

Prosecutor Trial Preparation - Countering Common Defenses

A WARNATH GROUP PRACTICE GUIDE



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The WARNATH GROUP

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PRACTICE GUIDE
by the Warnath Group

AT A GLANCE

Intended Audience:

- Prosecutors and Investigators working on human trafficking cases.

Takeaway: The prosecutor can anticipate the common defense arguments offered in human trafficking cases and prepare to present counter arguments supported by corroborating evidence.

In this Practice Guide:

- The relationship between the elements of the crime of human trafficking, as laid out in the United Nations Palermo Protocol, and the common defenses
- Descriptions and examples of the three most common types of defenses
- Counter arguments to the three most common types of defenses and suggestions for corroborating evidence

Why Do It?

When preparing for a human trafficking trial, it is essential for the prosecutor to anticipate what argument(s) the defense may make on behalf of the accused and have a plan to counter those arguments. Because the facts of each human trafficking case are unique, the arguments that are offered by the defense will vary.

The more time you spend thinking about the specifics of any potential defenses, the more time you will have to craft and tailor your responses. You will be better able to “build in” antidotes to these defenses by preparing your witnesses to respond to questions relevant to the defense arguments. You will also have more time and opportunity to gather evidence to support your counter-arguments or otherwise negate the defenses.

Preliminary Considerations

Trafficking cases are frequently categorized as either "labor" or "sex" trafficking. Though some of the standard defenses are common to both labor and sex trafficking, some defenses will be used far more often in one type of trafficking case than in the other. Also, many of the regularly employed defenses apply only where the victims (and traffickers) come from a foreign country, often creating additional opportunities for the defense to attempt to use cultural, religious or economic differences as a shield to conviction. However, there is a fundamental similarity to the defenses used in the vast majority of trafficking cases, which is that the putative victim(s) has grossly mischaracterized 1) the nature of the relationship between him/herself and the trafficker, 2) the (allegedly coercive) conditions under which he or she worked, and 3) the reasons why he or she continued to work despite those conditions. Often, because these issues are interrelated, the defense will weave an argument that the victim is unreliable on all three of these matters. With or without a full-frontal assault on the character and credibility of the victim, the defense will attempt to argue that the victim has turned the picture on its head—that the trafficker was more patron or protector than overlord or oppressor, and the victim's allegations are the product of ignorance, self-interest, manipulation and/or malice.

The challenges for the prosecutor are to defend the credibility of the victim through witness preparation and careful and sympathetic questioning; to thoroughly investigate and persuasively present adequate corroboration for the victim's account; and to educate the judge or jury about the subtle psychological, economic, cultural or legal reasons that explain why and how a person can be forced to provide labor or services against his or her will.

The United Nations anti-human trafficking Palermo Protocol¹ defines human trafficking (TIP) by laying out three elements—Act, Means, and Purpose. The act requires proof that the accused recruited, transferred, harbored or received a person's labor. Means are the things the accused did to obtain control over the victim—force, fraud or coercion is the familiar troika found in most human trafficking statutes. Proving the means is relatively easy where the accused has used or threatened actual physical force, but more difficult when the labor or services were obtained by false promises, or through

¹ Article 3 of the United National Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

coercion by threats of psychological, economic, legal, cultural, familial or reputational harm. The purpose is the intent element—that the trafficker's actions were taken for the purpose of exploiting the victim(s), whether it be prostitution or other forms of labor.

Rarely is the defense centered on a denial of the act; most often the accused will admit the recruitment or employment relationship, as this is the most easily provable part of the prosecution's case. Instead, the defense will hammer at the dearth of evidence as to the use of prohibited means to obtain labor or services; or at the failure of the prosecution to prove that the accused **knew** that the victim's labor or services were not provided voluntarily. Thus, most defendants fight their battles around the more "subjective" elements of a trafficking offense. The job of the prosecutor is to present evidence and craft rebuttal arguments that demonstrate the victim's plight in a vivid and comprehensible way, using concrete examples of the trafficker's acts of force, fraud and abuse, thereby showing the ways by which these acts subjugated the victim, and explaining how the tactics were carefully calibrated to the victim's vulnerabilities.

The Most Common of the Common Defenses

A. The Victim Performed the Work Voluntarily

If a victim provided labor or services on a **genuinely** voluntary basis, you can't (or shouldn't) bring a human trafficking prosecution, no matter how awful or onerous the conditions of employment.² Bad bosses and a dramatically subpar workplace do not automatically create human trafficking if the person has validly consented. There may be the possibility of a prosecution for immigration violations or harboring, or wage and hour law violations or other violations of fair labor standards, but if the prosecutor is unable to rebut the defense that the victim's labor or services were given in a truly voluntary manner, the prosecution must fail. However, if the prosecution can show that what looks at blush to be "consent," was, in fact, the product of force, fraud or coercion, then there is every chance of success. This is especially true if the prosecutor can point to evidence that the accused has exploited a victim's position of vulnerability. Thus, the courtroom battle will be waged around the value of the evidence of the victim's consent.

