

Right to Privacy: Understanding Immigrant Survivors' Protections Under VAWA Confidentiality Laws

July 30, 2015
Workshop IV, Session B
New Orleans, LA

Introductions

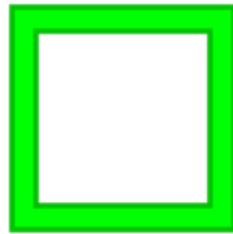
- Leslye Orloff
 - Director, National Immigrant Women's Advocacy Project
- Judge Mary Weir
 - Jackson County Court, Kansas City, Missouri
- Commissioner Loretta Young
 - Family Court, State of Delaware, New Castle County

Learning Objectives

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

- Identify VAWA confidentiality issues in state family and criminal court cases
- Understand Department of Homeland Security (DHS) policies on VAWA confidentiality and the related protections from DHS enforcement
- Implement strategies that anticipate, prevent, or limit disclosure of VAWA confidentiality-protected information and documents in state court cases

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



Yes



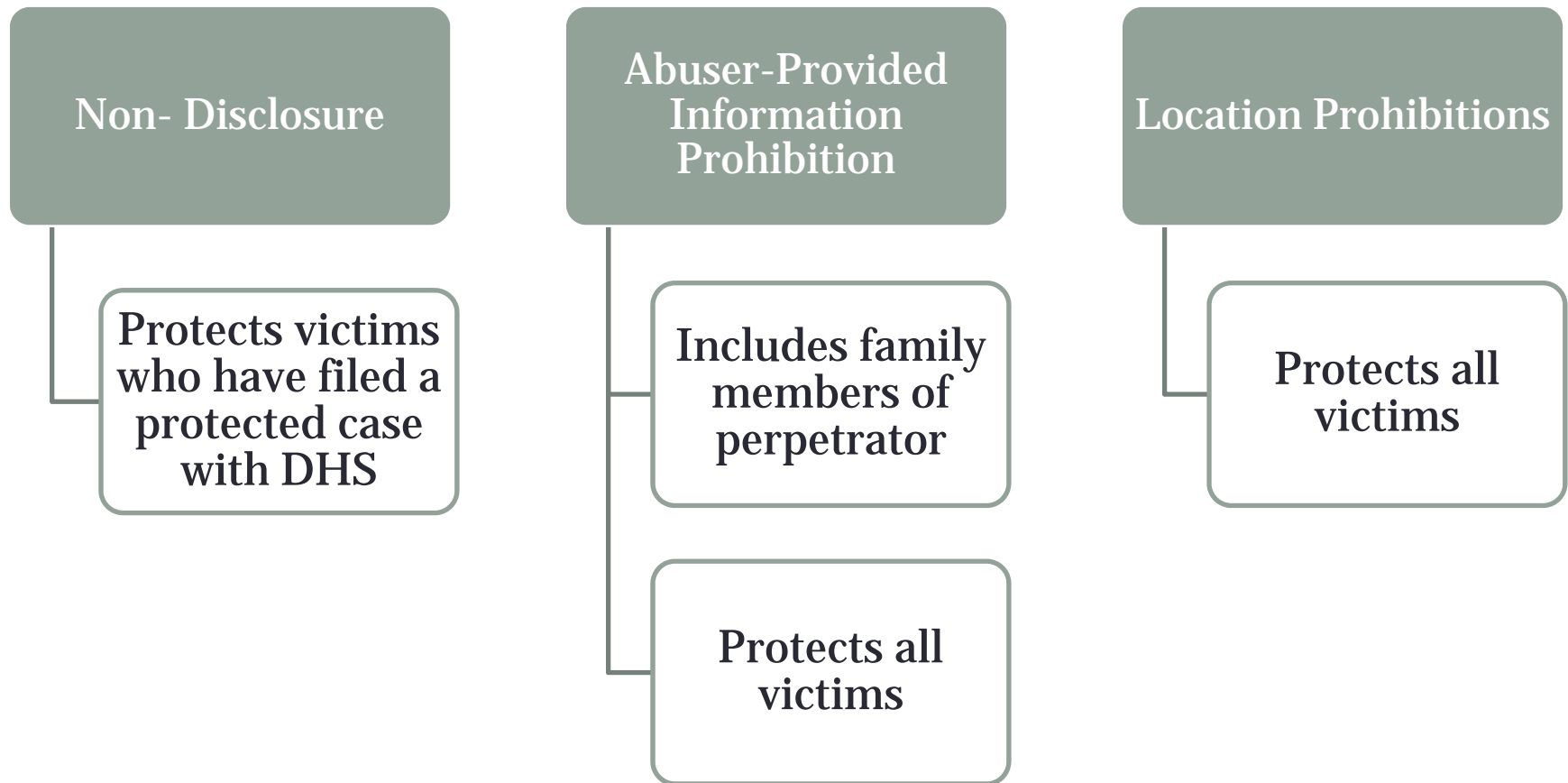
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VAWA Confidentiality: Overview

