

UTILIZING VAWA CONFIDENTIALITY PROTECTIONS IN FAMILY COURT PROCEEDINGS

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A. Overview of VAWA Confidentiality Protections²

A number of federal and state laws protect the confidentiality of information relating to domestic violence and sexual assault victims by restricting the disclosure of information collected by victim service providers and state and federal agencies.³ Congress created VAWA Confidentiality protections to prevent abusers and crime perpetrators from using immigration enforcement officials, and information provided by victims to the government in support of their VAWA related immigration cases, to abuse non-citizen victims. VAWA Confidentiality and Victim Safety Provisions provide three types of protection to immigrant victims of violence:⁴

- “Nondisclosure provisions” protect the confidentiality of information an immigrant victim provides to DHS, DOJ, or the Department of State to prevent abusers, traffickers and crime perpetrators from obtaining any information about the existence of the case, outcomes in the case, or information contained in the case and using the information to harm the victim, locate her or interfere in the adjudication of the victim’s case.⁵

¹ The authors wish to offer special thanks to the National Immigrant Women’s Advocacy Project’s talented legal interns Lucia Macias, Mojisola Ahonsi, and Krisztina Szabo from American University Washington College of Law without whom whose tireless work this chapter would not have been possible.

² For statutes, legislative history, articles, bench briefs, sample motions and other materials on VAWA confidentiality go to: NATIONAL IMMIGRANT WOMEN’S ADVOCACY PROJECT WEB LIBRARY, *VAWA Confidentiality*, <http://niwaplibrary.wcl.american.edu/vawa-confidentiality>; see also LESLYE ORLOFF, *VAWA Confidentiality: History, Purpose, DHS Implementation and Violations of VAWA Confidentiality Protections*, in EMPOWERING SURVIVORS (2013), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/september-20-21-2012-new-orleans-la/vawa-confidentiality/vawa-confidentiality-chapters/Ch3-SA-Man--Confidentiality-MANUAL-ES.pdf>; see also Leslye Orloff, *VAWA Confidentiality*, in BREAKING BARRIERS, available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/tools/3.2_BB_IMM_VAWAConf_Confidentiality-Breaches-MANUAL-BB.pdf

³ For a state by state chart on the range of confidentiality protections available in each state see Laura Waters, Spencer Cantrell and Leslye E. Orloff, *States Confidentiality Statutes* (October 6, 2014), available at: <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-tool-stateconfstatutes/>. See also, Kilpatrick Townsend & Stockton LLP, Laura Waters, Leslye E. Orloff and Rocio Molina, SERVICE PROVIDER CONFIDENTIALITY SAFEGUARDS: BEST PRACTICES (June 16, 2014) available at <http://niwaplibrary.wcl.american.edu/pubs/service-provider-confidentiality-safeguards/>

⁴ IIRIRA § 384, 8 U.S.C. § 1367; U.S. Department of Homeland Security, Instruction 002-02-001, Implementation of Section 1367 Information Provisions (November 7, 2013) available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>; U.S. Department of Homeland Security, DHS System Number: 002-02, Implementation of Section 1367 Information Provisions (November 1, 2013) available at <http://library.niwap.org/wp-content/uploads/2015/pdf/CONF-VAWA-Gov-DHSImpSection1367-11.1.2013.pdf>

⁵ IIRIRA § 384 (a)(2); 8 U.S.C. § 1367(a)(2).

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- “Source limitations” prevent immigration enforcement agencies from using information provided solely by an abuser, trafficker or U visa crime perpetrator, a relative, or a member of their family, ⁶as a basis for adverse immigration action against an immigrant victim. Adverse actions prohibited include but are not limited to denial of immigration benefits, initiation of and enforcement action against the victim, detaining or removing the victim. These protections apply whether or not she has ever filed or qualifies to file for VAWA related immigration relief.⁷
- “Enforcement limitations” prohibit enforcement actions at any of the following locations: domestic violence shelters; rape crisis centers, victim services programs; family justice center or supervised visitation center. Enforcement actions are prohibited at courthouses, or in connection with the appearance of the victim at a courthouse, if the victim’s appearance is related to a protection order case, a child custody case or other civil or criminal case related to domestic violence, sexual assault, trafficking, or stalking. If DHS undertakes any part of an enforcement action at any of these locations, it must disclose this fact in the Notice to Appear and in immigration court proceedings and must certify that such action did not violate section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).⁸

Violations of VAWA confidentiality non-disclosure rules create serious, even life-threatening dangers to crime victims. Violations also compromise the immigrant victims’ trust in the safety and efficacy of services intended to help them, and undermine their willingness and ability to seek justice system protections. In violating VAWA confidentiality, authorities may unknowingly aid crime perpetrators to retaliate against, harm and manipulate victims, and to evade or undermine criminal prosecutions.

Perpetrators of domestic and sexual violence are actively and continually engaged in efforts to exert power and control over and retaliate against immigrant victims who take steps designed to free themselves from abusive relationships. When victims file for immigration relief, custody, or protection orders, leave the family home, and/or seek help to end the abuse, perpetrators retaliate including by stalking victims, ongoing violence, using immigration related abuse and other power and control tactics.⁹

There are two primary issues concerning possible danger to the victim if VAWA confidentiality protected information about any immigration case a victim may have filed is released to the perpetrator either by government officials or through family court discovery. First, any information about the existence of a VAWA confidentiality protected case and/or release of information contained in the case could be used by the perpetrator to retaliate against the victim. This retaliation could take the form of physical and sexual abuse, psychological abuse,

⁶ Memorandum from Paul W. Virtue, Acting Executive Associate Commissioner, Office of Programs, to all INS Employees, *Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRIRA Section 384* (May 5, 1997), (on file with author) available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/government-memoranda-and-factsheets/c_VAWAConf_DHSGuidanceSec%20384_05.05.97_FIN.pdf (hereinafter “Virtue memo”).

