitative situation is domestic violence and to discount human trafficking. Do not let the existence of the intimate partner relationship and of familiar legal remedies end the inquiry. The client may have additional remedies available and pursuing them may not only benefit her, but result in the protection of other women from the same fate.

Family-Based Immigration: A Modern Day Slave Route

In an attempt to evade increasing immigration enforcement, some traffickers look to family-based immigration options to entrap a slave from overseas. These options include both marriage and adoption. A marriage, for example, may have been arranged by family members through family friends or acquaintances, via an internet connection (including “mail order bride” websites or marriage brokers) or have developed out of a romantic relationship. The couple may have known each other or each other’s families for many years or have only met at their wedding ceremony. Enslavement also occurs through adoptions, when a child is adopted legally, but the adopting family intends only to force the child to engage in labor or commercial sex. The victim may believe that he or she is indebted to, and/or legally bound to the trafficker. The victim may believe that he or she cannot leave without fear of deportation or imprisonment. The victim may have family ties that would lead to great shame, severe ostracism, or further abuse upon ending the relationship.

To determine whether a case constitutes a domestic violence and human trafficking intersection case, two key components must be satisfied:

- 1 Presence of an intimate partner relationship.** The victim is/was in an intimate relationship with the abuser/trafficker; and
- 2 Presence of labor, commercial sex or “involuntary servitude”¹¹ performed under force, fraud or coercion, or commercial**

¹⁰Marriage has a special connotation in many cultures of being beneficial, loving, safe, and important to society. These associations make it especially difficult for many people to identify trafficking within the relationship.

¹¹“Involuntary servitude includes a condition of servitude induced by means of, “any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint.” 22 U.S.C. § 7102(5)(A) (2008).

sex involving a minor. This includes any commercial element in which the abuser/trafficker benefits from the victim's labor. The labor performed may be highly varied, including cleaning the home, performing sexual acts for the abuser or others or working in a business owned by the abuser, his family, or others. The victim may be unpaid, underpaid, or face confiscation of her pay. The labor is mandated by the abuser through force, threats of force, or psychological coercion. The abuser may threaten deportation, arrest, harm to family members in the U.S. or elsewhere, or damage to the victim's reputation (or the reputation of her family). Sex trafficking of a minor does not require a showing of force, fraud or coercion.

Practice Pointers for Intersection Cases

Keep the following tips in mind as you explore potential intersection cases:

Ask about all kinds of work: Clients may not describe themselves as having been forced to work, but a discussion may reveal that when the client was sick and unable to clean the house, she was beaten. You may find that she was expected to clean not only the home that she shared with the abuser, but also that of the abuser's mother/sister/friend. You may find that she was forced to work in the business operated by the abuser or his family members. You may find that seemingly routine housework was required to an abusive degree. For example, the victim was beaten if any dust was visible.

Ask who chose the work: Exploitative labor situations abound with low pay and terrible working conditions. The key distinction between labor exploitation and trafficking is that trafficking victims cannot choose their employer or decide

when to leave. A domestic violence victim may be working at her abusive spouse's restaurant because she does not have a car or because she shares in the proceeds. A trafficking victim works in the restaurant because she is told that if she tries to get another job she will be thrown out on the street or because she is taken there every day and told she cannot leave until she finishes the dishes from the dinner service.

Ask about sexual abuse: Sexual abuse is always difficult for a client to discuss, but when you do discuss it you may find that the client was forced to engage in sexual acts with others as repayment for her abuser's debt or for payment (collected by her abuser). U.S. law describes sex trafficking as any sexual act induced by force, fraud, or coercion for which anything of value was exchanged.¹² Sex trafficking of a minor does not require force, fraud, or coercion, just a sex act in exchange for something of value. The premise of the law is that sexual consent from a minor is not possible.

Follow the money: If the client received any money for any labor or services, but the money was taken by the abuser, ask more questions. If she was working, but not keeping any of the money, find out why. This is a classic marker of trafficking—labor without adequate pay. If she really enjoyed her work but believed it was best for her spouse to handle the finances of the home and generally agreed with his financial decisions, it is probably not trafficking. Any situation short of that is potentially trafficking, but the coercion may be very subtle and culturally embedded.

Once you have identified an intersection case, you have a lot of decision-making to do. There are a variety of remedies available, but you may have to choose which to pursue and in what order. Keep in mind that the client may have remedies that

¹²“Sex trafficking means, “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.” 22 U.S.C. § 7102(9) (2008).

are unrelated to the victimization. For example, immigration remedies unrelated to victimization include temporary protected status, a family-based visa, a student visa, and/or an unrelated asylum claim. Those options are important to keep in mind but are thoroughly explored in other training materials. Please see the resources section for additional information on these remedies. Here, we will discuss only the remedies that directly relate to human trafficking and domestic violence.

Law Enforcement Referrals: What Will You Do?

Domestic violence programs around the country are increasingly being asked by law enforcement agencies to serve human trafficking victims. These clients' cases may be trafficking but may or may not be domestic violence cases. The victims are usually (but not always) women. The law enforcement agency is trying to find the most appropriate provider to serve these high-need clients, and there may not be a trafficking program in your area. Referrals from law enforcement tend to be for clients who were identified during a workplace raid or an anti-prostitution enforcement action. Before accepting such a referral, your agency should consider the ways in which trafficking clients may be different from domestic violence clients. Some key distinctions include:

- ▶ Trafficking victims who were “rescued” from the trafficking situation may not identify themselves as victims. They may be skeptical, or even resentful, of your services;
- ▶ The clients may have been arrested and detained in a jail for some time before being referred to you. They may think that you are connected to law enforcement and may have trouble trusting you;

- ▶ The clients may be emotionally connected to the trafficker and eager to return to the trafficker as soon as possible. They may be contacting the trafficker by phone and revealing your location;
- ▶ The clients should not participate in group therapy or discuss the trafficking situation with anyone who does not have a legal privilege (such as a lawyer or doctor);
- ▶ It is unlikely that law enforcement will tell you the whole story, either because they do not know it yet or to protect their ongoing investigation;
- ▶ Law enforcement may not understand that you have privacy protections for your clients and may expect that you will actively assist with their investigation;
- ▶ Law enforcement may not understand that you run a voluntary program and may expect that you will keep the client with you regardless of her desire to leave your facility.

These clients are often in need of very intensive case management and may need immediate medical and mental health care. Increasing access to comprehensive services for trafficking victims is an important goal. Your agency may be able to expand services to accommodate this incredibly vulnerable population, but it must be done thoughtfully. Begin to explore these issues with your organization before the referral comes to your door, and you will be better prepared to set reasonable limits with law enforcement and to provide appropriate services to these clients.

CHAPTER TWO

Civil Legal Remedies for Human Trafficking Victims

Litigating Civil Actions for Trafficking and Domestic Violence Victims

Once you identify a trafficking victim among your clients, you may choose to take the case yourself or refer the client to another attorney depending on a variety of factors, including the availability of resources and expertise. The following is an introductory roadmap to the civil remedies that may be available to your client should you decide to take the case.

Civil litigation can be an enormously powerful tool to seek redress for the harms done to trafficking and domestic violence victims. With some remedies, litigation may restore earnings, help victims pay off trafficking-related debts, or give victims a sense of justice in punishing the trafficker. In all cases, the victim drives the decision-making; as opposed to being the victim-witness in a criminal case controlled by the prosecution, the client is the center of the civil case. This role can be particularly vital in the process of empowerment.

It is crucial, however, to advise the client about the potential negatives of civil litigation. It can be time-consuming and drag on well past the time that the client just wants to move on with her life. It can be arduous, particularly during the discovery phase, requiring that the client provide ever greater levels of detail about her story. It can be frightening to face the trafficker across the litigation table, in a

deposition or during trial, and it may increase the risk to the victim's safety. All of these aspects need to be discussed with the client before considering whether to pursue a civil cause of action at all.

There are many different civil claims that can be brought on behalf of a trafficking victim. In intersection cases, a victim may benefit from a civil protection order. Causes of action exist at the federal and state levels, and in any given case, a different combination of these may be appropriate. Just like any complex civil litigation, strategy and timing are essential to effective representation. This chapter is not intended to be a comprehensive exploration of those issues. Several other extensive, more appropriate resources are available to assist you if you decide to litigate a case on behalf of a victim of trafficking.¹³ Please see Chapter 4 for information regarding additional, similarly helpful resources.

Please note that most of these claims may be brought in the same lawsuit. It is not necessary to file, for example, one case for wages and another for assault. One single case might have a dozen or more different causes of action. Statutes of limitation for some of these causes of action run fast, however, so it is best to determine if your client is eligible for this range of remedies quickly.

¹³One popular resource is Daniel Werner & Kathleen Kim, *Civil Litigation on Behalf of Victims of Trafficking* (S. Poverty Law Ctr. 3d ed.) (2008), available at http://library.lls.edu/atlast/HumanTraffickingManual_web.pdf.

