

52 Wake Forest L. Rev. 379

Wake Forest Law Review
Spring, 2017

Combating Human Trafficking: Current Trends and Cutting Edge Issues
Article and Essay

[Sarah Dohoney Byrne](#)^{a1}

Copyright © 2017 by Wake Forest University; Sarah Dohoney Byrne

MEETING THE LEGAL NEEDS OF HUMAN-TRAFFICKING SURVIVORS

Increased awareness among law enforcement, the courts, schools, and the public about human trafficking¹ has caused a surge in the need for service providers across the country.² Survivors of human trafficking³ need healthcare, counseling, housing, and support/empowerment programming, but *they also need lawyers*.⁴ *380 Unlike victims of most other crimes, trafficking survivors have their own legal needs due to their experience of being trafficked;⁵ yet they do not always meet the eligibility requirements for receiving a court-appointed attorney⁶ or Legal Aid services.⁷ “Without legal representation, survivors of trafficking can be left to wade through the rocky waters of justice alone, un-empowered and misunderstood; an experience not too dissimilar from being trafficked.”⁸

This Article will: (1) identify the various legal needs of trafficking survivors; (2) address the unique challenges facing the lawyers who represent them; (3) argue for the self-directed representation of minor survivors; and (4) provide guidance for lawyers and law firms called on to meet the legal needs of those who have endured such a horrific reality.

I. AREAS OF LEGAL NEED

A. *Clearing Past Criminal Records*

Many sex trafficking victims *first* interface with the justice system as perceived criminals.⁹ The experience of being trafficked *381 can involve criminal activity beyond commercial sex, such as drug use and sales, illegal firearm possession, and robbery.¹⁰ As a tactic to further their exploitation, traffickers will induce the victim to engage in such criminal conduct and then threaten to report it if the victim does not continue to “work” for them.¹¹ Once a survivor is free from exploitation, she¹² may be left with debilitating criminal charges, outstanding warrants, or convictions.¹³ Despite the current wave of “ban the box” type efforts, which encourage employers to look past a job applicant's criminal history,¹⁴ a record can still be an absolute bar to employment, housing, and education.¹⁵

*382 Pro bono lawyers can lift this barrier to independence for survivors by assisting them to vacate or expunge criminal records related to their exploitation. Vacatur and expunction statutes vary by state and require complicated eligibility analysis;¹⁶ some statutes provide for the removal of various types of records and others confine relief for human trafficking survivors to prostitution convictions.¹⁷ Pro bono lawyers can assist by analyzing the relevant law

and, if the survivor is eligible for vacatur or expunction, the lawyer can complete and file the necessary petition or motion with the appropriate court.¹⁸ Many survivors find this process “inaccessible, confusing, and intimidating,” yet it can produce a lifetime of benefits.¹⁹

B. Addressing Pending Criminal Charges

“Undoing” a conviction by expunction or vacatur can be much more challenging than addressing a charge before it turns into a permanent record.²⁰ It is an easier task to help a survivor address a *pending* charge, when a lawyer is consulted early enough. Pro bono ***383** lawyers can provide meaningful assistance in the survivor's defense, even when a criminal lawyer has been appointed by the court to represent the survivor.²¹

Due to an underfunded criminal defense system, public defenders are often deprived of the time to adequately consult with their clients.²² The mistrust, shame, and psychological trauma that result from being trafficked often disable victims from telling their stories to their own lawyers.²³ When a victim's own lawyer is not aware of the material facts, available defenses are neglected; resulting in ineffective assistance of counsel.²⁴ Survivors are often encouraged to plea to a lesser charge even though they were forced or coerced to engage in the conduct that gave rise to the prosecution.²⁵ This injects criminal intent where it didn't exist and unjustly criminalizes a victim.²⁶

Private pro bono attorneys can advocate for the survivor by clearing up the prosecutor or the defense attorney's misunderstanding as to why the defendant engaged in the conduct in question and help explain the survivor's circumstances.²⁷ In ***384** addition, the survivor feels empowered in having chosen and directed her pro bono attorney to facilitate her defense.²⁸ She may trust the pro bono lawyer to relay the underlying causes of the criminal conduct in a way that can have a meaningful impact on the ultimate disposition of the survivor's charges and her vindication.

C. Victim-Witness Assistance in the Investigation and Prosecution of the Trafficker

Some trafficking survivors want assistance prompting an investigation of the trafficker once they feel safe, stable, and on their way to recovery.²⁹ Many survivors are motivated by the noble desire to prevent others from having to endure what they did.³⁰ Others feel forced to participate in the investigation and prosecution despite tremendous fear of the trafficker and their own criminal liability.³¹ Although their rights are at stake and their fears significant, our criminal justice system generally does not afford legal representation to crime victims,³² but pro bono attorneys can.

***385** Survivors of human trafficking who have the courage to prompt an investigation of the trafficker often don't know where to begin--whether to report to local, state, or federal law enforcement; how to report it; and whether they are exposed to criminal liability for their involvement in illegal conduct.³³ Pro bono lawyers can help navigate a process further complicated by jurisdictional questions due to the mobility of human trafficking enterprises.³⁴

Victims of crimes have the right to: (1) be treated fairly and respectfully (especially with regard to privacy); (2) protection from the accused; (3) receive notification of and be present at court proceedings (with some exception); (4) be informed about the prosecution and sentence of the offender; and (5) receive restitution.³⁵ These rights are, of course, in addition to the constitutional right against self-incrimination.³⁶ Crime victims' rights are vested as early as the investigative

MEETING THE LEGAL NEEDS OF HUMAN-TRAFFICKING..., 52 Wake Forest L....

interview phase.³⁷ Pro bono attorneys who have agreed to represent human trafficking victims should be present for all law enforcement interviews to ensure the protection of these rights.³⁸

Helping survivors obtain restitution for their victimization (i.e., back pay and damages for physical and psychological harm) can be some of the most meaningful work for both lawyers and their clients.³⁹ Federal law and some state law require that restitution be paid by the defendant for “the full amount of the victim's losses.”⁴⁰ Despite this statutory mandate, restitution is rarely sought by prosecutors or ordered by the court.⁴¹ As victims' counsel, pro bono *386 lawyers can help ensure that the prosecutor pursues mandatory restitution from the defendant. Full recovery for losses in human trafficking cases can be facilitated by the pro bono lawyer's help in calculating lost wages or the defendant's gross income born by the victimization, and by drafting a bench memorandum on restitution.⁴² Restitution awards can be life changing for these victims. For example, in *United States v. Lewis*,⁴³ the District Court for the District of Columbia ordered the defendant to pay four minor victims of his sex-trafficking scheme a total of \$3,892,055.⁴⁴ The calculations to get to that number, performed by various parties including a pro bono attorney, accounted for the defendant's daily profit from selling the child victims for sex and other expected costs for their recovery (e.g., medical and psychiatric care).⁴⁵

If criminal restitution is not adequately awarded or not awarded at all, victims of human trafficking can pursue a civil action against the defendant to recover damages.⁴⁶ Note that the lower standard of “preponderance of the evidence” can favor a victim when criminal prosecution was not pursued or not successful.⁴⁷ Alternatively, if the defendant was convicted and restitution was ordered but not paid, a pro bono lawyer can assist the victim in seeking restoration to apply any funds forfeited by the defendant to the restitution order.⁴⁸ Even if the trafficker was not ultimately convicted, eligible victims can file a petition for remission of forfeited property to compensate them for their pecuniary losses.⁴⁹ Again, pro bono attorneys can fill gaps in the pursuit of justice for survivors by assisting them in seeking restitution,⁵⁰ *387 remission,⁵¹ restoration,⁵² or civil remedies.⁵³

Legal support in the investigation and prosecution of the trafficker is particularly important for survivors who have had adverse experiences with law enforcement and the courts in the past.⁵⁴ Pro bono lawyers can inspire renewed trust in the legal system and provide access to justice by advocating for victim-witnesses' rights in the wake of their victimization.

D. Other Civil Matters

Unlike other pro bono opportunities for lawyers (e.g., will drafting or eviction defense), trafficking clients often present with unclear and varied legal needs. Common areas of need for survivors include representation in custody disputes,⁵⁵ immigration assistance⁵⁶ for foreign-born victims, name change petitions to seek *388 anonymity,⁵⁷ disability claims,⁵⁸ and protective orders if those they fear are not in law enforcement custody.⁵⁹

II. THE CHALLENGES IN REPRESENTING SURVIVORS OF HUMAN TRAFFICKING

Representing human trafficking survivors is a unique pro bono opportunity for lawyers, in both rewarding and challenging ways. The list below addresses some challenges to anticipate, but this is an evolving concept as new obstacles present themselves with each representation.⁶⁰

A. Issue-Spotting and Identifying the Client's Desired Outcome

Firstly, these clients don't always walk into the lawyer's office with one identified legal need. New client intake meetings involve not only issue spotting but desire spotting.⁶¹ In other words, it involves identifying what legal needs the survivor has and with which ones they want assistance. An initial request for expunction *389 analysis can evolve into a request for help appealing a disability claim denial. Discerning the goals of the representation requires time and patience.

