Volume 61, Issue 2 Page 355

Stanford Law Review

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INTRODUCTION

The presence of an estimated 11.5 million undocumented immigrants in the United States,[1] of which an estimated 7.2 million are working,[2] has become a flashpoint in the emerging national debate about immigration. Despite the fact that immigrants often accept jobs and working conditions that no citizens seem willing to undertake,[3] this country has responded with hostile state initiatives[4] and federal legislative efforts that not only fail to recognize their contributions, but also penalize many aspects of their daily existence.[5]

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1. JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 1 (2006), http://www.pewhispanic.org/files/reports/61.pdf (explaining that as of March 2005 there were 11.1 million unauthorized immigrants in the United States).

2. *Id.* at ii (explaining that approximately 7.2 million unauthorized migrants were employed as of March 2005, which accounts for approximately 4.9% of the civilian labor force).

3. *See* Haya El Nasser, *Family, Better Jobs Pull Mexicans to USA*, USA TODAY, Dec. 7, 2005, at A3; S. Mitra Kalita & Krissah Williams, *Help Wanted as Immigration Faces Overhaul: Congress Considers New Rules, and Businesses Worry About Finding Workers*, WASH. POST, Mar. 27, 2006, at A1 ("Businesses say it is hard to persuade Americans to perform the unskilled jobs that immigrants easily fill."); Dave Montgomery, *Bush Presses Immigration Proposal: Illegal Aliens to Get Chance to Work Here 6 Years Before Return*, PITTSBURGH POST-GAZETTE, Oct. 19, 2005, at A11 ("[F]oreign workers are needed to fill jobs that U.S. citizens often bypass, including unskilled labor and seasonal agricultural work."); Mary Lou Pickel & Matt Kempner, *Reliance on Illegals Props up Economy: Law Would Hit Industry, Consumers*, ATLANTA J. & CONST., Mar. 23, 2006, at A1 ("[T]he hotel industry in Georgia has become a magnet for workers from other countries who are willing to take tough, low-paying jobs, such as housekeeping . . . .").

4. *See* Nicholas Riccardi, *States Take On Border Issues*, L.A. TIMES, Jan. 16, 2006, at A1 ("In New Hampshire . . . two sheriffs last year began arresting illegal immigrants, reasoning that their presence violated state laws against criminal trespass."); John Turner Gilliland, *Arizona Prosecutor Has New Twist on Prosecuting Illegal Aliens*, CNSNEWS.COM, Mar. 15, 2006, http://www.cnsnews.com/Nation/Archive/200603/NAT20060315b.html (describing Arizona Maricopa County Attorney's filing of felony conspiracy charges against illegal immigrants under Arizona's antihuman smuggling law).

5. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302-23 (preventing states from issuing standard federally recognized driver's licenses to undocumented immigrants; creating additional proof requirements in asylum claims; eliminating habeas corpus review of removal orders and expanding the grounds of inadmissibility).

On December 16, 2005, the United States House of Representatives passed the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, sponsored by James

When an employer, wittingly or unwittingly, hires an undocumented worker, a question arises regarding the extent to which labor and employment statutory protections extend to undocumented workers. In analyzing this question, courts are forced to address the interplay between immigration and employment statutes and their respective underlying policy rationales. Prior to 2002, courts confronting these issues developed a body of law that harmonized these two distinct areas of jurisprudence, finding, in many contexts, that undocumented workers were entitled to statutory protections in the workplace.[6] This body of law shifted in 2002 when the United States Supreme Court decided *Hoffman Plastic Compounds, Inc. v. NLRB* and found that back-pay for undocumented workers under the National Labor Relations Act (NLRA) was foreclosed by federal immigration policy.[7] Since the *Hoffman* decision, lower courts have struggled to define the parameters of the case, and, while the jurisprudence is still evolving, many courts have limited *Hoffman*'s reach and found workers entitled to seek legal remedies for workplace violations under a variety of statutes.[8]

Sensenbrenner (R-WI) and Peter King (R-NY). H.R. 4437, 109th Cong. (2005). The bill includes a provision that makes "unlawful presence" in the United States a federal crime. *Id.* §§ 201, 203. For a description of additional measures set forth in H.R. 4437, see NAT'L IMMIGRATION FORUM, THE SENSENBRENNER-KING BILL'S "GREATEST MISSES" (2006), http://www.immigrationforum.org/documents/policyWire/legislation/SenseKingGlance.pdf (summarizing some of the provisions of the bill including: a provision that makes any relative, employer, coworker, clergyman, or friend of an undocumented immigrant into an "alien smuggler" and a criminal; a provision that makes it harder for legal permanent residents to become citizens; a provision that requires employers to verify workers' legal status; a provision that denies admission to nationals of certain countries; a provision that authorizes state and local police to enforce federal immigration laws; and various provisions that erode due process, including a provision that reverses the burden of proof).

6. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 884 (1984) (holding that undocumented workers were considered employees under the National Labor Relations Act); Equal Employment Opportunity Comm'n v. Hacienda Hotel, 881 F.2d 1504, 1517 (9th Cir. 1989) (finding that the district court did not err in awarding undocumented workers back-pay under Title VII); Rios v. Enter. Ass'n Steamfitters Local Union 638, 860 F.2d 1168, 1172 (2d Cir. 1988) (permitting undocumented workers remedies under Title VII prior to passage of the IRCA); *In re* Reyes, 814 F.2d 168, 170 (5th Cir. 1987) (finding that both undocumented and documented workers are covered under the Fair Labor Standards Act (FLSA)); Local 512, Warehouse & Office Workers' Union v. NLRB, 795 F.2d 705, 716 (9th Cir. 1986) (finding that undocumented workers are entitled to the protections afforded under the NLRA); Bevles Co. v. Teamsters Local 986, 791 F.2d 1391, 1392-93 (9th Cir. 1986) (upholding an arbitrator's award of back-pay and reinstatement to undocumented workers prior to passage of IRCA); Donovan v. Burgett Greenhouses, Inc., 759 F.2d 1483, 1485 (10th Cir. 1985) (allowing for the enforcement of the FLSA on behalf of undocumented workers); NLRB v. Apollo Tire Co., 604 F.2d 1180, 1183 (9th Cir. 1979) (finding that undocumented workers qualify as employees under the NLRA and are entitled to seek relief under the act). *But see* Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1121 (7th Cir. 1992) (interpreting *Sure-Tan* as disallowing undocumented workers back-pay under the NLRA).

7. 535 U.S. 137, 151-52 (2002).

8. Workers who are not paid can seek recovery of wages. *See, e.g.*, Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499, 501-02 (W.D. Mich. 2005); Trejo v. Broadway Plaza

Undocumented workers who pursue enforcement of their legal rights have heightened concerns about the disclosure of their status in the context of civil litigation. Because of the precarious situation that undocumented workers inhabit in the workplace,[9] the potential for mistreatment is great.[10] Further,

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Hotel, No. 04 Civ. 4005, 2005 U.S. Dist. LEXIS 17133, at *2-3 (S.D.N.Y. Aug. 16, 2005); Cortez v. Medina's Landscaping, No. 00 C 6320, 2002 U.S. Dist. LEXIS 18831, *2-3 (N.D. Ill. Sept. 30, 2002); Flores v. Amigon, 233 F. Supp. 2d 462, 463-64 (E.D.N.Y. 2002); Singh v. Jutla, 214 F. Supp. 2d 1056, 1060-61 (N.D. Cal. 2002); Zeng Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002).

Those who are discriminated against can seek relief under anti-discrimination statutes. Rivera v. Nibco, Inc., 364 F.3d 1057, 1066-69 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 1603 (2005) (holding that *Hoffman* does not apply to Title VII claims); Escobar v. Spartan Security Service, 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003) (finding that *Hoffman* did not preclude all remedies for undocumented workers under the NLRA or other comparable federal labor statutes); De La Rosa v. Northern Harvest Furniture, 210 F.R.D. 237, 238-39 (C.D. Ill. 2002) (reasoning, in dicta, that given the differences between the authority of federal courts and the NLRB, as well as Title VII precedent favoring back-pay, *Hoffman* was not dispositive of issues raised by the defendant); Lopez v. Superflex, Ltd., No. 01 Civ. 10010, 2002 U.S. Dist. LEXIS 15538, at *3-4 (S.D.N.Y. Aug. 21, 2002) (rejecting employer's argument that in order to state a claim of disability discrimination, the plaintiff was required to plead that he was a documented alien).

Those injured on the job can pursue personal injury remedies or workers' compensation. *See, e.g.*, Farmers Bros. Coffee v. Workers' Comp. Appeals Bd., 35 Cal. Rptr. 3d 23, 27-30 (Ct. App. 2005); Safeharbor Employer Services I, Inc. v. Velazquez, 860 So. 2d 984, 985-86 (Fla. Dist. Ct. App. 2003); Earth First Grading v. Gutierrez, 606 S.E.2d 332, 334-36 (Ga. Ct. App. 2004); Cont'l PET Techs., Inc. v. Palacias, 604 S.E.2d 627, 630-31 (Ga. Ct. App. 2004); Wet Walls, Inc. v. Ledezma, 598 S.E.2d 60, 63-64 (Ga. Ct. App. 2004); Design Kitchen & Baths v. Lagos, 882 A.2d 817, 829-30 (Md. 2005); Correa v. Waymouth Farms, Inc., 664 N.W.2d 324, 329-31 (Minn. 2003); Rosa v. Partners in Progress, Inc., 868 A.2d 994, 997, 1001 (N.H. 2005); Cherokee Indus. v. Alvarez, 84 P.3d 798, 799, 801 (Okla. Civ. App. 2003); Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233, 244, 247 (Tex. Ct. App. 2003).