DHS Goals

- Implementing federal laws, including
 - Violence Against Women Act (VAWA)
 - Trafficking Victims Protection Act (TVPA)
- 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 priorities

VAWA Confidentiality Prongs



VAWA Confidentiality Violations

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



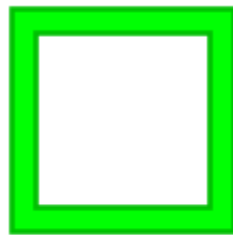
VAWA Confidentiality Violations

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



VAWA Confidentiality in State Court Proceedings

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



Yes




No

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



- Criminal case
- Employment case
- Family law case



What kind of family
law case?

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 information protected by federal VAWA confidentiality
- Prohibited immigration enforcement locations include courthouses

VAWA Confidentiality: Impact on Court Proceedings

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
 - Action taken
 - 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 by an immigration judge 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

Federal Court Case Law on VAWA Confidentiality

Hawke v. Dep't of Homeland Security

(N.D. CA, 2008) – VAWA Self-Petition Case

- VAWA self-petitioning 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 immigration cases

Hawke continued---

- 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”*

Demaj v. Sakaj (D. Conn, 2012) – U Visa Case

- *Although relevant to credibility & impeachment, discovery barred as contrary to the purpose of VAWA confidentiality which is to --*
- Prevent disclosure of documents & information in a protected case file from being used by alleged criminals
- Stop perpetrators' actions to interfere with & undermine a victim's immigration case:
 - Including claims that victim's application was fraudulent or
 - That DHS wrongly approved the victim's U visa case

Demaj v. Sakaj (D. Conn, 2012) – U Visa Case

- Efforts to obtain information through the custody case constituted the kind of interference with the victim's immigration case 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

Small Group Activity

- If you were a judge asked to limit discovery of –
 - The existence of a VAWA, T, and U visa case
 - Information filed in the federal immigration case
 - Action taken in such a case
- Make a list of all of the questions you would imagine a court would have
 - In criminal cases
 - In family court cases
 - In civil employment cases

Report Back

- Facilitated discussion with Judge Weir and Commissioner Young

Judicial Options When VAWA Confidentiality Protected Information is Sought in Discovery

- Keep focus of the court on relevance
- Judicial options for responding to discovery requests
- What if anything might be discoverable
 - Criminal court case
 - Family court case
 - Employment case

Prong 2: Relying on Information Provided by the Abuser

- Immigration officials 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
- This protection applies to all victims
 - Whether or not the victim has filed an immigration case

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)

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

- If violations of VAWA confidentiality contributed to initiation of a removal action
 - The immigration judge may dismiss the case

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

- The goal of Prong 2 was to stop immigration related abuse so that it would not cause
 - Victim's deportation or detention
 - Denial of the victim's immigration case
- Stops perpetrators from using DHS as a tool to retaliate against victims who
 - Are trying to leave their abusers
 - Seek protection orders
 - Cooperate with police or prosecutors

Small Group Activity

- List ways that information and education about VAWA's protections, that were designed to stop perpetrators' immigration related abuse, could affect judicial decision making in each of the following types of cases (topics assigned by table)
 - Family
 - Criminal
 - Employment

Report Back

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Prohibitions on DHS Enforcement at Courthouses

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
- Protected Locations:
 - 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, or stalking



