

Prosecutor Trial Preparation - Preparing the Victim of Human Trafficking to Testify

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 working on human trafficking cases.

Takeaway: The prosecutor can prepare and help the victim of human trafficking to successfully and comfortably testify against his or her trafficker(s).

In This Practice Guide:

- The five W's and "how" of preparing the human trafficking victim to testify
- How to prepare to work with the victim
- How to make the victim comfortable
- How to review your own prosecutorial questions with the victim
- How to anticipate defense questions
- How to review defense questions with the victim

WHY DO IT?

The prosecutor must not assume that a victim of human trafficking will be able to go into court unprepared and give a full, detailed and coherent account of everything that happened to him or her while trafficked.

The trafficking victim will forget many of the details during the long delay between the first statements to the police and the trial. This delay can last many weeks, months or even years. During this delay, the victim will move on with his or her life. It is only natural that the victim will not think about the ordeal but instead focus on reclaiming an old life or building a new one. The victim will need your help to go back and recall the relevant details of the trafficking situation which might include bad or painful memories they have been trying to forget. Trafficking in Persons ("TIP") is a continuing crime that often takes place over a long period of time. A victim can be trafficked for many months

or even years. In this way human trafficking differs from most other types of crime, which involve a single event occurring in a short period of time. At trial the trafficking victim, unlike most other crime victims, must be able to recall many details, which happened over many weeks, months or years. The victim will need your help to do so.

Finally, trafficking victims are often afraid when they go to court. They are afraid of the judge, of going to jail themselves, of having to face the trafficker in court, of having to testify in public about things that may be viewed as shameful by the victim or the victim's friends and family, of being embarrassed in front of their family and/or community, and of the possibility of retaliation from the traffickers against them or their loved ones. Fear can make it harder for the victim to recall details and give truthful testimony. The victim will need your help to overcome this fear

WHEN TO DO IT?

Typically, victim preparation takes place shortly before the victim is scheduled to testify in court. Sufficient time must be allocated to allow for a full and thorough briefing. Depending on the complexity of the case, the number and sensitivity of facts involved, problems in the case that need to be explained, and the needs and concerns of the victim that must be resolved, this can take many hours spread out over multiple sessions. Prosecutors should prepare to spend the time necessary to conduct a proper pretrial interview.

WHERE TO DO IT?

The prosecutor's office or other similar location is suitable as long as it provides sufficient privacy to allow for a free and open discussion.

WHO SHOULD BE PRESENT?

It is a good idea to have a second person present to assist with the victim preparation. The prosecutor who will be asking the questions in court should take the lead so that the victim becomes familiar with the prosecutor and a relationship of trust can be established. A second person, either another prosecutor or investigator, should be present, if possible. This person should not interfere with the interview. His or her role is

to take notes and be a witness to verify the fairness of the interview if a question arises at trial as to how the preparation was conducted.

CAN YOU DO IT?

In many countries, prosecutors do not prepare witnesses, including trafficking victims, to testify. This is usually not a matter of law but of practice. That is, there may not be a legal prohibition preventing witness preparation. It just is not done, either because it is viewed as unfair interference with the victim's testimony or because of a fear that defense counsel will argue that the prosecutor has told the witness what to say.

While witness preparation may not be necessary in many types of prosecutions involving less complex crimes, preparing the victim to testify in a trafficking in persons (TIP) case is essential for the reasons listed above. An unprepared victim is likely to be a poor witness for the prosecution and may feel re-victimized by the trial process. Unless there is a legal prohibition against doing so, a good prosecutor must take the time to properly and fairly prepare a TIP victim to testify. Preparing the TIP victim for court is an essential part of the prosecutor's job. Failure to perform that function in a TIP case is unfair to the victim and potentially detrimental to the case.

The key is that victim preparation must be done fairly, as further outlined below.

WHAT CAN YOU NOT DO?

