

Custody Part 2: VAWA Confidentiality and Family Courts

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Workshop III, Session A

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Introduction

- Judge Susan Breall
 - San Francisco County, California
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Learning Objectives

By the end of this training, you will be better able to:

- Implement case strategies that anticipate and prepare to respond when opposing party seeks VAWA confidentiality protected information
- Submit motions, make arguments, and introduce evidence in support of a motion in limine
- File and win motions to quash discovery requests for VAWA confidentiality protected information from a victim's VAWA or U visa case

VAWA Confidentiality: Overview

VAWA Confidentiality Prongs

- **Non-Disclosure:** DHS, DOJ and the State Department cannot disclose VAWA information to anyone
 - Helps victims with VAWA confidentiality protected cases filed
 - Immigration enforcement/deportation protection upon filing
- **Abuser-Provided Information:** DHS, DOJ and the State Department are barred from taking action against a victim based *solely* upon information provided by abusers, including family members of abusers
 - All victims
- **Location Prohibitions:** Enforcement locational prohibitions
 - All persons

Prong 1: Protecting Information About A Victim's Immigration Case

- Prohibits disclosure of any information about
 - The existence of a VAWA, T or U visa case
 - Information contained in the case file
- Helps victims who have suffered
 - Battering or extreme cruelty
 - Human trafficking
 - Sexual assault, stalking and other U visa listed crimes
- Disclosure prohibited TO ANYONE, not just the perpetrator

Disclosure Exceptions

- Limited disclosure in narrow circumstances
 - Disclosure to law enforcement or national security officials
 - Solely for a legitimate law enforcement or national security purpose; and
 - In a manner that “protects the confidentiality of such information.”

Other exceptions to disclosure

- Judicial review of the victim's immigration case (*Hawke v. U.S. Dep't of Homeland Security*)
- Benefit granting or public benefits purposes
- Congressional oversight and data collection
 - Statistical data collection
 - The chairman and ranking member of the judiciary committees of the House and Senate for Congressional oversight
 - Limited to closed cases and
 - In a manner that omits personal identifying information and protects victim confidentiality

Hawke v. Dep't of Homeland Security

- First federal case on VAWA Confidentiality
- VAWA confidentiality provisions extend to those whose qualifying immigration application cases were denied when such denials were not based on the merits. Procedural denials or withdrawals of applications continue to receive the full scope of VAWA Confidentiality eligible protection.
- The exception to VAWA confidentiality for a “judicial review of a determination” extended only to immigration reviews and not to civil or criminal court proceedings

Prong 2: Relying on Information Provided by Abuser

- The government cannot gathering and/or use information provided by an abuser, trafficker, crime perpetrator, or family member of any victim to an enforcement action or make any adverse determination
- The victim does not have to have filed the qualifying application to be eligible

Prong 2: DHS cannot rely on information *solely* provided by the perpetrator

- Information provided ***solely*** by prohibited sources **must** be independently corroborated by DHS
 - DHS Directive (11/1/2013): Adverse information about the victim from a prohibited source should be treated as “inherently suspect”
 - Information can only be used if verified in
 - Immigration database, public records, government records, criminal records.
 - Must complete required ICE form filed in the victim’s case documenting publicly verified information(ICE Policy 2007)
- Prohibited Sources (ICE Policy Memo 1/22/2007):
 - Perpetrator, abuser, and/or trafficker or
 - Perpetrator’s family members living in the same house

Prong 2: DHS cannot rely on information *solely* provided by the perpetrator

- VAWA 2005- corroboration of adverse information can only be made through objective sources such as:
 - Court records, government databases, affidavits from law enforcement officials, and previous decisions by DHS or DOJ personnel

Prong 3: Locational Prohibitions

- Enforcement actions are not to be taken against victims at
 - A shelter
 - Rape crisis center
 - Supervised visitation center
 - Family justice center
 - Victim services program or provider
 - Community based organization
 - Courthouse in connection with any
 - Protection order case, child custody case, civil or criminal case involving or related to domestic violence, sexual assault, trafficking, stalking

Sensitive Location Certificate of Compliance

- INA § 239(e)
- If any part of the enforcement action leading to the victim being brought before an immigration judge included
 - Relying upon abuser-provided information
 - Enforcement action taken at prohibited location
- DHS is required to file a certification in the immigration case that VAWA confidentiality protections were not violated
- The Immigration Judge is to dismiss the case against the immigrant victim if VAWA confidentiality violations occurred

VAWA Confidentiality and Enforcement at Sensitive Locations

- DHS also prohibits enforcement actions “near sensitive community locations such as schools, places of worship, and funerals or other religious ceremonies.” (*DHS Field Guidance on Enforcement Activities in and Around Sensitive Locations*, 2008)
- Congress expects that immigration enforcement officials should proceed cautiously when making an arrest at a sensitive location (ICE Policy 2007)

VAWA Confidentiality Violations

- Each violation
 - Disciplinary action and/or
 - \$5,000 fine for the individual
- Dismissal of the immigration proceeding against the non-citizen
- Violations also include making a false certifications in a Notice to Appear

VAWA III (2005)- Prohibition of Identification Document Disclosure

- §827: Victims of battery, extreme cruelty, domestic violence, sexual assault, stalking or trafficking
 - Disclosure of information about their address on identification documents, like driver's licenses, is prohibited
 - Recognizes that confidentiality of addresses is key to victim safety

When does confidentiality protection end?