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

- 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: VAWA Confidentiality and Enforcement at Sensitive Locations

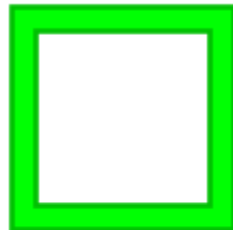
- DHS also prohibits enforcement actions “near sensitive community locations such as schools, places of worship, and funerals or other religious ceremonies” (*DHS Field Guidance on Enforcement Activities in and Around Sensitive Locations*, 2008)
- Congress expects that immigration enforcement officials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

Large Group Discussion

- How would you engage with judges and local courts to
 - Inform court staff and judges about these provisions?
 - Educate the community about these protections?
 - Address problems that arise at local courthouses?

VAWA Confidentiality in Criminal Courts

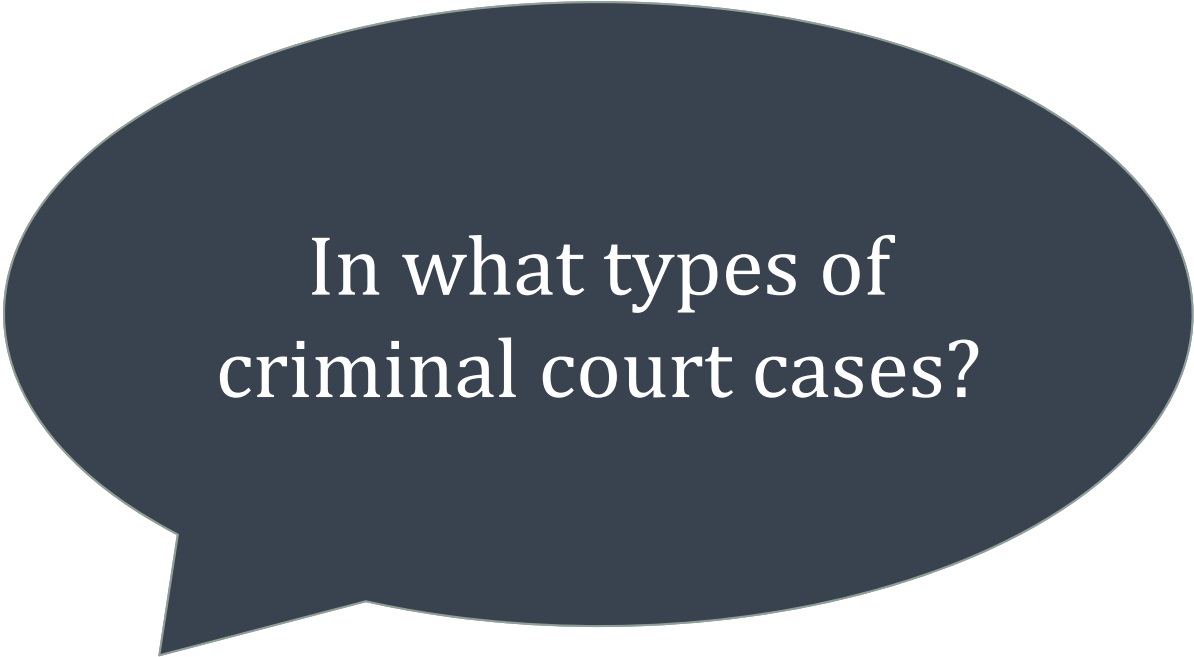
Have you been involved in a criminal case where discovery attempts were made to obtain information in a U visa case?



Yes



No



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?"

