APPENDIX A

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

Note: This motion was prepared at the request of Bay Area Legal Aid by Diane Bailey and Jenny Kim, law students in the Stanford Immigrants' Rights Clinic. It has not been filed in court and does not contain an exhaustive list of arguments that could be presented in response to a subpoena seeking disclosure of a U visa application, but reflects some arguments that immigration lawyers and advocates may wish to explore in future motions to quash. Many of the arguments are based on California law, and may not apply in other jurisdictions or under different fact patterns. The motion was last updated in March 2010.

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF _____

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff* v. ____, *Defendant*.	Case No. XXXX MOTION TO QUASH SUBPOENA DUCES TECUM Date: Time: Before: Hon. ____

TO ALL INTERESTED PARTIES:

On [DATE] at XXXX a.m. in Department __ of the above-entitled court, for the reasons set forth in this motion, attorneys ____, attorneys for victim ____, move to quash Defendant's subpoena duces tecum on the following grounds: (1) the subpoena is overbroad and irrelevant;

(2) granting the subpoena would undermine critical government interests; (3) the subpoena is unduly burdensome on the complaining witness; (4) the subpoena unreasonably infringes on the complaining witness's constitutional right to privacy under California law; and (5) the records sought are covered by the attorney-client privilege, which has not been waived.

BACKGROUND AND STATEMENT OF FACTS

Ms. ____ is Defendant's ex-girlfriend and the complaining witness in the instant case. Defendant has issued a subpoena duces tecum to [Attorneys] for an immigration application known as a "U visa," which [Attorneys] have prepared on Ms. __'s behalf. In order to qualify for the U visa, non-citizens must have "suffered substantial physical or mental abuse as a result of having been a victim of criminal activity," including domestic violence, and demonstrate that they were "helpful" in a criminal "investigation or prosecution." 8 U.S.C. § 1101(a)(15)(U). *Id.* U visa applications are filed with the Violence Against Women Act Unit ("VAWA Unit") of the federal agency Citizenship and Immigration Services ("USCIS").

Ms. ____'s U visa application contains, *inter alia*: a written declaration describing how Defendant's abuse affected her emotionally and psychologically, as well as the steps she has taken to recover from the domestic abuse; letters of support from friends, family, and religious leaders; copies of phone bills that identify her current location and whom she contacts for support; reports from rape and crisis counselors; medical records; the location of domestic violence shelters from which she received assistance; and multiple documents related to Ms. ____'s immigration status.

ARGUMENT

APPENDIX A

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

I. THE SUBPOENA SHOULD BE QUASHED BECAUSE IT IS OVERBROAD AND IRRELEVANT.

The Court should quash any part of the subpoena that Defendant has not affirmatively shown is relevant and necessary to his defense. *Fabricant v. Superior Court*, 104 Cal. App. 3d 905, 915 (1980). Section 210 of the California Evidence Code defines relevant evidence as evidence "having any tendency in reason to prove or disprove a disputed fact that is of consequence to the determination of the action." Cal. Evid. Code § 210. Defendant must "identify any particular information which would be of benefit to the defendant," *Hammon*, 15 Cal. 4th 1117, 1121 (Cal. 1997), and make specific allegations about the factual basis of its materiality. *See also Lee v. Superior Court*, 177 Cal. App. 4th 1108, 1129 (Cal. App. 4th Dist. 2009) (holding that bare legal conclusions that information was necessary for "fair and effective presentation at trial" was *not* sufficient to establish good cause for subpoena); *Davis v. Superior Court*, 7 Cal. App. 4th 1008, 1017 (Cal. App. 5th Dist. 1992) ("Mere speculation as to the possibility that some portion of the records might be relevant to some substantive issue does not suffice.").

Defendant has failed to demonstrate the relevance and materiality of Ms. ____'s U visa application with the requisite level of specificity. Here, the requested records are neither necessary nor relevant to the defense. The U visa application contains documents related to Ms. ____'s immigration status, accounts of previous incidents of abuse, and descriptions of her recovery from an abusive relationship that are irrelevant to the current proceedings.

