U.S. Department of Justice
Office of Justice Programs
Office for Victims of Crime

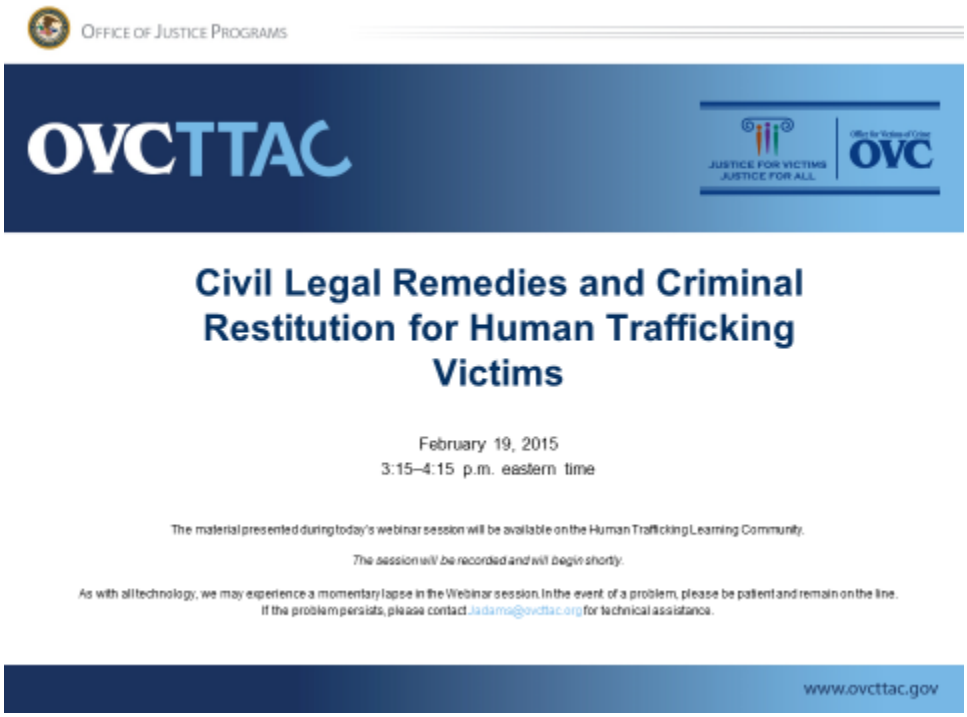
OVC
Webinar Transcript

Civil Legal Remedies and Criminal Restitution for Human Trafficking Victims

February 19, 2015

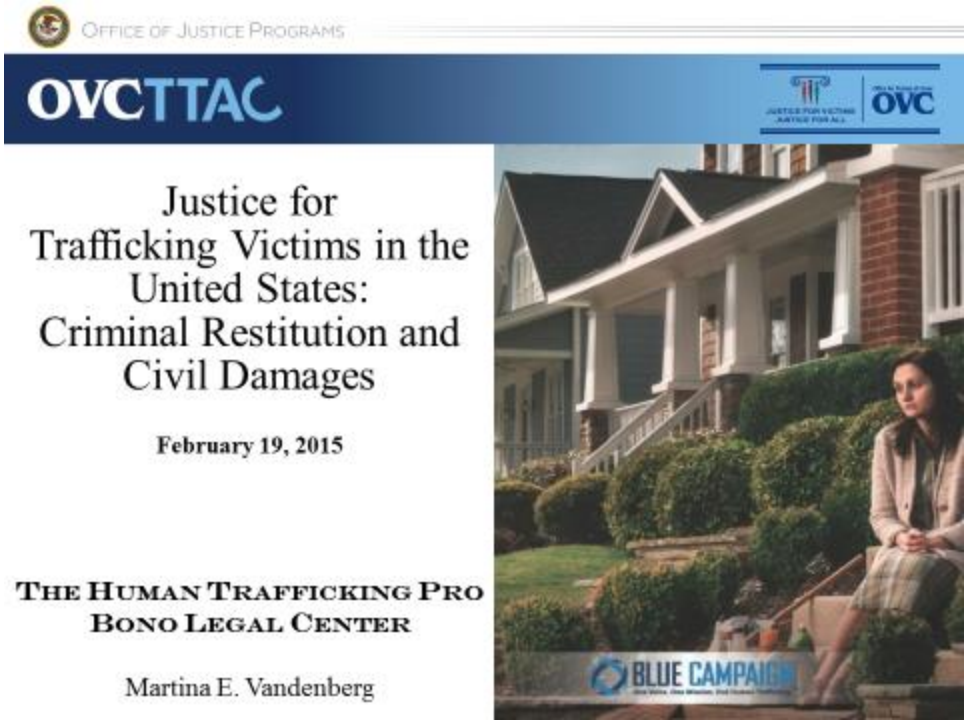
Welcome

Soojin Park: Hi, everybody. This is Soojin Park from OVC TTAC. Along with myself from OVC TTAC, we have Marti Kovener, Senior Project Manager, and Jason Adams, Digital Strategies Specialist. I want to thank you all for joining us today for our monthly technical assistance Webinar entitled: *Civil Legal Remedies and Criminal Restitution for Human Trafficking Victims.*



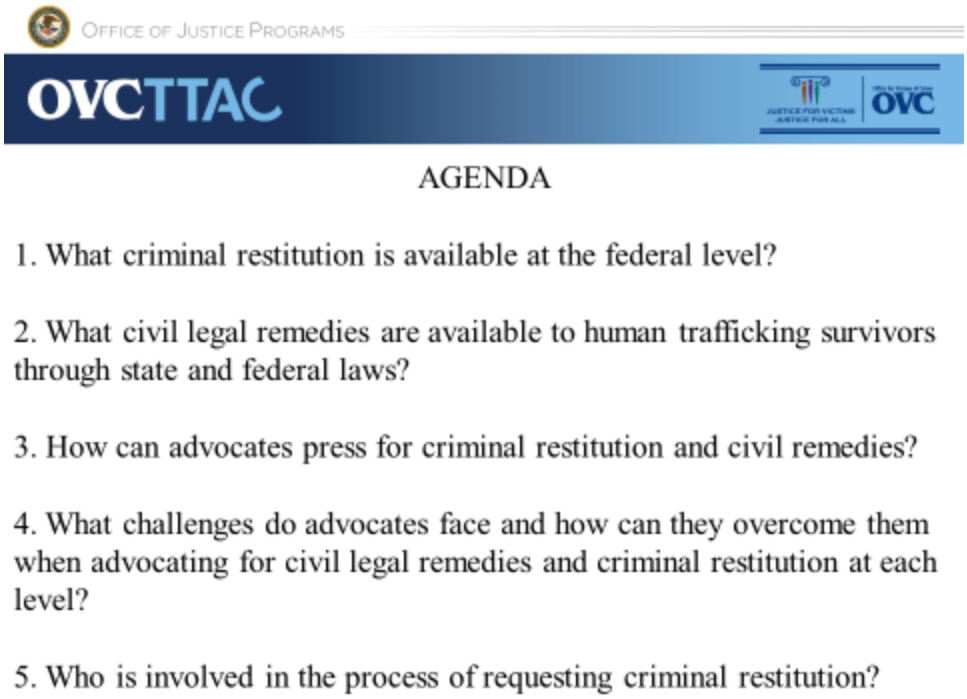
Soojin Park: Before we get started, as a reminder, today's call is being recorded, and with all technology, we may experience a momentary lapse in the Webinar session. In the event of a problem, please be patient and remain on the line. If you have any questions throughout the Webinar today, please feel free to use the chat box to ask them, and if we can, we will address them during the presentation.

Soojin Park: Our presenter for today is Martina Vandenberg, Founder and President of the Human Trafficking Pro Bono Legal Center. If during the Webinar you have any questions, please feel free to type them in the chat box. Again, thank you for attending, and now I am going to pass it over to Martina, who will again begin the Webinar.



Justice for Trafficking Victims in the United States: Criminal Restitution and Civil Damages

Martina Vandenberg: Hi. Thank you. Judging from the list of participants, I think there are a lot of friends out there. So, thank you for joining today. Today, we are going to cover *Civil Legal Remedies and Criminal Restitution for Human Trafficking Victims.* And, if we can advance the next slide.

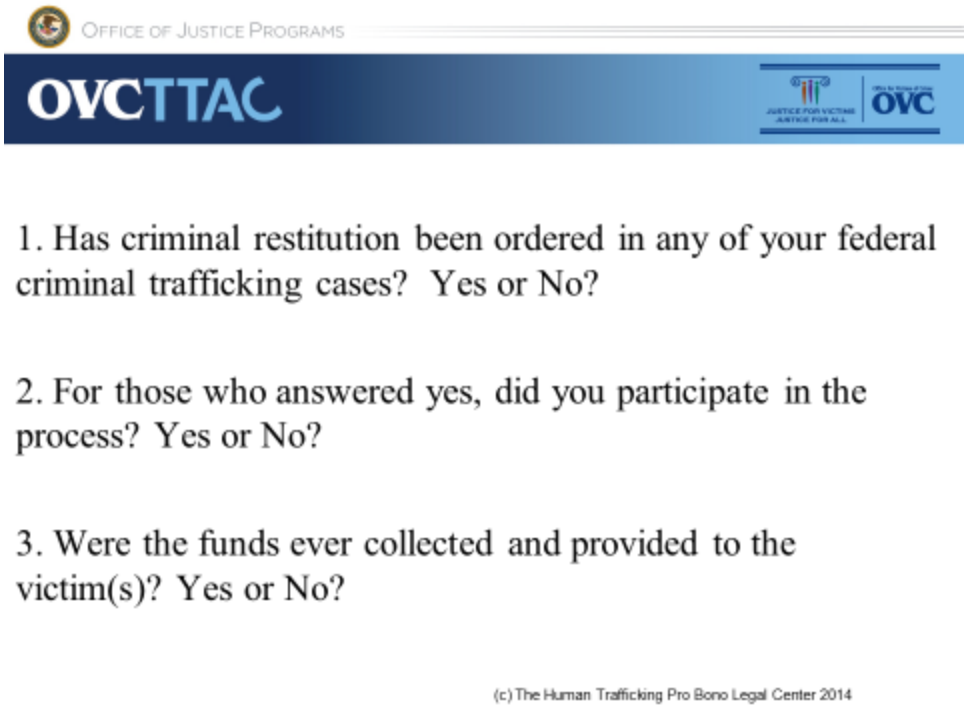


Agenda

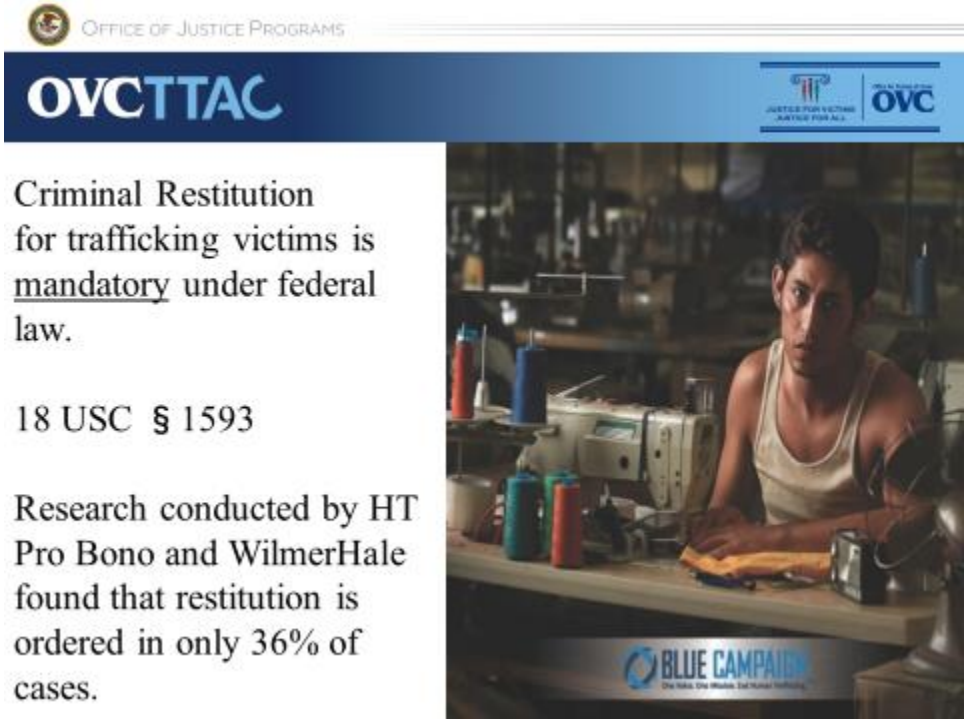
Martina Vandenberg: Thank you. Many of you, as advocates, I think, have managed to get criminal restitution or civil damages, but we are going to go over today and cover the agenda. So, our agenda is: What can you get at the federal level? Secondly, what civil legal remedies are available to survivors, both at the federal and state and – federal and state level? What can you do as advocates to press for these remedies? We are going to go over a few of the challenges, and then we are going to talk about who is involved and who you need to interact with.