The Trafficking Victims Protection Reauthorization Act and State Law Trafficking Claims

The Trafficking Victims Protection Reauthorization Act of 2003 provides a specific mechanism to allow many trafficking victims to file civil lawsuits.¹⁴

The claim must allege one of three kinds of harm: (1) forced labor, (2) trafficking into servitude or (3) sex trafficking by force, fraud, or coercion, or of children under 18.¹⁵ The 2003 TVPRA does not specify remedies but permits victims of forced labor, trafficking into servitude, or sex trafficking to seek damages generally. Punitive damages in such cases can be extensive, so this claim may provide a valuable opportunity for compensation if the underlying elements of the claim are all present. As of the writing of this guide (Summer 2009), there is no statute of limitations for filing a claim under the 2003 TVPRA.

In addition to federal claims, you may want to explore state anti-trafficking laws in your jurisdiction. Most states have criminal code provisions making trafficking a felony.¹⁶ Some states may also provide benefits and services for human trafficking victims while federal TVPRA claims are pending, and some have created causes of action for a civil case to recover penalties,

actual damages, and statutory damages.¹⁷ For more information, please see Chapter 4.

Employment Law Claims

Trafficking victims are often forced or otherwise coerced into slave labor, including involuntary servitude in private homes, restaurants and sweatshops, among other places. State and federal employment law protections may provide victims with much-needed economic resources, in addition to penalizing the trafficker financially. Trafficking victims may have access to employment protections from one or more of three sources: (1) federal and state wage and hour laws; (2) federal and state laws such as anti-discrimination and anti-harassment in employment; and (3) tort remedies.

Federal and State Wage and Hour Claims:

The federal Fair Labor Standards Act (FLSA)¹⁸ and analogous state wage and hour laws provide several possible economic remedies for a victim who was denied or deprived compensation for work performed. The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in federal, state, and local governments.¹⁹ Covered “nonexempt”²⁰ workers are entitled to a federally-established minimum wage.²¹

¹⁴Trafficking 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.).

¹⁵18 U.S.C. § 1595 (2008).

¹⁶Center for Women Policy Studies, US PACT [Policy Advocacy to Combat Trafficking], *Fact Sheet on State Anti-Trafficking Laws* (December 2007), <http://www.centerwomenpolicy.org/programs/trafficking/facts/documents/FactSheetonStateAntiTraffickingLawsDecember2007.rev9208.pdf>.

¹⁷To find out more about the available state remedies in your jurisdiction, see Center for Women Policy Studies, US PACT [Policy Advocacy to Combat Trafficking], *State Laws/Map of the United States*, available at http://www.centerwomenpolicy.org/programs/trafficking/map/default_flash.asp.

¹⁸Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201-219 (2000); *see also* 29 C.F.R. §§ 500-794.

¹⁹For current information and overview regarding the Fair Labor Standards Act, *see* U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division at <http://www.dol.gov/esa/whd/flsa/> (last visited September 9, 2008).

²⁰29 U.S.C. § 213(a)(1) (2004) and § 213(a)(17) (2004) provide an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional, outside sales employees, and certain computer employees. All other employees (including most trafficked employees) are “nonexempt,” and are therefore subject to the terms of the FLSA.

²¹29 U.S.C. § 206 (2007).

Many states and localities also have minimum wage laws. In cases where an employee is subject to both local and federal minimum wage laws, the employee is entitled to the higher minimum wage.²²

Covered nonexempt employees must receive overtime pay (at least 150% of regular pay) for hours worked over 40 per workweek.²³

Importantly, FLSA applies to employees regardless of their immigration status.²⁴ This is important because many trafficking victims are undocumented immigrants. Moreover, courts have held that it is illegal under FLSA to report a worker to the Department of Homeland Security as retaliation for a wage and hour complaint.²⁵

An employer who violates FLSA is liable to the employee for the unpaid wages and an additional equal amount as liquidated damages.²⁶ If the employee is successful in her FLSA claim, she can also be awarded reasonable attorneys' fees and costs to be paid by the defendant.²⁷ As a result, there should be experienced attorneys interested in working with you to bring these claims. Some large firms are willing to take such cases on a *pro bono* basis and donate the recovered fees to the non-profit organization which is primarily serving the client.

Federal and State Anti-Discrimination in

Employment Claims: When a human trafficking victim experiences sexual harassment or sexual assault at work, either inside the building or on premises controlled by the employer (who is often also their trafficker), she may be able to avail herself of protections under state and federal anti-discrimination laws if her employer fails to take action regarding the assault or retaliates against her for reporting it.

Title VII of the Civil Rights Act of 1964 (Title VII), as amended, prohibits discrimination against an employee in hiring, in the terms and conditions of employment, and in firing based on sex (including pregnancy), race, national origin, religion and color, for employers with 15 or more employees.²⁸ Courts have also recognized that sexual harassment is a prohibited form of sex discrimination.²⁹ An employer can be held liable if it failed to exercise reasonable care to prevent and correct the behavior, and the employee did not unreasonably fail to take advantage of corrective opportunities provided by the employer.³⁰

Sexual assault may also constitute sexual harassment when the perpetrator is a supervisor or otherwise an agent of the employer, and commits an act of rape or sexual assault on the job. Rape may create a sufficiently severe or pervasive hostile environment to hold an employer liable for the

²²29 U.S.C. § 218 (2006).

²³29 U.S.C. § 207 (2006).

²⁴*See, e.g., Montoya, et al. v. S.C.C.P. Painting Contractors, Inc., et al.*, 530 F.Supp.2d 746 (D. Md. 2008); *E.E.O.C. v. City of Joliet*, 239 F.R.D. 490 (2006); *Galaviz-Zamora, et al. v. Brady Farms, Inc.*, 230 F.R.D. 499 (W.D. Mich. 2005).

²⁵*See, e.g., Sigh v. Jutla & C.C.&R's Oil, Inc.*, 214 F.Supp.2d 1056 (N.D. Cal. 2002); *Contreras v. Corinthian Vigor Insurance Brokerage, Inc.*, 25 F. Supp. 2d 1053 (N.D. Cal. 1998).

²⁶29 U.S.C. § 216(b) (2008).

²⁷29 U.S.C. § 216(e) (2008).

²⁸42 U.S.C. § 2000e (2006).

²⁹*See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

³⁰*Id.*

resulting damages.³¹ It may also constitute sexual harassment when the perpetrator is a co-worker or non-employee such as a customer, and the employer knew or should have known of abuse that involved the workplace and failed to take prompt and appropriate remedial action.³² Sexual harassment laws apply to all employees, regardless of the relationship between the perpetrator and the victim.³³

Importantly, like FLSA, Title VII applies to employees regardless of their immigration status.³⁴ Because lawsuits filed under Title VII provide for attorney's fees and substantial damages, it is often possible to find lawyers who will undertake these cases, if the considerable demands of a Title VII case are beyond your own resources.

Civil Rights Act of 1866 and 1870, 42 U.S.C. §§ 1981, 1983: Claims for race and national origin discrimination may also be brought under the Civil Rights Acts of 1866 and 1870. Known more broadly as section 1981 and section 1983 claims, these sections were specifically created to prevent race discrimination by private actors, but they have been applied to address discrimination based upon

national origin. Section 1981 protects the rights of all persons to enter into and enforce contracts. Amended in 1991,³⁵ the law also provides expanded remedies for intentional discrimination. Importantly, there is no minimum size requirement, thus small businesses and companies may be sued.

Intentional Torts: Assault and Battery

In many intersection cases, there has been battery, assault, or sexual assault. One strategy in a lawsuit may be to include these intentional torts as claims within the lawsuit, for at least three reasons. First, the harms were done and including them more fully captures the harm done to the victim than a case that only seeks payment of wages. Second, these claims can yield significant damages for physical and emotional harm and punitive damages. Third, this may be the best option for sex trafficking cases or more subtle cases of labor trafficking when it may not be possible to recover wages.

The statutes of limitations for intentional torts vary by state. Therefore, these claims must be monitored carefully so that they are not lost.

³¹See, e.g., *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (sexual assault by supervisor with whom employee had a prior social relationship); *Little v. Windermere Relocation, Inc.*, 265 F.3d 903, 911 (9th Cir. 2001) (serial rape on one occasion during business trip); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995); *Brock v. United States*, 64 F.3d 1421, 1423 (9th Cir. 1995) (every rape committed in the employment setting is also discrimination based on the employee's sex); *Jones v. United States Gypsum*, 81 FEP Cases (BNA) 1695 (N.D. Iowa 2000).

³²See, e.g., *Little v. Windermere Relocation, Inc.*, 265 F.3d 903 (9th Cir. 2001) (rape by client); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1012 (8th Cir. 1988) (unwanted touching and offensive comments by co-workers); *Menchaca v. Rose Records, Inc.*, 67 Fair Empl. Prac. Cases (BNA) 1334 (N.D. Ill. 1995) (harassment by employer's customer); *Otis v. Wyse*, 1994 WL 566943 (D. Kan. 1994) (harassment by co-worker); *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1025-1026 (D. Nev. 1992) (harassment by employer's customer); see also 29 C.F.R. § 1604.11 (d) & (e) (EEOC guidelines confirming employers' liability for sexual harassment by co-workers and customers).

³³See, e.g., *Fuller v. City of Oakland*, 47 F.3d 1523 (9th Cir. 1995) (holding city liable for failing to take steps to stop a police officer from harassing another officer after she ended their relationship); *Excel v. Bosley*, 165 F.3d 635 (8th Cir. 1999) (finding that sexual harassment at work by employee's ex-husband violated Title VII).

