

Preserving and Presenting the Testimony of a Victim of Trafficking not Physically Present at Trial

A WARNATH GROUP PRACTICE GUIDE



Preserving and Presenting the Testimony of a Victim of Trafficking not Physically Present at Trial

PRACTICE GUIDE
by The Warnath Group

AT A GLANCE

Intended Audience:

- Investigators and prosecutors working on human trafficking cases

Takeaway: The investigator and/or prosecutor should consider using any and all methods for gathering information and preserving or obtaining admissible testimony from the victim. If there is no clear process in place for the preservation or remote acquisition of testimony, the prosecutor should seek to use any of the alternative methods not specifically prohibited by law.

In This Practice Guide:

- How to use a victim-centered approach when building an effective criminal case of human trafficking against the perpetrator(s) if the victim(s) returned to their home country prior to trial
- Tips for using a deposition or pre-trial statement as evidence
- Considerations for using remote testimony as evidence

Introduction

“Many who escape or are rescued from human trafficking often just want to go home. This impulse is natural and understandable. There are many reasons for this, not the least of which is that many have families that they are desperate to see after being trapped and exploited, and often a long time apart. Nevertheless, when home is in a different country this can present significant challenges for criminal justice officials who desire to investigate and prosecute the traffickers. In this paper, we discuss options for addressing these issues, including victim-centered techniques available to obtain testimony remotely.”

- *Stephen Warnath, CEO and President*



The Issue: The victim returns to his or her country and will be unavailable to testify in person at trial.

Prosecutors in human trafficking cases where the victim is from another country often face a difficult practical challenge: How to build an effective criminal case of human trafficking against the perpetrator(s) if the victim(s) return to their home country prior to trial?

This usually happens one of two ways:

- 1. A victim desires to return home; or**
- 2. A country seeks to remove a victim pursuant to immigration laws.**

In the latter situation, the potential victim/witness will not be available because of a country's rush to remove undocumented foreign nationals from the country pursuant to immigration laws. Many countries prioritize quick removal of undocumented foreign nationals without properly considering or caring about the deleterious consequences this may have to successful investigation and prosecution of human trafficking cases. These removals can occur involuntarily, even when it is against the desires or interests of a victim. In some countries, often those that do not have fully realized national victim-centered trafficking responses, undocumented victims including those who have been identified as possible trafficking victims may be deported quickly as a matter of that country's immigration regulations. In such cases, the prosecutor may have little ability to delay the removal process and may not even be notified that it is happening. For criminal justice actors, this approach creates obstacles in securing the availability and

cooperation of victims for the investigation and prosecution of traffickers. The unavailability of the victims ensures substandard national efforts in building cases and establishing criminal accountability for traffickers.

However, many countries, recognizing the importance of assuring victim testimony at trial in trafficking prosecutions, have instituted a temporary visa policy to allow victims of trafficking to remain in country legally pending, at a minimum, completion of legal proceedings against the trafficker and also, in some cases, civil actions by victims against the traffickers seeking damages. These provisions are usually found in the anti-trafficking laws enacted following that country's ratification of the UN Palermo Protocol.

For these countries, the issue nevertheless arises when the victim, though able to remain temporarily, wants to return to his or her home country immediately, well before a criminal trial can take place. In that situation the prosecutor has an important role to play in attempting to appropriately gain cooperation of the victim, obtain and preserve the victim's evidence for trial whenever possible and, in some cases, determine the circumstances of the victim's return.



How Should the Prosecutor Respond? Factors to Consider

The first thing to recognize is that international good practice recommends adoption of victim-centered practices which means, in part, that in human trafficking cases criminal justice officials should respect the wishes of the victim whenever possible, including when the victim expresses a clear desire to return home.¹

¹ The Palermo Protocol (UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=XVIII-12-a&chapter=18&clang=en, indicates

At the same time, the prosecutor's primary responsibility is to vigorously but fairly represent the State in criminal matters by presenting in court the best evidence available to establish a violation of the law. In human trafficking cases this means that the prosecutor should take all reasonable steps to ensure that the victim's testimony is presented to the court. The victim is, after all, the key witness in the case without whom a successful prosecution will be unlikely.²

