

Prosecutor Trial Preparation - Direct Examination Questions for the Victim

A WARNATH GROUP PRACTICE GUIDE



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PRACTICE GUIDE
by The Warnath Group

AT A GLANCE

Intended Audience:

- Prosecutors working on human trafficking cases.

Takeaway: The prosecutor must be prepared to deliver an orderly and logical direct examination of the victim as the victim is the only witness in a TIP case who can tell the full story of the trafficking crime.

In This Practice Guide:

- How to organize the direct examination around the elements of the crime
- Methods of questioning on direct examination
- Practical Preparation Method – Elements of TIP
- Questioning skills including types of questions and delivery
- Sample questions to ask to emphasize important facts

WHY PREPARE?

The most important witness for the prosecution in a trafficking in persons (TIP) trial is the victim. The victim is the only witness in a TIP case who is in a position to tell the full story of the trafficking crime, from beginning to end – from recruitment through exploitation. If the victim is unable to narrate these events in a coherent and convincing fashion, the possibility of a successful result is greatly diminished.

The role of the prosecutor is to enable the victim to tell his or her story in court through careful questioning. These questions must be prepared in advance of the trial. Well before the trial is scheduled to begin, the prosecutor must take the time to think through what questions to ask the victim and in what order to ask them. He or she should then prepare a detailed outline of the topics to be covered in the direct examination and key questions to be asked. Finally, the prosecutor

should review those questions with the victim during a pre-trial preparation interview. The pre-trial preparation interview is described in detail in the Warnath Group Practice Guide entitled “Prosecutor Trial Preparation: Preparing the Victim of Human Trafficking to Testify”.

A prosecutor who goes into court unprepared to conduct an orderly and logical direct examination of the victim is not serving the victim or justice well.

Preliminary Considerations

◆ Common Law vs. Civil Law Approach

In some countries, often those with a “common law” system, the prosecutor takes the lead role in questioning the victim witness. In other countries with a “civil law” system the judge does most of the questioning.

In both systems the prosecutor should prepare an outline of topics to cover or a list of questions to ask the victim, either as the primary questioner or following the judge’s questions.

◆ Methods of Questioning on Direct Examination

In conducting direct examination of the victim, there are two techniques that can be used:

Q&A Model

The first technique, the Q&A technique, is to have a set series of questions written out in advance and to ask the victim those questions. This approach is designed to make sure that all of the important information from the victim gets into evidence. This kind of preparation helps the prosecutor ensure that the victim addresses all the issues in the case.

Narrative Model

The second technique is the narrative technique. In this method of questioning, the witness is allowed to tell the story in his or her own words without interruption except to note those matters of fact which the witness may overlook along the

way. After the witness has finished the narrative, the questioner then uses specific questions to take the witness back to any areas overlooked during the narrative and fill in anything that was missed or which needs further explanation.

This can be a very effective approach, especially if the victim is articulate and able to tell the story clearly without prompting or guidance. Some prosecutors may use this technique in questioning victims because it gives the victim the greatest possible latitude in testifying, which allows the judge or jury to more accurately gauge the credibility of the victim's account. The risk is that the victim will unintentionally leave out details and explanations from the narrative that are important to the case. If using this open-ended technique, the prosecutor should be especially alert to this problem. The prosecutor must follow up on missing details or elicit explanations from the victim on problems in the evidence. Having a pre-prepared list of questions or essential elements and associated facts will assist the prosecutor in identifying areas that were missed and on which the prosecutor must focus during follow-up questioning. Which method of questioning to use may depend on the practice in a particular country or the preference of the judge trying the case.

◆ *Developing a Plan*

The aim of the prosecutor is to present the evidence as persuasively as possible to the judge or jury. The prosecutor should have a specific plan to accomplish this goal.

Objectives

In preparing questions to ask the victim, the prosecutor should keep three key objectives in mind.

Key Objectives for Questioning a TIP Victim

- ✓ To make certain that the judge or jury has a clear idea of what happened to the victim
- ✓ To make certain that evidence establishing the elements of TIP are thoroughly covered in the testimony
- ✓ To make certain that the judge or jury has been given reasonable explanations for any inconsistencies or unresolved problems in the evidence

Plan

In accordance with these three objectives, the prosecutor should have in mind a clear plan for the direct examination of the victim.

