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Immigrants' Rights Clinic

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UNDERSTANDING AND RESPONDING TO SUBPOENAS: A GUIDE FOR IMMIGRATION ATTORNEYS REPRESENTING U-VISA APPLICANTS

This guide was developed in May 2010 by Samantha Barbas and Joelle Emerson, students in Stanford Law School's Immigrants' Rights Clinic, in collaboration with Bay Area Legal Aid.

INTRODUCTION

Over the past few years, several immigration attorneys assisting clients with U-visa applications in Northern California have had their clients' immigration records subpoenaed by the criminal defense as part of the ongoing criminal prosecution of their clients' abusers. Although the issuance of such subpoenas is relatively rare,[1] it can be a serious problem for immigration attorneys and their clients. The adverse consequences of such subpoenas include the release of the following kinds of information to a client's abuser: the client's personal information (contact information, psychiatrist reports, domestic violence counselor records), evidence that could be used to impeach the client's credibility at the criminal trial, and information that could raise the prejudicial issue of the client's immigration status at the criminal trial. For clients who are struggling to overcome years of abuse, the release of such information to the abuser, or attacks on their credibility, can be traumatic and undermine their trust in the legal process. Moreover, for non-profit organizations or immigration law offices that serve high numbers of crime victims in U-visa applications, receiving such a subpoena can impose high resource costs.

For example, in one recent case in Northern California, defense counsel subpoenaed a non-profit immigration attorney's copy of a client's complete U-visa application. The immigration lawyer filed a motion to quash, which the judge denied. The judge then conducted an in camera review of the documents. After reviewing the documents, the judge released a majority of the contents of the U-visa application to the defense. This information was subsequently used to impeach the victim's credibility on the stand, and to request further records from the victim's sexual assault counselors. The immigration lawyer was also required to testify about the timing of the client's request for U-visa assistance. One attorney has described the process of dealing with a subpoena as "time-consuming," "frustrating," and "stressful."[2]

This guide seeks to equip immigration lawyers representing U-visa applicants with suggestions on how to prepare for, and respond to, a possible subpoena. Samantha Barbas and Joelle Emerson, students in Stanford Law School's Immigrants' Rights Clinic, developed these guidelines in collaboration with Catherine Ward-Seitz, Regional Immigration Coordinator of Bay Area Legal Aid, during the Spring of 2010. The guide was developed based on legal research, informal surveys of immigration attorneys, and interviews with five prosecutors in Northern California. The guide is based on California law, so it may have limited application in other jurisdictions. The guide is intended to assist immigration attorneys working on U-visas in protecting their clients' confidential information. It does not constitute legal advice, and should not be relied on for that purpose.

The guide is organized into two sections: Part I presents suggestions for immigration attorneys

[1] In a May, 2010 survey of attorneys on the VAWA Experts listerv, we asked attorneys if they had ever personally been subpoenaed or heard of other immigration attorneys being subpoenaed by criminal defense counsel as part of the criminal prosecution of a U-visa client's abuser. Nine out of 25 (over one-third) of respondents had heard of this happening. The survey is on file with the Stanford Immigrants' Rights Clinic.

[2] May 2010 survey of VAWA Experts, on file with the Stanford Immigrants' Rights Clinic.

to protect clients' information from unnecessary disclosure, regardless of whether or not a subpoena is issued. It focuses on strategies for counseling the client; communicating with the district attorney; and preserving, storing, and labeling documents. Part II discusses how attorneys can respond if a subpoena is issued.

PART I:
GENERAL STRATEGIES FOR PROTECTING CLIENT INFORMATION

Some of the subpoenas that defense attorneys have issued to immigration lawyers have targeted the U-visa application only. Others have targeted all of a client's immigration records, or an attorney's entire file on a U-visa client. In addition to the U-visa application, an attorney's file may include other materials, such as notes from client and witness interviews and notes from conversations with non-legal service counselors.

When a subpoena is issued, the immigration attorney can file a motion to quash and request an in camera review. (Discussed in more detail in Part II, below.) The general strategies for protecting client information provided here—specifically, the discussion on labeling and storing documents—might lead to better outcomes should a subpoena be issued. Utilizing these strategies might increase the likelihood of success on a motion to quash, or might enhance a judge's willingness to redact confidential information during an in camera review.

