

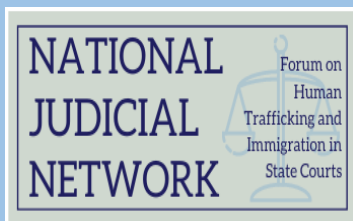
National Judicial Network Forum on Human Trafficking and Immigration in State Courts

Violence Against Women Act (VAWA) Confidentiality and Criminal Case Discovery

October 1, 2024

This presentation was developed under grant number SJI-23-T-043 from the State Justice Institute. The points of view expressed are those of the authors and do not necessarily represent the official position or policies of the State Justice Institute.

1



Peer-to-Peer Session Faculty



**Judge Rosemary Collins
(Ret.)**
Circuit Court Judge of the 17th
District Circuit Court of
Winnebago County



Leslye Orloff
Director
National Immigrant
Women's Advocacy Project,
American University
Washington College of Law

Peer-to-Peer Session Faculty



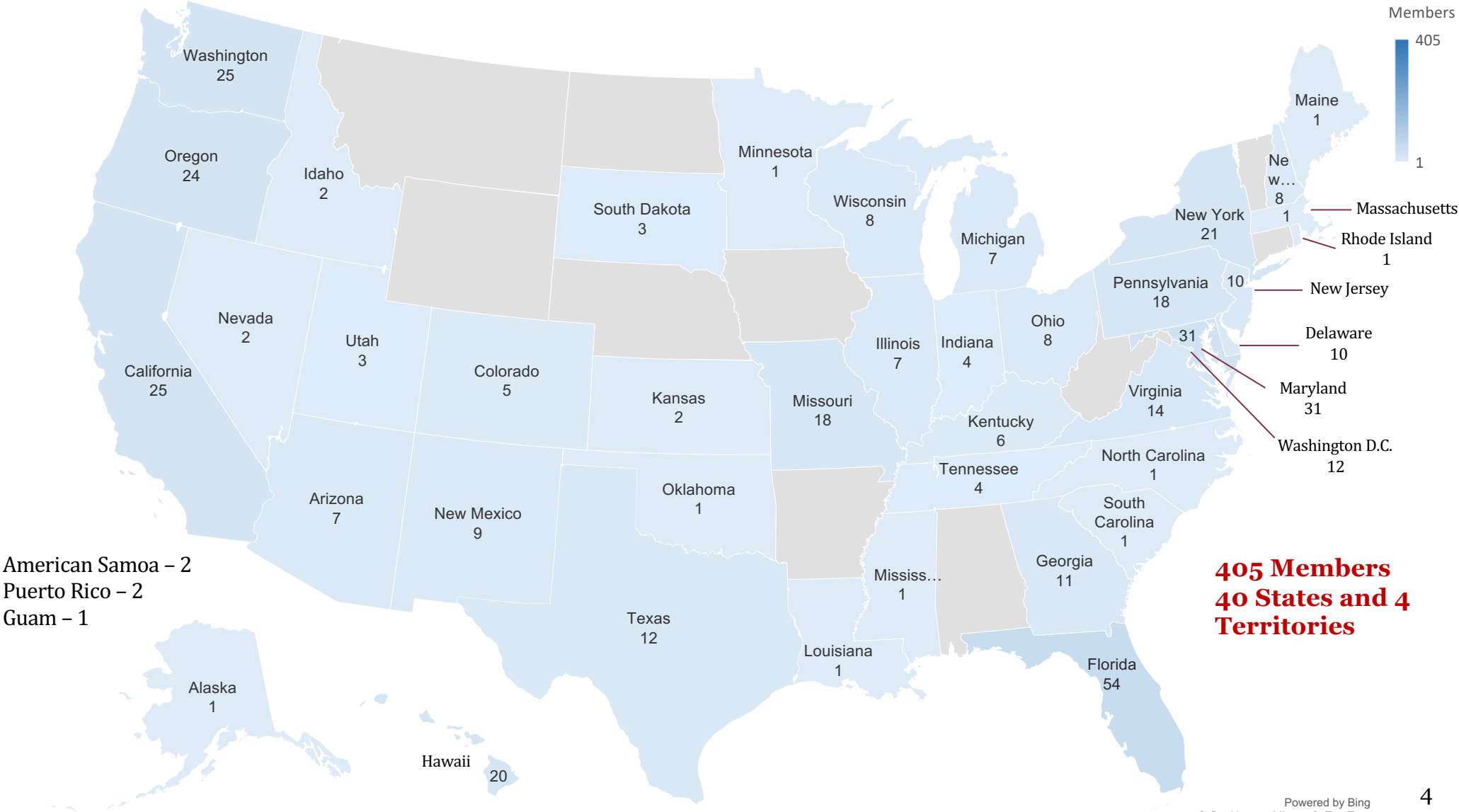
**Judge Rosemary Cosgrove-
Aguilar**

Division VII, Bernalillo County
Metropolitan Court
Albuquerque, New Mexico



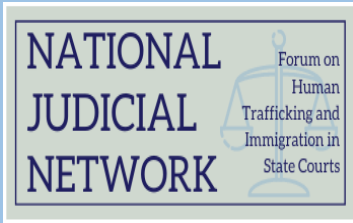
Judge Gustavo Sztraicher
Superior Court of California,
County of Los Angeles

State Representation in The National Judicial Network as of October 1, 2024



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4



Upcoming Peer-to-Peer Sessions & Webinars

November 12, 2024

VAWA Confidentiality and Family Court Discovery (Peer-to-Peer-Session)

December 3, 2024

Culturally Appropriate Protection Orders (Webinar)

January 2025 (TBD)

