

To: Mark Freedman, Senior Assistant General Counsel, Legal Services Corporation
Stefanie K. Davis, Assistant General Counsel, Office of Legal Affairs, Legal Services Corporation

From: Leslye E. Orloff and Benish Anver, National Immigrant Women's Advocacy Project (NIWAP), American University, Washington College of Law

Date: December 13, 2013

Re: Supplement to Comments on Proposed Rule Updates to the Legal Service Corporation Regulation on Legal Assistance to Aliens. 45 CFR Part 1626 – 78 Fed.Reg. 51696 (Aug. 21, 2013)

INTRODUCTION

These supplemental comments are in response to a follow up inquiry made by Legal Services Corporation on November 25, 2013. The inquiry was made in response to Comment 6 on page 12 of NIWAP's October 21, 2013 submission regarding NIWAP's suggestion that LSC add assistance with privacy and confidentiality protection as a form of related legal assistance that LSC funding recipients may provide to eligible victims.

The first inquiry asked NIWAP to identify "what kinds of services recipients would be providing with respect to the privacy and confidentiality provisions" referred to in our comments. The second inquiry asked NIWAP "how those services would fit into 'related legal assistance.'" As part of these supplemental comments, we are submitting a number of Appendices that we incorporate by reference to be included in these comments and that we refer to as providing further support for the comments we provide here.

I. Types of Privacy and Confidentiality LSC Funded Programs Could Provide to Victims of Sexual Assault, Domestic Violence, Human Trafficking, Stalking and Other U Visa Listed Crimes

1. Legal Services, Consultations and Advise for Victims

Privacy and confidentiality concerns are an area of legal services, consultation and advice that is very important for crime victims, including immigrant crime victims. There is a growing number of privacy and confidentiality laws that govern when and how legal services, victim advocacy, justice system and federal benefits granting agencies can share information when providing services to a crime victim and there are special VAWA confidentiality laws that apply in cases of immigrant crime victims. LSC funding recipients representing or providing legal counsel and advice to crime victims need to be aware of the privacy and confidentiality requirements that apply if the LSC program or other agencies assisting crime victims who are clients of LSC funded agencies receive funding under federal and state programs that fund assistance for victims of crime including immigrant victims.

These laws were developed to stop crime perpetrators from locating their victim (the victim's family members or children); threatening and carrying out threats to trigger government

actions against the victim (e.g. immigration enforcement, child welfare, internal revenue service); and learning about actions the victim is taking to protect herself and free herself from the perpetrator's control (e.g., filing for immigration relief, obtaining emergency shelter, transitional housing, health care, mental health care).

Federal funding programs that include statutory privacy and confidentiality requirements include, but are not limited to, the Victims of Crime Act, the Violence Against Women Act, the Family Violence Prevention and Services Act, and the Trafficking Victims Protection Act. In addition, many states have victim confidentiality and privacy laws. These laws affect and interact with state laws regarding privileged communications and affect what information can be legally collected, placed in data bases, discoverable or disclosed by a shelter, legal services program, federal or state housing agency, the U.S. Department of Homeland Security, and victim services programs.

Privacy and confidentiality laws are designed to enhance victim safety and to ensure that information is not disclosed about an immigrant crime victim to a perpetrator or any other person without an opportunity for the victim to learn about the proposed disclosure, provide a time limited consent to that disclosure, object to the disclosure or discovery, obtain a court ruling on and have an ability to appeal the matter, and take steps to protect against harm that could occur as a result of the release of the information should the victim choose to consent to or should the victim fail to prevent the disclosure.

The following provides examples of legal services, legal advice and consultations on matters that commonly arise in cases involving crime victims and immigrant crime victims.

- Domestic Violence and Stalking¹
 - Preventing discovery of shelter records or mental health records of a victim in a custody, protection order, or criminal court proceeding.
 - Responding to subpoenas in family, civil or criminal court cases designed to discover information about the location of a victim who is in hiding from the perpetrator.
 - Attempts by the perpetrator to obtain information about the victim from legal services agencies, federal public benefits providers or immigration authorities to use to local or harm the victim.
 - Objecting to attempts by perpetrators to circumvent federal immigration VAWA confidentiality laws in state courts using methods that include:
 - Subpoenaing the victim in a family or criminal case to turn over a copy of the immigration case file the victim filed with the U.S. Department of Homeland Security (DHS). LSC funded programs can challenge subpoenas for disclosure or ask the court to limit the scope of the subpoena with motions and briefs that inform the court about federal VAWA confidentiality protections and can preclude discovery of the case file.² Only the U visa certification signed by a police officer, the prosecutor, the judge or other government official is discoverable.

¹ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013) (Stalking was added to the list of U visa crimes).

