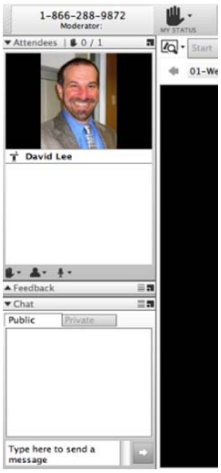
WEBINAR

VAWA Confidentiality: Understanding the Three Safeguards and Discovery Limitations That Apply in Cases of Immigrant Survivors in Family and Criminal State Courts

Presented by: U.S. Department of Justice Office on Violence Against Women in partnership with the National Immigrant Women's Advocacy Project (NIWAP), AEquitas, and The California Coalition Against Sexual Assault (CALCASA)

THIS PROJECT WAS SUPPORTED BY GRANT NO. 2013-TA-AX-K009 AWARDED BY THE OFFICE ON VIOLENCE AGAINST WOMEN, U.S. DEPARTMENT OF JUSTICE. THE OPINIONS, FINDINGS, CONCLUSIONS AND RECOMMENDATIONS EXPRESSED IN THIS PUBLICATION/PROGRAM/EXHIBITION ARE THOSE OF THE AUTHOR(S) AND DO NOT NECESSARILY REFLECT THE VIEWS OF THE DEPARTMENT OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN.

How to use this technology



- Raise hand
- Text chat
- PowerPoint slides
- Polling Questions
- Phone

Please send a private chat message for help or call iLinc Support at 800-799-4510.



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



Jane Anderson
Attorney Advisor
*AE*quitas:
The Prosecutors' Resource on Violence Against Women



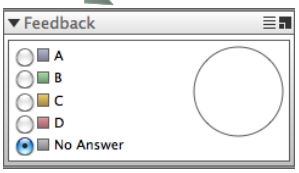
Amy Cucinella
U.S. Department of Homeland Security

Resources and Webinar Materials

- www.niwap.org/go/vawaconfidentiality
- PowerPoint
- Legislative and Regulatory History
- VAWA Confidentiality
  - Newsletter
  - Benchcard for Family Court Judges
  - Brochure
- Web library materials
  - www.niwaplibrary.wcl.american.edu

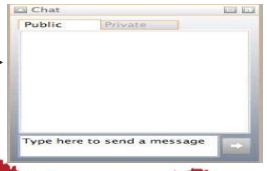
Let's see who is on the webinar with us. Please check the box that best describes you:

Answer on the left



A. Victim Advocate/ Lawyer
B. Prosecutor
C. law enforcement
D. Judge / Court Staff

Other write in chat box



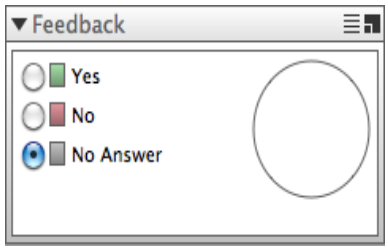
Learning Objectives

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

- Address VAWA confidentiality issues in state family and criminal court cases
- Understand Department of Homeland Security (DHS) policies on VAWA confidentiality and the relationship to DHS priorities
- Implement strategies that prevent or limit disclosure in state court cases

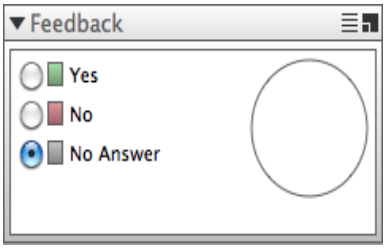
Have you used VAWA confidentiality provisions to protect survivors you work with?

Answer on the left



Have you had a case in which a perpetrator sought information about a VAWA, T visa or U visa case in a state court proceeding?

Answer on the left

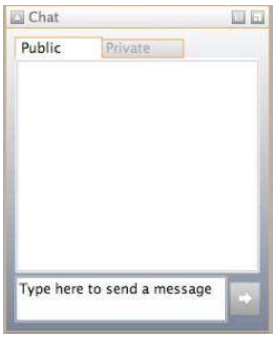


Raise your hand if the perpetrator sought this information in a ---



- Criminal case
- Employment case
- Family law case

What kind of family law case?



