



# Anticipating and Protecting Immigrant Survivors' Privacy Interests

Cannon Han  
Jessica Mindlin

Session 1: Judge Mary Weir  
Session 2: Judge Rosemary Collins

Day 1  
Session 1B  
New Orleans, LA

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**VRLC Portland Office  
520 SW Yamhill, Suite 200  
Portland, OR 97204  
(503) 274-5477  
1-855-411-5477**

**VRLC Boston Office  
115 Broad Street, 3<sup>rd</sup> Floor  
Boston, MA 02110  
(617) 399-6720  
1-877-758-8132**

**Email: [privacyTA@victimrights.org](mailto:privacyTA@victimrights.org)  
Web: [www.victimrights.org](http://www.victimrights.org)**



**CANNON HAN  
PROJECT COORDINATOR  
INTERPRETATION TECHNICAL ASSISTANCE  
RESOURCE CENTER  
CHAN@API-GBV.ORG**

**chan@api-gbv.org**



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VIOLENCE**

# Judicial Faculty

- Session 1
  - Judge Mary Weir, State of Missouri- Kansas City
- Session 2
  - Judge Rosemary Collins, State of Illinois- Rockford

# Learning Objectives

**After this training you will better be able to:**

- Understand why and how immigrant survivors' privacy needs inform our work
- Identify 4 common privacy risks to avoid
- Summarize survivors' privacy rights under VAWA
- Share tips for protecting survivors' privacy interests

# Why Does Privacy Matter to Immigrant Survivors?

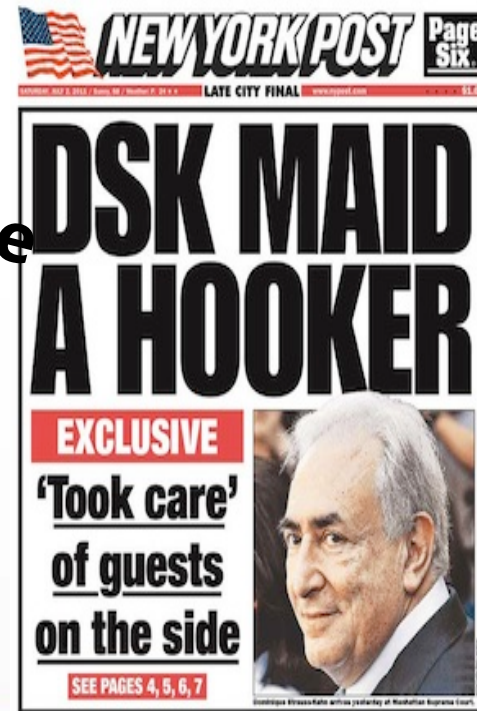




# Why Immigrant Survivors Might Not Report

- “It [U visa] was never intended to protect Latinos from Latinos,” Bell said. “It was designed to protect them from high-crime areas.”

Phoenix police said the  
[10-year old] victim's  
parents, who are  
said the  
You ripped my family apart, you made my cousin cry, so when I see  
you bitch it's gone be a homicide  
Hou.  
and rap  
police cru





## Policing Patient Privacy

# When Students Become Patients, Privacy Suffers

University students have less privacy for their campus health records than they would have if they sought care at a hospital. Schools say they are trying to seek the right balance between privacy and safety.

by Charles Ornstein

ProPublica, Oct. 23, 2015, 5 a.m.



This is part 1 of a series.

### Policing P

ProPublica is a non-profit news organization that is dedicated to exposing patient privacy issues affecting patients and their medical care.