However, compelling victims to remain in-country against their will is, not only a violation of international norms, but also, as a practical matter, not a good prosecution strategy. This is especially so if victims are required, as often occurs in various countries around the world, to remain over a long period of time awaiting trial of the trafficker(s) in a closed shelter with limited freedom of movement and autonomy and/or if they are not permitted to work and earn money. Victims so compelled will likely resent their treatment and blame the prosecutor or investigator. They may run away and disappear, trying to get back home on their own or seek out gainful employment without proper documentation or, simply, to attempt to escape from a different form of constraint. Those victims will not be around when it comes time to testify at the trial. Or they may change their story at the urging of their family or defense counsel to deny that they were victims in the hope that the prosecutor will dismiss the case, allowing them to return home. If they can be found and are required under penalty to go to court, the prosecutor may find, to his or her surprise, that the formerly cooperative victim has become a reluctant and even hostile witness in court.

There are, in other words, persuasive arguments in favor of honoring the wishes of victims for repatriation. But experience has shown that once victims go back to their home country, it will be difficult if not impossible to locate them there to invite them to return for the trial. And even if they can be found, they often will not agree to travel back to testify at the trial. Why should they? While most victims want to see that traffickers are held accountable, traveling back to the country where they were exploited can be counter to the victim's interests in significant ways. It may be expensive, perhaps prohibitively so, and physically and emotionally tiring to make the trip. They may have to

that if the victims want to go home they should be able to repatriate as quickly as feasible, as long as returning will not further endanger them.

² For more information on corroborating evidence, see the Warnath Group Practice Guide "Prosecutor Trial Preparation – Countering Common Defenses" available at <https://www.warnathgroup.com/practice-guide-prosecutor-trial-preparation-countering-common-defenses/>.

take time away from their work and families. They could lose money or even their jobs. Financial insecurity is often a contributing factor to an elevated risk of human trafficking in the first place, so this type of financial sacrifice may be devastating to the family and renew the risk of a family member potentially being trafficked. Testifying can cause them embarrassment, stigma or even put them or their families at risk. Many victims move on with their lives and no longer want to revisit that time in their life. The thought of testifying may be retraumatizing.

The benefit of having the victim remain in country to cooperate with the investigation and provide testimony is often incompatible with the victim's interest in returning to their home. This raises the question of if there are any viable alternatives to this stark choice. Is there a way to accommodate the victim's wishes while maximizing the integrity of the prosecution as much as possible?

The following discussion assumes that a trafficking case has been charged pending trial. The victim has asked to return to his or her home country as soon as possible, despite best efforts to persuade the victim to remain until the trial is completed. The prosecutor understands the victim's desire to be reunited with family and recognizes that it would be unfair and counterproductive to force the victim to remain. But the prosecutor wisely takes steps to increase the likelihood that at trial the victim's story will be presented to the court. In many countries there are alternatives available to prosecutors that can be useful in such a situation.



Deposition or Pre-Trial Hearing

In many countries it is possible to take the statement of a victim or witness in advance of trial and to present that written statement later before the court at trial in place of the absent victim or witness. The court can then use that written statement as if it were live testimony from that victim or witness to determine the guilt or innocence of the accused.

In some legal systems this is called a “deposition.” Other countries refer to this process by other names. No matter what the terminology, taking a pre-trial statement from a victim before he or she leaves the country can be an excellent way to preserve critical evidence for trial. In fact, given the importance of the victim’s account in a human trafficking case, preserving his or her testimony in this way can mean the difference between a successful and failed prosecution. But before embarking on this course of action, the prosecutor must take a number of factors into consideration.

1. Does the Law Allow for a Deposition or Pre-trial Hearing?

Where the prosecutor knows or suspects that the victim will or may return to his or her home country before the trial can commence, serious consideration should be given to taking the victim’s statement before such a departure. Once the victim returns to his or her home country, it may prove difficult if not impossible to bring the victim back for trial.

The pre-trial statement, however, if it is to have any value at all, must be taken in a way that will render it admissible as substantive evidence at the trial. This means that there must be a law or regulation explicitly permitting depositions or pre-trial hearings and

making clear the circumstances under which those statements can be taken and how they may be used in court.