B. Ensuring Trauma-Informed Representation

Generally, lawyers expect their clients to narrate the timeline of facts giving rise to their legal needs.⁶² However, most trafficking survivors battle post-traumatic stress disorder, depression, and anxiety.⁶³ Post-traumatic stress disorder and other psychological trauma can impair a victim's ability to recall facts accurately and linearly.⁶⁴ In addition, shame, distrust, and fear of criminal liability can prevent survivors from providing candid and comprehensive information at the new client intake phase.⁶⁵ Lawyers should commit extra time to build trust and gather the necessary information for the representation.⁶⁶

C. A Transient Population

As they work to rebuild their lives, trafficking survivors may choose to change housing and human services providers (i.e., nonprofit organizations that provide shelter, counseling, healthcare, mentorship, and job search assistance).⁶⁷ While they may currently live in one geographic area, many come from other parts of the country or world.⁶⁸ Therefore, they are in great transition. Legal representation is sometimes terminated prematurely when the *390 client relocates, disengages from their primary service provider,⁶⁹ returns to exploitation,⁷⁰ or simply ceases communication with the lawyer.⁷¹ This can be disappointing for the lawyer who set out to help, but they should trust that the short relationship that was established likely had a positive impact.

D. A Young Population

Far too many victims of human trafficking, sex trafficking in particular, are children.⁷² Representing them presents many challenges for lawyers.⁷³ The first challenge lies in the uncertainty around the autonomy of minor⁷⁴ survivors in their pursuit of legal rights. The other challenges, which exist in all areas of legal work for children, relate to the child's mental capacity to self-direct her representation and what lawyers are to do when their own opinion about the best course of the representation deviates from that of their client.

391 1. *Minor Survivors Deserve Self-Directed Legal Representation

[C]hildren do need lawyers, not only in delinquency proceedings where the constitution guarantees counsel, but also in child welfare and other proceedings where children have significant rights and legal interests at stake. ... [C]hildren are best served when their lawyers comport with the traditional, ethically-dictated expectations for an attorney-client relationship, and not when lawyers serve as guardians *ad litem* or otherwise substitute their ideas of what is best for the child for the child's own ideas. This means that children who have the capacity to direct the representation should be treated like ordinary clients: their

MEETING THE LEGAL NEEDS OF HUMAN-TRAFFICKING..., 52 Wake Forest L....

lawyers should consult with them, keep their confidences, serve them with undivided loyalty, and follow their lawful directions.⁷⁵

With the state of minority rendering these victims especially vulnerable⁷⁶ and the trafficking of them considered per se “severe,”⁷⁷ access to direct legal representation is vital. Minors who are competent to make their own decisions ought to direct their legal representation in all the areas addressed in Part I of this Article, and more. This means representation of their “expressed interests” without requiring parental or guardian consent or involvement.⁷⁸

As a practical matter, legal representation that is free of parental or guardian involvement is critical for minor victims of human trafficking because many are semi-independent persons.⁷⁹ *392 Even if parental or guardian rights exist, many victims do not regularly communicate with those who have legal custody of them.⁸⁰ Those parents or guardians are often inaccessible when the child is living in a safe home, shelter, in a private residence with roommates, or independently.⁸¹ Requiring consent and direction from a parent or guardian can delay the delivery of necessary legal aid, not to mention adversely impact it.⁸² Effective advocacy means that the lawyer need *not* (1) wait for parental or guardian consent to commence representation; (2) execute an engagement letter with the parent or guardian;⁸³ or (3) heed parental or guardian direction in *393 asserting the client's rights.⁸⁴

Philosophically, minors who survive trafficking deserve self-directed legal representation as part of their recovery. Arming minor victims with the tools to chart their path to justice empowers them after having been deprived of autonomy by being trafficked.⁸⁵

Children asserting their rights in other contexts often experience an amicable relationship of trust with their parents or guardians.⁸⁶ However, such trust can be scarce either before, during, or after a child has been trafficked.⁸⁷ Absent trust by the child, a parent or guardian ought not influence the child's pursuit of his legal rights. In some very disturbing cases, the parents or guardians may have had some direct or indirect responsibility for the child's trafficking experience.⁸⁸ In those circumstances, parental involvement in the child's legal affairs is, of course, completely inappropriate.

*394 Due to the sensitive nature of having been trafficked, the legal matters of a minor victim ought to remain private as between her and her attorney. In other contexts, an attorney's duty of confidentiality extends to the child client to the exclusion of the parent.⁸⁹ The same should apply when representing a minor victim whose legal needs arose from such a personal experience, unless, of course, the minor client has consented to such disclosure.⁹⁰ That the duty of confidentiality extends only to the client⁹¹ can be comforting to the minor victim.⁹²

2. The Landscape of Minor Legal Autonomy

Currently, the autonomy of minors in legal matters varies depending on the context; a disparity largely stemming from the tension between affording children independence and acknowledging their limitations with mature decision-making.⁹³ There are several areas in which children are not free to direct their legal representation⁹⁴ and where the minor's expressed interests are either only partly considered, if at all,⁹⁵ or the child simply has no *395 standing to assert a claim or right.⁹⁶ For example, in abuse and neglect cases (proceedings in which the placement of the child after abuse

or neglect is being adjudicated)⁹⁷ and in contested custody disputes (proceedings in which legal and physical custody of the child is being adjudicated),⁹⁸ a guardian ad litem may be appointed to represent the “best interests of the child.”⁹⁹ Depending on the jurisdiction, “best interests” advocacy may or may not include consideration of the child's desires.¹⁰⁰

Conversely, in the juvenile defense context, minors are unequivocally entitled to self-directed legal representation.¹⁰¹ Lawyers representing child offenders have an obligation only to the child.¹⁰² The child's lawyer honors the child's express wishes and keeps information confidential from all other parties unless an exception exists.¹⁰³ The lawyer need not rely on permission from or consultation with a parent or guardian.¹⁰⁴

Substantive areas of law may require the appointment of a guardian ad litem in legal proceedings, but not all trafficking victims' legal needs involve a court, as demonstrated by the various areas of need listed in Part I. Therefore, unless explicitly forbidden by applicable substantive law, or where uncertain or otherwise unjust, minors should be entitled to “expressed interest” representation free from parental or guardian involvement as in the juvenile defense context. While the law does not afford minors adult *396 status in many areas,¹⁰⁵ legal autonomy in the assertion of legal rights after being deprived of human rights is crucial for their pursuit of justice and healing.

3. Minor Mental Capacity

Opponents of self-directed legal representation of children point to incapacity due to young age and mental health.¹⁰⁶ This position is understandably based on the concept that client competence to make decisions as to legal matters is vital to effective representation.¹⁰⁷ However, most state rules of professional conduct (which are the ethical rules governing lawyers) address how to handle the representation of clients with diminished capacity--including children.¹⁰⁸ The American Bar Association's model version of this rule specifically contemplates the challenge with representing children, providing that “[w]hen a client's capacity to make adequately considered decisions in connection with a representation is diminished, ... *because of minority* ... the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”¹⁰⁹

The argument for autonomous legal representation of a child trafficking survivor's expressed interest presumes a base level of mental capacity.¹¹⁰ Of course, the decision-making capacity of a *397 sixteen-year-old victim pursuing vacatur of a conviction born by coercion is different than that of a six-year-old seeking emancipation from his parents.¹¹¹ A discussion of where the boundaries of mental capacity lie based on age, child cognitive development, and mental health are beyond the scope of this Article. But generally, absent a belief that the client would otherwise be substantially harmed, lawyers for children must pursue as “normal” an attorney-client relationship as possible.¹¹² This means “abid[ing] by a client's decisions concerning the objectives of the representation.”¹¹³

4. When the Lawyer Disagrees with the Minor's Desires

Likely the greatest ethics challenge for attorneys representing minors comes when the client's expressed interests are not aligned with the lawyer's opinion about her best interests.¹¹⁴ This may seem like a problem acute to clients who are children, however, this is an ethical challenge that all lawyers face with all sorts of clients.¹¹⁵ Yet, lawyers aren't quick

MEETING THE LEGAL NEEDS OF HUMAN-TRAFFICKING..., 52 Wake Forest L....

to question the mental capacity of adult and institutional clients who direct their representation in a way that doesn't comport with the lawyer's opinion about the best course of the representation.¹¹⁶

***398** When lawyer and client disagree, our ethical duties allow us to advise our client in a way that may be informed by moral and social factors.¹¹⁷ In fact, “a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.”¹¹⁸ Perhaps this is an even more important task when the client is a child who may never have received much adult advice and counsel before. But after offering such advice, maintaining a normal client relationship means the client has the “ultimate authority to determine the purposes to be served by legal representation.”¹¹⁹

If the lawyer and her client cannot reconcile their disagreement about representation after meaningful consultation,¹²⁰ the lawyer may withdraw from the representation.¹²¹ This is not an uncommon eventuality for lawyers and clients of all kinds.¹²²

***399** Lawyers certainly confront ethical challenges in the representation of a minor's expressed interest, but these obstacles pale in comparison to the profound reward in helping a child who has endured such horror.

