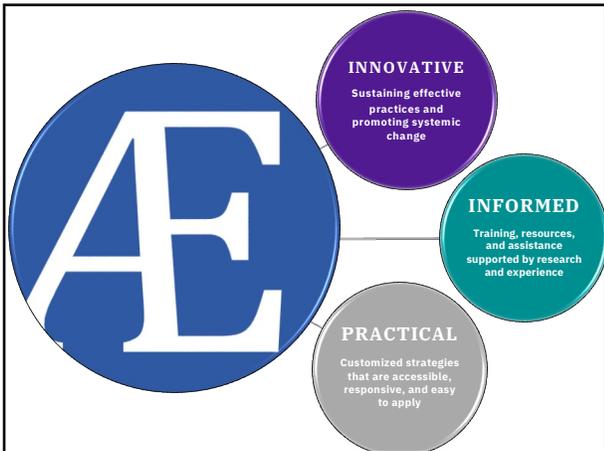




1



2

What We Do	
<p>Resources</p> <p>Create, research, and curate publications, statutory and case law compilations, and other resources that strengthen prosecution practices</p>	<p>Consultations</p> <p>Offer on-demand 24/7 consultations with our seasoned prosecutors to answer case-specific inquiries, discuss strategy, conduct research, and recommend data-driven solutions</p>
<p>Training Events</p> <p>Develop curricula and facilitate a wide range of specialized in-person and web-based trainings designed to empower prosecutors and allied professionals</p>	<p>Partnerships & Initiatives</p> <p>Provide long-term support in building frameworks for coordinated responses to gender-based violence including data collection and analysis, task force development, and training</p>

3

Disclaimer

This presentation was produced by AEquitas under 15POVC-21-GK-03263-HT, awarded by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, and conclusions or recommendations expressed in this presentation are those of the contributors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

4

Presenters

Jane Anderson



Jennifer Dolle



5

Objectives

- Support victim participation
- Minimize and respond to witness intimidation
- Identify victim statements that may be admissible without the victim testifying

6

What is your biggest challenge when investigating or prosecuting human trafficking cases?



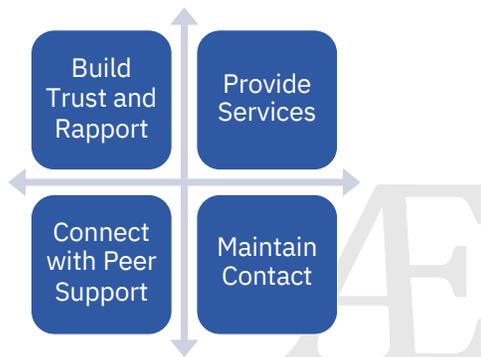
7

Challenges



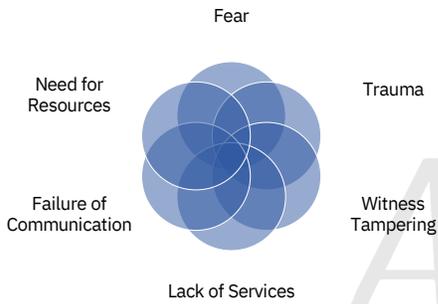
8

Increasing Participation



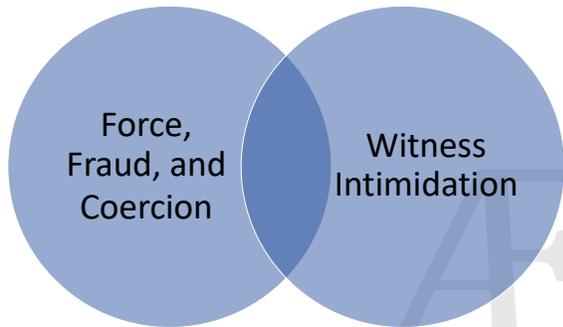
9

Inability to Participate



10

Anticipate Offender Tactics



11

What type of intimidation have you witnessed in human trafficking cases?