Martina Vandenberg: So, before we get started with the meat of the presentation, we wanted to actually do a little survey to see where all of you sort of fit into this picture. So, if you can answer whether or not you have ever managed to get a restitution order in any of your cases, that would be helpful. What we have found, unfortunately, is that criminal restitution, although it is mandatory, it is often not ordered. So, it looks to me like we have got about almost a 50/50 split, maybe 60/40 split. That is not – that is not atypical. That is actually better than the norm.

Martina Vandenberg: So, let us go on to the second question. For those of you who said "yes," did you actually participate in the process, either as an advocate, as a social worker, or as an attorney? Looks like it is about – looks like it is about 50/50. So, for those of you who did participate, bravo. By the end of the presentation, I hope all of you will feel empowered to participate in the future.

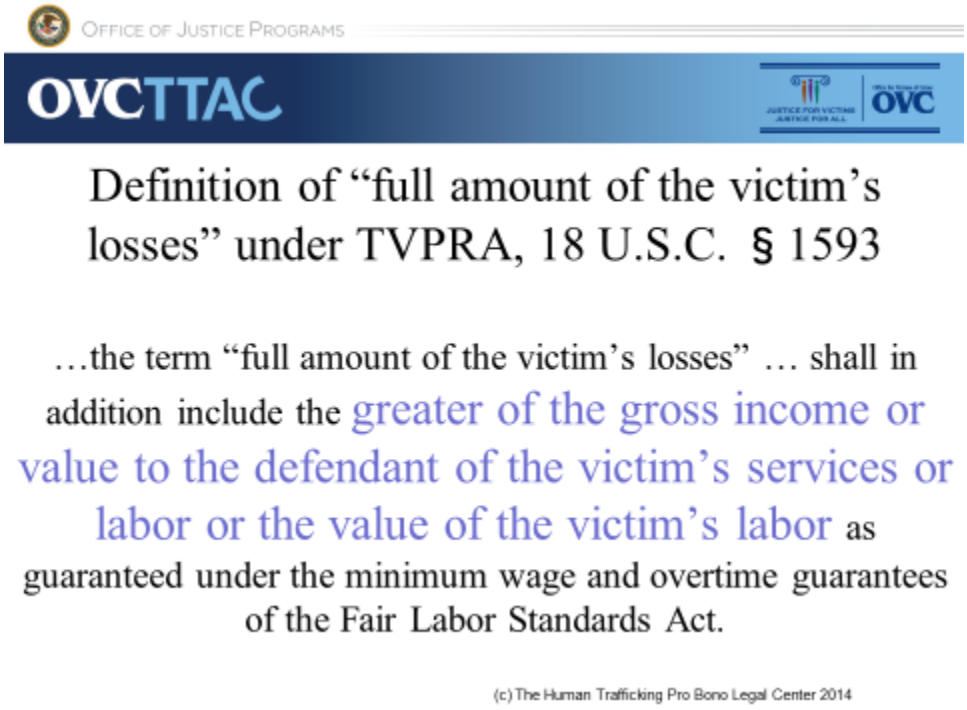


Martina Vandenberg: So, let us go to the third, and this is the key question I think for many of our clients. Were the funds ever collected and provided to the victims? And, by that I mean not all of the funds, because full collection of restitution orders is rare, but even a portion of the funds. If even a portion went to the victim of trafficking, that would be useful to know. So, that is good. It looks like, in about two-thirds of the cases, the victims did get some of the funds, so that is terrific.



Criminal Restitution for Trafficking Victims is Mandatory Under Federal Law

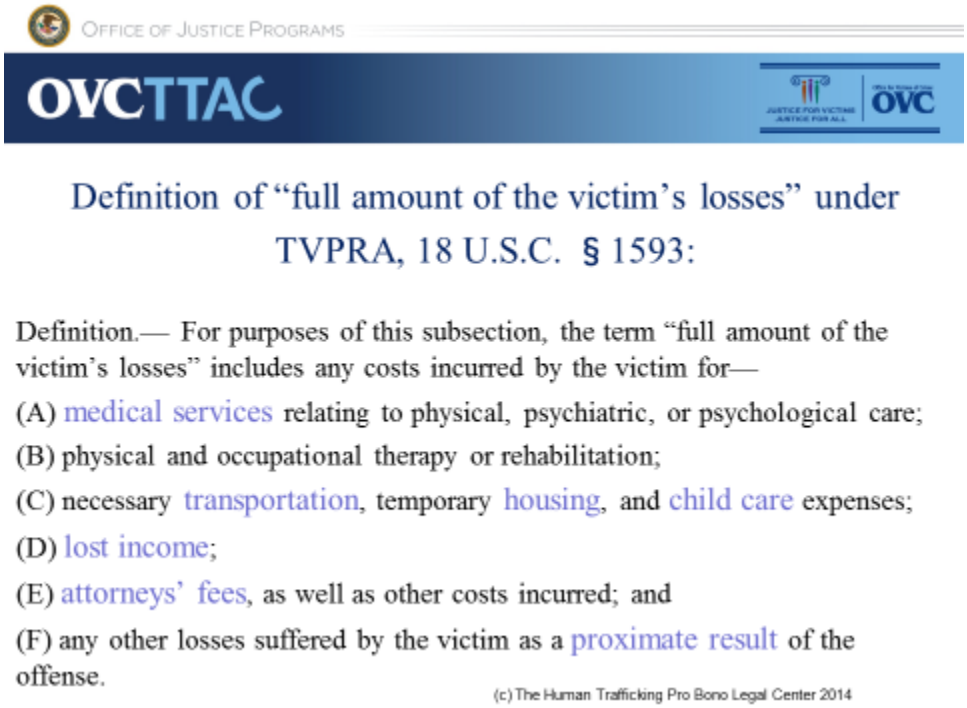
Martina Vandenberg: So, let us go on now and talk about, for those of you who have not done this, let us talk about sort of how it is done. As I mentioned, criminal restitution is mandatory under federal criminal law. The statute is 18 USC § 1593, which is part of Chapter 77, and for those of you who deal with the federal prosecutors, you know Chapter 77 is sort of their shorthand for all the trafficking crimes. Unfortunately, as I mentioned before, when we conducted a research report on restitution in the United States, looking to see whether mandatory really does mean mandatory, what we found is that restitution is ordered in only about 36 percent of the cases. So, those of you who are on the phone today are sort of in a better spot than the vast majority of cases, where we really only see – we only really see restitution in about a third of the matters.



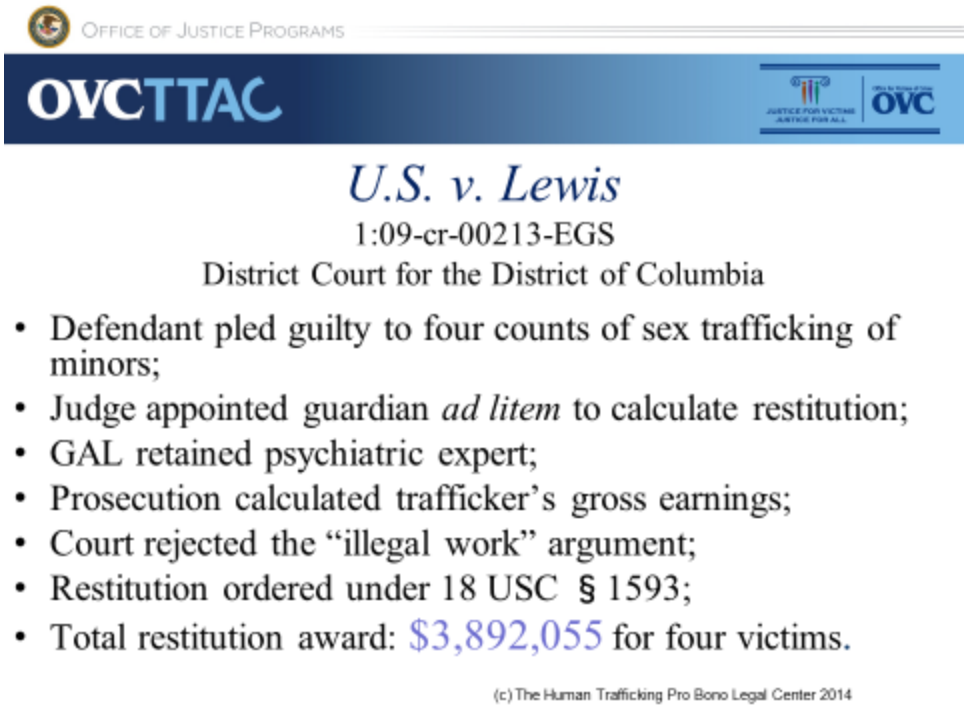
Definition of "Full Amount of the Victim's Losses" Under TVPRA, 18 USC § 1593

Martina Vandenberg: So, what does restitution mean? And, I think there is confusion between sort of civil damages and criminal restitution. Criminal restitution is essentially out of pocket expenses for a victim that can be recovered in the criminal case. And, you know, Congress has done so many things not quite clearly, but, fortunately in this statute, we have very clear guidance to the courts and to the prosecutors that the full amount of the victim's losses, so the out of pocket restitution that can be awarded, is the greater of the gross income or value to the defendant of the victim's services or labor, or the value of the victim's labor, under the Fair Labor Standards Act. What that means is that prosecutors, if they are doing their job with really sort of zealous – with zealous work, many of the prosecutors will put in a restitution brief in a case that will provide two alternative versions of how restitution can be calculated. So, for example, in a forced prostitution case, or a child sex trafficking case, the restitution can be calculated either by the value of the defendant, whatever the profit is that the trafficker earned, or you can actually use a Fair Labor Standards Act minimum wage calculation. Needless to say, in the case of the sex industry, the minimum wage calculation is always lower. The court is required to take the calculation that is higher.

Martina Vandenberg: In a forced labor case…and we will go over – we will go over some case law…in a forced labor case, generally, someone from the Department of Labor will come and will provide testimony about what the back wages are that are required, and then the court will award restitution based on those calculations of back wages.