⁷ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [hereinafter IIRIRA], Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) § 384 (a)(1); 8 U.S.C. § 1367(a)(1). DHS has not come out with an official interpretation of what constitutes an adverse determination of admissibility or deportability.

⁸ IIRIRA § 384 (a)(2); 8 U.S.C. § 1367(a)(2).

⁹ See Krisztina E. Szabo, David Stauffer, Benish Anver, and Leslye E. Orloff, Early Access to Work Authorization For VAWA Self-Petitioners and U-Visa Applicants 22 (February 12, 2014) available at http://niwaplibrary.wcl.american.edu/pubs/final_report-on-early-access-to-ead_02-12/ (56.5% of VAWA self-petitioners and U visa domestic violence victims report ongoing threats, attempts and incidents of physical and sexual assault while their immigration case is pending and 55.8% report this abuse occurring at least monthly)

intimidation, harassment and/or coercive control. Perpetrators will pursue or increase efforts to locate a victim in hiding. Second, perpetrators who learn about the existence of the victim's immigration case may step-up actions designed to have the victim deported or may attempt to communicate with DHS to interfere with the adjudication of the victim's VAWA confidentiality protected immigration case.¹⁰

In its discussion of VAWA 2005, Congress recommended that removal proceedings filed as a result of violation of VAWA confidentiality provisions be dismissed by immigration judges.¹¹ This sanction was in addition to the sanctions against individual government officials who violate VAWA Confidentiality Protections that were included in the statute when VAWA confidentiality was created in 1996. To deter individual officers from violating these provisions, 8 U.S.C. § 1367(c) provides that each violation of VAWA Confidentiality or Victim Safety Protections is punishable by a \$5,000 fine and disciplinary action.¹² The Department of Homeland Security has designated the Office on Civil Rights and Civil Liberties as the entity that receives, investigates, and adjudicates complaints about DHS officials who have violated VAWA Confidentiality protections.¹³ Denying perpetrators access to information about and information contained in VAWA confidentiality protected cases when such information is sought through state family court and criminal court discovery is consistent with this approach and necessary to protect the integrity of the VAWA confidentiality.

In addition to expanding protections relating to confidentiality and source limitations, VAWA 2005 also limited DHS enforcement actions in certain protected locations so as to assure that immigrant victims of domestic violence, sexual assault, trafficking and U visa crimes can safely seek help from police, prosecutors, courts, shelters, and other victims' services without fear of deportation. In explaining the kinds of practices the statutory bars on DHS enforcement actions at protected locations were designed to protect against, Congress noted that:

“[I]t is very important that the system of services we provide to domestic violence victims, rape victims and trafficking victims and our protection order courtrooms and family courts are places to which victims can safely turn for help without worrying that their abuser may have sent immigration enforcement officers after them when they are seeking service and protection. Section 825(c) establishes a system to verify that removal proceedings are not based on information prohibited by Section 384 of IIRIRA. When any part of an enforcement action was taken leading to such proceedings against an alien at certain places, DHS must disclose these facts in the Notice to Appear issued against the alien. DHS must certify that such an enforcement action was taken but that DHS did not

¹⁰ See Krisztina E. Szabo, David Stauffer, Benish Anver, and Leslye E. Orloff, Early Access to Work Authorization For VAWA Self-Petitioners and U-Visa Applicants 25 (February 12, 2014) available at http://niwaplibrary.wcl.american.edu/pubs/final_report-on-early-access-to-ead_02-12/ (While immigration cases are pending in 26.7% of VAWA self-petitioners and U visa cases perpetrators make calls to DHS to have the victim deported and to trigger immigration enforcement actions against the victim).

¹¹ See U.S. DEPARTMENT OF JUSTICE, *Department of Justice Appropriations Authorization Act, Fiscal Years 2006 through 2009: Report of the Committee on the Judiciary, House of Representatives, to accompany H.R. 3402*, H.R. REP. NO. 109-233, at 123 (2005), available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/legislative-history/VAWA%20CONF_VAWA%20House%20Judiciary%20Committee%20Report%20Legislative%20History_9.22.05.pdf; see also 151 CONG. REC. E2606-07 (2005) (statement of Rep. Conyers), available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/legislative-history/Conyers-Legislative-History_12.18.05 (hereinafter “Conyers remarks”).

¹² Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162, 119 Stat. 2960 § 817; VAWA 2005 § 825(c).

¹³ See U.S. Department of Homeland Security, *Violence Against Women Act (VAWA) Confidentiality Provisions at the Department of Homeland Security*, available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/government-memoranda-and-factsheets/VAWA-CONF_DHS-Complaint-Instructions_2008.pdf (Instructions on how to file a VAWA confidentiality violation complaint were issued by DHS Office of Civil Rights Civil Liberties).

violate the requirements of Section 384 of IIRIRA. The list of locations includes: a domestic violence shelter, a rape crisis center, and a courthouse if the alien is appearing in connection with a protection order or child custody case.”¹⁴