The Prosecutor's Plan

- ✓ To develop testimony that addresses the three elements of TIP
- ✓ To expand upon the fundamental facts in such a way as to make the evidence of the witness not only credible but actually persuasive
- ✓ To identify problems in the victim's evidence and allow the victim to explain

Organize the Direct Examination Around the Elements of the Crime

The prosecutor must always remember that he or she must prove the required elements of the crime charged to win the case. It is a good idea to develop the victim's testimony around those crucial facts that prove the elements of the crime.

Under the international definition of TIP in the UN Trafficking Protocol, this would mean planning the direct examination around the elements of Act, Means and Purpose. The national laws enacted by most countries defining the crime of "trafficking in persons" closely track the scope as defined in this international instrument.

If the prosecutor were trying to establish the crime of human trafficking under the UN Trafficking Protocol definition, the elements that must be shown for an adult victim are:

1. The accused recruited, transported, transferred, harbored or received a person [ACT].
2. By means of the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power, abuse of the position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person [MEANS].
3. For the purpose of exploitation, including the exploitation of the prostitution of others, other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs [PURPOSE].

◆ *How to Prepare the Direct Examination Around the Elements of TIP*

Preparing a direct examination of the victim to make sure that all elements of the TIP crime will be covered by the victim's testimony in court is a three-step process.

1. Review Prior Statements of the Victim

First, the prosecutor should carefully review all prior statements of the victim to determine what evidence he or she can testify to that tends to establish one or more of the elements of TIP.

2. Make a List

Once the review is completed, the prosecutor should make a list of each of the facts that the victim can testify to in support of each of the three elements: Act, Means, Purpose. When this analysis is complete, the prosecutor will have a complete list of all facts and evidence for each element that must be brought out on direct examination.

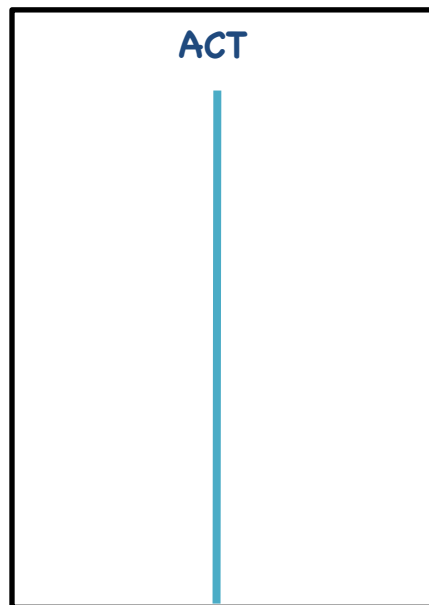
3. Prepare the Questions or Outline

Only after the relevant facts have been identified can the prosecutor determine what questions to ask. These questions should be designed to bring out each particular piece of evidence identified. By the end of this process, the prosecutor will have a clear plan of what he or she must ask the victim to assure that all pertinent facts are brought out and that nothing is overlooked.

Practical Preparation Method – Elements of TIP

This Practical Preparation Method can be used by prosecutors everywhere. Take out three sheets of paper, one for each of the three elements of TIP: Act, Means and Purpose. Each sheet of paper should be labeled with one of these three elements. Depending on the complexity of the case, additional sheets of paper may be needed to accommodate all the evidence that the victim can testify to.

The prosecutor should draw lines lengthwise from top to bottom down the middle of each of these three papers, like so:



On the right side of this line, the prosecutor should list every fact or piece of evidence from the victim that proves that particular element. If that evidence relates to the element of Act, then that fact should be listed on the right side of the line on the sheet of paper labeled "Act." If the evidence pertains to the Means or Exploitation elements, the evidence should be listed on the right side of the line on the sheet of paper corresponding to those elements.

Practical Preparation Method – Elements of TIP – Continued

For example:

The victim told police that she was approached by trafficker “A” in her village promising her a good job at a hotel in the city. That fact should be listed on the “Act” sheet on the right side of the center line.

The victim also said to the police that Trafficker “B” drove her to the city but dropped her off at a brothel, rather than a hotel. That fact should also be listed on the “Act” sheet to the right of the center line but below the fact involving trafficker “A”. In this way the chronological order of events can be preserved.

Further, in her statement to investigators, the victim recalled that when she arrived at the brothel, trafficker “C” slapped her in the face when she refused to service the first client. This fact should be listed on the “Means” sheet to the right of the center line because it tends to establish the use of force which is a component of “means.”