In a word, the prosecutor cannot "coach" the victim. This means that the prosecutor cannot tell or even suggest how the victim should answer a specific question. Rather the prosecutor will conduct a pretrial preparation interview. Using this method, the prosecutor is letting the victim know what questions will be asked at trial so that the victim is not surprised, has a chance to recall details, and is better able to answer fully and truthfully.

To the extent that the victim may not remember a fact during the pretrial preparation interview, the prosecutor can try to refresh the victim's recollection by, for example, showing him or her a prior statement. But the prosecutor must accept the victim's answer and cannot urge or suggest that the victim respond in another way.

There is a big difference between “preparing” and “coaching.” Remember, the prosecutor is preparing the victim to testify truthfully and not telling the victim what to say. As long as the prosecutor strictly adheres to this distinction when talking to the victim, neither the judge nor the defense attorney can have any issue with the fairness of this process.

HOW TO DO IT



Prepare

Before conducting a pretrial interview of the victim, the prosecutor must first thoroughly prepare for that interview. The prosecutor must know what questions he or she intends to ask the victim at trial before he or she can review those with the victim.

This means that the prosecutor must:

- Review the case file and be thoroughly familiar with the evidence as well as with all prior statements from the victim;
- Prepare a list of questions to ask the victim at trial on direct examination or an outline of the areas to cover with the victim on direct examination at the trial;
- Identify problem areas in the evidence that the victim will need to explain during direct examination at trial.

The above three steps are described in detail in the Warnath Group's Practice Guide entitled "Prosecutor Trial Preparation: Direct Examination Questions for Victim". Please review that Practice Guide for suggestions on how to prepare an effective direct examination.

◆ *Conducting the Pretrial Preparation Interview*

Once the prosecutor has reviewed the file, prepared the questions and identified problem areas in the evidence, he or she should schedule the victim interview and be prepared to do the following things:

- Make the victim comfortable
- Review the questions you will ask the victim
- Anticipate the questions the defense lawyer will likely ask the victim
- Review those likely questions with the victim

Make the Victim Comfortable

To put the victim in the best position possible to tell his or her story in court truthfully, coherently and persuasively, the prosecutor must make the victim comfortable, both with the court and with his or her testimony.

Most trafficking victims are unfamiliar with how courts and trials work. For them, the judicial system is something to be feared and avoided at all costs. This fear may be even greater for victims who come from other countries and who have no experience with or understanding of local laws and procedures and who do not speak the local language.

A good prosecutor does not want the victim to be afraid, because fear interferes with a person's ability to think and communicate clearly. A frightened victim does not make a good witness. The prosecutor must deal with the victim's fear and try to neutralize it as much as possible. This is best done by giving the victim as much information as possible about the trial and court procedures. The more the victim knows about how the trial will work, the less fearful he or she will be.

**To Help the Victim Feel Comfortable About Testifying,
the Prosecutor Should:**

- Explain the trial process in detail to the victim. This means telling the victim who the main players are in court and describing their roles at the trial. Thus the prosecutor should explain the purpose of the trial, how the evidence will be taken, who will ask questions and in what order, how long the trial will take, and who will decide the issue of guilt or innocence.
- Show the victim the courtroom in advance of trial, letting the victim stand on the witness spot or sit in the witness chair and showing the victim where the judge, defense lawyer and prosecutor will sit. Simply becoming familiar with the physical set up of the courtroom can do much to calm a victim's fears.
- Familiarize the victim with the procedure for taking an oath or making an affirmation. The prosecutor should explain the purpose for the oath and why it is important. Here, it is important to remind the victim that his or her only role at the trial is simply to answer all questions truthfully. The victim should be told how the oath or affirmation is administered, what words will be used and what he or she is expected to say. In some cases, you might want to have the victim practice what he or she will say when taking the oath.
- Show the victim where he or she will wait before being called to testify and describe the process of how he or she will be called into the courtroom to testify.
- Explain the testimonial protections, if any, in place for the trial and show the victim how they will work in the courtroom. If screens will be used to shield the victim from the defendant and the rest of the courtroom, for example, the victim should understand where he or she should stand or sit in relation to the screen. If the victim will be testifying from a remote location via video link, he or she should understand precisely how this will work and whether their face and/or voice will be electronically masked.