### Latest Story

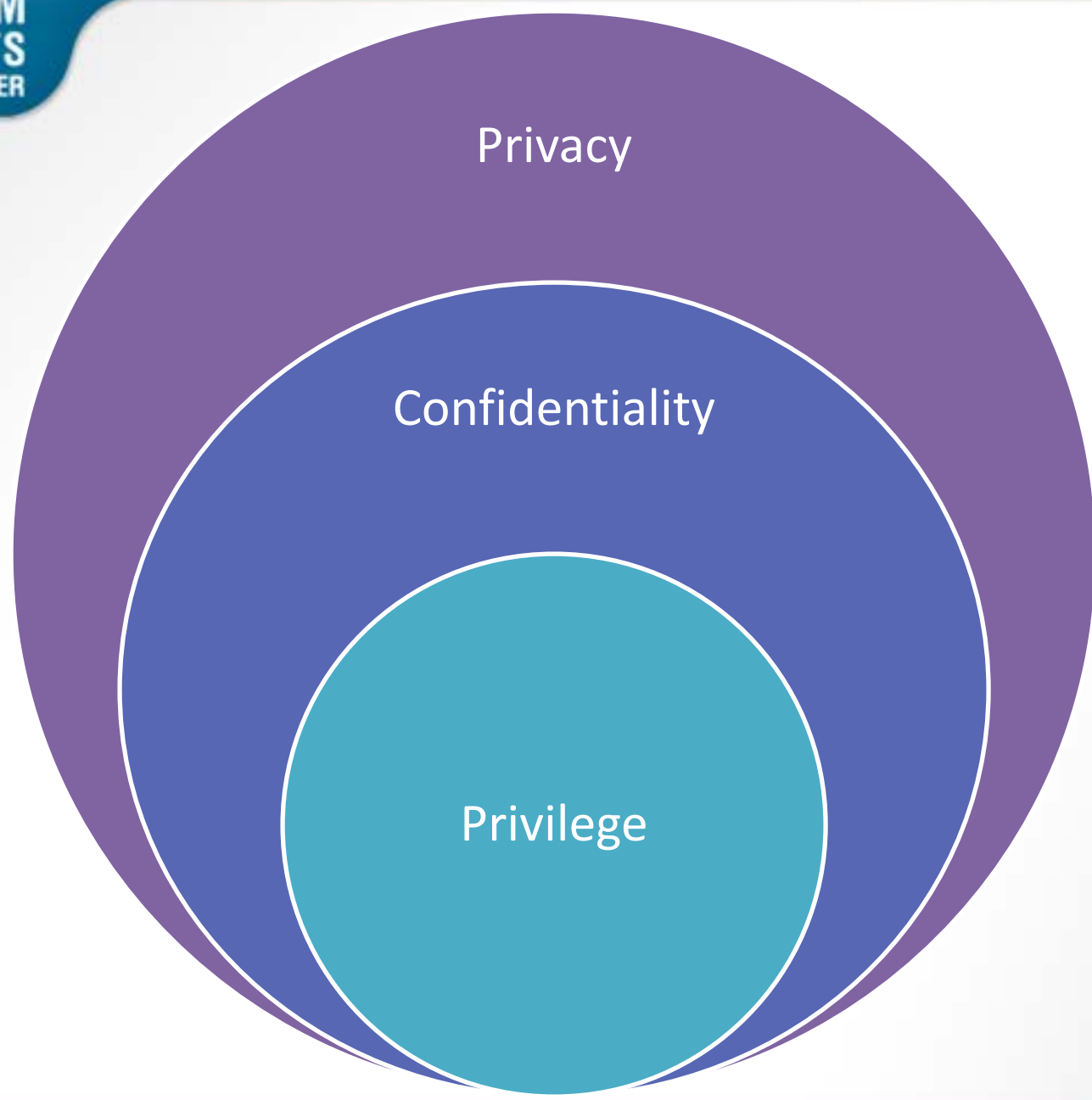
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Privacy