9. Rebecca Smith, *Immigrants' Right to Workers' Compensation*, 40 TRIAL 48, 49 (Apr. 2004) ("Latino immigrants are now far more likely to be killed on the job than their counterparts of European ancestry. From 1992 to 2000, fatalities among Latino immigrants rose by 67 percent—at a time when the number of fatal occupational injuries to all workers declined by 5 percent.") (citing BUREAU OF LABOR STATISTICS, CENSUS OF FATAL OCCUPATIONAL INJURIES, FATAL OCCUPATIONAL INJURIES TO FOREIGN-BORN WORKERS BY SELECTED WORKER CHARACTERISTICS (2002); CTRS. FOR DISEASE CONTROL & PREVENTION, PROTECTING THE SAFETY AND HEALTH OF IMMIGRANT WORKERS (2002), http://www.cdc.gov/programs/workforc22.htm; AFL-CIO, DEATH ON THE JOB: THE TOLL OF NEGLECT 9-10 (12th ed. 2003), http://www.aflcio.org/issues/safety/memorial/upload/death_2003_intro.pdf); Rebecca Smith, Amy Sugimori & Luna Yasui, *Low Pay, High Risk: State Models for Advancing Immigrant Workers' Rights*, 28 N.Y.U. REV. L. & SOC. CHANGE 597, 598-600 (2003-2004) (detailing the statistics showing that immigrant workers are at greater risk of work-related injuries and death than their counterparts).

10. *See* Christopher Ho & Jennifer C. Chang, *Drawing the Line After* Hoffman Plastic Compounds, Inc. v. NLRB*: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473, 477 & n.12 (2005) (stating that "the conditions under which these persons work are—owing to their precarious circumstances—typically substandard, rife with exploitation by avaricious employers and, sometimes, astoundingly appalling in the extent and depth of their cruelty" and providing examples of

once their status is disclosed, the ramifications for undocumented immigrants are uncertain at best; they could be reported to the Bureau of Immigration and Customs Enforcement (BICE) and deported, charged criminally and/or barred from reentering the country.[11]

Lawyers litigating employment-related claims involving undocumented workers are likely to confront a host of complex ethical issues. The ethical quandaries have grown increasingly more difficult in light of ongoing debates about comprehensive immigration reform. Recent legislative proposals contain stepped-up employer verification provisions,[12] make mere presence in the United States a federal crime,[13] and make those who help undocumented immigrants susceptible to liability as "alien smugglers."[14] These looming developments increase the potential risks and consequences to undocumented immigrants, their employers, and, potentially, to the lawyers who are involved in the litigation. The following case is illustrative of the complex interplay of ethical issues that can arise.

A group of workers sued their employer, a landscape company, for violations of the Fair Labor Standards Act (FLSA). As the case proceeded, defense counsel repeatedly questioned the immigration status of some of the workers and suggested that plaintiffs' counsel was somehow aiding and abetting illegal conduct by failing to report the plaintiffs' whereabouts to immigration officials. In an attempt to protect the clients, plaintiffs' counsel obtained a written agreement from the defendant that it would not raise the issue of plaintiffs' immigration status at depositions. This agreement was promptly violated at the first plaintiff's deposition and, in response, plaintiff asserted his rights under the Fifth Amendment. Then, during a break, defense

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such exploitation).

11. 8 U.S.C. § 1227(a)(1)(B) (Supp. V 2006) (making individuals who are present in the United States without lawful status deportable); *see Rivera*, 364 F.3d at 1064 ("While documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution.").

12. Stepped-up verification has been included in many of the proposed bills designed to address immigration reform. *See, e.g.*, The Secure America Through Verification and Enforcement ("SAVE") Act of 2007, H.R. 4088, S. 2368, 110th Cong. (2007) (expanding the already existing Basic Pilot/E-Verify employment eligibility verification program to require participation by all employers and all workers in the country); The Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006) (creating a new Electronic Employment Verification System (EEVS) for checking the employment eligibility of every newly hired worker in the United States).