To the extent that Defendant wishes to argue that the possibility of receiving the U visa motivated Ms. __ to call the police, then Defendant can rely on the federal immigration statute

alone to develop this theory. The federal immigration statute provides immigration relief in the form of the U visa to certain non-citizens who can prove to DHS that they were victims of certain forms of criminal activity and "helpful" in a criminal investigation or prosecution. *See* 8 U.S.C.§ 1101(a)(15)(U). Nonetheless, the subpoena should be quashed unless Defendant can allege that Ms. ____'s U visa application contains unusually revealing information, beyond what is implied by the federal immigration statute.

II. THE COURT SHOULD QUASH THE SUBPOENA TO PROTECT CRITICAL GOVERNMENT INTERESTS.

It is well-settled that the Court has "broad discretion" to quash a criminal defendant's subpoena if it "might unduly hamper the prosecution or violate some other legitimate governmental interest." *Hill v. Superior Court*, 10 Cal. 3d 812, 817 (1974). The federal government and the State of California have repeatedly expressed critical governmental interests in protecting crime victims, preserving victims' rights, and encouraging cooperation with law enforcement regardless of immigration status. The Court should quash Defendant's subpoena because disclosure of the U visa application would undermine these legitimate government interests.

The State of California has endorsed a strong interest in protecting victims' rights during criminal prosecutions, which include the right to not disclose information to the defendant that would lead to a violation of the victim's rights to confidentiality, privacy, safety, and recovery. In 2008, the Victims' Bill of Rights specifically amended the California Constitution to include the right of victims "*[t]o prevent the disclosure of confidential*

information or records to the defendant," Cal. Const., art. I, § 28(b)(4) (emphasis added); to "refuse an interview, deposition, or discovery request by the defendant", Cal. Const., art. I, § 28(b)(5); "[t]o be free from intimidation, harassment, and abuse, throughout the criminal . . . justice process," Cal. Const., art. I, § 28(b)(1); and "[t]o be reasonably protected from the defendant." Cal. Const., art. I, § 28(b)(2). The recent amendments to the California Constitution should weigh against disclosure here.

Furthermore, the federal government, in enacting the U visa, has demonstrated an exceptional interest in encouraging undocumented victims of crime to cooperate with law enforcement, Pub. L. No. 106-386, § 1513(a)(2)(B), and protecting victims of domestic violence, Pub. L. No. 106-386, § 1513(a)(2)(A). Through the U visa, the federal government has embraced the goal of preventing perpetrators from exercise "undue control over the [non-citizen crime victims] through manipulation of the legal system." 8 C.F.R. § 214.14(a)(14)(ii)(B)(2). Municipal authorities in the State of California have similarly acknowledged local authorities' interests in promoting the law enforcement and crime victim protection goals of the U visa. The City of Oakland has declared that the victim protection provided by the U visa "directly improves the safety and overall quality of life of the residents of Oakland." City of Oakland, A Report Resolution Declaring Support for the United States U Visa Program (Jan. 22, 2008), *available at* http://clerkwebsvr1.oaklandnet.com/attachments/18224.pdf.

Permitting disclosure of Ms. __s U visa application risks undermining the very government interests animating the U visa. If victims know that courts may order the disclosure of the

personal information in U visa applications to their abusers, they will be severely discouraged from reporting crime.

In the domestic violence context, the protection of victim confidentiality constitutes a critical federal and state interest, particularly with respect to preventing further physical, emotional, and psychological manipulation by abusers. *See, e.g.*, Violence Against Women Act, 42 U.S.C. § 13925 (Congressional finding that lack of confidentiality had been one of the two "most significant barriers to young victims of domestic and dating violence seeking help"); Cal. Evid. Code § 1037.2 (special privilege for confidential communications between victims and their domestic violence counselors); 42 U.S.C. §§ 14043b; 11383 (federal confidentiality protections for victims of domestic violence who disclose information to shelters or housing providers). Permitting disclosure of Ms. __'s U visa application, which contains various documents from domestic violence service providers, would violate the clear government interest in keeping domestic violence victims' records confidential.

The Court should respect these critical government interests and order Defendant's subpoena to be quashed.