B. Ways Attorneys Can Use VAWA Protections in Family Court

i. Avoiding DHS Immigration Enforcement at Family Court

Attorney should carry copies of VAWA confidentiality policies and training materials to family court proceedings.¹⁵ If a DHS enforcement officer (ICE¹⁶ or CBP¹⁷) arrives at the courthouse¹⁸ to question or arrest a domestic violence or sexual assault survivor, it is likely that the agent does not know about the protections afforded by the Confidentiality Provisions of VAWA. An attorney may be able to prevent her arrest and/or detention by educating the agent. Showing the agent and the judge copies of the following documents may be helpful.¹⁹

- **IIRIRA § 384**: prohibits DHS employees from acting solely on information given by the abuser and/or family members of the abuser; prohibits DHS from disclosing any information relating to VAWA self-petitioners or applicants for T and U visas.²⁰
- **INA § 239(e)**: certification of VAWA confidentiality compliance for enforcement actions at prohibited locations.²¹
- **DHS Broadcast Message on New 384 Class of Admission Code**: informs DHS officials "to become familiar with a new code in the Central Index System (CIS). The new Class of Admission (COA) code “384” was created to alert DHS personnel that the individual is protected by confidentiality provisions. Information about the location, status, or other identifying information of any individual with the code “384” may not be released.”²²

¹⁴ *Conyers Remarks* at E2606-07, available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/legislative-history/Conyers-Legislative-History_12.18.05. These remarks quoted substantially from and reiterated the legislative history and intent contained in the bipartisan Sensenbrenner – Conyers House Report, H.R. Rep. No. 109-233, available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/legislative-history/VAWA%20CONF_VAWA%20House%20Judiciary%20Committee%20Report%20Legislative%20History_9.22.05.pdf

¹⁵ Immigration and Customs Enforcement and the Office of the Principle Legal Advisor operating memoranda on VAWA confidentiality implementation memos issued in 2007 are available at <http://niwaplibrary.wcl.american.edu/pubs/iceopla-vawa-confidentiality-2007-foia/>

¹⁶ Immigration and Customs Enforcement (ICE) handles enforcement of immigration laws generally in the interior of the United States.

¹⁷ Customs and Border Patrol (CBP) handles enforcement of immigration laws at borders, airports, and other ports of entry as well as at DHS checkpoints within the United States.

¹⁸ Follow these same procedures when a DHS official is seeking to conduct an immigration enforcement action at any location protected by VAWA confidentiality including: domestic violence shelters, rape crisis centers, supervised visitation centers, family justice centers, victim’s services or victim’s services providers or community based-organizations, and courthouses. See INA § 239(e).

¹⁹ In March 2014, Immigration and Customs Enforcement (ICE) at the U.S. Department of Homeland Security implemented new policies regarding immigration enforcement at courthouses. ICE immigration enforcement officials would only conduct courthouse enforcement against individuals who are high priorities for removal. Before undertaking an enforcement action at a courthouse, ICE officials would check the VAWA confidentiality “384” database to help ensure that enforcement actions are not taken against victims with pending and approved VAWA confidentiality protected cases filed with United States Citizenship and Immigration Service (USCIS). VAWA confidentiality protected cases include immigrant victims who have filed VAWA, T and U visa cases. U.S. Citizenship and Immigration Services, *DHS Broadcast Message on New 384 Class of Admission Code* (Dec. 21, 2010), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/message-to-DHS-384-COA-Final-12.21.10.pdf>. ICE also agreed that when it conducts enforcement actions at courthouses, ICE officials will only interview and arrest the targeted high priority individual and no other persons accompanying that individual or other people at the courthouse. Additionally, to the extent possible, immigration enforcement conducted by ICE at courthouses will take place in non-public areas of the courthouse. As of April 2014, these courthouse enforcement procedures are being implemented nationally by ICE, but are not being implemented by Customs and Border Patrol (CBP).

²⁰ VAWA 2005§ 1367, *Penalties for Disclosure of Information*, available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/statutes/VAWA%20CONF_8%20USC%201367_2005.pdf (last viewed April 25, 2014).

²¹ Immigration and Naturalization Act, § 239(e), available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/statutes/VAWA%20CONF_8%20USC%201229_2005.pdf (last viewed April 25, 2014).

²² *DHS Broadcast*, available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/message-to-DHS-384-COA-Final-12.21.10.pdf> (last viewed April 25, 2014).

- Crime Victims and Witnesses Memo, John Morton, Director, U.S. Immigration and Customs Enforcement, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*, at 3 (June 17, 2011).²³
- Prosecutorial Discretion Memo, Jeh Johnson, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014).²⁴
- Memorandum from Paul Virtue, Acting Executive Associate Commissioner, on *Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRIRA Section 384* (May 5, 1997).²⁵
- Memorandum from John P. Torres, Director of Detention and Removal Operations, & Marcy M. Forman, Director of Office of Investigations, *Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005* (January 22, 2007) (designates prohibited locations including, but not limited to, state courthouses, domestic violence shelters, rape crisis centers, victims services centers, and supervised visitation centers and clarifies that a self-petitioner is someone the officer believes presents credible evidence that she is eligible for one of the designated forms of relief).²⁶
- Memorandum from William J. Howard, Principle Legal Advisor, Immigration and Customs Enforcement (ICE), *VAWA 2005 Amendments to the Immigration and Nationality Act and 8 U.S.C. Section 1367* (February 1, 2007)²⁷ (Describing the requirements that ICE trial attorneys are required to follow with regard to VAWA confidentiality protections for immigrant victims)²⁸
- Pending Applications Memo, John Morton, Assistant Secretary, U.S. Customs and Immigration Enforcement, *Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions* (August 20, 2010).²⁹
- Cases in Proceedings Adjudication Memo, U.S. Citizenship and Immigration Services, *Guidance for Coordinating the Adjudication of Applications and Petitions Involving Individuals*

²³ Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to all field office directors, special agents in charge and chief counsel, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Morton-CertainVictimsWitnessesandPlaintiffs-Memo-06-17-2011.pdf> (last viewed April 25, 2014).