ACT

Victim was approached by “A” in her village with offer of good job at a hotel in the city

“B” drove victim from her village to the city, dropped her off at brothel instead of hotel

MEANS

When victim arrived at the brothel, “C” slapped her in the face when she refused to service first client

Practical Preparation Method – Elements of TIP – Continued

Once the relevant facts have been identified, the prosecutor can determine what questions to ask. These questions should be designed to bring out each particular piece of evidence identified. List the questions on the appropriate sheet of paper to the left side of the line opposite the fact to be elicited by that question. For example:

Questions to bring out the evidence as to trafficker “A” above, might be:

- *Do you know trafficker “A”?*
- *Where did you meet him?*
- *Did he promise you anything?*
- *What did he promise you?*

Questions to bring out the evidence as to trafficker “B” above, might be:

- *How did you get to the city?*
- *Who drove you there?*
- *Where did you think you were going?*
- *Where did he actually take you?*

Questions to bring out the evidence as to trafficker “C” above, might be:

- *What did you do or say when you were told by trafficker C to service the first client?*
- *How did trafficker “C” respond?*
- *Where did she hit you?*
- *How hard?*

Practical Preparation Method – Elements of TIP – Continued

ACT

Do you know trafficker "A"?
Where did you meet him?
Did he promise you anything?
What did he promise you?

How did you get to the city?
Who drove you there?
Where did you think you were going?
Where did he actually take you?

Victim was approached by "A" in her village with offer of good job at a hotel in the city

"B" drove victim from her village to the city, dropped her off at brothel instead of hotel

MEANS

What did you do or say when you were told by trafficker "C" to service the first client?

How did trafficker "C" respond?

Where did she hit you?

How hard?

When victim arrived at the brothel, "C" slapped her in the face when she refused to service first client

Note that the questions are simple, covering only one subject at a time, are in the direct form, not leading, and use plain language, not jargon or unfamiliar terms.

The prosecutor will have to review these questions with the victim during the pre-trial preparation interview to assure the victim understands what is being asked and can respond appropriately. It may be that during the preparation interview, the prosecutor will recognize the need to revise some of the questions to make them more clear and understandable to the victim. See the accompanying Practice Guide entitled “Prosecutor Trial Preparation: Preparing the Victim of Human Trafficking to Testify”.

Some experienced prosecutors will not formulate the actual questions. It is enough for them that they have identified the facts that must be addressed by the victim at trial. They have sufficient experience to construct appropriate, non-leading questions at trial and will use this list of facts as an outline to remind them of what facts they must cover with the victim at the trial. For experienced prosecutors, this is an appropriate approach. For less experienced prosecutors the exercise of actually constructing the questions prior to trial may be necessary to assure that they are properly formulated and designed to elicit the testimony needed.

Note, however, that having the questions written out in advance can make it more difficult for a prosecutor to improvise at trial when necessary. The prosecutor should not be so focused on his or her list of questions that they fail to listen to what the victim is saying. For example, the victim may not answer in a way that the prosecutor expected. In such a case, the prosecutor must be flexible enough to ask the next logical question even if that is not on his or her list of questions. As long as the prosecutor is clear on what facts the victim must cover during direct testimony in order to prove all the elements of the crime, the prosecutor will be able to bring the victim back to that topic through careful questioning.

◆ *Emphasizing Important Facts*

After the essential facts and questions are identified, listed and formulated, the prosecutor should think about how to highlight for the judge or jury what is important in the victim's testimony. By using specific and detailed questions to help the victim focus on the facts that must be proven to establish a violation of the crime charged, the prosecutor effectively and persuasively presents the case to the trier of fact.

It is useful to think of the process like a movie. The movie director will emphasize an important scene by using music or close up shots or dramatizing the action with slow motion effects. In a way, the prosecutor is like a movie director. The prosecutor also has a story to tell and in telling that story, certain facts are more important than others. A good prosecutor, like a good movie director, does not let those important facts get lost in the narrative detail. He or she emphasizes them. But the prosecutor, unlike the movie director, is working with live witnesses obligated to tell the truth. The prosecutor's ability to dramatize and emphasize are quite limited. Nevertheless, the prosecutor can put the narration of the victim into "slow motion" by using detailed questions to bring out specific details of the victim's testimony that prove each element of the crime.

For example, when the victim testifies how the accused recruited and transported him or her (the Act element), the prosecutor may ask the victim a series of questions designed to bring out details of that event, thus highlighting it and emphasizing it to the judge.

Each case, of course, is unique and the questions asked will depend on the specific facts of that case. As an illustration of the technique, some questions might include:

Where were you when the accused came into your house?

Was the accused with anyone else?

What were you doing at that moment?

Were your parents in the house then?

Where were they?