III. PRODUCTION OF THE REQUESTED DOCUMENTS WOULD UNDULY BURDEN AND HARRASS MS. ____.

The California Supreme Court has made clear that in the criminal context, "courts may [ ] refuse to grant discovery if the burdens placed on . . . third parties substantially outweigh the demonstrated need for discovery." *People v. Kaurish*, 52 Cal. 3d 648, 687 (Cal. 1990) (emphasis omitted). In order to "justify the imposition of such a burden," Defendant must "provide greater specificity or a greater showing of relevance in his broad discovery request."

APPENDIX A

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

Id. Defendant cannot justify the burden of the subpoena here, first because disclosure could jeopardize Ms. ____'s safety, and second, because disclosure could lead to greater "intimidation, harassment, and abuse." Cal. Const. art. 1 § 28(b)(1). Defendant has not demonstrated that the need for discovery justifies the risks here.

The law recognizes a heightened need to protect against disclosure if safety interests are implicated. Courts have quashed subpoenas issued to potential witnesses where the witnesses had reason to fear retaliation for testifying in a criminal trial, *Montez v. Superior Court*, 5 Cal. App. 4th 763 (Cal. App. 2d Dist. 1992), or harassment and danger for associating with a party in the litigation. *Planned Parenthood v. Superior Court*, 83 Cal. App. 4th 347 (Cal. App. 1st Dist. 2000). Here, disclosure of the requested materials would jeopardize Ms. ____'s physical safety because it would enable Defendant to learn about her current location, daily activities, and networks of support. Given her history with Defendant, Ms. ____ has a reasonable basis for believing that her safety depends on shielding her personal information from Defendant.

Ordering the disclosure of the U visa application would further burden Ms. ____ because granting Defendant access to the sensitive and private material contained in the application could intensify Defendant's psychological control over her. The subpoena would allow Defendant to exploit a legal process in order to inflict further "intimidation, harassment, and abuse" over Ms. __. Cal. Const., art. I, § 28(b)(1). The U visa application contains a declaration of Ms. ____ that describes, in great detail, the emotional and psychological effects of her abusive relationship with Defendant on multiple aspects of her life. It would be psychologically harmful for Ms. ____ to allow Defendant, Ms. ____'s ex-boyfriend, to gain access to her firsthand account of the emotional toll of the abuse he inflicted on her. In fact,

providing Defendant with such information may enable him to exercise even greater psychological dominance and control over Ms. ____. Ignoring these realities contradicts the spirit of the U visa, which was intended to "offer[] protection to victims of such offenses in keeping with the humanitarian interests of the United States." Pub. L. No. 106-386, §1513(a)(2)(A).

IV. THE SUBPOENA SHOULD BE QUASHED BECAUSE IT UNREASONABLY INFRINGES ON MS. _____'S CONSTITUTIONAL RIGHTS OF PRIVACY AND FREEDOM FROM HARASSMENT.

The California Constitution protects privacy as an "unalienable right," Cal. Const., art. I, § 1, that is "on a par with defending life and possessing property," *Rubio v. Superior Court*, 202 Cal. App. 3d 1343, 1349 (Cal. App. 4th Dist. 1988) (quoting *Vinson v. Superior Court*, 43 Cal. 3d 833, 841 (Cal. 1987)). Although the constitutional privacy protection is not absolute, [o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation on the right of privacy." *Boler v. Superior Court*, 201 Cal. App. 3d 467, 473 (1987).

The Defendant's rights to a fair trial do not outweigh Ms. ____'s imperative need to protect her privacy. "An impairment of the privacy interest 'passes constitutional muster only if it is *necessary* to achieve the compelling interest.'" *Brillantes*, 51 Cal. App. 4th at 342-43. A finding of necessity requires the court to consider alternative means of disclosure, and "requires that the [subpoenaing party] utilize the 'least intrusive' means to satisfy its interest." *Brillantes*, 51 Cal. App. 4th at 343.

