

Community of Practice for Family Law Attorneys Representing Immigrant Survivors

Confidentiality

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The following slides are intended to be a guide to lead our discussion on this topic and to provide substantive material for your future reference.



Agenda

- Discussion of Confidentiality issues for those serving immigrant survivors.

Why is Privacy & Confidentiality Important to Survivors?

- Most survivors report their top two concerns are **safety** and **privacy**.
- For many victims, there is a direct link between keeping their information private & their safety.
- For some survivors, knowing that they may lose their privacy or control over their personal information can result in them not seeking help.

Shared Responsibility

Helping Victims Weigh Risks & Rewards of Coming Forward

RISKS

- Physical danger
- Emotional trauma
- Reputational harm
- Legal cases

REWARDS

- Safety
- Emotional support
- Accountability for Person Who Harms
- Access to services

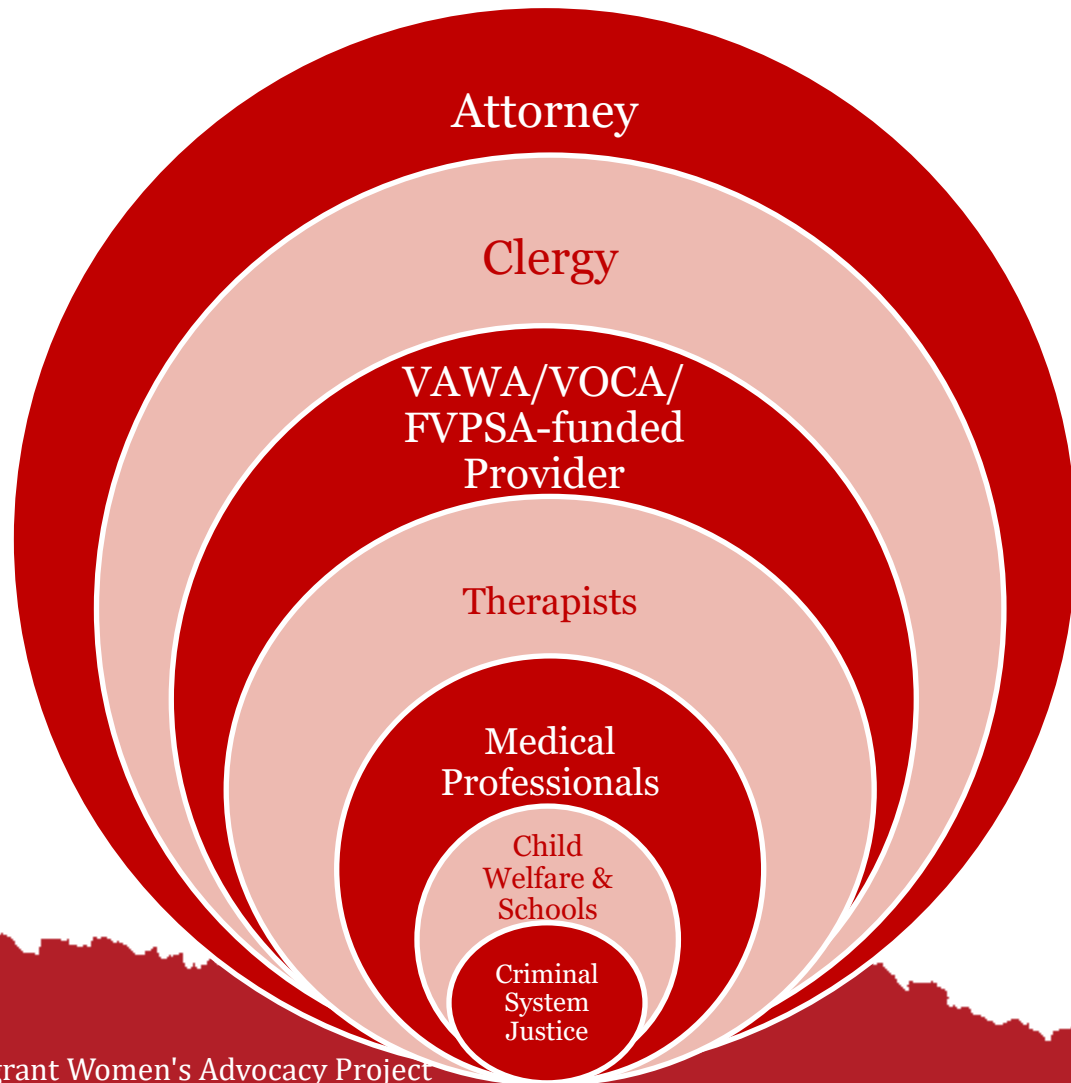


Responsibility to Help Victim Understand Who Can & Cannot Maintain Their Privacy

Victims have the right to understand the scope of the confidentiality each person can promise to the victim PRIOR to disclosure.

Scope of confidentiality that can be promised is determined by various factors:

- Profession
- Place of employment
- Source of funding
- Applicable laws



COMMON PRIVILEGED COMMUNICATIONS

Counselor

--

Patient

Attorney

--

Client

Clergy

--

Penitent

Victim Advocate

--

Victim

Spouse

--

Spouse

Media

--

Source

GENERAL CONFIDENTIALITY STATUTES

Health Insurance
Portability &
Accountability Act
(HIPAA)

Federal Education
Rights & Privacy
Act (FERPA)

Freedom of
Information Act
(FOIA)
Exemptions

VICTIM - SPECIFIC CONFIDENTIALITY STATUTES

Victim's Rights Laws
-
Constitutional &
Statutory

Fed. Crim. Rule 17(c)(3)
Subpoena valid only
AFTER Victim Notice &
Court Order

Clery Act – Higher
Education
Protection of Victim
Identifying Info

Prison Rape Elimination
Act (PREA)
-
Anonymous Reporting

VAWA Confidentiality
-
Governmental –
Immigration Authorities

VAWA/FVPSA/VOCA
Confidentiality
-
