

What Judges, Attorneys, and Prosecutors Need to Know About How VAWA Confidentiality Impacts Discovery In Cases Involving Immigrant Survivors

October 14, 2022

Learning Objectives

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

- Identify litigants who are crime victims eligible for VAWA confidentiality protection
- As a judge decide, or as a prosecutor or victim's family lawyer, respond to discovery requests in criminal and family court cases consistent with VAWA confidentiality
- Understand best practices for anticipating, preparing for, and addressing VAWA confidentiality discovery issues in a manner that promotes and protects victim safety and offender accountability

This event is supported by Grant No. SJI-21-T-047 from the State Justice Institute and Grant 2017-TA-AX-K043 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions and recommendations expressed in this publication are those of the author and do not necessarily reflect the view of the Department of Justice, Office on Violence Against Women.

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Judge Mary F. Weir
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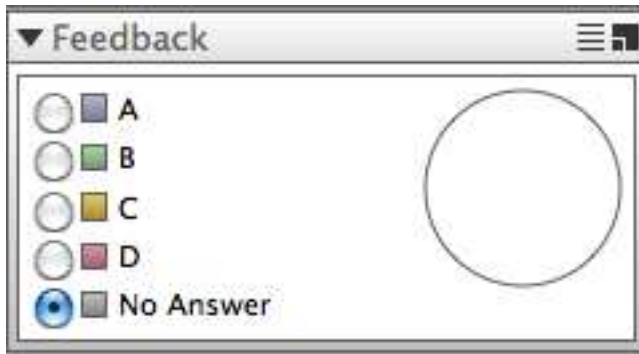


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Who Has Joined Us on This Webinar?

Answer on
the left

- A. Judge/court staff
- B. Prosecutor
- C. Domestic violence/Family law attorneys
- D. Victim Advocate
- E. Other



A screenshot of a 'Feedback' window. It has a title bar with a dropdown arrow and the word 'Feedback'. Below the title bar, there are five radio buttons with corresponding colored squares: A (blue), B (green), C (yellow), D (red), and 'No Answer' (blue with a globe icon). To the right of these options is a large empty circle.