³⁴Most but not all remedies apply to workers regardless of immigration status. Compare *Galaviz-Zamora, et al v. Brady Farms, Inc.*, 230 F.R.D. 499 (W.D. Mich. 2005) (holding that immigration status is not relevant to claims for wages already earned) with *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (holding that undocumented workers are not entitled to backpay for time that they have not actually been working).

³⁵Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

Contractual and Quasi-Contractual Claims

A civil lawsuit may also raise contractual and quasi-contractual claims. These are important where either the promised wage was significantly higher than the minimum wage, or where the market value of the labor was significantly higher than the minimum wage.

A claim based on breach of contract simply needs to allege the basic elements of any contract case: formation of a contract, breach of contract, and harm. In a trafficking case, contracts are often fraudulently made by the trafficker but accepted in good faith by the worker. Courts will enforce such a contract when breached and when your client has suffered harm. No liquidated or punitive damages are available, however, under a pure contract claim. Generally, a contract claim seeks only compensatory damages.

A claim based upon unjust enrichment is a quasi-contractual claim recognizing that sometimes people are hired without an explicit wage being set but with an understanding that they will be paid appropriately for their services. In your lawsuit, you could seek redress for unjust enrichment when the trafficker wrongly benefits from the labor of your client. In such a case, the money sought would be equivalent to the prevailing wage for such labor, which will almost always be higher than the minimum wage and is therefore worth including in case a particular job is found not to fall within the FLSA's protections.

Similar to unjust enrichment is the principle of *quantum meruit* which allows the worker to seek compensation for work performed.

Civil Protection Orders

Domestic violence attorneys are already well aware of the utility of civil protection orders (variously known as CPOs, PFAs, peace orders, or restraining orders, depending on the jurisdiction). Civil protection orders for victims of domestic violence are available in every state, and jurisdictions have begun to enact statutes creating CPOs specifically for victims of sexual assault and stalking.³⁶

Clearly, the same factors that would encourage a client to seek a CPO in any domestic violence, sexual assault, stalking or harassment case also may exist in a case that intersects with human trafficking. The CPO may be a valuable tool, especially in the short term, to assist with some of your client's immediate needs and to facilitate future legal actions. The majority of states have "catch-all" provisions in their CPO statutes that can be used for relief above and beyond the basic "stay-away" provisions. This can be extremely useful when the trafficker has control of your client's passport or immigration documents, or if your client left photos or documents behind which might help her with one of her civil claims (e.g. a marriage certificate, or an original contract). Clients also may have fled in fear and simply left behind personal items that are not replaceable (phone book, gifts, items with sentimental value). Where possible, the CPO should seek return of all of those items, especially anything that could make the client's immigration or other civil case easier.

Immigration Remedies

There are a variety of immigration remedies that may be available to victims of domestic violence and human trafficking who are non-U.S. citizen

³⁶For additional information about civil protection order statutes, see the Statutory Summary Charts section of the ABA Commission on Domestic Violence website, at www.abanet.org/domviol (last visited Apr. 13, 2009).

(and generally non-LPR³⁷) victims. The remedy crafted specifically for trafficking victims is the T visa. The options that exist specifically for domestic violence victims are the Violence Against Women Act (VAWA) self-petition, the battered spouse waiver, and VAWA cancellation of removal. Other options may be the U visa for victims of crime (including domestic violence, trafficking, and other crimes) and asylum.

There are other forms of permission to remain in the U.S., such as continued presence (for trafficking victims assisting a law enforcement agency with the investigation or prosecution of a trafficking case) or the S visa (sometimes called the “snitch visa” for victims or witnesses assisting law enforcement with the investigation or prosecution of organized crime), but these do not confer long-term legal status. These options are initiated by the government only and may enable your client to remain here temporarily with employment authorization while a case is being pursued against a trafficker. Depending on the particular facts of your client’s situation, she may be eligible for several of these options. In most cases, it is possible for your client to pursue multiple remedies concurrently.

Please bear in mind that children may have their own immigration remedies, some of which are the same as those described in this guide and some of which are child-specific. For more information on representing trafficking victims who are minors, or who were minors during their victimization, refer to Eva Klain & Amanda Kloer, Amer. Bar Ass’n, *Meeting the Legal Needs of Child Trafficking Victims: An Introduction for Children’s Attorneys & Advocates* (2008).

VAWA Self-Petition: In the normal course of events, a U.S. citizen or lawful permanent resident (LPR) may petition for a spouse or child to gain lawful permanent residency. However, in abusive relationships, the abuser often refuses (or “forgets”) to complete (or even begin) this process, because he is aware that gaining immigration status removes one of the spouse’s sources of vulnerability and dependence.

CASE STUDY

The story of Charu (described in the Introduction), who married her abuser/trafficker, is an example of a case where a trafficking victim also could be eligible to file a VAWA self-petition. Because her abuser/trafficker was a U.S. citizen, and they were married, Charu would be able to file an application for her green card at the same time that she files her VAWA self-petition. This may make the VAWA self-petition the remedy of choice for Charu, despite her eligibility for other kinds of relief. It might be advisable to concurrently pursue a T visa or continued presence, however, if Charu is in need of public benefits or specialized social services reserved for trafficking victims.

The Violence Against Women Act of 1994 (amended in 2000, and again in 2005)³⁸ recognized this problem and provided a route for abused spouses and children to petition for themselves and not be reliant upon the abuser to file the petition.

³⁷Victims who are lawful permanent residents (LPRs) may not need any further immigration remedies that are specific to their victimization; they will be eligible for U.S. citizenship within three to five years and can apply independently. However, if the client may have obtained her status fraudulently (perhaps due to the abuse) or if she has family members in her home country that she would like to bring to the U.S., she may need to renounce her LPR status and apply for one of the remedies described here to correct the fraud or to more expeditiously bring the family members to the U.S.

³⁸Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1902 (1994), *amended by* the Battered Immigrant Women Protection Act, Pub. L. No. 106-386, 114 Stat. 1518 (2000), *and* the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-62, 119 Stat. 1990 (2005).

The spouse must show that:

- 1 The abuser is a U.S. citizen or LPR;
- 2 There is/was a valid good faith marriage, i.e., not entered into solely for immigration purposes;
- 3 There was physical or emotional abuse;
- 4 The petitioner resided with the abuser; and
- 5 The petitioner is a person of good moral character.

An approved petition will generally lead to an employment authorization document (or “work permit”), limited eligibility for federally-funded public benefits, and eventual (in some cases more immediate) eligibility to adjust to LPR status and then citizenship. Petitioners can include their children as derivative beneficiaries, and there are provisions relating to self-petitions based on the abuse of one’s children. The government is not permitted to divulge information about a petition to an abuser, and the government cannot rely solely on information from the abuser in taking action against a victim. There are several excellent resources that detail this well-established remedy. See the list of resources in Chapter 4.

Battered Spouse Waiver: Sometimes the LPR or citizen abuser will petition for the spouse to gain LPR status. If the application is approved during the first two years of the marriage, the spouse receives conditional residency, which is valid for two years.³⁹ At the end of two years, the couple petitions *jointly* to “remove the conditions” and make the residency permanent. However, abusers often use

this requirement as a tactic to assert their power and control over their spouse by refusing to file the joint petition or to follow through with the process.

CASE STUDY

Josephine was living in California when she met the U.S. citizen who would become her husband.⁴⁰ He filed for her green card after their marriage, and she was granted conditional residence. A year into their marriage, he became violent toward her. To finance his drug use, he forced Josephine to take over the daily operations of his small convenience store, and confiscated the profits. For her 14-hour days, she earned no money, and he used the store’s security cameras to make sure she was not engaging in conversations with the customers. When she did, he beat her. He told her he would have immigration officials arrest and deport her if she ever left him, and he refused to file the paperwork necessary to make her conditional residency permanent. Josephine is a trafficking victim whose most immediate immigration relief is through a battered spouse waiver, although she also may be eligible for other immigration remedies.

There is a waiver of the joint filing requirement for domestic violence victims, generally referred to as the “battered spouse waiver.” It permits abused spouses to petition to remove the conditions independently. A similar provision exists where a

³⁹The two year conditionality is a result of the Immigration Marriage Fraud Act, which responded to concerns over immigration fraud by requiring that all marriage-based residency cases granted while the marriage was less than two years old would be required to undergo a second review two years after the first review. The same legislation created a waiver of this requirement for victims of domestic violence, the first immigration remedy created specifically for domestic violence victims. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended at 8 U.S.C. §§ 1154, 1184, 1186a (1994)).

⁴⁰See *supra* note 1.

good faith marriage nonetheless ends in divorce. Children of victims who have conditional residency may qualify to be included in this petition.

The battered spouse waiver was the first immigration remedy crafted for domestic violence victims. It was included in the Immigration Marriage Fraud Amendments of 1986.⁴¹ It is a written petition that confers LPR status, and the petitioner needs to show that:

- 1 There is/was a valid good faith marriage, i.e., not entered into solely for immigration purposes;
- 2 There was physical or emotional abuse;⁴² and
- 3 The petitioner is currently a conditional resident.

There are several excellent resources that detail this remedy. See Chapter 4 for further information.