February 4, 2025

March 4, 2025

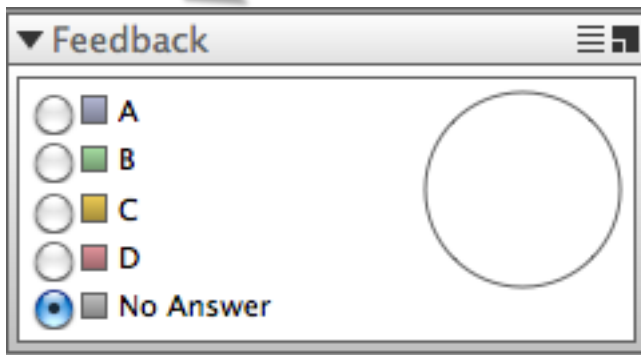
Learning Objectives

By the end of the session judges will be better able to:

- Understand the limitations federal statutes (8 U.S.C §1367), regulations and policies place on state court discovery (VAWA Confidentiality)
- Identify litigants who are crime victims eligible for VAWA confidentiality protection
- Decide discovery motions in criminal court cases consistent with VAWA confidentiality requirements

Poll 1: Who Has Joined Us on This Peer-to-Peer Session?

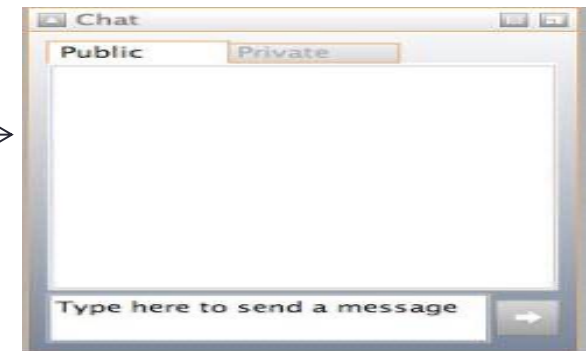
Answer on the left



A screenshot of a feedback poll interface. It features a title bar with a dropdown arrow and the word "Feedback". Below the title bar, there are five radio button options: "A" (blue square), "B" (green square), "C" (yellow square), "D" (red square), and "No Answer" (blue circle). To the right of these options is a large empty circle.

- A. Criminal court judge
- B. General jurisdiction judge
- C. Family court judge
- D. Juvenile court judge
- E. Other

Other write in chat box



A screenshot of a chat box interface. It has a title bar with the word "Chat". Below the title bar, there are two tabs: "Public" and "Private". The main area is a large empty text box. At the bottom, there is a text input field with the placeholder text "Type here to send a message" and a send button.

