

NIWAP

CONFERENCE

Strengthening Community and Organizational Responses: Serving
Immigrant Victims of Domestic Violence, Sexual Assault, and Stalking

AMERICAN UNIVERSITY
WASHINGTON
COLLEGE OF LAW

VAWA Confidentiality's Impact on Discovery in Family and Criminal Court Cases

Workshop 3A
August 2023

NIWAP

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

Thank You to OVW

This event is supported by Grant No. 15JOVW-21-GK-02208-MUMU; Grant No. 15JOVW-22-GK-04002-MUMU and Grant No. 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.

Faculty



Jane Anderson
Attorney Advisor with
AEquitas



Rosemary Collins
Judge, Rockford, IL
(Retired)



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

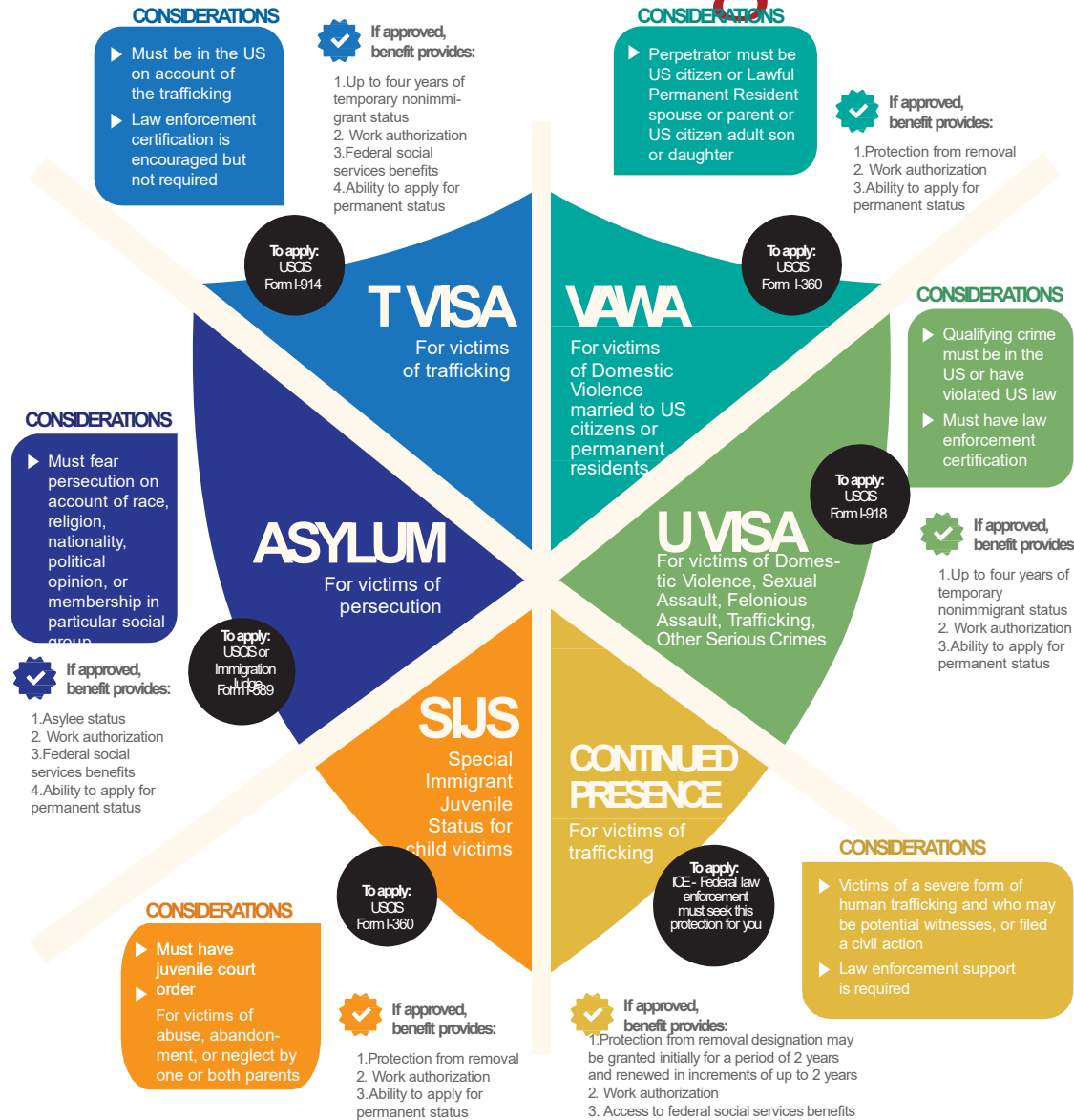
Learning Objectives

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

- Identify litigants who are victims eligible for VAWA confidentiality protection
- Ensure that discovery in criminal and family court case is consistent with immigration law VAWA confidentiality requirements
- Anticipate and respond to discovery requests that violate VAWA confidentiality laws

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." [...]

