

MAXIMIZING JUSTICE:

Building a Prosecution Review Process

This document assists multidisciplinary anti-human trafficking task forces to develop a process that details how they will work with local, state, and federal prosecutors to conduct case reviews and referrals for both state and federal prosecutions. This guidance helps stakeholders to evaluate federal and state criminal justice systems in order to make informed decisions on the most effective route to pursue prosecution based on a thorough analysis of each legal system’s statutes, policies, and procedures. The best way to complete this analysis is to have federal and local stakeholders jointly discuss each step.

This analysis will assist anti-human trafficking task forces to:

- Maximize offender accountability by leveraging state and federal criminal statutes;
- Consider how legal processes impact victim’s privacy, safety, and autonomy; and
- Mitigate collateral consequences to victims.

Step 1: Identify Relevant State and Federal Statutes

Federal statutes:¹

[Federal Sex Trafficking Statute, 18 U.S.C. § 1591](#)

[Federal Labor Trafficking Statutes, 18 U.S.C. § § 1589-90](#)

[Trafficking Victims Protection Act \(TVPA\), 22 U.S.C. § 7102](#)

Step 2: Analyze State and Federal Statutes

Use the “Act, Means, Purpose” worksheet to map out each statute for ease of comparison. For convenience, federal statutes are pre-charted for you on the next page, and a blank copy of the chart (below) is provided on the last page.

| Statutory Analysis Worksheet | | |
|------------------------------|-------|---------|
| Statute: _____ | | |
| Act | Means | Purpose |
| | | |

¹ Note: these statutes are linked in this document for ease of free reference. LexisNexis and Westlaw are generally considered to be the best sources of current statutory language.

Statutory Analysis: Sex Trafficking

The Act, Means, Purpose chart below outlines federal laws on sex trafficking based on **22 U.S.C. § 7102** and **18 U.S.C. § 1591**:

| Act | Means | Purpose |
|---|--|--|
| <ul style="list-style-type: none"> ■ Recruits ■ Entices ■ Harbors ■ Transports ■ Provides ■ Obtains ■ Advertises ■ Maintains ■ Patronizes ■ Solicits ■ Benefits, financially or by receiving anything of value | <ul style="list-style-type: none"> ■ Force ■ Fraud ■ Coercion | <ul style="list-style-type: none"> ■ Commercial sexual activity |

- 1 Map your state sex trafficking statute using the Act, Means, Purpose chart.
- 2 Consider the following related to the proscribed acts outlined in the federal-level chart above contrasted with your state-level Act, Means, Purpose chart.
 - Are there any differences?
 - How might the language of the proscribed acts affect your availability to prosecute particular fact patterns?
 - Buyers
 - Third-party beneficiaries
- 3 Consider the following related to the proscribed means outlined in the federal-level chart above with your state-level Act, Means, Purpose chart.

Coercion

“Coercion” is defined by 18 U.S.C. § 1591(e)(2)² as:

- A. Threats of serious harm to or physical restraint against any person;
- B. Any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
- C. The abuse or threatened abuse of the legal process.
 - Does your state statute use language other than “force, fraud, and coercion?”
 - Does your state statute enumerate other “means” that would constitute coercion?
 - Drug-facilitated human trafficking?
 - Withholding of personal documents?

Serious Harm

“Serious harm” is defined by 18 U.S.C. § 1591(e)(5)³ as: any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

- Does your state define “serious harm” more narrowly or broadly?
- Does your state statute employ an objective, subjective, or hybrid standard?
- What is the standard in your state statute?
- How could this affect a prosecution where the victim was coerced in a less common or familiar means?
 - Specific vulnerabilities of the victim
 - Personalized form of coercion

Abuse of the Legal Process

“Abuse of the legal process” is defined by 18 U.S.C. § 1591(e)(1)⁴ as: the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

- Does your state statute specifically enumerate abuse of legal processes as a means of coercion?
- Would it include threats of any/all of the following?
 - Arrest
 - Deportation
 - Calling child welfare
 - Eviction
 - Denial of benefits

Commercial Sexual Activity

- How does your state define this?
- Would state and/or federal prosecutors include any/all of the following as commercial sexual activity?⁵
 - Exotic dancing
 - Stripping
 - Webcam performances
 - Pornography
 - Erotic massages
- How does your state statute treat minors engaged in commercial sexual activity?
 - Age: The federally-defined age of adulthood is 18 years. Is this the same as your state statute?
 - Means: Federal statute does not require any proof of means. Does your state mirror the federal statute?
 - Safe Harbor: Does your state have a Safe Harbor⁶ statute? Is it discretionary? What crimes does it cover?