“Ultimately, the most therapeutic thing a lawyer can do is to empower the child client.”¹²³

III. GUIDE TO START REPRESENTING SURVIVORS OF HUMAN TRAFFICKING

The balance of this Article offers a step-by-step guide to law firms endeavoring to provide this much-needed pro bono service to human trafficking survivors.

A. Establish Sources of Client Referrals

Most other pro bono programs receive client referrals from nongovernmental organizations that serve a specific population, legal aid corporations, or local bar referral programs.¹²⁴ Because there are very few organizations, particularly in smaller cities and rural areas,¹²⁵ that specifically support survivors of human trafficking,¹²⁶ there often isn't a natural referring agency for this type of pro bono program. Similarly, most legal aid corporations don't have a specific mission of providing representation to trafficking victims and are often restricted by government requirements regarding permitted service areas and income levels.¹²⁷

Therefore, the first step to offering this legal representation is to establish trusted relationships with law enforcement, state and federal prosecutors, public defenders, local legal aid organizations, and service providers who may intersect with victims of trafficking.¹²⁸ Child advocacy organizations are a particularly important cog in this wheel due to their work as juvenile defenders and civil advocates.¹²⁹ Often, it is one of these institutions that first ***400** interfaces with trafficking victims and is best equipped to identify them as such.¹³⁰

For a variety of reasons, it is critical that a survivor-client receive comprehensive human services (e.g., housing, counseling, healthcare, and empowerment) before and during the legal representation.¹³¹ Lawyers are not trained to identify this form of victimization, or to do much else by way of human services other than providing legal aid.¹³²

MEETING THE LEGAL NEEDS OF HUMAN-TRAFFICKING..., 52 Wake Forest L....

Human services providers are better positioned to assess the realities of an applicant for service and ensure that their basic human needs are being met. Lawyers can only effectively assert a survivor's legal rights after they have been screened by law enforcement or service providers, who identify the client as a victim of human trafficking.¹³³

B. Match Needs with Firm Competencies and Co-Counsel as Needed

Existing practice areas for paying and other pro bono clients can create the primary areas of service for a human trafficking pro bono program. Just because a law firm does not regularly provide family or criminal law assistance doesn't have to be a barrier to meeting those types of legal needs. Lawyers must consult the applicable rules of professional conduct to ensure that they can provide competent representation.¹³⁴ Association with outside counsel who possess the subject matter expertise and necessary study can render a lawyer competent.¹³⁵ Further, there are many lawyers and anti-trafficking organizations across the country that have been assisting *401 victims of human trafficking for many years.¹³⁶ Although dispersed in all parts of the country, there exists a reliable network of expertise ready and willing to help.

CONCLUSION

Victims of human trafficking feel abandoned by “the system” and powerless in dictating their fate; yet they have less access to justice than so many other populations in need. Despite the challenges in this work, courageous lawyers who are committed to pro bono publico and have a desire to meet an unmet need ought to pursue this truly unique pro bono opportunity.

Footnotes

- a1 Attorney at Moore & Van Allen, PLLC in Charlotte, North Carolina, where she established the firm's Human Trafficking Pro Bono Project. Byrne thanks Morgan Switzer, Christopher Thompson, and Sally Hentz for their assistance with this Article.
- 1 The United Nations defines human trafficking as “the recruitment, transportation, transfer, harboring, or receipt of persons by improper means (such as force, abduction, fraud, or coercion) for an improper purpose including forced labor or sexual exploitation.” *Human Trafficking*, NAT'L INST. JUST., <https://www.nij.gov/topics/crime/human-trafficking/pages/welcome.aspx> (last modified Mar. 30, 2017). In addition to the United Nations' definition, the United States government also added that “human trafficking” includes “[s]ex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age.” *Id.* Many state laws closely mirror the federal definition. *See, e.g.*, MASS. ANN. LAWS ch. 265, §§ 50(a), 51(a) (LexisNexis Supp. 2016); N.Y. SOC. SERV. LAW §§ 135.35(1)-(3), 230.34(2)-(3), (5) (McKinney Supp. 2017); N.C. GEN. STAT. ANN. § 14-43.11 (West 2006).
- 2 *See* Melinda Sykes Haggerty, *Human Trafficking in Ohio*, OHIOLAW., Nov./Dec. 2013, at 6, 10 (discussing how increased awareness, investigation, and prosecution of human trafficking cases has necessitated an effort “to build a system of services for the victims who are left broken by these traffickers and in need of restoration and healing”).
- 3 The terms “survivor of human trafficking” and “victim of human trafficking” will be used interchangeably in this Article, usually comporting with the stage of victimization and recovery.
- 4 DEPT OF HEALTH & HUMAN SERVS., SERVICES AVAILABLE TO VICTIMS OF HUMAN TRAFFICKING: A RESOURCE GUIDE FOR SOCIAL SERVICE PROVIDERS 2-3 (2012), https://www.acf.hhs.gov/sites/default/files/orr/traffickingservices_0.pdf (listing legal services among the various service needs of human trafficking survivors); U.S. DEPT OF STATE, TRAFFICKING IN PERSONS REPORT 26 (2015), <https://www.state.gov/documents/>

MEETING THE LEGAL NEEDS OF HUMAN-TRAFFICKING..., 52 Wake Forest L....

organization/245365.pdf (same). Survivors of both sex-and labor-trafficking need legal representation. While the legal needs can vary based on the form of exploitation, they are generally similar. *See* Lori L. Cohen, *Sex Trafficking and Labor Trafficking: Overlap and Convergence*, in *LAWYER'S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS* 95, 98-100 (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 2013) [hereinafter *LAWYER'S MANUAL ON HUMAN TRAFFICKING*], <https://www.nycourts.gov/ip/womeninthecourts/pdfs/lmht.pdf>. Therefore, this Article will address both forms of trafficking collectively unless one form is specifically identified.

- 5 *See generally* OFFICE OF VICTIMS OF CRIME, U.S. DEPT OF JUSTICE, OVC FACT SHEET: THE LEGAL RIGHTS AND NEEDS OF VICTIMS OF HUMAN TRAFFICKING IN THE UNITED STATES 1 (2015), https://ovc.ncjrs.gov/humantrafficking/Public_Awareness_Folder/Fact_Sheet/HT_Legal_Rights_Needs_fact_sheet-508.pdf (discussing the unique legal needs of human trafficking survivors).
- 6 Victims only receive a court-appointed attorney when facing their own criminal charges, if eligible, *see, e.g.*, 18 U.S.C. § 3006A(a)(1)(A) (2012); N.C. GEN. STAT. §§ 7A-450 (b), 15-4 (2016), or through detention as a material witness. *See, e.g.*, 18 U.S.C. § 3006A(a)(1)(G); N.C. GEN. STAT. § 15A-803(d) (2016). Also, minor victims are appointed an attorney, child's advocate, or guardian ad litem for certain civil court proceedings, *see, e.g.*, MASS. GEN. LAWS ANN. 260 § 4D(f) (West 2017); VT. STAT. ANN. § 2662(b) (West 2016), and in the trial against the trafficker. *See, e.g.*, 18 U.S.C. § 3509(h); N.M. STAT. ANN. § 30-52-2(B) (West 2017). Other than in these contexts, trafficking survivors are not guaranteed free legal representation.
- 7 Sarah Dohoney Byrne, *Human Trafficking Persists, But Firms Can Help*, NAT'L L.J. (Aug. 29, 2016), <http://www.nationallawjournal.com/id=1202766126695/Human-Trafficking-Persists-But-Firms-Can-Help>. There are not many legal aid corporations whose sole mission is to represent trafficking survivors. *See* Kavita Desai, *Legal Strategies in the Fight to End Human Trafficking*, 3 HLRE: OFF THE RECORD 33, 46 (2013). Further, most are bound by government-funding mandates on area of law and income requirements. FREEDOM NETWORK USA, COMPREHENSIVE LEGAL SERVICES FOR TRAFFICKED PERSONS 2-3 (2015), <https://freedomnetworkusa.org/app/uploads/2016/12/Comprehensive-Legal-Services-for-Trafficked-Persons.pdf>.
- 8 Byrne, *supra* note 7.
- 9 *See* SUZANNAH PHILLIPS ET AL., CITY UNIV. OF N.Y. SCH. OF LAW, CLEARING THE SLATE: SEEKING EFFECTIVE REMEDIES FOR CRIMINALIZED TRAFFICKING VICTIMS 1 (2014), <http://www.law.cuny.edu/academics/clinics/iwhr/publications/Clearing-the-Slate.pdf> (“[V]ictims of human trafficking frequently first come into contact with the criminal justice system when they are arrested.”). Unlike the popular Hollywood portrayals, victims of human trafficking are often hard to identify. LAURA SIMICH ET AL., VERA INST. OF JUSTICE, IMPROVING HUMAN TRAFFICKING VICTIM IDENTIFICATION - VALIDATION AND DISSEMINATION OF A SCREENING TOOL 11 (2014), <https://www.ncjrs.gov/pdffiles1/nij/grants/246712.pdf>. Improved institutional awareness and identification is key because victims are often hidden in the shadows of society or behind the guise of a “criminal,” “delinquent,” or “truant.” *See* CTR. FOR CT. INNOVATION, IDENTIFYING AND RESPONDING TO SEX TRAFFICKING: A GUIDE FOR THE COURTS 1-4, http://www.courtinnovation.org/sites/default/files/documents/DV_SJI_Risk%20Need_.pdf (last visited Mar. 23, 2017); U.S. DEPT OF EDUC., HUMAN TRAFFICKING IN AMERICA'S SCHOOLS 7 (2015), <https://safesupportivelearning.ed.gov/sites/default/files/HumanTraffickinginAmericasSchools.pdf> (noting that child victims of human trafficking may display behavioral problems such as truancy). We need to continue the meaningful progress of deciphering this often-masked form of victimization rather than further criminalizing victims of this crime. *See Combating Human Trafficking: Federal, State, and Local Perspectives: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 113th Cong. 10-13 (2013) (statement of Anne C. Glannon, Nat'l Coordinator for Child Exploitation Prevention and Interdiction, Office of the Deputy Att'y Gen., and Joseph S. Campbell, Deputy Assistant Director, Federal Bureau of Investigation) (describing federal law enforcement initiatives to address trafficking).
- 10 PHILLIPS ET AL., *supra* note 9, at 15; *see also* OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, U.S. DEPT OF STATE, PROTECTING VICTIMS FROM WRONGFUL PROSECUTION AND FURTHER VICTIMIZATION 1 (2016), <https://2009-2017.state.gov/documents/organization/259304.pdf>.