Case Scenario (continued...)

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.

Additional Facts

- Eduardo married Clara
- Clara wants Eduardo prosecuted for his abuse and to ask the family court to grant her custody of Lupe in her divorce case.
- She fears what Eduardo would do if he learned about her immigration case.
- Which form of immigration relief would be most protective of Clara and Miguel?



A

U/T Visa

B

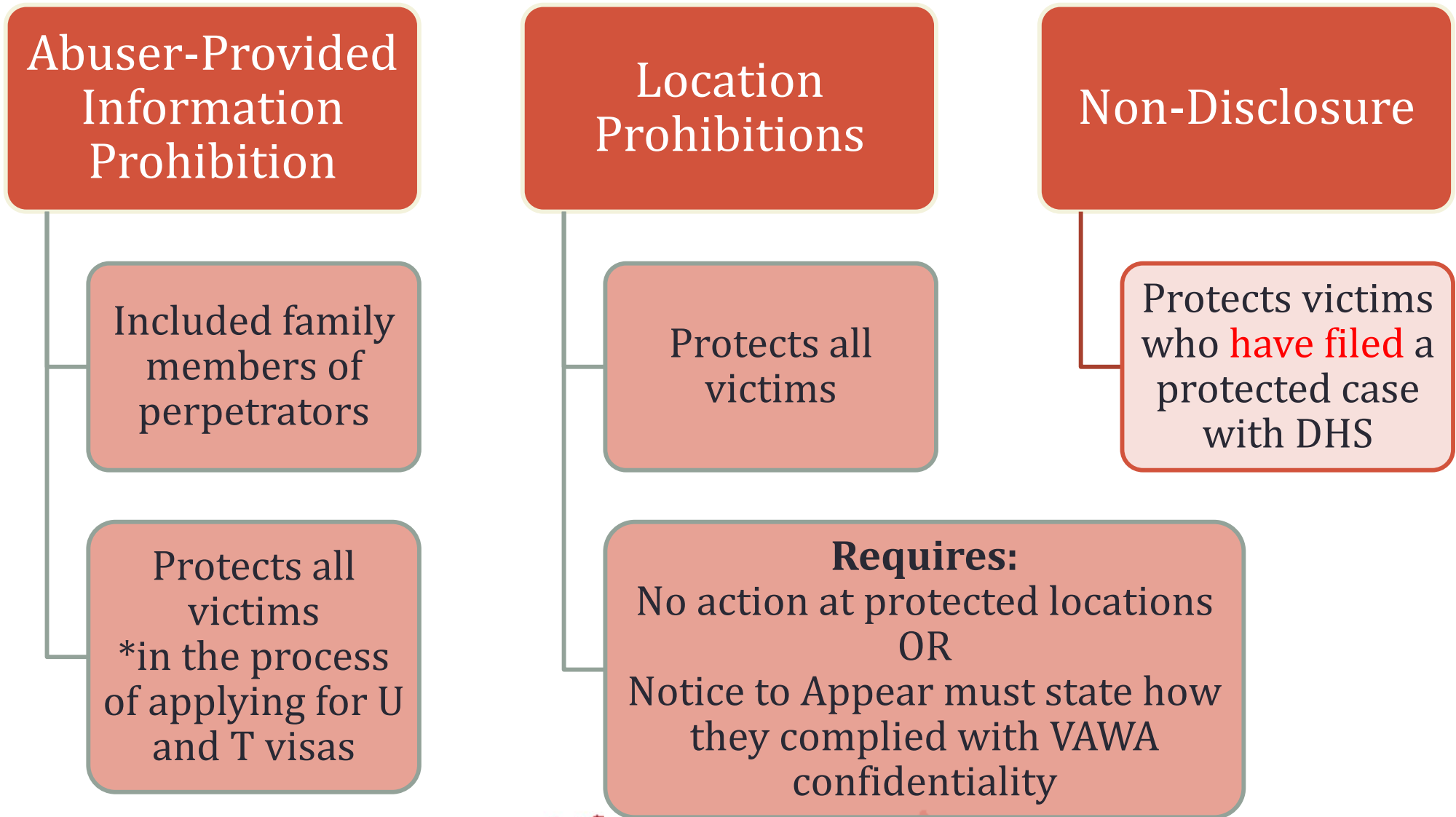
VAWA Self-Petition

C

SIJS

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

VAWA Confidentiality Prongs



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.”*



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

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 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



Raise Your Hand 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, raise your hand if the case was a ...



A

**Criminal
Prosecution**

B

Family law case

C

**Civil employment
case**

D

Other civil case

Large Group Discussion

- 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

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”

Raise Your Hand - True or False?

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



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

Federal, state and local public benefits agencies, and to private agencies providing public benefits