Immigration attorneys can also protect against the disclosure of confidential client information by being aware of the prosecutor's obligation to disclose statements from the U-visa applicant to the criminal defense. Further, in cases where the criminal prosecution is pending, attorneys should advise clients about the possibility of a subpoena.

PRACTICE TIP

There are some general steps you can take to ensure the highest level of protection for your files and your client:

- Consider advising clients with pending criminal prosecutions about the potential of a subpoena and possible disclosure to the defense.

- Be aware of the prosecutor's obligation to disclose witness statements and other material, exculpatory evidence to the defense.

- Label and store your U-visa related documents to ensure that they are protected by the attorney client and work product privileges.

A. Communicate Potential Risks to your Client

During the first meeting with your client, find out whether the criminal prosecution of her abuser is ongoing. If the criminal prosecution is complete or will not occur in the future (e.g., a police investigation took place with no subsequent prosecution), the risk of receiving a subpoena is minimal. However, if the criminal prosecution is pending, consider discussing the possibility of a subpoena with your client, and focus on protecting your client's information in the event that a subpoena is issued.[3]

Of course, every client is different and may respond differently to this discussion. Each lawyer should evaluate her individual relationship with the client and determine whether this conversation is appropriate. In some cases, for example where clients are extremely distrustful of attorneys and the legal system, it may be better not to discuss these risks at the outset of the attorney-client relationship. Nonetheless, the following are some points that immigration lawyers may wish to consider discussing with their clients:

- The criminal proceedings are entirely separate from the immigration case and the U-visa application. (Under federal law, immigration officials cannot disclose the contents of the U-visa application to any member of the public, including the abuser,[4] and cannot rely on information furnished solely by the abuser in making an adverse determination on the U-visa application.[5])

- If the criminal prosecution is ongoing, there is a *small* risk that the U-visa application could be disclosed to the defense. In particular, the client's description of the events for which the abuser is being prosecuted (for example, in the client's U-visa declaration) probably has the greatest chance of being disclosed to the defense.

- Defense attorneys may attempt to use the U-visa application to show that a victim is only saying that she has been abused in order to get the immigration benefit of a U-visa.

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[3] In another May 2010 survey of immigration attorneys in the Bay Area, we asked attorneys who had received subpoenas for their clients' U-visa records what types of documents were subpoenaed. 20% had their client's declaration subpoenaed, 60% had the entire application subpoenaed, and 40% had the client's immigration documents subpoenaed. The survey is on file with the Stanford Immigrants' Rights Clinic.

[4] 8 U.S.C. § 1367(a)(2) ("[I]n no case may the Attorney General, or any other official or employee of the Department of Justice, the Department of Homeland Security, the Secretary of State, or any other official or employee of the Department of Homeland Security or Department of States . . . permit use by or disclosure to anyone (other than a sworn officer of the Department, or bureau or agency thereof, for legitimate Department, bureau or agency purposes) of any information which relates to an alien who is the beneficiary of an application for relief under . . . 15(U) . . of section 101(a) of the [INA]."

[5] *See* 8 U.S.C. § 1367(a)(1)(E).

- Because counselors' and social workers' records may be subpoenaed, immigration attorneys should advise clients to not discuss their legal cases with people other than the immigration attorney. In one recent case, the defense obtained documents from a victim's sexual assault counselor that included notes of a phone call in which the victim confided that she was nervous about her U-visa case. This information was ultimately used in the criminal trial to challenge the victim's motives.

B. Be Aware of the Prosecutor's Disclosure Obligations

General Points on Communicating with the Prosecutor

Under Supreme Court and California case law, prosecutors have discovery obligations to disclose certain information to the defense. Depending on the information and the prosecutor, some of the records subject to discovery may include U-visa-related information.