12

Common Tactics

Emotional Appeals

Bonomi, R. Gangamma, C. Locke, H. Katafiasz & D. Martin, *Meet Me at the Hill Where We Used to Park*, 73 SOCIAL SCIENCE & MEDICINE, 1054-61 (2011)

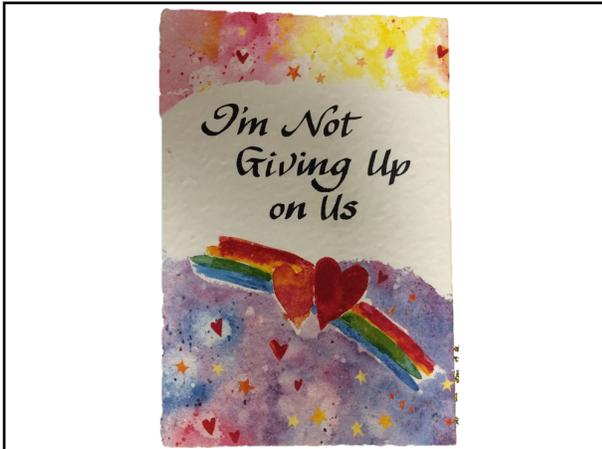
Cultural Fear Tactics

Deportation

Threats of Violence

Financial Manipulation

13



14



15

Strategies

- Educate victims**
 - Reality of tampering
 - How to report and preserve
- Protect privacy**
 - Seal documents from public records
 - Use initials, redact identifying information
- Monitor offenders**
 - Jail communications and social media
 - Pretrial release conditions; GPS
- Safety plan**
 - Technology
 - Third-party offenders

16

Read Between the Lies

When he says, "Stay in pocket"

DON'T BE TRICKED

he means, "Stay under my thumb"

OWN YOUR LIFE
LET US HELP

CALL 305-547-0749

Heard these lines before?

"I promise, this will never happen again."

"It's just until we can pay off these bills."

"If you go to the police, they'll arrest you."

"I took you when your own family didn't want you."

"You're supposed to be my girl."

"If you didn't snitch, I wouldn't be in this situation."

"When I beat this case, we can finally get married."

"You were in the game before I met you."

"Who's going to want you now?"

"If anyone finds out, you'll lose your kids."

"If you don't come to court, this will all go away."

"I've always got eyes on you."

See also, City of Denver's Victim Services Program, available at: <https://www.familyjusticecenter.org/wp-content/uploads/2018/09/Victim-Resources-Program-What-May-Happen-While-Your-Case-is-Pending.pdf>

17

Prepare for Recantation



Meet Me at the Hill Where We Used to Park

18

Eliminating the Payoff

AE

19

Are sex and labor trafficking victims eligible for protection orders in your jurisdiction?

AE

20

Protection Orders

Criminal	Civil
<ul style="list-style-type: none"> • Condition of pretrial release • Revocation of release • May be a crime • Contempt 	<ul style="list-style-type: none"> • Relationship between offender and victim • Type of violence or threats • Violation is a crime • Contempt

21

Civil Protection Orders

<p>Stalking</p> <ul style="list-style-type: none"> • Victim of a course of conduct that causes victim to fear for their safety or the safety of another, or to suffer emotional distress 	<p>Sexual Assault</p> <ul style="list-style-type: none"> • Victim of nonconsensual sexual conduct or sexual penetration 	<p>Domestic Violence</p> <ul style="list-style-type: none"> • Family or household members who are related by blood, (former) marriage, share a home, have a child together, or have a dating relationship
--	---	---

22

Contempt

See 750 Ill. Comp. Stat. Ann. 60/223

- File a Petition for an Order to Show Cause
- Initiates civil or criminal contempt proceeding
- Judges have an inherent right to uphold their own orders
- Defendant will have a right to an attorney, but likely not a right to a jury
- Allowable punishment can range from 30-90 days in jail

"A petition for a rule to show cause for violation of an order of protection shall be treated as an expedited proceeding."
 750 Ill. Comp. Stat. Ann. 60/223(b)(2)