² The exception to this rule occurs when the victim is underage, and the TIP statute punishes a person for causing the victim to be involved in commercial sex trafficking.

You should anticipate that the defense will argue one or more of these variations on the theme of fully willful participation in the employment relationship, and you must be prepared to refute the truth of each of these claims.

1. The Victim Entered into the Recruitment or Employment Agreement Willfully

The defense may point to the fact that the victim initially agreed to the employment relationship. Many foreign national victims, especially victims of labor trafficking, are at first enthusiastic about beginning a new life in a different country, where (they are told) they will live a comfortable life with higher wages and better working conditions. The defense may point to the fact that life in the home country was hard, that the standard of living is low, and then try to contrast that with the superior conditions in the new country.

Even in a (domestic) sex trafficking context, the defense will likely argue that the victim's decision to provide sexual services was knowing and voluntary, made because of economic necessity and, or, out of a sense of loyalty to the accused. Again, the defense may ask the judge or jury to look to the victim's prior disadvantaged circumstances, suggesting that though life as a prostitute under the direction of the accused was far from perfect, it was, nevertheless, better and safer than life without his protection and care.



Your Response: First, it is entirely possible that the victim was entirely willing to enter into the employment arrangement initially, but that is of little legal significance if the actual work conditions turned out to be very different than was described. Traffickers frequently engage in blatant fraud—a "bait and switch"—so that when the victim arrives at the workplace, the nature or conditions of work are nothing like those promised. The classic example is the unsuspecting female victim who is told she will be working as a waitress in the new country, only to find upon arrival that she really will work as a stripper or prostitute. Because the victim is alone in a new and unfamiliar setting, without resources apart from the trafficker, he or she has no real choice but to submit to the new and distasteful conditions and terms of labor. You must develop evidence of the disparity between the trafficker's promises and the victim's reality. Of course, this will often rest heavily on the testimony of the victim, but you can also look to the testimony of friends or family

members who may have been witnesses to the recruitment, as well as the experiences of others recruited by the trafficker. In many cases, the conditions of employment are sufficiently horrific that you can simply submit to the court that the victim's account of the false promises is credible because no reasonable person, no matter how desperate or vulnerable, would have agreed to those inhuman circumstances, so that the victim *must* have been misled. Put differently, the bad conditions themselves are compelling proof that the trafficker is a deceiver and that his/her claim of victim consent is a sham.

Second, look to the power disparity between the trafficker and victim that makes true "consent" inherently impossible. In the labor context, young, uneducated persons from poor rural areas are forced into debt bondage by wealthy traffickers, and these unfortunates have no real choice but to work until that debt is repaid. What may look, on the surface, like consent to recruitment and voluntary work is illusory; the trafficker has preyed upon the victim's position of socio-economic vulnerability. In sex trafficking cases, the accused has often sought out homeless, drug-addicted women or frightened teenagers out on their own in the world who are told they will be loved and cared for if they prostitute themselves. Again, the trafficker has identified and exploited the victim's weakness, or "position of vulnerability," knowingly creating the appearance of consent when the victim's vulnerabilities make true consent impossible.

Third, be aware that there may be situations where, in the beginning, the victim did freely and legitimately consent to the employment arrangement, and where the trafficker initially used no threats, fraud or other forms of coercion. Over time, however, some of these voluntary employment arrangements are transformed into human trafficking, when the victim decides he/she wants to stop working and the employer is unwilling to "let the worker go." This is frequently true in the domestic servant context: the servant will come to understand that he/she has made a bad deal, working long hours for little pay, and wants out of the employment relationship; the employer, on the other hand, has come to depend on the servant, understands that he/she/they cannot hire another worker for anything like the current terms of employment, and does everything in their power to hold the worker to the deal. Often this means confiscation of the victim's passport or threats of legal/immigration consequences, restrictions on the victim's freedom of movement, threats to family members back home, etc. It is the job of the prosecutor to work with the victim to chart and document the evolution of the employment arrangement, demonstrating for judge or jury how consent morphed into coercion or control.