Attempts at Discovery of--

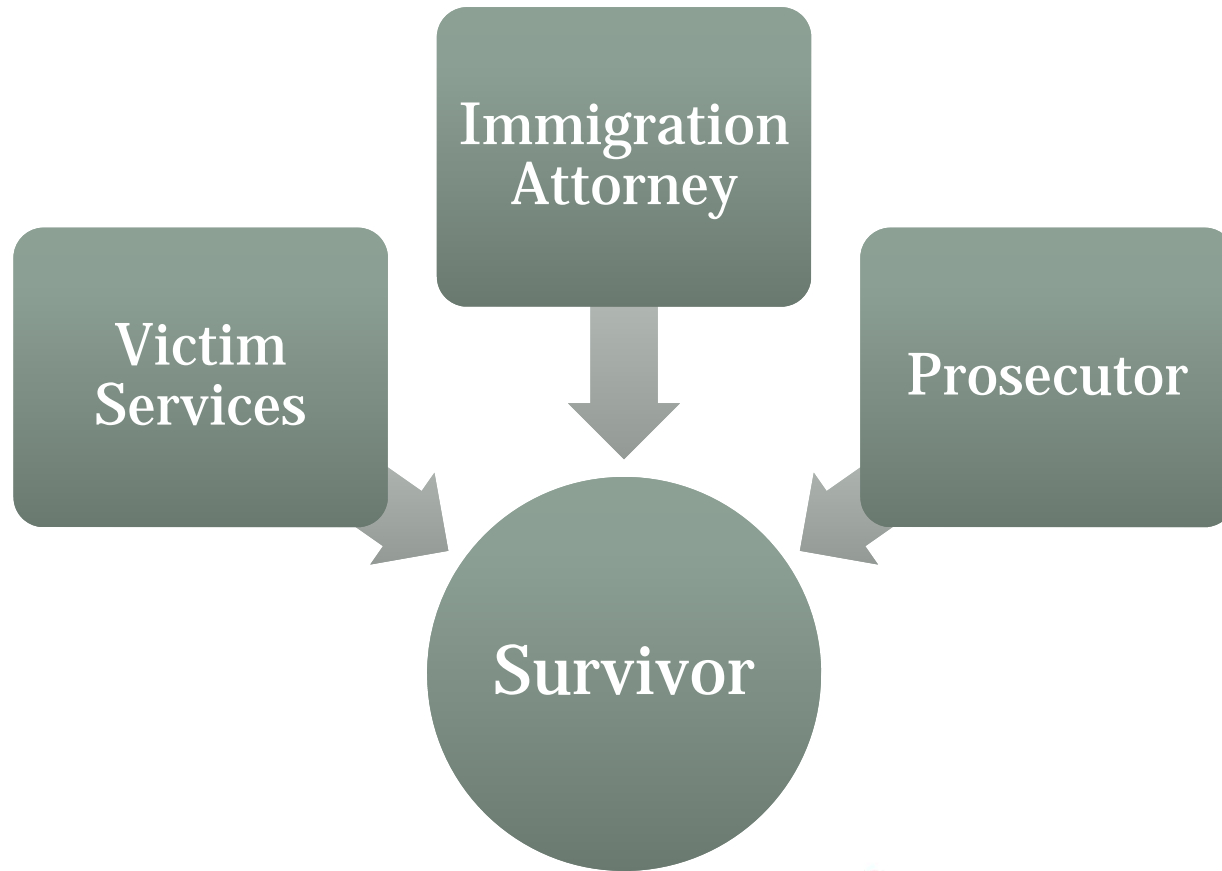
- U visa certification
 - Police, prosecutor, judge, EEOC, DOL
- VAWA, T, or U Visa application
- Supporting documentation
- Immigration attorney
- Victim services

Strategies to Protect the Survivor

- Educate the judge
- Consider safety of conceding existence
- Limit disclosure of content
- Argue pretrial motions
- Prepare victim for cross examination
- Use expert and/or fact witnesses



Coordination



Educate the Judge



- Provide context of VAWA
 - Promote the reporting, investigating, and prosecution of violent crime
 - Allow victims to escape & heal from abuse
 - homes and work places
- Strict confidentiality protections
 - Prohibits “use by or disclosure to anyone . . . of any information”

Disclosure Requirement Does Not Extend 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.

Existence

v.