Poll 2: Have you had a criminal case where the defendant sought discovery of... (Check all that apply)

Feedback

A

B

C

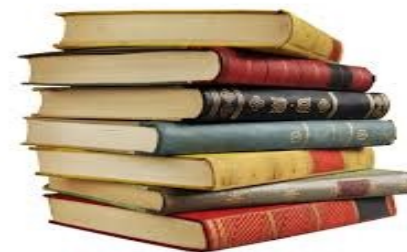
D

No Answer

- A. A U visa certification
- B. A T visa declaration
- C. Information about the existence of a victim-based immigration case
- D. The victim's immigration case file or information in the file
- E. The outcome of a victim's immigration case

Violence Against Women Act
(VAWA) Immigration Confidentiality
Protections:
History, Purpose and Key
Protections

VAWA, T and U Visa Legislative History: Senator Biden Senate Congressional Record 10/11/2000



- *“The single most important provision we add to the Violence Against Women Act is the battered immigrant women provision”*
- *Ensuring abusers “are brought to justice and the battered immigrants also escape abuse without being subject to other penalties.”*

Historical Context of VAWA Immigration Legislation

“Eliminating domestic violence is especially challenging in immigrant communities, since victims often face additional cultural, linguistic and immigration barriers to their safety. Abusers of immigrants- spouses or children are liable to use threats of deportation to trap them in endless years of violence. Many of us have heard horrific stories of violence in cases where the threat of deportation is used against spouses and children – if you leave me, I’ll report you to immigration authorities, and you will never see your children again.” ...

*Senator Kennedy. VAWA 2005 Congressional
Testimony*

Excerpts of speech of Hon. John Conyers, Jr.

“Threats of deportation are the most potent tool abusers of immigrant victims use to maintain control over and silence their victims to avoid criminal prosecution.”

Re: VAWA 2005 (12/18/2005)

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.” (8 U.S.C. §1367)



Immigration Protections for Noncitizen Victims of Crime and Abuse

NIWAP

U.S. Immigration Benefits for NONCITIZEN CRIME VICTIMS

T VISA CONSIDERATIONS

- ▶ Must be in the U.S. on account of human trafficking
- ▶ Law enforcement declaration is encouraged but not required

If approved, benefit provides:

- Up to four years of temporary nonimmigrant status
- Work authorization
- Access to federal and state benefits and services
- Ability to apply for permanent residency
- Ability for qualifying family members to receive derivative nonimmigrant status, even if not already in the U.S.

To apply: USCIS Form I-914

VAWA CONSIDERATIONS

- ▶ Have suffered battery or extreme cruelty perpetrated by your U.S. citizen or Lawful Permanent Resident spouse or parent or your U.S. citizen adult son or daughter
- ▶ Petitioners and perpetrators may be of any sex or gender

If approved, benefit provides:

- Lower priority for removal
- Work authorization
- Access to federal and state benefits and services (possibly sooner than approval)
- Ability to apply for permanent residency
- Ability for children of self-petitioning spouses or children to receive permanent residency, even if not already in the U.S.

To apply: USCIS Form I-360

ASYLUM CONSIDERATIONS

- ▶ Must fear persecution on account of race, religion, nationality, political opinion, or membership in a particular social group
- ▶ If in removal proceedings, may need to file Form I-589 with the immigration judge

If approved, benefit provides:

- Asylee status
- Work authorization
- Access to federal and state benefits and services
- Ability to apply for permanent residency
- Ability for spouse and children to receive asylum, even if not already in the U.S.

To apply: USCIS Form I-589

SIJ CONSIDERATIONS

- ▶ Must be a victim of abuse, abandonment, neglect, or a similar basis under state law by one or both parents
- ▶ Must have a juvenile court order with the required determinations

If approved, benefit provides:

- Ability to apply for permanent residency

To apply: USCIS Form I-360

U VISA CONSIDERATIONS

- ▶ Qualifying crime must have occurred in the U.S. or violated U.S. law
- ▶ May apply from the U.S. or while abroad
- ▶ Must have law enforcement certification

If approved, benefit provides:

- Up to four years of temporary nonimmigrant status
- Work authorization
- Ability to apply for permanent residency
- Ability for qualifying family members to receive derivative nonimmigrant status, even if not already in the U.S.

To apply: USCIS Form I-918

BLUE CAMPAIGN
One Voice. One Mission. End Human Trafficking.

Center for Countering Human Trafficking

DHS.GOV/BLUECAMPAIGN

For victim support call 1-888-373-7888 or text INFO or HELP to BeFree (233733)
All U.S. Citizenship and Immigration Services (USCIS) forms can be found at: www.uscis.gov/forms/all-forms

VAWA Confidentiality Prongs

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

Abuser Provided Information Bar: DHS cannot seek, gather, use, call as witness, or rely on perpetrator provided information ...