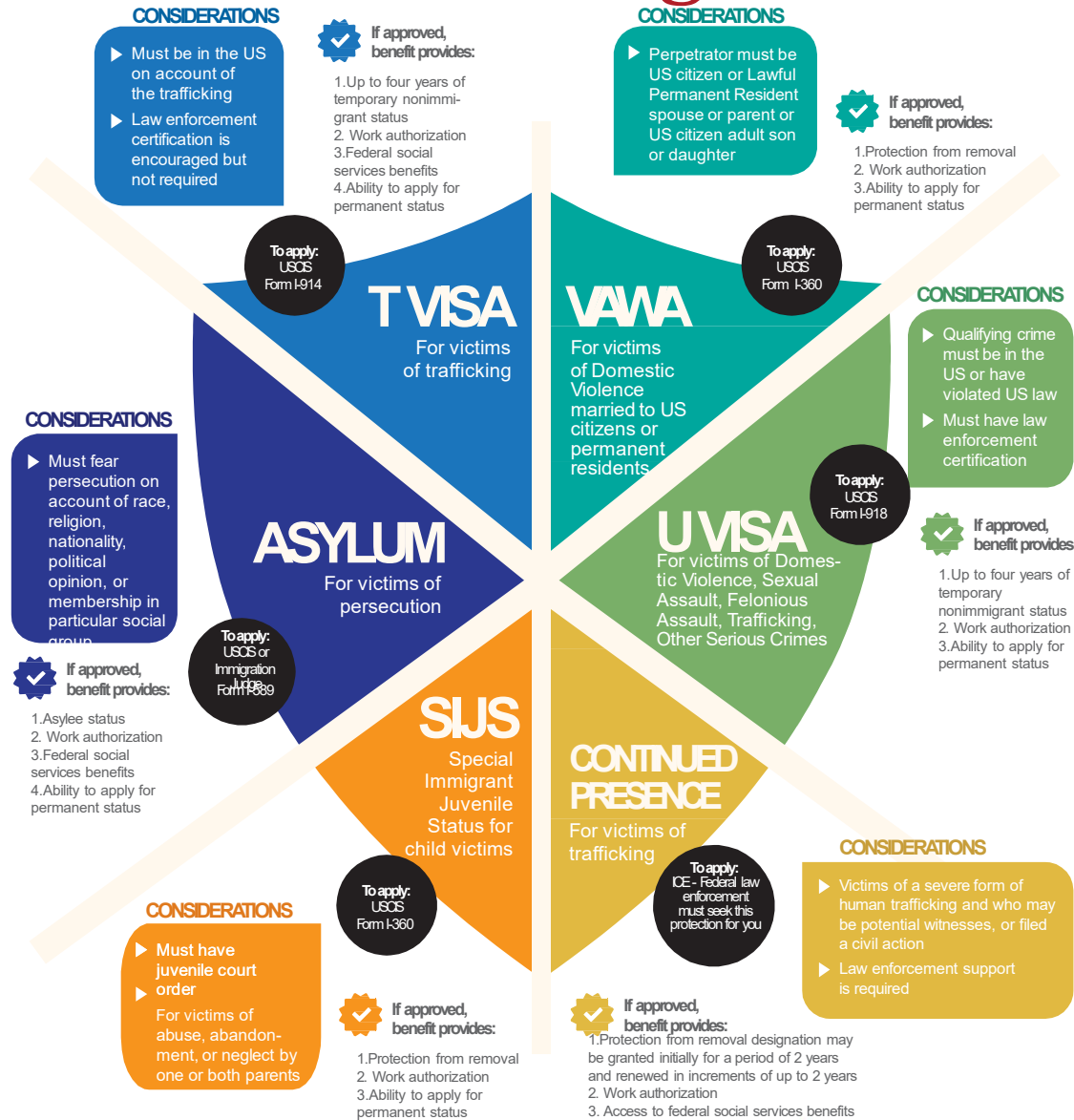
Other write
in chat box



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Identifying Cases Eligible for VAWA Confidentiality Protections

Protections For Immigrant Victims



DHS.GOV/BLUE-CAMPAIGN

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
 - Stalking
 - Involuntary servitude
 - Slave trade
 - Being held hostage
 - Fraud Foreign Labor Contracting
 - Peonage
 - False Imprisonment
 - Blackmail
 - Extortion
 - Witness tampering
 - Obstruction of justice
 - Perjury
 - **Nature & elements of offense substantially similar**
 - Hate crimes, child, elder, disabled adult abuse, video voyeurism
- Attempt, conspiracy or solicitation to commit any of these crimes or any similar activity**

VAWA Self-Petitioning Requirements

- Subjected to Battery or Extreme Cruelty
- By a U.S. Citizen or Permanent Resident
 - Spouse or Parent; or
 - Citizen adult son/daughter (over 21)
- With Whom Self-Petitioner Resided
 - No time period required
- Good Moral Character
- Good Faith Marriage
- VAWA cancellation of removal has similar eligibility requirements
- Battered Spouse Waiver if perpetrator files
- **VAWA confidentiality: No discovery criminal, family, or civil case**

U Visa Requirements

- Victim of a qualifying criminal activity
- Has been, is being, or is likely to be helpful in
 - Detection, investigation, prosecution, conviction, or sentencing
- Suffered substantial physical or mental abuse as a result of the victimization
- Possesses information about the crime
- Crime occurred in the U.S. or violated U.S. law
- **VAWA Confidentiality:** U visa certification *may be discoverable* in criminal or civil multiple victim employment case