MEETING THE LEGAL NEEDS OF HUMAN-TRAFFICKING..., 52 Wake Forest L....

- 11 See PHILLIPS ET AL., *supra* note 9, at 9 (“Traffickers will also ... threaten[] to call the police to have the victim arrested or deported if they do not submit to the trafficker’s demands.”).
- 12 When referring to survivors, “he” and “she” will be used interchangeably with no significance.
- 13 See PHILLIPS ET AL., *supra* note 9, at 5, 21-23; see also DARA GOODMAN ET AL., REPRESENTING VICTIMS OF HUMAN TRAFFICKING IN MASSACHUSETTS: A GUIDE FOR ATTORNEYS § 7.2 (Seth Orkand & Julie Dahlstrom eds., 2013), http://media.wix.com/ugd/6d5c12_e4e8c12d8ea3487fbebfa0f7d3eabdb0.pdf (discussing legal consequences of a criminal conviction).
- 14 Christina O’Connell, Note, *Ban the Box: A Call to the Federal Government to Recognize a New Form of Employment Discrimination*, 83 FORDHAM L. REV. 2801, 2801-04 (2015).
- 15 GOODMAN ET AL., *supra* note 13, § 7.2.1, at 79-80; OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, *supra* note 10, at 1.
- 16 HUMAN TRAFFICKING & THE STATE COURTS COLLABORATIVE, POST-CONVICTION RELIEF FOR HUMAN TRAFFICKING VICTIMS CONVICTED OF CRIMES COERCED BY A TRAFFICKER 2-4 (2015), http://www.htcourts.org/wp-content/uploads/150904_PostConviction_Relief_forHTvictims_v05.pdf.
- 17 Compare CAL. PENAL CODE § 236.14(a) (West 2017) (permitting vacatur for a person “arrested for or convicted of any nonviolent offense committed while he or she was a victim of human trafficking”), with N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney Supp. 2017) (permitting vacatur for various prostitution related convictions where “the defendant’s participation in the offense was a result of having been a victim of sex trafficking”), and N.C. GEN. STAT. § 15A-1415 (b) (1) (2015) (permitting relief from only the first offense of prostitution when “the defendant’s participation in the offense was a result of having been a victim of human trafficking”). See generally The Human Trafficking Pro Bono Legal Ctr. et al., *Vacatur & Expungement Database*, GOOGLE SITES, <https://sites.google.com/a/htprobono.org/vsdatabase/> (last visited Mar. 23, 2017) (providing links with information on state laws pertaining to expungement or vacatur laws for human trafficking victims). The broadening of state vacatur statutes to include relief from convictions of non-prostitution offenses resulting from the experience of being trafficked is critical for ensuring justice for individuals who are only victims and not perpetrators. See OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, *supra* note 10, at 2.
- 18 Byrne, *supra* note 7.
- 19 *Id.*
- 20 See Courtney Bryan, *Representing and Defending Victims of Commercial Sexual Exploitation in Criminal Court*, in LAWYER’S MANUAL ON HUMAN TRAFFICKING, *supra* note 4, at 183, 189 (“[A]ttorneys should determine if their client is a trafficking victim *before* conviction and sentencing ... because it may be difficult to meet the standard required to ... vacate a conviction.”); cf. Francisco Zornoza, *Protecting Human Trafficking Victims from Punishment and Promoting Their Rehabilitation: The Need for an Affirmative Defense*, 22 WASH. & LEE J. CIV. RTS. & SOC. JUST. 177, 186, 190 (2016) (“Given the ineffectiveness of trafficking-related vacatur statutes, legislators ... should ask themselves why they do not provide these victims with relief *before* a conviction”).
- 21 See Amy Barasch & Barbara C. Kryszko, *The Nexus Between Domestic Violence and Trafficking for Commercial Sexual Exploitation*, in LAWYER’S MANUAL ON HUMAN TRAFFICKING, *supra* note 4, at 83, 89 (recommending that domestic violence advocates who represent trafficking victims that have been charged with a crime coordinate with the victim’s defense attorney); Amanda Norejko, *Representing Adult Trafficking Victims in Family Offense, Custody, and Abuse/Neglect Cases*, in LAWYER’S MANUAL ON HUMAN TRAFFICKING, *supra* note 4, at 193, 202 (recommending that attorneys representing adult trafficking victims in abuse and neglect cases coordinate with defense counsel that represents the victim).

MEETING THE LEGAL NEEDS OF HUMAN-TRAFFICKING..., 52 Wake Forest L....

- 22 See generally Laurence A. Benner, *Eliminating Excessive Public Defender Workloads*, CRIM. JUST., Summer 2011, at 24, 25 (“[A]most three out of every four county-funded public defender offices have attorney caseloads that exceed nationally recognized maximum caseload standards.”).
- 23 Dorchon A. Leidholdt, *Interviewing and Assisting Trafficking Survivors*, in *LAWYER'S MANUAL ON HUMAN TRAFFICKING*, *supra* note 4, at 169, 169-73 (describing how trafficking victims' trauma, fear, and shame can “impede the efforts of attorneys ... to interview victims and develop strong working relationships with them”); see also Leah Kaylor, *Psychological Impact of Human Trafficking and Sex Slavery Worldwide: Empowerment and Intervention*, AM. PSYCHOL. ASS'N, <https://www.apa.org/international/pi/2015/09/leah-kaylor.pdf> (last visited Mar. 23, 2017) (discussing the psychological trauma many victims experience).
- 24 Benner, *supra* note 22, at 26 (citing *Powell v. Alabama*, 287 U.S. 45, 58 (1932)) (discussing how a public defender's inability to conduct a reasonable investigation to determine factual innocence or mitigating factors for proper defense violates the Sixth Amendment).
- 25 *Id.*; see also Bryan, *supra* note 20, at 184 (noting that many victims' criminal cases are considered trivial and are disposed of with a plea, without consideration of whether the accused may herself be the victim of violence or exploitation).
- 26 OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, *supra* note 10, at 1.
- 27 See Bryan, *supra* note 20, at 184.
- 28 Cf. PHILLIPS ET AL., *supra* note 9, at 27 (noting that a trafficking victim who had the assistance of an attorney in vacating a record said, “I can never in a million words describe what it felt like to walk into that courtroom and have [my attorney] by my side, an attorney I trust.”); Theodore R. Sangalis, Comment, *Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act*, 80 FORDHAM L. REV. 403, 438 (2011) (suggesting that a victim's ability to direct her attorney in pursuing a civil remedy against her trafficker empowers her).
- 29 AMY FARRELL ET AL., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES 137 (2012), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412593-Identifying-Challenges-to-Improve-the-Investigation-and-Prosecution-of-State-and-Local-Human-Trafficking-Cases.pdf> (noting that “victims who feel safe and secure are more likely to cooperate with authorities”); cf. HEATHER J. CLAWSON ET AL., ICF INTERNATIONAL, PROSECUTING HUMAN TRAFFICKING CASES: LESSONS LEARNED AND PROMISING PRACTICES § 3.2 (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/223972.pdf> (“[V]ictims are often hesitant or unable to come forward out of fear of retaliation, distrust of authorities, and lack of understanding of their rights and therefore the crime remains hidden.”).
- 30 INT'L ASS'N OF CHIEFS OF POLICE, THE CRIME OF HUMAN TRAFFICKING: A LAW ENFORCEMENT GUIDE TO IDENTIFICATION AND INVESTIGATION 19 (2007), <http://www.theiacp.org/portals/0/pdfs/CompleteHTGuide.pdf> (discussing a survivor who decided to cooperate with law enforcement “to help others who are not able to speak out because of fear”).
- 31 FARRELL ET AL., *supra* note 29, at 15, 107, 122; PHYLLIS J. NEWTON ET AL., NAT'L OP. RESEARCH CTR., NORC FINAL REPORT: FINDING VICTIMS OF HUMAN TRAFFICKING 6 (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/224393.pdf>; Amy Farrell et al., *The Prosecution of State-Level Human Trafficking Cases in the United States*, ANTI-TRAFFICKING REV., May 2016, at 48, 57.
- 32 See *supra* note 6 and accompanying text (describing circumstances in which a human trafficking victim-witness may receive free legal representation (i.e., when they are detained as a material witness or when they are a child)).
- 33 Cf. Hussein Sadruddin et al., *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL'Y REV. 379, 395 (2005) (discussing how victims who are willing to cooperate with law