What did the accused say to you when she came into the house and saw you?

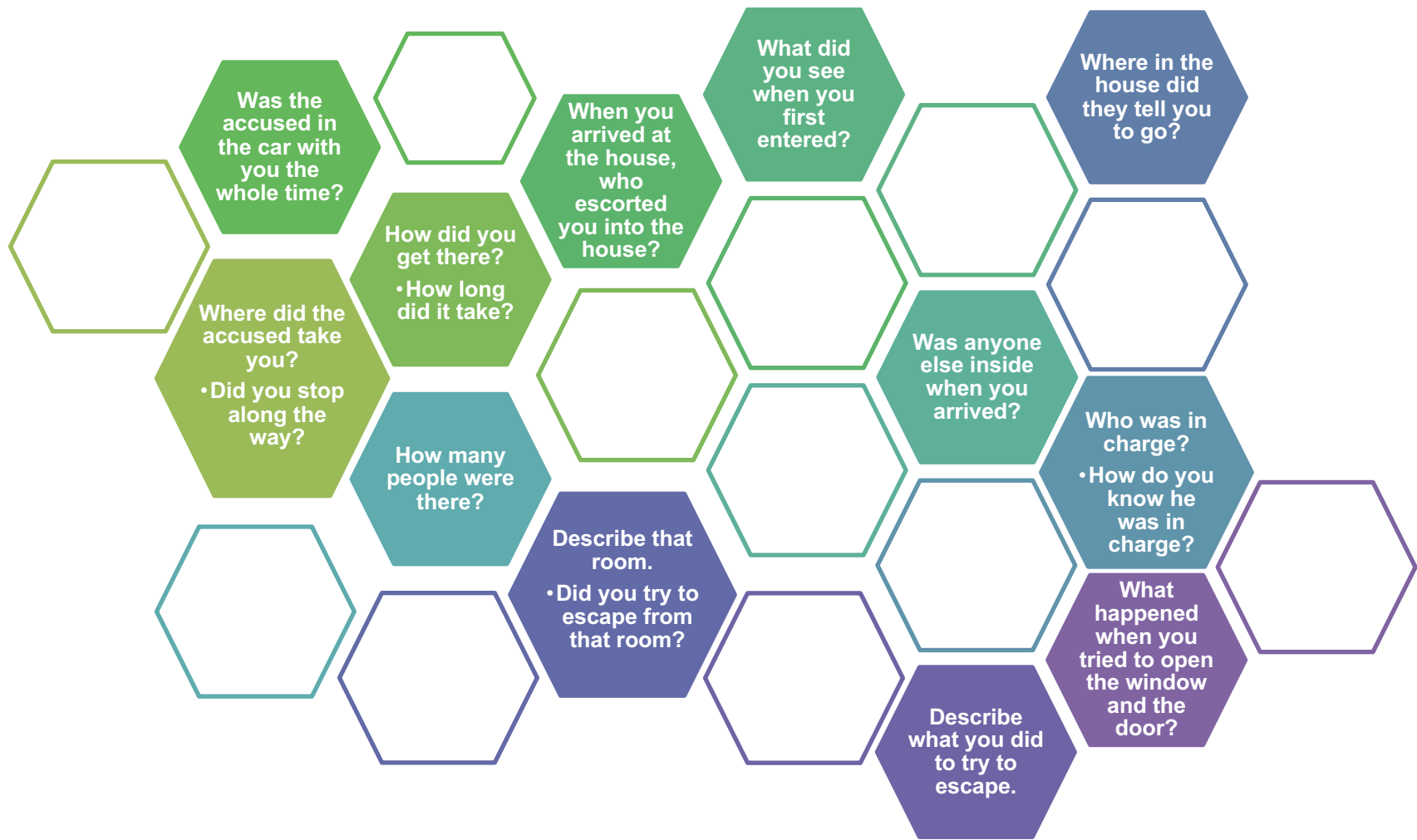
How did you respond?

Did your parents say or do anything?

