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CHALLENGES IN PROVIDING LEGAL SERVICES FOR VICTIMS OF TRAFFICKING IN THE UNITED STATES

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"The Human Rights Challenge of Globalization in Asia-Pacific-US: The Trafficking in Persons, Especially Women And Children"

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The United States' Trafficking Victims Protect Act ("TVPA") of 2000 created a powerful tool has the potential to curb the problem of trafficking in persons, and to protect and assist victims—to take what is a devastating and life-altering crime and help victims work through the trauma to thrive and be productive members of society. I use this phrase because that is exactly what my clients say.

However, in order for the TVPA to have its intended impact, the United States and its designated agencies—those agencies which must be intimately involved in victims' cases in order to facilitate protection and re-integration into society—must embrace these victims with open arms.

What does this mean? Government agencies must attack these cases from a victim-centered perspective. The needs of victims must be our "number one" priority, even over the law enforcement imperative. This is not to suggest that the systematic shutting down of perpetrators through law enforcement methods is not important—it is, but law enforcement must recognize the real trauma experienced by victims, and they must recognize that law enforcement is the ultimate beneficiary when victims, advocates, and immigrant communities trust that victims will be cared for and protected, by having access to services, housing, work authorization, and if applicable, a T visa.

Victims are law enforcement's greatest asset, and must be treated as such.

Why is this so important for advocates and attorneys? Because the biggest challenge, or barrier, to providing legal services to trafficking victims is distrust of government among immigrants and in immigrant communities.

This distrust is such a challenge for two reasons:

1. Distrust makes it more difficult to actually identify and access such victims—members of immigrant communities and advocates in immigrant community-based organizations are extremely cynical about the sincerity of the

Immigration and Naturalization Service (“INS”) in assisting immigrant communities and are reluctant to provide intelligence to authorities; and

2. Distrust makes it more difficult to encourage victims to come forward, cooperate with law enforcement, stick with the case—in other words, not to drop out and disappear.

With this in mind, I’d like to talk about the “nuts and bolts” challenges that lawyers and advocates may face when providing legal services to trafficking victims. The primary legal benefit for victims is the T visa, which allows a victim to stay in the United States for three years, and apply for a green card. Victims may also apply for continued presence through INS. Continued presence is a less complex process with fewer long-term benefits, but many of these same challenges will apply. Both the T visa and continued presence allow a trafficking victim to obtain benefits through the Department of Health & Human Services’ Office of Refugee Resettlement (“ORR”).

There are four requirements that a person must meet to qualify for the T visa:

1. Victim of severe form of trafficking;
2. Physically present on account of such trafficking;
3. Comply with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, or victim is under 15 years of age; and
4. Extreme hardship.

I. How do you identify a victim of trafficking?

There are two ways for trafficking victims to come forward:

1. Law enforcement (Federal Bureau of Investigation (“FBI”), INS, local police, prosecutors) coordinates a raid of an operation. Since the passage of the TVPA, it is more common for law enforcement to collaborate with non-governmental organizations (“NGO’s”) on such raids, and think ahead of necessary services, such as housing, medical screening and/or treatment, and psychological counseling.

In these cases, where the government and law enforcement have already made the case a priority, collaboration between NGO’s and government goes more smoothly, and it is much easier to identify victims as having been trafficked. This is a result of government investment in the case.

2. Victims escape from their traffickers, or are convinced by NGO’s and community-based organizations to come forward, and connect with law enforcement and/or advocates within their communities.

For example, victims may be girls who escape from a brothel, where they are under constant watch. In these cases, where victims come forward on their own, it is imperative to connect with law enforcement and have government agencies treat these cases as a priority. Making this happen is one of our major challenges as advocates.

As advocates and service providers, how do you identify trafficking victims?

A trafficking victim is a person who engages in a commercial sex act and is under eighteen, or that act involves force, fraud, or coercion; or, engages in other labor or services that involve force, fraud, or coercion, for the purpose of involuntary servitude, peonage, debt bondage, or slavery.

Therefore, we are looking for evidence of control, or an inability to leave the situation without threat of something bad happening to the trafficked person or his or her family. In some situations, it is clear that the trafficked person cannot move freely. However, in other situations, it may appear that the victim can come and go with some level of autonomy, but they cannot leave the trafficker, for fear of some form of retribution, or because of fear and isolation. It is very important not to ask about trafficking or smuggling directly.