Brady Obligations: Material, Exculpatory Evidence

Under the Supreme Court's decision in *Brady v. Maryland*, prosecutors have a constitutional mandate to disclose "material" and "exculpatory" evidence to defendants in criminal cases, even absent a request from the defendant for such evidence.[6] This obligation is also codified in the California Penal Code.[7] The California Supreme Court has defined "material" to mean evidence that "tends to influence the trier of fact because of the logical connection with the issue."[8] Thus, the prosecution's duty of disclosure extends to all evidence that reasonably appears favorable to the accused, not merely that which appears likely to affect the verdict.[9] This appears to include evidence that undermines the credibility of a prosecution witness.[10] Therefore, most prosecutors we interviewed seemed to agree that they would be required to disclose to the defense any information that would show that the U-visa applicant had a motive to lie about the abuse to receive immigration benefits.

Under *Brady*, a prosecutor must disclose any material, relevant, and exculpatory fact that she possesses about the witness (whether it comes from a witness statement or not). Therefore, immigration attorneys should be careful not to convey anything to the prosecutor's office that might suggest that a client was motivated to report the crime in order to get a U-visa. Immigration attorneys should pay close attention to facts about the witness that are communicated to the prosecutor (for example, in U-visa cover letters or conversations with the prosecutor's office), and to the contents of documents that the attorney submits in connection with the request for certification. (It is important to remember that prosecutors do not have an obligation to seek out information about the witness that they do not possess. Under *Brady*, they only have an obligation to disclose information that is in their possession, and that they know they possess.)

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[6] *Brady v. Maryland*, 373 U.S 83 (1963).
[7] CAL. PENAL CODE § 1054.1(e) (West 2010).
[8] *People v. Morris*, 46 Cal. 3d 1, 30, fn. 14 (1988).
[9] *Id.*
[10] *People v. Pensinger*, 52 Cal. 3d 1210, 1272 (1991).

Non-*Brady* Discovery Obligations: Witness Statements or Reports of Statements

In addition to their discovery obligations under *Brady*, the California Penal Code requires prosecutors to disclose various items to the defense, including the names and addresses of trial witnesses,[11] trial witnesses' felony convictions (if the witnesses' credibility is likely to be critical to the outcome of the trial),[12] trial witnesses' recorded or written statements or reports of their statements,[13] and real evidence seized or obtained in an investigation.[14]

In the U-visa context, trial witnesses' statements or reports of their statements[15] may raise the most concerns for an immigration attorney. The disclosure obligation extends to written and oral statements that are made by a trial witness directly to the prosecution.[16] "Reports of the statements of witnesses" refers to any statement by a trial witness that the prosecutor receives from another person, whether oral or written.[17] Thus, it appears that any oral or written statement of the client that an immigration attorney subsequently communicates to the prosecutor (for example, by telling the prosecutor "my client said x," or by giving the prosecutor a written statement reflecting the client's words, such as a declaration) can be disclosed to the defense if the prosecutor interprets her non-*Brady* discovery obligation to include such material. Therefore, immigration attorneys should be mindful when repeating their clients' words to prosecutors.

Prosecutorial Discovery Obligations In Practice: Significant Variations Among Prosecutors

Based on informal conversations with five prosecutors in Northern California, it appears that prosecutors have discretion in following the disclosure rules. They had a wide range of opinions on whether U-visa materials fall under their disclosure obligations.[18] Significantly, every prosecutor we spoke to said that under *Brady*, they would be obligated to voluntarily disclose the fact that a victim requested a U-visa certification, because they believe it to be relevant to the defense's case. One prosecutor said she would also disclose the victim's immigration status, since this could be relevant to the credibility of the witness. However, another prosecutor said she would not disclose the victim's immigration status, as she believes immigration status is not relevant to witness credibility and could unfairly prejudice the jury.

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[11] CAL. PENAL CODE § 1054.1(a) (West 2010).

[12] CAL. PENAL CODE § 1054.1(d) (West 2010).

[13] CAL. PENAL CODE § 1054.1(f) (West 2010) (requiring disclosure of "[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial"),

[14] CAL. PENAL CODE § 1054.1(c) (West 2010).

[15] CAL. PENAL CODE § 1054.1(f) (West 2010).

[16] *Roland v. Superior Court*, 124 Cal. App. 4th 154, 167 (Cal. Ct. App. 2004) (interpreting Cal. Penal Code § 1054.3, governing discovery obligations of defense counsel to prosecution, and suggesting that holdings apply to prosecutor's discovery obligations under Cal. Penal Code § 1054.1).