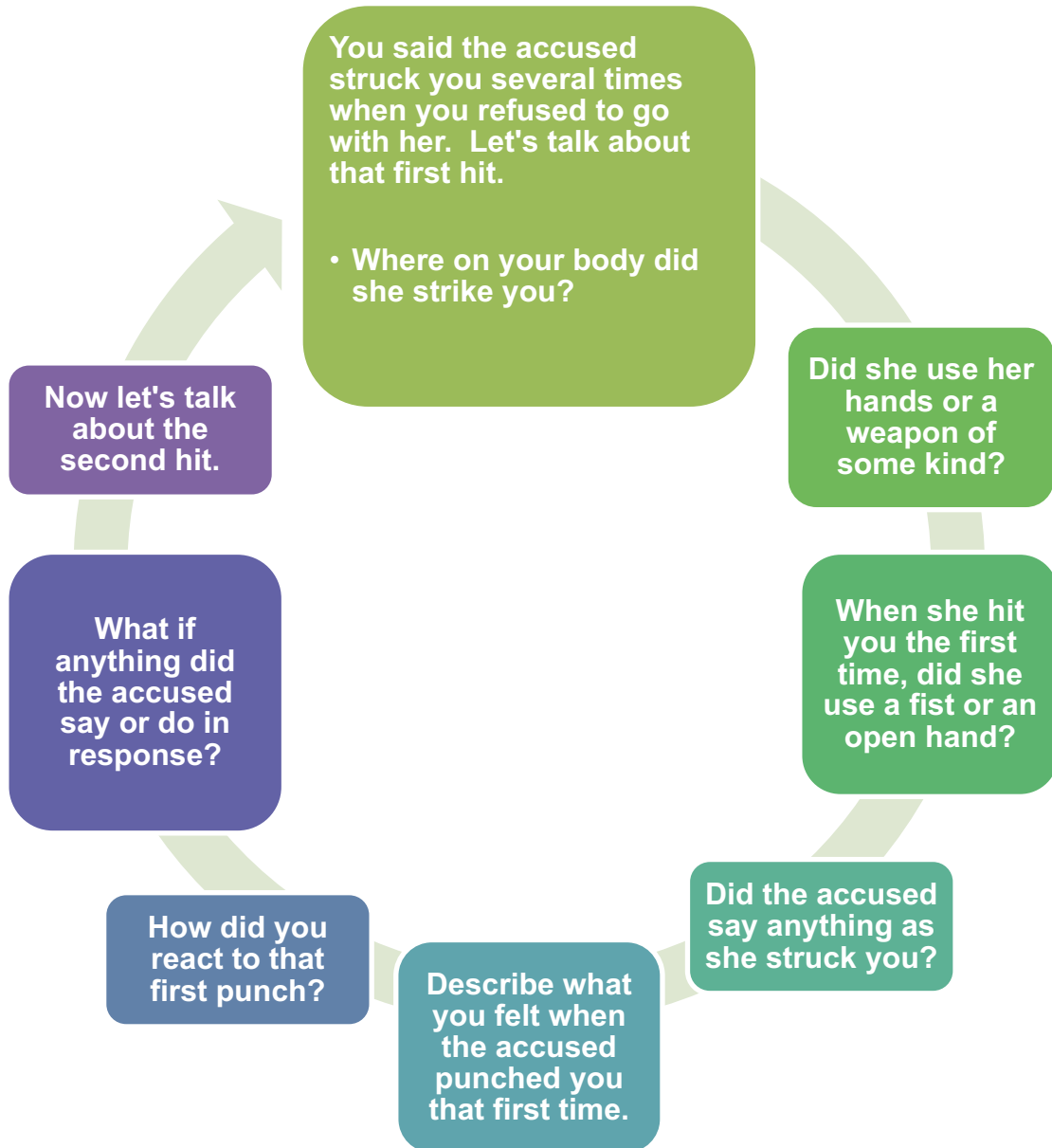
Please describe what your parents did or said at that moment.

Did you want to go with the accused?
• Why (or Why not?)