23

Inside the Courthouse

Safe spaces	Train personnel
Make a record	Ask for court orders

24

When Intimidation has Occurred

- Make a record and ask for additional security measures, including court orders
 - Cell phone policies
 - Require identification to enter courtroom
 - “Intimidation is enabled by anonymity”
 - e.g., *United States v. Smith*, 426 F.3d 567 (2d Cir. 2005)
- Convene an anonymous jury
 - 28 U.S.C. § 1863
 - e.g., *United States v. Dinkins*, 691 F.3d 358, (4th Cir. 2012)

25

Waller v. Georgia

467 U.S. 39, 104 S. Ct. 2210, 2212, 81 L. Ed. 2d 31 (1984)

- Test for any partial court closure, including closing the courtroom during a victim’s testimony:
 - The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced
 - The closure must be no broader than necessary to protect that interest
 - The trial court must consider reasonable alternatives to closing the hearing; and
 - The court must make findings adequate to support the closure

26

Forfeiture by Wrongdoing

(6) Statement Offered Against a Party That Wrongfully Caused the Declarant’s Unavailability. 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.

- F.R.E. 804(b)

(5) *Forfeiture by Wrongdoing*. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

- IL R EVID Rule 804(b)

27

Have you ever been involved in a case where Forfeiture by Wrongdoing was used?



28

“The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.”

Reynolds v. U.S., 98 U.S. 145 (1878)

29

Elements

```

graph TD
    A[Witness is unavailable] --> B[Because of the defendant's wrongdoing]
    B --> C[The defendant intended to make the witness unavailable]
  
```

30

Unavailability

- Witness cannot be located after diligent attempts
 - Document steps taken and attempts made
 - May need to issue a subpoena
- Witness has real or feigned amnesia or memory loss
- Defendant marries the witness
- Witness refuses to testify

31

Wrongdoing

State v. Hallum, 606 N.W.2d 351 (Iowa 2000)

- Wrongdoing is not limited to wrongful conduct or misconduct
- Does not require threats, force, in intimidation
- Includes persuasion and control by the defendant
- May be established if the defendant directs the witness to exercise the Fifth Amendment privilege

32

People v. Pappalardo

152 Misc. 2d 364, 576 N.Y.S.2d 1001 (Sup. Ct. 1991)

- A witness's claim of amnesia at the time of trial creates a "practical unavailability"
- Defendant financed, supported and was actively involved in implementing the plan to prevent the witness from testifying.
- Court found that the forfeiture could be established when the defendant had any knowledge or complicity

33

Defendant's Intention

Sufficient for prosecution to prove that "wrongdoing was at least partially intended to procure the declarant, his wife's, unavailability"

• United States v. Montague, 421 F.3d 1099 (10th Cir.2005)

"defendant need only intend 'in part' to procure the declarant's unavailability"

• United States v. Gray, 405 F.3d 227 (4th Cir.), cert. denied, 546 U.S. 912 (2005)

To establish forfeiture by wrongdoing, prosecution "need only show that the defendant 'was motivated in part by a desire to silence the witness"

• United States v. Dhinsa, 243 F.3d 635 (2d Cir.), cert. denied, 534 U.S. 897 (2001)

34

"Even if the idea to marry originated with the victim, the defendant agreed to marry, and the victim's spousal privilege existed only because of his agreement...the judge was entitled to infer that the defendant intended to make her unavailable to testify by agreeing to marry her. The judge did not need to find that making her unavailable as a witness was the defendant's sole or primary purpose in marrying her; it is sufficient that it was a purpose in marrying her."

Com. v. Szerlong,
457 Mass. 858, 933 N.E.2d 633 (2010)

35

People v. Golden

2021 IL App (2d) 200207

- Defendant appealed DV conviction arguing that victim statements were improperly admitted:
 - Defendant was not the reason that victim was unavailable
 - Victim had other reasons for not testifying (her own open criminal case)
 - Defendant did not engage in wrongdoing to the level of threats, bribery, or coercion
- Admission of statements upheld

36

Defendant's contention, however, assumes that the only sort of conduct that is countenanced under the doctrine of forfeiture by wrongdoing is violent and threatening conduct. Here, defendant's conduct was cajoling and attempting to play on Atwood's feelings for defendant both as a romantic partner and as the father of her children...