VAWA Cancellation of Removal: For victims who are in removal (also known as deportation) proceedings, a special remedy called VAWA cancellation of removal may be their best option. The “cancellation” refers to cancellation of the removal proceedings and the granting of lawful permanent residence. The victim must prove to the immigration judge that:

- 1 The abuser is a U.S. citizen or LPR;
- 2 There is/was a valid good faith marriage, i.e., not entered into solely for immigration purposes;
- 3 There was physical or emotional abuse which occurred in the U.S.;
- 4 The victim has at least three years of physical presence in the U.S.; and
- 5 The victim and/or her parents or child(ren) would suffer extreme hardship from her deportation.

CASE STUDY

In the example of Thuy and Thang (described in the Introduction), Thuy was forced to work for her abusive spouse as soon as she arrived in the U.S. Thang, her husband, left her to live with, and work for, others. Thuy may not be eligible for a VAWA self-petition, since she did not live with her spouse. However, if Thang does marry her, and if she has been in the U.S. for three years, VAWA cancellation of removal might be an option for her, especially if law enforcement is unable to recognize that her experience constituted trafficking or if she is unwilling to report Thang to law enforcement. Many trafficking victims in intersection cases are unwilling to make reports to law enforcement because they are related to the trafficker and reporting them would bring great shame and humiliation to the family. If Thuy is not already in removal proceedings, she would have to present herself to DHS to request being placed in removal proceedings in order to apply.

This remedy is less commonly used than others because denial leads to deportation. Victims may be eligible for employment authorization (“work permit”) during the removal proceedings which can last for several months to several years. A non-abused parent can file for cancellation as the parent of an abused child. However, a child cannot be included in the parent’s application but can apply for cancellation directly if s/he was also abused (note that several studies show that witnessing abuse of the parent causes injury to the child). Alternatively, once the parent’s application is approved, children can be granted parole which will last until the child is granted lawful permanent

⁴¹See *supra* note 39.

⁴²Although the regulations contain a requirement for a psychological evaluation for applications based on emotional cruelty, that requirement was eliminated and is *not* required by USCIS.

residency through another process (for example, the parent can file a family-based petition for the child).

T Visa: The Trafficking Victims Protection Act (TVPA) of 2000⁴³ provided an avenue for lawful immigration status for trafficking victims. Applicants must prove that they are:

- 1 A victim of a severe form of trafficking in persons;⁴⁴
- 2 Physically present in the U.S. on account of the trafficking;
- 3 Cooperating or have cooperated—or made reasonable efforts to cooperate—with law enforcement in the investigation of the trafficking; and
- 4 Likely to suffer extreme hardship if removed.

The T visa provides legal immigration status for four years, work authorization, and the opportunity to apply for lawful permanent residence. Certain close family members also can be included in the application as derivatives.⁴⁵

CASE STUDY

Hope came to the U.S. to be with her boyfriend, a man who had been violent toward her in their home country, but who she believed had changed.⁴⁶ When she arrived, however, the violence persisted with the added humiliation of it happening in public because they shared their living space with some of his friends. Hope's boyfriend found her a job at the upscale market where he was a manager,

but he confiscated all of her earnings. He kept her passport and told her how the police in America beat immigrants when they arrest them. After two months, Hope realized things would never improve and that she had to leave him. Hope may be eligible for a T visa if she is willing to file a report against her abuser (either to local police or federal authorities).

The T visa may be superior to other immigration options for two reasons. First, T visa recipients also are eligible for a wide range of specialized social services and benefits. Second, the victim's cooperation need not be certified by law enforcement (unlike the U visa, as explained later); instead, the victim may show the ways in which she attempted to cooperate, for example, by making reports to different law enforcement agencies about the trafficking. Minors are not subject to the cooperation requirement to get a visa, but may need to at the adjustment of status stage. For more information about filing T visas for minors, refer to the list of resources in Chapter 4.

This is a relatively new remedy, and many nuances of eligibility remain. Adjustment of Status regulations have recently been published, so the path to lawful permanent residence and citizenship is still being clarified for T visa holders. A report to law enforcement *is* required (except for minors), but a certification of cooperation is *not* required; secondary evidence of cooperation is acceptable. There is a filing deadline (with possible exceptions) only for cases where the victimization ended before October 2000; victimizations that

⁴³TVPA, *supra* note 5.

⁴⁴Defined as “(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.” 22 U.S.C. § 7102(8) (2008).

⁴⁵Victims over the age of 21 may include their spouse and/or children on their applications. Victims under the age of 21 may include their spouse, children, parents and/or unmarried siblings. 8 U.S.C. § 1101(a)(15)(T)(ii) (2009).

⁴⁶*See supra* note 1.

occurred or lasted after that date have no application deadline. Applicants are eligible for social services and benefits, and can include their spouse and/or child(ren) in the application. Unlike previously described remedies, minor victims can also include their parents and unmarried siblings in the T visa application.

U Visa: A U visa is a special visa for victims of certain criminal activities—including domestic violence and human trafficking—who cooperate with law enforcement in the investigation or prosecution of those crimes. The visa lasts for four years and a recipient may apply for a work permit. Certain close family members also may be included in the application.⁴⁷

CASE STUDY

Maryam was living undocumented in the U.S. when she began a romantic relationship with a U.S. citizen who refused to marry her and became emotionally and psychologically abusive.⁴⁸ She was working but he made her put all her earnings in a joint bank account, for which he had the only ATM card, and he spent all of her money. She was frustrated by this but was raised to believe that a woman should support the man and provide whatever he needs. She felt that she needed to prove her value to him so that he would marry her. One day, he threw the telephone hard at her head when he thought she was talking to a man. Bleeding, she fled from their apartment, and a passerby called the police. The police took a report, and the abuser was arrested but never prosecuted. Maryam is eligible for a U visa on the basis of the assault, despite the fact that it was never prosecuted. She also may have a T visa option, but it is a more

challenging case factually, particularly since she had friends and stayed not through force, but from hope and culturally-based beliefs that were manipulated by her abuser. Law enforcement and immigration officials do not always understand the more subtle forms of coercion that are based in cultural beliefs and practices.

Unlike all of the other immigration remedies discussed here, a U visa petitioner *must* submit a certification from law enforcement. Chapter Three addresses this requirement in more detail.

As long as the victim never refused reasonable requests for cooperation from law enforcement, there is no requirement that the case results in an investigation or prosecution; however, in practice, it is easier to get certifications where there has been, at the very least, a criminal investigation.

This is a new remedy; the regulations were recently published as of the publication of this guide, so there are many unanswered questions. Practitioners may need to devote considerable time to convincing law enforcement to set up a certification process. The victim may have any relationship to the trafficker or no relationship at all, making this the remedy of choice for domestic violence victims who were not married to their abusers; whose abusers are neither U.S. citizens nor LPRs; or where the abuse does not amount to trafficking. Unlike the T visa, the U visa does not require a showing of hardship upon removal. Approved U visa holders may be eligible to become lawful permanent residents after three years, but relevant regulations have just been published and the process is still slow and confusing. Applicants can include their spouse and/or child(ren), and

⁴⁷As with the T visa, victims over the age of 21 may include their spouse and/or child(ren) on their applications. Victims under the age of 21 may include their parent(s), spouse, child(ren) and/or unmarried siblings under the age of 21. 8 U.S.C. § 1101(a)(15)(U)(ii) (2006).

⁴⁸See *supra* note 1.

minor victims can also include their parents and unmarried siblings.

Asylum: Asylum may be available for someone who is “outside of his or her country of nationality who is unable or unwilling to return because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁴⁹

CASE STUDY

Edith came to the U.S. on a student visa.⁵⁰ She fell in love with a fellow student from her country and moved in with him after a few months, although she knew her family would strongly disapprove. Threatening to tell her family if she left him, he started beating her when they fought. When money grew short, he forced her to work as a dancer in a topless bar where he was the bouncer. On two occasions, he acted as her pimp and forced her to have sex with the bar’s customers. She finally fled and, with help from a domestic violence services agency, filed criminal charges against him. Edith may have an asylum claim based on her fear of persecution by him or her own family if she were returned to her home country. He might be deportable, if convicted, which would add to her fear. Her asylum claim might also be based on the persecution she might face for having done commercial sex work, or for living with a man outside of marriage.

A victim may have a fear of return because of several of these factors, but in cases involving domestic violence, the category “membership in a particular social group” is of great interest. “Social group” claims are typically articulated with gender or sex as the immutable core of inter-related characteristics that help to more precisely define the persecuted social group. For example, arguing in support of asylum on the basis of domestic violence persecution in the prominent case *Matter of R-A*,⁵¹ the Department of Homeland Security itself argued:

It would . . . be inaccurate to say that the social group is broadly defined by gender, the marital relationship, by her inability to leave the relationship or nationality. Rather, it is the space occupied by the intersection of these factors – married women in Guatemala who are unable to leave the relationship – that is the targeted characteristic.⁵²

A woman who took steps to denounce her abuser might have a claim based upon her assertion (or the imputed assertion) of a political opinion in doing so. A woman may fear severe ostracism or physical harm from her family or community as the result of protesting an abusive marriage or divorcing. A woman trafficked into prostitution might likewise fear harm if forced to return. Abuse directed at your client because of her race, religion or ethnicity presents another potential ground for asylum. These grounds may all exist within the same case.