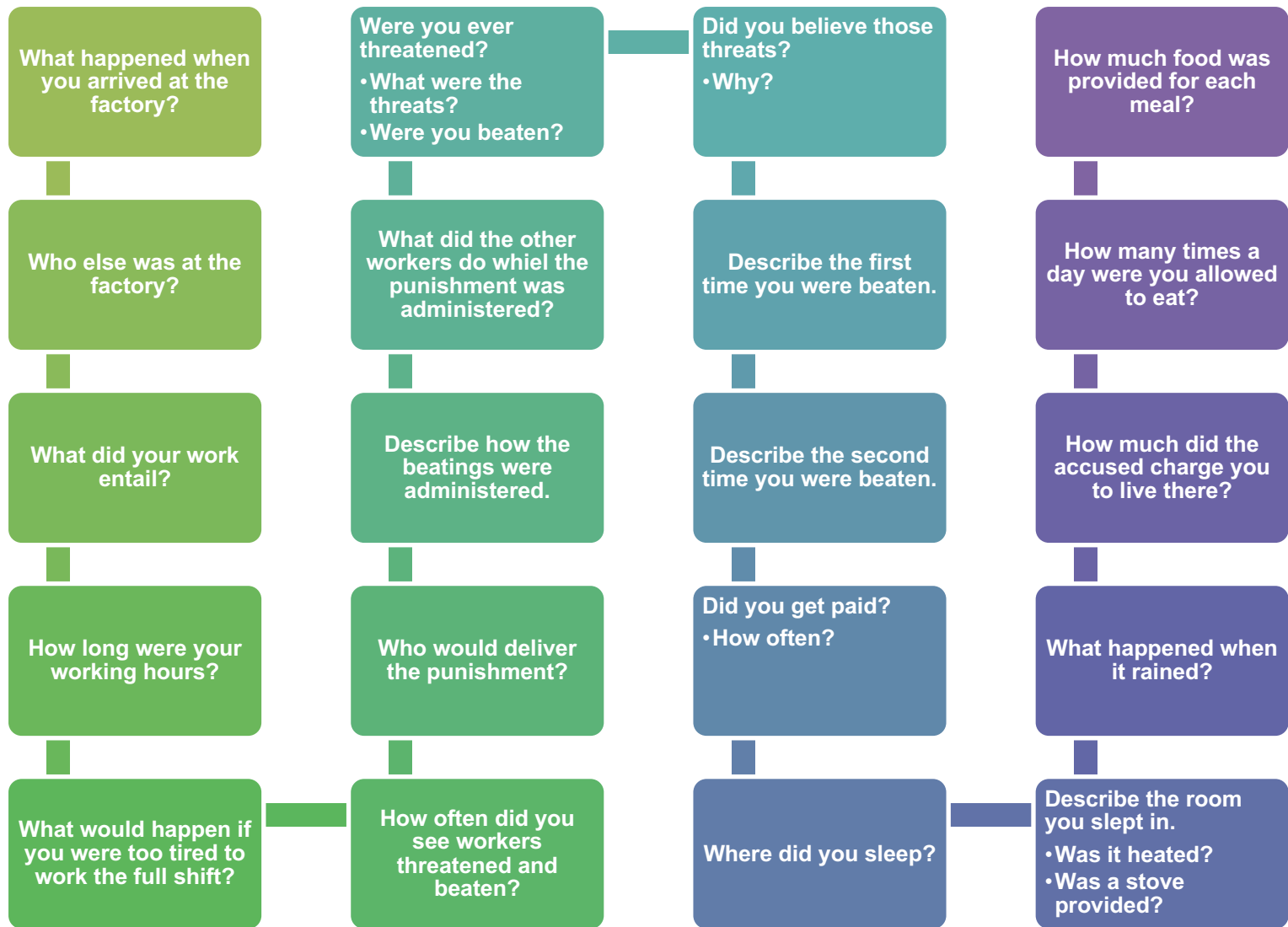
When the victim describes how he or she was transported, which is also sufficient to demonstrate the Act element of the offense, the prosecutor does not want to let the victim skim over the details. To focus attention on these facts, the prosecutor may ask the victim questions designed to get the victim to provide specifics, including:



When the victim reaches the part of the narration where the accused used threat, force, abduction, fraud, deception, abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person (the element of Means), the prosecutor will want to highlight these facts and not risk that this important part of the story will go unnoticed. Accordingly, he or she may ask the victim questions intended to bring out details, including:



Similarly, when the victim begins to testify about his or her exploitation (the element of Purpose), the prosecutor will focus his or her questions to bring out as many details as possible. Some forms of TIP exploitation – for example, “slavery” or “forced labor” - may be further defined in the country’s TIP law or elsewhere in its laws. The prosecutor’s line of questions should elicit testimony from the victim about the facts that show the victim’s treatment meets the definition of exploitation as charged by the prosecutor.



This line of questioning highlights both the elements of Means and Exploitation. It is often the case that force or coercive techniques are used to control victims during the exploitation phase.

◆ *Fronting Problems and Having the Victim Provide Explanations*

In addition to developing questions on direct examination designed to help the victim tell his or her story, it is also important for the prosecutor to help the victim explain any obvious inconsistencies in the testimony that will trouble the judge if left unacknowledged or explained.

For example, the victim may have said he or she was put in a room and the trafficker locked the door from the outside so it was impossible to leave. The investigation, however, uncovered no such lock. Or the evidence shows that the victim did not escape the brothel or factory even though there was ample opportunity to do so. Or the victim may have failed to tell police about an important fact like a police officer delivered a victim, who tried to leave and go home, back to the trafficker.