MEETING THE LEGAL NEEDS OF HUMAN-TRAFFICKING..., 52 Wake Forest L....

enforcement still have difficulty navigating the complexity of the Trafficked Persons Protection Act, which provides for benefits for some cooperating witnesses).

34 See FARRELL ET AL., *supra* note 29, at 163, 194-95; NEWTON ET AL., *supra* note 31, at 5.

35 See, e.g., 18 U.S.C. § 3771(a) (2012); EXEC. OFFICE OF U.S. ATTORNEYS, U.S. DEPT OF JUST., VICTIMS AND WITNESSES: UNDERSTANDING YOUR RIGHTS AND THE FEDERAL COURT SYSTEM 2-4 (2001).

36 See U.S. CONST. amend. V.

37 NAT'L CRIME VICTIM LAW INST., LEWIS & CLARK LAW SCH., CRIME VICTIMS HAVE THE RIGHT TO RETAINED COUNSEL'S PRESENCE DURING INVESTIGATIVE INTERVIEWS 2 (2014) ("Protecting victims' legal rights and interests implicated in such interviews requires special legal knowledge and analysis that may only be provided by victims' counsel.").

38 *Id.*

39 Martina E. Vandenberg, *Palermo's Promise: Victims' Rights and Human Trafficking*, 6 ANTI-TRAFFICKING REV. (SPECIAL ISSUE) 138, 139 (2016).

40 18 U.S.C. § 1593 (2012); see, e.g., N.C. GEN. STAT. § 14-43.20(b) (2016).

41 See ALEXANDRA F. LEVY ET AL., THE HUMAN TRAFFICKING PRO BONO LEGAL CTR. & WILMER CUTLER PICKERING HALE & DORR LLP, WHEN "MANDATORY" DOES NOT MEAN MANDATORY: FAILURE TO OBTAIN CRIMINAL RESTITUTION IN FEDERAL PROSECUTION OF HUMAN TRAFFICKING CASES IN THE UNITED STATES 3 (2014), https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/Human-Trafficking-When-Mandatory-Does-Not-Mean-Mandatory-2014.pdf (finding that restitution was awarded in only thirty-six percent of federal human trafficking cases between 2009 and 2012).

42 See *In re Sealed Case*, 702 F.3d 59, 66 (D.C. Cir. 2012) (indicating that restitution under 18 U.S.C. § 1593 need not "be proven with exactitude").

43 791 F. Supp. 2d 81 (D.D.C. 2011).

44 *Id.* at 92-94.

45 *Id.* at 86, 92-94.

46 18 U.S.C. § 1595(a) (2012).

47 See DANIEL WERNER ET AL., CIVIL LITIGATION ON BEHALF OF VICTIMS OF HUMAN TRAFFICKING 146 (4th ed. 2015), <http://www.nycourts.gov/ip/human-trafficking/content/1.Civil%20Litigation%20on%20Behalf%20of%20Victims%20of%20Human%20Trafficking.pdf>.

48 See DEPT OF JUSTICE ASSET FORFEITURE PROGRAM, RETURNING FORFEITED ASSETS TO CRIME VICTIMS: AN OVERVIEW OF REMISSION AND RESTORATION 2, 4 <https://www.justice.gov/sites/default/files/criminal-afmls/legacy/2015/01/26/victms-faqs.pdf> (last visited Mar. 23, 2017).

49 *Id.* at 2, 6. ("Judicial forfeiture orders may be criminal or civil.").

50 Notably, the benefits to pursuing restitution under 18 U.S.C. § 1593, as compared to other federal restitution statutes, such as 18 U.S.C. § 3663A, include tax exemption and immateriality of the defendant's ability to pay. Compare I.R.S., Notice 2012-12, 2012-6 I.R.B. 366 (Feb. 6, 2012), <https://www.irs.gov/pub/irs-drop/n-12-12.pdf> (declaring that restitution payments awarded under 18 U.S.C. § 1593 are "excluded from gross income for federal income tax purposes"), with 18 U.S.C. § 3664(f)(3)(B) (factoring in the defendant's "economic circumstances" in determining the schedule on which restitution is to be paid to the

MEETING THE LEGAL NEEDS OF HUMAN-TRAFFICKING..., 52 Wake Forest L....

victim). Note that restitution may be sought under § 1593 even if the defendant ultimately pleads guilty to a lesser charge. Judgment as to Gloria Tafalla Edwards at 5, No. 8-11-cr-00216 (D. Md. May 8, 2013), ECF 89; Judgment as to Alfred Edwards, Jr. at 5, No. 8-11-cr-00316 (D. Md. Apr. 25, 2013), ECF 91; *see also* Press Release, U.S. Attorney's Office, Dist. of Md., Upper Marlboro, Maryland Couple Sentenced to Prison for Harboring Filipino Woman in Their Home for More than 10 Years: Ordered to Pay the Victim Restitution of \$369,580.80 (May 8, 2013), <https://www.justice.gov/usao-md/pr/upper-marlboro-maryland-couple-sentenced-prison-harboring-filipino-woman-their-home-more>.

51 *See* DEPT OF JUSTICE ASSET FORFEITURE PROGRAM, *supra* note 48, at 2-4.

52 *See id.* at 4-5.

53 Civil damages may be sought under 18 U.S.C. § 1595, even if the trafficker was already ordered to pay restitution after pleading guilty to a lesser offense. *See* *Kiwanuka v. Bakilana*, 844 F. Supp. 2d 107, 112 (D.D.C. 2012) (denying a motion to dismiss a civil suit brought by a trafficking victim seeking damages from her trafficker after the trafficker pleaded guilty to making false statements to the FBI and was ordered to pay restitution in the criminal case).

54 PHILLIPS ET AL., *supra* note 9, at 2, 17.

55 *Legal Needs of Human Trafficking Survivors*, POLARIS PROJECT (2012), http://www.americanbar.org/content/dam/aba/multimedia/trafficking_task_force/resources/LegalNeedsOfHumanTraffickingSurvivors.au.

56 “T Visas” provide nonimmigrant status for victims of human trafficking. *See* 8 U.S.C. § 1101(15)(T) (2012) (providing nonimmigrant status for an alien who “is or has been a victim of a severe form of trafficking in persons”); *see also id.* § 1184(o) (providing limitations on eligibility for T Visas); *Victims of Human Trafficking: T Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status> (last updated Oct. 3, 2011). “U Visas” are also a path to nonimmigrant status for victims of many crimes, including human trafficking. *See* 8 U.S.C. § 1101(15)(U) (providing nonimmigrant status for an alien who “has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity”); *see also id.* § 1101(15)(U)(iii) (listing crimes that qualify a victim for U Visa status); *id.* § 1184(p) (listing requirements for U Visas); *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status> (last updated July 28, 2016). For more information on immigration need for victims, *see* GOODMAN ET AL., *supra* note 13, § 5, and Kathleen Slocum, *Immigration Remedies for Victims of Human Trafficking*, in *LAWYER'S MANUAL ON HUMAN TRAFFICKING*, *supra* note 4, at 207, 207-19.

57 *See* Human Trafficking: Victim Confidentiality, S.B. 597, 2017 Leg., Reg. Sess. (Cal. 2017) (“The Legislature finds that persons attempting to escape from ... human trafficking[] frequently establish new names or addresses in order to prevent their assailants or probable assailants from finding them.”).