If the victim knows the mechanical details of the courtroom and feels comfortable about what to expect at the trial, the victim will feel more confident about appearing at court and will be in a better position to concentrate on his or her testimony.

Review Your Questions with the Victim

Go over the questions you intend to ask the victim at trial. Ask them exactly as you would in court. Let the victim answer the questions any way they want. Do not direct the victim's answer or even suggest how he or she should respond. That would be coaching.

You may be surprised by an answer the victim gives. This may be because your question is confusing or the victim does not understand what you mean. This gives you an opportunity to modify your question to make it clearer. Do not be afraid to change your questions so that the victim better understands what is expected in response. In this way, the pretrial interview can not only help to prepare the victim, but also help to improve the quality of your presentation in court.

The victim's answer may surprise you, not because your question is confusing, but because what the victim says is not consistent with a prior statement given to the police. Again, do not tell the victim the answer is wrong or that they must change the testimony to be consistent with a prior statement. Instead, you can show the victim his or her prior statement, or read it aloud, and then ask if that refreshes his or her memory. The victim may say that it does and change his or her answer to your question accordingly.

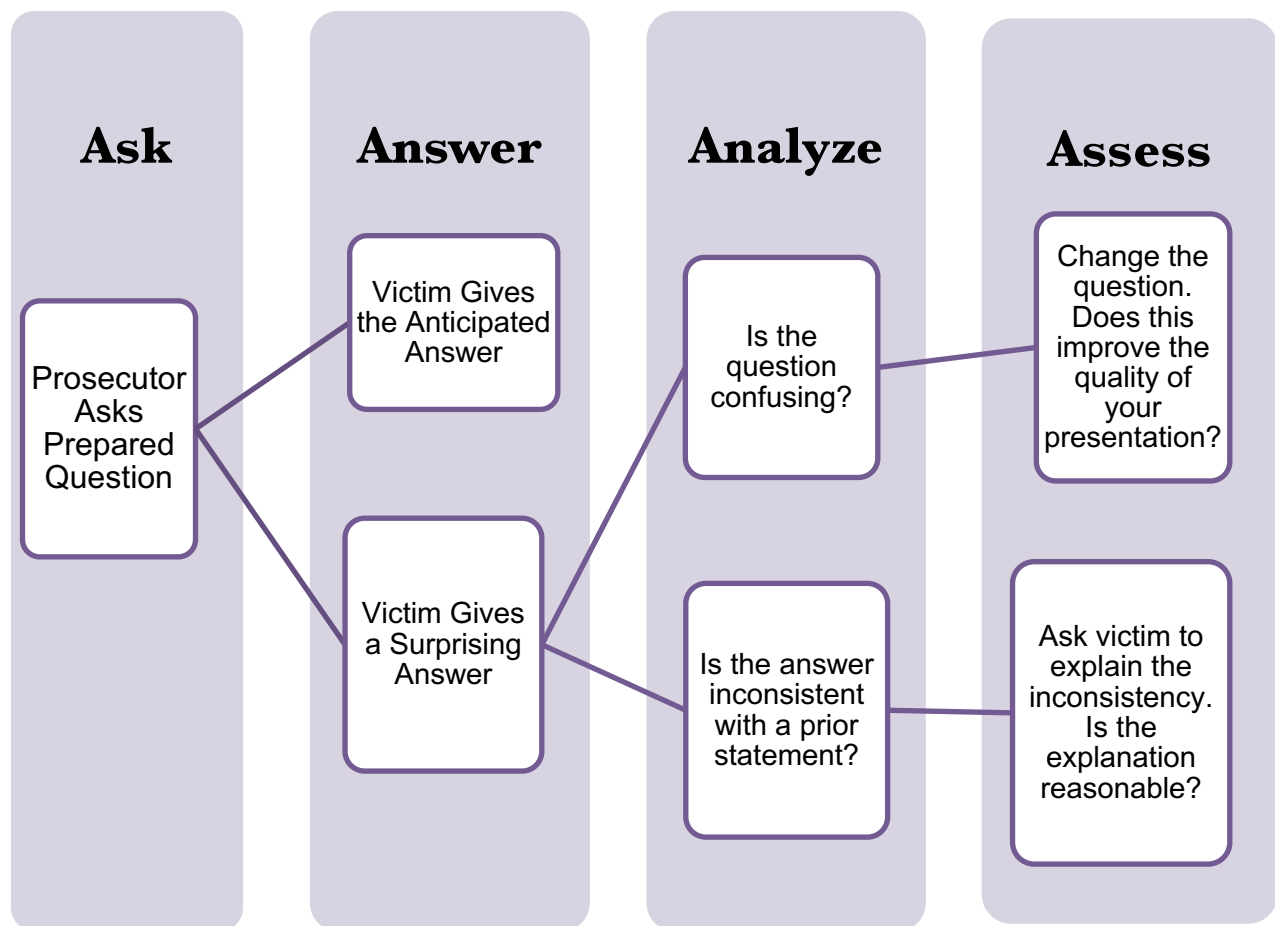
On the other hand, the victim may not change his or her answer, either because they do not remember giving that statement to the police or because they admit to you that what they told the police was not the truth.