3 [Ibid.](#)

4 [Ibid.](#)

5 Note: Commercial sexual activity may also overlap with labor trafficking. For more information see, *When Labor Trafficking Appears Sexualized: Case Reviews and Practical Guidance on Making the Connections*. OVC TTAC, 2019. https://www.ovcttac.gov/ovcttac_assets/eblast/July_Webinar_When_Labor_Trafficking_Appears_Sexualized_508c_07292019_JA.pdf

6 “Safe Harbor” laws are designed to protect minor victims of human trafficking from criminalization.

Statutory Analysis: Labor Trafficking

The Act, Means, Purpose chart below outlines federal laws on labor trafficking based on **22 U.S.C. § 7102** and **18 U.S.C. §§ 1589-1590**:

| Act | Means | Purpose |
|---|--|---|
| <ul style="list-style-type: none"> ■ Recruits ■ Harbors ■ Transports ■ Provides ■ Obtains ■ Benefits, financially or by receiving anything of value | <ul style="list-style-type: none"> ■ Force ■ Restraint ■ Threats of harm ■ Abuse or threatened abuse of the legal system ■ Any scheme, plan, or pattern intended to cause the person to believe that if they did not perform labor, they would suffer serious harm or restraint | <ul style="list-style-type: none"> ■ Involuntary servitude ■ Peonage ■ Debt bondage ■ Slavery |

- 1 Map your state labor trafficking statute using the Act, Means, Purpose chart.
- 2 Consider the following related to the proscribed acts outlined in the federal-level chart above with your state-level Act, Means, Purpose chart:
 - Are there any differences?
 - Would your state statute allow prosecution of third-party beneficiaries?
- 3 Are there any “purposes” that are different than general “forced labor or services?”
- 4 Are there any types of labor or services that would not be covered?
 - Forced criminality (e.g. drug sales, robberies, burglaries)

Labor Trafficking “Means”

NOTE: The definitions of “Serious Harm” and “Abuse of the Legal Process” are consistent with those contained within the Sex Trafficking statute; see 18 U.S.C. § 1589(c)7.

- The federal statute does not specifically list “fraud” as a “means,” however it could be part of a coercive scheme.
- How does your state statute define the means for labor trafficking?
 - Is it more expansive?
- Does your state statute treat minor victims of labor trafficking differently than adults? The federal statute does not.

Statutory Analysis: Penalties

Consider the following regarding penalties for human trafficking charges at the state and federal levels:

- What is the minimum and maximum penalty for each type of trafficking?
- How is a sentencing range calculated?
- Are there minimum mandatory penalties?
- Does the sexual offender registry attach to any/all trafficking crimes?
- Is restitution mandatory? What does it include?

Step 3: Consider Charging Strategies

- 1 Looking at the entire criminal enterprise, what other crimes could you charge? Common co-occurring crimes include:
 - Domestic violence
 - Sexual violence
 - Drug-related crimes
 - Money laundering
 - Racketeering/organized crime
 - Immigration-related offenses
 - Tax crimes
 - Child pornography
 - Identity theft
 - Computer crimes
 - Kidnapping/custody interference
 - Prostitution-related/Mann Act
- 2 Are there any related crimes that you could only charge in state court? Federal court?
- 3 Use the Act, Means, Purpose chart to analyze elements of the most commonly charged co-occurring crimes and articulate the differences, advantages, and disadvantages of charging each.

Discuss the following case examples and consider what you would/could charge on the state and federal levels. Note any differences and discuss the advantages and disadvantages of prosecuting the cases in each criminal justice system.



Case Example 1: Gangs and Human Trafficking

- Traffickers are gang-related
- Victims are female and male members of the gang and are:
 - Trafficked for sex
 - Trafficked for labor via forced tax fraud and identity theft
 - Trafficked for labor via forced drug sales
- Women and men are sexually assaulted by gang members as a part of their initiation



Case Example 2: Domestic Violence and Human Trafficking

- Trafficker and victim are intimate partners who share a 4-year old child in common
- Their relationship began as a romantic one, but became violent and eventually exploitive when the trafficker forced the victim to engage in webcam performances
- Trafficker forces the child to be in the same room during the victim's webcam performances
- Trafficker threatens to report the victim to child protective services

For each of the case examples described above, discuss the following with your task force colleagues:

- How might you decide to charge this case?
- What are your considerations for making charging decisions?

Step 4: Compare Criminal Justice Systems

- 1 Are there significant differences in the training and experience of the judiciary that would impact your case?
 - Have judges received training on human trafficking?
 - Are judges familiar with the impact of trauma?
 - What is the bench's experience with complex financial or organized crime cases?
- 2 Review each of the following and discuss similarities and differences; articulate advantages and disadvantages of the state and federal justice systems.