California courts have interpreted constitutional privacy protections to apply to the kind of information contained in Ms. ____'s U visa application. A person has a constitutional right

to privacy in medical records, *Div. of Med. Quality Assur. v. Gherardini*, 93 Cal. App. 3d 669, 679 (1979); psychiatric records, *People v. Stritzinger*, 34 Cal.3d 505 (1983); sexual relations, *Vinson*, 43 Cal. 3d 833; and the "details of one's personal life," *Valley Bank of Nevada v. Superior Court*, 15 Cal. 3d 652, 656 (Cal. 1975). The declaration of Ms. ____ submitted in support of her U visa application contains detailed statements about her intimate relations and personal life. Letters from a rape crisis counselor reveal sensitive information about Ms. ____'s personal experience of abuse.

Since the constitutional right to privacy attaches to Ms. ____'s U visa application and is not outweighed by the defendant's need for this requested records, the subpoena should be quashed. It is unnecessary for the Court to order the production of Ms. ____'s entire U visa application. Defendant can attempt to show the victim's bias or motive through Ms. __'s live testimony in the current proceeding. Defendant can rely on the provisions of the federal U visa statute to develop his defense. However, the disclosure of the entire U visa application is unnecessary here, where privacy rights attach to much of the application. Given the alternate means available to achieve Defendant's interest, the Court should quash this subpoena.

V. THE INFORMATION DEFENDANT SEEKS IS PRIVILEGED AND SHOULD NOT BE DISCLOSED BY THE COURT.

A. The Court Should Not Disclose Ms. ____' s Immigration File Because It Is a Privileged Communication Between the Client and Her Attorneys.

Defendant seeks the disclosure of confidential communications between Ms. __ and her lawyer. The California Constitution explicitly grants victims the right "to prevent the disclosure of confidential information or records," particularly if those records "are otherwise

privileged or confidential by law." Cal. Const., art. I, § 28(b). The Court should not grant Defendant's subpoena duces tecum because the U visa application is protected by attorney-client privilege. Cal. Evid. Code § 954.

The attorney-client privilege applies to Ms. ____'s entire U visa application, which was prepared based on confidential communications between Ms. ____ and her immigration attorneys. For example, the victim's declaration was prepared by Ms. ____'s attorneys, for the purpose of obtaining immigration relief, and contains Ms. ____'s personal reflections on the emotional impact of Defendant's abuse. It should therefore not be disclosed by the Court.

B. Ms. ____ Did Not Waive the Attorney-Client Privilege by Filing the U Visa Application with a Confidential Government Agency.

The records requested by Defendant should not be disclosed because Ms. ____ has not waived attorney-client privilege. Ms. ____'s filing of her U visa application to the Violence Against Women Act Unit ("VAWA Unit") of Citizenship and Immigration Services ("USCIS"), a federal office that is bound by strict confidentiality provisions, did not waive attorney-client privilege against Defendant for at least four reasons. First, the filing of Ms. ____'s application with USCIS was itself privileged as official government information. Second, reporting to USCIS "was reasonably necessary for the accomplishment of the purpose" for which she consulted her lawyer. Third, Ms. ____ never demonstrated a subjective intent to abandon confidentiality. Fourth, the filing of Ms. ____'s application was a "selective waiver" of the privilege, which applies only against USCIS and not to third parties such as Defendant.

APPENDIX A

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

As an initial matter, Defendant bears the burden of proof by a preponderance of the evidence that Ms. ____ waived her attorney-client privilege. Cal. Evid. Code § 917; *Trikek Telecom, Inc. v. Superior Court*, 169 Cal. App. 4th 1385, 1390 (2009). Otherwise, Ms. ____'s communications to her attorneys are "presumed to have been made in confidence" and they may not be disclosed to the Court. Cal. Evid. Code § 917(a).

1. Ms. ____ Did Not Waive Attorney-Client Privilege Because Her Communication with USCIS Was Itself Privileged.

Ms. ____'s communication to the VAWA Unit of USCIS, a federal office bound by strict confidentiality rules, did not waive the attorney-client privilege because "[a] disclosure that is itself privileged is not a waiver of any privilege," Cal. Evid. Code § 912(c). The communication to USCIS was protected under the official information privilege. Therefore, the U visa application remains privileged.

