

LAWYER'S MANUAL ON HUMAN TRAFFICKING

PURSUING JUSTICE FOR VICTIMS

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Representing and Defending Victims of Commercial Sexual Exploitation in Criminal Court

by Courtney Bryan

As a new public defender, the first time the concept of “sex trafficking” crossed my mind was when I represented a foreign-born Chinese woman in her early twenties, who had been arrested with two men for running an illegal gambling operation out of an apartment in Sunset Park, Brooklyn. The charge was a misdemeanor, and it was her first arrest. When I met her in the holding cell, she was crying and seemed very frightened. She wore heavy eye make-up that was smeared on her face, and she was dressed in short denim shorts, a tight tank top, and high-heeled strappy sandals. Through an interpreter, I asked her about what had happened, the circumstances of her arrest, and how she came to the United States. She provided little information. I spent only a short time with her, explaining that when we appeared before the judge I would ask for an ACD (adjournment in contemplation of dismissal), which meant that the case would be dismissed and sealed in six months if she was not re-arrested, and she would be free to go home. As predicted, the judge granted the ACD — another easy win and one fewer matter to add to my increasing caseload. As my client walked out of the courtroom, I saw two men (later I learned they were her co-defendants) stand and escort her out. As I watched them leave the courtroom I felt uneasy. Was she afraid of these men? What was she really involved in? Could it be prostitution? Then I returned to the grind of arraignments.

At home later that night, I kept thinking about this woman. I asked myself, “Should I have spent more time with her? Should I have asked more questions? Should I have encouraged her to come to my office the next day to meet with a social worker? What if she’s desperate for help and I failed her?”

Months later I represented an immigrant woman after a raid on an apartment. She and several other women had been arrested for prostitution and a few men were arrested for promoting prostitution. My client was distraught and fearful. Through an interpreter I tried to get information about whether she was being pressured or forced to prostitute. She too gave me very little information.

As this was her first arrest for what the criminal justice system considers a fairly benign offense, she was granted an ACD and walked out the courtroom door, free to go but leaving me to wonder how free she really was.

In the jargon of criminal court, these cases were called “disposables” or “dispos.” After considering the charge, the defendant’s criminal record, and the “worth of the case,” these cases were very likely to be disposed of at arraignment, either with an ACD or a plea. The typical disposition for a first arrest was an ACD and for a second or third arrest a plea to a non-criminal violation (e.g., disorderly conduct). While someone with a lengthier record faced a misdemeanor conviction and jail time, plea offers from the prosecutor or judge were often enticing enough so that many defendants pled guilty at arraignment. Everyone — the defense attorney, the prosecutor, and the judge — considered these cases trivial. No one seemed concerned that they likely involved acts of violence or exploitation or that the defendant might be at risk. We now know that victims of trafficking are arrested and prosecuted, sometimes numerous times, but are rarely identified as victims by the criminal justice system.

It is easy to miss the sex trafficking victims coming through our criminal courts arrested for prostitution offenses. In addition to the institutional practice and pressures to dispose of cases quickly with a plea or ACD to avoid additional court dates, criminal conviction, and jail time, criminal defense attorneys, prosecutors, and criminal court judges often know very little about trafficking. Also, unlike most labor trafficking victims whose work is not in and of itself illegal, victims of sex trafficking are induced to engage in illegal activities and therefore often are arrested and treated as criminals. Finally, sex trafficking victims rarely reveal right away that they are indeed victims. Because of the fear and abuse they experience, disclosure takes time and is only achieved after rapport, trust, and confidentiality have been established. The result is that criminal defense attorneys, prosecutors, and criminal court judges learn very little about the victims before them or about trafficking in general.

These realities pit victims of sex trafficking arrested for prostitution against the very government actors designed to protect crime victims — the police and prosecutors. Given this dynamic, it is unlikely that victims will be identified and protected. It is far more likely that they will be re-victimized by our criminal justice system and left at the mercy of their traffickers. Thus, it is crucial that criminal defense attorneys take a leading role in identifying potential trafficking victims and that other criminal justice system players work with defense attorneys to develop policies designed to identify and protect sex trafficking victims arrested for prostitution and other offenses.

Current Law

The federal Trafficking Victims Protection Act,¹ which qualifies foreign-born, non-citizen victims for immigration relief and social services, has led to confusion about who qualifies as a trafficking victim and the mistaken belief that trafficking is by definition international and that U.S. citizens cannot be trafficking victims. This is not the case. Under federal law, immigrants and non-immigrants may be prosecuted for the crimes of sex and labor trafficking, and immigrants and non-immigrants may be trafficking victims.