² The National Immigrant Women's Advocacy Project (NIWAP) has sample motions pertaining to privacy and confidentiality issues that legal service providers can refer to when representing victims. For sample motion in limine for VAWA confidentiality case, see Appendix I, also available at: http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/civil-justice-system/VAWA-CONF_Sample-Motion-in-Limine_2009.pdf

- Keeping the following types of information out of a family court case through a motion in limine, a protective order and/or Rule 11 or similar state court law to strike pleadings and discovery requests and preclude cross examination on issues including the following:³
 - The victim's immigration status
 - Obtaining VAWA confidentiality protected information, including:
 - Whether the victim has filed for VAWA, T or U visa immigration relief
 - Information that is or may be contained in the victim's VAWA confidentiality protected case filed with DHS.
- Sexual Assault, Human Trafficking, Felonious Assault, Kidnapping and other crimes covered by the U Visa
 - Legal assistance and representation regarding subpoenas and discovery similar to that described above for domestic violence victims should also be provided in a sexual assault criminal cases and civil or family court cases brought by or against the sexual assault survivor.
 - Of particular concern in sexual assault cases, the legal service provider should assist the victim in court by taking measures to protect the victim's identity and/or from physically facing the perpetrator.
 - The legal service provider can request that the judge allow the victim to testify via telephone, video conferencing over the internet, or if she can appear before the judge in chambers.⁴
 - The legal service provider should also assist the victim in court by requesting services such as blind reporting or using Jane or John Doe on legal documents to protect the victim's identity and privacy.
 - Assistance with change of identity for crime victims who are witnesses eligible to participate in victim protection programs.
 - Assistance with taking advantage of Rape Shield laws.

2. Legal Consultation on Privacy and Confidentiality Rights and Issues

Consultation with a victim about her rights is particularly important because most victims do not know what rights privacy and confidentiality laws do and do not provide them with. Providing victims with information about privacy and confidentiality is particularly important when the service provider is representing minors or vulnerable adults.⁵ A general understanding of their rights will provide victims with a better ability to protect their privacy and safety plan with their attorneys and advocates.

³ For a sample motion for protective order, see Appendix II, also available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/sample-motions/VAWA-CONF_Sample-Protective-Order_2009.pdf

⁴ For a sample motion to appear telephonically or via video conference, see Appendix III, also available at: <http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/parental-rights-of-detained-immigrants/Motion-to-Appear-Via-Telephone-or-Video.pdf>

⁵ See generally, Leslye E. Orloff, *VAWA Confidentiality: History Purpose, DHS Implementation and Violations of VAWA Confidentiality Protections*, in EMPOWERING SURVIVORS: LEGAL RIGHTS OF IMMIGRANT VICTIMS OF SEXUAL ASSAULT (2013), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/september-20-21-2012-new-orleans-la/vawa-confidentiality/vawa-confidentiality-chapters/Ch3-SA-Man--Confidentiality-MANUAL-ES.pdf> (attached here as Appendix IV)(Legal service providers can use this particular chapter to address VAWA confidentiality with their clients). See also Victim Rights Law Center Resources for Victims- Privacy <http://www.victimrights.org/nodc/109>

- Sexual Assault, Human Trafficking, Felonious Assault, Kidnapping and other crimes covered by the U Visa
 - A legal services provider should discuss confidentiality and privacy concerns with a victim before disclosure of any information to third parties, such as medical professionals and hospitals, social workers, police departments, school officials, etc. Attorneys need to be aware of mandatory reporting requirements that allied professionals working with an immigrant victim may have.⁶ Similarly, it is important for attorneys to know what confidentiality or privileges may exist under state or federal law or grant recipient requirements between each professional and the immigrant crime victim.⁷
 - If disclosure has already taken place, the legal service provider can contact third parties on behalf of the victim to notify them of the state and federal privacy and confidentiality laws that pertain to the victim's case and limit their use or release of information about the victim
 - Legal assistance, advise and consultation regarding seeking and receiving services and obtaining help from the justice system in a manner that will be most effective in protecting the safety, privacy and confidentiality of the victim. Including special laws that apply in cases of child victims.
 - Legal assistance in obtaining protections from disclosure for rape victims on campus and in schools and other protections available under state and federal law for victims of sexual assault.
 - Consultations to help clients with privacy and confidentiality issues and how they relate to electronic communication and the use of social media.⁸
 - Consultations can be provided to the victim on electronic communications and discoverability in criminal cases. This type of consultation will allow the attorney to devise a proper safety plan to protect the victim and her privacy.