Arrest

- Ability of law enforcement to arrest a dangerous offender
 - Timing
 - Probable cause vs. arrest warrant
 - Prosecutor notification
- Likelihood of pre-trial detention
 - Bond and bail
 - Court order to have defendant prove that any bail/bond is paid with "clean funds"
 - Criminal stay-away orders

Charging

- Grand jury
- Information
- Adversarial pre-trial hearing
- Non-adversarial pre-trial hearing
- Impact of charging method
 - Timing
 - Need for victims to testify at pre-trial hearing
 - Requirement that sworn statement be taken by witnesses
 - Safety of victims
 - Admission of any testimony at trial
 - Ability to amend charges at a later date
- Assessing culpability: are there office policies on the state or federal side that would impact how a human trafficking case was charged or resolved when a victim has been identified as being culpable in the trafficking operation?
- Creative dispositions
 - How much discretion do prosecutors have?
 - What creative resolutions are possible?
 - Are diversion programs available? What do they look like?
 - What victim services are available?
 - Is medical treatment available to treat substance use disorders?
 - Are these services available to those charged with crimes, or pending trial?

Discovery

- Beyond due process requirements of Brady⁸ and Giglio⁹, how do the state and federal discovery rules differ?¹⁰
- Safety of the victim
 - Ability to use initials or pseudonyms
 - Redact identifying information
 - Timing of disclosure

8 [Brady v. Maryland, 373 U.S. 83 \(1963\)](#)

9 [Giglio v. United States, 405 U.S. 150 \(1972\)](#)

10 Research your state-specific case law for more information or contact AEquitas at info@aequitasresource.org for technical assistance.

- Privacy of the victim
 - Available protections for victim service records
 - Medical records / Sexual Assault Nurse Examiner (SANE) photographs
 - Immigration records
- Defense access to victims
 - Do defense attorneys have access to victims for discovery purposes?
 - Discovery depositions
 - Interviews
 - Are prosecutors made aware when defense attorneys contact victims?
 - How is any contact made?
 - What is the potential impact on the case?

Pre-trial Motions

- Rape Shield, e.g. F.R.E. 412¹¹
 - How do the court systems view Rape Shield as applying to prostitution charges?
- Expert testimony
 - What type of expert testimony is allowed?
 - Victim behavior
 - Dynamics of trafficking
 - Effect of culture on coercion
 - Would the following be deemed an expert if they had the requisite training and experience?
 - Direct service provider
 - Law enforcement officer
 - Survivor
- Other bad acts
 - How does each court system evaluate the admission of “other bad acts”¹² evidence?
 - Narrow vs. broad
 - Requirement of strikingly similar facts
 - Uncharged crimes admissible
 - Acquitted charges
 - Beyond the statute of limitations
 - Acts occurring after crime was charged
 - Propensity evidence allowed for sex crimes or domestic violence crimes
 - How is witness tampering combatted?
 - Proactive monitoring of jail communications
 - Post-bail monitoring capacity
 - Revocation of bail/bond
 - Contempt of court
 - Additional charges
 - Enhanced sentences
 - Courtroom safety
 - Safety provisions for victims
 - Litigation of Forfeiture by Wrongdoing

¹¹ [Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition, Federal Rules of Evidence 412 \(2020\).](#)

¹² See “Evidence of Other ‘Bad Acts’ in Intimate Partner Violence, Sexual Violence, Stalking, and Human Trafficking Prosecutions” (May 2017) at <https://aequitasresource.org/resources/>.



Case Example 3: Witness Intimidation in Human Trafficking

- Labor trafficking case where the victims are undocumented and applying for T visas
- Trafficker is out on bond using his brother's home as collateral, per the judge's order that bond must be satisfied with "clean funds"
- Victim received a Facebook message from the trafficker's brother, threatening the victim's family in his country of origin

With your task force colleagues, discuss what remedies you have in each court system to address this witness intimidation.

- Forfeiture by Wrongdoing¹³
 - Defined in F.R.E. 804(b)(6), Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability:¹⁴ a statement offered against a party that wrongfully caused - or acquiesced in wrongfully causing - the declarant's unavailability as a witness, and did so intending that result.
 - Elements:
 - Witness is unavailable
 - ↳ Because of the defendant's wrongdoing
 - ↳ The defendant intended to make the witness unavailable
- Combating witness intimidation
 - Has your state codified "Forfeiture by Wrongdoing" as non-hearsay or an exception to hearsay?
 - Is there case law establishing solid precedent?
 - Definitions of witness "unavailability"
 - Definition of "wrongdoing"
 - Including emotional pleas as well as threats
 - Including threats related to deportation
 - Standard of proof
 - Federal level: preponderance of the evidence

Trial

- Jury selection
 - How will any differences affect your availability to uncover bias and ensure a fair jury who can understand and evaluate the evidence?
- Testimony and evidence
 - Are there any issues with having local, state, or federal investigators available to testify? (e.g., federal law enforcement being prohibited from testifying in state court)
 - Is there any evidence that is more or less available to either state or federal prosecutors?
- Victim unable to testify
 - What would be the likelihood that you could proceed without a victim testifying at trial?
 - Are there office policies affecting how a case would be resolved in this circumstance?
 - Proceed with an evidence-based case?
 - Proceed on co-occurring crimes that could be proven?
 - Under what circumstances, if any, would your office require you to issue a material witness bond?