²⁴ Jeh Johnson, Sec., Dep't of Homeland Sec., to ICE, CBP, USCIS, Ass. Sec. for Policy, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, 1, 5 (Nov. 20, 2014), available at <http://niwaplibrary.wcl.american.edu/pubs/dhspoliciesforapprehensiondetentionandremoval112014/>

²⁴ *Id.*

²⁵ Memorandum from Paul W. Virtue, Acting Executive Associate Commissioner, Office of Programs, to all INS Employees, *Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRIRA Section 384* (May 5, 1997), available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/government-memoranda-and-factsheets/c_VAWAConf_DHSGuidanceSec%20384_05.05.97_FIN.pdf

²⁶ Memorandum from John P. Torres, Director, Office of Detention and Removal Operations, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, and Marcy M. Forman, Director, Office of Investigations, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, to Field Office Directors and Special Agents in Charge, *Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005* (January 22, 2007), AVAILABLE AT: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/government-memoranda-and-factsheets/VAWA-CONF_Torres-ICE-VAWA-Confidentiality-Memo-Jan-22-2007.pdf

²⁷ William J. Howard, Principle Legal Advisor, Immigration and Customs Enforcement, *VAWA 2005 Amendments to the Immigration and Nationality Act and 8 U.S.C. Section 1367* (February 1, 2007) available at <http://niwaplibrary.wcl.american.edu/pubs/iceopla-vawa-confidentiality-2007-foia/>

²⁸ Procedures that will help attorneys working on cases of victims eligible for VAWA cancellation of removal, VAWA suspension of deportation, VAWA self-petition, U visa, T visa or battered spouse waiver when the victim has been placed in immigration proceedings and/or has an order of removal who encounter problems with ICE trial attorneys in VAWA confidentiality protected cases have been established by the Office of Principal Legal Advisor. See NIWAP, *Updates on VAWA Confidentiality Training for Immigration and Customs Enforcement Assistant Chief Counsel and Enforcement and Removal Operations Officers* (November 11, 2016) available at <http://niwaplibrary.wcl.american.edu/pubs/ice-opla-vawa-confidentiality-training/>

²⁹ Memorandum from John Morton, Assistant Secretary, U.S. Customs and Immigration Enforcement, to Peter S. Vincent, Principal Legal Advisor, U.S. Customs and Immigration Enforcement, and James Chaparro, Executive Associate Director, Enforcement and Removal Operations, *Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions* (August 20, 2010), available at: <http://www.ice.gov/doclib/detention-reform/pdf/aliens-pending-applications.pdf>

in Removal Proceedings; Revisions to the Adjudicator's Field Manual (AFM) New Chapter 10.3(i): AFM Update AD 11-16 (PM-602-0029) (February 4, 2011).³⁰

- Office of Civil Rights Civil Liberties Complaint Procedures, DHS Office of Civil Rights Civil Liberties, "Violence Against Women Act (VAWA) Confidentiality Provisions at the Department of Homeland Security". This memo outlines recommended procedures for filing complaints for VAWA confidentiality violations with DHS and lists the types of information and evidence that should be included in the complaint.³¹

These statutes and DHS memoranda describe federal laws and DHS policies designed to offer protection to immigrant crime victims and to deter detention, removal and enforcement actions against immigrant survivors.³²

*ii. Keeping VAWA Confidentiality Protected Information Out of State Court Proceedings*³³

Congress enacted VAWA with the aim of eliminating barriers to women leaving abusive relationships. To that end, the VAWA confidentiality provisions seek to prohibit disclosure of confidential information about, documents filed in, and materials relating to a petitioner's immigration case to her abuser.³⁴ VAWA confidentiality protections are undermined if the accused batterer or crime perpetrator can obtain the victim's protected information through discovery,³⁵ cross examination or by calling the victim as an adverse witness in a state family, civil or criminal court proceeding. Although there are some limited exceptions to the VAWA confidentiality provision's bar on disclosure, none of these permit obtaining the information through state court discovery or through the victim's testimony in a state court case. Most importantly, none allow or could be construed to allow VAWA confidentiality protected information to be turned over to the perpetrator or the perpetrator's attorney.

As VAWA legislative history and case law have demonstrated, VAWA confidentiality permits only very limited disclosure of protected information. Disclosure is authorized only under the following circumstances and with the required limitations:³⁶

- Statistical information that complies with census data collection requirements (excluding all personally identifying information)³⁷

³⁰ Policy Memorandum from U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security (February 4, 2011), available at: <http://www.uscis.gov/USCIS/Outreach/Interim%20Guidance%20for%20Comment/coordination-adjud-removal-proceedings.pdf>.