While many countries have laws or rules governing depositions or pretrial statements, other countries do not. In the absence of a specific provision expressly permitting taking depositions or pre-trial hearings, it is unlikely that a court would allow such statements to be admitted into evidence at trial.

It is therefore essential that the prosecutor, as the first order of business, check the national law to determine whether there is a provision governing pre-trial statements or depositions. Some countries do have relevant laws that are rarely used so prosecutors may be unaware of them.

In many countries, provisions relating to pre-trial hearings can be found in the rules of criminal procedure. For example, in the Philippines, Rule 119, Sec. 15, of the Rules of Criminal Procedure, establish a procedure for taking pre-trial witness statements which may be used in court during a trial. In other countries the taking of depositions are governed by the evidence code or even, in a few instances, in the criminal code itself. An example of the latter is Thailand which has a specific section in its anti-human trafficking law that allows for depositions of victims to be taken in human trafficking cases, Thailand: Act No. B.E. 2551, Anti-Trafficking in Persons Act, Section 31 (2008).

2. What Conditions Must be Met Before a Deposition or Pre-trial Statement Can be Taken?

Once it is determined that the rules permit depositions or pre-trial hearings, the prosecutor must carefully determine what conditions, if any, must be met before such a hearing can be undertaken. Often, rules governing this process do not give blanket permission for pre-trial statements in every case. Rather, certain facts must be established before a deposition or pre-trial hearing will be allowed. Frequently, these rules require showing that the victim is somehow unavailable to appear for trial.

The meaning of “unavailability” is sometimes narrowly limited to sickness or disease that prevent the victim from attending court. Other countries take a broader approach

and cover instances where the victim is unavailable because he or she is out of the country or cannot be located.

The Philippines rule is fairly typical and provides a good example of a broader approach. Rule 119, Sec. 15, of the Rules of Criminal Procedure, makes clear when a pre-trial statement can be taken; specifically, when a witness is too sick or infirm to appear at trial, or has to leave the Philippines with no definite date of return. This last clause is particularly helpful in human trafficking cases involving foreign victims.

The prosecutor should carefully analyze the applicable law or rule to determine whether the victim's situation satisfies the requirements that must be met for a deposition or pre-trial statement.

3. How is the Deposition or Pre-trial Hearing Conducted?

Typically, the rules will state that the examination in a deposition or pre-trial hearing should be conducted in the same manner as at trial.

This means, **first**, that the questioning is done before a judge or magistrate often, but not always, in a court room;

Second, that the witness will be placed under oath and required to swear or vow to tell the truth, just as in trial;

Third, that the testimony of the witness will be recorded, usually using the same system employed at trial in that country. The testimony may be transcribed verbatim by a court reporter, preserved on audio tape or reduced to a signed statement. No matter what technique is used, it is this record that will be introduced later at the trial so it is vitally important for the prosecutor to elicit a complete and clear account from the witness during the deposition. In other words, the prosecutor must prepare for the deposition just as he or she would for trial³, with an understanding that the deposition transcript may be the only source of key evidence available at trial;

³ For detailed information on preparing victims for trial please see the Warnath Group Practice Guide Series on Prosecutor Trial Preparation, with a focus on "Preparing the Victim Witness to Testify" and "Direct Examination Questions for the Victim" available at <https://www.warnathgroup.com/tag/prosecutor-trial-preparation/>.

Fourth, that the order and form of questioning in a deposition or pre-trial hearing will be the same as at trial. This usually means that the prosecutor will question the witness using non-leading questions, just as it would be done at trial. The judge may question the witness as well.

4. What About Defense Counsel?

The applicable rule may require that the accused and/or defense counsel be present during the deposition to cross examine the witness, as at trial. This is a good rule that assures that the deposition statement is rigorously tested so that its credibility can be adequately assessed by the trial judge.

But in some countries, there is no such requirement. It is felt that the circumstances of the deposition, taken before a judge under oath, lend sufficient credibility to the statement to warrant its admissibility at trial. Moreover, securing the presence of defense counsel at a deposition can create scheduling issues and contribute to delay.

Providing an opportunity for the accused through counsel to challenge the credibility of the victim through cross examination is essential to protect the fundamental fair trial rights of the accused and is consistent with international good practice. Additionally, having the defense counsel present at the deposition, even if not required by the rules, makes sense from a tactical standpoint, since the trial judge is likely to give greater weight and significance to a pre-trial statement from a victim who has been tested through cross examination.