⁴⁹8 U.S.C. § 1101(a)(42)(A) (2006).

⁵⁰See *supra* note 1.

⁵¹*Matter of R-A*, 23 I & N Dec. 694 (BIA 2005) (interim decision).

⁵²Dep’t of Homeland Sec.’s Position on Respondent’s Eligibility for Relief, Feb. 19, 2004, at 27 (“DHS Alvarado Brief”), available at http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf (last visited May 8, 2008). The DHS Alvarado Brief constitutes an authoritative interpretation of a statute, signed by the general counsel of the agency charged with the execution of that statute, and as such, should be accorded considerable deference. After briefing, the Attorney General remanded the case to the BIA in January 2005 where it sat until Sept. 2008, when Attorney General Mukasey certified the case to himself and ordered the BIA to reconsider it without waiting for further regulations. On Dec. 4, 2008 the BIA granted a joint motion to remand the case back to the Immigration Court for the development of additional facts.

An applicant for asylum must prove that:

- 1 She was a victim of past persecution⁵³ or that she has a well-founded fear of future persecution;
- 2 The persecution is/was/will be committed either by the government or by persons or groups that the government is unable or unwilling to control;
- 3 The persecution is on account of the race, religion, nationality, political opinion, or membership in a particular social group (including family group or gender) of the applicant; and
- 4 The application was filed within *one year* of arriving in the United States (limited exceptions exist where a change in circumstances materially affects your client's situation, or where exceptional circumstances prevented your client from filing within one year).⁵⁴

Victims can include a spouse and unmarried children in the application, and if granted, are eligible for a range of public benefits. Asylees are eligible to work immediately and can apply for LPR status one year after the grant of asylum. Applicants who are denied are referred to the immigration court if they have no other lawful status; if denied by the immigration court, the client will face deportation (but may be able to appeal). Asylum based on family groups or social groups defined by domestic violence or trafficking are cutting edge claims; there is little binding case law to support these claims, and that case law needs to be navigated very carefully to avoid undermining the claim. Please see Chapter 4 for additional information.

Additional Considerations: To gain legal immigration status, your client needs to be *admissible* to the U.S. The Immigration and Nationality Act defines grounds of inadmissibility, including entry without inspection, having a significant communicable illness (like HIV), misrepresenting one's intentions to an immigration official, or commission of a crime.

Fortunately, in many (but not all) cases, waivers of inadmissibility are available, or the grounds of inadmissibility may not apply to your client, for reasons related to the abuse she has suffered. If a client presents any of these issues, we recommend consulting with a more experienced practitioner.

Companion Criminal Remedies

In addition to the civil claims listed in this guide, civil attorneys should be aware of certain criminal actions which provide for civil remedies as well.

Racketeer Influenced and Corrupt Organizations (RICO) Act: RICO makes it a crime to participate in an enterprise that affects interstate commerce and involves a pattern of racketeering.⁵⁵ Some prostitution and sex trafficking networks are, therefore, being prosecuted under the RICO statute. RICO includes civil remedy provisions under 18 USC § 1694, which allow for an injured party to seek threefold damages suffered as a result of the RICO violation, as well as costs including reasonable attorney fees. The statute specifically addresses injuries to business or property.

Civil or Criminal Forfeiture: Defendants may be subject to civil or criminal forfeiture of any property used or intended to be used to commit or promote

⁵³Persecution is "harm or suffering inflicted upon an individual to punish that individual for possessing a belief or characteristic that the entity inflicting the harm or suffering seeks to overcome." It may be "broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs. . . . [such as] requiring a person to renounce his or her religious beliefs." *Matter of Kasinga*, 21 I & N Dec. 357, 365 (BIA 1996).

⁵⁴Children are no longer subject to the one-year filing deadline. William Wilberforce Trafficking Victims Protection Reauthorization Act § 235 8 U.S.C. 1158(a)(2)(E). 2008.

⁵⁵18 U.S.C. § 1962 (2007).

commission of any offense. Forfeiture may include loss of property or businesses used as fronts for trafficking enterprises, or any property traceable to gross profits or other proceeds. The Mann Act also allows victims of sexual abuse, sexual exploitation, and Mann Act violations to recover actual damages and the cost of any lawsuit (including reasonable attorney fees).⁵⁶

State criminal statutes may include forfeiture provisions as well, and will often specify how the assets acquired may be used. In some circumstances, forfeiture funds may be available to your client.

Restitution as Part of Sentencing: A federal court can order restitution for a victim of trafficking, slavery or peonage as part of criminal sentencing. When a defendant is convicted of a trafficking crime, the court is required to order restitution for the victim.⁵⁷ When a defendant is convicted of a non-trafficking crime that includes a scheme, conspiracy, or a pattern of criminal activity, a federal court can, and in certain situations, must, order restitution.⁵⁸

Restitution to victims of trafficking is often part of sentencing in state as well as federal court. For example, under the New Jersey human trafficking statute, victim restitution can be ordered for the greater of the gross income or value of the victim's labor or services.⁵⁹

When there is a criminal case, it is important to develop and maintain regular contact and interaction with the criminal prosecutor (and crime victim compensation and services personnel) in your client's case. Prosecutors can recommend that a defendant's sentence include, for example, payment of a victim's medical or counseling expenses.

Victim Assistance Services: Your client may also be able to access victim-assistance services available through the criminal or civil court or an outside agency. Often, such services include access to a victim compensation fund. Check whether your jurisdiction has explicitly, or in practice, added human trafficking to the list of offenses that entitle victims to compensation. For example, Iowa includes trafficking in its victim compensation provisions.⁶⁰

Litigation Practice Pointers

Reducing Trauma: Some practices to reduce re-victimization and trauma during the litigation process include:

- Avoid unnecessary interviews by various professionals involved in the criminal and civil cases involving your client;
- Evaluate your client's ability to testify in front of the defendant and court;
- Discuss your client's rights as a crime victim;
- Help your client prepare a victim impact statement for use during sentencing;
- Consider motions for protective orders that may prevent improper questioning or bullying of your client as a witness; and
- Collaborate with a mental health provider or other support person to ensure support after difficult experiences.

Bring Both State and Federal Claims: Since FLSA establishes only minimum standards for states, an employee may be able to benefit from additional protections provided under state law. Thus, it is

⁵⁶Pub. L. No. 105-314, § 605, 112 Stat. 2974 (1998).

⁵⁷18 U.S.C. § 1593 (2008).

⁵⁸See 18 U.S.C. § 3663 and § 3663A (2008) (ordering mandatory restitution for victims of certain crimes, such as violence and consumer tampering).

⁵⁹N.J. Stat. Ann. § 2C:13-8 (2005).

⁶⁰Iowa Code Ann. §§ 915.80 - 915.94 (2008).

important to allege violations of both FLSA and more expansive state laws if they apply to maximize remedies. Similarly, every state in the U.S. has its own anti-discrimination in employment laws, as to many local jurisdictions. It is important to become familiar with these state laws which often provide increased protections, and also have different statutes of limitations and administrative filing requirements.

Immigration Status: Courts in many states are reaching the conclusion that immigration status (past or present) is irrelevant to discrimination, wage and contract claims. The case law on this point is clear.⁶¹ However, your client may feel much more confident going into the process if you already have been able to help her secure legal immigration status (even if it is temporary) in the U.S. If it seems possible to at least file for immigration relief before any statutes of limitation expire, then perhaps that would help your client. Simultaneously, you can reassure the client that you will fight to keep her past and present immigration status out of the proceedings, from discovery through trial. Excellent sample briefs arguing in support of protective orders on the question of immigration status are available from organizations that have confronted this issue, should it arise in your case. Refer to Chapter 4 for more information.

Concurrent Criminal Case: The existence of a criminal case may require that your civil action be stayed, once filed. For example, the TVPRA of 2005 specifically states that a civil matter based on similar facts to a criminal proceeding *shall* be stayed.⁶² Other claims can be stayed or allowed at the discretion of the court. Because an admission or finding of guilt in a criminal case is admissible in a civil case, it is usually to your advantage to stay the proceedings until the criminal case is concluded. If, however, the case is moving forward slowly,

and your client is in urgent need of compensation, it may be possible to proceed with at least some of her claims. Keep in close contact with the law enforcement officials working on the criminal case so that the civil case does not inadvertently disrupt their case in ways that are preventable.

Filing Multiple Claims: As noted above, most of these claims can be filed within the same lawsuit. (This is true of any claim with a private right of action.) As long as you can include in the pleadings sufficient factual allegations to withstand a motion for summary judgment, you can include the claims. Consider a broad mix to cover the different kinds of damages available to your client and to ensure that if one part of your case is weak, a claim is alleged that will play to the strengths of your case.

There may be strategic reasons, however, to include some claims but not others. For instance, you may strongly want a jury trial if you believe jurors would be sympathetic to a human trafficking case and if you are seeking punitive damages. However, if your client is an immigrant, and you fear your jury may be biased as a result, then a bench trial may be preferable. Another consideration is whether you want to litigate in state or federal court. Think about your jury pool, the reputations of the judges who might preside over the case, and the time and expense of federal litigation versus state litigation. You can include state and federal claims in one case, but if you file in state court and include a federal claim, the defendant(s) can remove the case to federal court.