[17] *Id.*

[18] Interview memoranda of these conversations are on file with the Stanford Immigrants' Rights Clinic.

With regard to the actual U-visa application, two prosecutors said that they would feel obligated under *Brady* to disclose the entire U-visa application if they possessed it. One of these prosecutors explained that information in the U-visa application, especially if it contains evidence of a client's motivation to seek the U-visa, could potentially be relevant and exculpatory to the defense. Another prosecutor, however, said that she could not imagine a situation where the U-visa application would be relevant and exculpatory, unless the client's declaration contradicted the official records of the criminal prosecution, which would suggest the client's dishonesty. She imagined that such a case would be unlikely.

In general, immigration attorneys should not make any assumptions about what a prosecutor will or will not disclose to the defense. As a rule of thumb, attorneys should probably communicate with the prosecutor's office as little as possible beyond what is required for certification. Some DA's offices may have a formal policy on disclosing information about the victim, but practices seem to vary between offices. Immigration attorneys might consider asking the appropriate DA's office if it has a formal policy on disclosure of U-visa material to the defense.

Communicating During the Certification Process

The prosecutors we spoke to generally agreed that official records—such as police reports, criminal court records, or evidence that the victim testified—are sufficient for requesting certification. An immigration attorney does not need to submit the U-visa application form itself (Form I-918), the client's declaration, or other supporting documentation (such as a therapist's letter of support) for certification. If the attorney submits the client's declaration and the criminal prosecution is ongoing, the prosecutor may disclose that material to the defense. Therefore, the attorney should, if possible, submit only official documents, such as court records and police reports, when requesting certification.

Because prosecutors must disclose all exculpatory information to the defense, some may be more likely to sign certifications only after the criminal prosecution is completed. However, this is up to the discretion of the individual prosecutor and usually determined on a case-by-case basis. For example, in some counties, the chances of receiving a certification may be reduced if the prosecution is ongoing. On the other hand, DA's offices in other counties erroneously interpret the purpose of the U-visa as solely to assist in helping law enforcement, and will only grant certification if the prosecution is ongoing. Awareness of the specific policy in the relevant county may help guide an immigration attorney's decision about when to seek certification.

The decision regarding when to seek certification is complex, and depends on the unique circumstances of the client as well as the specific policies of the prosecutor's office. While some prosecutors may prefer to certify only after the completion of criminal proceedings, such a policy could impose a serious burden on clients that need a U-visa in order to get a work permit that will enable them to support themselves and leave their abusers. On the other hand, many clients may not hear about the U-visa or have access to an immigration attorney until the prosecution is completed, so for those clients, certification will necessarily happen later.

C. Label and Store your U-Visa Related Documents to Maximize Privileges

Overview

Privileged documents are those covered by the attorney client privilege and the work product doctrine. A lawyer should be able to assert the privilege over many documents in a U-visa client's file. If a subpoena is issued and the judge conducts an in camera review of subpoenaed documents, the attorney may have a stronger argument that documents should not be released to the defense if she can show that those documents are privileged.

The attorney client privilege protects information that is communicated between the client and her lawyer for the purpose of seeking legal advice. The communication must be confidential. It must not, as far as the client is aware, disclose information to third parties "other than those who are present to further the interests of the client in consultation or to those whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted."[19] In other words, communication between the client and attorney that is disclosed to a third party, or that takes place before a third party, may no longer be confidential.

Attorney work product is also confidential. Section 2018.030(a) of the California Code of Civil Procedure, which also applies in the criminal context via the California Penal Code § 1054.6, gives absolute protection from discovery to "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories."[20] An attorney should record her thoughts and impressions on a document in order for it to be privileged as attorney work product.

In cases where a criminal prosecution is pending, it may be helpful to use tabs to separate documents in a U-visa file into "privileged" and "non-privileged" sections. Separating documents in this way may strengthen an attorney's argument to the judge in an in-camera review that at the very least those documents in the "privileged" section should not be released.

Non-Privileged Records in Attorney File

However, not all documents in a U-visa file are covered by the attorney-client privilege or work product doctrine. Thus, notes from interviews and communications with third parties other than the client, such as witnesses, doctors, or service providers are likely not covered by the attorney-client privilege since they do not constitute communications with the client. Some exceptions may apply. For instance, *if* the attorney incorporates her own conclusions and impressions into the notes, then they may arguably fall under the work product doctrine.