5. How to Schedule the Deposition or Pre-trial Hearing?

Once the prosecutor decides that a deposition is necessary to preserve the testimony of a victim unavailable for trial and has determined that the rules provide for taking a deposition under the circumstances present in the case, the next step is to ask the court to schedule a time for the deposition. This may sound easier than it actually is.

Judges are busy and may not be familiar with the rules governing depositions or fully appreciate the need for a deposition in your case, “Why not just wait for the trial? Why waste my time hearing this witness twice?”

Also, judges may not want to delay their docket full of urgent matters to take a deposition in a case that may not go to trial for months, if ever. Getting a judge to set a quick date for the deposition can be a difficult.

It is incumbent on the prosecutor to persuade the judge of the necessity for the pre-trial statement. Depending on the regular practice in court, this can be done in writing through a formal motion or application or more informally through an oral request in court or the judge’s chambers.

In whatever form the request takes, the prosecutor must explain to the judge that the law allows for a pretrial statement under just these circumstances. The prosecutor must also explain how important the victim’s account is in a human trafficking case; that the victim is the central witness in the case who can narrate the entire series of events of the crime and is almost certainly the best witness in a position to provide direct evidence on each of the elements that must be proved. The prosecutor must explain that in this particular case under these unusual circumstances taking the statement of the victim expeditiously, before he or she leaves the country, is critical for the prosecution to present its case and for the court to be fully informed of the facts so that it can make a proper judgement in the matter.

6. Beware of Delay

Even if the judge agrees to set an early date for the deposition or pre-trial hearing, delay is likely. The defense lawyer may claim a scheduling conflict or illness or some other pretext requiring a postponement. The lawyer may try delaying tactics repeatedly, using a different excuse each time.

Moreover, an appropriate interpreter, a likely necessity in cases involving foreign victims, may prove difficult to locate and, once identified, present additional scheduling complications.⁴

Repeated cancellation and rescheduling can have a negative impact on the victim who will inevitably grow increasingly frustrated as the hearing is reset over and over again. The risk to the prosecutor is that repeated delays may undermine the victim's confidence in the system and cause the victim to lose interest in the case and in cooperating.

The prosecutor should remind the court that the victim's availability to testify is limited and urge the court to hold the defense counsel to a hearing date, making clear that no further excuses or requests for a continuance will be entertained.

The prosecutor should always be careful to keep the victim fully informed of the status of the hearing and explain why a postponement was necessary. Keeping the victim updated on the status of court proceedings and other important developments can be key to maintaining the victim's commitment to the case.

7. Prepare

The prosecutor should consider the deposition or pre-trial interview as a kind of mini-trial in which one witness will testify under conditions similar to those at a full trial. As such, the prosecutor must prepare for this hearing as he or she would for a trial.⁵

The prosecutor should resist the temptation to treat this hearing as somehow less important than a trial. Indeed, the victim who will testify at the deposition hearing is arguably the most important witness in the case. The transcript of his or her testimony

⁴ For more information on working with interpreters in human trafficking cases, please see Warnath Group Practice Guide "Selecting, Vetting, and Preparing Interpreters for Human Trafficking Cases" available at <https://www.warnathgroup.com/practice-guide-selecting-vetting-interpreters-human-trafficking-cases/>.

⁵ For more information on preparing the victim to testify and direct examination questions, please see Warnath Group Practice Guides "Prosecutor Trial Preparation – Preparing the Victim of Human Trafficking To Testify" available at <https://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 <https://www.warnathgroup.com/practice-guide-prosecutor-trial-preparation-preparing-victim-human-trafficking-testify/>.

at the hearing will be introduced later at the trial and may very well determine the outcome of the trial.

It is therefore essential that the record of the victim's testimony be complete, coherent, and persuasive. To achieve this result, the prosecutor must be ready to ask the right questions in the right order and prepare the victim to be a good witness and to do so without resorting to coaching.