Negotiations and Settlements: Prior to, or in lieu of, filing a civil claim, you may wish to enter negotiations with the trafficker to obtain compensation or other relief for your client. Negotiations can be formal or informal, but it is a good practice to initiate the negotiation in writing,

⁶¹See, e.g., *E.E.O.C. v. City of Joliet*, 239 F.R.D. 490 (N.D. Ill., 2006); *Galaviz-Zamora, et al. v. Brady Farms, Inc.*, 230 F.R.D. 499 (W.D. Mich. 2005); and *Flores v Amigon*, 233 F. Supp. 2d 462, 463 (E.D.N.Y. 2002).

⁶²18 U.S.C. § 1595(b)(1) (2008).

laying out the allegations in a letter clearly marked “for negotiation purposes only” (so that the letter cannot be used to impeach your client in any related civil proceeding), and making the request for relief. The letter should advise that, as this is a legal matter that could result in a lawsuit, the trafficker may wish to consult an attorney.

Negotiations with traffickers rarely result in settlements that come close to approaching the full amount of money that your client is owed. However, they are completed more quickly, do not require face-to-face interactions between your client and her trafficker, and can be concluded in complete secrecy. These can be important considerations for clients who fear retaliation from their family, community or the trafficker.

If you do reach an agreement with the trafficker, get that agreement in writing. We advise never putting a confidentiality clause into the agreement, unless the negotiation falls apart without it. If the other party insists upon such a clause, it should be carefully limited so that the client is able to talk to her loved ones, therapist or other support persons about what happened to her without fear of being sued for breach of contract. Sometimes it is possible to limit the clause to not disclosing the amount of the settlement.

Tax considerations are important to the structuring of the agreement. Generally, any money your client receives through a settlement will be taxable as income. However, if there was physical abuse in the relationship, you can try to structure the settlement agreement as compensation for that abuse; money paid to settle a physical abuse claim is not taxable as

income. Finally, if the settlement primarily covers unpaid wages, then the employer is still responsible for payroll taxes and FICA.

Diplomatic Immunity: Unfortunately, when a trafficker is a diplomat, diplomatic immunity provisions may affect a client’s ability to pursue certain remedies. The basic rule is that diplomats have full civil and criminal immunity under the Vienna Convention on Diplomatic Relations *if* they raise immunity as an affirmative defense. This basic rule may not apply, however, if the trafficking situation involved commercial activities, such as the diplomat running a catering business from his or her home.⁶³ It is also vital to realize that not everyone who calls themselves a diplomat is entitled to immunity. There are much lower levels of protection for non-diplomatic embassy staff and consular staff, for example. Inquiries can be made at the Department of State Office of Protocol to ascertain if the diplomat is immune. The only certain way to find this out is to sue the diplomat and see what proof is offered as an affirmative defense. The Department of State can request that the trafficker’s home country rescind or waive immunity, but that is a very long process and unlikely to be successful in all but the most egregious cases. Significant media attention may be required to prompt the State Department to act. However, the threat of media attention or reports to the government that employs the diplomat can sometimes encourage a diplomat to agree to a settlement. These cases are difficult and require a careful analysis of the politics of the situation.

⁶³Many advocates contend that hiring a domestic servant also constitutes a commercial activity. Circuits are split on this issue. A suit brought under the Vienna Convention disagreed with that view, although a suit brought under the Foreign Sovereign Immunities Act, *did* recognize domestic work as a commercial activity. *Compare Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996), (holding that employing a domestic servant is not “commercial activity” under the Vienna Convention) *with Park v. Shin*, (holding that a domestic servant falls within the commercial activities exception) 313 F.3d 1138 (9th Cir. 2002). The arguments for the commercial activities exception to apply are arguably weaker in the context of an intersections case where there is not likely to be any formal hiring process or contractual employment relationship.

CHAPTER THREE

Practice Pointers for Effective Representation

Comprehensive Client Care

Human trafficking cases can be very complex, with multiple legal remedies and social services available. Similar to domestic violence victims, trafficking victims benefit from a holistic approach that identifies and addresses all of their needs. Trafficking victims may have just recently escaped and have no safe place to stay, or may already have built a new life. New clients should be screened for their complete legal and social needs. Ideally, an attorney will have a close partnership with a social service agency and in some cases, an in-house case manager that can provide case management services. Domestic violence attorneys may need to expand their list of potential partners to comprehensively serve trafficking victims.

It is critical that all of the providers working with a specific trafficking victim communicate often about their roles and any common challenges. Defense attorneys for the traffickers may contact the immigration attorney or other providers seeking information. It is important to inform all who are assisting the victim of such tactics so that they are ready to respond appropriately. It is important for all to know who the client's representative or advocate is for purposes of any criminal prosecution, and what exactly that person's role is. This is likely to be either the attorney filing any civil claims for back wages or damages or the immigration attorney. For trafficked immigrants, it is critical that the immigration attorney be involved in any communication with law enforcement since most trafficking-related immigration remedies require,

or are greatly supported by, reports from law enforcement. Clients will be bewildered by the various government agencies involved and legal cases contemplated. Social service providers need to have enough context to respond to the client's concerns and assist in clarifying the process.

Safety Planning: As with domestic violence clients, the first step with trafficking clients is to develop a safety plan. The process is very similar for both client groups, but trafficking victims may have some additional issues to consider. Traffickers may be part of a larger network, even an organized crime ring. If so, safety issues may be more urgent and may require relocating the client to another city or state. The involvement of law enforcement may be necessary to adequately protect both the victim and the provider. Trafficking victims may need to avoid the trafficker's or victim's ethnic group (which may be the same or different) or certain parts of town that are well-known to the trafficker. Always ask the client if she has a cell phone or bank account or other documents that might be traceable by the trafficker. Finally, be sure to conduct safety planning for your own agency and other providers working with the client. Address the safety of personnel, property, and data.

Housing: Domestic violence shelters may or may not have received training on human trafficking. They have probably encountered intersection cases before, but may not be aware of it. Many shelters have requirements and rules that may not be appropriate for trafficking victims. Particular attention should be paid to policies that restrict

privacy (required participation in group therapy or other disclosures) or relate to employment. Trafficking victims may be witnesses for a federal or state criminal prosecution of the traffickers, and discussing the case in a group setting could cause problems with the case. Additionally, trafficking victims may have experienced very different forms of abuse which would not be easily understood by other members of the group. Trafficking victims may have debt that led, in part, to their vulnerability to the trafficker. They may be completely focused on working to repay that debt. Policies that restrict their ability to work and repay their debt (curfews, mandatory meeting times, mandatory classes, mandatory savings plans) may not be appropriate and may put them in danger. Alternatively, trafficked immigrants may not be permitted to work immediately. As with battered immigrant women, trafficked immigrants may have to prepare and submit a thorough application and wait for approval before being issued employment authorization (commonly referred to as a “work permit”). This may take months or years. Emergency, temporary, and transitional housing programs which require proof of legal status or legal employment could be problematic.

Medical Care: Trafficking victims generally receive little to no medical care during their enslavement. They may have been exposed to dangerous chemicals or viruses, or they may suffer from long-term conditions like heart disease that have gone untreated. A trafficking victim should be taken for a thorough medical exam as soon as possible. The client should be asked about prior illnesses, pains, or problems that were not treated (or not thoroughly treated) before and during her victimization, including dental problems.

Mental Health Care: All trafficking victims should be offered mental health care. Depending on the client’s background and experience, she may not be comfortable with American mental health care. Clients should not be forced to attend counseling

sessions, but the advocate may need to think carefully about how to explain and introduce the option. Terms like “counseling” and “therapy” may not be understood or accepted by some clients. Instead, it may be helpful to offer to introduce the client to someone who is a “very good listener.” It might also be important to emphasize that this person (if your state provides a mental health provider privilege) will be able to keep everything a secret and that the case manager cannot (if your state does not have a trafficking advocate privilege). Privilege is an important issue to consider when selecting a mental health provider for trafficking clients. Because a federal and/or state prosecution is possible, it is important that the client discusses the details of the trafficking experience only within the context of a privileged relationship. Thus, a case manager with no privilege should not discuss the trafficking experience with the client.

Education: Trafficking victims may have limited previous education. Identifying appropriate educational resources will empower the victim and help her to find new employment opportunities after completing her studies. Trafficked immigrants may not be immediately eligible for financial aid but may become eligible once they secure immigration status (grants of asylum, T visas and continued presence all lead to eligibility for federally-funded financial aid). All minors should be accepted, regardless of their immigration status, by publicly funded schools up to grade 12. Trafficked immigrants may also benefit from English classes. All trafficking victims are likely to benefit from basic job skills or computer skills classes.

Employment: Most trafficking victims are eager to work. Working without authorization is not legal, and if the workplace is raided by Immigration and Customs Enforcement (ICE), the client could be detained and put into deportation proceedings. It is important that all undocumented clients are provided with multiple copies of their lawyer’s business card and a letter stating that the client is

a trafficking victim pursuing a T visa (or whatever immigration remedy is being sought) to be presented to ICE or other law enforcement agents if detained. This will generally reduce the chance of a client being transported to a distant facility or immediately removed (deported).