Privilege

# Waiver of A Privilege

Confidential info victim  
shared w/ privileged  
party



Info shared  
with 3d party

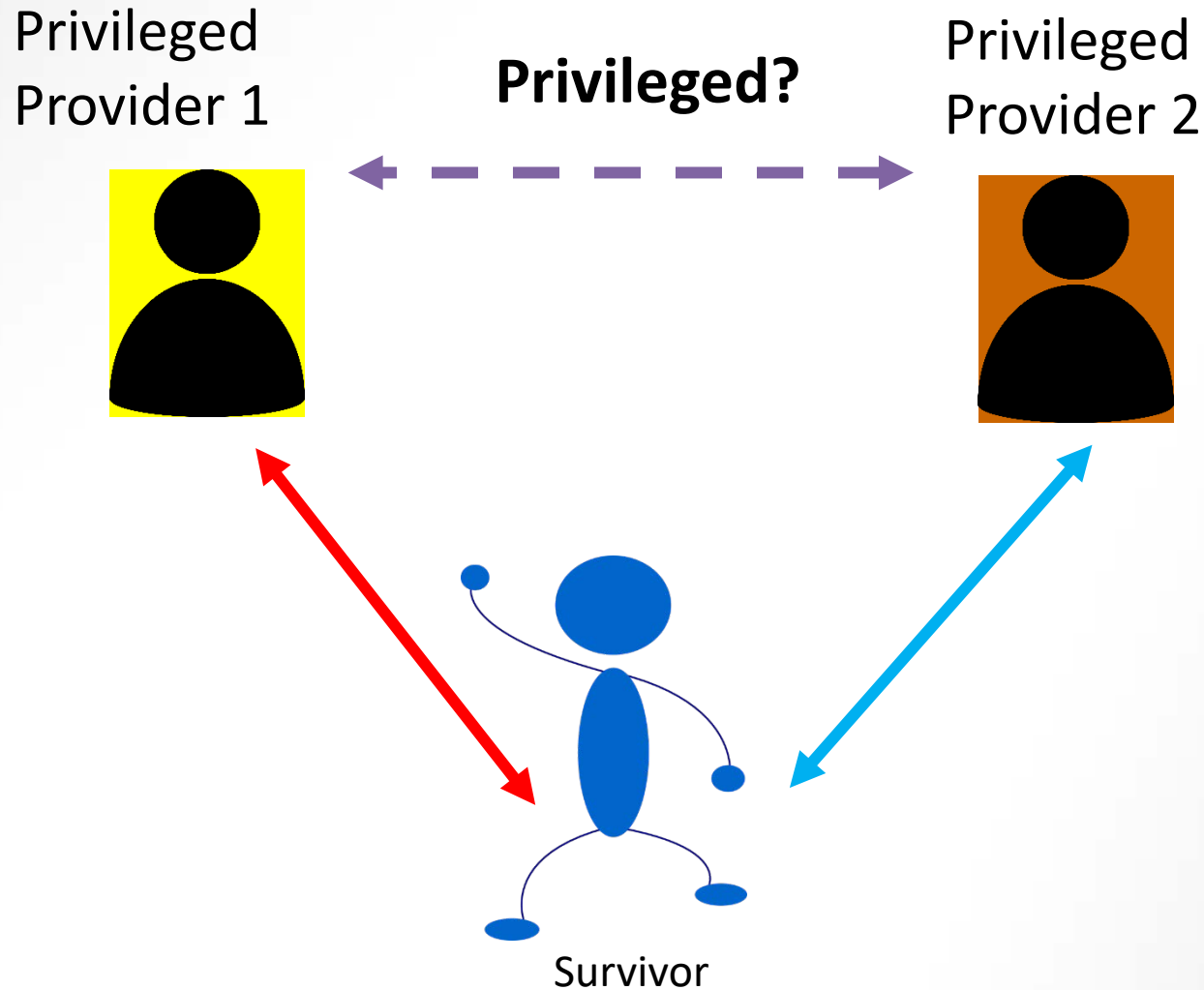
# Disclosure Not Always A Waiver!