If the victim says that the prior statement does not refresh their recollection, then you must accept the inconsistency.

If the victim admits having lied to the police, you must not in any way encourage him or her to change their testimony to conform to that prior statement. That would be coaching. Instead, ask the victim why they were not truthful with the police. The

explanation may or may not be credible. For example, the victim may say that he or she was afraid to tell the police the truth because the traffickers were friends with many of the police.

Once the victim has explained the inconsistency, the prosecutor must assess the reasonableness of that explanation. This may require additional investigation to verify the victim's account. If the victim says that they feared for the safety of their family, evidence should be developed to show that the traffickers did indeed know where the victim's family lived. If the victim says that the traffickers locked them in their room but the investigation shows that there was no lock on the door, the prosecutor may want the investigators to take a closer look at the door in question to determine if there is any physical evidence suggesting that a lock had at one time been placed there. If the victim says they did not run away because the traffickers told them that the police would arrest them and return them to the traffickers who would then beat them, corroborating evidence from another victim or from a cooperating accomplice would be helpful.



Assuming that the victim's explanation is reasonable, the prosecutor must then decide how to deal with the issue at trial. The prosecutor should prepare questions to ask the victim about any inconsistencies and go over those questions with the victim during the pretrial preparation interview. For example, if the victim admits during the pretrial interview that they did not tell the police the entire truth during an investigative interview, you should let the victim know that you intend to ask questions about that issue on direct examination so the victim can explain the reasons for not being forthcoming with the investigators.

The risk in not raising the issue on direct examination and giving the victim a chance to offer an explanation in response to your questions is that the defense lawyer may bring the issue up when questioning the victim on cross-examination. An explanation, if there is one, offered by the victim for the first time to the defense lawyer may not be accepted as credible by the judge or jury. It is better for the prosecutor to address the problem first on direct examination.

Similarly, the prosecutor should confront other obvious problems in the case during direct examination and not ignore them hoping that the judge or defense lawyer won't notice. For instance, victims often are given some freedom of movement while being exploited, yet they fail to escape or complain to the authorities. This is a common problem in TIP cases. Such facts seem to support a defense claim of consent and lack of coercion and may raise questions in the mind of the judge as to whether this is really a TIP case. The prosecutor should anticipate this problem by asking the victim to explain why they did not escape when given an opportunity to do so. The explanation, if credible and supported by the evidence, should satisfy the judge's concerns and prevent the defense from exaggerating the issue.