³¹ U.S. Department of Homeland Security, *Violence Against Women Act (VAWA) Confidentiality Provisions at the Department of Homeland Security*, available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/government-memoranda-and-factsheets/VAWA-CONF_DHS-Complaint-Instructions_2008.pdf. For additional information on VAWA confidentiality, steps to take if your client becomes subject to a DHS enforcement action, and filing VAWA Confidentiality complaints, see LESLYE ORLOFF, *VAWA Confidentiality, History, Purpose, and Violations of VAWA Confidentiality*, in EMPOWERING SURVIVORS (2013), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/september-20-21-2012-new-orleans-la/vawa-confidentiality/vawa-confidentiality-chapters/Ch3-SA-Man--Confidentiality-MANUAL-ES.pdf>

³² All documents are contained in National Immigrant Women's Advocacy Project's web library at: <http://niwaplibrary.wcl.american.edu>

³³ Adapted from Model Amicus Curiae Brief developed by Morgan Lewis LLP for Legal Momentum for use as a bench brief or an amicus brief in trial court cases when VAWA confidentiality an issue in a state court proceeding; available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/vawa-confidentiality/sample-motions/Family-Ct-VAWA-Conf-Brief.pdf>

³⁴ *Hawke v. United States Department of Homeland Security, Citizenship and Immigration Services*, 2008 U.S. Dist. LEXIS 87603 (N.D. Cal. Sept. 29, 2008).

³⁵ This may occur through propounding interrogatories, requests for production of documents, a subpoena and/or a deposition.

³⁶ 8 U.S.C. § 1367(b).

³⁷ U.S. DEPARTMENT OF HOMELAND SECURITY, *Instruction Number 002-02-001 Implementation of Section 1367 Information Provisions*, 6 (November 7, 2013) available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>

- To law enforcement officials solely for legitimate law enforcement purposes³⁸ and law enforcement receiving the information is required to treat the information received in a manner that continues to protect the confidentiality of the information³⁹
- In connection with judicial review of rulings made in the victim’s immigration case in a manner that protects the confidentiality of such information⁴⁰
- When adult battered immigrants have been informed about and waived their VAWA confidentiality non-disclosure rights⁴¹
- For the disclosure of information to Federal, State, and local public and private agencies providing benefits, to be used solely in making determinations of eligibility for public benefits⁴²
- Congressional oversight limited to specific congressional committees and only “information on closed cases under this section in a manner that protects the confidentiality of such information and that omits personally identifying information (including locational information about individuals)”⁴³
- “For purposes of communicating, with the ‘prior written consent of the alien involved,’ with nonprofit, nongovernmental victims’ services providers ‘for the sole purpose of assisting victims in obtaining victim services.’ The victim services providers receiving such referrals are bound by the nondisclosure requirements of Section 1367. Recall that Section 101(i) of the INA (8 U.S.C. section 1101(i)) mandates that DHS provide T nonimmigrants with a referral to an NGO “that would advise the alien regarding the alien’s options while in the United States and the resources available to the alien.”⁴⁴
- To national security officials to be used solely for a legitimate national security purpose in a manner that protects the confidentiality of such information.⁴⁵

In creating these limited exceptions to VAWA’s confidentiality protections Congress made a concerted effort to ensure that one of the following was true with regard to any information released.

- The information released for statistical or oversight purposes contained no personally identifying information or any other information that could tie the contents of the information released to any individual victim; or
- The agency seeking and receiving the information was mandated to continue to preserve the confidentiality of the information. This applies to courts, law enforcement officials, prosecutors, victim services agencies, federal, state, local and private agencies administering public benefits, and national security officials.

An accused batterer cannot use state court litigation to obtain protected information that could not legally be disclosed to him by federal authorities. In *Hawke*,⁴⁶ an abuser sought

³⁸ Id at 7

³⁹ VAWA 2013 Amendments to VAWA confidentiality 8 U.S.C. § 1367(b)(2). See, *Kavell Joseph and Leslye E Orloff, Violence Against Women Act (VAWA) Confidentiality Interlineated Statute HRAIRA § 384 8 USC §1367 Penalties for Disclosure of Information (July 16, 2016) available at <http://niwaplibrary.wcl.american.edu/pubs/vawa-confidentiality-interlineated/>*

⁴⁰ *Hawke* at 8

⁴¹ U.S. DEPARTMENT OF HOMELAND SECURITY, Instruction Number 002-02-001 Implementation of Section 1367 Information Provisions, 7 (November 7, 2013) available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>

⁴² Id.

⁴³ Id.

⁴⁴ Id at 7-8

⁴⁵ Id at 8

⁴⁶ *Hawke* at *16-19.

discovery of his wife's VAWA self-petition. *Hawke* argued that the VAWA confidentiality disclosure exception at 8 U.S.C. § 1367(b)(3) allowing for "disclosure of information in connection with judicial review of a determination in a manner that protects the confidentiality of such information" authorizes civil and criminal discovery into a victim's confidential VAWA information. The *Hawke* court disagreed⁴⁷ and ruled this exception only applies to judicial review in immigration proceedings not in state court. The court denied the batterer's request to produce his wife's immigration records for use in criminal battery proceedings. As *Hawke* emphasizes, VAWA's confidentiality protections are "strict" and "broad;" prohibiting the "use by or disclosure to anyone...of any information."⁴⁸ The purpose behind Congress' language in § 1367 was to prevent abusers from discovering the substance, as well as the existence, of a VAWA or U visa application.⁴⁹

In *Hawke*, the federal district court weighed the arguments presented by the abusive spouse of a VAWA self-petitioner that his constitutional rights were being violated by the nondisclosure against the language and intent behind Congress' creation of VAWA confidentiality protections. In examining the need for confidentiality in the VAWA application process, the *Hawke* Court ruled that [w]hile Mr. Hawke's Sixth Amendment right to Compulsory Process permits him access to some information held by the government, it does not permit him to receive absolutely privileged information like any records held by DHS here.⁵⁰ The language used here is significant because it explicitly recognizes the privilege of VAWA confidentiality as "absolute."⁵¹

In *Demaj v. Sakaj*,⁵² a Connecticut federal district court ruled that VAWA Confidentiality protected documents cannot be released even if the person seeking release of the documents intends to use them for impeachment and not to re-adjudicate the respondent's immigration case. *Demaj* was a case in which the victim had filed a U visa application. The court followed the same reasoning as the *Hawke* court. The court balanced the rights of the abuser against the protections guaranteed to the survivor by the federal immigration VAWA confidentiality provisions.