Content

Disclosure of U Visa

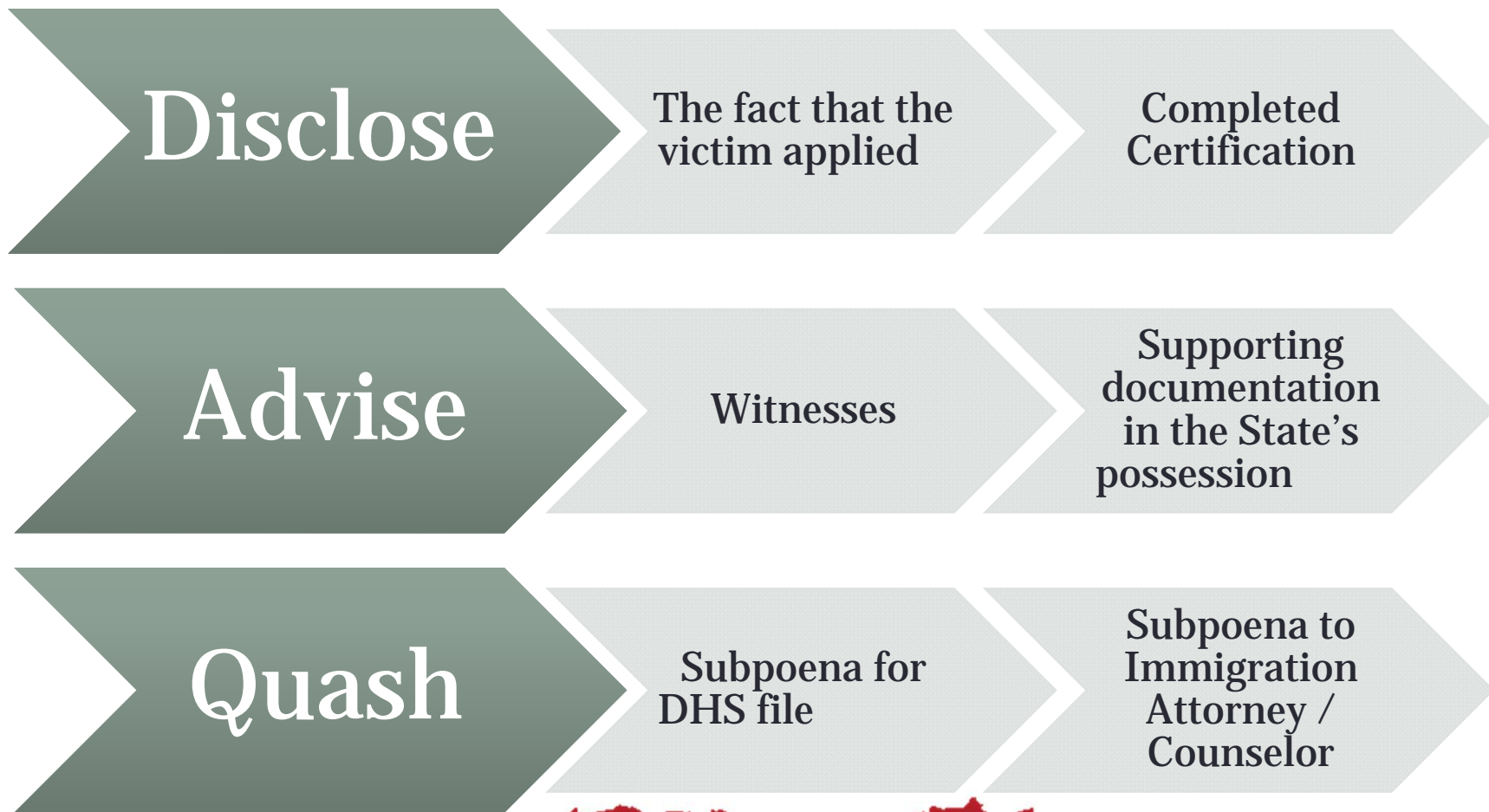
What?

- Application
- Certification
- Victim's statements
- Supporting documentation
- DHS file

How?