However, the prosecutor must be careful not to suggest an explanation to the victim. That would be improper coaching. The victim must be allowed to provide that information on their own. A tear-out checklist for preparing the victim for direct examination is provided on the next page.

Preparing the Victim for Direct Examination – A Brief Check-List

- ✓ Review the case file and carefully prepare questions for the victim, making sure to cover the three elements of TIP.
- ✓ Choose a private place to conduct the interview.
- ✓ Arrange to have a second person observe and take notes.
- ✓ Set aside sufficient time to conduct a thorough interview.
- ✓ Make the victim comfortable about the trial process, by explaining how the trial will proceed, who the key actors in the trial are, and where they will be located in the courtroom.
- ✓ Explain any protection measures that will be implemented during the victim's testimony.
- ✓ If possible, show the victim the courtroom prior to the trial.
- ✓ Review your questions with the victim, making changes to assure clarity.
- ✓ Confront problems in the evidence, such as inconsistent statements or evidentiary problems such as failure to escape, and ask the victim to provide an explanation.
- ✓ Assess the credibility of the explanation.
- ✓ Remind the victim that his or her only job is to tell the truth.
- ✓ Know the difference between preparing and coaching.
- ✓ Do not coach.

Anticipate Questions from the Defense

Preparing the victim for your questions on direct examination is only half of the preparation process. You must also get the victim ready to respond to questions from the defense. If you fail to do so you risk the possibility that an ill-prepared victim will panic and recant testimony in the face of aggressive questioning from a clever defense lawyer.

It is impossible to anticipate every possible defense in a trafficking case. However, certain types of defenses tend to be used in TIP cases. Some defenses seek to negate one or more of the elements of the crime of trafficking. Other defenses attack the victim as a person who cannot be believed. Still other defenses play on the emotions of the judge. In many cases, a combination of these is used in the defense.

That said, in virtually all TIP cases, the defense will attempt to attack the credibility of the victim. The defense lawyer will say: “The victim is not to be believed. The victim is confused or lying. The prosecutor has failed to carry the burden of proof and the defendant must be acquitted.”

Evidence that the defense may use to suggest a victim’s lack of credibility (and which needs to be effectively countered by the prosecutor) often consists of:

- Prior inconsistent statements
- Conflicting accounts from the victim during testimony, particularly in response to cross-examination
- Physical evidence that does not support the victim’s account
- The victim has a reason to lie: to get benefits given only to trafficking victims, get monetary damages from defendant, avoid criminal charges for illegal acts, etc.
- The victim committed crimes and is a bad person who should not be believed

Correctly anticipating the defenses that are likely to be used in a particular TIP case will depend on the evidence in that case. A careful analysis of the quantity and quality of the evidence as to each element of the crime charged should reveal weaknesses in the prosecutor’s case. The prosecutor can reasonably anticipate that the defense will capitalize on those weaknesses, and build the defense around them.

Review Likely Questions from the Defense with the Victim

Once the prosecutor has a good idea of what topics the defense lawyer is likely to focus on in cross-examining the victim, the prosecutor can begin to prepare the victim. That preparation should involve the following tasks:

◆ Explain the Role of the Defense Lawyer

The prosecutor should first explain to the victim what role the defense lawyer will play at trial. The prosecutor should make clear that the defense lawyer's job is to protect his or her client, the trafficker. That means that the defense lawyer will try to undermine or throw doubt upon the victim's testimony. The victim should understand that even if the defense lawyer is being friendly and kind, the defense lawyer is not the victim's ally or friend in court. The victim should understand that the defense lawyer has a job to do. The defense lawyer may be aggressive or even seem angry at times. The victim should know that the defense lawyer is not angry at the victim. He or she is only trying to change the victim's testimony to help her/his client. The victim should always be polite and respectful in addressing the defense lawyer.