Victim Service Providers

CONSTITUTIONAL & STATUTORY VICTIM RIGHTS

Sources

- Federal Crime Victim Rights Act, 18 U.S.C § 3771
- State constitutions
- State statutory victim's rights protections

Core Rights Important to Privacy Protections

- The right to be treated with fairness, dignity, sensitivity, & respect
- The right to attend & be present at criminal justice proceedings
- The right to be heard in the criminal justice process
- The right to be informed of proceedings & events
- The right to protection from intimidation & harassment
- The right to privacy
- The right to enforcement of these rights

Federal Criminal Rule 17(c)(3)

Subpoena for Personal or Confidential Information About a Victim.

After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

*This amendment implements the Crime Victims' Rights Act, codified at 18 U.S.C. §3771(a)(8), which states that victims have a right to respect for their “dignity and privacy.”

VAWA/VOCA/FVPSA Confidentiality

Federal Grantees

- **Violence Against Women Act (VAWA)**
 - To improve criminal justice & community-based responses to domestic violence, dating violence, sexual assault and stalking
 - Grants administered by the federal Office on Violence Against Women
- **Victim of Crime Act (VOCA)**
 - To compensate and directly assist victims of crime
 - Grants administered by the federal Office of Victims of Crime
- **Family Violence Services and Protection Act (FVPSA)**
 - To support emergency shelter & related assistance for victims of domestic violence and their children
 - Grants administered by US HHS - Family Violence Prevention and Services Program

VAWA/VOCA/FVPSA Confidentiality

Federal Grantees

- As a condition of funding, grantees & sub-grantees **MUST** strictly maintain the confidentiality of “personally identifying information” of individuals seeking services
- Applies to all of the agency’s services (or victim’s services program if a large umbrella organization)
- Failure to comply could result in a loss of funding
- Who is NOT covered?
 - Victim-witness assistants at law enforcement/prosecutor’s offices
 - Forensic Nurse Examiners
 - Why not? They are not providing “victim services.”