Such discrepancies must be acknowledged and an explanation given by the victim up front before the defense lawyer has a chance to cross-examine her. If the prosecutor does not front such problems on direct examination, the defense attorney will certainly address them when he or she has a chance to question the victim, who will not have a full opportunity to explain the situation during cross-examination. Even if the defense lawyer fails to further develop these issues, the judge or jury will have questions and will want answers. If those answers do not come from the victim on direct but only on cross-examination by the lawyer or the judge, it will appear that the prosecutor was trying to hide important information from the court and the victim's belated responses will be less credible.

The prosecutor should not try to hide obvious problems in the victim's testimony in the hope that the lawyer or judge will not notice. This is a dangerous strategy.

In dealing with problem evidence, the prosecutor must do three things in preparing his or her direct examination:

1. identify the issue that needs to be explained;
2. draw the victim's attention to it; and
3. ask the victim to provide an explanation.

For instance, with respect to the lock on the door issue above, the prosecutor should draw the victim's attention to the prior statement to police that "the door had been locked on the outside" but that no such lock was found when the police checked the door. "Why did you say that you thought the door had been locked from the outside?" The victim is then invited to clarify. He or she might explain that it was an assumption because it was not possible to open the door from the inside. The victim might further explain that after several months of keeping the door locked the traffickers began to trust the victim not to leave, or had rendered the victim too afraid to even try and escape the trafficker's control, and the traffickers removed the lock.

In conducting the direct examination of the victim, the prosecutor must not ignore problems in the evidence, but instead confront the victim with them and seek a reasonable explanation.

Of course, confronting a victim with problem evidence for the first time in trial is very risky. The victim may react negatively if he or she does not understand the purpose for the question and the reason why he or she is being asked to explain. That is one reason why a pre-trial preparation interview is so important. See the Warnath Group's Practice Guide entitled "Prosecutor Trial Preparation: Preparing the Victim of Human Trafficking to Testify".

Questioning Skills

◆ Types of Questions on Direct Examination

There are two types of questions used during a trial: direct questions and cross-examination questions.

- **DIRECT QUESTIONS** are open ended and do not suggest the answer to the witness. A direct question allows the witness latitude to respond freely in his or her own words.

- CROSS-EXAMINATION QUESTIONS, on the other hand, contain the answer in the question itself. A cross-examination question (also called a leading question) is designed to be answered with a simple yes or no.

For example, you could ask a witness: “*Where did you go that night?*” (Direct question: the witness is free to answer in any manner he or she wishes). Or you could ask that same question but in a much different way: “*You went back to the hotel that night, didn’t you?*” (Cross-examination question: the witness is limited to answering yes or no).

When questioning victims, prosecutors should ask direct questions and should avoid using the leading form of the question. This is because the prosecutor wants the victim to freely explain what happened in his or her own words. Asking the victim questions that suggest the answer deprives the victim of the ability to tell the story in his or her own way. The victim is merely responding to the prosecutor with yes or no answers. This undercuts the victim’s credibility, because it looks as if the prosecutor is controlling the testimony and does not trust the victim to tell the truth.

Be Flexible

Each question the prosecutor asks the witness must have an objective. Consider the example of a witness who is asked to describe what he or she observed on a table in a room. The crucial item the prosecutor wants the witness to describe is a gun. But the witness forgets:

Q: What did you see?

A: I saw some papers and a pen and a manila folder and a glass.

Q: Anything else?

A: I don’t think so. [Or, No]

The answer, “I don’t think so” is not what the prosecutor expected to hear. The prosecutor could prompt the witness’ memory of the gun by using a leading

question such as, “you saw a gun on the table, didn’t you?” But this form of question really undermines the victim’s credibility. It looks as if the prosecutor is planting that memory in the victim and the victim is simply agreeing with the prosecutor’s assertion. Instead, the prosecutor must find another way to get this evidence out without using a leading question. The prosecutor could continue the inquiry above with the following line of questioning:

Q: Did someone arrive later?

A: Yes.

Q: In a uniform?

A: Yes.

Q: Who was that?

A: Police Office Chan.

Q: Did he take some items into his possession?

A: Yes.

Q: Do you remember any particular item which attracted his attention?

A: Oh yes, there was a gun on the table, I forgot that.

This example shows that the main objective for the line of questioning was that there was a gun on the table when the witness was in the room. The additional direct questions enabled the witness to recall and describe the gun in the answer.

