

Criminal Record Relief for Survivors of Human Trafficking in New York ***By Kate Mogulescu***

The 50-year-old woman sits across the table from the clinic team. She has come to the Criminal Defense & Advocacy Clinic at Brooklyn Law School for criminal record assistance. She just lost her job of nearly 20 years and fears how background checks will take her out of the running for the range of jobs for which she is qualified. As we begin to talk about what appears on her criminal history – a series of cases from the mid-1980s – the raw emotion emerges.

This woman was a victim of human trafficking at the time of her arrests, years before the vocabulary or legal framework existed. She has not told anyone, including her family, what happened to her. She feels fortunate that her entry into the workplace came before what are now ubiquitous and unavoidable criminal history checks. She was arrested and convicted of offenses eight times when she was 16 and 17 years old. The final conviction on her record is a violent felony, Robbery in the Second Degree. After a brutal beating by her exploiter for not making enough money for him in prostitution, she and another victim attempted to steal a woman's purse in the bathroom at Port Authority. They struggled over the purse, causing injury to its owner. The police pursued and arrested them right away. Both ended up sentenced to state prison. Because of the conditions of her childhood and the extensive neglect she endured, this woman recalls that as a teenager in state prison, she felt cared for by the older women who were serving life or long term sentences. Sitting with us in our office, she explains that was the first time in her life she felt supported or nurtured.

Decades later, she sought assistance sealing her convictions under NY's relatively new sealing law, C.P.L. § 160.59, only to learn she was excluded because her conviction was a violent felony and she had more than 2 convictions overall. She came to the clinic because we specialize in vacating convictions for human trafficking survivors under C.P.L. § 440.10(1)(i), relief that became available in 2010. In our office, we explored what happened to her in the 1980s, as we must to determine her eligibility for relief. Everything rises to the surface – fear, shame, anger, sadness, guilt. Each emotion is compounded as we explain that her robbery conviction is ineligible to be cleared under existing law, which limits record clearing to prostitution offenses.

This woman, like so many other survivors of violence and exploitation, has carried the weight of her criminal record for years. At this point, the record and the barriers it creates nearly overshadows her experience being forced into commercial sex as a homeless minor.

Criminalized survivors shoulder the burden of their records, their imprisonment, their punishment, in ways we can't begin to quantify. However, over the last many years, state law has begun to recognize this phenomenon. In 2010, New York became the first state to allow survivors of human trafficking to vacate criminal convictions for prostitution offenses imposed as a result of their trafficking. This was groundbreaking, brought on by the thoughtful and deliberate advocacy of sex workers' rights advocates across the state.

Since New York passed its law, almost every state in the country has followed suit and enacted some form of relief for human trafficking survivors with criminal records. Last March, I co-authored a report that analyzes these state laws and grades each state on the relief it offers trafficking survivors. The laws vary greatly. Many are too limited in scope to offer meaningful relief, such as applying to only juvenile records or only certain charges. Some impose unnecessary conditions or obstacles, like waiting periods or high fees, such that the process becomes too burdensome to matter. As the laws stand now, nearly all of the states receive failing grades. New York earned a 63 out of 100 possible points, mostly because of the restriction that relief is only available for prostitution offenses.

Although this is a relatively new area of law with respect to human trafficking, advocates have been fighting for years to reduce the harm caused by criminalizing survivors of violence more broadly. New York saw a critical, and hard fought victor, last year in the passage of the Domestic Violence Survivors Justice Act (DVSJA), which allows judges to depart from mandatory sentencing on felony cases where domestic violence was a significant contributing factor in the commission of the offense. The DVSJA also creates a mechanism for incarcerated domestic violence survivors to seek sentence modifications.

Specific to human trafficking, Senator Jessica Ramos and Assembly Member Richard Gottfried have introduced a bill that would address the shortcomings in New York's criminal record relief law. S04981/A06983 expands the relief available to survivors of human trafficking to include all criminal convictions resulting from their trafficking and exploitation, rather than just prostitution offenses. The bill also protects the confidentiality of the information provided to the court when survivors seek post-conviction relief.

The amendment to the law also makes clear that trafficking survivors do not need to prove their "rehabilitation" in order to be eligible for criminal

record relief. This is much more consistent with the underlying justification for post-conviction relief. S04981/A06983 affirms that when a court grants a survivor's motion to vacate a conviction, it is on the merits not because the survivor has earned the relief by showing good conduct after their victimization. One other improvement is that the new version allows survivors to consolidate motions for relief from different counties into one proceeding, with the prosecutor's consent. This will streamline the process for many survivors and lessen the burden of seeking relief in multiple places. S04981/A06983 offers critical protection of people arrested because of their compelled involvement in the commercial sex industry or because of their exploitation in other labor sectors.

What resistance do these efforts encounter? None that is persuasive. Predictably, the impulse of both lawmakers and law enforcement is to lament that this may open the flood gates to a sea of unfounded claims from people purporting to be survivors. But the truth of the matter is that this has not, and will not, come to pass. In fact, our experience under the original law has been the opposite. Most trafficking survivors remain unaware of criminal record relief and are reluctant to seek relief because of their profound and well-earned distrust of the criminal legal system.

Even if people who aren't eligible seek relief under an expanded law, their motions will be denied. This bill, like the DVSJA, simply empowers courts to decide survivors' motions. The criminal legal system constantly assesses, evaluates and reconciles complicated situations. We should not, and cannot, shy away from important reform that involves undoing harm or reducing sentences because of a small chance that people will seek to use the law incorrectly and opportunistically.