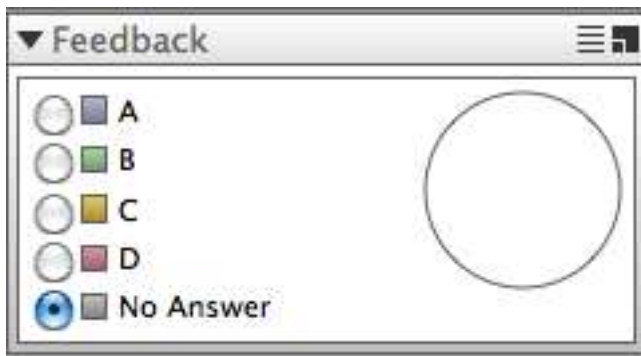
T Visa for Trafficking Victims

- A victim of a severe form of trafficking in persons
 - Sex or labor trafficking involving victim under 18 or and adult subject to force, fraud or coercion
- Victim is physically present in the U.S. on account of trafficking
- Victim must comply with reasonable requests for helpfulness in investigating or prosecuting trafficking.
Exceptions
 - Under age 18
 - Physical or psychological trauma impede helpfulness/cooperation
- Removal from the U.S. would cause extreme hardship
- **VAWA Confidentiality: T visa declaration only *may be discoverable* in criminal or multiple victim employment case**

Case Scenario

Clara met Eduardo a lawful permanent resident 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 and Clara get married. After Clara became pregnant and gave birth to a baby girl Lupe, Eduardo decided to bring Clara, Miguel and Lupe to the U.S. to live with him. When they arrived in the U.S. Eduardo took Clara, Miguel and Lupe's passports and became physically and sexually abusive of Clara and abusive of Miguel who tried to protect his mother from Eduardo's abuse. Eduardo also physically beat Lupe when he said she "misbehaved". Within a year following their arrival in the U.S., Eduardo forced both Clara and Miguel to work for his family's business and never paid them for their labor. One night when Miguel was 13 and Lupe was 5, Eduardo's rage led to severe beatings with a belt on Miguel and Lupe. When Clara intervened to protect the children, Eduardo strangled her until she passed out. The neighbors called the police for help. Clara talked to the police when they arrived. The police arrested Eduardo for attempted murder and child abuse, took Clara to the hospital, and placed the children in the care of the state.

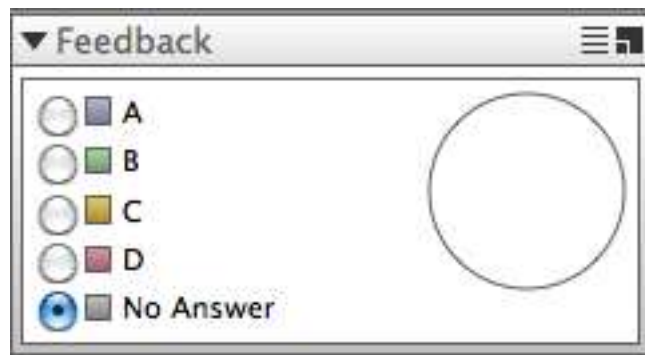
If Clara wanted Eduardo prosecuted for his abuse and wanted the family court to grant her custody of Lupe in her divorce case but feared what Eduardo would do if he learned about her immigration case, which form of immigration relief would be most protective of Clara?



- A. U visa
- B. VAWA self-petition
- C. T visa

Yes or No?

- Tell us your experience:
- Have you had a case where an abuser, trafficker or crime perpetrator sought discovery of information about or contained in a victim's immigration case file?



▼ Feedback

☐ A

☐ B

☐ C

☐ D

☒ No Answer

A. Yes

B. No

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

Overview of DHS Policies and Regulations on VAWA Confidentiality

- Protects all information about the victim's VAWA confidentiality protected 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 is prohibited to all persons, not just the perpetrator

Protecting Information About a Survivor's Immigration Case

- Protect survivors who have suffered
 - Battering or extreme cruelty
 - Domestic violence, child abuse, elder abuse
 - 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

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) – Apply to all victims
- **Location Prohibitions:** Enforcement locational prohibitions unless comply with specific statutory and policy safeguards – Apply to all victims
- **Non-Disclosure:** Unless one of the enumerated exceptions apply, DHS, DOJ and the State Department cannot disclose VAWA information to anyone
 - Apply to VAWA self-petitioners, VAWA cancellation/suspension, T visa, U visa, Battered Spouse Waiver, Abused Visa Holder Spouses, Continued Presence

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)
- ICE required to:
 - Check for “384” flag before enforcement actions
 - Certify compliance to immigration judge = violations can be basis for dismissal



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.”