58 The experience of being trafficked can lead to mental illness rendering a survivor eligible for Supplemental Security Income (“SSI”). *See* *Post Traumatic Stress Disorder and Social Security Disability*, DISABILITY BENEFITS HELP, <http://www.disability-benefits-help.org/disabling-conditions/post-traumatic-stress-disorder-and-social-security-disability> (last visited Mar. 23, 2017). And many survivors also suffered from pre-existing disabilities that the trafficker preyed upon. *See* U.S. DEPT OF STATE, *TRAFFICKING IN PERSONS REPORT 39* (2012), <https://www.state.gov/documents/organization/192587.pdf> (“Persons with disabilities remain one of the groups most at risk of being trafficked.”). Both groups of survivors benefit from legal representation in their application for disability benefits or the appeal of the denial therefrom.

59 *See* *Legal Needs of Human Trafficking Survivors*, *supra* note 55.

60 *See* NAT'L SEXUAL VIOLENCE RESOURCE CTR., *BULLETIN: ASSISTING TRAFFICKING VICTIMS 1* (2012), http://www.nsvrc.org/sites/default/files/publications_nsvrc_bulletins_human-trafficking-bulletin.pdf (providing guidance for

MEETING THE LEGAL NEEDS OF HUMAN-TRAFFICKING..., 52 Wake Forest L....

victims' advocates given "the nuances in the laws [designed to assist trafficking victims] and the changing nature of the legislation").

61 Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 *GEO. J. LEGAL ETHICS* 103, 133-34 (2010).

62 See Amy Siniscalchi et al., *Services for Trafficking Victims: A Brief Guide for Lawyers*, in *LAWYER'S MANUAL ON HUMAN TRAFFICKING*, *supra* note 4, at 241, 241 ("Attorneys are used to clients approaching them with discrete legal issues and responding in kind with what we might call a 'laser' approach, zeroing in on the legal issue initially raised.").

63 ERIN WILLIAMSON ET AL., U.S. DEPT HEALTH & HUM. SERVS., EVIDENCE-BASED MENTAL HEALTH TREATMENT FOR VICTIMS OF HUMAN TRAFFICKING 2 (2010), <https://aspe.hhs.gov/system/files/pdf/76116/index.pdf>.

64 See INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 30, at 10 ("Due to the trauma victims may have experienced, you should not expect them to talk about their experience in an organized, linear way, rather their stories will likely be shared in pieces."); see also *The Anatomy of Trauma*, UNIV. OF MICH. SEXUAL ASSAULT & PREVENTION AWARENESS CTR. (on file with author) (discussing trauma's effect on memory including the voiding of time and sequence).

65 Leidholdt, *supra* note 23, at 170-75.

66 See GOODMAN ET AL., *supra* note 13, § 4.1, 4.4.

67 See *id.* § 10.4 (listing service providers that assist trafficking survivors); Leidholdt, *supra* note 23, at 179-80 (discussing a trafficking victim's need for safety and material wellbeing and the attorney's role in helping them find resources).

68 See *Human Trafficking and Smuggling*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Jan. 16, 2013), <https://www.ice.gov/factsheets/human-trafficking> ("[T]he United States is a destination country for thousands of men, women, and children trafficked from all areas of the world.").

69 Cf. DEBORAH GIBBS ET AL., EVALUATION OF SERVICES FOR DOMESTIC MINOR VICTIMS OF HUMAN TRAFFICKING ES-5 (2014), <https://www.ncjrs.gov/pdffiles1/nij/grants/248578.pdf> (noting that minor trafficking victims often disconnect from service providers for a variety of reasons, including relocation).

70 Some victims return to the trafficker due to Stockholm syndrome, mistrust of service providers, homelessness, drug addiction, or other circumstances born by their initial victimization. *Id.*; Amanda Walker-Rodriguez & Rodney Hill, *Human Sex Trafficking*, F.B.I. LAW ENFORCEMENT BULL., Mar. 2011, at 1, 3-4.

71 See N.C. State Bar, Ethics Op. RPC 223 (1996) (acknowledging constructive discharge of the attorney when client cannot be located and is incommunicative).

72 See generally KRISTIN FINKLEA ET AL., CONG. RES. SERV., R41878, SEX TRAFFICKING OF CHILDREN IN THE UNITED STATES: OVERVIEW AND ISSUES FOR CONGRESS 1-2 (2015) ("Between January 1, 2008 and June 30, 2010, [federally funded human trafficking] task forces opened 2,515 investigations; 82% were classified as sex trafficking" and 40% of those "involved prostitution or sexual exploitation of a child.").

73 One practical challenge is having to find and review the client's criminal records because the criminal records of minors are often sealed under state law. See, e.g., RIYA SAHA SHAH ET AL., JUVENILE RECORDS: A NATIONAL REVIEW OF STATE LAWS ON CONFIDENTIALITY, SEALING AND EXPUNGEMENT 12 n.25 (2014), <http://juvenilerecords.jlc.org/juvenilerecords/documents/publications/national-review.pdf> (listing states that "fully protect juvenile record information from public accessibility"). Part of the legal work for that child will include overcoming that hurdle and seeking inspection of the records based on client or parental authorization or otherwise. See, e.g., LA. CHILD. CODE ANN. art. 412(F) (2016) ("[T]he court may [] order release of [juvenile] records or reports to the counsel or other appropriate legal representative of a child, still a minor, who was the subject of any proceedings"); see also LINDA A. SYZMANSKI, NAT'L CTR. FOR JUV. JUST., CAN SEALED JUVENILE COURT RECORDS EVER BE UNSEALED OR INSPECTED? 1

MEETING THE LEGAL NEEDS OF HUMAN-TRAFFICKING..., 52 Wake Forest L....

(2010), http://www.ncjj.org/PDF/Snapshots/2010/vol15_no5_Sealedrecordsthatcanbeunsealed.pdf (discussing when and how sealed juvenile records can be accessed).

- 74 The terms “minor” and “child” are used interchangeably in this Article with no particular significance assigned to each.
- 75 Bruce A. Green & Annette R. Appell, *Foreword, Representing Children in Families*, 6 NEV. L.J. 571, 572 (2006) (footnotes omitted).
- 76 Jill Laurie Goodman, *What We Know About Human Trafficking: Research and Resources*, in *LAWYER'S MANUAL ON HUMAN TRAFFICKING*, *supra* note 4, at 1, 7.
- 77 The Trafficking Victims Protection Act categorizes the trafficking of a minor as a “severe” form of trafficking. 22 U.S.C. § 7102(8)(A) (2012).
- 78 See *Veazey v. Veazey*, 560 P.2d 382, 390-91 (Alaska 1977) (noting in a custody case that “when a child needs a guardian ad litem, he needs an advocate--someone who will plead *his* cause as forcefully as the attorneys for each competing [] claimant plead theirs. The basic premise of the adversary system is that the best decisions will be reached if each interested person has his case presented by counsel of unquestionably undivided loyalty. There is no person more interested in a child custody dispute than the child. His representative should act accordingly.”).
- 79 The concept of implied emancipation provides that the law can find a minor emboldened to make decisions as if he were an adult in certain circumstances when the conduct of his parents is inconsistent with the obligations of parenthood or when the child removes himself from the home. *E.g.*, *P.J. Hunycutt & Co. v. Thompson*, 74 S.E. 628, 629 (N.C. 1912) (finding partial emancipation such that a parent's alienating actions meant his child could make his own decisions about money, but the parent retained other parental responsibility); *Buxton v. Bishop*, 37 S.E.2d 755-56, 757 (Va. 1946) (establishing concept of implied emancipation).
- 80 CHILD WELFARE INFO. GATEWAY, DEPT' OF HEALTH & HUMAN SERVS., ISSUE BRIEF, CHILD WELFARE AND HUMAN TRAFFICKING 9 (2015), <https://www.childwelfare.gov/pubPDFs/trafficking.pdf> (noting that minors who are trafficked generally enter the child welfare system alone because their parents are not nearby or known to the agency); see also *Child Trafficking Statistics: U.S. & International*, ARK HOPE FOR CHILD., <http://arkofhopeforchildren.org/child-trafficking/child-trafficking-statistics> [hereinafter *Child Trafficking Statistics*] (last updated Mar. 19, 2016, 1:10 PM) (stating that among minors, the group that are most at risk for human trafficking are runaway, abandoned, or homeless children).
- 81 See HILARY CHESTER ET AL., CHILD VICTIMS OF HUMAN TRAFFICKING: OUTCOMES AND SERVICE ADAPTATION WITHIN THE U.S. UNACCOMPANIED REFUGEE MINOR PROGRAMS 24 (2015), <http://www.usccb.org/about/anti-trafficking-program/upload/URM-Child-Trafficking-Study-2015-Final.pdf> (finding that most minor trafficking victims could not be reunited with their family); *Human Trafficking*, COVENANT HOUSE, <https://www.covenanthouse.org/homeless-teen-issues/human-trafficking> (last visited Mar. 23, 2017).
- 82 There are many situations where the delay caused by seeking consent of a parent or guardian would harm the child's interests. One example occurs where a minor asks an attorney to represent him in the pursuit of a protective order because he is in fear of imminent harm from the trafficker or their affiliates. See *TEX. CODE CRIM. PROC. ANN. art. 7A.01(a) (4)* (West 2016) (requiring parental consent). A second example is when a minor asks an attorney to research her rights to confidential medical treatment for a condition related to being trafficked. See Abigail English & Carol A. Ford, *The HIPPA Privacy Rule and Adolescents: Legal Questions and Clinical Challenges*, 36 PERSP. ON SEXUAL & REPROD. HEALTH 80, 81-82 (2004). A final example is when a survivor asks his lawyer to assist with the filing of a name change petition in the interest of safety from the trafficker. In North Carolina, for example, a parent or guardian must sign the petition. See *Name Change*, SELF SERVE CTR., http://nc.legal-aid.com/can-i-represent-myself/name-change-claims/#NAME_CHANGE_OF_A_MINOR_CHILD (last visited Mar. 23, 2017).
- 83 A child's lawyer may consider executing an engagement letter with her client even if the representation is pro bono in order to clearly set forth expectations for the representation. The enforceability of such an agreement has no bearing on