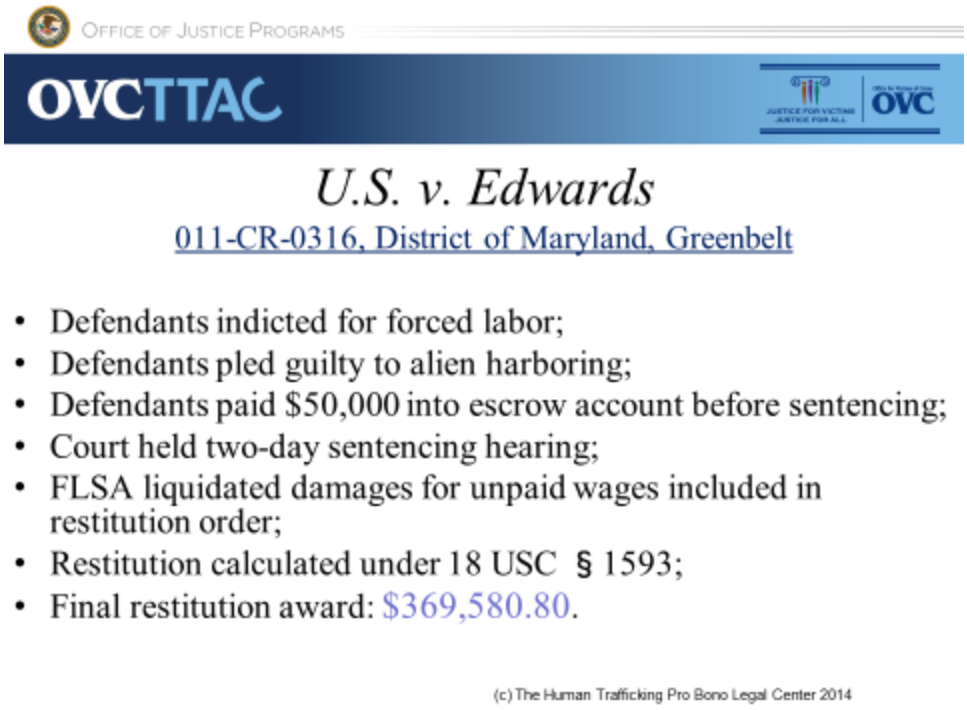
Martina Vandenberg: The other piece to remember is that the statute under the trafficking law incorporates other categories of the full amount of the victim's losses. So, you can get restitution to cover medical services, to cover all sorts of therapy, transportation, housing, lost income, attorney's fees as well, although, frankly, I have never gotten any attorney's fees for this, and then any other losses that are suffered as a proximate result. So, in addition to the sort of back wages or fair labors, or the value to the defendant calculation, there are also these statutory restitution amounts that can be given. The trick with these is that, in order to get these, you actually have to have some sort of receipt.



U.S. v. Lewis

Martina Vandenberg: So, let us talk about case law now, because I think the case examples really show how restitution can benefit trafficking victims in the United States. U.S. v. Lewis is, perhaps, one of the most important cases. It was in the district court – the federal district court in the District of Columbia, and, just by way of a footnote, we are just talking here about federal cases. We are not yet talking about state cases. This particular defendant pled guilty to four counts of sex trafficking of children, and the judge, Judge Sullivan, in the District of Columbia court, decided that it was very important that these children have a guardian ad litem, that they have a lawyer to represent them. As you all know, the prosecutors represent the federal government. It is their job to handle the prosecution for the federal government. Judge Sullivan appointed this guardian ad litem, and the guardian ad litem went to work, found a psychiatric expert, calculated the trafficker's earnings from those children's work in the sex industry, and then managed to present a report, an expert report, to the court, which is sealed. So, none of us are able to read that report. We do not know exactly what it says. What we do know are the facts that are summarized in the order that Judge Sullivan issued. The total order for those four children was $3.8 million to those four victims.

Martina Vandenberg: The important thing to note is that the court accepted very, somewhat vague information about how much those children had earned. So, for example, the children had quotas, and the quota was approximately $500 a day. The court literally made a calculation of the number of days that the children were held. One was held about 1,100 days, multiplied that by the quota, $500 a day, and came out with a number. In addition, the psychiatric expert was able to calculate how much it would cost in the future for these children to get the kind of treatment that they need. And so, happily, these are future-looking damages, as well as backwards-facing damages for these children.



U.S. v. Edwards

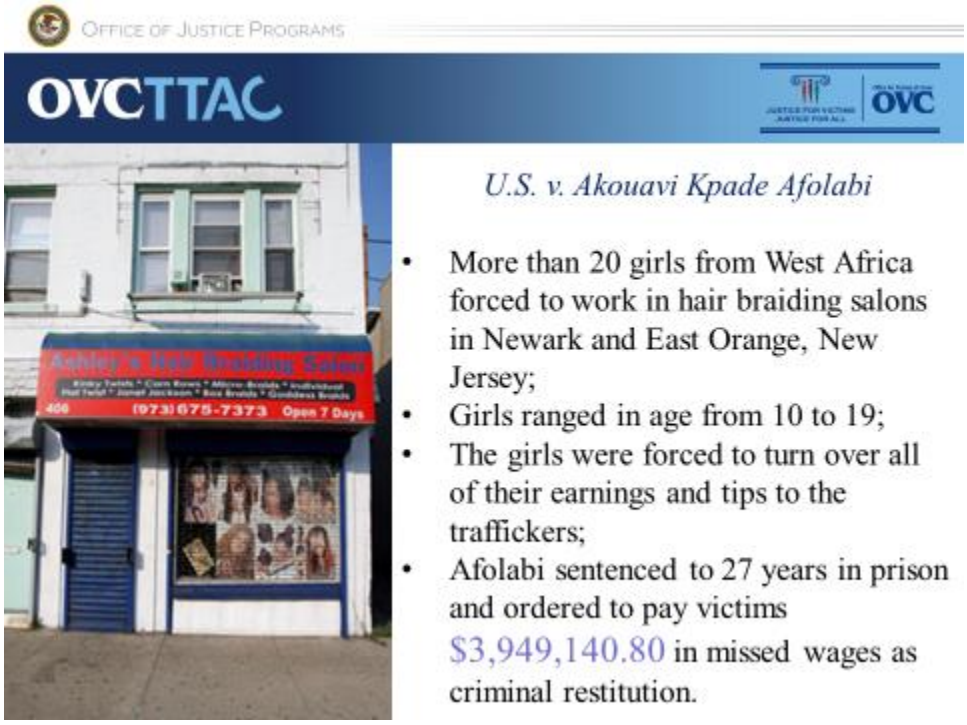
Martina Vandenberg: So, what about in the context of forced labor? So, in the forced labor context, we have a case from Maryland. It is a fairly recent case, U.S. v. Edwards, and the Department of Justice prosecutors, in this case, did a superb job. The case was originally indicted for forced labor. This was someone who was allegedly held for approximately 10 years. The government then – the government then issued a superseding indictment, another indictment, for alien harboring, and the defendants actually pled guilty, not to forced labor, not to any trafficking crimes. They pled guilty to alien harboring. But the prosecutors did a brilliant job on multiple fronts because, number one, they argued, in brief to the court, that the defendants needed to pay some amount of restitution into escrow before sentencing. So, the defendants, in this case, paid $50,000 into their own attorney's escrow account, so the defense attorney's escrow account. Sometimes, we have the amount paid into the pro bono attorney for the victim's escrow account, but either way will work. In this case, it went to the defendant's escrow account.

Martina Vandenberg: The court held a two-day sentencing hearing, and to its credit, because this was a huge investment to make, the FBI agent in this case, actually, was on the stand for nearly a day, testifying about the background information, the evidence that would support an order for restitution.

Martina Vandenberg: The other really important thing that the prosecutors did in this case, and the prosecutor from DOJ (Department of Justice) was Cindy Chung, she argued that the Fair Labor Standards Act, so the actual minimum wage damages, had to be calculated based on all hours worked. She had support on that from an expert who testified from the Department of Labor, Wage and Hour Division. But then, in addition, she argued that the restitution order needed to include liquidated damages. Now, liquidated damages are, essentially, if you are collecting back wages, you get back wages plus 100 percent of your back wages. So, in this

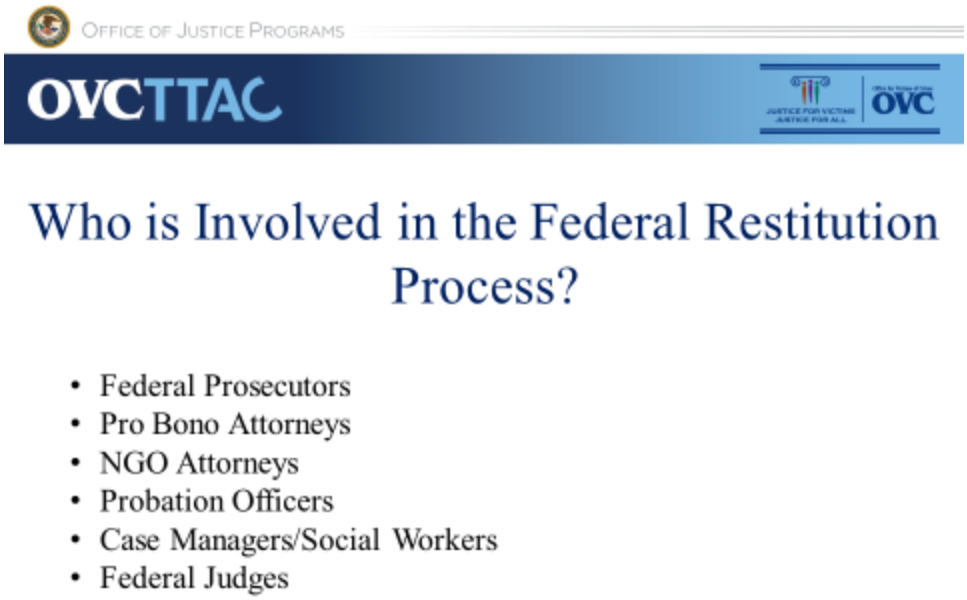
particular case, the court agreed with the prosecutors that the victim should get not just back wages, but essentially back wages times two.

Martina Vandenberg: The next thing that the prosecutors did that was excellent was they calculated restitution under 18 USC §1593. Now, the statute does not seem like it should matter, but actually it matters a lot, because what the Department of the Treasury had said is that restitution calculated under 1593 is tax free. Restitution calculated under other mandatory restitution statutes is taxable. And so, one needs to be very, very careful about this, and lawyers should consult tax attorneys to get tax advice about this, but it matters a great deal whether or not the restitution is taxable or not. Trafficking victims can lose almost 40 percent right off the bat if the restitution order is taxable under federal income tax. So, the restitution award in this amount – in this case was about $369,000, which is a significant amount of money. Now, again, collection is another story. Collection is always tricky, but that – but getting the order is sort of the first step.



U.S. v. Akouavi Kpade Afolabi

Martina Vandenberg: In another case that sort of shows how this can be done for forced labor cases, it is a case U.S. v. Afolabi. This was a case involving young girls from West Africa who were brought over from Togo. They were doing hair braiding. Again, hair braiding is not a place where we would expect to find forced labor, but unfortunately these girls were working in hair braiding salons in Newark, New Jersey, and they were forced to turn over all of their tips. They earned essentially no money, and, in addition, there were allegations that at least one of the girls was taken across state borders and raped, sexually assaulted. So, again, in this case, the court ordered $3.9 million in missed wages as criminal restitution for these victims.



Who is Involved in the Federal Restitution Process?