The prosecutor must carefully review all the evidence in the file and be thoroughly familiar with the prior statements of the victim. The prosecutor should also be completely fluent in the elements of the crimes charged. A good practice is for the prosecutor to create an outline of the areas or topics that must be covered in the examination of the witness keyed to the elements of the crime. In this way, the questioning will bring out all the facts that the victim can testify to establishing the crime, and important evidence will not be inadvertently left out of the record.

The prosecutor should also identify any problematic issues in the victim's account, facts that the defense attorney is likely to focus on in cross examination. These are areas that the prosecutor may want the victim to explain during the direct examination, thus anticipating defense attacks and lessening the impact of any possible cross-examination.

The prosecutor must also take time to prepare the victim to be a good witness. This means explaining how the hearing process works, identifying who the players are, and describing their roles and responsibilities. Make it clear that the victim has an important role to play in the hearing but that the victim's only obligation is to tell the truth. This will reduce the fear and mystery of testifying in court and make the victim more confident and better prepared to answer questions completely and truthfully.

In addition, the prosecutor should review with the victim the areas or topics to be covered on direct examination. In doing this review, the prosecutor must be careful not to coach the witness; that is, indicate directly or indirectly how to answer any question. Rather, the purpose is simply to give the witness a chance to focus on the facts of the case and recall as many details as possible.

If the victim has difficulty recalling certain details, the prosecutor cannot supply those facts to the victim. That would be coaching. But the prosecutor may allow the victim to review any prior statements he or she gave to the police during the investigation to refresh his or her recollection. This, of course, assumes that the rules and practices in that country permit this practice.

This is also a good time to have the witness directly address any issues or problems in the account, such as prior inconsistent statements or descriptions that do not comport with the evidence or common sense. The prosecutor should seek an explanation from the victim for these anomalies. If the explanation is credible, the prosecutor should let the victim know that the prosecutor will ask additional questions at the hearing that will give the victim an opportunity to offer that explanation. Again, the victim's own explanation must be accepted by the prosecutor. The prosecutor must not steer the victim to a particular answer. As always, coaching must be avoided.

Finally, it is important to prepare the victim for questioning from defense counsel. Likely lines of attack from the defense should be discussed with the victim so that the victim is not taken by surprise at the hearing.

The prosecutor should also explain the difference between direct questions and cross examination and give examples of both types of questions, making clear that the lawyer for the accused is entitled to ask questions that suggest the answer. The victim should be told that it is okay to disagree with any question that is not true and that it is the victim's obligation to do so. The victim's only job at the hearing is to tell the truth.

If the relationship between the prosecutor and victim is strong, it may be advisable to conduct a role play exercise in which the prosecutor plays defense counsel posing cross examination style questions at the victim. If the relationship is not strong it may still be possible to conduct this role play with the help of a colleague who can play the role of defense counsel. This exercise is designed to give the victim a better understanding of how difficult such questioning can be and practice in responding appropriately.

Failure to fully prepare the victim to respond to your questions on direct and handle cross examination from defense counsel risks creating an incomplete and confused record that will be unpersuasive to the court at trial.⁶

8. At Trial

Introducing the record of the victim's testimony at trial is a matter of national evidentiary rules and local practice. Once admitted into evidence, however, the transcript should be accepted by the court as competent evidence and given as much weight as if the witness had appeared in person to testify.

While this may be true, testimony presented on paper is just not as persuasive as live testimony. The trial judge will not have the benefit of actually seeing the victim in court, since the judge or magistrate who took the deposition earlier is often not the same judge presiding over the trial later. Observing the demeanor of the victim while testifying can have a powerful effect on a judge. A written record in place of live testimony is a pale shadow of live testimony and puts the prosecution at a tactical disadvantage.

It is, of course, better to have that evidence preserved in some form before the court, even if it is only on paper, than to have no victim statement at all. Nevertheless, it may be possible to capture some of the impact of live testimony in a deposition. The prosecutor might explore the possibility of recording the victim's deposition testimony via audio or video means. This will depend on whether the technology for recording and playback is available, and the judge and defense counsel agree to the procedure. But if it can be arranged, an audio, or even better, a video recording of the victim's deposition played to the trial judge can be effective in relaying the full nature of the victim's testimony.