Last year, the Assembly passed A06983 overwhelmingly, but the bill didn't get to a floor vote in the Senate. Promisingly, at the end of last legislative session, District Attorneys Cyrus Vance and Eric Gonzalez both pledged their support for the bill. Using our recent report's ranking system, if New York passes S04981/A06983, its score will go from 63/100 to a 99/100. More important than a score that would put New York in the lead, the reform is critical for survivors like the woman sitting in our office. She has worked tirelessly for over 30 years to move past her victimization. At each turn, her criminal record looms over her. Under S04981/A06983, she would be able to finally seek relief in court.

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Presumptive ADR in the New York State Unified Court System CLE

By Crystal R. Villasenor

On December 2, 2019, the NYWBA hosted an informative CLE, "**New York State's Presumptive ADR Initiative - Structure, Timing and Accomplishments to Date.**"

In her State of Our Judiciary speech on February 26, 2019, **Chief Judge Janet DiFiore** declared, "The time is right to provide litigants and lawyers with a broader range of options to resolve disputes without the high monetary and emotional costs of conventional litigation. We consider this vision of ADR to be an integral part of our Excellence Initiative, and we are excited to work with the Bar to make it a reality."

Lisa M Courtney, Esq., the Statewide ADR Coordinator of the NYS Unified Court System, moderated the impressive panel, including: The **Hon. Deborah Kaplan**, Administrative Judge, Supreme Court, New York County; The **Hon. Anthony Cannataro**, Administrative Judge, Civil Court, of the City of New York; The **Hon. Rita Mella**, Surrogate Court, New York County; The **Hon. Carol Sherman**, Chief Magistrate and Counsel of the New York City Family Court; **Lisa Denig, Esq.**, Special Counsel for ADR Initiatives, Office of Deputy Chief Administrative Judge George J. Silver for NYC, and **Joan Levenson, Esq.**, Principal Law Clerk to Administrative Judge Deborah A. Kaplan.

The panelists spoke about the various ADR programs that have been in place in various courts throughout New York State, for the past several years. The current programs include mediation referrals in the Surrogates Court and Matrimonial Court, a robust ADR program in the Commercial Division, Resolution Parts in the Civil Housing Courts, and judicial settlement conferences. The panelists also spoke about future ADR initiatives in their respective courts. For example, Judge Carol Sherman indicated the Bronx Family Court implemented a Presumptive ADR program where litigants in custody and visitation cases referred to mediators from a court approved roster. If no resolution is made after 30-45 days, then the case is placed on the trial track – eventually this program will be implemented in all other counties in New York State Family Court.



The ADR initiative's end result is to reduce the overwhelming caseloads across the state for represented and pro se litigants from diverse backgrounds on a wide range of cases throughout New York State. Judge Mella said it best, "the courthouse should be a place where discourse should be resolved in an appropriate manner, which does not always necessarily mean litigation."

The program was well attended by Judges, court personnel, and attorneys.

The program was co-sponsored by the NYWBA: ADR Committee – co-chaired by **Michele Kern-Rappy**, **Lisa M. Courtney**, and **Leona Beane**; Litigation Committee – co-chaired by **Sara Crasson** and **Nidhi Shetye**; Diversity Committee – co-chaired by **Yasmin Dwedar** and **Ernestine Mings**; Matrimonial and Family Law Committee – co-chaired by **Nina Gross**, **Matthew Goodwin** and **Olivia S. Lee**; Trust & Estates Committee – co-chaired by **Leona Beane**, **Tzipora Zelmanowitz** and **Loretta A. Ippolito**; Civil Courts Committee – co-chaired by **Melissa G. Ephron-Mandel**, **Judith Rifkin**, **Crystal R. Villasenor** and **Hon. John Wang**; Domestic Violence Committee – co-chaired by **Hon. Amanda B. Norejko**, **Laura Russell** and **Shani Adess**; and NYCLA: Civil Practice Section.

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January is Human Trafficking Awareness Month. There would be no better time for the New York State legislature to pass S04981/A06983 and, consistent with other contemporaneous efforts, work to reduce the harm caused to survivors by their own criminalization.

For more information on how to support the effort to pass S04981/A06983 this year, contact kate.mogulescu@brooklaw.edu.

Kate Mogulescu is an Assistant Professor of Clinical Law at Brooklyn Law School, where she directs the Criminal Defense & Advocacy Clinic. Her work and scholarship concentrate on gender issues in the criminal legal system, with a focus on sex work and human trafficking. Prior to joining Brooklyn Law School, Kate spent 14 years as a public defender with The Legal Aid Society's Criminal Defense Practice. Kate has founded several projects that attempt to address the criminalization of vulnerable and exploited people, including the Exploitation Intervention Project (2011), the Survivor Reentry Project (2016) and the Human Trafficking Clemency Initiative (2017). Kate received her J.D. from Yale Law School and B.A. from the State University of New York at Binghamton.

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Judge Rosado noted that even though judges often issued temporary restraining orders to protect the assets of an Incapacitated Person, these do not offer the same protection as an order of protection, and for that reason legislation is currently pending to authorize guardianship judges to issue Orders of Protection, upon application or on the court's own motion, to protect those people that need it.

At the conclusion, the judges gave other tips for practice. All judges agreed that practitioners should be mindful of emails to the court and court attorneys as well as ex-parte communications. While technology and emails are a resourceful and helpful tool, the court shall not be included in emails among parties regarding ongoing guardianship matters. The courts are overburdened with cases and cannot waste time and resources in reading and addressing these communications. However, if the court does need to be contacted, all communication should include the Index number and the Court Examiner should be copied.

They also spoke about fee applications and noted that when making one, practitioners should be careful to itemize time and task so the court can easily look at each task performed without trying to segregate and determine the appropriate value for the work done.