The official information privilege applies to information that is acquired and maintained in confidence by a public employee. Cal. Evid. Code § 1040. The information is privileged either if "[d]isclosure is forbidden by an act of the Congress of the United States" or if "[d]isclosure of the information is against the public interest . . . ." Cal. Evid. Code § 1040. Because disclosure of Ms. ____'s U visa application by the VAWA Unit of USCIS is both forbidden by an act of Congress and against public policy, the official information privilege applies to her submission. Thus, no waiver of the attorney-client privilege occurred when Ms. ____ filed her application with USCIS.

a. The Government Information Privilege Applies Because USCIS Is Forbidden by Federal Statute from Disclosing U Visa Applications.

Where, as here, an act of Congress forbids government disclosure of the information, the official information privilege is an absolute bar to discovery. Cal. Evid. Code § 1040, L. Revision Comm'n Comment (1965). Here, USCIS is explicitly forbidden by the Violence Against Women Act of 2005 from disclosing U visa applications to the public. 8 U.S.C. § 1367(a)(2). The act states that "in no case" may the government "permit use by or disclosure to anyone . . . of any information which relates to an alien who is the beneficiary of an application for relief under [the U visa]." *Id*. Furthermore, anyone who violates this law "shall be subject to appropriate disciplinary action and subject to a civil money penalty of not more than $5,000 for each such violation." 8 U.S.C. § 1367(c). Because Ms. ____ submitted privileged information to a government agency bound to confidentiality by an act of Congress, neither the attorney-client privilege nor the official information privilege was waived.

b. The Government Information Privilege Applies Because the Disclosure of U Visa Applications Is Against Public Policy.

The official information privilege also applies because "[d]isclosure of the information is against the public interest . . . ." Cal. Evid. Code § 1040. As discussed in Part II, *supra*, disclosing victims' U visa applications to their abusers severely undercuts public policy goals. Disclosure of U visa applications would (1) undermine the goals of the U visa, which include protecting victims and aiding law enforcement; (2) subject domestic violence victims to further emotional, psychological, and potentially physical abuse; (3) eviscerate the attorney-client privilege; and (4) cause permanent harm that cannot be undone on appeal. *See supra* Part II.

Accordingly, because disclosure is against the public interest, the filing of Ms. ____'s U visa application was itself privileged and the attorney-client privilege has not been waived.

2. Ms. ____ Did Not Waive Attorney-Client Privilege Because Sending Her Application to USCIS Was "Reasonably Necessary."

Ms. ____ did not waive the attorney-client privilege because sending her application to USCIS was "reasonably necessary" to achieve the immigration relief for which she sought legal assistance. No waiver of privilege occurs "when disclosure is reasonably necessary for the accomplishment of the purpose for which the [lawyer] was consulted" and when the communication was made in confidence. Cal. Evid. Code § 912(d). For instance, a company's disclosure of financial records to auditors, *S.E.C. v. Roberts*, 254 F.R.D. 371 (N.D. Cal. 2008), or an individual's disclosure of health records to an insurance company, *Pollock v. Superior Court*, 93 Cal. App. 4th 817, 821 (Cal. App. 2d Dist. 2001)) does not waive privilege because the disclosures were: (1) confidential, (2) necessary to the accomplishment of the goals, and (3) related to the purpose for which the attorney was consulted.

Ms. ____ did not waive the attorney-client privilege because her communication to USCIS was confidential and necessary to achieve immigration relief through the U visa. Ms. ____ sought her immigration attorneys for the primary purpose of obtaining relief through the U visa. Her report to the VAWA Unit of USCIS was strictly confidential pursuant to federal statute and required for adjudication of her claim of immigration relief.