2. *The Victim was a Happy Worker*

It is very common for the defense to produce witnesses who will testify that the victim seemed glad and grateful to be employed by the accused. Pictures of a smiling victim are often introduced into evidence. This is particularly true in the domestic servant context, where there are, inevitably, moments where the victim is shown at a genuinely festive event, perhaps a child's birthday party; or is heard to thank the accused for a rare kindness. In the sex trafficking context, there may well have been times when the victim is convinced that she loves her trafficker, and the trafficker loves her. The defense will produce witnesses who suggest that the accused and victim were in a genuinely romantic relationship, that they were a real team as opposed to trafficker and victim.



Your Response: Even the most beleaguered, badly exploited and unhappy victim will express some pleasure at certain moments, particularly if the exploitation continues for years. Sometimes this is because the victim has a genuine affection for a member of the trafficker's family, most often a child in her/his care, but the smiles in no way negate the fact that the victim was made to work against her will. More often, the victim is ordered to

appear happy or feigns contentment out of fear of the trafficker in the hope that the conditions of employment might be made less terrible and restrictive.

It may be appropriate to acknowledge that in many commercial sex trafficking cases the victim does actually "love" her trafficker, despite the control and abuse, as the trafficker created an atmosphere of protection, care, and romance. Perhaps she even told others that she was doing the commercial sex work because of this "love." However, these moments of happiness and affection normally evaporate into pure despair; the trafficker's expressions of devotion turn into threats and violence. Prosecutors need not run from the defense evidence that there was a time when the victim loved and "freely" worked for the trafficker (pimp)—rather, it becomes the prosecutor's challenge to demonstrate for the trier of fact how these expressions of love and affection by the trafficker were in fact merely instruments of control, emphasizing the victim's emotional, physical (especially where there is a drug dependency) and economic vulnerabilities.

3. *The Victim Could Always Leave Because There Were No Locks or Chains*

A very common defense strategy is to point to the fact that the victim was not physically imprisoned by the accused or completely cut off from society so that he or she had opportunities to simply walk away or reach out for help and *chose* to stay and work. The defense may call witnesses who saw the victim in the community, outside the presence of the trafficker and ask, rhetorically, why the victim never cried out to anyone about the involuntary servitude. Or the defense may produce evidence that the victim had money to fund an escape, a cellphone of his or her own, contacts at a church or work who could have notified the authorities if they'd been told of the forced labor; or, in a commercial sex case, that the victim had clients who could have facilitated her liberation. And it *is* sometimes true that trafficking victims had a certain amount of freedom of movement, or money in their pockets, access to a cell phone or computer, or friends outside of the job.



Your Response: Traffickers don't need to use handcuffs and fences when they have more subtle forms of restraint at their disposal. It is costly and time-consuming to monitor a victim's whereabouts or restrict a victim's movements twenty-four hours a day. It is much cheaper, and at least as effective to create a climate of fear that will prevent a victim from contemplating escape; this climate of fear can be created by using physical force

against the victim or other workers, or by simply threatening force; by threatening to report the victim to immigration authorities; by threats to the victim's family back in the home country; or by threatening to withhold the victim's pay or otherwise threaten the victim with economic or reputational ruin. After all, traffickers are afraid of getting caught, and they don't need to leave obvious physical marks on the body when they have a host of more sophisticated means of coercion at their disposal. And when a trafficker has successfully instilled these fears in the victim, the victim becomes his or her own captor, necessarily reluctant to attempt to leave even when they have the opportunities. The victim is equally afraid of "ratting" on the trafficker, for fear of retaliation if the trafficker learns of the victim's outcry, as the trafficker has convinced the victim that nobody will listen, nobody will help, and there will be potentially dire consequences to "crossing" the trafficker.

B. The Victim Is Lying to Receive an Immigration or Other Legal Benefit

Because it is critically important for investigators and prosecutors to have access to victim-witnesses for trial preparation and testimony, and because it is fundamentally unfair to punish persons who have already been victimized by traffickers, many governments have elected to confer special benefits, such as a favored immigration status or immunity from prosecution, on such victims. In the labor context, this means that deportation will be deferred, or eliminated, providing the victim with an avenue to residency or even citizenship. In the sex trafficking context, this can mean that a prosecution for prostitution charges will be declined or dismissed. Many governments provide social service support to victims as outlined in the Palermo Protocol that can include housing, food, medical treatment, education, and even small stipends. These are significant benefits, and, accordingly, they provide grist for a trafficker's attorney. Increasingly, the focus of a trafficking defense is the claim that the victim is exaggerating or concocting a claim of forced labor to secure one of these valuable benefits from a naïve and overeager investigator or prosecutor.

The defense may produce witnesses to testify that such immigration legal benefits or social service provisions were known or discussed among other workers close to the victim. If the victim was rescued or assisted by an NGO, they might assert that these lawyers or victim advocates "planted the seeds for a trafficking claim" to make the person eligible for benefits.