◆ Explain the Role of the Victim as a Witness

The victim should be told that his or her job is first and foremost to tell the truth. The victim should not be concerned about the outcome of the case or the effect his or her testimony may have on the case. The victim's role is not to make sure that the accused is convicted. The victim's function is simply to tell the truth. The victim must also understand that the victim, like any witness in a trial, will provide evidence by answering questions from the defense lawyer as well as from the judge and the prosecutor. The victim should always respond to questions, no matter who asks them, with the truth. Remind the victim of the oath that will be administered and explain the purpose of the oath. The prosecutor should make clear that to answer any question untruthfully is a violation of that oath.

◆ Explain How to Respond to Questions Generally

In responding to questions from the defense lawyer, as from the judge or the

prosecutor, the victim should listen very carefully to each question before answering. If the victim does not understand the question, it is permissible for the victim to say so and to politely ask for the question to be repeated or explained. The victim cannot tell the truth unless he or she understands the question. If the victim does not know the answer to a question, the victim must say so. The victim should not invent a response just to please the questioner. Nor should the victim embellish or exaggerate an answer in an attempt to help either side. This would be wrong, as the victim has taken an oath to tell nothing but the truth.

◆ *Explain How to Respond to Questions from the Defense*

The prosecutor should explain that the defense lawyer is allowed to ask leading questions of the victim. The prosecutor should explain to the victim what a cross-examination question is and to provide examples.

The prosecutor should tell the victim that it is perfectly appropriate to disagree with the defense lawyer. Nothing bad will happen if the victim disagrees, but it should be done politely. The prosecutor must remind the victim that agreeing with a false question from the defense is wrong, because the victim must always tell the truth.

The victim should understand that disagreeing with a correct statement from the defense lawyer is also wrong. Victims sometimes believe that under no circumstances are they to agree with any proposition put forward by a defense lawyer. An attitude that “the lawyer for the trafficker will get nothing from me” is bound to be damaging to the credibility of the witness and the case.

Explain that the victim is to listen carefully and to respond politely but always truthfully.

The victim should be advised to answer questions from the defense in the most succinct and appropriate way possible. It is crucial that the victim be warned of the dangers of volunteering anything.

The victim must be made to understand that if the cross-examining lawyer fails to explore a crucial part of the evidence then it is not up to the victim to bring it up. The victim must understand that any information provided by the victim in an answer to a

defense question can be used by the defense lawyer to conduct additional cross-examination, which may do damage to the victim's credibility. Therefore, the victim should resist giving the defense anything more than what is asked.

This may be frustrating for the victim, especially since a good cross-examiner always tries to prevent the victim from explaining an answer. The defense attorney just wants the victim to answer "yes" or "no". The victim needs to know that he or she will have an opportunity to further explain answers on redirect. Explain to the victim that the prosecutor will keep track of which answers need more detailed explanations and after the defense attorney is finished will ask follow-up questions so the victim can provide that information. It is important that the victim knows it is better to provide an explanation in response to redirect questions from the prosecutor, as any explanation they give to the defense lawyer on cross-examination will inevitably lead to additional leading questions and an attempt to cast doubt on the credibility of the explanation.

◆ *Rehearse with the Victim*

One way of preparing victims to testify in court is to rehearse with them. The prosecutor or someone from his or her staff can play the role of the defense lawyer and ask the victim the kinds of questions the defense lawyer might be expected to ask at the trial. Role-playing is a very good way to prepare the victim to effectively handle cross-examination in court.

In doing this exercise with the victim, the prosecutor should clearly explain that this is just practice and that the questions asked in court will not be exactly the same as the questions asked during the exercise. But what is important is for the victim to get used to the type of questioning he or she is likely to encounter at trial from the defense and to practice responding to such questions by listening carefully to each question, responding truthfully, disagreeing politely where appropriate and by not being afraid or losing patience.

The prosecutor should not be surprised if, even after a careful explanation of what to expect and how to respond to leading questions from the defense, the victim quickly agrees with leading questions that are clearly untruthful. This is not uncommon. When this happens, the prosecutor must point this out to the victim by asking the victim if the

truthful answer to the leading question was “yes.” If not, then the victim must tell the truth by disagreeing with the questioner. The prosecutor may have to repeat this exercise a number of times before the victim understands how to respond.