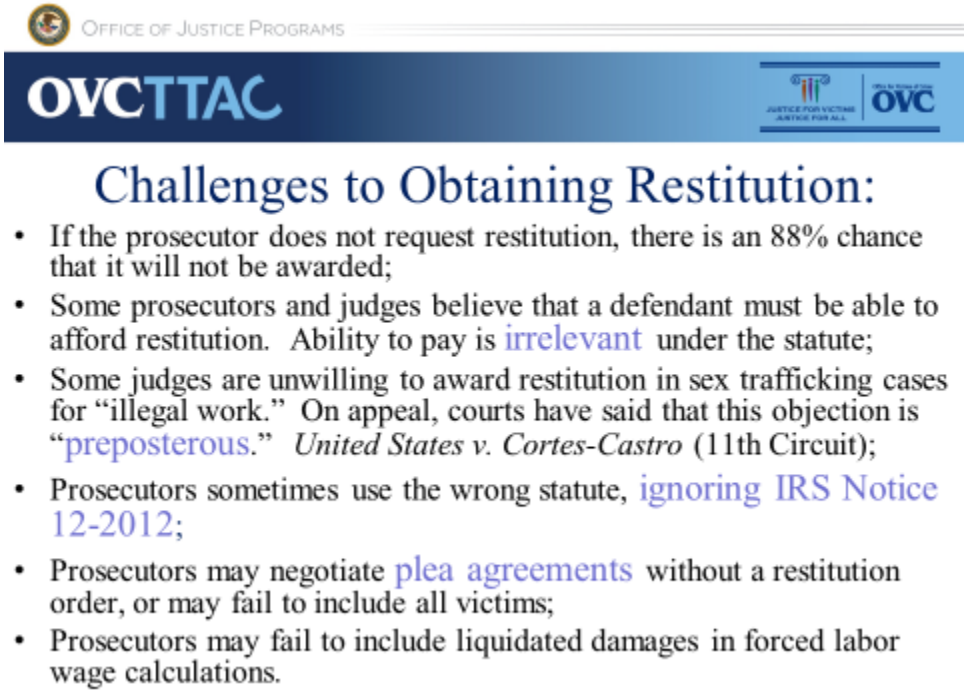
Martina Vandenberg: So, I described to you those three cases, and tried to talk about sort of who is involved. The words you have heard me utter most of all are the federal prosecutors, because, ultimately, the mandatory restitution statute falls on the shoulders of the federal prosecutors to file the brief. And, what we found in our research with WilmerHale was that you are far, far more likely to get a restitution order if the federal prosecutors file a separate motion requesting restitution specifically. But, in addition to the federal prosecutors, I think it is important to – to realize that pro bono attorneys actually have an important role to play in this particular aspect of the case. As a pro bono attorney, you know your client better than anyone, and certainly better even than the federal prosecutor in a lot of cases. And, you can talk to your client about how many hours she worked, if it was a forced labor situation, how many hours she or he worked, whether or not he or she was on call, because those hours have to be compensated as well, whether or not he or she had any days off or breaks. And then, you can – and this is what I did when I was working pro bono at a firm – you can develop your own spreadsheets with your own assessment of what those back wages should be, based on what your client tells you. Similarly, you will have a relationship of trust with trafficking survivors who have been trafficked into the sex industry, and you can ask some very delicate questions, such as: What was your daily quota? How many clients did you have? How much on average did the clients pay?

Martina Vandenberg: The other piece of this is, if there is not a – if there is not a pro bono attorney in the mix, frequently the non-government organizations (NGOs) who are on this call will have attorneys who are working on the cases, and this is particularly true when the NGOs have immigration attorneys. So, I hope that, to the extent that you are providing assistance in the immigration space and working on T visas and U visas, you will also think about, if there is no pro bono attorney in the mix, you will also think about asking for restitution.

Martina Vandenberg: Next is probation officers. Probation officers are traditionally very important, because it is the probation officers who are writing the pre-sentence report, and they are making determinations about how much money the defendants have, what their ability to pay may be. They are making recommendations about sentencing. And so, in some jurisdictions, the probation officers will actually interview the trafficking victims, but not in all jurisdictions. And so, one thing that you can do as an advocate is suggest to the probation office that the trafficking victim actually be interviewed by those probation officers, in order to increase the likelihood that they will make an appropriate assessment for restitution for your client, for your – the person who is seeking restitution.

Martina Vandenberg: The case managers and social workers also have a very, very good sense of what the sort of statutory damages might be. As experts in psychology and in mental health, you can actually be very, very helpful in, essentially, assessing as an expert what the future costs might be. So, if you have a child victim of sex trafficking, it may be possible for you either to find an outside expert, or for you yourself to make an assessment and create an expert report about how much money it will cost for this child to get appropriate care and tutoring.

Martina Vandenberg: And then, the final piece is federal judges, and federal judges are very much used to working with a different law. They are used to working with 3663A, which is the regular mandatory restitution statute. And so, I think there is a tendency to sort of fall into that law, to assume that that is the mandatory restitution statute that will be applied. But the reality is that I think we really need to educate the judges, and much of this I think is done by federal prosecutors and by their clerks, to educate the federal judges that, number one, restitution should be ordered under the special trafficking restitution statute, 1593. And, secondly, that even though the – the value to the defendant that we are trying to recover is, in some judges' view, the product of illegal work. Right? So, the product of work in the sex industry. Even though that is the case, it is still appropriate to force the defendants, as part of their punishment, to forfeit that money to the victim in criminal restitution.



Challenging to Obtaining Restitution

Martina Vandenberg: So, there are definitely challenges to obtaining restitution. One of them is that prosecutors sometimes just do not ask, and what our research found is if the prosecutor does not ask, there is an 88 to 90 percent chance that restitution will not be awarded. And so, I think it is very important as advocates for us to work closely with the prosecutors, to bring up the issue of restitution early in the process, and to talk them through all that you already know about restitution in terms of which statute and how to calculate it. I always provide the prosecutor with my own numbers. I generally do not provide it in writing, because almost everything you turn over to the prosecutor has to be turned over to the defense. So, I tend to have those conversations orally, but I will call the prosecutor and say, "Please request restitution, and here is my number," and then we can compare notes on what the number will be.

Martina Vandenberg: The other important reason to get in touch early with the prosecutor is that these cases often will result in plea deals, and you never quite know when a plea agreement is coming down the pike, and much better to have had the conversation about restitution before the prosecutor is negotiating a plea deal with the defendant, or the prosecutor might accidentally leave it out otherwise. So, some prosecutors, again, looking at the regular statute, 3663A, the regular statute, if you read it carefully, does say that part of the assessment for restitution is based on whether or not the defendant can pay it. Under the trafficking restitution statute, it does not matter whether or not the defendant can pay it. And, I think we can pretty much guarantee that in the U.S. v. Lewis case, the Shelby Lewis case, where the restitution was $3.8 million, I think we can fairly well assume that Mr. Lewis did not have $3.8 million in a mattress, and did not just gorge that money the moment the restitution order was entered. But, it is very important in these particular cases for that number to reflect what the value was to the defendant, because the defendant already earned that money. Right? The defendant already has that money. The defendant may have squandered that money, but that money is still owed to the victim.

Martina Vandenberg: So, as I mentioned before, some judges are concerned that this is illegal work. We now have multiple appellate decisions across the country, where one court even said, and this is preposterous, but, unfortunately, in the course of doing the WilmerHale HT (Human Trafficking) Pro Bono report on restitution, we read a large number of transcripts for sentencing hearings, and what we discovered in the sentencing hearings is that judges still ask questions of the prosecutors about this issue of the work being illegal. The prosecutors need to be very, very well prepared, with citations to circuit courts of appeals, to answer the judge, and answer that question immediately, because we do not need those sorts of – those sorts of concerns continuing to float out, particularly in sex trafficking cases.

Martina Vandenberg: Again, I mentioned earlier that it is very important to use the trafficking statute. The IRS Notice 12-2012 is the notice that provides non-taxable status to restitution orders that are done under the proper statute. And, I will just put a plug-in for he University of Michigan Law School, because the law school clinic on trafficking, together with the law school clinic on taxation, they paired up and they managed to convince the Treasury Department to issue this notice. It is pretty remarkable when you think about it, that these restitution orders are tax free, and until recently the only other people who had any tax-free status for restitution were Holocaust survivors. So, this is an enormous deal. And, the other thing you should know is that if you have a restitution order under the proper statute that was entered 3 years – 3 years ago, you can – you can [unclear] the money back from the IRS. So, again, you need tax counsel to do these things, but you can actually pull the money back.

Soojin Park: Martina, it looks like we have a question coming in. It says: Can the victim's attorney be heard by the court on the issue of reimbursement?

Martina Vandenberg: So, the answer is yes. And, this is a tricky area, but say that the prosecutor does not wish to request restitution, for whatever reason, or say, for example, that the prosecutor has a different theory of restitution or a different number on restitution than you do as the victim's rights attorney. It is possible, under the National Crime Victims' Rights Act, for you to intervene in the case. And so, we now have instances where victim's rights attorneys are actually intervening in criminal cases for multiple purposes. One way that we already sort of informally participate is at the end of a case at the time of sentencing we put in the victim impact statement, and we generally help our clients write the victim impact statement, and will sometimes mention restitution in the context of the victim impact statement. But, nevertheless, if things are going along with some difficulty, you can actually intervene. The one footnote I would drop is that, in my experience, the prosecutors are actually very much working in good faith and are very reasonable, and are willing to sort of collaborate and cooperate with you. So, I have never intervened in a case, because I think that it is better for the prosecutor to ask, but I do understand that there are circumstances when victim's rights counsel does need to get into the case.

Soojin Park: It looks like we have another question from the same grantee. What if the only criminal charge prosecuted, or that reaches conviction, is something less than one of the trafficking charges? For example, if the defendant is only convicted of harboring for financial gain, is there a possibility for restitution in such cases?

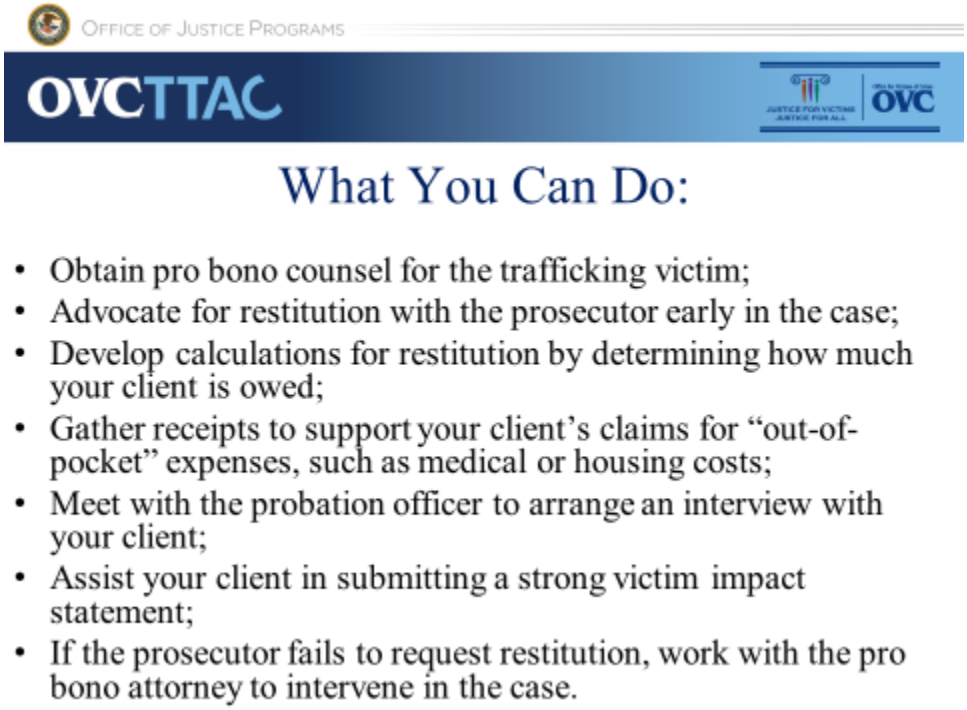
Martina Vandenberg: So, the answer is yes, under that circumstance, but you have to be very, very careful. So, in the Edwards case that I described, you had a forced labor indictment. It has to be a Chapter 77 crime that is initially charged in the indictment. It has to be a crime under the Trafficking Victims Protection Act (TVPA) in order for the mandatory restitution under the TVPA to kick in. So, in the research that we did, for example, where we looked at whether or not restitution had been awarded, we only looked at indictments under Chapter 77, so only indictments for forced labor and – and sex trafficking. If the person is convicted of a lesser crime, and it is a crime that does not include restitution, where restitution would not normally come up, and it is a conviction, so the jury has convicted, then I think probably the answer is no. But, here what you have is harboring for financial gain. So, I think there is potentially an argument that the financial gain would need to be disgorged as restitution. The other sort of point I will make, though, is the time when – when a lesser crime generally comes into the conversation is when there is a plea agreement. So, when the defendant is entering a plea to a lesser crime, the prosecutors have really significant leeway to negotiate into that plea agreement restitution. And they can even, I have seen them do this, negotiate restitution under the trafficking statute. So, the actual plea agreement can say that the restitution is being calculated under 1593. So, even in a case were the defendants plead guilty to alien harboring, which would normally be a statute that does not necessarily give rise to restitution, the plea agreement is something that I think of rather as a settlement agreement with the defendants. And, if the defendants are willing to sign up to that, then they can. Now, one very good federal prosecutor from Seattle mentioned that it is very important that the plea agreement mention a number, because the defendants can go back and try and challenge on appeal the entire plea agreement if the plea agreement is not specific enough on the amount of restitution that is going to be – that is going to be mandated.