One issue that the prosecutor may be confronted with at trial is an argument from the defense lawyer that he or she had insufficient opportunity to fully cross examine the victim at the deposition because new facts have recently emerged not available to him

⁶ For a more detailed discussion on preparing victims to testify, see Warnath Group Practice Guides in the Prosecutor Trial Preparation Series available at <https://www.warnathgroup.com/tag/prosecutor-trial-preparation/>. Practice Guides are available on preparing the victim to testify and the direct examination questions for the victim, how to counter common defenses, and understanding coercion.

at that time. As a result, counsel requests the judge to call the victim to court for additional questioning. The defense lawyer may further argue that if the victim is unavailable to appear in court, the deposition transcript is incomplete and should be disallowed in toto as evidence.

The prosecutor in response to such an argument should urge the court not to accept defense counsel's request at face value, but rather to demand that defense counsel specify in writing what new facts have recently come to light and to submit in writing what questions he or she proposes to ask the victim that were not asked during the deposition. The court and the prosecutor will then have an opportunity to assess whether the evidence is, in fact, new and significant and whether the questions proposed have previously been asked or are important enough to warrant recalling the victim. In most instances, defense counsel will have a difficult time satisfying these criteria and the request to recall the victim or disallow the deposition statement will be denied.

To the extent that the judge agrees that the victim should answer additional questions, it may be possible to persuade the court to submit those questions to the victim in writing (properly translated, if necessary) for a response by post. This assumes that you have the victim's contact information, and the victim agrees to respond.

Alternatively, it may be proposed that an investigator question the victim on these issues and submit the answers to the court in a report. Again, this assumes that the victim can be contacted. Sending a local investigator would be expensive and may implicate diplomatic issues. Using an investigator from the victim's country could involve language issues and may require issuing a Mutual Legal Request through diplomatic channels, which can take time.

As a last resort, the prosecutor should argue that the deposition is good evidence tested by cross examination and properly administered under the applicable laws and regulations. There is no justification to disallow the entire deposition transcript even if additional questions could have been asked. The court is entitled to take that testimony under consideration, giving it the weight he or she thinks proper.



Remote Testimony

If the laws of the jurisdiction do not provide for a deposition or pre-trial hearing under the facts of the case, or the victim has been repatriated to his or her home country before the prosecutor had an opportunity to schedule a deposition, can anything be done to get the victim's account before the court? Is there another alternative available that will allow the victim to return home and enable the prosecutor to present as strong a case as possible?

The prosecutor could try to persuade the victim to return to testify, but he or she probably does not want to do that. And, in any event, it would be expensive to bring the victim back.

There is another possibility, however: arrange for the victim to give live testimony over a video hookup directly to the court. In this way, the victim does not have to physically return, making it safer, more convenient, and more economical for both the victim and the courts. This solution presents significant legal and technical hurdles, however, which will be discussed below.

1. Get the Victim's Contact Information Before He or She Leaves the Country

The first thing to do is to make sure the victim can be found if he or she leaves the country. This is important, because the victim may be willing to return to testify at the trial or through a remote video link hookup. In fact, before the victim leaves, the

prosecutor should start a discussion about the possibility of returning or giving testimony remotely. The prosecutor may get the victim to commit to doing so. While this is no guarantee of cooperation when the time comes, it plants a seed and increases the likelihood that the victim may actually follow through.

But for this to happen, the victim will have to be notified and invited at the right time. The prosecutor will need to know how to find him or her.

Before the victim leaves the country, be sure to record his or her contact information in as much detail as possible, including ultimate destination (city, town, or village); address and, if possible, phone number of residence; names, addresses and phone numbers of family members, relations, and friends; and name, address and phone number of home country employer, if applicable. Some of this information may not be available or change over time. But it is better to get as many details as possible, including contact information of people who will likely know the victim's whereabouts over time, while the opportunity presents itself. Even partial information may prove useful in locating the victim.

It is advisable for you or someone from your office to stay in periodic contact with the victim using the information provided, if possible. By providing the victim with case status updates and sharing relevant information on any developments in the case, you may be able to keep the victim engaged in the process. This will also make it easier to keep track of the victim's whereabouts. You may learn about the victim's plan to move elsewhere from the victim's friends or family.

All of this suggests the importance of taking steps to develop a level of trust with victims during the time before they leave the country.