Determine eligibility for public benefits

Anonymous Information

Congressional oversight same privacy protections as census

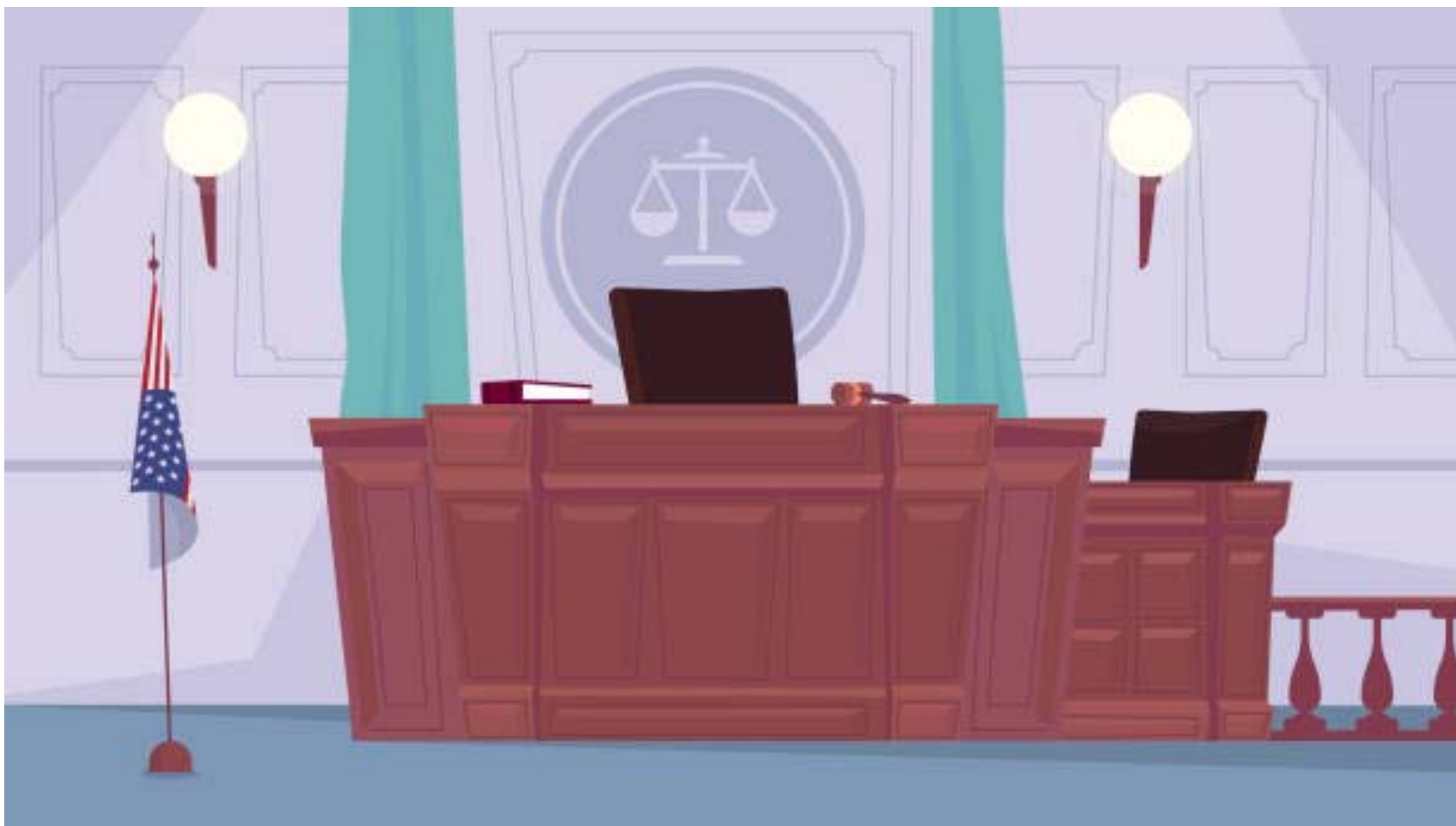
Victim Directed

Victim can authorize DHS to refer them for help to victim service providers

Must have consent from all adult victims to waive confidentiality

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

Freeze Frame and Small Group Activity



Criminal Court

People vs. Moore

The case involves a criminal court proceeding where a defendant is facing charges for sexual assault. The defense attorney has filed a motion requesting that the prosecutor turnover of the victims entire U Visa files. The prosecutor has objected to the turnover of the victims U Visa immigration case files.

Civil Court

Smith vs. Smith

The case involves a family court domestic violence divorce and contested custody case. The issues involve allegations of domestic violence, and there is a discovery motion filed on behalf of Mr. Smith, who wants to discover the immigration file of Mrs. Smith. Mrs. Smith's attorney has objected to the discovery of the victim's immigration case file and its contents.

Large Group Discussion

Would any of the arguments or the outcome be different if this was a contested protection order case?



Ask the Judge and Faculty

Large group debrief with the judge and faculty with an opportunity for questions about the outcome in both the family and criminal cases.



Key Learning Points

- The need for balancing of interests
 - Relevancy of the information vs.
 - Prejudice against immigrants
 - Federal law protecting the information
- Difference between
 - U/T Visa case with certification
 - T Visa case with no certification
 - VAWA Self-Petition

Multiple Choice Exercise – Raise Your Hand

- Which are the best legal arguments to make to a judge in a family or criminal court case to bar disclosure of the victims full VAWA Self-Petition, U Visa or T Visa case file?



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

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

Large Group Discussion

- In a family court case, when and why might a victim's attorney raise the fact that the victim has filed a VAWA or U Visa case to the court?
- Should the discovery decision by the judge be different?



Ask NIWAP

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

EEOC v Koch (5th Circuit)

- In civil discovery, courts must consider