In *Demaj*, the court found the protections promised by federal VAWA confidentiality were absolute:

"[W]hile it would appear that claims of abuse made in Respondent's U-Visa application are relevant to Respondent's credibility as a witness and may be used to impeach Respondent's testimony at trial, disclosure of these documents for this purpose runs contrary to the intent of the protections afforded by 8 U.S.C. 1367."⁵³

The court also recognized that releasing such documents would interfere with the respondent's immigration case in an improper manner:

⁴⁷ *Id.* at *16-*20.

⁴⁸ *Hawke v. U.S. Dep't of Homeland Sec.*, No. C-07-03455, 2008 WL 4460241 *1, *7 (N.D. Cal. Sept. 29, 2008).

⁴⁹ Amici Curiae Brief EEOC v Koch Foods (October 22, 2015) <http://niwaplibrary.wcl.american.edu/pubs/amici-curiae-brief-eioc-v-koch-foods-october-22-2015/>

⁵⁰ *Hawke* at *20.

⁵¹ *Id.*

⁵² 2012 U.S. Dist. LEXIS 18159 at *1 (D. Conn. Feb. 14, 2012); No. 3:09CV255(JGM), 2012 WL 476168 at *1 (D. Conn. Feb. 14, 2012).

⁵³ *Demaj* at *18-19.

“[t]hus, while Petitioner may need the documents underlying and related to Respondent’s U-Visa application as they may be relevant to her credibility and may be used to impeach her, in order to use these documents in that manner, Petitioner must seek to undermine the decision of DHS by challenging the veracity of Respondent’s statements, upon which both DHS and law enforcement relied, thereby, interfering with Respondent’s immigration case.”⁵⁴

Case law and DHS memos are consistent with VAWA confidentiality congressional intent of the VAWA confidentiality provisions which were designed to offer special protection from a perpetrator discovering information and to safeguard information contained in a victim’s U visa or VAWA immigration case. *Hawke, Demaj*, and § 1367 on its face not only sustain this assertion but also make it clear that this information should not be discoverable. As *Hawke* emphasizes, VAWA’s confidentiality protections are “strict” and “broad;” prohibiting the “use by or disclosure to anyone...of any information.” The purpose behind Congress’ language in § 1367 was to prevent abusers from discovering the substance, as well as the existence, of a VAWA or U-visa application.⁵⁵

In a recent Fifth Circuit case, *Maria Cazorla, et. al. and the EEOC v. Koch Foods of Mississippi, L.L.C.*, [hereinafter *Koch*] the Fifth Circuit was asked to consider VAWA confidentiality in the context of an employment discrimination lawsuit filed by the Equal Employment Opportunity Commission (EEOC) alleging that multiple employees during their employment at Koch Foods suffered sexual assault and other crimes committed against them by a supervisor. In the action, Koch Foods served discovery on the EEOC and the plaintiffs seeking information regarding the U visa status of some of the plaintiffs. When the EEOC and plaintiffs objected, Koch filed a motion to compel the discovery, which was granted in part by the District Court. The District Court held that the U visa information was relevant based on the specific defense asserted by Koch, and that the relevance outweighed the *in terrorem* effect on the plaintiffs and the EEOC. The EEOC and Plaintiffs appealed the District Court decision. the Fifth Circuit found that the District Court had failed to fully consider VAWA confidentiality in crafting its discovery orders in the case and that it erred in not fully considering the harm to victims and law enforcement personnel who were not part of this litigation that could occur as a result of discovery that the District Court may order. The Court stated:

“The district court’s analysis of the harm that U visa discovery might cause the claimants was imperfect, but not critically so. More pressing is that the district court did not address how U visa litigation might intimidate individuals outside this litigation, compromising the U visa program and law enforcement efforts more broadly.”⁵⁶

In *Koch*, the Fifth Circuit decision provided direction to the District Court to reconsider its discovery orders with the history and purpose of VAWA confidentiality protections and the effect that the discovery ordered in the case could have on other VAWA confidentiality protected cases and other victims leaving open the possibility that under Federal Civil Procedure Rule 26 in an employment action between abused employees and an employer, some limited discovery related

⁵⁴ Demaj at *21

⁵⁵ Carly Erickson and Leslye E. Orloff, Court Rulings Confirm Federal VAWA Confidentiality Protections Bar Discovery of VAWA Confidentiality Protected Information in State Family Court Proceedings (June 17, 2014)

⁵⁶ Koch at 30

to U visa cases may be permissible.⁵⁷ The court in considering discovery requests in a civil employment action would be required to consider the harm to the victims and the deterrent effect discovery could have on other claimants who may be deterred from filing employment discrimination actions.

The Fifth Circuit also made an important point in its order about the possibility of limited discovery is based on the premise that a victim's U and/or T visa applications should and could remain anonymous, at a minimum, in the liability phase.⁵⁸ Such anonymity is not possible in state family and criminal court cases involving victims and perpetrators. In state family and criminal court cases involving a domestic violence or sexual assault perpetrator there is no possibility of maintaining the anonymity of the victim. The victim and perpetrator are family members who are opposing parties in family court litigation or who are the witness and defendant in a state criminal domestic violence case. Therefore, in state family law cases, the *Koch* case is of limited applicability and is significantly distinguishable from the VAWA confidentiality concerns that are at issue in state court domestic and sexual violence cases.