PRACTICE POINT: Do not have the victim tell his or her story to too many people in your agency—there is some chance that a defendant may argue that the client’s statement are discoverable in the legal process. This is especially important where no confidentiality or privilege applies (such as attorney/client, counselor/patient, or doctor/patient). Such statements will impede the prosecution process if they are inconsistent, and clients rarely tell the story in the same way every time. You don’t want too many details out there floating around.

Ask the client questions about the conditions that they experienced:

- Where did you sleep/eat/work?
- Did you ask permission to eat/sleep/go to the bathroom?
- Did you see a lock on the door?
- Were there windows? Were they locked?
- How did you expect things to be?
- How did they/you handle your money?

You will likely notice that this is similar to identifying victims of domestic violence—you do not ask a person if she has been battered—you start at the edges of their experience.

II. Physical Presence on Account of Trafficking

Clients must be in the United States or its territories on account of the trafficking. They may not go to their home countries to see their families. This is especially difficult for younger victims, who may want to see their families desperately, despite the risks to their safety. Therefore, it is critical to emphasize to your client that he or she must not leave the country—this will jeopardize both the immigration case and the criminal prosecution.

PRACTICE POINT: Advise victims that they must weigh the pluses/minuses of staying in the United States, and this is difficult for victims who are young. One issue that victims should consider is safety back home, for them and their family. Also, victims should be aware that they can include their spouse and children, and if they are under twenty-one, their parents, on their T visa applications.

III. Cooperation

If you think that your client is a trafficking victim, it is important to work with an attorney immediately, preferably one with immigration and criminal experience. Your next step will be to approach law enforcement. There are two reasons to approach law enforcement:

1. The victim may want to pursue prosecution and “justice”—he or she may want to see the trafficker punished, or may feel that the only way that he or she will feel safe is if the trafficker is behind bars. The victim may also want to take every step to ensure that the trafficker does not harm any one else.

PRACTICE POINT: Advocates should explain to victims that any prosecution process will be long and emotionally draining—the American justice system works slowly. This tends to cause a great deal of emotional “wear and tear” on clients.

2. If the victim feels a need to stay in the United States, he or she will want to pursue continued presence and/or a T visa, both of which will result in benefits for the victim. To obtain immigration benefits, a victim must either be under fifteen years old, or cooperate with any reasonable request for cooperation from law enforcement. If there is a request for cooperation, it is critical that a victim has advocates who can negotiate the reasonableness of any requests.

Cooperation is broadly defined, and potentially includes, among other things:

- Assisting with investigation of the crime or related acts;
- Assisting with prosecution of the crime;
- Identifying perpetrators; or
- Providing other information relating to the crime or the traffickers.

Dealing with law enforcement is very challenging for advocates and victims—the TVPA itself states that trafficking victims must comply with reasonable requests for cooperation from law enforcement. However, the INS regulations that implement the law require that the victim cooperate with a federal law enforcement agency. This creates a problem where the victim who cooperates with local and state investigations and prosecutions gets locked out.

This is especially problematic because NGO's and community-based organizations are often more in touch with local law enforcement and may have pre-existing relationships with them. They, as well as community informants, are more likely to call in local law enforcement, as they tend to have more knowledge of and access to these local actors. Furthermore, it is intimidating for victims to deal with a whole other set of government agents, and exacerbates their trauma, as victims may not understand why they are required to share their story with so many different strangers.

From a practical perspective, it is also much more difficult to link up with federal law enforcement agents—this is particularly true in the New York City area, where the FBI and INS are expending many of their resources against terrorism.

We should encourage all levels of law enforcement to be involved in fighting against trafficking. Local law enforcement can cooperate seamlessly with federal law enforcement. Alternatively, although many states do not have specific anti-trafficking statutes, they can prosecute under rape, assault, kidnapping, false imprisonment, and other crimes. Cooperation with such prosecutions should be sufficient for providing law enforcement agency endorsements to victims.

IV. Extreme Hardship

Advocates should note that in order to obtain a T visa, a victim must show that he or she will suffer extreme hardship upon removal—this is the strictest hardship standard under the United States' immigration law.

PRACTICE POINT: Advocates and attorneys should think with their clients about the following types of evidence that will be relevant to showing extreme hardship:

- Victim's personal story, especially with respect to threats to the client and his or her family. It is relevant to show knowledge or well-founded suspicion that trafficker and/or cohorts are still in the victim's home country and are potentially dangerous;
- Country conditions in the victim's home country that relate to the government's protection of citizens. This can include government action with respect to trafficking, such as willingness of police to protect against traffickers, but hardship can also exist on grounds that have nothing to do with trafficking;

- Victim's ability to obtain necessary medical or psychological care in home country. The need for care does not have to be linked to the trafficking—the victim may have other medical issues; and
- Particularly where the trafficking victim was forced to engage in sex work, it is relevant to document treatment of women in the home country, and to show the potential impact of stigma for the victim.