VAWA Confidentiality: Overview

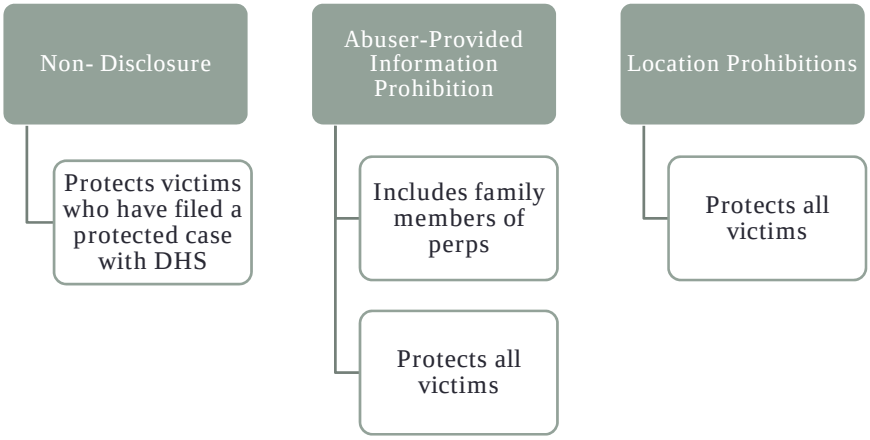
DHS Goals

- Implementing federal laws, including
  - Violence Against Women Act (VAWA)
  - Trafficking Victims Protection Act
- Protecting crime victims and witnesses
  - Including VAWA self-petitioners, T and U visa cases
- Preventing use of DHS enforcement resources on cases involving immigrant crime victims
- Ensuring DHS enforcement is consistent with DHS enforcement proprieties

VAWA Confidentiality Prongs

- **Non-Disclosure:** Unless one of the enumerated exceptions apply,DHS, DOJ and the State Department cannot disclose VAWA information to anyone
  - VAWA self-petitioners, T visa, U visa and Battered Spouse Waiver cases
- **Abuser-Provided Information:** DHS, DOJ and the State Department are barred from taking action against a victim based *solely* upon information provided by abusers, including family members of abusers
- **Location Prohibitions:** Enforcement locational prohibitions without following explicit safeguards

VAWA Confidentiality Prongs



Prong 1: Protecting Information About a Survivor's Immigration Case

- Prohibits disclosure of any information about
  - The existence of a VAWA, T or U visa application
  - Information contained in the A file
- Helps survivors who have suffered
  - Battering or extreme cruelty
  - Human trafficking
  - Sexual assault, stalking and other U visa listed crimes
- Disclosure prohibited to all persons, not just the perpetrator

Prong 1: Prohibition on Disclosure

- Information about the existence of the application
- Any information contained in the application
- Action taken on the application by DHS



Prong 1: 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"

Prong 1: Exceptions to Disclosure

- Judicial review in a manner that protects the confidentiality of the information
- Benefit granting or public benefits purposes
- Congressional oversight and data collection
  - Omitting personally identifying information
- Adult victim waived confidentiality protections

Prong 2: Relying on Information Provided by Abuser

- The government cannot gather and/or use information provided solely by:
  - an abuser;
  - trafficker;
  - crime perpetrator or
  - the perpetrator's family member
- To take an adverse action against a victim
- The victim may not have to have filed an immigration case to be protected

Prong 2: DHS cannot rely on information *solely* provided by the perpetrator

- Information provided ***solely*** by prohibited sources **must** be independently corroborated by DHS
  - Adverse information about the victim from a prohibited source should be treated as "inherently suspect" (DHS Directive 11/1/2013):
  - Information can only be used if verified
  - Must complete required ICE form filed in the victim's case documenting publicly verified information (ICE Policy 2007and DHS Instruction 11/1/13)

Prong 2: DHS cannot rely on information *solely* provided by the perpetrator

- VAWA 2005 legislative history- corroboration of adverse information can only be made through objective sources such as:
  - Court records
  - Government databases
  - Affidavits from law enforcement officials
  - Previous decisions by DHS or DOJ personnel

Prong 2: DHS cannot rely on information *solely* provided by the perpetrator

- Adverse actions include
  - Denying a victim's immigration case
  - Initiating an enforcement action against a victim
  - Detaining a victim
  - Removing or deporting a victim

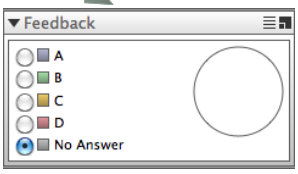
Prong 3: Locational Prohibitions

- Enforcement actions are not to be taken unless the action is certified in advance through a specific process aimed at protecting victims:
  - 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



VAWA confidentiality is not violated when a DHS enforcement officer arrests a victim who has come to court…….