◆ *Explain Follow-up Questions (Re-Direct)*

Tell the victim that after the defense lawyer concludes his or her examination, the court may allow the prosecutor to ask additional follow-up questions to help the victim clarify any confusion resulting from the cross-examination. The victim should understand that the prosecutor has the opportunity to allow the victim to provide explanations for questions asked and on cross-examination. So the victim should not feel frustrated or angry if the defense lawyer does not allow him or her to explain answers to some of the yes or no questions. There will be an opportunity to do so when the prosecutor asks the victim to explain.

Give the victim an example so she understands how it works in court. For example, during cross-examination:

Q: “In all the many months you worked at the factory, you never once went to the police station to ask for help, did you?”

A: “No.”

The victim had no opportunity to explain why he or she did not go to the police. The defense lawyer did not ask him or her that question and the victim wisely did not volunteer that information. Explain to the victim that after the defense lawyer finishes all of his or her questions, the prosecutor has an opportunity to ask follow-up questions, like this one:

Q: “You told the defense lawyer that you did not go to the police station to ask for help. Please tell the judge why you did not go to the police.

A: “The traffickers told me that the police were working for them and that if I went to the police they would just return me to the factory and I would be beaten.”

Note: the only reason to ask the victim additional follow-up questions is to clarify facts, correct misimpressions or allow the victim to explain his or her answers. If the defense lawyer’s questioning was ineffective and failed to undermine the victim’s credibility or to raise doubts that need clarification, the prosecutor should not ask the victim any follow-up questions. You should explain to the victim that you will only conduct follow-up examination when it is absolutely necessary to do so. A tear-out checklist for preparing the victim for cross-examination is provided on the next page.

Preparing the Victim for Cross-Examination – A Brief Check-List

- ✓ Tell the victim that once you have completed the direct examination, he or she will be questioned by the defense lawyer. The victim should be told what topics or areas covered in direct examination are likely to be challenged by the defense attorney on cross-examination.
- ✓ Explain to the victim what cross-examination questions are and how they are used by defense lawyers.
- ✓ Advise the victim that when answering questions in cross-examination if the question is capable of a “yes” or “no” answer then such an answer should be given. If the answer is not capable of a “yes” or “no” answer then the victim should give as short an answer as possible.
- ✓ Prepare the victim to disagree with the defense lawyer if the question contains a wrong or inaccurate statement. The victim should disagree firmly but politely.
- ✓ Direct the victim not to volunteer any additional, unnecessary information in response to a question in cross-examination.
- ✓ Remind the victim of his or her obligation to tell the truth.
- ✓ Apprise the victim to remain relaxed and calm in cross-examination. The victim should be told that some defense lawyers deliberately attempt to aggravate or irritate witnesses and that the victim should resist any temptation to lose his or her calm demeanor in those circumstances.
- ✓ Tell the victim if they do not understand a question then they should say “I don’t understand the question” or “I did not follow the question, could I have it again please?” The victim should be specifically told that he or she should not answer unless they are sure of what is being asked.
- ✓ Clarify that after the defense lawyer concludes the cross-examination, the prosecutor may be allowed to ask follow-up questions. At this time, the

prosecutor will be able to ask the victim to provide any additional explanation to complete answers given to the defense lawyer.

Acknowledgements

For more information about prosecutor trial preparation in human trafficking cases, including preparing the victim to testify, contact the Warnath Group at info@WarnathGroup.com. The Warnath Group thanks Al Moskowitz, former Civil Rights Division Chief at the U.S. Department of Justice (DOJ) and former Regional Prosecutions Advisor at the Australia-Asia Program to Combat Trafficking in Persons (AAPTIP), for his contribution to the preparation of this paper. To access additional practical tools and resources, visit our website at www.WarnathGroup.com. Studies and background material – including the stories of victims of human trafficking -- are at www.NEXUSInstitute.net.

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