

# **Violence Against Women Act Confidentiality and Courthouse Enforcement**

Florida State Team Training

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# Faculty

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# Learning Objectives

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

- Understand the limitations federal laws, statutes, regulations and policies place on discovery and immigration enforcement at courthouses
- Identify litigants who are crime victims eligible for VAWA confidentiality protection
- Decide discovery motions in family court cases consistent with VAWA confidentiality
- Identify steps that can be taken if immigration enforcement occurs at your courthouses

# **VAWA Confidentiality in State Court Proceedings**

# Bipartisan VAWA Confidentiality Legislative History in VAWA 2005

- “In 1996, Congress created special protections for victims of domestic violence against disclosure of information to their abusers and the use of information provided by abusers in removal proceedings...”
- These provisions are designed to ensure that abusers and criminals cannot use the immigration system against their victims

# Bipartisan VAWA Confidentiality Legislative History in VAWA 2005

- “This Committee wants to ensure that immigration enforcement agents and government officials covered by this section do not ... rely on information furnished by or derived from abusers to apprehend, detain and attempt to remove victims of domestic violence, sexual assault and trafficking, as prohibited by section 384 of IIRIRA.”

# VAWA Confidentiality Prongs

- **Abuser-Provided Information:** DHS, DOJ, and the State Department are barred from taking action against a victim based *solely* upon information provided by abusers and crime perpetrators (and their family members)
- **Location Prohibitions:** Enforcement locational prohibitions unless comply with specific statutory and policy safeguards
- **Non-Disclosure:** Unless one of the enumerated exceptions apply, DHS, DOJ and the State Department cannot disclose VAWA information to anyone
  - VAWA self-petitioners, VAWA cancellation/suspension, T visa, U visa, Battered Spouse Waiver, Abused Visa Holder Spouses

# DHS VAWA Confidentiality Computer System

- Directs to check for “384” computer system flag that identifies victims who have already filed for or have been granted victim-based immigration relief
- Reminds immigration officers, agents, and attorneys about immigration law protections for
  - Survivors of domestic violence
  - Crime victims survivors
  - Human trafficking survivor

# VAWA Confidentiality 384 Red Flag System and Prohibitions on Release of Information Apply to Following Cases

- VAWA self-petition
  - VAWA self-petitioner
  - Battered spouse waivers
  - VAWA Cuban Adjustment Act
  - VAWA Haitian Refugee Immigration Fairness Act
  - VAWA Nicaraguan Adjustment & Central American Relief Act
- VAWA cancellation of removal
- VAWA suspension of deportation
- U visa applicants
- T visa applicants
- VAWA work authorization abused spouses of visa holder applicants

# VAWA Confidentiality Violations

- Each violation
  - Disciplinary action and/or
  - \$5,000 fine for the individual
- Violations also include making a false certifications in a Notice to Appear
- VAWA Confidentiality Enforcement Guidance CRCL (2008)



**How might these policies be important for state courts?**

# Why is VAWA Confidentiality Important for State Courts?

- Promotes access to justice and just and fair outcomes in state courts
- Perpetrators may attempt to use state court discovery to obtain federal VAWA confidentiality protected information
- Prohibited immigration enforcement locations include courthouses

# VAWA Confidentiality and Discovery

# Protecting Information About a Survivor's Immigration Case

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

# Protecting Information About a Survivor's Immigration Case

- Disclosure prohibited to all persons, not just the perpetrator
- Protections apply from the time of filing permanently unless
  - Case denied on the merits
  - All appeal options have been completed

# 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”

# *Hawke v. Dep't of Homeland Security*

(N.D. CA, 2008) – VAWA Self-Petition Case

(Judicial review exception)

- VAWA Confidentiality Protects cases:
  - All cases unless denied on the merits
- Judicial exception applies to appeals of victim's immigration case
  - Does not apply to civil or criminal court proceedings
- 6<sup>th</sup> Amendment right to compulsory process does not permit access to absolutely privileged information
- “Primary purposes of the VAWA confidentiality provision, namely to prohibit disclosure of confidential application materials to the accused batterer”

# Exceptions to Disclosure

- All DHS instruction 002-02-001
  - Only “in a manner that protects the confidentiality of such information”
  - “Please note, defense counsel in state cases may sometimes attempt to make the entire A-file discoverable; however the entire file is not discoverable in its entirety under this exception”