DHS Victim Protections for Whom?

Statutes/Regulations/Policies

- VAWA confidentiality protected cases
 - VAWA self-petition, cancellation, suspension
 - Battered Spouse Waiver
 - U Visas
 - T Visas
 - Abused spouses of work visa holders who file for VAWA employment authorization
 - Continued presence for trafficking victims

Legal Representation of Petitioners at the Time of Filing U-Visa



91.6%

Principal Petitioners Who
Filed with Legal
Representation (G-28)

4.6%

Principal Petitioners
Who Filed with a
Preparer

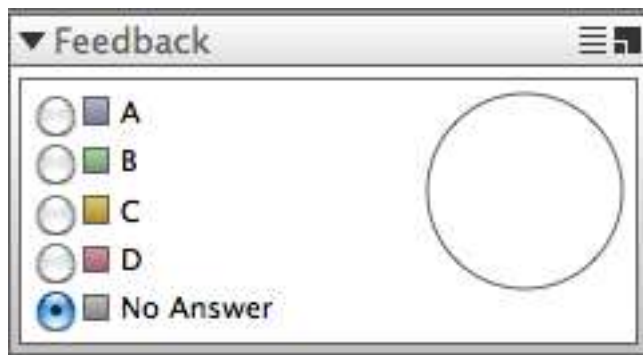
2.8%

Percent of Principal
Petitioners Who
Filed Pro Se

Source: USCIS, U-Visa Report, Demographics (March 2020)

Yes or No?

- **Tell us your experience:**
- Have you had a case where an abuser, trafficker or crime perpetrator sought discovery of information about or contained in a victim's immigration case file?



A. Yes

B. No

If you answered yes, was the case ?

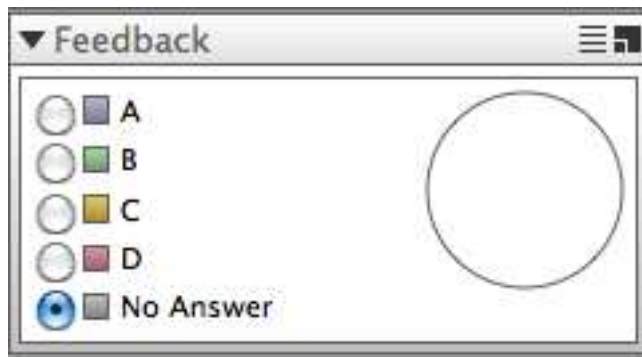
- Check all that apply

A. Criminal Prosecution

B. Family law case

C. Civil employment case

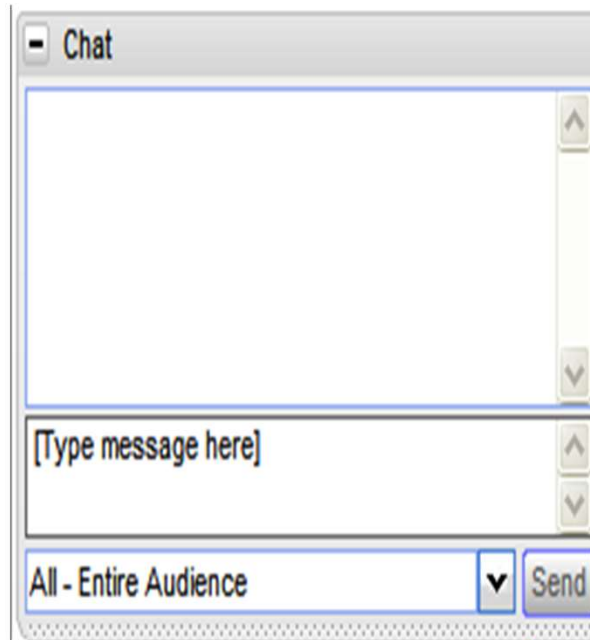
D. Other civil case

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What are the types of information that might be in the victim's VAWA confidentiality protected immigration case file?