People v. Golden, 2021 IL App (2d) 200207, ¶ 88

37

...As discussed above, wrongful conduct under the doctrine of forfeiture by wrongdoing is any conduct performed with the intent to prevent the witness from testifying.

Id.

38

What if the victim recants on the stand?



AE

39

Emerging Issue

People v. Nelson, 67 N.Y.S.3d 719 (N.Y. App. Div. 2017)

“Unavailability’ in this context is not limited to a witness's outright refusal to testify or physical absence from the proceedings; a witness is practically or effectively unavailable where the witness recants his or her initial statements or otherwise changes his or her version of the events as a result of misconduct on the part of the defendant.”

40

Argument for Expansion

People v. White, 772 N.Y. S.2d 309 (1st Dept. 2004)

“To deem a testifying, but recanting witness ‘available’ for Confrontation Clause purposes, as defendant suggests, would provide witness tamperers with an incentive to induce witnesses to recant rather than to refrain from testifying at all.”

41

Judicial Determination

- Requires hearing outside of the jury
- Court may reserve ruling based on unavailability until trial
- Standard = “Preponderance of the evidence”
- See People v. Stechly, 225 Ill. 2d 246, 870 N.E.2d 333 (2007)
- MD, WA, and NY require “clear and convincing evidence”
- Hearsay evidence admissible, including affidavits
- Statements which you wish to introduce are admissible
- See Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)
- Consider using expert witness to educate

42

Hearsay, & Crawford

People v. Hanson, 238 Ill. 2d 74, 939 N.E.2d 238 (2010)

“Therefore, although left unsaid in *Stechly* as a matter of Illinois law, we now expressly recognize that the doctrine serves both as an exception to the hearsay rule and to extinguish confrontation clause claims.”



43

Evidence of Wrongdoing



44



45

Hearsay

F.R.E. 801; IL R EVID Rule 801

“Hearsay” means a statement that:

- (1) the declarant does not make while testifying at the current trial or hearing; and
- (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

A “statement” is:

- An oral or written assertion; or
- Nonverbal conduct of a person, if it is intended by him as an assertion.

46

Solicitation as a Verbal Act

“...the act of posting an online advertisement offering sexual conduct for money, itself, carries legal significance, regardless of whether the statements contained in the advertisement are true. In any event, the advertisements in this case were not offered to prove the truth of the statements in them but, rather, to demonstrate that defendant was connected to offers of prostitution. Therefore, the advertisements are verbal acts and not hearsay.”

State v. Warren, 291 Or. App. 496, 422 P.3d 282, review denied, 363 Or. 744, 430 P.3d 567 (2018)

47

Statements of Coconspirators

F.R.E. 801(d)(2)(E); IL R EVID Rule 801(d)(2)(E)

- Statements made by the defendant’s coconspirator during and in furtherance of the conspiracy are not hearsay
- Coconspirator need not be charged
- Coconspirator may be immune from prosecution
 - People v. Brown, 14 Cal. App. 5th 320, 221 Cal. Rptr. 3d 854 (Ct. App. 2017) - Statute prohibiting prosecution of victims did not preclude such victims from being considered uncharged coconspirators under coconspirator exception to hearsay rule

48

Hearsay Exceptions

See IL R EVID Rule 803

- Present sense impression
- Excited utterance
- Then-existing mental, emotional, or physical condition
- Statement made for medical diagnosis or treatment

49

Crawford Analysis

Testimonial	Nontestimonial
<ul style="list-style-type: none"> • Generally more formal or made to law enforcement or their agents • Primary purpose is to report facts for later prosecution 	<ul style="list-style-type: none"> • Statements during ongoing emergency • Casual remarks to others • For purposes of medical treatment

50

Reports and Records

Williams v. Illinois, 567 U.S. 50 (2012)