New York is one of many states that have created crimes of sex and labor trafficking. New York State's 2007 legislation on human trafficking² defines trafficking with reference to the typical kinds of fraud and coercion that traffickers use on their victims, rather than strictly relying on the threat or use of physical force. Under New York's Safe Harbour for Exploited Children Act of 2009,³ a person under the age of eighteen who is engaged in prostitution is presumed to be a trafficked person. Consistent with federal law, which deems prostituted children up to the age of eighteen trafficking victims without requiring proof of force, fraud, or coercion, the law permits the child to avoid criminal charges of prostitution and instead to be considered a "person in need of supervision" within the meaning of the Family Court Act.⁴ Rather than requiring these sexually exploited youth to be placed in a juvenile detention facility, the statute provides them with support and services, including safe houses, crisis intervention programs, and community-based programs. It also requires law enforcement training to help officers identify and assist sexually exploited youth.

Practice Tips for Criminal Defense Attorneys

In general, criminal defense attorneys should consider every defendant arrested for prostitution a potential trafficking victim. While foreign-born, non-U.S. citizens typically come to mind when trafficking is mentioned, U.S. citizens are also victims. Defense attorneys should conduct interviews, investigate, and explore defenses with this in mind. Finally, defense attorneys should try to identify victims of trafficking pre-plea because only limited post-conviction relief is available.

Training is key. Criminal defense attorneys must seek training on the dynamics of trafficking, and learn how to identify potential victims and to forge relationships with them. Trafficking service providers can partner with

defender organizations to provide training to defense attorneys. Public defender organizations should be encouraged to cover trafficking in new staff attorney trainings, since new public defenders typically start out by handling low-level, seemingly simple cases, like prostitution, but all defense attorneys should receive ongoing training about human trafficking.

Partnering with Service Providers

Criminal defense attorneys should partner with trafficking service providers not just for training but also to assist in screening people arrested for prostitution for trafficking. Trafficking service providers may have already developed a screening protocol, or they can work with the defense bar to develop one. The protocol can also be used to train social workers assisting defense attorneys.

Recognizing that even with robust screening, victims will rarely disclose their trafficking history right away, defense attorneys should link their clients with trafficking service providers or staff social workers with trafficking expertise. The social service needs of trafficking victims are critical and serious, often including safety, shelter, medical and mental health care, services for victims' children, and economic support.

Defense attorneys must be cautious about the limits of confidentiality when social service workers are involved in their cases. While communications between clients and social workers have some protection under state law,⁵ these communications may not be covered by attorney-client privilege, even if the social worker is counseling the defendant at the attorney's request to explore a defense strategy and reasonably could be considered a member of the defense team. Defense attorneys should instruct non-attorney advocates and social workers, especially those who are not employed by the attorney's office, to avoid taking notes in case a court later requires the non-attorney advocate to testify or turn over notes about communications with the defendant.

Identifying Child Victims

Defense attorneys should try to verify the age of clients and determine whether they are under eighteen years old and thus covered by the Safe Harbour Act. Many young people involved in the commercial sex industry are familiar with, and want to avoid, the intrusions of family court. When stopped by law enforcement, teenagers may lie about their age because they know that in criminal court they will receive less scrutiny, suffer fewer consequences, and be subjected to fewer conditions than they would in family court. For children who are sixteen or younger, family court is without question the appropriate place for

them. In New York State, sixteen to eighteen-year olds are treated as adults under the criminal law. Although the Safe Harbour Act does not explicitly require that prostituted children sixteen to eighteen years old be diverted to family court instead of being arrested and arraigned in criminal court, the *intent* of Safe Harbour is clear — children under eighteen are presumed to be trafficking victims. Defense attorneys who learn that a client is under eighteen should notify the court and prosecutor, and they should move to dismiss the charges on jurisdictional grounds and/or in the interest of justice.

Negotiating with Prosecutors

Once defense attorneys learn that a client is a trafficking victim, they should contact the prosecutor and persuade him or her to withdraw or dismiss the charges. Defense attorneys may also explore whether the client wants to provide the government with evidence about the traffickers in exchange for dismissal of the charges.

Moving to Dismiss

Criminal defense attorneys should consider filing a motion to dismiss the case in the interest of justice whenever their client is a trafficking victim.⁶ According to *People v. Clayton*, the leading case on these motions, courts should consider: (a) the nature of the crime, (b) the available evidence of guilt, (c) the prior record of the defendant, (d) the punishment already suffered by the defendant, (e) the purpose and effect of further punishment, (f) any prejudice resulting to the defendant by the passage of time, and (g) the impact on the public interest of a dismissal of the indictment.⁷ Factors (a), (d), (e), and (g) are particularly relevant when a trafficking victim is arrested and prosecuted for prostitution. To create a compelling picture of the circumstances of a client's sexual exploitation, current and past, defense attorneys should work with trafficking service providers, who may be better positioned to elicit useful information from the client.