Soojin Park: Thank you, Martina. We have another question. If the victim cooperates in an investigation and/or prosecution, but is not included as a victim in the indictment, even as a Jane Doe, can the victim be eligible for restitution?

Martina Vandenberg: So, that is an excellent question, and I have to confess, I do not know the answer. Maybe you do know the answer, because I think you have actually – you may have confronted this problem in the past. The problem that we have more frequently is that someone is maybe mentioned in the indictment, but then not mentioned in the restitution order for some reason. The prosecutors left them out, for whatever reason. These are moments – this question that you have asked about the victim not being in the indictment, and then also the victim even being in the indictment but not being in the restitution order, for reasons that we do not understand, those are times when I think you need to go to the prosecutor and have a conversation with the prosecutor, try and figure out what is going on. And then, if you, you know, if you still feel like you need to, it may actually be worthwhile intervening in a case like that.

Martina Vandenberg: Okay. So, the prosecutors, as I mentioned, can negotiate plea agreements, and we need to be very careful that those plea agreements – and this goes to the question that just came up – we need to be very careful that those plea agreements actually include all of the victims. It is easy in a single victim case, but where you have multiple victims, the plea agreements actually need to call out all of those victims and provide restitution. The other point that I will make is that it is very important, under the National Crime Victims' Rights Act, to protect the identities of these victims. So, the victim should be referred to by, at most, initials, but even initials can be problematic. So, they should be referred to by some sort of Jane Doe pseudonym.

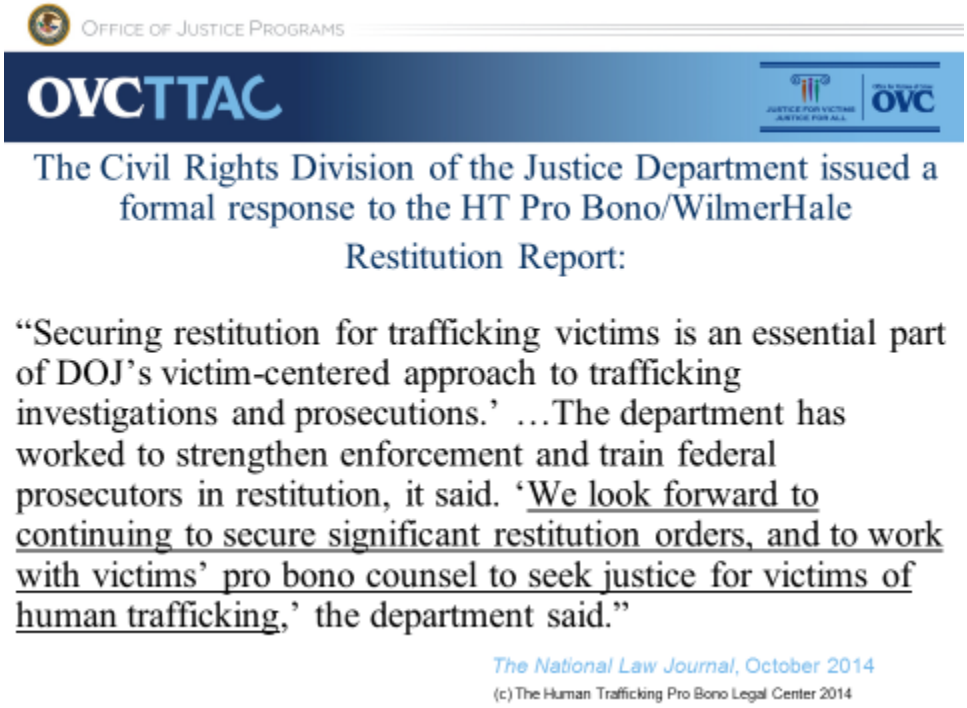
Martina Vandenberg: The other piece that we see – and this is in forced labor cases, not in sex trafficking cases – but in forced labor cases, sometimes we see that the prosecutors will fail to include liquidated damages. So, they will have the actual back wages amount, but they will not have the liquidated damages amount in there. And that may actually just be because they are not aware of a really brilliant case that was litigated in the Second Circuit Court of Appeals, which is a case called U.S. v. Sabhnani. And, in the Sabhnani case, the Court in the Second Circuit said liquidated damages are basically automatic. And so, liquidated damages should be included in restitution orders, and that is appropriate.



What You Can Do

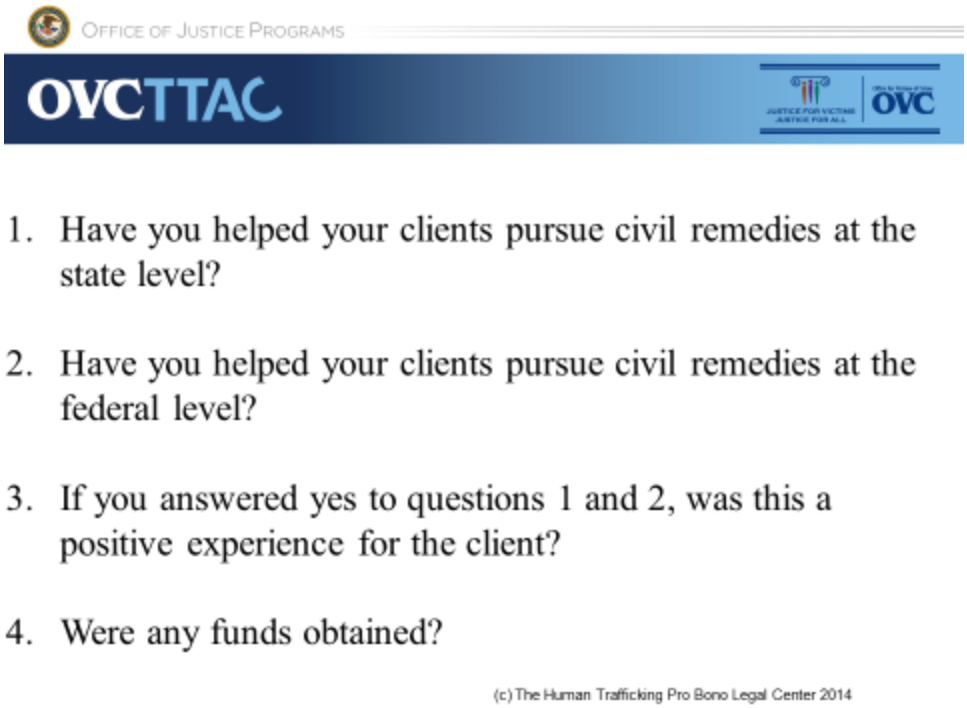
Martina Vandenberg: So, here are the things that you can do. You can first get pro bono counsel for the trafficking victim. You can also advocate with the prosecutor. You can develop your own calculations for restitution. And, again every time I had one of these cases, I always did my own spreadsheets. You can also gather receipts. Again, as I mentioned, the statutory damages piece for medical expenses and all of that, you really have to be quite specific in a way that you do not have to be specific with the – with the money that is earned. You can meet with the probation officer, and you can assist your client in submitting a very strong impact statement. And then, you can intervene in the case. And, in the question that was asked by one of the grantees a while back, where the – the trafficking victim was not included, that seems like an appropriate time to intervene. So, it looks to me like some questions may have come in.

Soojin Park: For those of you who are asking if this Webinar will be available online, yes, it will be available online on the Human Trafficking Learning Community on the TTAC website.



The Civil Rights Division of the Justice Department Issued a Formal Response to the HT Pro Bono/WilmerHale Restitution Report

Martina Vandenberg: Okay. When HT Pro Bono released the report, the Department of Justice put out an official statement. And the official statement that DOJ put out was actually excellent, because what they indicated was that they are ready to work with pro bono counsel, and with all of you with NGO counsel, to continue obtaining significant restitution orders. So, the Department of Justice, Civil Rights Division particularly, is very, very engaged in this issue of restitution, very, very keen on increasing the level of restitution, and already I think has been making really excellent strides in obtaining even larger restitution orders.



Martina Vandenberg: So, we are going to move now to civil remedies, and we are going to do a quick poll real quick. And, the first question is whether you have helped your client pursue any civil remedies at the state level. So, again, these would be cases in state court, California state courts, any state court cases. So, it looked like it is about 25 percent. That sounds about right to me, so let us go to the second question

Martina Vandenberg: Have you done any at the federal level? Have there been any cases at the federal level? And, my own bias is that I generally prefer to go to federal case – federal courts to do civil cases because, at least in the jurisdictions where I practice, the federal – the federal courts are better for us. So, it looks like mostly no. So let us go to number three.

Martina Vandenberg: This is a pretty key question, and a pretty subjective question. Do you feel like this is a positive experience for the client? Because there is a fair amount of discussion and controversy among advocates about whether or not this is sort of too hard for clients, or whether this is actually a really good experience. Hey, so it looks to me like a 100 percent good experience. That is terrific. That is great.

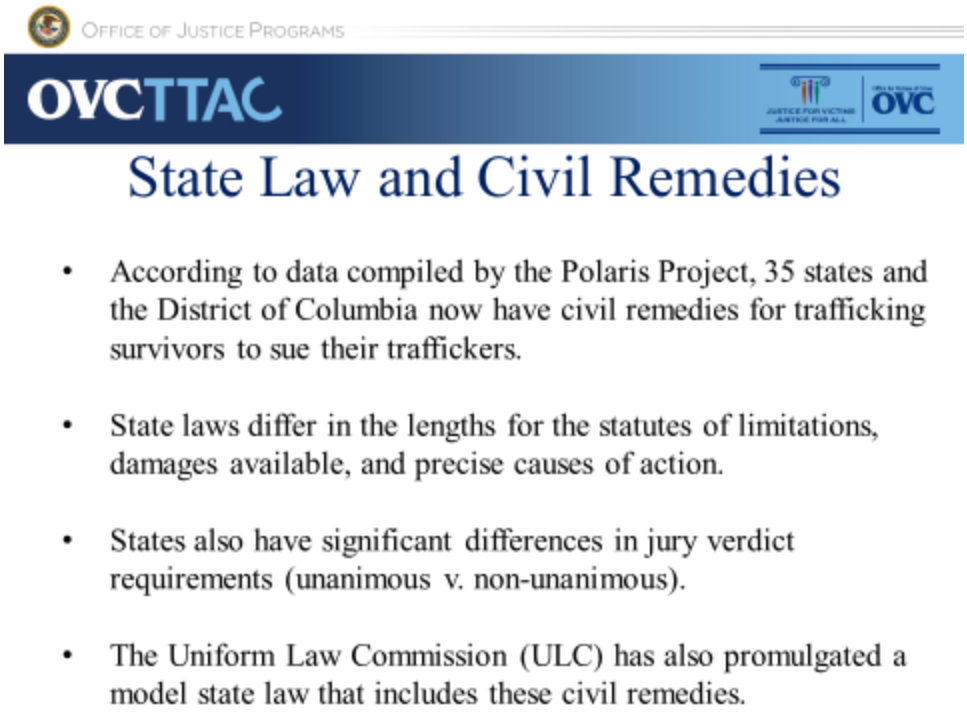
Martina Vandenberg: And then, finally, were any funds obtained, either through a civil damages order…? So, it looks like a lot of cases ended in – in a damages award. So, we have statistics on this, and we will come to this in a moment, but, from what I am seeing, it looks like this has been a good experience. I think we have some questions.