## Example # 1:

- Privilege “is not waived by disclosure of the communications . . . to another person if the disclosure is reasonably necessary to accomplish the purpose for which the certified advocate is consulted.”



# Ex.# 2: Privilege Between Providers



# Some Privacy-Related Laws

- VAWA
- HIPAA
- FERPA
- Privilege (state/fed)
- State-specific
  - Housing
  - Employment
  - Health-care
  - Minors





# **VAWA, VOCA, & FVPSA: Releases and Consent**

# VAWA et. al. & Releases

- Grantees & sub-grantees may not disclose personally identifying or reveal individual client information about someone who sought, received or was denied services, *regardless of whether the information has been encoded, encrypted, hashed or otherwise protected . . .*
- Unless:
  - The victim consents *or*
  - Release is compelled by statute or by court mandate.

got  
consent?

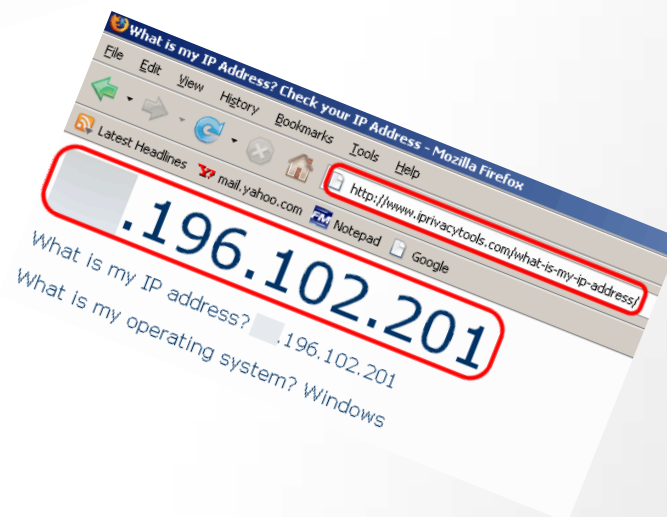


# What is PII?



What is your date of birth?

Day  Month  Year



# Social Media



## “Doctor Reprimanded After Privacy Breach on Facebook”

- Dr. did not use patient's name or other identifying information.
- Posting included enough detail that a third party was able to identify the patient.
- Dr. deleted her Facebook account shortly afterward.
- Dr. found to have engaged in unprofessional conduct; fined \$500 by the Medical Board. Hospital terminated her privileges.

# Court Mandate

- Court Mandate
  - Judge's order
  - \* Subpoena (?)
- If judge orders disclosure, consider:
  - Motion to quash subpoena
  - Redacting records
  - *In camera* review
  - Was service pro



# If Information Must Be Released:

VAWA/VOCA's 2 conditions:

- 1) Make reasonable attempts to notify victim; and
- 2) Take steps necessary to protect the privacy and safety of the persons affected by the release of information



# “Consent”

- Written
- Specific & narrowly tailored
- Reasonably time-limited
- Informed





# VRLC's Bilingual Release Form

## Authorization and Release of Information Form / Formulario de autorización para divulgar información

I understand that \_\_\_\_\_ [Name of your Agency] has an obligation to keep confidential our conversations, my records, and my personal and identifying information. I also understand that I can choose to allow [Name of your Agency] to share this information with specific people or agencies, and to request information from them on my behalf.

Entiendo que \_\_\_\_\_ [Nombre de su Agencia] tiene una obligación de mantener confidencial nuestras conversaciones, mi información personal, información que me identifica, y mis expedientes. También entiendo que puedo permitir que [Nombre de su Agencia] comparta esta información con ciertos individuos o agencias y solicita información de estos individuos o agencias de parte de mí.