# Federal VAWA Confidentiality Implementing Regulations

- 8 C.F.R. 214.14 (3)(2)
  - “Agencies receiving information under this section, whether governmental or non-governmental, are bound by the confidentiality provisions and other restrictions set out in 8 U.S.C. 1367”
- Chevron v NRDC (S. Ct. 1984)
  - Considerable weight and deference required of federal regulations

## Demaj v Sakaj (D. Conn, 2012) –U Visa/Custody Case

- Although relevant to credibility and impeachment
- Family court discovery barred as contrary VAWA confidentiality purpose --
  - 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
- Seeking to obtain protected information through discovery in a custody case = interference with the victim's immigration case barred by the federal statute
- VAWA confidentiality applies to protect the case file contents, including in cases when
  - The victim discloses in state court that DHS has approved her protected immigration case

# EEOC v Koch (5<sup>th</sup> Circuit)

- In civil discovery court must consider
  - How discovery of U visas might intimidate victims outside of the case before the court
  - Compromising the U visa program and law enforcement investigations and prosecutions more broadly
  - Koch: limited discovery crafted to maintain anonymity may be allowable
  - That is not possible in a family or criminal court case

# State v. Marroquin-Aldana – Criminal Case

2014 ME 47, ¶ 20, 89 A.3d 519, 525

- “Insufficient justification” to disclose additional documentation when the defense had the certification form
- Provided defense opportunity to cross-examine victim and call credibility into question
- Court noted the “high level of protection” given to documents filed with immigration

# People v. Alvarez Alvarez- Criminal Case

No. G047701, 2014 WL 1813302, at \*5 (Cal. Ct. App. May 7, 2014),  
review denied (July 16, 2014)

- “The visa was a tangential, collateral issue, and allowing evidence about it invited speculation about the legal status...which was completely irrelevant to this case.”
- The trial court was well within its discretion in excluding reference to the U visa

# Eduardo and Clara: Discoverable or Not?

## Eduardo seeks discovery of:

- Information contained in the victims VAWA self-petition case file in any state court case
- Clara's immigration case file
  - Criminal case
  - Family court case
- The U visa certification in a
  - Criminal Case
  - Family case
- Information about the existence of Clara's VAWA self-petition or U visa case in a
  - Protection order or custody proceeding
  - Criminal prosecution

# **Bars and Limitations on Reliance on Perpetrator Provided Information**

# Bars Limiting Reliance Upon Information Provided by a Perpetrator

- The government cannot gather and/or use information provided solely by:
  - A domestic violence or child abuser
  - A sexual assault or stalking perpetrator
  - A trafficker
  - The perpetrator of any U visa listed crime
  - The perpetrator's family member
  - Other persons associated with the perpetrator
- To take an adverse action against a victim
- 8 U.S.C. 1367(a)(1)

# Victims Protected by Non-Reliance Prohibition

- No immigration case filing required
  - Domestic violence victims
  - Child abuse victims
  - Immigrant parents of child abuse victims
  - Victims of family violence perpetrated by another family member residing in the same household
- Victims in the process of filing
  - T Visas
  - U Visas

# Adverse Actions Include Using Perpetrator Provided Information To...

- Deny a victims immigration case
- Detain a victim
- Deport a victim
- Initiate an immigration enforcement action against a victim
- Seek out, question or detain a victim at a prohibited location, including courthouse

# All DHS Memo 002-02-001

- Adverse information about the victim from a prohibited source should be treated as “inherently suspect”

# All DHS Memo 002-02-001

- “Whenever a DHS officer or employee receives *adverse information* from a spouse, family member of a spouse, or unknown private individual, the employee will check the Central Index System (CIS) for the COA ‘384’ flag. Employees will be sensitive to the fact that the alien at issue may be a victim and that a victim-abuser dynamic may be at play.”