- To take any adverse action against a victim
 - Adverse information about the victim from a prohibited source should be treated as “**inherently suspect**” (DHS Directive 11/1/2013)
 - “If the officer believes there is any credible evidence that the alien may be eligible for VAWA benefits or T or U” **VAWA confidentiality applies** (ICE 2007)
- Adverse actions examples:
 - Detain, deport, seek out, question, any immigration enforcement action, deny victim’s immigration case

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



Non-Disclosure Protections: Overview Laws, Regulations and Policies –

- Protects all information about the victim's VAWA confidentiality protected immigration case
 - Extends to all immigration cases filed by the victim
- 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 is prohibited to all persons, not just the perpetrator
- 8 U.S.C §1367

VAWA Confidentiality Violations

- Each violation
 - Disciplinary action and/or
 - \$5,000 fine for the individual
- VAWA Confidentiality Enforcement Guidance (1997, 2005, 2007, 2008, 2013, 2021, 2023, 2024)
- ICE required to:
 - Check for “384” victim flag before enforcement actions
 - Certify compliance to immigration judge = violations can be basis for dismissal



Federal VAWA Confidentiality Law's Impact on Criminal Case Discovery in State Court

Which Victim's Immigration Cases Receive VAWA Confidentiality Protections?

- VAWA confidentiality protected cases
 - VAWA self-petition
 - VAWA cancellation of removal
 - VAWA suspension of deportation
 - Battered Spouse Waiver
 - U Visas
 - T Visas
 - Abused spouses of work visa holders who file for VAWA employment authorization
 - Continued presence for trafficking victims
- Applies to every immigration case filed by victims with these pending or approved cases

Victims Protected by VAWA Confidentiality

- Victims who have suffered
 - Battering or extreme cruelty
 - Domestic violence, spouse abuse, elder abuse, child abuse – includes step-children
 - 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

Immigration Relief Available for Immigrant Victims of

- Domestic violence
 - Sexual assault
 - Rape
 - Incest
 - Prostitution
 - Torture
 - Felonious assault
 - Manslaughter
 - Murder
 - Female genital mutilation
 - Kidnapping
 - Abduction
 - Trafficking
 - Involuntary servitude
 - Slave trade
 - Being held hostage
 - Fraud Foreign Labor Contracting
 - Peonage
 - False Imprisonment
 - Blackmail
 - Extortion
 - Witness tampering
 - Obstruction of justice
 - Perjury
 - Stalking
 - Similar activities
 - Hate crimes
 - Video voyeurism
 - Child/elder abuse
 - Abuse of adults with disabilities
- Attempt, conspiracy or solicitation to commit any of these crimes or any similar activity**

Victim's Immigration File Content

Affidavits of the
Victim

Affidavits of
Witnesses

Health and
Mental Health
Records

Attorney-Client
Privileged
Information

Information
About
Immigration-
Related Cases

Information
About the
Victim's Location

Passports, Social
Security Numbers

Taxpayer
Identification
Numbers

Forensic
Examinations of a
victim and/or
their child

VAWA Confidentiality's Limited Exceptions

- Law enforcement, Judicial, National security officials
 - In a manner that protects the confidentiality of the information
 - Solely for legitimate law enforcement, national security purpose
- For verification of victim's eligibility for *state or federal public benefits*
- Disclosure in the same manner as census data and Congressional oversight
 - Without identifying information
- All adults waive confidentiality protections
 - Must be voluntary, specific, time limited

Poll 3: True or False?

- VAWA confidentiality's judicial exception applies to State Court judges hearing criminal, family and/or civil court matters.

A. True

B. False

A screenshot of a poll feedback window. The window has a title bar with a dropdown arrow and the word "Feedback". Below the title bar, there are five radio button options: "A" (blue square), "B" (green square), "C" (yellow square), "D" (red square), and "No Answer" (blue circle). The "No Answer" option is selected. To the right of the options is a large empty circle.

Limited Disclosure in Narrow Circumstances – Judicial

- A judicial exception applies only to appeals of the victim's immigration case
- Exception does not extend to state or federal judges hearing other civil, family, or criminal court matters

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, family, 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”

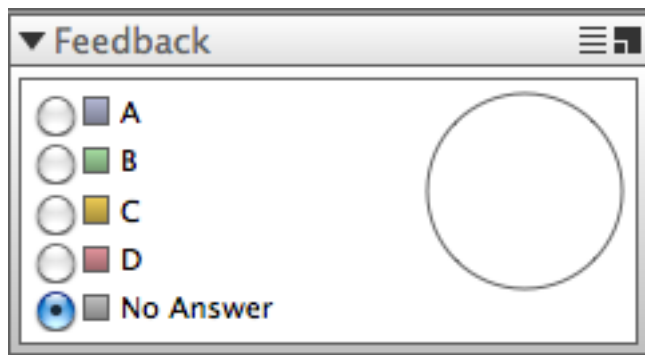
*How do VAWA Confidentiality
Issues Arise in Criminal Court
Cases?*