Access to Benefits: Trafficking victims often have difficulty accessing the benefits that they need. U.S. citizens and lawful permanent residents (LPRs) face challenges proving their eligibility if the trafficker confiscated their documents. This is compounded by challenges faced by some trafficking victims who have been enslaved for so long that they do not know their birth names or ages. Once identity documents are obtained, victims will find that the services often are limited, and the waiting lines are long. Clients may benefit from food stamps, subsidized housing, and free medical care for the uninsured. Cash benefits are rare and generally reserved for mothers with young children, the elderly, and individuals with disabilities.

Trafficked, undocumented immigrants generally are not immediately eligible for any federally-funded public benefits. They must first obtain recognition as a trafficking victim from the Office of Refugee Resettlement within the Department of Health and Human Services (HHS). In order to obtain such recognition, a victim can file for a T visa, or be granted continued presence. For further information, please consult the resources listed in Chapter 4.

Working with Law Enforcement

Domestic violence attorneys may have some experience in working with law enforcement, but most legal remedies traditionally pursued by domestic violence attorneys do not require any on-going interaction with law enforcement. Trafficking cases, however, are different. Law enforcement is much more present, either because the victim needs assistance from law enforcement in order to access benefits or legal remedies or because the client has

been charged with a criminal incident related to the trafficking. Attorneys working with trafficking victims need to be prepared for this increased interaction with law enforcement and be prepared to act strategically. The key roles of the attorney in a trafficking case, however, are the same as in a domestic violence case: closely follow any criminal cases, facilitate communication between law enforcement and the client, and advocate for your client's interests at all times. There are, however, a few key differences.

First, the stakes may be higher in trafficking cases. Domestic violence is a matter of state and local law, and can often be minimized by law enforcement. Prosecutions are few and the penalties handed down in the rare convictions are, in all but the most horrific cases, comparatively light. Human trafficking, on the other hand, is a federal crime. It has been highlighted as a human rights focus of the U.S. government. Significant resources have been dedicated to identifying and prosecuting traffickers. The penalties are steep. Under the TVPA, traffickers can be sentenced to 20 years to life for trafficking crimes. Additionally, many states are implementing trafficking laws that include a state crime of trafficking.

Second, both the T and U visas *require* your client to engage with the criminal justice system. The familiar immigration remedies for domestic violence victims (VAWA self-petition and cancellation, battered spouse waiver, and asylum) are certainly strengthened by corroboration from law enforcement, but do not require it.

Third, there may be additional safety concerns in a trafficking case. The trafficker(s) may be part of a criminal network or may simply have powerful connections in your client's community or home country. Both of these scenarios greatly raise the risk of retaliation against your client and her family members, as well as any advocates and attorneys working with her. The client, and even members of her family, may be eligible for asylum simply

because of the fear of retaliation. Every effort, therefore, needs to be made to protect your client during the investigation and the prosecution. It is also wise to conduct safety planning for your office.

Note, however, that involvement with law enforcement may *not* be necessary. Trafficking victims may be able to achieve all of their objectives with the traditional civil remedies available to domestic violence victims. Clients may be uninterested in the criminal justice system, wanting only to get away safely and to move on. Generally, U.S. citizens have that option. Trafficked immigrants, however, often must work with law enforcement in order to secure immigration remedies, reunite with family, and access social services. Clients should carefully consider their priorities and understand the pros and cons of all available resources and remedies before deciding to contact law enforcement.

Timing: If your client has not yet reported the crime to law enforcement, there are some benefits to taking time before making the initial approach. In particular, a traumatized client may be receiving counseling that will help her tell her story to you and later to law enforcement in a more effective, coherent way. Some clients are not able to discuss the trafficking situation for several months regardless of the benefits available. Time also allows you to develop a more nuanced understanding of your client's situation; the average trafficking case takes two or three multi-hour interviews before even the broad parameters of the story are known and settled. It may take even longer if you are using an interpreter to communicate with your client.

With the T visa particularly, although your client may be eager to secure immigration relief due to safety and other concerns, it ultimately will benefit the client to develop the case thoughtfully and accurately to avoid inconsistencies and errors that could prolong adjudication of her application down the road. There is no deadline for filing a T visa application.⁶⁴

With the U visa, however, there may be significantly more risks associated with delayed reporting. Although there is no statute of limitations, the requirement that law enforcement certify the victim's cooperation means that in practical terms, reports must be made in such a timeframe that law enforcement is likely to actually investigate or at least document the crime. As domestic violence attorneys already know, the likelihood of domestic violence charges being investigated, let alone prosecuted, diminishes with each passing day. There are also specific criminal statutes of limitation affecting law enforcement's ability to prosecute. Therefore, if the U visa is your client's best route to immigration status, you may not have the luxury of working with a therapist for a significant period of time to help the client tell her story in the most effective way. The practicalities of launching an investigation may demand a much quicker response.

This time also should be used to investigate to which law enforcement agency the report could be made.⁶⁵ Some agencies, offices, and individuals are more likely to investigate trafficking cases. Some are known to be more victim-centered in their approach. Contact local or national trafficking advocates to research your options. Determine the client's priorities. Does the client want to see a prosecution go forward, or is she just willing to do whatever is necessary to bring her children to

⁶⁴A one year filing deadline exists for trafficking cases which occurred before the passage of the TVPA, with limited exceptions. However, the deadline was not in the statute and the regulations are thus arguably *ultra vires*. Alternatively, advocates can argue the trafficking continued past the October 2000 date, e.g. threats made to family members subsequent to the victim's escape.

⁶⁵Reports can be made to a variety of agencies including: Department of Justice, Criminal Section, Civil Rights Division; Federal Bureau of Investigation; Department of Homeland Security, Immigration and Customs Enforcement; Department of Labor; the local U.S. Attorney; and state and local law enforcement.

the U.S.? If the former, find the agent who is most interested and experienced in trafficking cases.

There are good faith ways to make the report while assuring your client that law enforcement will display sensitivity in handling the report. For example, the Department of Justice Trafficking in Persons Hotline will keep the client's identity protected during the phases of an investigation prior to determining whether they will bring a criminal case forward or not. Many local law enforcement agencies have been well-trained on these issues and can be valuable allies in supporting victims during a trafficking investigation. See Chapter 4 for additional information.

Finally, you should work to control the timing of the various interviews and other related appointments. In some cases, clients benefit from scheduling an appointment with their therapist or other support person immediately after a law enforcement interview. Communication among all providers working with a client is especially important during an active law enforcement investigation, when a client is likely to be re-traumatized to some degree.

The Trafficking Victim as Victim-Witness: In the criminal case, your client transforms—often unfortunately so—from “client” who has agency over her case to “witness” who has little control over the process. The civil lawyer's role in this process is to advocate for the client's interests, to help the client maintain some agency during the process, and to help the client make sense of the often bewildering process (particularly for traumatized clients).

Specifically, the lawyer can be an invaluable advocate helping to communicate the client's interests to law enforcement. Does your client have fears about making the abuser deportable? Does she

fear retaliation against herself or her family? Will your client be devastated if the abuser is allowed to serve merely a few hours of community service in return for a guilty plea? Being able to help law enforcement understand the client's goals may help to obtain a better outcome for your client.

In interviews with law enforcement, your presence also may be reassuring to the client. Although the interviewer will prefer fewer interruptions, you may be able to help clarify where you see a misunderstanding, or ask for a break to speak with your client when you sense she is unable to talk about the most traumatic aspects of her case. You may need to ask for more time (weeks) to allow your client to start processing the trauma with a therapist. Your understanding of the case and your relationship with the client are a tremendous asset to the law enforcement investigation, so you must not be shy about embracing this role.

Your role is also to advocate for law enforcement to understand the case in its entirety. As noted above, a prosecutor experienced in domestic violence cases may not be on the lookout for signs of human trafficking. You can argue the case to him or her so that the investigation covers what is important to your client.

You also may need to ensure that your client's rights, as a victim, are being protected. The U.S. Department of Justice's *Attorney General Guidelines for Victim and Witness Assistance* outlines crime victim rights fairly clearly.⁶⁶ Notably, the client is entitled to notification about the status of the case, assistance in accessing services and protection from the perpetrator. The client also has the right to attend the trial or to prepare a victim impact statement. The client will likely benefit from assistance in preparing a victim impact statement, which can affect sentencing.

⁶⁶U.S. Department of Justice, Office of Justice Programs, Office for Victims of Crime; *Attorney General Guidelines for Victim and Witness Assistance* (2005), available at <http://www.usdoj.gov/olp/final.pdf>.

Finally, where your client is pursuing a T or U visa, your role is certainly to advocate for law enforcement to certify your client's cooperation. For the T visa, the lawyer can document the client's efforts to cooperate if law enforcement is unwilling to provide an official certification. Some law enforcement agencies have excellent systems in place to certify. Many others will require education about the certification purpose and process, and will need follow-up from you to get the certification done. For the latter, drafting the form itself, and/or talking with local service providers, the victim advocate, prosecutor, detective, or responding officer may help.

Standards for Cooperation: Ongoing Cooperation, Reasonable Requests: When considering whether or not to certify your client, law enforcement can consider whether your client has cooperated on an ongoing basis. A client who files a police report but then refuses to speak with a detective is unlikely to be certified. Likewise, a client who refuses to testify may, possibly, be deemed to have stopped cooperating. If an official certifies your client, and at a later date the client stops cooperating, the official has the ability to revoke the certification, so the "ongoing" character of the cooperation is very important.