System-Based Victim-Witness Assistants

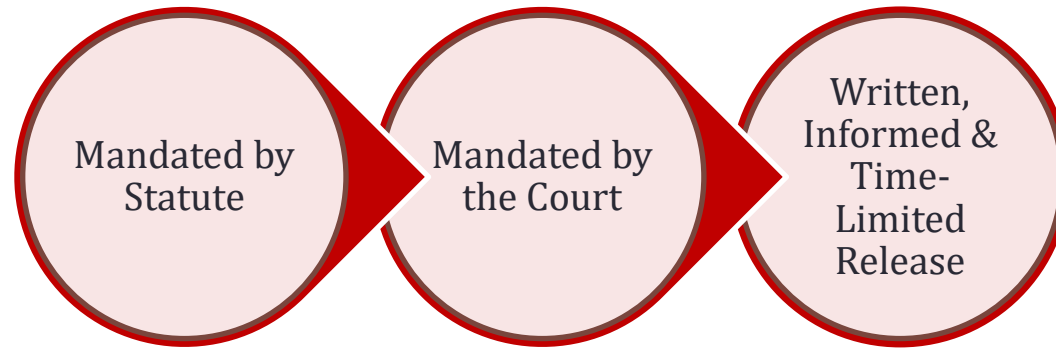
- Employed by criminal justice system agency
- Focus on interests of both victim & agency
- Serve victims of reported crimes
- Advocacy related to helping victim navigate criminal justice system
- Service period limited to length of criminal process or case status
- Communications NOT confidential

Community-Based Victim Advocates

- Employed by a non-profit organization
- Sole focus on interest of victim
- Serve all victims – reporting not required
- Comprehensive advocacy based on victims' choices
- Service period can extend for length of time determined by victim
- Communications may be protected by VAWA Confidentiality or other professional privilege

VAWA/VOCA/FVPSA Confidentiality & Community-Based Victim Services

Non-governmental victim service agencies federally funded by VAWA, VOCA or FVPSA are prohibited from disclosing “personally identifying information” about a victim/client
UNLESS:



Note: There are special rules for minors & legally incapacitated persons

Prior to release, agency must also make reasonable attempt to:

- Inform the victim
- Safety plan with victim to mitigate any potential harm

VAWA/VOCA/FVPSA Confidentiality

What is Personally Identifying Information?

Individually identifying information for or about an individual including information likely to disclose the location of a victim of domestic violence, dating violence, sexual assault, or stalking, including—

- (I) first and last name;
- (II) home or other physical address
- (III) contact information (including a postal, e-mail or internet protocol address, or telephone or fax number);
- (IV) social security number
- (V) any other information, including date of birth, racial or ethnic background, or religious affiliation, that, in combination with any other non-personally identifying information would serve to identify any individual

VAWA Confidentiality

What Information Can be Shared Without a Release or Mandate?

Grantees and sub grantees *may* share without a release or mandate:

- ☼ Non-personally identifying data in the aggregate regarding services to clients
- ☼ Non-personally identifying demographic information in order to comply with Federal, State, tribal, or territorial reporting, evaluation, or data collection requirements (e.g. service numbers for grant reports)
- ☼ court-generated information and law-enforcement generated information contained in secure, governmental registries for protection order enforcement purposes; and
- ☼ law enforcement- and prosecution-generated information necessary for law enforcement and prosecution purposes.