2. What Does the Law Say?

The prosecutor will need to determine whether the national law or rules permit a court to accept as evidence in a criminal proceeding remote testimony by electronic means. Provisions governing this issue are often found in the criminal procedure code or rules of evidence. Usually, these provisions are quite general, stating, something to the

effect, that evidence given through electronic means is allowed if relevant, subject to the discretion of the trial judge. Precisely how remote testimony is to be transmitted is a technical matter and usually not specified in the law or rule, though there may be implementing regulations that go into such details. The prosecutor should become familiar with all applicable rules and regulations governing this issue.

In some criminal justice systems, the law may be silent on this matter. In the absence of specific rules and regulations addressing this procedure, courts may rule that remote testimony is improper and refuse to accept it as evidence in the trial.

In that case, the prosecutor may have to reassess the file to determine if there are alternative ways to present the victim's story. For example, there may be other victims who are available to testify, and who can describe what happened to the victim. Or, perhaps the victim gave a thorough statement to the police or to a magistrate during the investigation before returning to his or her home country, which under the applicable rules of evidence is admissible as substantive proof.

Of course, the judge is free to accord whatever weight he or she deems appropriate to such an out-of-court statement. To the extent that the statement was given under circumstances that tend to bolster its credibility, the judge is more likely to view it favorably. For instance, it would be helpful if the victim gave the statement under oath and signed it, swearing that he or she has reviewed the statement, that it was voluntarily given, and that it is true and accurate. The investigator who took the statement can testify to the conditions under which it was taken, the demeanor of the victim, and the fact that it was reviewed and signed by the victim freely and voluntarily.

A prosecutor suspecting that the victim may not be available for trial may want to discuss with the investigator early in the case the importance of taking a detailed, under oath signed statement from the victim, anticipating the possibility that that statement may have to be used in evidence as a last resort to preserve the victim's account before the judge.

3. Is the Necessary Technology Available?

Even if the law allows remote testimony, this will not be possible if the necessary technology in the courtroom is unavailable to receive the signal from the remote location. Since the victim will be located in another country requiring long distance transmission, security and privacy issues are implicated. These are technical problems outside the expertise of most prosecutors. Many courts have an information technology (“IT”) expert on staff or on call. The prosecutor should consult with that person to understand what is available and possible.

One possible solution to consider in areas without sophisticated video reception and playback capacity, is a commercial audio/video connection service, such as Skype or Zoom, to link the victim to the court. Skype or a similar service has the advantage of low cost and simplicity. It is cheap and can work with little more than a computer or phone and Wi-Fi connection in both the sending and receiving locations. The strength and security of the connection are possible problems, but if the court agrees and these concerns can be addressed, internet-based services may be a practical way to present remote testimony economically and easily.

4. Where Should the Victim Go to Testify?

Assuming the prosecutor has secured the necessary contact information and has been able to invite the victim to provide testimony from a remote location close to home, and the victim has agreed to do so, the question then becomes where should the victim go to give testimony. In selecting an appropriate site, several criteria should be considered:

- **The location should be secure.** Protecting the victim’s safety is essential. This means that the place selected should not be accessible to the accused, his or her family or associates.
- **The location should be private.** There should be no one else in the room during the victim’s testimony to assure that the official testimony is not

subject to influence. Also, securing the victim's privacy is critical. The victim should not be concerned that the testimony may be overheard by others.

- **The location should be quiet.** There should be no distractions that would interrupt the victim's testimony, and no background noises that would interfere with the quality of the transmission.
- **The location should be as close to the victim's home as possible.** It is important to make the experience as convenient for the victim as possible. This will increase the likelihood that the victim will agree to cooperate. However, the victim's safety and security should not be sacrificed for convenience. If an otherwise suitable location is near the victim's village, it may also be close to the family or friends of the trafficker. The victim should not be placed in potential danger for the sake of convenience. In selecting a safe location, the prosecutor should be aware of where the accused lives or frequents and take steps to avoid putting the victim in or near those areas.
- **The location must be equipped.** Proper equipment to assure a strong and secure connection is essential. This may be the most limiting factor in selecting a suitable space for the remote testimony.