Defenses at Trial

Attorneys defending trafficking victims should explore defenses aggressively. For example, using the general defense of duress may be possible even though being trafficked into prostitution may not present a classical case of duress. To assert duress successfully, the lawyer must show that the danger used to compel the commission of the crime was not a danger of future violence but of present and immediate violence at the time of the offense.⁸ Some trafficking victims

may have faced “present and immediate violence” at the time they were induced to engage in the act of prostitution for which they are charged, but most trafficking victims’ experiences do not fit so neatly into the statutory requirements. Many victims in prostitution are threatened with future violence to themselves and/or their families, but few trafficking victims are threatened with “present and immediate violence” each time they are induced into an act of prostitution. Past violence and threats of future violence to the victim and the victim’s family are often enough to coerce acts of prostitution, but this may not appear to meet the legal definition of duress. Prostitution is usually not a single act but a series of acts that take place over time and often under circumstances that suggest a defendant could have escaped from the trafficker. This leads to the misconception that the defendant is under no immediate threat of danger. In this respect, as in others, the experience of a trafficking victim mirrors the experience of a domestic violence victim, whose abuser’s pattern of coercive control has established ongoing risk even though it may appear to an outsider that the victim could have escaped during a lull in the violence. Defense attorneys, with the help of an expert, must educate prosecutors, judges, and juries about the violence, threats, coercion, and ongoing effects of the terror tactics that keep trafficking victims in a constant state of fear and in immediate danger. Without this information, fact finders may rely on myths and misconceptions that could undermine the victim’s defense.

Another potential hurdle in the assertion of duress is the unavailability of the defense to a defendant who “recklessly placed” herself in the situation.⁹ For example, if the defendant knew or had reason to know the person who exploited her was a trafficker or pimp, she may be viewed as responsible for her predicament even if she was under immediate threat of physical injury when she was induced to commit the act of prostitution. The defense attorney, with assistance from an expert, must explain how the dynamics of trafficking, like those of domestic violence, impair a person’s agency and ability to avoid or leave the situation and relationship.

The New York sex trafficking law itself helps defense attorneys establish that their prostituted clients are sex trafficking victims and therefore not criminally responsible for the crime for which they were arrested.¹⁰ If a person is guilty of sex trafficking for engaging in the conduct enumerated in the statute, then it stands to reason that someone subjected to that conduct is a victim of sex trafficking. For example, a person arrested for prostitution who has experienced some violence and threats from a pimp may not, depending on the circumstances, be able to successfully assert a duress defense, but should be considered a

trafficking victim under the New York State law and therefore should not be charged with the crime of prostitution. The crime of sex trafficking includes, among other things, the use of force or deception to compel or induce a person into prostitution by instilling a fear that, if the victim does not comply with the demand, she will be injured, arrested, or deported.¹¹

Post-Plea and Post-Conviction Relief

If at all possible, defense attorneys should determine if their client is a trafficking victim *before* conviction and sentencing to avoid further victimization and because it may be difficult to meet the standard required to withdraw a plea or vacate a conviction. Very few defendants arrested for prostitution fight their cases and go to trial. The overwhelming majority of prostitution convictions result from pleas. If, however, defense attorneys do not learn that their client is a trafficking victim until *after* plea or conviction, attorneys may still be able to pursue a few avenues of relief. On August 14, 2010, the governor of New York signed into law the first legislation in the nation that specifically allows trafficking victims to vacate prostitution-related convictions resulting from coerced prostitution.¹² Defense attorneys can file a motion to vacate convictions under this statute. As a practical matter, defense attorneys should seek the support of prosecutors in moving to withdraw a plea or vacate a trafficking victim's conviction for prostitution. If the prosecutor does not oppose the motion or plan to appeal the decision, the judge will be more likely to grant the motion.

Under New York law, in the court's discretion, a defendant may withdraw a plea of guilt before sentence is imposed.¹³ A defendant's decision to plead must be voluntary and intelligent.¹⁴ The circumstances of the case may allow a defense attorney to argue that the trafficking victim's plea was not voluntary because the trafficker forced the victim to plead guilty and/or to remain silent about her exploitation.

However, even if attorneys can successfully argue that the defendant's plea was not voluntary, attorneys can only make a motion to withdraw a plea prior to sentencing. In most prostitution and other low-level cases in New York City, conviction and sentencing occur at the same appearance before the judge. Practically, the only option available to defense attorneys is a motion to vacate the conviction, an even more difficult avenue of relief.¹⁵ Finally, Constitutional challenges, more difficult still, might also be made. Defense attorneys can argue that the conviction by plea was obtained in violation of the client's constitutional rights because the plea was not voluntarily entered or, if the attorney did not explore or assert a viable defense such as duress, because counsel was ineffective.