MEETING THE LEGAL NEEDS OF HUMAN-TRAFFICKING..., 52 Wake Forest L....

its utility for effective communication with a client. *See* MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 2016). Overall, the benefit of an engagement letter signed by a minor client depends on the circumstances. *See* AM. IMMIGRATION LAWYERS ASS'N, AILA DOC. NO. 14102240, ETHICAL ISSUES IN REPRESENTING CHILDREN IN IMMIGRATION PROCEEDINGS 5 (2014), <http://www.aila.org/practice/ethics/ethics-resources/2012-2015/ethical-issues-representing-children> (“There is no minimum age regarding a child's ability to comprehend and sign an engagement letter. The lawyer must make a determination on a case-by-case basis. In some cases involving pro bono representation, where the child is very young and there is no adult representative, it may be preferable not to have an engagement agreement with the child but to advise the child verbally in such a way that the child will understand the nature of the matter. The effectiveness of an engagement letter may involve legal issues that are beyond the scope of the ethics rules. A contractual arrangement with a minor who is unable to comprehend its significance may be found to be unenforceable and voidable as a matter of law.” (footnote omitted)).

84 *See* AM. IMMIGRATION LAWYERS ASS'N, *supra* note 83, at 5 (“If the child's adult representative enters into an engagement on behalf of the child, the lawyer must make clear that the child is the client and the adult is executing the engagement on behalf of the child.”).

85 *Cf.* Linda D. Elrod, *Client-Directed Lawyers for Children: It Is the “Right” Thing to Do*, 27 PACE L. REV. 869, 871 (2007) (noting that in neglect, abuse, and custody cases, “[c]hildren want to be heard on matters affecting them”); Sangalis, *supra* note 28, at 438 (noting that in the context of the TVPA, “[c]ivil remedies empower survivors by affording them the choice of when and how to hold their oppressors accountable”).

86 INT'L FED'N OF SOC. WORKERS, SOCIAL WORK AND THE RIGHTS OF THE CHILD: A PROFESSIONAL TRAINING MANUAL ON THE UN CONVENTION 38 (2002), http://cdn.ifsw.org/assets/ifsw_124952-4.pdf.

87 *See* NOREEN MUHIB & VIVIAN HUELGO, AM. BAR ASS'N TASK FORCE ON HUMAN TRAFFICKING, VOICES FOR VICTIMS: LAWYERS AGAINST HUMAN TRAFFICKING TOOL KIT FOR BAR ASSOCIATIONS 2 (2013), https://www.americanbar.org/content/dam/aba/multimedia/trafficking_task_force/resources/TFHT_Toolkit/HumanTrafficking_Bar.authcheckdam.pdf.

88 *Child Trafficking Statistics*, *supra* note 80 (“Some children are even sold to traffickers by their families, who may or may not have an understanding of what will happen to the child.”). State statutes also recognize that parents or guardians may be involved in trafficking a child victim. *See, e.g.*, N.C. GEN. STAT. § 7B-101 (defining abused juveniles to include those whose “parent, guardian, custodian, or caretaker ... [c]ommits or allows to be committed an offense under G.S. 14-43.11 (human trafficking), G.S. 14-43.12 (involuntary servitude), or G.S. 14-43.13 (sexual servitude) against the child”).

89 *See* N.C. State Bar, Formal Ethics Op. 9 (2012) (addressing duties of child's attorney in custody and visitation proceedings and stating that “[t]he lawyer owes the duty of confidentiality to the child and her communications with the child are protected by the attorney-client privilege”).

90 MODEL RULES OF PROF'L CONDUCT r. 1.6(a) & cmt. 2 (AM. BAR ASS'N 2016) (stating that client consent to disclosure is an exception to the duty of confidentiality).

91 *See id.*

92 *See* EVA KLAIN & AMANDA KLOER, AM. BAR ASS'N, MEETING THE LEGAL NEEDS OF CHILD TRAFFICKING VICTIMS: AN INTRODUCTION FOR CHILDREN'S ATTORNEYS & ADVOCATES 15-16 (2009), http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/Child_Trafficking.authcheckdam.pdf.

93 *See* Megan Annitto, *Consent, Coercion and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL'Y REV. 1, 21-24 (2011). As an example of a situation where minors are given autonomy, some immigration proceedings allow minors with demonstrated competence to make the decisions about their case. *See* AM. IMMIGRATION LAWYERS ASS'N, *supra* note 83, at 4.

MEETING THE LEGAL NEEDS OF HUMAN-TRAFFICKING..., 52 Wake Forest L....

- 94 For example, minors may not enter into an enforceable contract. AM. IMMIGRATION LAWYERS ASS'N, *supra* note 83, at 5 (acknowledging question of enforceability of engagement letters with minors). This example ironically highlights the need for autonomous legal representation. The incapacity to enter into a contract means that a minor client may not enter into an enforceable engagement agreement with his attorney. *Id.* This deprives the client of protection from harm born from undelivered legal services. Forest Jackson Bowman, *Engagement Letters*, W.V. LAW., Apr. 1991, at 15, 15 (discussing importance of engagement letters to avoid misunderstanding over the scope of the attorney's representation).
- 95 For example, in asserting special educational rights, lawyers usually follow direction from the child's parents or a combination of that of the parents and the child. *See* Yael Zakai Cannon & Laura N. Rinaldi, *Initiating a Special Education Case*, in *SPECIAL EDUCATION ADVOCACY* 5, 5-8, 11 (Ruth Colker & Julie K. Waterstone eds., 2011) (citing constitutional rights of parents to make decisions about their children and a legal interest in the education of one's child).
- 96 Minors cannot sue civilly without a representative (e.g., guardian or fiduciary). **FED. R. CIV. P. 17(c)**.
- 97 *See* Sarah H. Ramsey et al., *A Primer on Child Abuse and Neglect Law*, JUV. & FAM. CT. J., Winter 2010, at 1, 2.
- 98 LLOYD T. KELSO, *NORTH CAROLINA FAMILY LAW PRACTICE* § 13.2 (2016) (discussing various types of custody and visitation arrangements).
- 99 Tara Lea Muhlhauser, *From "Best" to "Better": The Interests of Children and the Role of a Guardian Ad Litem*, 66 N.D. L. REV. 633, 636 (1990).
- 100 *Compare* OHIO REV. CODE ANN. § 3109.04(F)(1)(b) (West 2016) (may consider "the child's wishes and concerns" if the court has interviewed the child in chambers), *with*, HAW. REV. STAT. § 571-46(b) (2016) (failing to list the child's wishes as a factor in the best interests analysis for custody and visitation decisions), *and* 705 ILL. COMP. STAT. 405/1-3(4.05)(e) (2016) (requiring consideration of "the child's wishes and long-term goals").
- 101 *See* NAT'L JUVENILE DEF. CTR., NATIONAL JUVENILE DEFENSE STANDARDS pt. 2.3, at 43 (2012), <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf> ("[C]ounsel should always keep in mind the ethical obligation to represent only the expressed interests of the [minor] client.").
- 102 *Id.*
- 103 *Id.* at 42.
- 104 *Id.* ("When a third party, including a parent, is trying to direct the representation of the client, counsel should inform that person of counsel's legal obligation to represent only the expressed interests of the client. In the event of a disagreement, counsel is required to exclusively abide by the wishes of the client.").
- 105 A poignant example being the important federal and state "safe harbor" laws, which immunize minors from prosecution for prostitution, based on the reasoning that children do not have the capacity to consent to selling sex. *See* Annitto, *supra* note 93, at 21-23, 45; Tessa L. Dysart, *Child, Victim, or Prostitute? Justice Through Immunity for Prostituted Children*, 21 DUKE J. GENDER L. & POL'Y, 255, 271, 282 (2014).
- 106 *See* Annitto, *supra* note 93, at 23; Elrod, *supra* note 85, at 879.
- 107 MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 1 (AM. BAR ASS'N 2016) ("The normal client-lawyer relationship is based on the assumption that the client ... is capable of making decisions about important matters.").
- 108 MODEL RULES OF PROF'L CONDUCT r. 1.14(a) (AM. BAR ASS'N 2016); AM. BAR ASS'N, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 1.14: CLIENT WITH DIMINISHED CAPACITY (2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_14.authcheckdam.pdf.