Answer on the left



A. Seeking a protection order
B. For a child custody case
C. As a defendant in a "hit and run" case
D. As a State's witness in a criminal case

Prong 3:Sensitive Location Certificate of Compliance

- INA § 239(e)
- If any part of the enforcement action leading to the victim being brought before an immigration judge included
  - Relying upon abuser-provided information
  - Enforcement action taken at prohibited location
- DHS is required to file a certification in the immigration case that VAWA confidentiality protections were not violated

Prong 3: VAWA Confidentiality and Enforcement at Sensitive Locations

- DHS also prohibits enforcement actions "near sensitive community locations such as schools, places of worship, and funerals or other religious ceremonies" (*DHS Field Guidance on Enforcement Activities in and Around Sensitive Locations*, 2008)
- Congress expects that immigration enforcement officials should proceed cautiously when making an arrest at a sensitive location (ICE Policy 2007)

When Does VAWA Confidentiality Protection End?

- Limitation to disclosure ends when application for relief is denied based on **substantive grounds** and all opportunities for appeals have been exhausted.

DHS VAWA Confidentiality Policies

- All DHS policy (2013)
  - VAWA Confidentiality required training
- Immigration and Custom Enforcement Policy (2007)
- U.S. Citizenship and Immigration Services Policies (1997)
- Immigration Judges Policies (1997)

DHS VAWA Confidentiality Computer System

- Directs to check for"384" computer system flag that identifies victims who have already filed for or have been granted victim-based immigration relief
- Reminds immigration officers, agents, attorneys about immigration law protections for
  - Survivors of domestic violence
  - Crime victims survivors
  - Human trafficking survivor

VAWA Confidentiality Violations

- Each violation
  - Disciplinary action and/or
  - $5,000 fine for the individual
- Violations also include making a false certifications in a Notice to Appear
- VAWA Confidentiality Enforcement Guidance CRCL (2008)

VAWA Confidentiality Violations Effect on Immigration Court Proceedings

- Can result in dismissal of the immigration proceeding against the non-citizen (VAWA 2005 legislative history)



VAWA Confidentiality in State Court Proceedings

Why is VAWA Confidentiality Important for State Courts?

- Promotes access to justice and just and fair outcomes in state courts
- Perpetrators may attempt to use state court discovery to obtain federal VAWA confidentiality protected information
- Prohibited immigration enforcement locations include courthouses

Federal Court Case Law on VAWA Confidentiality

Hawke v. Dep't of Homeland Security
(N.D. CA, 2008) – VAWA Self-Petition Case

- Protects cases:
  - Denials not based on the merits; and
  - Procedural denials or withdrawals of applications continue to receive full scope of VAWA confidentiality protections
- The exception to VAWA confidentiality for a "judicial review of a determination" applies only to judicial review of the victim's immigration case
  - Does not apply to civil or criminal court proceedings

VAWA Confidentiality Upheld By Federal Courts

- *Hawke v. United States Department of Homeland Security* (N.D. CA, 2008) – VAWA Self-Petition Case
  - VAWA confidentiality:
    - Applies unless immigration case dismissed on its merits
    - Statutory exception applies only judicial review of victim's immigration case
    - 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"*

Federal Courts -- Continued

- *Demaj v. Sakaj* (D. Conn, 2012) – U Visa Case
  - *Although relevant to credibility and impeachment, discovery barred as contrary to the purpose of VAWA confidentiality which is to --*
    - 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:
      - Including claims that victim's application was fraudulent and;
      - That DHS wrongly approved the victim's U visa case.
  - Court concluded that efforts to obtain the information through the custody case constituted the kind of interference with the victim's immigration case and that was 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.

Best Practices for Courts When VAWA Confidentiality Issues Arise

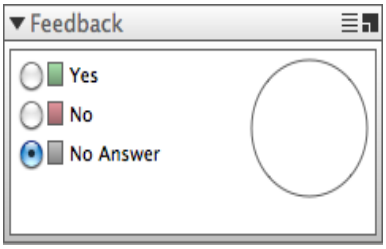
- In civil court cases
  - Family
  - Employment involving sexual violence
  - Keep focus of the court on relevance
  - Judicial options

Relevance and Judicial Options

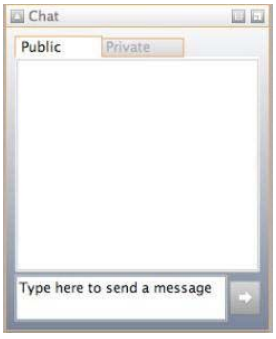
- In criminal court cases
- Implementing VAWA's statutory limitation
  - Any release must be in a manner that protects the confidentiality of the information

Have you been involved in a criminal case where discovery attempts where made to obtain information in a U visa case?

Answer on the left



In what types of criminal court cases?