Soojin Park: There is a comment here for you. It says, "Hi, Martina. The AOC here has always worked with the Department of Labor, Wage and Hour to calculate lost wages and/or undue enrichment, in order to establish amounts for restitution orders. I am not sure if you discussed this already."

Martina Vandenberg: So, that is a really important point, because the Department of Labor, Wage and Hour specialists are an excellent resource, and in many, many of the criminal cases across the country, they are brought in as experts to do the calculations, because they know better than anyone else what the Fair Labor Standards Act damages should be. So, I would encourage all of the prosecutors certainly to work with the Department of Labor experts on this. And, as a civil litigator, someone who is doing these cases in civil court without the capability to call upon the Department of Labor, which has been pointed out is a neutral party, so they are a neutral party and they are particularly effective, as a civil attorney, I generally work with retired Wage and Hour experts. It is harder for us to get the Department of Labor current Wage and Hour experts to – to serve as experts for us.

Civil Litigation Against Traffickers

Martina Vandenberg: So, in talking about civil litigation against traffickers, one point I want to make is that you can have a civil case, whether or not there has been a criminal case. Right? So, even if there is no criminal case, it does not matter. The trafficking victims can do a state case. In many states, they can do it under state law, and trafficking victims have a federal private right of action.



State Law and Civil Remedies

Martina Vandenberg: So, in the state civil remedies context, there are about 35 states and the District of Columbia that have civil remedies. You have to be very careful, because the states' laws – the states' laws differ widely, with different statutes of limitations and different causes of action. Some of them may only deal with sex trafficking. Some deal with both forced labor and sex trafficking. One thing that is also important to note, and this is particularly true for litigators in California, at the federal level you have to have a unanimous jury. At the state level in California, it can be non-unanimous. And so, many of the litigators I work with in California actually much prefer state court, because you do not need a unanimous jury. And, the laws now are changing a little bit, because the Uniform Law Commission as promulgated the model state law, and it includes civil remedies. So, I would suspect, over time, we are probably going to see civil remedies in all 50 states.

OFFICE OF JUSTICE PROGRAMS

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Federal Private Right of Action:18 U.S.C. § 1595

(a) An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.

(b)

(1) Any civil action filed under this section shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim.

(2) In this subsection, a "criminal action" includes investigation and prosecution and is pending until final adjudication in the trial court.

(c) No action may be maintained under this section unless it is commenced not later than 10 years after the cause of action arose.

***Original statute passed in 2003, as amended.

(c) The Human Trafficking Pro Bono Legal Center 2014

Federal Private Right of Action: 18 USC § 1595

Martina Vandenberg: So, let us just talk briefly about the federal law, which is actually sort of my area of expertise. The federal law is, again, something – it is a gift that Congress gave us. It is a tremendously powerful remedy for trafficking victims, again, whether or not they have already had a criminal case. You can bring a civil case after a criminal case. You can bring a civil case during a criminal case, although I do not recommend it. And you can bring a civil case if there has been no criminal case at all. Now, the law has changed over time, so you have to be very, very careful. It has been amended in 2003, 2005, 2008, and again in 2013. So, you have to be very careful about which version of the law you are using, based on when the facts occurred in your particular case. But you can bring a civil action against the perpetrator, but not only against the perpetrator. You can also bring an action against whoever knowingly benefits, financially or by receiving anything of value, where they knew or should have known that there was a violation of Chapter 77. All these references to chapter are Chapter 77, the trafficking laws.

Martina Vandenberg: The beauty of that is that, in the past, I could only sue the traffickers. If I wanted to sue people who were co-conspirators, who perhaps had not been indicted in the criminal case, if it preceded my case, or had not been engaged in the full range of trafficking offenses across the – across the entire fact pattern, I had to bring that case as a RICO (Racketeer Influenced and Corrupt Organizations) case. And, RICO cases are hard, right? The racketeering cases are very, very difficult to do. What this law has done, the way it is amended, is essentially make it unnecessary for us to bring these cases as racketeering cases. We do not have to bring them anymore as RICO cases.

Martina Vandenberg: The second piece that we have highlighted, that you may recover damages. Those damages include punitive damages. We have actually managed, happily, to avoid a split between the courts, and now we have two Courts of Appeals, the 9th Circuit and the 10th Circuit,

that both say you can get punitive damage for victims. And, those damages can be very significant. One tricky piece of this is that the civil action shall be stayed during the pendency of the criminal action. So, this was designed for the Department of Justice to be able to come into a civil case and say, "No, no, no. We want to do a federal case, and so we need to stay this civil case until the criminal case is over." What has happened, unfortunately, is that the defendants have started exploiting this particular portion of the statute, and the defendants now come in and ask for a stay. And, in some circumstances, they get it. Although, happily, in one case recently, a pro bono law firm managed to beat off a stay, to prevent a stay, where the defense had argued that there was a state criminal proceeding that was ongoing, even after the federal criminal proceeding had closed. So, a state proceeding is not enough, but if there is a federal proceeding, the defendant may be able to move for this.

Martina Vandenberg: Now, the other important thing to know is that it is a 10-year statute of limitations. So, 10 years is a long time. We all know that trafficking victims need a significant amount of time often to decide whether or not they are going to file a lawsuit. The sad thing, from my perspective, is that we have a database actually of every federal case ever filed, and if any of you are interested in having access to that database, we are happy to share it. It is free. All you have to do is send me your Gmail account address, not your password, and we will make the database available to you. The reason it is password protected is because I think the database is very useful to pro bono attorneys, and it is very useful to all of us in the advocacy community, but it is also tremendously useful for defense attorneys. And so, we would like to not have defense attorneys using the database that we have collected at such great expense. So, only 135 cases, and I think we have a question.

Soojin Park: We have a question that just came in. So, it is: How do we find attorneys who are willing to take these civil cases on? We do not have any here. We have attorneys willing to do pro bono immigration work and legal services who can cover some other legal issues survivors have. We have not yet been able to engage pro bonos in this type of case. Do you have any thoughts?

Martina Vandenberg: That question makes me so happy because I can say two things. Number one, we have trained about 1,400 attorneys throughout the United States to handle these cases, and by these cases I mean civil cases and victim representation in criminal cases. So, we have done trainings all across the country. I would be happy to travel to any state to do a training for pro bono counsel. The other thing I will say is that if you contact us and say that you need a pro bono referral, many of the law firms that we have trained are large law firms that have offices scattered throughout the United States, and it may be the case that we have trained those lawyers in Washington D.C. that we may be able to access attorneys in other offices. And, we have done this actually quite a lot recently. We have trained attorneys in L.A., and then needed to call on their office in Denver. So, the trainings that we do are free, and we do them in-house at law firms, so if there is a law firm that you want to collaborate with, we are happy to come out and do a co-training with you. So, please feel free to get in touch with me about that.

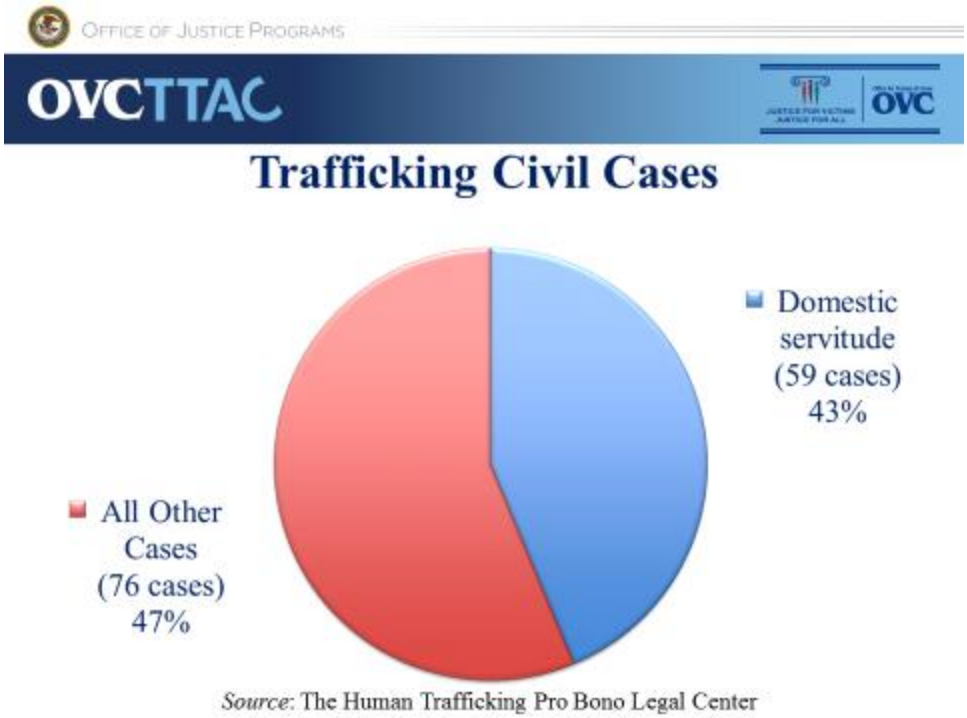
Soojin Park: The same grantee is asking, "Could we ask that when you train attorneys or law firms in a certain area, you could connect them with providers in those areas? An introductory e-mail would be great."

Martina Vandenberg: That would be terrific, and better yet, what I actually prefer to do is to do a co-training with the local NGO. So, that is what I have done in multiple places around the United States. So, in Atlanta, I did a training with a local provider, and we went to the law firm together. That way, the relationship that is built is a relationship between you and the law firm. I mean, ultimately, HT Pro Bono's goal is to be unnecessary, right? I mean, ultimately, our hope is that

your relationships with the pro bono attorneys will be strong enough that you can go to them directly, and make the referrals directly to them. But, until that glorious moment comes, we are happy to serve as a go-between, and we would be delighted to do training with you as well.

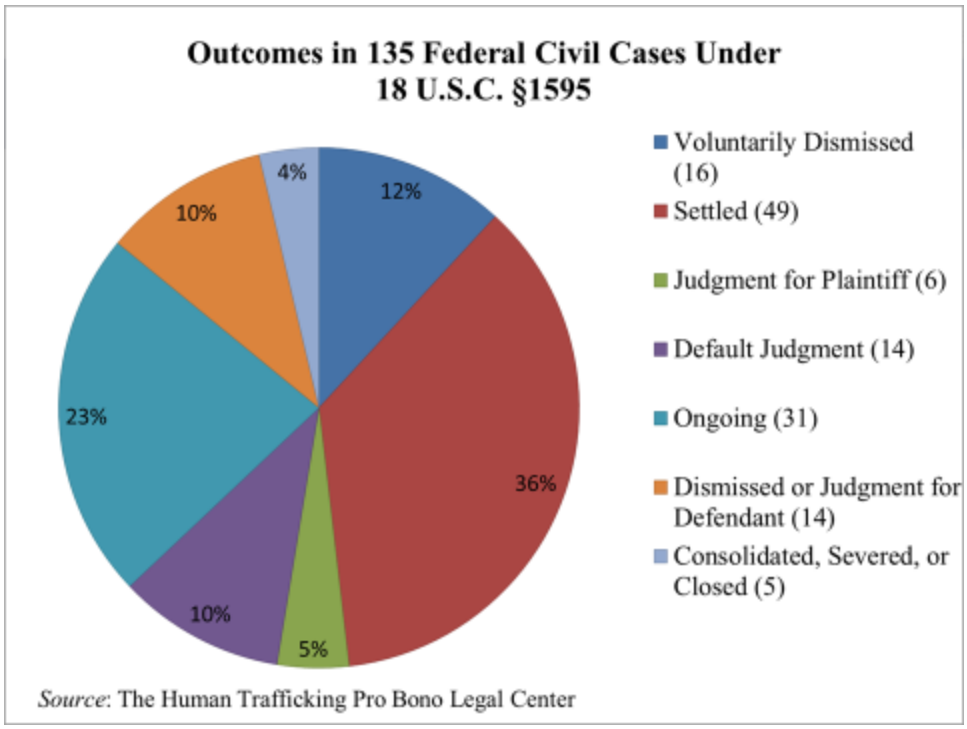
Trafficking Civil Cases

Martina Vandenberg: Okay. So, let me show you how the lay of the land is on these cases, because I think it is fascinating. When we look at our database and try and see what sorts of cases are being brought, one of the things that was incredibly striking to us is that, of the 135 cases that have been brought, only eight of those cases are for sex trafficking. And, if anybody wants to sort of comment here about why you think that is, I mean I have my own theories. One theory though is that the sex trafficking cases are much more likely to be prosecuted. Very, very few of the forced labor cases are prosecuted. So, when I talk to survivors who have been trafficked into the sex industry, what many of them will say to me is, "I do not want to do a civil case. Not interested in a civil case. I have a restitution order. I just want you to collect the restitution order. Can you please do that?" Or, alternatively, "I do not want to go to court. I do not want my family to know about this. I do not want anybody to know about this."