Systemic Change

In New York City, two criminal courts are especially positioned to identify trafficking victims arrested for prostitution and to serve as models for other courts. The first is the Midtown Community Court, which handles approximately 80 percent of the prostitution cases in the borough of Manhattan. The presiding judge orders defendants who plead guilty to attend an on-site social service program designed to address many potential issues — economic instability, violence, physical and mental health, trauma, lack of education and job training, and addiction. Because of this special program the court not only handles the prostitution arrests originating in its catchment area but also the prostitution cases from the traditional downtown criminal court that are not resolved at arraignment. The court partners with service providers, including trafficking victim service providers, who work with the court’s clinical staff to screen defendants for trafficking and provide voluntary services to those in need. Also, one attorney from the public defender’s office is specially assigned to handle all of the office’s prostitution cases. This attorney works closely with the trafficking service providers and the court’s clinical staff to screen clients for trafficking.

Second, Queens Criminal Court has created a prostitution diversion courtroom. The presiding judge orders many defendants who plead guilty to participate in counseling sessions with partnering service providers. The service providers screen for trafficking during counseling and continue to work with some defendants on a voluntary basis after they complete their court-ordered program.

Conclusion

No longer a public defender, I now serve as the Director of the Midtown Community Court. I regularly speak with trafficking service providers, defense attorneys, prosecutors, and judges about the challenges that arise when trafficking victims are arrested for prostitution. In spite of the special attention paid to these defendants in the model Midtown and Queens courts, defense attorneys, prosecutors, and judges still do not know how many defendants are, in fact, trafficking victims. We can only imagine the vast number of victims who go unidentified in traditional criminal courts.

Even when a service provider has identified a defendant arrested for prostitution as a trafficking victim, the defense attorney, prosecutor, and criminal court judge may never learn that this defendant was a victim. In many ways, this

is understandable — service providers are interested in helping victims and may decide that the criminal justice system, which treats these victims as criminals, offers very little to their clients. Also, service providers have varied definitions of what constitutes trafficking from both clinical and legal perspectives. Many service providers, including attorneys in these organizations, focus on the immigration legal needs of foreign-born victims. These advocates may not have the victim's criminal conviction uppermost in their minds. Figuring out how to track down the defense attorney who represented the client months or even years before and may have critical information about the case or may be able to vacate a conviction may be a low priority. The process may be unfamiliar and daunting. Finally, trafficking victims may not want a service provider to reveal information about their experiences and the abuse they suffered to defense attorneys, and service providers may be compelled by client confidentiality protocols to remain silent. Without this communication, however, opportunities to prevent or vacate convictions are lost, and the criminal justice system never learns about victims wrongly arrested, convicted, and processed through the system.

If we are to combat sex trafficking effectively, the criminal defense bar must act as a partner in identifying and advocating for trafficking victims who are arrested for prostitution and other offenses. Defense attorneys are the first and often only players in the criminal justice system and beyond who have the opportunity and the protected attorney-client relationship that allows them to identify victims facing criminal charges. For these reasons, the defense bar must be involved in developing strategies and policies to better identify and serve victims. Without this, justice and safety for all trafficking victims cannot be achieved.

Notes

1. The Trafficking Victims Protection Act of 2000 (“TVPA”), Pub. L. 106-386, was enacted in October 2000. Congress has reauthorized the TVPA under the title Trafficking Victims Protection Reauthorization Act. *See* Pub. L. 108-193, Dec. 19, 2003; Pub. L. 110-457, Dec. 23, 2008.
2. Laws of 2007, Ch. 74.
3. Laws of 2008, Ch. 569.
4. N.Y. Family Court Act, Art. 7.
5. N.Y. Civ. Proc. Law and Rules § 4508 governs social worker-client privilege.
6. N.Y. Crim. Proc. Law § 210.40 governs motions to dismiss in furtherance of justice.
7. 41 AD 2d 204 (2d Dept 1973).
8. N.Y. Penal Law § 40.00(1) defines the defense of duress. *See, e.g., People v. Staffieri*, 251 AD 2d 998, 999 (2d Dept 1998) (“[p]rior threats and assaults may support a claim of duress at the time of the crime, but only when combined with a present and immediate compulsion”).
9. N.Y. Penal Law § 40.00(2).
10. N.Y. Penal Law § 230.34.
11. N.Y. Penal Law. § 230.34(5).
12. Bill (A.7670/S.4429).
13. N.Y. Crim Proc. Law § 220.60(3).
14. *See Boykin v. Alabama*, 395 U.S. 238 (1969).
15. N.Y. Civ. Proc. Law § 440.10.