COMMON STATUTORY MANDATES

CHILD ABUSE
OR NEGLECT

VULNERABLE
ADULT ABUSE

PRISONER
SEXUAL
ASSAULT

GUNSHOT
VICTIMS

STATUTORY
DUTY TO
WARN

COURT MANDATES

COURT ORDER

SUBPOENA
SIGNED BY A
JUDGE

SEARCH/ARREST
WARRANT
SIGNED BY A
JUDGE

COMMON LAW
DUTY TO WARN

BRADY V. MARYLAND

REQUIRES PROSECUTORS IN A CRIMINAL CASE TO SHARE EXCULPATORY OR
IMPEACHMENT EVIDENCE WITH THE DEFENSE

VAWA/VOCA/FVPSA COMPLIANT RELEASES



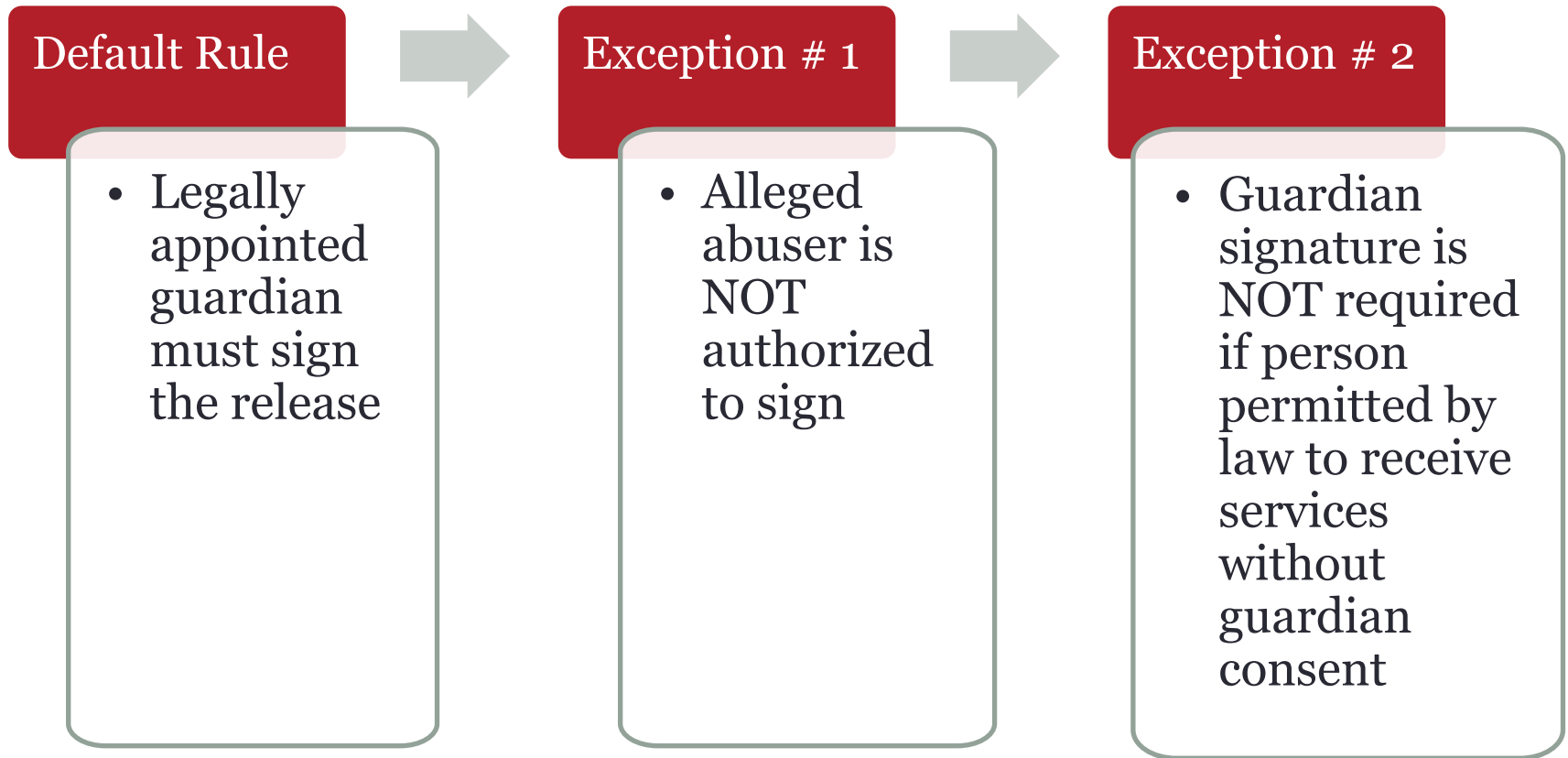
RELEASE FOR UNEMANCIPATED MINORS

Default Rule: Both the minor AND parent or legal guardian must sign the release.