Martina Vandenberg: What we have managed to do on the forced labor side – and 127 of these cases are forced labor cases, which I think is pretty remarkable – what we have managed to do on the forced labor side is, in forced labor cases where we have very violent sexual assault, much like you would see on the sex trafficking side, the victims in those cases have the same concerns as victims who have been trafficked into the sex industry. And so, we have very good practice now in multiple jurisdictions. Much of it has been spearheaded by brilliant lawyers like Dan Werner and others, to bring these cases as Jane Doe or John Doe. And, although we cannot promise totally anonymity to the trafficking survivor, we can at least give her a fighting chance – or him a fighting chance that the case will proceed and that no one will be able to Google his or her name and know that he or she brought the case.

Martina Vandenberg: The other thing that I think is quite striking when we look at these cases is that many of them, 59 of them, so not quite half, but 43 percent of these cases, are for domestic servitude. And, out of those cases, probably about 29 are cases brought against diplomats or international organization employees, which is my favorite thing to do. I love doing diplomats. If you ever come up with a diplomat who needs to be sued, let me know. Interestingly enough, I mean, for the domestic servitude cases, a civil remedy may be the only remedy available to that victim, if the federal government does not want to do a prosecution, because, while the states are now moving into prosecuting trafficking cases, it is very rare, and almost unheard of, that the states actually do prosecution for forced labor. The states are focused pretty myopically on sex.



Outcomes in 135 Federal Civil Cases Under 18 USC §1595

Martina Vandenberg: So, I thought it would be interesting to go over how these cases end, because looking at this with the data I think echoes what we had in the earlier poll about this being a good experience for the survivors. Thirty-six percent of those cases, or 49 of them, settled. Settlement for our clients may actually be one of the best-case scenarios, because they settle. They decide. They decide how much they are willing to take. It really does put the sort of decision-making reins back in their hands. They are making the decisions. They are telling the lawyer what to do. I think it can be sort of very therapeutic if it is done correctly. I am not saying it is always done correctly. Sometimes it is not.

Martina Vandenberg: But I [unclear], particularly with foreign-born trafficking survivors, the foreign-born trafficking survivors need a T visa and a nest egg, because even with a T visa, you are still totally impoverished and may not be able to immediately hop back into the job market. And, frankly, you may not have the skill set or the language skills to jump into a job that actually can support you an your family, particularly if you are bringing a few derivatives into the country. And so, the nest egg that we can obtain through a settlement can be extremely important in helping trafficking survivors actually settle in the United States.

Martina Vandenberg: Now, 16 of the cases were voluntarily dismissed. Voluntarily dismissed is usually code for settlement, so I would argue that actually 55 of these cases settled. Voluntarily dismissed generally means we settled, but we are not admitting that we settled.

Martina Vandenberg: Judgment for plaintiff, only six cases, but those judgments and the default judgments, 20 altogether, are a little bit of a mixed bag. The beauty of settlement is that the defendant has to pay. The difficulty with judgments is that you have to fight. Just as you have to fight for a restitution order payment, you have to fight to get it paid. The cases that were dismissed are by and large cases where the defense was diplomatic immunity. So, we can talk

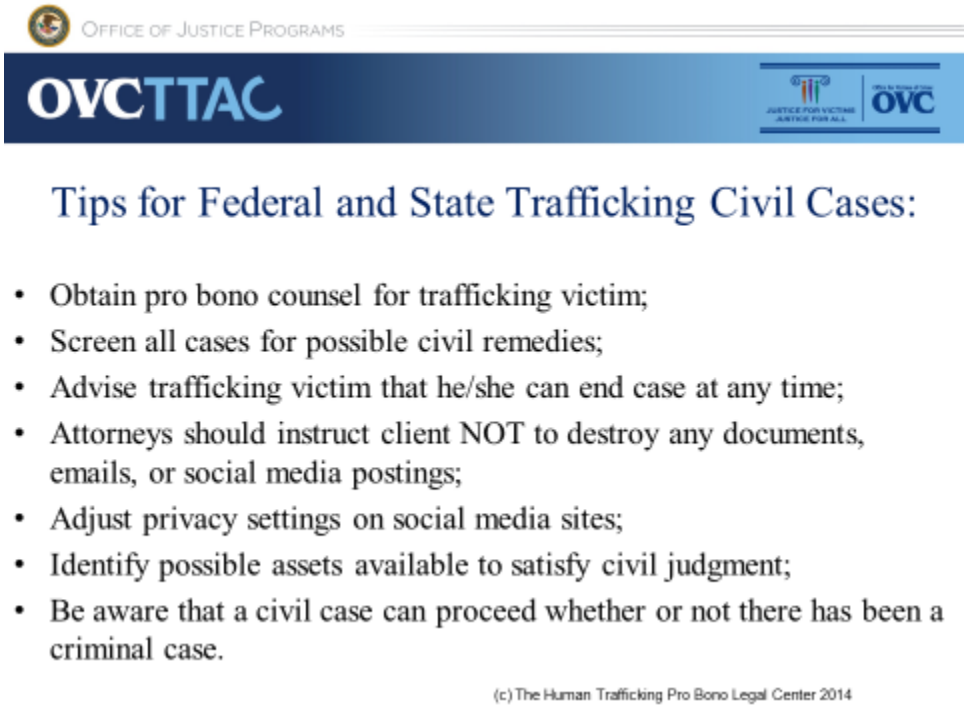
about diplomatic immunity if people are concerned about that, but dismissal for immunity is mostly the ground for dismissal in these cases.

Martina Vandenberg: So, I wanted to give you just a quick sense of the sorts of damages that we are obtaining in civil cases for trafficking victims, and I have a chart here that I actually want to highlight a case that is not on this chart. Many of you have been following the Southern Poverty Law Center's (SPLC) amazing litigation on behalf of Indian workers who were trafficked to the United States, purportedly to do skilled labor to repair the shipyards after Hurricane Katrina. And, the Southern Poverty Law Center, and Dan Werner in particular, have done really heroic work, yeoman's work, bringing multiple cases. When the first case was not actually accepted as a class action, the cases broke up and the Southern Poverty Law Center found lawyers for every single victim who wanted to proceed. The first case just ended yesterday, and the jury found Signal, the corporate defendant and the corporate defendant's labor brokers, guilty and awarded a judgment of $14 million, which I think is the largest judgment in history, certainly the largest one I have ever heard of. There is no guarantee that everyone is going to get $14 million, and certainly past performance is no promise of future decisions. But this is an incredibly important case, and SPLC deserves enormous kudos for actually managing – managing this case. And, the other thing that is really interesting is that the other cases are still in the pipeline, and moving through the pipeline, and they will probably be about 400 more plaintiffs. So, if five plaintiffs got $14 million, you are potentially looking at a billion dollars in damages. Who knows how that will work.

Case	Facts	Duration of Labor	Judgment
Aguilar v. Imperial Nurseries, 2008 WL 2572250 (D. Conn. May 28, 2008)	Twelve Guatemalan plaintiffs obtained lawful visas to work planting in North Carolina, but instead transported to Connecticut, forced to work at tree nursery for 78 hours a week and little pay. Passports confiscated and travel restricted--threatened with arrest, imprisonment, and deportation.	3 Months	$3,000/day Compensatory (Forced Labor) $6,000/day Punitive $300,000 Trafficking Damages **Total Awards Range from $371,000 to $827,000 per person**
Mazengo v. Mzengi, No. 07-756 (D.D.C. 2008)	Passport confiscated, forced to cook meals, clean, do laundry, and care for children. Forced to cook food for catering company. Cut off from contact with outside world. Threatened and never paid.	4 Years	$510,249.21 in treble damages under the Maryland Wage and Hour Law; $45,101.69 in compensatory damages for unjust enrichment; $19,961.64 in compensatory damages for fraudulent inducement; $250,000.00 in compensatory damages for emotional distress; $150,000.00 in punitive damages; $84,036.25 in attorney's fees **Total Award = $1,059,348.79**
Pena Canal v. de la Rose Dann, 2010 U.S. Dist. LEXIS 97856 (N.D. Cal. Sept. 2, 2010)	Peruvian Plaintiff promised high wage and private living space for housework. Instead had passport confiscated, threatened with deportation, worked 15 hours/day 7 days/wk cleaning, caring for three children, cooking, and cleaning houses for defendant's real estate business. Forced to sleep on living room floor and kept from communicating with family in Peru.	1 Year, 9 Months	Assumed hourly wage of $23.70. $340,746.75 wages (increased by labor code penalties; reduced by criminal restitution order of $123,740.34) $92,400 emotional distress $309,406.41 punitive **Total Award = $618,812.82**

Martina Vandenberg: I will highlight one case that is here on the screen, which is Mazengo v. Mzengi. This is a case actually against a diplomat, where a woman was held for 4 years and paid nothing. The typical case, her passport was taken away, etcetera, but if you look at the actual amounts that were awarded, it is treble damages for her back wages. So, the back wages were about $170,000, and this is one of those cases where we did bring in a Department of Labor

expert, the person who managed the prevailing wage database, who provided an expert report that provided the basis for the court to award this amount in back wages. It was very, very important. We also managed to get compensatory damages, and we also managed to get punitive damages. There are attorneys' fees listed as well. You can get attorneys fees in these cases. I have been doing these cases for more than a decade, and I have actually never collected any of the fees, but it is nice to have them ordered nevertheless. But, that gives you a sense of what kinds of damages are available.



Tips for Federal and State Trafficking Civil Cases

Martina Vandenberg: Some tips that I would sort of make to all of you, again, find pro bono counsel. And, as I mentioned earlier, if you are having problems finding pro bono counsel, I am happy, happy to help you and can put you in touch with your local firms in your area. It is easier on the coast. It is a little bit more difficult in the middle, but I am trying to now sort of focus the attention on the middle of the country. And, there are some parts of the United States that are very, very well developed. So, for example, Illinois and Chicago have an incredibly robust pro bono practice with all of the firms that are there. So, there is really amazing work being done by large firms that can actually afford to absorb these, in some cases, million dollar legal fees that are being generated.

Martina Vandenberg: I would recommend that the non-governmental organizations doing this work, and all the advocates doing this work, actually screen your cases for possible civil remedies, to at least broach the subject with trafficking survivors in your client group to determine whether or not these individuals have even thought about the fact that they can recover their back wages in a forced labor case, or that they can sue their traffickers. Or, because of this financially benefitting piece, with the amendments to the trafficking law, they can actually sue other parties. I mean, the whole construct now of civil sex trafficking cases has changed, because we are not suing a judgment-proof trafficker, who probably squandered all the money already.