# The perpetrator provided information bar

- Is enforced in a variety of ways
  - Complaints filed with the office of civil rights at the Department of Homeland Security
  - The prohibited sensitive locations bar

# Prohibiting immigration enforcement at sensitive locations was designed to...

- Ensure that abusers and criminals cannot use the immigration system against their victims stopping victims from:
  - Accessing civil and criminal justice system help
    - Protection courthouses, family justice centers, and supervised visitation centers
  - Obtaining help from shelters, rape crisis centers, victim services, and community-based organizations

# Locational Prohibitions

- Enforcement actions at VAWA Confidentiality protected sensitive locations actions are not to be taken:
  - “[A]bsent clear evidence that the alien is not entitled to victim-based benefits”
  - Actions taken must “be handled properly given that they may ultimately benefit from VAWA’s provisions”
  - Officers are to follow a specific process aimed at protecting victims that includes obtaining advance permission from a supervisor or ICE general counsel for enforcement actions at statutorily protected sensitive locations
- John P. Torres and Marcy Forman, Interim Guidance Relating to Officer Procedure Following the Enactment of VAWA 2005 (January 22, 2007)

# VAWA Sensitive Location Prohibitions

- Enforcement actions are not to be taken unless the action specific procedures designed to protect victims are followed:
  - 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



VAWA confidentiality is likely violated when a DHS official comes to the courthouse in response to a “tip” from the perpetrator and arrests a victim who has come to court.....

- A. Seeking a protection order
- B. For a child custody case
- C. For an eviction case when the perpetrator stopped paying rent required in a protection order
- D. As a State’s witness in a criminal case
- E. All of the above

# Are Courthouses Sensitive Locations?

- Courthouses are not considered sensitive locations
- Exception: VAWA confidentiality statutes and DHS policies treat courthouses as sensitive locations with regard to victims
- DHS required to certify to the immigration judge that VAWA confidentiality not violated
  - Immigration case can be dismissed

# Additional Protections for All Immigrants

- Sensitive Location Protections
- Immigration and Customs Enforcement (ICE) Limitations on Courthouse Enforcement
- Victims receive
  - These protections + VAWA confidentiality

# Sensitive Locations

- Enforcement actions by ICE and CBP are not to occur or be focused at sensitive locations:
  - Schools
  - Medical treatment and health care facilities
  - Places of worship
  - Religious or civil ceremonies: e.g. weddings, funerals
  - During a public demonstration: e.g., march, rally, parade
- Very limited exceptions:
  - Exigent circumstances
  - Prior approval by a designated supervisor
  - Other law enforcement action led ICE/CBP there

# January 2018 ICE Courthouse Enforcement Policy: Targeted Immigrant Limitation

- Civil immigration enforcement at courthouses will only occur when
  - ICE officers have information that leads them to believe that a *targeted immigrant* will be present at a courthouse
- To be targeted an immigrant must
  - Have criminal conviction(s)
  - Be gang members
  - Be a threat to national security or public safety
  - Have been ordered removed and failed to depart, or
  - Have re-entered the country illegally after being removed

# January 2018 Policy: Persons Who are Not Targets

- Will not subject to immigration enforcement persons who are not targets including
  - Witnesses
  - Family members
  - People accompanying others to to court
  - Victims

# Civil Immigration Enforcement Action Defined

- Action by immigration enforcement action regarding an individual to:
  - Apprehend
  - Arrest
  - Interview
  - Stop
  - Search

# January 2018 Policy:

## Avoid Non-Criminal Proceedings

- Avoid enforcement in courthouses or areas within a courthouse that are dedicated to non-criminal proceedings
  - Applies to courts and cases
  - Family cases
  - Civil cases
- Requires Field Office Director/Special Agent in Charge Approval
  - Will involve screening for VAWA confidentiality protected victim's cases

# Policy Directives: Immigration Enforcement at Courthouses

- Civil enforcement actions at courthouses will be planned
- Minimize impact on court proceedings
- Take place in non-public areas
- Be conducted in collaboration with court staff and security
- Use non-public entrances and exits
- Substantial efforts will be made to not alarm the public

What policies or procedures might courts implement with regard to VAWA confidentiality and courthouse enforcement?

# Steps Courts Are Taking

- Restrict activities that interfere with courtroom operations
- Enforcement restricted to non-public areas of the courthouse\*
- Courts ask ICE to coordinate with court security staff and use of non-public entrances & exits\*
- Some courts do not allow ICE into courtrooms
- No enforcement in civil and family proceedings absent written authorization from ICE Field Office Director or Special Agent in Charge\*
- No interruptions during court proceedings or until case is completed
- No enforcement against victims, witnesses, family members, people accompanying others to court\*
- Call courthouse security if ICE fails to comply with court orders