Discovery Obligations in Criminal Court

Relevant and Material?	• Does it tend to prove or disprove any fact significant to the issue at hand?
Brady or *Giglio*?	• Is it evidence that exonerates the defendant or calls into question the victim's motives?
Is it in the State's Possession?	• Is it held by a Federal Agency "uninvolved in the state investigation or trial?"

Discovery

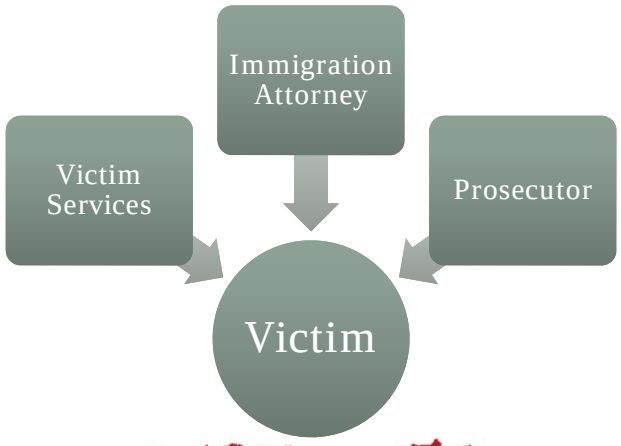
- U Visa Application
- Law Enforcement Certification
- Supporting Documentation
- Immigration Attorney
- Victim Services

Existence v. Content

Strategies to Protect Crime Victim

- Coordinate with Allied Professionals
- Educate Judge
- Concede Existence
- Limit Disclosure of Content
- Argue Pretrial Motions
- Prepare Victim for Cross Examination
- Use Expert and/or Fact Witnesses

Coordination



U Visa Application

- Application can be made at ANY TIME after the criminal act
- Initial application requires very little information
- Supporting documentation is likely public record
- Certification can be completed by prosecutor, law enforcement, judge, etc.

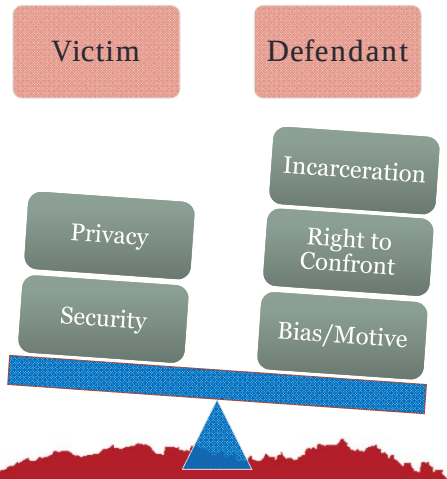
Educate the Judge

- Provide context of VAWA:
  - Promote the reporting, investigating and prosecuting of violent crime
  - Allow women to escape abuse
- Strict confidentiality protections
  - Prohibits "use by or disclosure to anyone . . . of any information"

Disclosure Requirement Does Not Extend to:

- To information acquired by federal agencies uninvolved in the state's investigation or trial
  - *States v. Locascio*, 6 F.3d 924, 949 (2d Cir. 1993)
    - Refusing to impute to prosecutors knowledge of reports prepared by FBI agents who were not involved in the underlying investigation or trial.

Concessions



Disclosure of U Visa

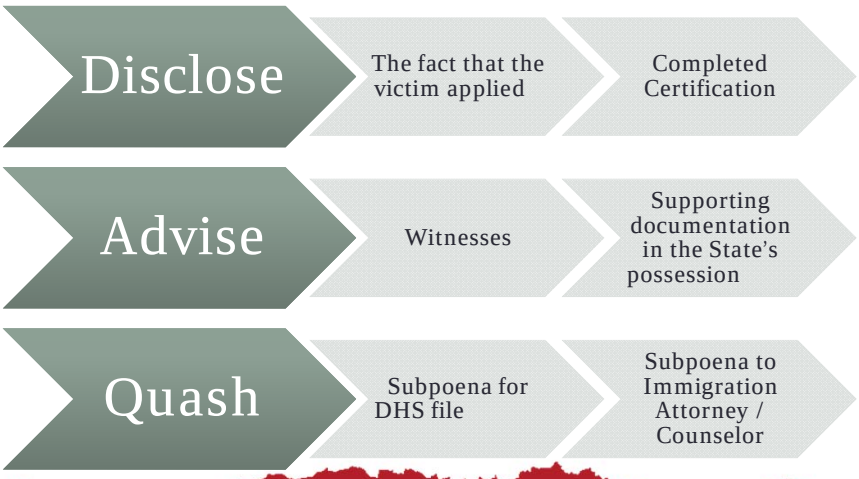
What?