- 109 MODEL RULES OF PROF'L CONDUCT r. 1.14 (AM. BAR ASS'N 2016) (emphasis added).
- 110 AM. IMMIGRATION LAWYERS ASS'N, *supra* note 83, at 5 (“It is important that the attorney remember that there are very real differences between a child and an adult. The appearance of maturity may not be an indicator as to whether the child is competent to make the same decisions as an adult. The level of maturity may be in response to trauma at a young age. Children may also not be able to fully understand the nuances of the law or the long-term consequences, although they may say that they do. Using child-centered techniques, such as having the child explain to the attorney what the child thinks the consequences of a decision will be, is crucial to making sure the child understands. Attorneys must also be sensitive to how the mind of an adolescent works, especially if he or she has undergone trauma. Scientific data show that adolescents can make risky decisions, as they lack the development in the frontal cortex to make the same rational decisions as adults. It is therefore critical that the attorney always keep the child's competence in mind when communicating and use techniques that are uniquely suited to dealing with children.” (footnote omitted)).
- 111 Elizabeth J. Cohen, *Shape-Shifter: When Representing Kids Lawyers' Duties Can Vary with Their Role*, A.B.A./B.N.A. LAW. MANUAL ON PROF. CONDUCT, June 15, 2016, at 11, 13 (2016) (discussing spectrum of capacity of minors); *see also* MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 1 (AM. BAR ASS'N 2016) (“In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.”).
- 112 MODEL RULES OF PROF'L CONDUCT r. 1.14(a) (AM. BAR ASS'N 2016) (describing steps a lawyer can take when she reasonably believes the client has diminished capacity and is at risk of substantial physical or financial harm).
- 113 MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2016).
- 114 *See* Elrod, *supra* note 85, at 910 (“The biggest debate in the area of child representation is whether the lawyer should represent the ‘best interests’ of the child or whether the lawyer should function in a traditional attorney/client relationship with the child.”).
- 115 Robert P. Burns & Steven Lubet, *Division of Authority Between Attorney and Client: The Case of the Benevolent Otolaryngologist*, 2003 U. ILL. L. REV. 1275, 1276 (noting that the issue of “who makes the decisions” as between the client and the attorney “is a difficult issue because it arises every day in nearly every interaction between attorney and client”).
- 116 *See* Mass. Comm. on Prof'l Ethics, Ethics Op. 93-6 (1993) (acknowledging that minors can be legally incompetent but have capacity to make their own decisions).
The issue of competence is, in large measure, separate and apart from the issue of what is in the child's interest. This distinction is clearer when the client is an adult, since lawyers do not automatically assume that an adult client is incompetent merely because the client chooses a course of action that is against the client's interest as the lawyer sees it.
Id.
- 117 MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2016).
- 118 *Id.* r. 2.1 cmt. 1.
- 119 *Id.* r. 1.2 cmt. 1. As expressed by the National Juvenile Defense Center:
Counsel's primary and fundamental responsibility is to advocate for the client's expressed interests.
a. Counsel may not substitute his or her own view of the client's best interests for those expressed by the client;
b. Counsel may not substitute a parent's interests or view of the client's best interests for those expressed by the client;
c. Where counsel believes that the client's directions will not achieve the best long-term outcome for the client, counsel must provide the client with additional information to help the client understand the potential outcomes and offer an opportunity to reconsider; and

MEETING THE LEGAL NEEDS OF HUMAN-TRAFFICKING..., 52 Wake Forest L....

d. If the client is not persuaded, counsel must continue to act in accordance with the client's expressed interests throughout the course of the case.

NAT'L JUVENILE DEF. CTR., *supra* note 101, at 19-20.

120 MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2016) (“[A] lawyer shall abide by a client's decisions concerning the objectives of representation and ... shall consult with the client as to the means by which they are to be pursued.”); *id.* r. 1.4(a)(2) (“A lawyer shall ... reasonably consult with the client about the means by which the client's objectives are to be accomplished.”).

121 *Id.* r. 1.16 (“[A] lawyer may withdraw from representing a client if ... the client insists upon taking action ... with which the lawyer has a fundamental disagreement.”).

122 Dale A. Hudson, *How to Withdraw from Representation*, L.A. LAW., Mar. 1994, at 26, 26 (“Withdrawal from representation is handled smoothly on a routine basis by practicing attorneys every day.”).

123 FLA.'S CHILDREN FIRST, ETHICAL REPRESENTATION OF CHILD CLIENTS: FINDING THE RIGHT BALANCE 6 (2011), <https://www.floridaprobono.org/volunteerresources/library/attachment.249552>.

124 STANDING COMM. ON PRO BONO & PUB. SERV., AM. BAR ASS'N, SUPPORTING JUSTICE III: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 13 (2013), http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_Supporting_Justice_III_final.authcheckdam.pdf.

125 *See id.*

126 *See* Desai, *supra* note 7, at 46.

127 *See* FREEDOM NETWORK USA *supra* note 7, at 2-3.

128 *See* MUHIB & HUELGO, *supra* note 87, at 3 (2013).

129 *See, e.g., How the CAC Model Works*, NAT'L CHILD. ALLIANCE, <http://www.nationalchildrensalliance.org/cac-model> (last visited Mar. 23, 2017) (recognizing how the Children's Advocacy Center (“CAC”) brings agency professionals together to work in a collaborative approach that results in effective, efficient, and child-centered casework for child victims).

130 CHILD WELFARE INFO. GATEWAY, *supra* note 80, at 1 (explaining that “[c]hild welfare agencies are on the front lines,” interacting with children who may be trafficked). It is important to note that without the middleman of a single and specialized referring agency, the law firm is primarily responsible for client intake and issue spotting.

131 *See* NAT'L SEXUAL VIOLENCE RES. CTR., ASSISTING TRAFFICKING VICTIMS: A GUIDE FOR VICTIM ADVOCATES 17 (2012), http://www.nsvrc.org/sites/default/files/publications_nsvrc_guides_human-trafficking-victim-advocates.pdf.

132 *Cf.* Siniscalchi et al., *supra* note 62, at 241 (noting that attorneys must learn to “uncover cases of human trafficking when they present themselves” and should also be prepared to help client victims with needed nonlegal services).

133 *Id.* (“To focus their energies on these clients' legal rights and remedies, attorneys should try to find comprehensive case management services”). Continued support of a service provider can foster a productive attorney-client relationship by ensuring access to reliable methods of communication. Unsupported victims often disengage from the representation. *See supra* Subpart II.C. on the transient nature of this client base and the circumstances giving rise to premature termination of representation.

134 MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2016).

135 *Id.* at r. 1.1 cmts. 1-2.

MEETING THE LEGAL NEEDS OF HUMAN-TRAFFICKING..., 52 Wake Forest L....

136 See, e.g., *What We Do*, HUMAN TRAFFICKING PRO BONO LEGAL CTR., <http://www.htprobono.org/our-work/what-we-do/> (last visited Mar. 23, 2017) (noting that the center “has trained more than 2000 lawyers throughout the country”); see also *Human Trafficking Prevention Project*, UNIV. BALTIMORE, <http://law.ubalt.edu/clinics/humantrafficking.cfm> (last visited Mar. 23, 2017) (providing representation to clients filing expungement, shielding, and state or federal pardon petitions); *Leigh Latimer Appointed Head of Exploitation Intervention Project*, LEGAL AID SOCIETY (Dec. 3, 2015), <http://www.legal-aid.org/en/mediaandpublicinformation/inthenews/leighlatimerappointedheadofexploitationi> (announcing new leadership of a nationally recognized defender-based approach to vacatur of trafficking survivors' criminal records); *Moore & Van Allen Announces Human Trafficking Pro Bono Project*, MOORE & VAN ALLEN (June 2014), <http://www.mvalaw.com/news-room-628.html> (offering comprehensive legal services to survivors in various civil matters); *Survivor Reentry Project*, AM. BAR ASS'N, http://www.americanbar.org/groups/human_rights/projects/task_force_human_trafficking/survivor-reentry-project.html (last visited Apr. 4, 2017) (providing national training and technical assistance for attorneys working with survivors of human trafficking who have been convicted of a crime as a result of their victimization).

52 WFLR 379

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.