Immigration file Content

- Affidavits of the victim
- Affidavits of witnesses
- Health and mental health records
- Attorney-client privileged information
- Information about immigration-related proceedings
- Information about the victim's location
- Passports, Social security numbers
- Taxpayer identification numbers
- Others

What are the VAWA Confidentiality Law's Statutory Disclosure Exceptions?

Limited Disclosure in Narrow Circumstances – Law enforcement

- 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”

True or False?

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

A. True

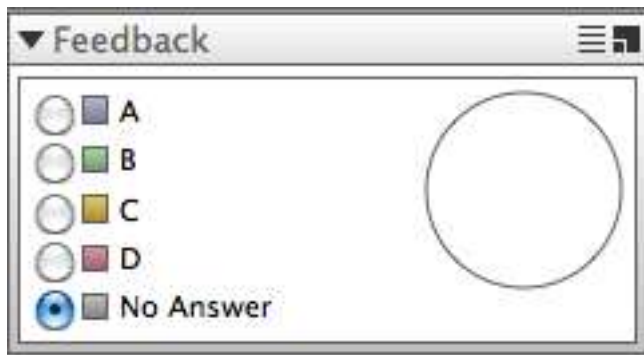
B. False



True



False



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”

Other Limited Exceptions

- **Public Benefits:** Disclosures are authorized to federal, state and local public benefits agencies, and to private agencies providing public benefits . Any information disclosed must be used solely for the purpose of making a determination about the protected individual's eligibility for public benefits
- **Anonymous Information:** Congressional oversight same privacy protections as census
- **Victim Directed:** Victim can authorize DHS to refer them for help to victim service providers. All adult victims agree to waive confidentiality

Discovery Requests for VAWA Confidentiality Protected Information in Family, Civil and Criminal Court Cases

How do VAWA
confidentiality and
discovery issues come up
in family court cases?



Is it relevant ?

- In a family court case how do you address
 - Relevancy of the information vs.
 - Prejudice against immigrants

How should a judge rule
and why?



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

- 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

Demaj v Sakaj (D. Conn, 2012) – U Visa/Custody Case – Part 2

- 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

When and why in a family court case might a victim's attorney raise the fact the victim has filed a VAWA or U visa case to the court?



How do VAWA
confidentiality and
discovery issues come up
in civil court cases?



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

In what other types of civil court cases might state court judges see discovery requests for VAWA confidentiality protected information?



How do VAWA
confidentiality and discovery
issues come up in a criminal
case?



Is it relevant ?

- In a criminal court case how do you address
 - Relevancy of the information vs.
 - Prejudice against immigrant victims

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

How is the approach DHS
takes in the regulations
consistent with
prosecutor's discovery
obligations?



Can you explain whether prosecutors required to disclose the cover letter requesting a U visa certification and anything the victim's lawyer gave them along with the certification request?



Tips for Victim Advocates and Attorneys

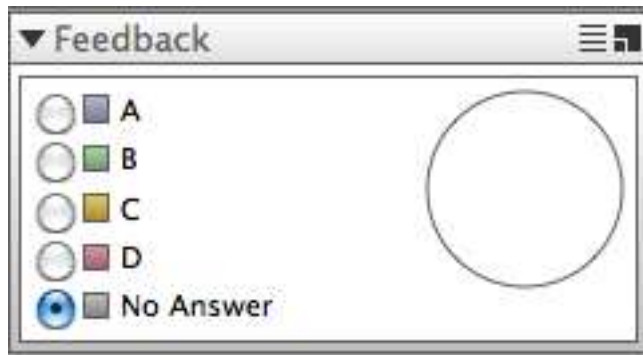
- Know that anything you provide the prosecutor or law enforcement when seeking certification is discoverable
- Prosecutors and police certify based on information in their records and case files
- Do not give the prosecutor or law enforcement copies of documents victims file with DHS

What are best practices for prosecutors in cases involving immigrant survivors that may include the discovery issues we have been discussing?



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. 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?



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

How do VAWA, U visa and
T visa cases differ in terms
of discovery?



How to issues regarding VAWA
confidentiality protected information
and case files come up in depositions
and how should attorneys and judges
respond?



How might expert witnesses be helpful
in family, civil or criminal court cases
involving immigrant victims ?