Notes taken by a service provider (domestic violence counselor, shelter) *might* also be covered by other privileges for counselors and service providers (for further discussion on this topic, see

[19] CAL. EVID. CODE § 952 (West 2010).
[20] CAL. CIVIL PROC. CODE § 2018.030(a) (West 2010); CAL. PENAL CODE § 1054.6 (West 2010).

Part II.C. below).

Furthermore, the privilege will not be waived if the presence of the third party is "reasonably necessary for…the accomplishment of the purpose for which the lawyer is consulted" and "further(s) the interest of the client in the consultation."[21] The privilege is usually not waived when translators and secretaries are present. It is less clear whether husbands, children, and other family members of the U-visa applicant are necessary parties whose presence does not waive the privilege. If the family members are derivative beneficiaries of the U-visa, however, their presence would probably not waive the privilege because those family members would also be clients of the attorney. (Thus, immigration lawyers should include all derivative beneficiaries on retainer agreements to clarify that those derivatives are also clients).

Note also that official documents such as police reports, court documents, trial transcripts, restraining orders, and prior medical records do not fall under either privilege.

Strategies to Minimize the Risk of Unnecessary Disclosure

Although the question of whether a document falls under the attorney-client privilege or work product doctrine generally requires an individualized analysis, there are some file management steps that immigration attorneys can take to minimize the risk of disclosure in the event a subpoena is issued. For clients with pending criminal prosecutions, these steps may be particularly relevant. First, lawyers should separate and label documents to identify privileged records. The following document separation and labeling guidelines may be helpful for immigration attorneys to consider:

- Label all privileged documents "privileged and confidential/attorney work product."
- Indicate when particularly sensitive material is a communication to the attorney from the client, and vice-versa (by noting, for example, "This document contains materials directly conveyed by the client to the attorney in confidence.").
- Place privileged and non-privileged documents in separate sections of the file when possible. Note, however, that while this strategy may later help convince a judge that particular privileged information should be redacted in an in camera review, it may also be time consuming. Immigration attorneys should balance the potential benefits separating privileged and non-privileged documents against the burdens it places on her busy practice.

With respect to communications and notes of communications with third parties, notes and declarations of witnesses may be covered by the work product doctrine if they include the thoughts and impressions of the attorney. An attorney might consider writing her observations on interview notes with a witness, so that the notes are covered under the work product doctrine. Or, the attorney might write the declaration for the witness and shred verbatim notes from the witness interview.

[21] CAL. EVID. CODE § 952 (West 2010).

Finally, attorneys should avoid the presence of third parties at meetings unless absolutely necessary. The presence of translators, secretaries, and experts such as psychologists probably does not waive the attorney-client privilege.

If the client's family members (who are not derivative beneficiaries) attend the client meeting, the attorney should explain that their presence may waive the privilege. However, the privilege is not waived if the family members are also clients (for example, if they are derivative beneficiaries of the U-visa). To make sure that the presence of such family members does not waive the privilege, the attorney should be sure to include these family members in the retainer agreement.

PART II:
OPTIONS FOR RESPONDING TO A SUBPOENA

This section provides advice on how immigration attorneys can respond if they actually receive a subpoena. As an initial matter, the immigration attorney should *not* immediately send any documents to the defense. Rather, the attorney should consider what steps to take to avoid disclosing documents unnecessarily. One possibility is to file a motion to quash the subpoena, a strategy discussed in Part C, below. Immigration attorney should also consider contacting the prosecutor, communicating with third parties who have contributed to the client's U-visa application, and preparing for an in camera review.

PRACTICE TIP

If you receive a subpoena, here are some steps you should consider taking to protect your client's information:

- Contact the prosecutor to let her know that you have been served with a subpoena.
- Contact counselors/experts who contributed to the U-visa application to let them know that you have received a subpoena and that they might be subpoenaed, as well. Let them know that they may have legal options aside from turning over the requested documents.
- Legal Options
    - File a motion to quash the subpoena.
    - Request an in camera review to redact irrelevant information.