Instead, in ruling on state court discovery requests courts should be governed by the plain language of 8 U.S.C. § 1367, and its legislative history. Courts should adopt the approach taken by courts that have upheld VAWA confidentiality. State family court discovery should deny discovery of VAWA confidentiality protected case information in VAWA self-petitions, T visa and U visa cases. This includes information that could be used to confirm the existence of applications and the information contained in these application case files. Courts should hold that this information is "absolutely privileged" and cannot be compelled for use in either criminal or civil cases as it can pose serious danger to the victim.⁵⁹

i. Defending Against Discovery Requests that Violate VAWA Confidentiality and Seeking Rule 11 Sanctions⁶⁰

It is important for attorneys representing immigrant victims in family court cases to take immigration related abuse seriously. Abusers often use immigration related threats as a tool to further control their victims. Immigration related abuse often precedes escalation of abuse or corroborates the existence of physical or sexual abuse. This is because the probability of immigration related abuse is 10 times higher in physically and sexually abusive relationships than in emotionally abusive relationships.⁶¹ Further, although protection orders are effective in helping reduce ongoing physical abuse against immigrant women,⁶² immigration related abuse continues

⁵⁷ In *Koch* the Fifth Circuit remanded the case to the District court to craft any discovery allowed of VAWA confidentiality protected case information from victims directly to ensure that identifying information about the victims and their family members not be revealed. In the *Koch* case the Federal District Court following the 5th Circuit decision only allowed discovery only of redacted copies of victim's U visa certifications signed by the EEOC without any identifying information about which employee victim that certification was related to. .

⁵⁸ *Koch* at 33.

⁶⁰ Further information including legal memoranda, sample Motions in Limine, motions for protective orders in discovery and other materials on VAWA confidentiality are available at: http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/civil-justice-system/VAWA-CONF_Sample-Motion-in-Limine_2009.pdf

⁶⁰ Further information including legal memoranda, sample Motions in Limine, motions for protective orders in discovery and other materials on VAWA confidentiality are available at: http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/civil-justice-system/VAWA-CONF_Sample-Motion-in-Limine_2009.pdf

⁶¹ Mary Ann Dutton et al., *Characteristics of Help Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 292 (2000), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/Characteristics%20of%20Help-Seeking%20Immigrant%20Battered%20WomenOVW%2010.23.01.pdf>.

⁶² U.S. Citizenship and Immigration Services, DHS Broadcast Message on New 384 Class of Admission Code (Dec. 21, 2010), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/message-to-DHS-384-COA-Final-12.21.10.pdf>

as the second highest form of protection order violation occurring when immigrant victims obtain protection orders. Significant numbers of immigrant victims (68.3%) experience immigration related abuse after being awarded protection orders. Immigration related abuse includes threats of deportation, refusing to file or withdrawing immigration papers the perpetrator filed on the victim's behalf and threats and attempts to report immigrant crime victims to DHS officials to initiate immigration enforcement actions, detention and removal of victims.⁶³ Additionally, 88.1% of immigrant women report abusers violate no contact orders after obtaining a protection order.⁶⁴

Attorneys may be able to use VAWA confidentiality protections to prevent and counter immigration related abuse, perpetrated as part of the abuser's strategy in family court cases. Attorneys representing victims should be prepared to object and brief VAWA confidentiality issues if needed to prevent the use of state court discovery to obtain information about the existence of, outcomes in, and information contained in VAWA confidentiality protected cases. These include VAWA self-petitions, battered spouse waiver, U visa and T visa cases.⁶⁵

In these cases, the family law attorneys should get the court to focus on the plain language of the 8 U.S.C. Section 1367, its legislative history, and the approach taken in by other courts that have upheld VAWA confidentiality. State family court discovery should deny discovery of VAWA confidentiality protected case information in VAWA self-petitions, T visa, and U visa cases, This includes information about the application or that could be used to confirm the existence of applications, and the information contained in these application case files. Courts should hold that this information is "absolutely privileged" and cannot be compelled for use in either criminal or civil cases as it can pose serious danger to the victim.⁶⁶

Case Preparation Strategy

It is highly recommended that immigrant victims involved in family court litigation are screened early for and file applications for VAWA self-petitions and U visa protections as early as possible. Once a VAWA self-petition or U visa case is filed the victim receives VAWA confidentiality protection from deportation and discovery of the immigration case is restricted. Early filing also improves the likelihood that the victim could attain legal work authorization, approval of their immigration case, or depending on the form of immigration relief and the state some access to public benefits before the family court case goes to trial. When victims have pending or approved VAWA self-petitions or U visa cases before the date set for trial counsel for the victim in the family court case has the benefit of being able to consider whether there could be advantages in the family court case of including evidence of immigration related abuse as part of the history of abuse in the relationship. This will be particularly effective in VAWA self-

⁶³ Nawal H. Ammar, Leslye E. Orloff, Mary Ann Dutton, & Giselle Hass, *Battered Immigrant Women in the United States and Protection Orders: An Exploratory Research*, 37 CRIM. JUST. REVIEW 337, 351 (2012), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/family-law-for-immigrants/protective-orders/research-reports-and-data/AmmaretalCPO.pdf>

⁶⁴ *Id.*

⁶⁵ Sample bench briefs and amicus briefs and motions are available from the National Immigrant Women's Advocacy Project, American University Washington College of Law <http://niwaplibrary.wcl.american.edu/topic/vawa-confidentiality/sample-motions-briefs/>

⁶⁶ Hawke v. United States Department of Homeland Security, 2008 U.S. Dist. LEXIS 87693, at *1 (N.D. Cal. Sept. 29, 2008); No. C-07-03456 RMW, 2008 WL 4460241 at *1 (N.D. Cal. Sept. 29, 2008); Demaj v. Sakaj, 6 2012 U.S. Dist. LEXIS 18159 at *1 (D. Conn. Feb. 14, 2012); No. 3:09CV255(JGM), 2012 WL 476168 at *1 (D. Conn. Feb. 14, 2012).

petitioning cases in which the perpetrator could have filed an immigration case on the victim's behalf and either did not file or filed and withdrew the case.