 - How the 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 (See also Walsh v. Unforgettable Coatings, Inc., (D. Nev. Aug. 23, 2022))
 - That is not possible in a family or criminal court case

EEOC v. Sol Mexican Grill LLC (D.D.C. June 11, 2019)

- Categories of information are strictly off-limits for discovery (regarding the charging parties, the claimant, their family members, and other claimants or witnesses):
 - Information Related to Immigration and Residency Status (past and current)
 - Any immigration-related proceedings
 - Travel to and from the United States
 - Sensitive personal identifiers that can relate to immigration and residency status (social security, ITIN, passports, etc.)
 - Work histories

Large Group Discussion

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



DHS Policy: 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 U Visa 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

Prosecutor's Strategies and Criminal Case Discovery

Raise Your Hand Exercise

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



YES

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)

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

Prosecutors Disclosure Obligations

- Disclosure obligations generally
- In a U Visa case
- In a T Visa case
- In a VAWA self-petition case

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

Best Practices in Criminal and Family Court Cases

Motion in Limine

- Precluding Irrelevant or Prejudicial Evidence
- Limiting Disclosure of Confidential Records
- Restricting Testimony or Questions
 - Collateral questions, not necessarily about immigration status
- Excluding Personally Identifiable Information (PII)

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 immigration relief serves the perpetrator's control over the victim

The expert should not be the victim's immigration lawyer

Handling Depositions

- Object during deposition citing 8 U.S.C. 1367
- File a bench brief on VAWA confidentiality
- NIWAP has a webpage with all the needed information



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

Technical Assistance and Materials

- NIWAP Technical Assistance:
 - Call (202) 274-4457
 - E-mail info@niwap.org
 - Web Library:
www.niwaplibrary.wcl.american.edu
- Materials for this Workshop:
 - <https://niwaplibrary.wcl.american.edu/BostonDiscovery>
- Contact NIWAP to provide training for your jurisdiction