



VAWA Confidentiality and State Court Discovery

Multi-State Training
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Faculty





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Learning Objectives

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

- Understand how VAWA confidentiality statutes impact state court discovery in family, criminal and civil court cases
- Issue rulings on discovery motions that are consistent with federal VAWA confidentiality statutes and their legislative history and purpose
- Know what is and is not discoverable based on the immigration case type (VAWA, T Visas and U visas)

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Overview of DHS Policies and Regulations on VAWA Confidentiality

- Protects Information About Victim's Immigration Case
- Prohibits disclosure of any information about
 - The existence of a VAWA, T or U visa application
 - Decisions made in the case
 - Information contained in the #A file
- Disclosure prohibited to all persons, not just the perpetrator

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Protecting Information About a Survivor's Immigration Case

- Helps survivors who have suffered
 - Battering or extreme cruelty
 - Human trafficking
 - Sexual assault, stalking and other U visa listed crimes
- Protections apply from the time of filing permanently unless
 - Case denied on the merits
 - All appeal options have been completed
 - DHS computer system

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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"
 - Judges hearing appeals of the victim's immigration case, not state court judges and
 - In a manner that "protects the confidentiality of such information"

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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”

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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

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Criminal approach applies equally in Civil and Family Court Cases

Discoverable if any part of the application in the custody or control of the prosecutor?

- Only U visa or T visa certification signed by
 - Law enforcement
 - Prosecutor
 - Judge
- T visa certifications not mandatory and thus present in fewer cases

Not discoverable

- Any part of a VAWA self-petition case
 - No law enforcement or prosecutor involvement required
- Other items contained in the federal immigration case file in U and T visa cases beyond the certification form

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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
- 6th 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"

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 (5th 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



DHS Quotes on VAWA Confidentiality

Violence Against Women Act (VAWA) Confidentiality Case Law Compilation

Small Group Activity - Case

Clara met Eduardo a naturalized U.S. citizen when he came back to his hometown to visit his family in El Salvador. Eduardo started dating Clara, who was raising her 9 year old son Miguel. Eduardo began regularly coming to visit Clara, who became pregnant and gave birth to a baby girl Lupe. When Lupe turned 1 year old Eduardo decided to bring Clara, Miguel, and Lupe to the U.S. to live with him. Upon their arrival in the U.S., Eduardo took Clara, Miguel, and Lupe's passports and became physically and sexually abusive of Clara. Eduardo's abuse turned toward Miguel when he tried to protect his mother from Eduardo and Lupe was also physically beaten by Eduardo when he said she "misbehaved". One night when Miguel was 13 and Lupe was 5, Eduardo's rage led to severe beatings with a belt of Miguel and of Lupe. When Clara intervened to protect the children, Eduardo strangled her until she passed out. The neighbors called the police for help. Clara is in family court seeking a protection order with temporary custody of Lupe and in a criminal case Eduardo is being prosecuted for attempted murder and child abuse.

In Small groups


- Prepare for 2 cases
 - Eduardo's motion for discovery in the protection order and custody case for Clara's VAWA self-petition file
 - Case assumes Eduardo and Clara are married
 - 1 team represents Eduardo (Table 1)
 - 2 team represent Clara (Tables 5-6)
 - Defense attorneys request for the U visa case file in Eduardo's criminal case
 - Case assumes Eduardo and Clara are *not* married
 - 1 team is defense counsel for Eduardo (Table 3)
 - 1 team represents the prosecution (Table 4)
 - 1 team represents Clara in the criminal case (Table 5)
- Teams will use hard copy handouts as references

Interactive Exercise



DEBRIEF

- What is the role judges can play in these cases?



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Flash Drive Materials

- California Center for Judicial Education: Discover and Use of Immigration Information Court Checklist
- VAWA Confidentiality Cases Judicial Quick Reference Guide
- Quotes From Federal Laws, Regulations and Statutes: VAWA confidentiality
- U visa interlineated statute
- Copies of all VAWA confidentiality cases cited
- Sample amicus briefs and motions



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Technical Assistance and Materials

- Power Point presentations and materials for this conference at
 - <http://niwaplibrary.wcl.american.edu/jtn-nola-2019/>
- Judicial Training Manual at
 - <http://niwaplibrary.wcl.american.edu/sji-materials/>
 - **NIWAP Technical Assistance:**
 - Call (202) 274-4457
 - E-mail info@niwap.org
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