I (Yo), \_\_\_\_\_, give \_\_\_\_\_ permission to ☐ give the following information to \_\_\_\_\_ and/or to ☐ get information from the following (doy permiso a \_\_\_\_\_ para ☐ dar información a y/o ☐ recibir información de lo siguiente):

<b>Who I want my information to be shared with:</b>  Quien deseo que tenga mi información:	<b>Name/ Nombre:</b>  <b>Title or Agency/ Título o Agencia:</b>  <b>Telephone number/ Número de teléfono:</b>
<b>What information will be shared:</b>  Qué información será compartida:	

# What Privacy Challenges Do Your Immigrant Survivor Clients Confront?



# Scenario

Claudia was born and raised in Guatemala. She migrated to the United States with her family 2 years ago, at age 15. (They moved to eastern Washington to pick fruit.) Claudia goes to school and works evenings at the convenience store. Two nights ago she went to dinner with some school friends. She had a fruity drink; not long after she felt dizzy. A stranger named David, who'd come to the party with one of her classmates, offered to drive her home. David stopped part-way to her house and raped her in his car. Claudia is terrified. She has not gone to work. She is not eating. She's crying a lot, skipping school, and cannot sleep.

# Claudia

1) What might she need?

2) What remedies will you consider?

3) What are the privacy implications?

NEED	POTENTIAL REMEDY	PRIVACY IMPLICATIONS

# Some Common Privacy Challenges & Considerations

- Mandatory reporting
- Interpreters and translators
- Immigration benefit applications
- Defense subpoenas
- School issues (Title IX, Clery, FERPA)
- Minors

# **Mandatory Reporting for OVW-Funded Victim Service Providers (VSP)**

## **Are you a mandatory reporter?**

Review your statute to determine who must report abuse in your jurisdiction. Pay attention to the particular requirements. Be sure to inform the victim at the outset - before the victim makes any disclosures- if you are a mandatory reporter.

Yes

## **Is the victim someone whose abuse must be reported?**

Is the victim a minor under the law?

If the victim has a disability, does the disability subject the victim to mandatory reporting requirements in your jurisdiction?

Is the victim an “older adult” under the statute?

Note: In all but two states, the age of majority is 18.

Is a report required based on how the injury occurred?

Yes

## **Has the victim experienced “abuse” as defined by statute?**

Yes

## **Are you exempt from reporting in this case?**

For example, is the disclosure protected by a victim-advocate, therapist-patient, attorney-client or other privilege that prohibits disclosure without victim consent?

No

## **Report Must Be Made**

Make the report to the appropriate agency.

If there is a choice between agencies, discuss the options with the victim.

Ensure you are reporting only what is required and that you are complying with VAWA (and FVPSA, VOCA or other funders’) confidentiality requirements.

**You may report only the information required by statute unless the victim gives written informed consent for you to release additional information.**

**Remember to safety plan and offer the victim ongoing support.**



No

No

No

Yes

**Do not breach a victim's confidentiality without a victim's written and informed consent.**

**For more information, contact the VRLC at 503.274.5477 or [TA@victimrights.org](mailto:TA@victimrights.org). Visit us on the web at [www.victimrights.org](http://www.victimrights.org)**

Preparation of this material was supported in part by grant 2010-X3768-MA-TA awarded by OVW, US DOJ. The opinions, finding, and conclusions expressed are those of the authors and do not represent the official position or policies of the US DOJ.

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# Privacy Tips When Using Translators & Interpreters

- Get name & location
  - Know survivor?
  - Approval every time
- Address confidentiality / content at the outset
- Redact names before translation
- Family hierarchy
- Post-interview follow up w/ 2<sup>nd</sup> interpreter



# Privacy Considerations When Working With Interpreters?

- What are some of the privacy issues that you confront when working with interpreters?