If the prosecutor's country has an embassy located in the victim's country, that embassy may be an ideal venue for remote testimony, if it is secure, quiet, and equipped with the necessary communications technology. The prosecutor will have to coordinate with officials from that country's Foreign Affairs Ministry or Central Authority to secure agreement and schedule day and time for use.

5. Prepare!

The need to prepare is no less imperative for conducting the remote testimony of a victim than it is for questioning that victim in a deposition or pre-trial hearing. The guidance described above for depositions and pre-trial hearings apply equally to

electronic assisted testimony and need not be repeated here. The fact that the victim is in another country and not readily accessible to the investigator or prosecutor, however, greatly complicates the pre-hearing preparation process.

The best approach is for the prosecutor and/or investigator to travel to the victim before the testimony is scheduled to prepare the victim to testify by explaining the process, reviewing the areas to be covered on direct, and preparing the victim for cross examination, as outlined above. This may be prohibitively expensive, however.

A telephone or Skype call incurs little or no expense and can also connect the prosecutor with the victim before the hearing, if the victim has a phone or computer and can access it in a private space. Even so, this is clearly not as effective as a face-to-face interview, but it may be the next best option. The security of the connection will have to be verified to assure that no one can listen in to the conversation.

Should neither of the above options be available, an embassy official, preferably a lawyer or someone with legal experience, may be tasked to visit the victim and conduct a limited preparation interview. This is not an ideal solution, but it may be all that is available at this point. It is probably better to give the victim some information about the process of testifying than to simply let him or her testify without any preparation. This assumes that the embassy official chosen for the task is capable of conducting the interview without confusing or coaching the victim.

In any event, the prosecutor will have to carefully brief this official on what to cover and what not to say; specifically, how to avoid coaching. Since the official will not be familiar with all the facts in the case, the prosecutor may suggest a truncated interview to keep it as simple and error free as possible. The official can be told to focus on two areas only: explaining the process of how the testimony will be given and allowing the victim to review prior statements in order to refresh his or her memory. If the victim has any questions, the official should be instructed to refer them to the prosecutor who can respond to the victim by phone, email or through the official in a follow-up visit.

None of the above options may be available. In which case the prosecutor may consider sending a letter, email or text to the victim thanking the victim for cooperating, making clear the time of, and place for, the testimony, identifying how the victim will be transported to and from the location (hopefully someone from the embassy staff will do

that), describing the process by which the testimony will be taken, and explaining that the sole obligation of the victim (or any witness) is to tell the truth.

If the witness is in possession of any prior statements, the prosecutor might also ask the witness to review those, if the rules of criminal procedure and practice allow. But in the letter the prosecutor should carefully note that these statements are only to refresh memory and if the victim's memory is different from anything in the statements, the victim should testify consistent with his or her memory not the statements.

If, as is probable, the victim does not have those statements at hand, the prosecutor will have to decide if it is lawful under the rules to forward a copy and, if so, whether it is a good tactic to do so. The risk is that the victim may try to memorize the statements or lose control of them so that they somehow get into the hands of the defense.

Conclusion

It is possible to bring human traffickers to justice even if the trafficking victims are not in the country where they were exploited. The investigator and/or prosecutor should consider using any and all methods for gathering information and preserving or obtaining admissible testimony from the victim. If there is no clear process in place for the preservation or remote acquisition of testimony, the prosecutor should seek to use any of the alternative methods not specifically prohibited by law.

Acknowledgements

“Albert Moskowitz is the principle author of this Practice Guide. Mr. Moskowitz is a Warnath Group Expert specializing in the provision of our training and technical assistance on human trafficking and rule of law issues in countries around the world. He is the former Chief of the Criminal Section of the Civil Rights Division of the U.S. Department of Justice, the office in charge of federal prosecutions of cases of trafficking in persons. In this Practice Guide Mr. Moskowitz shares insights from decades of prosecutorial experience associated with human trafficking cases. One common issue faced in the investigation and prosecution of trafficking cases is the prospect of contemplating going forward with a criminal case when victims are not available to cooperate and testify against the traffickers. The insights offered in this Practice Guide introduce tools, techniques and strategies that can be used to address this issue in more effective ways that will both improve a country’s criminal justice practices and outcomes while, at the same time, offering more meaningful support for victims within the criminal justice context.”

- *Stephen Warnath, CEO & President*

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