3. Because Ms. ____ Did Not Demonstrate Any Intent to Abandon Secrecy, She Has Not Waived Attorney-Client Privilege.

Ms. ____'s U visa application should not be disclosed to her abuser because she has never demonstrated a "knowing and voluntary relinquishment of [the] attorney-client privilege." *FDIC v. Fidelity & Deposit Co*., 196 F.R.D. 375, 380 (S.D. Cal. 2000). "The

theory underlying the concept of waiver is that the holder of the privilege has abandoned the secrecy to which he is entitled under the privilege." Cal. Evid. Code § 912, Cal. L. Revision Comm'n Comment (1965). Since the commencement of her attorney-client relationship, Ms. ____ has never evidenced an intent to abandon the secrecy surrounding her U visa application. Ms. ____ kept the details of her U visa application confidential. She filed it with the VAWA Unit of USCIS, the federal agency responsible for adjudicating her immigration status and that is bound by strict confidentiality laws. 8 U.S.C. § 1367. Because Ms. ____ never evinced an intent to abandon the secrecy with which she entered the attorney-client relationship, Ms. ____'s application to USCIS for a U visa did not waive the attorney-client privilege.

4. Ms. ____'s Disclosure to USCIS Was a Selective Waiver of Privilege Against USCIS Alone, and Not a Universal Waiver of Privilege.

Even if the Court deems that Ms. ___'s communication to USCIS constitutes a waiver of the attorney-client privilege, the Court should treat it as a selective waiver that does not permit disclosure of the requested records to Defendant. Under the selective waiver doctrine, voluntary disclosure of privileged material in some protected instances waives the privilege as to the recipient of the information, but not towards all other parties. *See*, *e.g.*, *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (company that voluntarily discloses financial records to Securities and Exchange Commission did not waive attorney-client privilege towards other parties); *Pollock v. Superior Court*, 93 Cal. App. 4th 817, 821 (Cal. App. 2d Dist. 2001) (patient's disclosure of medical records to insurance company waived privilege only towards insurance company); Edward J. Imwinkleried, *The New Wigmore: A*

Treatise on Evidence 1019 (2d ed. 2010) (noting weight of scholarly authority in support of selective waiver doctrine).

This Court should find a selective waiver existed and refuse to order the disclosure of Ms. ____'s U visa application. Here, Ms. ____ voluntarily disclosed information about her abuse to a confidential government agency. Although Ms. ____ submitted her U visa application to USCIS, she did not intend to waive the attorney-client privilege toward entities other than USCIS. Critical public policy motivations, recognized by Congress, for limiting the waiver of attorney-client privilege exist. *See supra* Part II. These include the physical protection of the victim, the facilitation of full and frank disclosures to attorneys and government agencies, and encouraging victims of domestic violence to come forward with information about their abuse. *Id.*

Because any waiver of the attorney-client privilege should extend only to USCIS, and not to any other third parties, the Court should quash the subpoena.

C. The Court Should Respect the Privacy of Ms. ____ by Adjudicating on the Issue of Privilege Without Requiring Disclosure of the U Visa Application, or in the Alternative, by Conducting a Private, In Camera Review.

If the Court finds that there is a reasonable dispute as to whether a privilege applies, "the trial judge must accord a full hearing, *with* oral argument, before ordering revelation of client confidences to the other side and, in effect, compelling attorney testimony against a client." *Titmas v. Superior Court*, 87 Cal. App. 4th 738, 740 (2001) (original italics).

The Court is also responsible for protecting the privacy of non-parties and crime victims like Ms. ____ and should conduct an in camera review if such a review would be

absolutely necessary for a judicial determination. *See* Cal. Evid. Code § 915(b) (Court may hold The Court may require that Ms. ____ disclose her U visa application to the Court "in order to rule on the claim of privilege" *only* if there is "no other feasible means to rule on the validity of the claim other than to require disclosure." If the Court finds after arguments that there is no alternative other than to require disclosure, the Court should examine the U visa application "in chambers out of the presence and hearing of all persons" to respect Ms. ____'s privacy. Cal. Evid. Code § 915(b).

V. CONCLUSION

For the above stated reasons, Ms. ____and her attorneys should not be compelled to produce Ms. __'s U visa application. The subpoena is overbroad, irrelevant, unnecessary, and thus unreasonable. Ordering disclosure would violate legitimate government interests and violate Ms. ____'s right to privacy and attorney-client privilege. We therefore respectfully request that this court GRANT the motion to quash.

DATED:

[Law firm]

By: _____

[Attorney Name and SBN]