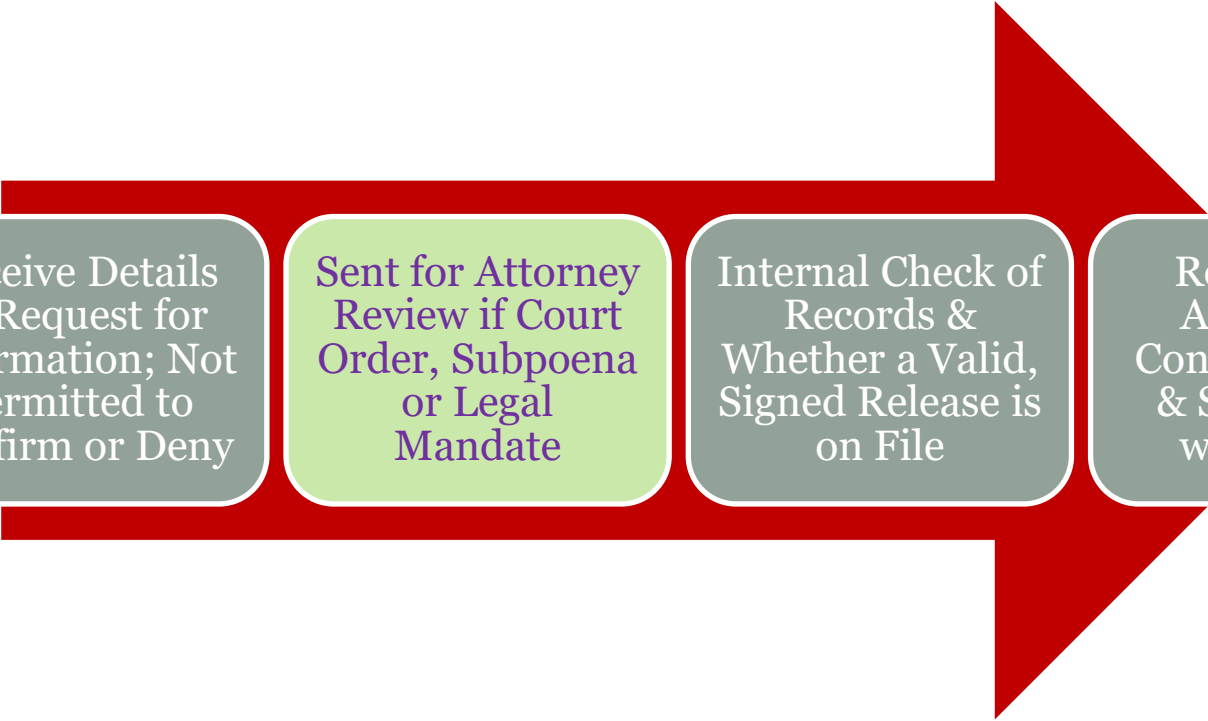
- *Exceptions:*

1. if minor is incapable of understanding, only parent signature is required
2. alleged abuser of minor or of other parent is NOT authorized to sign
3. parent/guardian signature NOT required if minor is permitted by law to receive services without parent/guardian consent

RELEASE FOR LEGALLY INCAPACITATED PERSONS



VAWA/VOCA/FVPSA GRANTEE RESPONSE PROTOCOL TO REQUESTS FOR CLIENT INFORMATION



Receive Details
re Request for
Information; Not
Permitted to
Confirm or Deny

Sent for Attorney
Review if Court
Order, Subpoena
or Legal
Mandate

Internal Check of
Records &
Whether a Valid,
Signed Release is
on File

Reasonable
Attempt to
Contact, Confer
& Safety Plan
with Client

VAWA/VOCA/FVPSA GRANTEE RESPONSE PROTOCOL TO REQUESTS FOR CLIENT INFORMATION

If valid, signed
client release →
Program provides
info as directed by
client

If subpoena or
court order →
formal legal
response only,
including
objections.

If mandated
reporting law
applies →
required info
reported.

If no client
release & no court
order or mandate
→ no response
permitted.

VAWA CONFIDENTIALITY IMMIGRATION AUTHORITIES

Prohibited Disclosure of Victim- Based Applications

- Protected Victims
 - Those who have filed a protected visa application
- Prohibition
 - From disclosing the existence or contents of a VAWA-protected immigration case

Prohibited Sources of Information

- Protected Victims
 - All victims abused by a spouse or parent
 - All victims in process of applying for U or T visa
 - Abused spouses of visa holders with work permit application pending
- Prohibition
 - From seeking or using info. provided solely by a perpetrator or his or her family members to make adverse determinations

Restricted Enforcement Locations

- Restricted Locations
 - domestic violence shelters
 - rape crisis centers
 - victim services programs
 - community based organizations
 - family justice centers
 - supervised visitation centers
 - courthouse if appearing in connection with criminal case or protection case
- Notice to Appear for Removal Case Requirements
 - Must Certify Compliance with VAWA Confidentiality requirements