Open Questions and Narrow Questions

Assume you want to establish, without using a leading question, that the witness was punched once in the face by the defendant and once in the chest by the defendant. This is a very important fact in the case and you want to emphasize it in the testimony. To make sure that the victim focuses on the details of an incident, a good approach is to start with open questions and gradually make them narrow:

Q: And then did he do something? (Open)

A: Yes, he hit me.

Q: Once or more than once? (Narrow)

A: Twice.

Q: Let me ask you about the first blow. Was it with a hand or with some other object? (Narrower)

A: With his hand.

Q: Was it open or closed? (Narrower)

A: It was closed.

Q: Where did he hit you? (Narrower)

A: In the face.

Q: Let's deal with the second blow. Was it with the hand or some other object? (Narrower)

By starting with the "hit" and then asking detailed questions about that "hit" (how often, how hard, open or closed fist), the questioner allows the victim to methodically explain the violent incident in detail. The incident is thus highlighted and does not get lost in the other less important details of the case.

Use Plain Language

Lawyers often use complex language and fail to realize that a question is useless if any part of it cannot be understood by the witness. Try to use words of one or two syllables which are familiar to all non-lawyers and witnesses. Long sentences can also confuse the witness. Do not ask a question if it is so long that the witness cannot remember the beginning when you get to the end.

Questions should be short, clear, simple and easy to understand.

Do not ask the witness a compound question; that is, a question that asks for two or more pieces of information in a single question. For example, “*How many customers did you entertain that night and what did the mamasan do when you tried to leave with the last customer?*” This is likely to confuse the victim and result in a disjointed answer. The better approach is to break up the question into separate, smaller questions:

Q: How many customers did you see that night?

A: Five.

Q: What time did you see the last customer?

A: Midnight.

Q: What did the last customer say to you before he left?

A: He asked me to leave with him. He said he would take me to a shelter.

Q: What did you do in response to his request?

A: I agreed and began to walk out with him.

Q: What did the *mamasan* do when you tried to leave?

By separating out the compound question into smaller questions, each question dealing with a single fact, the prosecutor is able to avoid confusion and highlight important details that would otherwise go unnoticed.

Links and Prompts

Link questions encourage the victim to go on with the story. The most useful link in the narrative is the question “and what happened then?” This open-ended question allows the victim to continue to tell the story in his or her own words with no direction from the prosecutor.

Prompts are questions that jog the witness’ recollection. For example, during the pre-trial preparation interview (see “Prosecutor Trial Preparation: Preparing the Victim of Human Trafficking to Testify”) you may have told the witness that immediately after asking her about the wad of cash on the table, the next question will be, “*Did you see anything else as well as the cash?*” That is the cue for the witness to recall the passports.

Pacing

Keep the pace of the questions slow enough for the witness to be able to give thorough and adequate answers. But vary the pace for dramatic effect. A long silence before or after an important question can emphasize the answer.

Interpreter

Direct examination is more difficult when an interpreter is being used. The time required to question the victim will take longer and the pace will be slower. When working with an interpreter, it is especially important to be careful with the language you use. Use simple and direct questions.

Make sure the interpreter understands that he or she is to translate everything said word for word. The interpreter must not summarize the statements or engage in side conversations with the victim witness.

Be sensitive to the possibility that the interpreter may be connected in some way to a party in the case. A biased interpreter can undermine the prosecution’s case by purposefully misinterpreting questions and answers or by disclosing confidential information compromising the privacy and security of the victim or even threatening or intimidating the victim. Always check the background of the interpreter to assure that the interpreter is independent and unbiased.

Guidelines for Working with an Interpreter in Court

- ✓ Address questions to the witness and not to the interpreter. When your question is being interpreted, look at the witness not the interpreter. Your conversation is with the witness, not the interpreter.
- ✓ In this regard, the seating arrangement is important. Assure that you are facing the victim and that the interpreter is not in a position to interfere with your relationship with the victim.
- ✓ Ask simple questions and avoid compound questions.
- ✓ Avoid jargon and slang.
- ✓ Make sure the interpreter knows his or her job is to translate accurately, nothing more. There should be no side discussions with the witness and the interpreter must translate everything said word for word.

Using the direct examination preparation techniques outlined above you are more likely to enable the victim witness to tell his or her story in a coherent and convincing fashion, increasing the possibility of a successful result in court.

Acknowledgements

For more information about prosecutor trial preparation for human trafficking cases, including direct examination questions for the victim, 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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