Help From an Expert Witness

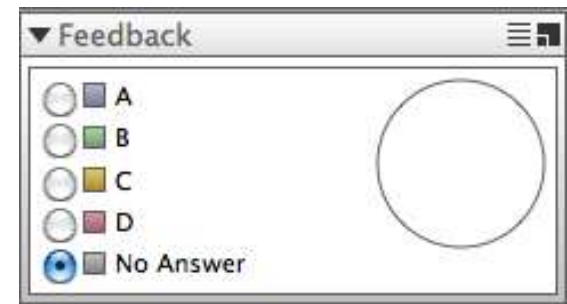
- Provide information about VAWA, T and U visa immigration relief
- Explain that the certification or declaration does not grant victims the relief
- Discuss dynamics of domestic violence, immigration-related abuse
- Describe how VAWA, U and T visa immigration relief severs the perpetrator's control over the victim
- The expert should not be the victim's immigration lawyer

Returning to Clara and Eduardo

Clara met Eduardo a lawful permanent resident 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 and Clara get married. After Clara became pregnant and gave birth to a baby girl Lupe, Eduardo decided to bring Clara, Miguel and Lupe to the U.S. to live with him. When they arrived in the U.S. Eduardo took Clara, Miguel and Lupe's passports and became physically and sexually abusive of Clara and abusive of Miguel who tried to protect his mother from Eduardo's abuse. Eduardo also physically beat Lupe when he said she "misbehaved". Within a year following their arrival in the U.S., Eduardo forced both Clara and Miguel to work for his family's business and never paid them for their labor. One night when Miguel was 13 and Lupe was 5, Eduardo's rage led to severe beatings with a belt on Miguel and Lupe. When Clara intervened to protect the children, Eduardo strangled her until she passed out. The neighbors called the police for help. Clara talked to the police when they arrived. The police arrested Eduardo for attempted murder and child abuse, took Clara to the hospital, and placed the children in the care of the state.

What is the best legal argument to make to the Court to bar the disclosure of Clara's VAWA self-petition, U visa, and T visa case files?

- A. Content is protected by VAWA Confidentiality
- B. Content is protected by Attorney-client privileges
- C. Content is not relevant
- D. All above





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

NIWAP Technical Assistance, Materials, and Training

- Power Point and materials for this webinar
 - <https://niwaplibrary.wcl.american.edu/Discovery2022>
- Judicial training manuals, toolkits, bench card and materials at <https://niwaplibrary.wcl.american.edu/sji-njn-materials>
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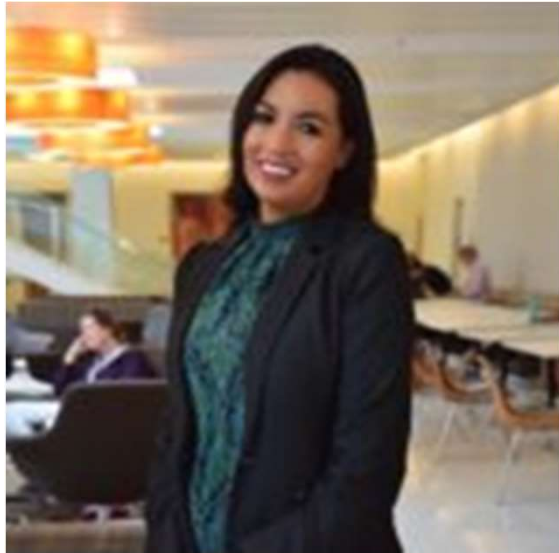
Virtual Roundtables for Law Enforcement and Prosecutors

- Discussion on topics and strategies that will improve ways departments can build rapport, establish trust, and ensure safety
- Interactive call with opportunity to ask questions about case challenges and strategies.
- To register:

<https://www.surveymonkey.com/r/LERoundtable>



Join NIWAP's Family Law or Victim Advocate Community of Practice



- To register for:
 - *Family law community of practice*
<https://www.surveymonkey.com/r/TVGDCCV>
 - *Victim Advocate community of practice*
<https://www.surveymonkey.com/r/BBHR3X3>

Evaluations