A. Communicate with the Prosecutor

Contacting the prosecutor can be helpful in developing the response to a subpoena. Some prosecutors may be willing to cooperate and communicate with immigration attorneys, but some may not. Further, because prosecutors have the duty to disclose certain information to the defense,[22] immigration attorneys should be thoughtful in deciding how to communicate with the prosecutor, and what information to share with her.

<u>If a subpoena is issued</u>
Many immigration attorneys may wish to consider filing a motion to quash the subpoena. Motions to quash are discussed in further detail below.

[22] This duty is discussed further in Part I.C. above.

However, if the motion to quash is unsuccessful, immigration attorneys should prepare to comply with the subpoena and request an in camera review of the documents. In an in camera review, the judge may redact information to protect a client's safety (such as her address or other identifying information). The judge may also redact information related to the client's immigration status or immigration violations that have been disclosed in an effort to obtain a waiver of inadmissibility, such as manner of entry if the client entered without inspection, as this information could prejudice the jury. Even if a motion to quash has already been filed, immigration lawyers should consider in advance what information they will ask the judge to redact.

Some prosecutors we interviewed recommended that immigration attorneys contact the prosecutor's office right away in the event that a subpoena is issued, because the prosecutor may be able to help the attorney move to quash the subpoena. In a 2008 case, *People v. Superior Court (Humberto S.*), the California Supreme Court clarified that the prosecution is entitled to participate in third party subpoena hearings if the trial court permits it.[23] Prior to the Court's decision in *Humberto S.*, the practice among prosecutors was to avoid participating in third party discovery proceedings.

In *Humberto S.*, the prosecution moved to quash a third-party subpoena issued by the defense for a victim's medical records. The California Supreme Court held that a prosecutor's argument at a third-party discovery hearing, whether permitted or solicited by the trial court, did not amount to the representation of third-party interests, and did not require recusal of the prosecutor. The court stated: "[A] prosecutor is not entitled to submit argument in certain types of third-party discovery proceedings. This does not mean the prosecution is prohibited from doing so; certainly with the trial court's consent, he or she is allowed to do so. Indeed . . . the prosecutor is entitled to notice of the hearing and may there address any questions the trial court has. . . . Having been allowed to participate in the hearing, the prosecutor is not for that reason then subject to recusal unless he or she has . . . formally assumed representation of a third party."[24] In the event that the prosecutor is not familiar with the case,[25] the immigration attorney can make the prosecutor's office aware of this case and request that the prosecutor assist the immigration lawyer in presenting arguments for quashing the subpoena.

B. Contact Counselors/Experts Who Contributed to the U-visa Application

Overview

A client's U-visa application usually includes letters or other supporting documents from experts or other third parties, such as sexual assault and domestic violence counselors. If immigration attorneys are required to provide a client's U-visa application to the defense, the

[23] *People v. Superior Court (Humberto S.)*, 43 Cal. 4th 737, 755 (2008).
[24] *Id.*
[25] In at least one recent subpoena issued in the Bay Area, the prosecutor refused to discuss the subpoena with the immigration lawyer.

defense will then have information about the experts and counselors that contributed to the client's U-visa application. Medical experts and counselors often have extremely private notes or other documents that a client may not want the defense to see. Once the defense has this information, they may try to obtain further information from those experts, either informally or through a subpoena. Thus, it is important for immigration attorneys to communicate this risk to service providers as soon as possible after being issued a subpoena.

What You Can Do

Like privileges that protect confidential communications between the attorney and the client, there are privileges that apply to a client's communication with various experts and counselors. It is important for immigration attorneys to be aware of these privileges. After receiving a subpoena, the immigration attorney should consider contacting experts whose information was included in the subpoenaed documents to let them know that they may also be contacted by the defense. The immigration attorney should let them know exactly what information was provided to the defense. The attorney should also tell them that they may be covered by a privilege, and that they should consider resisting the defense's request for information. Finally, the immigration attorney can inform them that, if they are served with a subpoena, they should consider seeking legal representation to represent their interests in the criminal proceeding.