A case in which victim is planning on raising the perpetrator's immigration related abuse and/or power and control over the victim's immigration status affirmatively in the victim's case will need to employ a different strategy with regard to responding to discovery requests than a case in which the goal is to keep all information about the VAWA confidentiality protected case out of the family court proceeding. Each of these scenarios is discussed separately below.

Case Plan to Keep Immigration Status and Information About Any Immigration Case Out of the Family Court Case

If the goal is to prevent information about the victim's immigration status or status or existence of a VAWA self-petition out of the family court, when such information is sought through discovery or on cross examination:

1. First, object to the relevance of such information in a custody, protection order or divorce action. The relevance of a victim's immigration status must be weighed against the in terrorem effect that disclosure of this information would have in discouraging the victim from asserting his/her rights in the family court proceeding.
2. If that argument is unsuccessful, argue that the opposing party's attempt to obtain this information is a pattern of control and further abuse of the victim.
3. Next, argue that the information is not discoverable under *Hawke* and *Demaj*. Sample bench briefs and amicus briefs and motions are available from the National Immigrant Women's Advocacy Project, American University Washington College of Law⁶⁷
 - a. At this stage, counsel should consider filing a Motion in Limine to keep all information about immigration status or a victim's VAWA or U visa case out of the family court proceeding.
4. Lastly, if the court does not rule favorably on any or all of the above, argue that if discovery must happen, that it should be limited to an *in camera* review of only the most relevant information. Counsel should argue that the in camera review be limited to the U visa law enforcement certification and not the full case file. If additional documents are required by the court for *in camera* review, counsel must remove personally identifying information from the documents provided.

Cases in Which the Victim Will Raise Her Own Immigration Status and/or Immigration Related Power and Control Abuse

When victims have obtained or are in the process of obtaining legal immigration status through a VAWA self-petition or U visa case this can be advantageous to the family court case. It can help victim's demonstrate that she will not be removed from the U.S. and that she has or will be receiving legal work authorization and a driver's license. The fact that counsel and the victim are choosing to affirmatively reveal as part of the family court case that the victim has received or is in the process of obtaining legal status does not mean that all or any part of the victim's federal immigration case file is discoverable through family or criminal court discovery. Counsel should still make the arguments in steps 2-4 above to prevent further discovery of any information contained in a VAWA self-petition case. In family court discovery where the criminal court

⁶⁷ Sample briefs are available at <http://niwaplibrary.wcl.american.edu/topic/vawa-confidentiality/sample-motions-briefs/>

Constitutional protections are not present, discovery of any documents contained in the U visa case including the certification should be denied. As both *Hawke* and *Damaj* held, protecting a victim's present and future safety was precisely Congress' intention when drafting the VAWA confidentiality protections that apply in U-visa and VAWA self-petition cases.

Attorneys representing battered immigrants in family court proceedings may successfully convince courts to grant Motions in Limine that preclude the abuser from obtaining VAWA confidentiality protected information and from threatening deportation in family court proceedings as a violation of Rule 11 of the Federal Rules of Civil Procedure and equivalent state rules. Rule 11 is a remedy for deterring malicious behavior, harassment, and exertion of undue influence in a civil court action.

Rule 11 was adopted to limit abusive and bad faith acts by attorneys and pro se litigants in court.⁶⁸ Rule 11 applies only to assertions contained in papers filed with or submitted to the court. When abusers or crime perpetrators seek discovery of VAWA protected information and/or, in the context of court proceedings, make threats of deportation, criminal prosecution, or other control tactics of immigration related abuse, such threats can constitute Rule 11 violations. To protect immigrant victims of violence during civil trials, advocates or attorneys may take advantage of either:

Rule 11(b) (1) and argue that threats of deportation or criminal action during a civil trial constitute harassment, cause unnecessary delay, or increase the cost of litigation. Courts have held that 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 mitigating factor⁶⁹; or

Rule 11(b)(2) and argue that threatening deportation or criminal actions in a civil trial is not warranted by existing law, or constitutes a frivolous argument to gain advantage in the civil court case.⁷⁰

⁶⁸ *Tarkowski v. County of Lake*, 775 F.2d 173, 175-176 (7th Cir.1985).

⁶⁹ *See People v. Wickes*, 112 A.D. 39, 49 (S.Ct. N.Y. App. Div., 1906) (citing *People v. Eichler* 75 Hun 26, 26 N.Y.S. 998; appeal dismissed, 142 N.Y. 642)

⁷⁰ *See In re Hart*, 131 A.D. 661, 666-667 (S. Ct. N.Y. App. Div., 1st Dept, 1909) (holding that threatening criminal prosecution in order to force a settlement of a civil action is illegal, improper and unprofessional; a threat for criminal prosecution may even be disguised under a friendly veil, but the court analyzes the intent to induce the other side to act in a certain manner in the civil case).