¹³ See "The Prosecutors' Resource on Forfeiture by Wrongdoing" (October 2012) and "Forfeiture by Wrongdoing" (March 2014) at <https://aequitasresource.org/resources/>.

¹⁴ [Hearsay Exceptions; Declarant Unavailable, Federal Rules of Evidence 804 \(2020\)](#).

Sentencing

- Beyond statutory penalties available, what other factors impact sentencing in each court system?
 - Likelihood of guilty plea
 - Cooperation agreements
 - Victim impact statements
 - Judicial discretion
 - Sentencing by jury
 - Ability to present evidence

Impact on the Victim

- Victim-centered approach
 - Realize that every decision made has untold ripple effects on the victim
 - How can we best protect the victim's safety, privacy, and autonomy while holding the offender accountable?
- Provision of victim services
 - Are there any differences in how and when a victim can access services through the state and federal systems?
 - Are systems-based victim advocates available?
 - What does this look like in each system?
 - Is crime victim compensation available?
 - Is cooperation required?
- Victim Bill of Rights
 - Does your state have a Victim Bill of Rights?
 - How does it differ from the Federal Bill of Rights?
 - How can these rights be enforced?
 - How might this impact the case and the victim?
- Victim relocation
 - Are victim relocation programs available?
 - Formal
 - Witness protection program
 - Relocation programs
 - Informal
 - Victim compensation funds
 - Community victim services
- Undocumented victims
 - Continued Presence
 - Must be signed off by federal law enforcement. Does this affect any policies on who can prosecute the case?
 - T Visa
 - It is highly recommended that a signed Declaration of Law Enforcement be included in any application.
 - Who will sign that declaration? When will they sign?
 - Effect on discovery
 - Effect on trial strategies
 - U Visa
 - Certification must be signed for the victim to apply. Are there policies that affect this?
 - Who will sign? When will they sign?
 - Effect on discovery
 - Effect on trial strategies

3 For each of the legal processes outlined above (arrest, charging, discovery, pre-trial motions, trial, and sentencing), how do those impact victims? Consider impact related to the following dimensions:

- Safety
- Privacy
- Autonomy
- Time frame
- Trust and rapport
- Trauma
- Collateral consequences
- Achieving justice



Case Example 4: Impact on Victim Testimony

- Victim of sex trafficking is 21 years old at the time of trial, but had been trafficked since age 15
- Victim had a history of sexual abuse by mother and stepfather
- Trafficker controlled victim by providing and then withholding heroin
- Victim has been in and out of rehab
- Victim has been suicidal
- Victim is stable at the time of trial, but refuses to testify because they do not want to revisit the trauma



Case Example 5: Case Disposition

- Labor trafficking victim was recovered and received Continued Presence while participating in the investigation of the case
- Victim since received a T Visa and is working and supporting their spouse and child in the U.S.
- Victim is afraid for their brother in their country of origin because the trafficker is from the same area and is affiliated with corrupt law enforcement
- Victim does not want to testify and does not care if the trafficker goes to jail
- Victim only wants to be paid back wages for their work

For each of the case examples described above, discuss the following with your task force colleagues:

- How would you handle this situation?
- Is there a difference between how federal and state prosecutors would handle this from a policy position?

Step 5: Consider Additional Contextual Factors

The following additional contextual factors may also impact decisions regarding prosecution venue:

- Complexity of the case
- Financial resources of the office
- Case load of prosecutors
- Existence or absence of dedicated units
- Training and experience of the prosecutors
- Cross-sworn prosecutors
- Pre-existing relationships with the victim
- Existence of related cases
- Other office policies that may impact the case and the victim

Step 6: Put it All Together

A prosecution case review process will be uniquely created by each inter-agency, multidisciplinary task force. The above guidance offers thoughtful evaluation of the prosecution tools available to task forces in order to maximize offender accountability and mitigate collateral consequences for victims. The considerations outlined in these steps may not be exhaustive. Evaluation of the elements of steps 1-5 goes beyond considering any single step alone; but rather, how those elements intertwine to create a prosecution landscape as unique as each individual community. The goal is to analyze all information gathered through steps 1-5 in order to make the best charging decisions possible to provide the highest level of justice for all parties to the case.

This product was supported by cooperative agreement number 2015-VT-BX-K001, awarded by the Office of Justice Programs, U.S. Department of Justice. The opinions, findings, and conclusions or recommendations expressed in this product are those of the contributors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

Statutory Analysis Worksheet

Statute: _____

| Act | Means | Purpose |
|-----|-------|---------|
| | | |