# What Are Some Privacy Concerns:

- Bilingual volunteer
- Bilingual Advocate
- Interpreter
  - Telephonic
  - In-person
- Translator

# What Are Some Privacy Concerns:

- At intake
- In the office
- In the courtroom
- Outside the courtroom

# VAWA: Confidentiality Protections in Immigration Benefits Cases

# VAWA Confidentiality Prongs

- **Non-Disclosure:** DHS, DOJ and the State Department cannot disclose information about VAWA confidentiality protected case to anyone
  - About the existence of a VAWA confidentiality protected case
  - Not release copies of information contained in the protected case file
- **Abuser-Provided Information**
- **Location Prohibitions**

# Disclosure Exceptions

- Limited disclosure in narrow circumstances
  - Disclosure to law enforcement, prosecutors, 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*)
- For public benefits purposes
- Adult victim waived confidentiality
- Congressional oversight and data collection



# Hawke v. Dep't of Homeland Security

## (N.D. CA, 2008)

- Provides protection:
  - Where denial is not based on the merits (e.g. victim received LPR status through another immigration case type);
  - Procedural denials or withdrawals of applications continue to receive full scope of VAWA confidentiality protections
- The exception to VAWA confidentiality for a “judicial review of a determination”
  - Applies only to judicial review of the V’s immigration case
  - Does not apply to civil or criminal court proceedings

# VAWA Confidentiality Upheld By Federal Courts

- *Hawke v. United States Department of Homeland Security* (N.D. CA, 2008) – VAWA Self-Petition Case
  - VAWA confidentiality continued:
    - 6<sup>th</sup> Amendment right to compulsory process does not permit access to privileged information
    - “primary purposes of the VAWA confidentiality provision, namely to prohibit disclosure of confidential application materials to the accused batterer”

# Demaj v. Sakaj (D. Conn, 2012)

- Although relevant to credibility and impeachment, discovery barred as contrary to the purpose of VAWA confidentiality which is to:
  - Prevent disclosure of documents & information in a protected case file to alleged criminals;
  - Stop perpetrator's actions to interfere with & undermine a victim's immigration case:
    - Including claims that V's application was fraudulent and;
    - That DHS wrongly approved the victim's U visa case
- Conclusion: Efforts to obtain the information through the custody case constituted the kind of interference with the V's immigration case and that was barred by the federal statute.

# VAWA Confidentiality in Family Court

1) In What Types of Proceedings Are Lawyers or Litigants Seeking Information on V's Immigration Status?

2) How did they request it?



# Disclosure Requirement Does Not Extend to:

- Information acquired by federal agencies uninvolved in the state's investigation or trial
  - *States v. Locascio*, 6 F.3d 924, 949 (2d Cir. 1993)
    - Refusing to impute to prosecutors knowledge of reports prepared by FBI agents who were not involved in the underlying investigation or trial

# Tips from the Bench





# 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 that asks:
  - About the *existence of* VAWA/T/U case
  - For information contained in VAWA/T/U case
- Use DHS policies to advocate when violations happen

# Educate the Judge

- Provide context of VAWA
  - Promote the reporting, investigating, and prosecution of violent crime
  - Allow victims to escape & heal from abuse
    - homes and work places
- Strict confidentiality protections
  - Prohibits “use by or disclosure to anyone . . . of any information”

# Make Your Record

- Use motion in limine to proactively prevent discovery or disclosure of protected info
- If V's status raised by perpetrator, object and make VAWA confidentiality arguments
- Make court aware of case law and memos
  - Offer to brief the issue
- If denied, create record for appeal or file a WRIT
  - ask for specific findings and conclusions of law

# Tools to Use In Litigation

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

# More Tips!

- Be proactive
- Attend V interviews
- Close courtroom
  - Exclude witnesses
- Consider filing:
  - Under seal
  - W/ protective order
  - Initials or pseudonym
- Review records w/ client before releasing
- Social media review

# Resources

- National Center for State Courts (NCSC)  
[www.ncsc.org](http://www.ncsc.org)
- American Translators Association (ATA)  
[www.atanet.org](http://www.atanet.org)
- National Association of Judiciary Interpreters and Translators (NAJIT) [www.najit.org](http://www.najit.org)
- Registry of Interpreters for the Deaf (RID)  
[www.rid.org](http://www.rid.org)