Other Immigration Options for Trafficking Victims

Some trafficking victims will not be viable candidates for a T visa—however, it is critical that they meet with qualified immigration attorneys to explore other potential avenues for immigration relief, including:

1. U Visa: The U visa applies to victims of enumerated crimes, including, among others, trafficking, rape, and domestic violence. The U visa does not include a hardship requirement, but it also does not lead to ORR benefits. The U visa also requires some level of cooperation with law enforcement, but includes state/local agencies as well as federal. There are 10,000 available every year, but INS has not issued regulations as of this date.
2. S Visa: The S visa applies to witnesses for crimes related to terrorism or organized crime. There are only 200 available every year, and are rarely offered. The S visa also requires cooperation with law enforcement, but includes state/local agencies as well as federal.
3. Political Asylum: Requires a well-founded fear of persecution, based on membership in a particular social group. For example, your client may fear being re-trafficked if he or she is sent back to the home country.
4. Special Immigrant Juvenile Status: If the client is under 21 and is eligible for long-term foster care, due to abuse, neglect or abandonment, he or she may be eligible if it is also not in the client's best interest to be returned to the home country.
5. VAWA Self-Petition: Battered spouse or child self-petition.

Related Legal Issues for Trafficking Victims

Advocates and attorneys must also think about other legal issues that co-exist with a victim's immigration applications, including criminal matters and civil claims, including labor/employment concerns.

Criminal Matters

1. When approaching law enforcement to discuss cooperation, attorneys should ask prosecutors, INS agents, and other government actors for limited use or proffer agreements. Such agreements guarantee that anything your client says will not be used against him or her, except for perjured statements. The goal is to protect your client from criminal or removal proceedings. Law enforcement is currently not offering such agreements, on the theory that if your client has not committed a crime, then you have no need to be concerned. From an advocate's perspective, not every law enforcement official will be well-trained on trafficking issues—therefore, this is one concern to keep in mind.
2. Attorneys and advocates should watch out for any client arrests or convictions that may come back and haunt him or her. If a victim has been arrested, especially for a prostitution-related offense, it is critical to engage in

aggressive advocacy that avoids a conviction, even if it is a low-level offense, since this can affect an immigrant's ability to stay in the United States or obtain legal permanent residency.

PRACTICE POINT: INS will take into consideration if the conviction was caused by or incident to the victimization however, it is better to advocate for an appropriate disposition.

3. Be careful of the timing of a T visa application. The trafficker's defense attorney could potentially subpoena a victim's application, claiming that it contains potentially exculpatory information, or is inconsistent with other statements. Prosecutors are required to turn over potentially exculpatory evidence to the defense. It may make more sense to wait until after a prosecution is complete before submitting a T visa application.

Potential Civil Claims

1. Wage & Hour
2. Anti-Discrimination/Sexual Harassment
3. Eligible for Disability?
4. Occupational Health & Safety
5. Private Fraudulent business Practices/Disgorgement Claims

In order to make many of these claims viable, it will be important to track down the trafficker's assets, especially real estate or business holdings, as cash and bank accounts are more difficult to trace. As with much sweatshop litigation, this may also force attorneys into involvement with bankruptcy proceedings.

Non-Legal Issues for Trafficking Victims

Finally, there are non-legal issues that will affect a client's case, and should be kept in mind with legal advocacy. First, advocates should be careful of discussing these cases with the media, as coverage can affect both client safety and the integrity of a legal case in a negative way. Finally, advocates must juggle the need for legal advocacy with the acute need of trafficking victims for services, including:

- Housing;
- Medical Care/Assessment;
- Psychological Care/Assessment;
- Language Skills;
- Education/Employment Assistance;
- Clothing;
- Culturally Appropriate Food; and
- Spending Money

Requesting this assistance is often very difficult for victims, and they may feel that it is another assault on their dignity. In fact, it is critical that as advocates, we network to share strategies and advocate around common concerns.

One fundamental tool at our disposal is documentation of problems that advocates encounter in the implementation of the TVPA, in order to make changes in the statute, and in broader immigration policy. It is imperative that we continue to make victims and their healing the central concern in government policy around trafficking in persons.