This requirement is tempered, however, by the requirement that a law enforcement request be *reasonable*. Clearly a request that puts the client or her family in danger, or a request for testimony in another state without any provision for transporting the client, could be unreasonable. The context matters greatly, and the lawyer must ensure that the client continues to be seen in the best possible light, explaining why a specific request is not possible while seeking ways to continue to be helpful generally. Specifically, the client's physical and mental state should be considered. Where a client has suffered psychological trauma, and interaction with law enforcement is interfering with her recovery, even an interview request may be seen as unreasonable.

When Law Enforcement Resists Identifying a Crime as Trafficking: Intersection cases are opportunities to bring many criminal statutes to bear in the effort to hold traffickers accountable. However, too frequently, law enforcement sees these cases as "either/or." Prosecutors who specialize in domestic violence may have only a cursory understanding of human trafficking, and of the breadth of the related federal criminal statute. Sadly, law enforcement agents also may be unwilling to "turn over" a case to another agency for prosecution and may choose to sit on it instead; or it may be determined that jurisdiction rests with the agency that is least interested in pursuing trafficking cases (especially intersection cases which are particularly hard to prosecute). This pigeon-holing and turf mentality precludes the fullest possible prosecution of the case.

It is entirely appropriate for you to encourage law enforcement to think about all the crimes embedded in an intersection case, emphasizing that the more charges that can be filed, the greater the leverage the prosecutor has during any plea negotiations.

The Trafficking Victim as Defendant: Some trafficking victims are discovered only after they have been charged with a crime. Generally the crime is related to the trafficking. Domestic violence attorneys may have experienced this with clients who, for example, turned to theft to feed themselves and their children. Trafficking victims may have been forced into theft, prostitution, drugs, fraud or any number of crimes. It is crucial that the attorney defending the client in the criminal case be made aware of the circumstances surrounding the criminal acts. It might be beneficial to report the trafficking crime quickly to an experienced and victim-centered law enforcement agency. The agent investigating the trafficking also should contact the prosecutor's office to possibly convince the prosecutor to reduce or drop the charges.

This conflict is often seen with sex trafficking victims who are arrested on prostitution-related charges. Increasingly, local law enforcement agencies are screening for trafficking victims, but not all do. For all trafficking victims, the arrest makes it more difficult to find appropriate services and support, and further erodes their self-confidence and belief in the system. The trafficker has likely been telling the victim that no one will believe her, that she is a bad person and will be arrested and (if applicable) deported if she calls the police or tries to escape. This arrest has reinforced these threats. In any case, additional psychological support will likely be necessary. Individuals seeking immigration relief will have to disclose and explain this criminal history in the context of their immigration application, although a waiver will likely be available.⁶⁷

Working with Media: Opportunities and Cautions

Human trafficking is an atrocious crime, and as such, has generated vast media interest. Organizations known to focus on human trafficking are often inundated with requests to interview “victims,” requests to go on rescue operations, and so forth. As with any kind of legal representation, media can be strategically useful, but only after careful analysis with the client about the risks and benefits.

The risks of working with media include direct retaliation to the client and/or her loved ones by the trafficker. This is especially true in the internet age when even a local media outlet’s story will be commented upon, blogged about and emailed instantaneously around the world. The dangers also may include condemnation in the home country

for bringing shame to a fellow national (where the trafficker is from the same country), or harassment of the client if she wins large money judgments in court, regardless of whether she ever collects money on those judgments. A client may also be re-traumatized by the telling or viewing of her story.

Apart from personal risks to your client, a separate but significant risk is the loss of control over the story; once an interview has been done, your client usually has little to no control over the editing process. Comments may be taken out of context, or key facts confused, which could then complicate ongoing civil, criminal or immigration cases. Finally, prosecutors understandably shy away from media during an investigation or prosecution for fear that the victim will make inconsistent statements that can then be used to attack credibility during a trial.

On the other hand, the benefits to engaging with the media can be considerable, depending on the circumstances. First, working with the media may help the victim to have more agency in holding her abusers accountable by publicly shaming them. Media exposure can also bring pressure to settle ongoing litigation or pressure traffickers to honor court judgments. In the specific case of traffickers who are diplomats with diplomatic immunity, media pressure (or the threat of it) may be the *only* way to start a negotiation process. Finally, many victims voice a hope that by telling their story, they can shed light on a terrible crime and prevent the victimization of others. This can also be therapeutic. In any case, it is likely that positive, responsible media coverage will generate interest in the case in ways that make an investigation by law enforcement and/or an immigration application even more compelling.⁶⁸

⁶⁷The process is not yet entirely clear as adjustment of status regulations have just been published for the T and U visas as of the writing of this guide.

⁶⁸Any solid media coverage of a client’s case could be submitted in support of an immigration application.

For some clients, no matter how great the benefits, her fear of speaking publicly about her experiences will rule out working with the media. For others, the time may not be right. For yet others, it is difficult to convince them *not* to talk to the media. There is no hard and fast rule for or against working with media, and we recommend simply helping your client think through all the options, the risks and the benefits, and documenting your advice for the client to reflect upon later. Clients should also be encouraged to consider what limitations they want to place on the media coverage (disguised face or voice, use of a false name) and have signed agreements from media outlets specifying these limitations.

CHAPTER FOUR

Resources for Attorneys & Advocates

This guide is meant to serve as a basic introduction to the variety of issues you will encounter and need to be aware of when assisting victims of human trafficking. Comprehensive resources relating to the topics outlined in this guide already exist and are constantly being updated to reflect changes in law. We hope the following information will be useful to you in locating these additional resources.

Additional Resources

Additional resources are available at www.abanet.org/domviol/tip.

Useful Organizations

There are many local and national organizations that have resources for attorneys representing human trafficking victims. Some of these organizations are:

- ▶ ASISTA: www.asistaonline.org
- ▶ Center for Gender and Refugee Studies: www.cgrs.uchastings.edu/
- ▶ Center for Women Policy Studies, US PACT [Policy Advocacy to Combat Trafficking], National Institute on State Policy on Trafficking of Women and Girls: www.centerwomenpolicy.org/programs/trafficking/default.asp
- ▶ The Freedom Network USA: www.freedomnetworkusa.org
- ▶ The Legal Aid Foundation of Los Angeles: www.lafla.org
- ▶ Humantrafficking.org: www.humantrafficking.org
- ▶ The Immigrant Legal Resource Center: www.ilrc.org
- ▶ Legal Momentum's Immigrant Women Program: www.legalmomentum.org
- ▶ The National Network to End Domestic Violence: www.nnedv.org
- ▶ The U.S. State Department Office to Monitor and Combat Trafficking in Persons: www.state.gov/g/tip
- ▶ National Employment Law Project: www.nelp.org
- ▶ National Employment Law Project's Immigrant Worker Project: www.nelp.org/iwp
- ▶ National Immigration Law Center: www.nilc.org
- ▶ Legal Aid Society, Employment Law Center: www.las-elc.org
- ▶ U.S. Committee for Refugees and Immigrants, National Children's Center Resource Library: www.refugees.org/article.aspx?id=1556&subm=75&area=Participate&ssm=118

Print Manuals

Ayuda. *Assisting Battered Immigrants and Their Children to File Immigration Claims Under the Violence Against Women Act: A Manual for Immigration and Domestic Violence Attorneys and Advocates* (5th Ed.), available upon request at www.ayuda.com/pages/page.cfm?id=41&pid=6&eid=11

Center for Applied Legal Studies, Georgetown University Law Center, *Asylum Case Research Guide*, available at www.ll.georgetown.edu/guides/CALSAsylumLawResearchGuide.cfm

Florida Coalition Against Domestic Violence, *Domestic and Sexual Violence Advocate Handbook on Human Trafficking: Collaborating to End Modern-Day Slavery* (2nd Ed.) (2004), available at www.fcadv.org/downloads/legal/Human%20Trafficking%20Handbook%20for%20advocates%20English.pdf

Regina Germain, Amer. Immigr. Law. Ass'n, *Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure* (5th Ed.) (2007).

Immigrant Legal Resource Center and the Catholic Legal Immigration Network, Inc., *The VAWA Manual: Immigration Relief for Abused Immigrants* (5th Ed.) (2008), available for purchase at www.cliniclegal.org/Publications/GuidesHandbooks.html

Daniel Werner & Kathleen Kim, *Civil Litigation on Behalf of Victims of Trafficking* (S. Poverty Law Ctr. 3d ed.) (2008), available at http://library.lls.edu/atlat/HumanTraffickingManual_web.pdf

Eva Klain & Amanda Kloer, Amer. Bar Ass'n, *Meeting the Legal Needs of Child Trafficking Victims: An Introduction for Children's Attorneys & Advocates* (2008), available upon request at www.abanet.org/domviol

U.S. Conference of Catholic Bishops, Migration and Refugee Services, Catholic Legal Immigration Network and the Legal Aid Foundation of Los Angeles, *A Guide for Legal Advocates Providing Services to Victims of Human Trafficking* (Nov. 2004), available at www.cliniclegal.org/Publications/Freepublications/HumanTrafficking.pdf



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