# Technical Assistance and Materials

- Power Point presentations and materials for this conference at [www.niwap.org/go/NOLA2016](http://www.niwap.org/go/NOLA2016)
- **NIWAP Technical Assistance:**
  - Call (202) 274-4457
  - E-mail [niwap@wcl.american.edu](mailto:niwap@wcl.american.edu)
- Web Library: [www.niwaplibrary.wcl.american.edu](http://www.niwaplibrary.wcl.american.edu)

# VRLC Resources

- Streamlined OVW-approved release
- Jurisdiction-specific privacy cards
  - English and Spanish
- Use of electronic devices (pending approval)
- Tip sheets
  - How to work effectively with interpreters
  - Protecting survivors' privacy rights



# Tools and Resources

- Tip Sheets
- Guides
- Templates
- Videos
- Spanish Translations
- Sample Motions
- Resource Sheets

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## VRLC Resources for OVW Grantees

*Would you like us to contact you regarding resources or training opportunities?  
Please check the appropriate boxes and provide your contact information below.*

### TIP SHEETS

- ☐ Ensuring Effective and Accurate Interpretation
- ☐ Privacy tip sheets (various)
- ☐ Mandatory Reporting of Elder Abuse
- ☐ Social Media & Victim Privacy
- ☐ Safety Planning with Victims of Non-Intimate Partner Sexual Assault
- ☐ Conducting a Victim-Centered Intake

### GUIDES & TOOLS

- ☐ SA-specific safety planning guide
- ☐ Guide to safety planning with SA survivors experiencing homelessness
- ☐ VRLC Model Intake Form & Issue Spotting Checklist
- ☐ Sample "Candor Script"
- ☐ Mandatory Reporting Flow Charts
- ☐ State privacy guides (e.g., on waivers, non-accidental injury reporting)
- ☐ Criminal and Civil Justice Systems (Key Differences)
- ☐ Sexual Assault Protection Order (SAPO) Chart (50-state summary)
- ☐ Housing and Sexual Assault FAQs

### TRAINING & MATERIALS

- ☐ *Surviving Sexual Violence on the Streets: A Know-Your-Rights Film for Homeless Women*
- ☐ *Survivor Confidentiality: What OVW Grantees Need to Know*
- ☐ SAPOs: A National Perspective and a Statewide Model
- ☐ Campus Sexual Assault: Advocating Under Title IX
- ☐ Sample letters to schools, employers, prosecutors on survivors' behalf
- ☐ Sample pleadings and legal briefs
- ☐ Information about upcoming VRLC webinars, trainings, and online courses
- ☐ Access to past VRLC webinars

### INDIVIDUAL CONSULTATION

- ☐ Victim Privacy
- ☐ Housing / Homelessness
- ☐ Employment Issues
- ☐ Education (Title IX, Clery, Campus SaVE Act)
- ☐ Immigration Issues
- ☐ Safety Planning
- ☐ Financial Stability
- ☐ Research Assistance
- ☐ Case-Specific Consultations

Your name: \_\_\_\_\_  
 Organization: \_\_\_\_\_  
 Email: \_\_\_\_\_ Phone: \_\_\_\_\_  
 OVW grant(s) (e.g., LAV, TA, Rural, SASP, etc.): \_\_\_\_\_  
 Years experience working with survivors of non-intimate partner sexual assault? \_\_\_\_\_

**VICTIM RIGHTS LAW CENTER**  
 Boston, MA: (617) 399-6720 ■ Portland, OR: (503) 274-5477  
 Email: [TA@victimrights.org](mailto:TA@victimrights.org) ■ [PrivacyTA@victimrights.org](mailto:PrivacyTA@victimrights.org)



EXTREMES  
**Not Possible!**  
Some people take their privacy a little too seriously

# Thank You!

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