- Discovery pleading
- *Brady* notice
- Discovery exhibit
- Disclosure of witnesses
- *In Camera* review

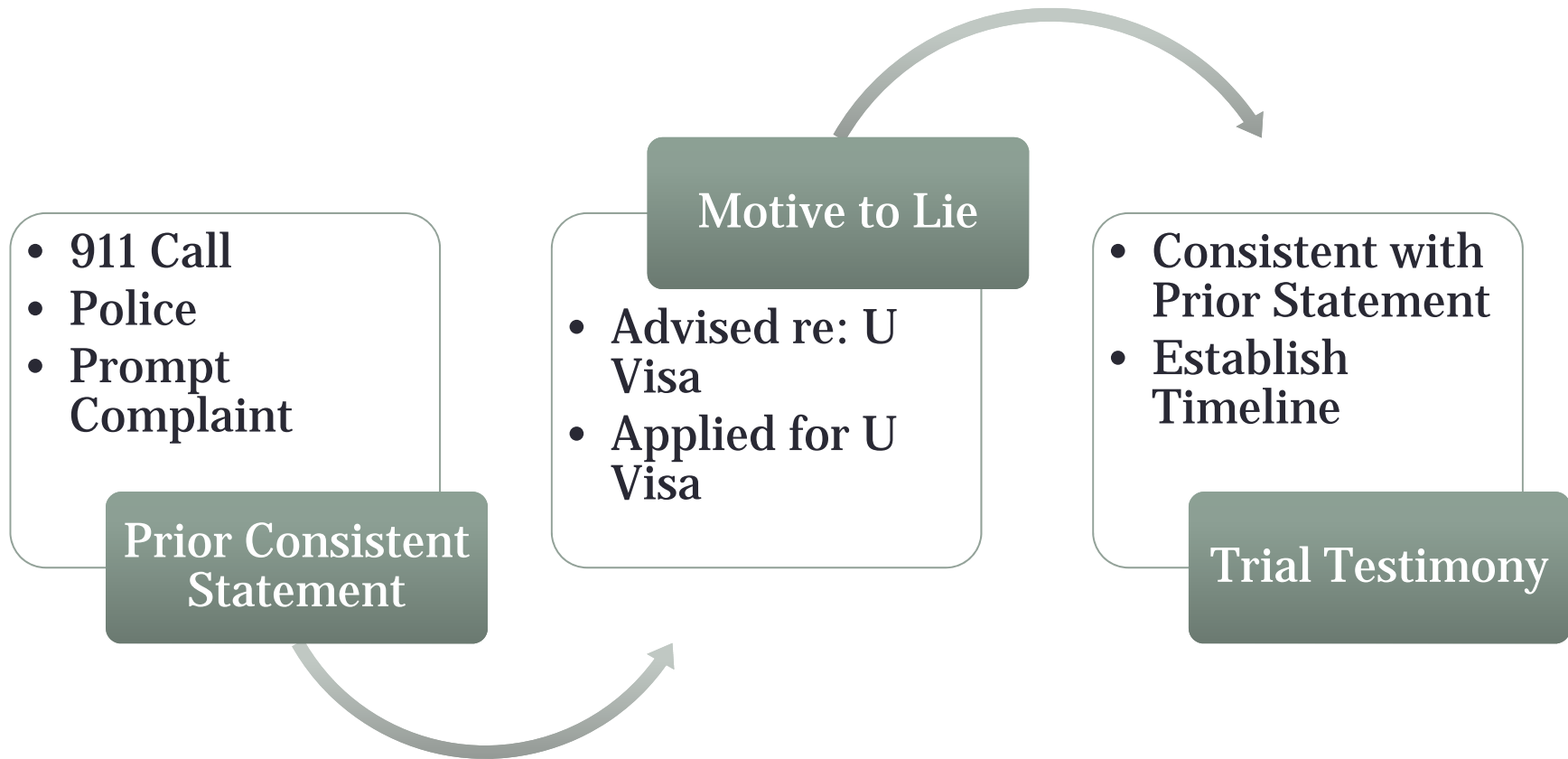
U Visa: Protect Confidential Content



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

Using Prior Statements of the Survivor



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
 - Ask about the *existence of VAWA/T/U case*
 - Ask 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

Preparing the Survivor

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

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 asking for specific findings and conclusions of law

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 DHS Violates Confidentiality

- **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

- Power Point presentations and materials for this conference at www.niwap.org/go/NOLA2015
- **NIWAP Technical Assistance:**
 - Call (202) 274-4457
 - E-mail niwap@wcl.american.edu
- Web Library: www.niwaplibrary.wcl.american.edu

Questions



Evaluations



Thank you!

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