VAWA Confidentiality in Criminal State Court Cases

- Discovery
- Admissibility
- Cross Examination of the Victim

Poll 4: A criminal judge can order which of the following to turn over information contained in a a victim's immigration case file (check all that apply):



A screenshot of a poll interface. The window title is "Feedback". On the left, there are five radio button options: A (blue square), B (green square), C (yellow square), D (red square), and No Answer (grey square). The "No Answer" option is selected. To the right of the options is a large empty circle.

A. The victim

B. Victim's Counsel

C. The prosecutor

*What Information About a
Victim's Immigration Case
Would Be in the Prosecutor's
Possession?*

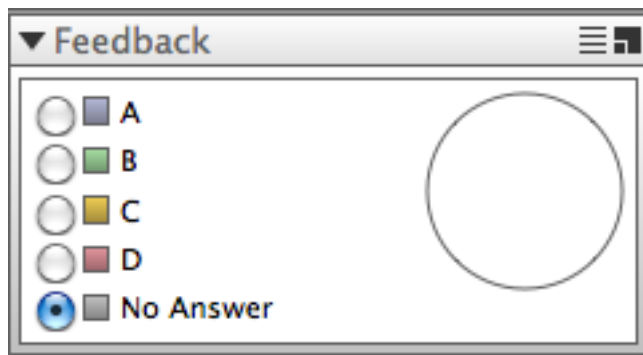


Prosecutors Will Possess...

- U visa or T visa certification signed by law enforcement or the prosecutor
- Cover letter requesting the certification
- Other information provided to the prosecutor or law enforcement by the victim requesting certification

Poll 5: Yes or No?

- Are state and local prosecutors required to obtain and disclose information contained in federal immigration case files and produce such information?



A screenshot of a web-based poll interface. The window title is "Feedback". On the left side, there are five radio button options: A (blue square), B (green square), C (yellow square), D (red square), and No Answer (grey square). The "No Answer" option is currently selected. To the right of the options is a large empty circle, likely a placeholder for a logo or image.

A. Yes

B. No

Disclosure of Information

- VAWA confidentiality protections prohibit the disclosure of information *contained in and information about* the existence of immigration cases filed by VAWA self-petitioners, T visa, and U visa applicants.
- “State and local prosecutors **are not constitutionally required** under the Brady line of cases to seek out, obtain or disclose the existence of or any information contained in an immigration case that is maintained in federal immigration case files”
- U visa Certification and T Visa Declaration Toolkit for Law Enforcement Agencies and Prosecutors (August 30, 2021)

How should criminal court judges respond to requests from defendants for the victim's immigration case file?



How Should A Judge in a Criminal Case Analyze A Discovery Request Related to the Victim's Immigration Case?

- Relevant
- Material
- Exculpatory
- Consider whether the information is protected by VAWA confidentiality
 - Will be about the victim
 - Will be immigration status or immigration case related

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”

Ramirez v. Marsh, and
New Mexico Immigrant Law Center v. Leos
(May 7, 2024) New Mexico Supreme Court

- Criminal court judge cannot order disclosure of U or T visa applications or related materials from
 - The victim
 - The victim’s parents
 - The victim’s counsel
- New Mexico Supreme Court invalidated subpoenas issued by state court judges requiring disclosure
- *Ramirez v. Marsh*, S-1-SC-39966, and *New Mexico Immigrant Law Center v. Leos*, S-1-SC-40114.

What is discoverable in a criminal case?

- U visa and T visa case
 - The request for certification letter
 - The U or T visa certification itself
- VAWA self-petition, VAWA cancellation, VAWA suspension cases
 - Nothing

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

*Is the U Visa Certification
Admissible in the Criminal Trial?*



Analyzing Admissibility

- Relevancy of the information vs
- Prejudice against immigrant victims

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

If you are in a state where criminal cases involve pretrial depositions of victims what is the impact of VAWA Confidentiality?



Questions and Answers



- VAWA confidentiality bench Card
- VAWA confidentiality legislative history, regulations and policies
- DHS quotes on VAWA confidentiality
- VAWA confidentiality case law
- VAWA confidentiality web page

Thank You!

