

# **Violence Against Women Act Confidentiality Limits Discovery in Civil and Criminal State Court Cases**

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# Introductions

- Commissioner Loretta Young
  - New Castle County, Delaware
- Judge Susan Breall
  - San Francisco, California
- Leslye E. Orloff
  - American University, Washington  
College of Law

# Learning Objectives

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

- Understand the limitations federal statutes, regulations and policies place on discovery in state courts
- Decide discovery motions in family court cases consistent with VAWA confidentiality
- Limit discovery in criminal cases to information in the prosecutor's or law enforcement's custody or control

**Have you seen discovery requests in state court cases for information about or copies of a victim's or party's immigration case file?**

**What types of cases/proceedings?**

# VAWA Confidentiality in State Court Proceedings

# 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

# 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

# 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”

# Disclosure Exceptions

- Judicial review exception
  - Applies to judicial review of a victim's VAWA confidentiality protected immigration case (Hawke)
- Benefit granting or public benefits purposes
- Congressional oversight and data collection
  - Omitting personally identifying information
- All adult victims have waived confidentiality protections

# 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

# 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
- Immigration judge can dismiss any immigration case filed



# VAWA Confidentiality Enforcement Guidance CRCL (2008)

- Any person can file a complaint notifying the Department of Homeland Security's Office of Civil Rights Civil Liberties of a VAWA confidentiality or courthouse enforcement violation

# VAWA Confidentiality and Discovery

In what types of family court cases  
have you seen this come up?

# Courts may be asked to rule on

- Motions *in limine*
- Protective orders
  - Objections to discovery
  - Regarding questioning victims about VAWA confidentiality protected case filings in court
- Rule 11 sanctions
- Case law supporting non-disclosure ...

## Demaj v Sakaj (D. Conn, 2012) –U Visa 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 discover 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

# Criminal Court Discovery

How do you respond when  
defense counsel asks for  
information about the victim's  
immigration case under VAWA?

# Discovery in Criminal Case

- Only in U visa cases any discovery =
  - U visa certification document only
  - Nothing else in or about the immigration case is discoverable
- VAWA self-petition, T visa, Visa holder spouse work authorization not discoverable

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

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

- 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”

# State v. Marroquin-Aldana

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

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

# Technical Assistance and Materials

- PowerPoint presentations and materials for this webinar at [www.niwap.org/go/JTN1](http://www.niwap.org/go/JTN1)
- **NIWAP Technical Assistance:**
  - Call (202) 274-4457
  - E-mail [niwap@wcl.american.edu](mailto:niwap@wcl.american.edu)
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# Questions