- Application
- Certification
- Victim's Statements
- Supporting Documentation
- DHS File

How?

- Discovery Pleading
- *Brady* Notice
- Discovery Exhibit
- Disclosure of Witnesses
- *In Camera* Review

U Visa: Protect Confidential Content



Prosecution Tools

- Protective orders
- Redactions
- Motions to quash
- *In Camera* review
- Motions *in limine*
- Expert testimony

Victim Testimony



Prepared

Damage

Preparing the Victim

- Pretrial Interview
  - Establish timeline
  - Review statements
  - Mock cross examination
  - Identify possible rebuttal evidence/witnesses
- Collaborate with victim services

Rebuttal Evidence

- Establish a timeline
  - Crime
  - Advised re: U Visa
  - Reported Crime
  - Applied for U Visa
- Prior consistent statements
- Expert or fact witnesses re: U Visa

Prior Consistent Statements

Florida Statute §90.801(2)(b) & Fed. R. Evid. 801

- A statement is not hearsay if…
  - The victim testifies and is subject to cross-examination AND
  - The statement is consistent with the trial testimony and *"is offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication…"*

Using Prior Statements of the Victim

- 911 Call
- Police
- Prompt Complaint

Prior Consistent Statement

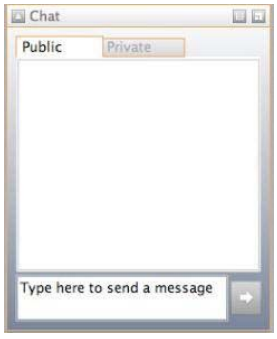
Motive to Lie

- Advised re: U Visa
- Applied for U Visa

- Consistent with Prior Statement
- Establish Timeline

Trial Testimony

What other strategies have been effective for you in protecting confidential content?



VAWA Confidentiality and Enforcement Case Strategies

Preventative Strategies

- File skeletal immigration applications
- Give survivor copy of DHS receipt proving that a VAWA, T or U case was filed
- Object to discovery and cross examination
  - Asking
    - about the *existence of* VAWA/T/U case
    - for information contained in the VAWA/T/U case file
- Use DHS policies to advocate when violations happen
- Train courts and agency personnel at prohibited locations

Be Prepared: Make your Record

- Decide if you want to raise survivor's immigration status as part of your case
- Use motion *in limine* to offensively prevent discovery or disclosure protected case
- If raised by perpetrator
  - object and make VAWA confidentiality arguments
- Make court aware of case law and memos and offer to brief the issue
- If not granted, create record for appeal ask for specific findings and conclusions of law

Tools to Use In State Court

- *Hawke v. Dep't of Homeland Security* factsheet
- Sample Motion *in Limine* and Brief
- Government Memoranda and Factsheets
  - All DHS Policy Memo (11/1/2013)
  - ICE VAWA Confidentiality Memo (1/22/2007)
  - INS VAWA Confidentiality Memo (5/5/1997)
  - EOIR Procedures for Immigration Judges (1997)

Rule 11 Sanctions

- Designed to deter malicious behavior, abuses, and bad faith acts by
  - Attorneys and pro se parties
- Striking pleadings, written motions, or other papers
- Disciplinary sanctions
- When the claims, defenses, or legal contentions are meant to:
  - Harass;
  - Cause unnecessary delay; or
  - Increase the cost of litigation

Threats: Deportation and Criminal Prosecution

- An attorney who threatens criminal prosecution to a person involved in the same civil case commits moral turpitude, and the attorney's belief in the person's guilt is no defense, and not even a mitigating factor
- Threatening criminal prosecution in order to force a settlement of a civil action is illegal, improper and unprofessional

What to Do When Violations by DHS Happen



- **Advocate on the spot-provide**
  - Proof of victimization
  - Copy of the statute
  - DHS enforcement policy
  - DHS complaint system
  - DHS 384 system
- **Collect information about the violating officer**
  - Name
  - Agency
  - Badge Number
- **Work it up the chain to a supervisor**
- **File a formal complaint-**
  - Penalties of up to $5000 per incident against the violating officer individually
  - Disciplinary actions
- **Advocate for release from detention/jail, termination of immigration proceedings, and/or granting immigration relief**
- **Call ICE Hotline 1-888-351-4024**

Technical Assistance and Materials

- PowerPoint presentations and materials for this webinar at www.niwap.org/go/vawaconfidentiality
- **NIWAP Technical Assistance:**
  - Call (202) 274-4457
  - E-mail niwap@wcl.american.edu
- Web Library: www.niwaplibrary.wcl.american.edu

Questions



NIWAP

69

Evaluations



NIWAP

70