Testimonial	<ul style="list-style-type: none"> • Forensic reports that include information from scientific testing are testimonial • e.g., DNA, Ballistics, fingerprints, drug testing
Nontestimonial	<ul style="list-style-type: none"> • Records that are compilations of stored information • e.g., Phone records, caller ID, GPS printouts

51

Statement Analysis



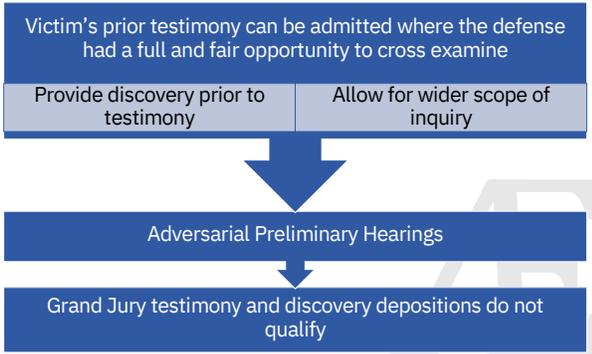
52

Identify Admissible Statements

- Identify anyone the victim spoke to
- Interview all witnesses and suspects
- Document any statements made to the witness by the victim
- Document circumstances of the statement
 - Timing
 - Demeanor

53

Prior Testimony



54

Example: Cal. Penal Code § 1335

Conditional examination of witnesses is authorized

(c)(1) If a defendant has been charged with human trafficking... and there is evidence that the victim or material witness has been or is being dissuaded by the defendant or a person acting on behalf of the defendant, by intimidation or physical threat, from cooperating with the prosecutor or testifying at trial, the people or the defendant may, if the defendant has been fully informed of his or her right to counsel as provided by law, have a witness examined conditionally as prescribed in this chapter...

55

Example: Cal. Penal Code § 1335

Conditional examination of witnesses is authorized, cont'd.

(2) If a defendant has been charged with human trafficking... and the court finds that there is a reasonable basis to believe that the material witness will not attend the trial because he or she is under the direct control of the defendant or another person involved in human trafficking and, by virtue of this relationship, the defendant or other person seeks to prevent the witness or victim from testifying, and if the defendant has been fully informed of his or her right to counsel as provided by law, the court may have a witness examined conditionally as prescribed in this chapter.

56

Going Forward

Encourage victim participation by collaborating to provide meaningful services

Combat witness intimidation and eliminate the payoff

Identify and preserve admissible victim statements

57

Jane Anderson

ATTORNEY ADVISOR

 janderson@aequitasresource.org
 (202) 596-4229

 1000 Vermont Street NW, Suite 1010
Washington, DC 20005

 AEquitasResource.org

58

Jennifer Dolle

ATTORNEY ADVISOR

 jdolle@aequitasresource.org
 (202) 578-2418

 1000 Vermont Street NW, Suite 1010
Washington, DC 20005

 AEquitasResource.org

59

FOLLOW AEQUITAS @



[@AEquitasResourc](https://twitter.com/AEquitasResourc)



[@aequitas_resource](https://www.instagram.com/aequitas_resource)



www.aequitasresource.org
www.justexits.org

60

Additional Resources

OVC-funded Resources

- Training and Technical Assistance
 - <https://ovc.ojp.gov/program/human-trafficking/training-and-technical-assistance>
- Human Trafficking Task Force e-Guide
 - <https://www.ovcttac.gov/TaskForceGuide/eguide/>
- Development & Operations Roadmap
 - <https://www.theiacp.org/resources/document/development-operations-roadmap-for-multidisciplinary-anti-human-trafficking-task>
- IACPlearn
 - <https://learn.theiacp.org>

61

Office Hours

3rd Thursday of Every Month, from 2-4pm Eastern



Discuss the most pressing issues facing prosecutors and allied professionals today



Serve as a resource, and provide you with relevant resources



Connect you with other practitioners in the field to help foster peer relationships

Register here:
<https://aequitasresource.org/trainings/>

62