We may actually be able to sue the hotel, because if you can show that the hotel financially benefitted and knew, or should have known, that there was trafficking occurring in the hotel, it means that you may actually have a defendant that can be sued where you might actually, at the end of the day, recover some assets.

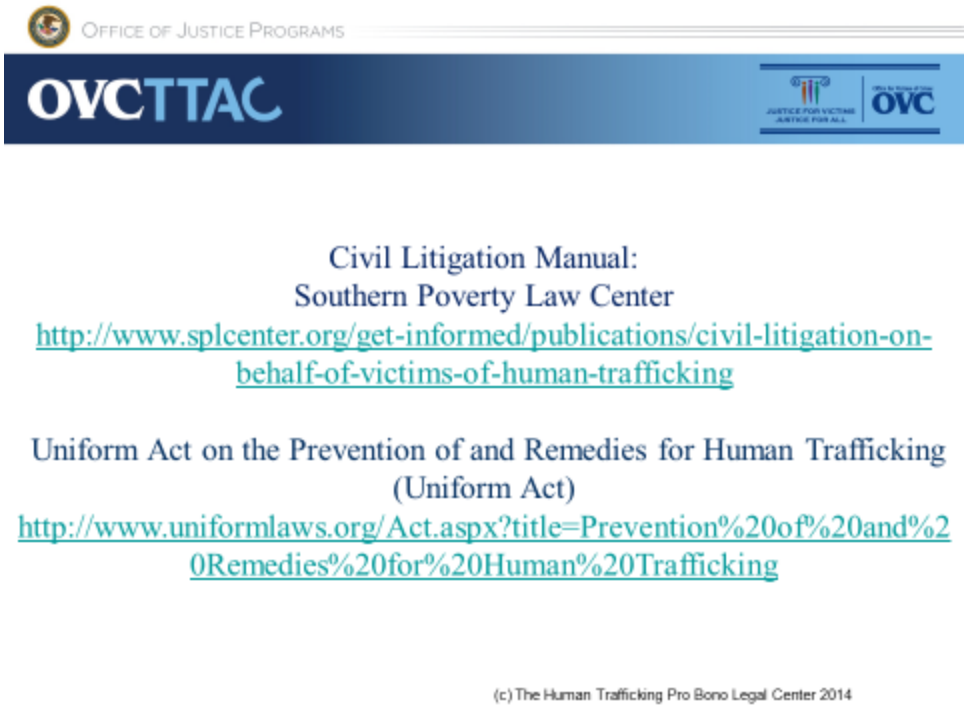
Martina Vandenberg: The other thing that I think is really important for trafficking survivors to know is that they can end the case whenever they want to. Right? If they decide that discovery is too difficult or too intrusive, if they discover that their families are facing repercussions at home, if they are exhausted and they just want to move on, they can end the case at any time. They can dismiss the case, or they can settle the case. And, the lawyers work for them, so the lawyers really have to follow the client's lead.

Martina Vandenberg: One important thing that we are finding is that the trafficking survivors need to know that they cannot destroy any documents. If the client has any thought that he or she may proceed to civil litigation, they need to hold on to absolutely everything.

Martina Vandenberg: And, the defendants are becoming very, very savvy at this point in a very problematic way, which is they are using Facebook against us. And so, what the defendants now do, when I walk into a settlement conference, the first thing the defendants do is pull out – print out from the Facebook page of our clients, and they say, "Here are the postings that your client made while she was supposedly in captivity. Here are the postings she has made since." Talking about how this is all, you know, wonderful that she is in the United States. Beware of Facebook, I have to say, as somebody who does civil litigation, Facebook is the enemy. And, at a minimum, your client should adjust the privacy settings so that the traffickers cannot track him or her on social media. But you should also be very careful to either get a snapshot, the pro bono attorney should get a snapshot of what that Facebook page looks like so you can store it. Or, alternatively, you should tell your client to destroy nothing. You cannot destroy anything once you sort of decide to proceed with civil litigation.

Martina Vandenberg: The other thing to keep in mind, and I have seen this happen now, is that the defendants can be very savvy. And we have seen cases actually where the defendants have created bogus Facebook pages, and set up the bogus Facebook page, in order to convince those who are concerned about the individual that everything is just fine and that they are very happy in the home. I think this happens in domestic servitude cases. Again, if your client does not speak English or read or write in any language, the likelihood that they are using Facebook is slender. But you have to be aware of the possibility that the defendants may have actually created the page.

Martina Vandenberg: And then, lastly, I have already mentioned this, you can do a civil case whether or not there has been a criminal case.

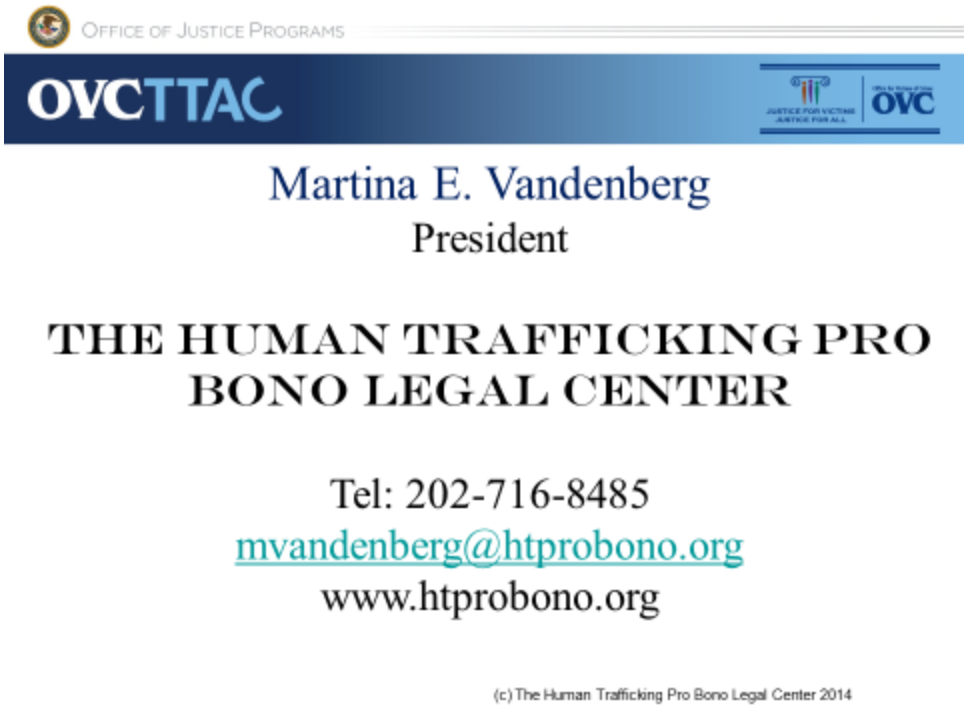


Civil Litigation Manual: Southern Poverty Law Center

Martina Vandenberg: So, as I mentioned, the real geniuses behind civil litigation are the folks at the Southern Poverty Law Center. And then, Kathleen Kim, who is now the Police Commissioner in Los Angeles, is also one of the major pioneers in this area. But the Southern Poverty Law Center has an actual publication, an actual manual, a kind of "bible" on how to do civil litigation. It was last published in 2008. I am happy to report that the revised edition is almost done. I just had the entire site check done for the revised edition, so it should be out soon, and that new manual will have sort of a lot more information about how to do these cases.

Uniform Act on the Prevention of and Remedies for Human Trafficking (Uniform Act)

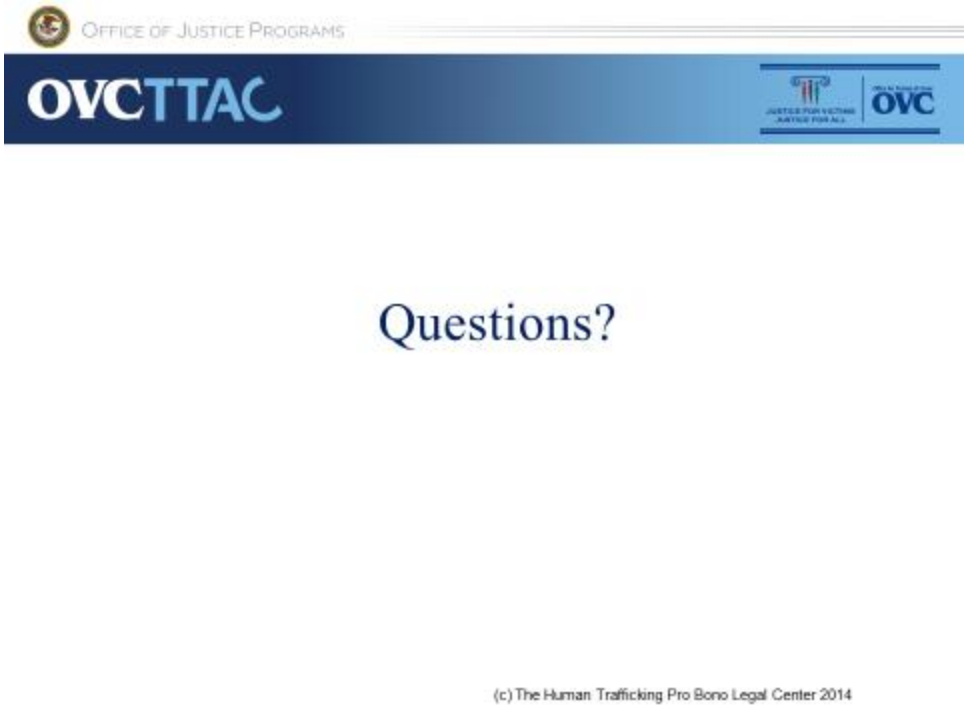
Martina Vandenberg: And then the Uniform Act is also available if you are interested in the Uniform Act.



Martina E. Vandenberg, President, The Human Trafficking Pro Bono Legal Center

Martina Vandenberg: So my contact information is on the last slide. I have left a little bit of time, 4 minutes, for questions. I do not know if anybody has any other questions. The one thing while we are waiting for questions to come in is I just want to mention that on our website, you can get a copy, and again it is free for download, you can get a copy of our report on mandatory restitution for trafficking survivors and whether or not restitution is actually awarded in these cases.

Martina Vandenberg: And then the second thing I just wanted to mention is one area where we are also doing pro bono assistance to trafficking survivors is where trafficking survivors need criminal – I am sorry – where they need vacatur from criminal conviction. A lot of the survivors, particularly those held in the sex industry, have criminal convictions all across the country. Some of them have them in eight or nine states. And so we have been working with really wonderful organizations, like Legal Aid in New York and the Urban Justice Center's Sex Workers Project in New York, and creating a database of all the vacatur statutes. So if you have clients who have criminal convictions on their records as well, those are also referrals that can be made to try and undo those convictions. As many of you know, if you have a criminal conviction on your record it is almost impossible to get a job or to move on with your life.



Martina Vandenberg: Okay, well, it does not look like any questions are coming in.

Soojin Park: The grantees are saying thank you, and it was very informative. So, if you do have any questions after this Webinar, you can feel free to e-mail them to humantrafficking@ovcttac.org, and we will be sure to pass them on to Martina. I want to thank you all for joining us today. When you end today's session you will see a pop-up box with an evaluation form. Please take the time to fill out the evaluation so we can learn and improve on our Webinar series. Just a note here, all of our TA Webinar recordings and the PowerPoints for them are available online on the Human Trafficking Learning Community, so this specific Webinar will be available sometime in the next month. We will not have our monthly Webinar next month due to the Grantee Meeting, but we look forward to seeing some of you in person then. Our next Webinar is scheduled for Thursday, April 16. Thank you all for attending today.

[End.]