LIMITING DISCLOSURE OF VAWA- PROTECTED IMMIGRATION RECORDS IN CRIMINAL & FAMILY COURT

- Limit information-sharing with governmental or 3rd parties
- Represent Victims in Fed. Rule of Criminal Procedure 17(c)(3) Proceedings
- Grounds of Objection
 - Attorney-Client Privilege
 - Victim's Rights Laws
 - VAWA/VOCA/FVPSA Confidentiality for Grantees
 - VAWA Confidentiality – Immigration Authorities

New ICE Directive # 11005.4 Interim Guidance on Civil Immigration Enforcement Actions Involving Current or Potential Beneficiaries of Victim-Based Immigration Benefits - Jan. 30, 2025

- 1) “ICE officers and agents **should coordinate and deconflict internally, and with local, state, and other federal law enforcement**, as appropriate, when determining whether to take civil immigration enforcement actions **to ensure criminal investigative and other enforcement actions will not be compromised**;
- 2) When encountering an alien who is the **beneficiary of a victim-based immigration benefit**, ICE officers and agents **should consult** with the Office of the Principal Legal Advisor (OPLA) through their Field Office Directors or Special Agents in Charge **prior to conducting a civil enforcement action** against such known beneficiaries, or against primary and derivative applicants or petitioners for such benefits, to ensure any such action is consistent with applicable legal limitations;
- 3) **When encountering an alien during a civil immigration enforcement action who is not known** to be an approved beneficiary of victim-based immigration benefits or to have applied or petitioned for such benefits, ICE officers and agents are **not required to affirmatively seek to identify indicia or evidence suggesting an alien is a victim of a crime or consider such evidence as a positive discretionary factor** in determining whether to take civil immigration enforcement action; and
- 4) ICE will no longer routinely request expedited adjudications from USCIS. ICE officers and agents may continue to do so subject to a case-by-case determination that it is in ICE’s best interests”

Rescinds Prior ICE Directives:

- ICE Directive 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims (Dec. 2, 2021)
- ICE Policy Statement 10076.1: Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (Jun. 17, 2011)

DISCUSSION

When & how might a victim
want to disclose
protected or confidential information?

VAWA Confidentiality Discovery

- View webinars and access training materials to counter discovery in criminal and family law cases at:
 - <https://niwaplibrary.wcl.american.edu/njn-vawa-criminal-case-discovery-oct-1-2024/>

VAWA Confidentiality

- NIWAP's previous presentation on VAWA Confidentiality where we discussed the protections for immigrant survivors can be found at:
 - <https://niwaplibrary.wcl.american.edu/family-law-cop-materials-repository/>
- Sample letters from Victim Advocates and Attorney's to immigration enforcement can be found at:
 - <https://niwaplibrary.wcl.american.edu/letters-that-promote-ice-compliance-with-2025-policies-and-statutes/>

Resources

- VAWA Confidentiality FAQ's
 - OVW, Frequently Asked Questions (FAQs) on the VAWA Confidentiality Provisions (34 U.S.C. Section 12291(b)(2)) (October 2017)
- Responsibilities of Shelters, Rape Crisis Centers and Victim Services Providers
 - Confidentiality and Immigrant Victims: Responsibilities of Shelters, Rape Crisis Centers and Victim Services Providers (July 6, 2012)
- An Advocates Guide to Survivors' Rights
 - Advocate's Guide to Immigrant Survivors' Rights and Protections (February 23, 2015 – Update January 7, 2025)
- ABA's Resource Manual
 - American Bar Association Subpoena Defense Project

Discussion



Technical Assistance and Materials

- NIWAP Technical Assistance:
 - Call (202) 274-4457
 - E-mail info@niwap.org
 - Web Library:
www.niwaplibrary.wcl.american.edu
 - Directory
 - <https://niwaplibrary.wcl.american.edu/home/directory-programs-serving-immigrant-victims/>
- Materials for this COP:
 - <https://niwaplibrary.wcl.american.edu/family-law-cop-materials-repository/>

Next Community of Practice Call

- Tuesday, May 27, 2025



Thank you!