General Information on Privileges

The privileges that might apply in your client's case include:

- Sexual Assault Victim-Counselor;[26]
- Domestic Violence Victim-Counselor;[27]
- Physician-Patient;[28]
- Psychotherapist-Patient;[29]
- Clergy-Penitent;[30]
- Human Trafficking Victim-Caseworker.[31]

Although these privileges may be helpful, and immigration attorneys should consider letting experts and counselors know about them, the privileges do have some important limitations. For example, some privileges may have very narrow definitions about what constitutes a "counselor." If a client's counselor doesn't meet certain requirements, he or she will not benefit from the privilege. For an example of these requirements, see California Evidence Code § 1035.2 (listing the specific requirements for a sexual assault counselor to be qualified to claim the privilege, including a master's degree in counseling or a related field or one year of counseling experience, and 40 hours of training by an individual who qualifies as a counselor). Finally, if the court determines that the probative value of the information outweighs the effect

[26] CAL. EVID. CODE §§ 1035-1036.2 (West 2010).
[27] CAL. EVID. CODE § 1037 (West 2010).
[28] CAL. EVID. CODE §§ 990-1007 (West 2010).
[29] CAL. EVID. CODE §§ 1010-1028 (West 2010).
[30] CAL. EVID. CODE §§ 1030-1034 (West 2010).
[31] CAL. EVID. CODE § 1038 (West 2010).

of disclosure of the information on the victim, the counseling relationship, and the counseling services, the court may still compel disclosure.[32]

C. Legal Options

Motion to Quash

In criminal court, third parties can file a motion to quash a subpoena.[33] Filing a motion to quash may be an important (if not required) path to pursue to prevent disclosure of a client's information. See Appendix A, "Model Motion to Quash a Subpoena Duces Tecum," for an example of some of the arguments that might be raised in a motion to quash. (Note that this model motion is based on a particular set of facts and on California law, and may not apply in other jurisdictions or under different fact patterns). The motion to quash is a method that some immigration attorneys have already utilized in responding to subpoenas.[34] The immigration attorney should plan to file a motion to quash before turning over any documents to the defense. The judge will likely order a hearing on the motion to quash. The immigration attorney should bring all subpoenaed documents to this hearing, as they may be required to submit them to the defense or to submit the documents to the court for in camera review.

In a motion to quash, the courts will generally balance a defendant's Constitutional right to confront the evidence against her under the Sixth Amendment against the client's interest in quashing the requested records. Defendants' rights under the Sixth Amendment are strong, and many trial courts may found that they outweigh the victim's privacy or other concerns related to disclosure.[35]Accordingly, because a motion to quash may result in the complete nondisclosure of records, the immigration attorney should also be prepared to request an in camera review.

In Camera Review

If the motion to quash is unsuccessful or if the immigration attorney is still required to disclose certain documents, the attorney may request an in camera review to redact irrelevant and potentially prejudicial information. In one recent case, an attorney requested an in camera review to ask that her client's contact information and manner of entry into the country be redacted. The client's contact information could have potentially been misused by her abuser, and her manner of entry into the country could have been prejudicial to the jury in the criminal case. The immigration attorney should ask that any information not directly relevant to the criminal case be redacted.

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[32] CAL. EVID. CODE § 1035.4 (West 2010).

[33] *Hill v. Superior Court*, 10 Cal. 3d 812, 817 (1974) (stating that a trial court has "broad discretion" to quash a subpoena issued by the defense if it "might unduly hamper the prosecution or violate some other legitimate governmental interest.")

[34] In a survey of immigration attorneys throughout the country, four out of 24 reported familiarity with the use of a motion to quash in these circumstances. In two of those four cases, the motion to quash was successful.

[35] *See, e.g., Davis v. Alaska*, 415 U.S. 310 (holding that defendant's Sixth Amendment confrontation rights outweighed state's interest in maintaining confidentiality of juvenile delinquency proceedings).

CONCLUSION

This guide aims to provide immigration attorneys with strategies that may increase the likelihood of preventing the disclosure of a client's confidential information to the criminal defense in an ongoing prosecution. Having one's client's records subpoenaed by the criminal defense is a serious problem, and may be difficult and time-consuming. However, immigration attorneys may be able to take proactive steps to maximize the chances of a successful outcome for themselves and their clients. Attorneys should consult the law in their jurisdictions as well as other immigration practitioners for further guidance.