3. Confidentiality and Privacy Protection Is Related Legal Assistance

Under the proposed LSC regulations and VAWA 2005's legal services provisions designed to assist crime victims gain access to legal assistance when a crime victim is obtaining representation from an LSC funded program, the services that can be provided must be related to escaping the abuse, overcoming or ameliorating the effects of the abuse or protect against further abuse. For immigrant crime victims' confidentiality, privacy, VAWA immigration

⁶ Attorneys should consult with national or local technical service providers about state laws concerning mandatory reporting. For sample flowcharts that attorneys can use to determine whether a third party service provider is a mandatory reporter, please see Appendix V (a) and Appendix V (b).

⁷ For examples of state privilege and confidentiality laws see "State Confidentiality Statutes," see Appendix VI, also available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/vawa-confidentiality/state-confidentiality-laws/State-Confidentiality-Chart.pdf/view>.

⁸ The Victim Rights Law Center is one such service provider that informs clients about electronic communications and social media's impact on privacy and confidentiality. The Victim Rights Law Center provides technical assistance to other Office on Violence Against Women (OVW) service provider grantees nationwide and can be contacted regarding best practices on how to educate victims about electronic communication and social media use. Please visit <http://www.victimrights.org/resources-legal-advocates-lawyers/ovw-grantees> for more information. See also The National Network to End Domestic Violence has initiated a project on electronic communication safety planning for victims called "Safety Net: the National Safe and Strategic Technology Project." Legal service providers can refer to NNDEV's website for more information on safety planning and materials to prepare for effective consultation with clients about risks electronic communication and social media pose to victims. Please visit: <http://nnedv.org/projects/safetynet.html>

confidentiality, privileged communications are essential components of providing effective legal representation to an immigrant crime victims.

The centrality of these issues being part of effective case representation and safety planning was has been documented by National Institutes of Justice (NIJ) funded research on immigrant victim and undocumented immigrant victim knowledge about and willing to seek protection orders. Research has found that 89% of battered immigrants approaching legal services and advocacy programs for help with domestic violence did not know about protection orders when they approach the agency and as the result of safety planning, the confidentiality, and trusting relationship the victim builds with the attorney or advocate 81% of immigrant victims choose to obtain civil protection orders.⁹ The scenarios above illustrate the wide range of case types and legal matters that can involve confidentiality and privacy issues including but not limited to family, criminal, immigration, education, and public benefits matters.

II. LSC Funding Recipients Should Seek Training and Technical Assistance From Other Service Providers Within Their State

Support is available to LSC funded programs to assist them in providing effective representation and consultations to crime victims and immigrant crime victims on privacy, confidentiality, and VAWA confidentiality issues. LSC funding recipients should be encouraged to contact agencies that provide national technical assistance on these issues, who can provide an overview and training materials on the laws that protect the privacy, confidentiality, and safety of crime victims. It is equally important to identify agencies within the state in which the LSC funded program practices that have experience and expertise and can provide guidance on the unique to the privacy and confidentiality laws that apply in their respective states. State based organizations with privacy and confidentiality expertise will also be able to inform the LSC funded agency about training opportunities and access to state based resources.

National technical assistance providers can assist legal service providers with identifying and contacting the appropriate state coalitions and/or organizations in their state that can provide them with effective assistance. The California Coalition Against Domestic Violence has an extensive list of national and state organizations that can assist legal service providers.¹⁰ Organizations like the Victim Rights Law Center (VRLC) and the National Immigrant Women's Advocacy Project (NIWAP), American University, Washington College of Law can provide technical assistance, conduct trainings, and have sample legal documents that pertain to privacy and confidentiality issues.¹¹ NIWAP specializes in VAWA confidentiality under U.S. immigration laws including how VAWA confidentiality laws apply in state court cases. VRLC is an Office on Violence Against Women funded technical assistance provider with expertise on

⁹ Nawal H. Ammar, Leslye E. Orloff, Mary Ann Dutton and Giselle A. Hass, *Battered Immigrant Women in the United States and Protection Orders: An Exploratory Research* 14, *Criminal Justice Review* 2012 37: 337 (originally published online August 1, 2012)(see Appendix VII), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/AmmaretalCPO.pdf/view>.

¹⁰ For a directory of national and state organizations, visit: <http://www.cpedv.org/Links>

¹¹ See supra note 8 on the Victim Rights Law Center, See also NIWAP's web library, which has a wide range of resources available to advocates and legal service providers, including access to a nationwide directory of service providers, which is available at: <http://niwaplibrary.wcl.american.edu/>.

the full range of privacy and confidentiality issues that arise for crime victims in civil court cases.¹²

¹² Please contact Jessica Mindlin, Esq., National Director of Training and Technical Assistance, Victim Rights Law Center, for additional information on training materials, resources and technical assistance questions regarding privacy and confidentiality issues.