Limitation to disclosure ends when application for relief is denied based on **substantive grounds** and all opportunities for appeals have been exhausted.

VAWA Confidentiality and Enforcement Case Strategies

DHS VAWA Confidentiality Computer System

- Directs use of new “red flag” “384” computer system to identify victim who have already filed for or have been granted victim-based immigration relief
- Reminds immigration officers, agents, attorneys about immigration law protections for
 - Victims of domestic violence
 - Crime victims
 - Human trafficking victims

Preventative Strategies

- File skeletal immigration applications
- Give survivor copy of DHS receipt proving that a VAWA, T or U case was filed
- Object to discovery and cross examination
 - Asking
 - about the *existence of* VAWA/T/U case
 - for information contained in VAWA/T/U case
- Use DHS policies to advocate when violations happen
- Train courts and agency personnel at prohibited locations

Scenario: What do you do when...

Undocumented survivor abused by her lawful permanent resident spouse goes to court seeking a protection order. Immigration enforcement officer enters the courtroom confirms with the abuser the identity of the survivor, her child and a witness and seeks to arrest all three in the protection order courtroom.

When Violations Happen

- **Advocate on the spot- provide**
 - proof of victimization,
 - Copy of the statute
 - DHS enforcement policy
 - DHS complaint system
 - DHS 384 system
- **Collect information about the violating officer**
 - Name
 - Agency
 - Badge Number
- **Work it up the chain to a supervisor**
- **File a formal complaint-**
 - penalties of up to \$5000 per incident against the violating officer individually
 - Also disciplinary actions
- **Advocate for release from detention/jail, termination of immigration proceedings, granting immigration relief**
- **Call ICE Hotline 1-888-351-4024**

VAWA Confidentiality in Custody Cases

Preventing Discovery & Disclosure Of Immigration Case Existence and Contents

(Interactive Exercise)

- Attendees divided into 4 groups
 - Motion In Limine to stop discovery of immigration case file and testimony about existence of case
 - Group A argument in support of Motion in Limine
 - Group B argues that case existence and contents discoverable
 - Introduce evidence in support of Motion
 - Group C and D identifies and introduces evidence

Tools to Use In Family Court

- *Hawke v. Dep't of Homeland Security* factsheet
- Sample Motion in Limine and Brief
- Government Memoranda and Factsheets
 - All DHS Policy Memo (11/1/2013)
 - ICE VAWA Confidentiality Memo (1/22/2007)
 - INS VAWA Confidentiality Memo (5/5/1997)
 - EOIR Procedures for Immigration Judges (1997)

Judge Breall's Courtroom

- Group A argues motion in limine
- Group B opposes
- Judge Breall presides and rules

Judge Breall's Courtroom

- Group C and D take turns
 - Introducing of evidence in support of motion in limine before Judge Breall
 - Judge Breall rules on admissibility of the evidence

VAWA Confidentiality Case Strategies

Rule 11 Sanctions

- Designed to deter malicious behavior, abuses and bad faith acts by
 - Attorneys and pro se parties
- Striking pleadings, written motions or other papers and
- Disciplinary sanctions
- When the claims, defenses or legal contentions are meant to
 - Harass
 - Cause unnecessary delay or
 - Increase the cost of litigation

Threats: Deportation and Criminal Prosecution

- An attorney who threatens criminal prosecution to a person involved in the same civil case commits moral turpitude, and the attorney's belief in the person's guilt is no defense, and not even a mitigating factor
- Threatening criminal prosecution in order to force a settlement of a civil action is illegal, improper and unprofessional

VAWA Confidentiality: Make your Record

- Decide if you want to raise survivor's immigration status as part of your case
- Use motion in limine to offensively prevent discovery or disclosure protected case
- If raised by perpetrator
 - object and make VAWA confidentiality arguments
- Make court aware of case law and memos and offer to brief the issue
- If not granted, create record for appeal ask for specific findings and conclusions of law

Criminal Court Discovery of VAWA Confidentiality Protected Information

- Only U visa certification by police, prosecutor, judge discoverable in state court proceeding
- Fill in after conversation with Judge Breall

Technical Assistance and Materials

- Power Point presentations and materials for this conference at www.niwap.org/go/NOLA
- **NIWAP Technical Assistance:**
 - Call (202) 274-4457
 - E-mail niwap@wcl.american.edu
- Web Library: www.niwaplibrary.wcl.american.edu

Questions



Evaluations



Thank you!