Your Response: Yes, indeed, it is critically important for investigators and prosecutors to have access to victims. Victim testimony is essential if traffickers are to be brought to justice. Traffickers intentionally create situations where their victims are at risk of deportation or imprisonment, and it is unfair to permit the accused to use this inherent uncertainty of victim status to insulate him/herself from prosecution for the exploitation. Thus, it is only

right that victims are protected from a second round of punishment, this time at the hands of the state; and that prosecutors have the tools to bring traffickers to justice. Conferring these benefits on trafficking victims is not unlike granting immunity to witnesses or entering into cooperation agreements in other kinds of criminal cases; this is a time-honored and necessary way of achieving the greater good of convicting the most culpable individuals.

You can normally belie the assertion that the victim had an understanding of such immigration or legal benefits before their outcry, rescue or escape. This can be done through the direct testimony of the victim³, or through the testimony of those individuals with contact with the victim during their servitude or immediately thereafter. Trafficking victims are often unsophisticated individuals, completely unfamiliar with the laws and practices of the country in which they find themselves, and, in most cases, it should be obvious that they lacked the wherewithal to concoct a story to obtain benefits. But even when there is some evidence that the victim may have been familiar with the possibility of receiving a benefit, you can point to the corroboration for the force, fraud and, or coercion, and argue that no one would willfully consent to inhuman treatment in the faint hope of some possible future benefit. Such benefits are small solace for the degradation of extreme exploitation at the hands of another.

C. The Trafficker’s Conduct is Accepted Cultural (and Legal) Practice in the Home Country

Foreign-born traffickers, who import and enslave their countrymen/women, will frequently assert the defense that the employment arrangement was consistent with cultural and legal norms in their home country, and, thus, that they lacked the requisite intent to commit the crime of human trafficking. They will produce witnesses for the proposition that their treatment of the victim, while harsh or penurious by host country standards, is in keeping with the treatment of servants or workers back home; and, accordingly, that they had no idea that maintaining “strict control” was not permitted in the “new” country. Sometimes the trafficker and victim are related, and the trafficker will claim that they were merely exercising traditional familial authority.



Your Response: What is acceptable in the trafficker's home country is entirely irrelevant to the issue of whether he or she committed the crime of human trafficking. When one settles in a new country, it is, without exception, the law of that host country that controls. It is absurd to believe that immigrants, especially immigrants of means—and human traffickers are almost always

³ For more information on preparing victims to testify as a witness during trial, please see the Practice Guides *Prosecutor Trial Preparation – Preparing the Victim of Human Trafficking to Testify* available at <http://www.warnathgroup.com/practice-guide-prosecutor-trial-preparation-preparing-victim-human-trafficking-testify/> and *Prosecutor Trial Preparation – Direct Examination Questions for the Victim* available at <http://www.warnathgroup.com/practice-guide-prosecutor-trial-preparation-direct-examination-questions-for-the-victim/>.

persons with some economic resources—would not understand that using force, fraud or coercion to obtain another's labor or services is prohibited. It is not as if the national campaigns against human trafficking have been conducted in secret; all over the globe, this type of exploitation has been publicized, condemned and legislated against. To claim ignorance of its prohibition is not only preposterous but, in fact, the last resort of a ridiculous defense. In a sense, it is also an admission of guilt.

Moreover, when one dissects these claims of cultural, familial or religious acceptance of the exploitive conduct, they are nearly always found to be false and hollow, a distortion of the truth about actual practices or norms in the home country. While there is a danger in doing battle on the issue of whether the trafficker's behavior would have been acceptable back home, as it dignifies the notion that cultural differences *can be* a defense, it might, in certain circumstances, be advisable to call an expert witness to belie the idea that any form of what is internationally recognized as human trafficking is legal or socially acceptable in the home country.

Conclusion

Prosecutors and investigators can work together to craft the counter arguments and locate evidence that will rebut potential defenses. Do not be afraid to bring a case that is imperfect, or because there are facts that seem to favor the Defendant. If you are prepared to respond by confronting any possible issues head-on you can still win your case.

Acknowledgments

For more information on prosecutor trial preparation in human trafficking cases contact the Warnath Group at info@WarnathGroup.com. The Warnath Group thanks Gerard Hogan, former Federal Prosecutor and Senior Litigation Counsel at the U.S. Department of Justice (DOJ) Civil Rights Division and former Maryland State Prosecutor, and Warnath Group Senior Advisor on Law and Policy Sheila Berman for their contributions to the preparation of this paper. To access additional practical tools and resources, visit our website at www.WarnathGroup.com. Studies and background material are available at www.NEXUSInstitute.net.

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