13. Border Protection, Antiterrorism, and Illegal Immigration Control Act, H.R. 4437, 109th Cong. §§ 201, 203 (2002).

14. *Id.* § 202 (expanding the definition of "smuggling" to include a person who knowingly "assists" an undocumented immigrant to "reside or remain" in the United States, even if that person does not encourage or induce the immigrant to come to or reside in the United States unlawfully).

counsel called the local police who, upon their arrival, called the local immigration enforcement office to report plaintiff as an illegal alien based only upon the assertion of plaintiff's Fifth Amendment rights.[15]

This Article explores the increasingly complex ethical obligations with regard to a client's immigration status in the context of employment-related civil litigation.[16] The inquiry begins with the initial question of whether or not a lawyer can represent an undocumented worker in such litigation. In light of prohibitions on lawyers assisting in conduct that is criminal or fraudulent, the answer to the question is not necessarily evident.[17] Undocumented workers currently can be criminally liable for various actions related to the manner in which they entered the country and the method by which they obtained employment. Thus, even though undocumented workers may have a legal right to certain employment-related remedies, lawyers need to determine whether the rules of professional conduct bar such representation. Ultimately, this Article concludes that, in most every instance, lawyers are not prohibited from representing undocumented workers in employment-related civil litigation, even if actions related to their manner of entry or method of obtaining employment are criminal or fraudulent.[18]

After determining that a lawyer can represent an undocumented worker in employment-related civil litigation, the Article explores additional complexities that arise in the course of the representation when lawyers have to decide whether to protect or disclose a client's immigration status. The lawyer's decision to protect or disclose the information is, in the first instance, dependent upon whether or not immigration status is relevant to the underlying lawsuit. In the wake of *Hoffman*, employers have attempted to broaden the Court's holding by arguing that immigration status is relevant to a whole range of employment-related civil litigation. If immigration status is determined relevant to the litigation, the lawyer's ethical obligations to protect the information involve inquiries into the rules of confidentiality, the client's Fifth

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15. NAT'L IMMIGRATION LAW CTR., LITIG. GUIDE FOR IMMIGRANT WORKER ADVOCATES § III(B)(2) (2007).

16. Throughout this Article, I refer to the American Bar Association (ABA) Model Rules of Professional Conduct in analyzing the ethical questions raised herein. While the ABA Model Rules themselves are not binding on any one state, the large majority of states have adopted them. *See* Alphabetical List of States Adopting Model Rules, http://www.abanet.org/cpr/mrpc/alpha_states.html (last visited Dec. 24, 2007). To the extent a state has adopted professional responsibility rules that differ from the Model Rules, the analysis might differ as well.

17. A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2007).

18. *See infra* Part II.

Amendment privilege against self-incrimination,[19] and the applicability and scope of the attorney-client privilege.

If, on the other hand, immigration status is determined not relevant, the client's immigration status would constitute confidential information and lawyers would be obligated to protect this information unless they were permitted or mandated to disclose it. The Model Rules of Professional Conduct contain a strong obligation to keep client information confidential as well as rules designed to prohibit lawyers from counseling or assisting a client in fraudulent or criminal activities. Proposed and existing legislation that characterizes an undocumented worker's presence or work in this country as criminal or fraudulent, thus, creates a tension between the lawyer's confidentiality obligations and the potential for permissive[20] or mandatory disclosure.[21] Among the applicable provisions are Rule 3.3(b)—which requires lawyers representing clients they know intend to engage or are engaging in criminal or fraudulent conduct to take reasonable remedial measures, including disclosure of such information to the tribunal[22]—and Rule 4.1(b)—which requires lawyers to disclose material facts in order to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.[23]

In trying to address the tension between confidentiality and disclosure obligations, lawyers should bear in mind that there are two important limitations on the crime and fraud rules embodied in the Model Rules of Professional Conduct. First, the rules apply only if there is a sufficient nexus between the alleged crime or fraud and the pending action.[24] Second, the rules

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19. Generally the Fifth Amendment privilege against self-incrimination can be invoked "whenever information sufficiently relevant to civil liability to be discoverable provides even a clue that might point a hypothetical government investigator toward evidence of criminal conduct." Robert Heidt, *The Conjurer's Circle—The Fifth Amendment Privilege in Civil Cases*, 91 YALE L.J. 1062, 1065 (1982).

20. Model Rule 1.6 contains several exceptions that are arguably relevant to this context. First, Rule 1.6(b)(2) is designed to prevent future client misconduct and allows attorneys to disclose if failure to do so will result in substantial injury to the financial interests or property of another. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2007). Second, Rule 1.6(b)(3) is designed to permit disclosure to mitigate or rectify the type of harm described in Rule 1.6(b)(2). *Id.* R. 1.6(b)(3). Finally, Rule 1.6(b)(6) addresses a lawyer's disclosure obligation pursuant to a court order. Additionally, Rule 4.1(b) sets forth a lawyer's obligation to disclose to third parties. *Id.* R. 4.1(b). Since Rule 4.1(b) has many conditions that must be met before disclosure, I include this in the category of permissive or, more accurately, conditional disclosure.

21. My use of the term "mandatory disclosure provisions" includes a lawyer's obligation to disclose to the tribunal under Model Rule 3.3(b). *Id.* R. 3.3(b).

22. *Id.*

23. *Id.* R. 4.1(b).

24. HAZARD & HODES, THE LAW OF LAWYERING 37-6 to 37-8 (3d ed. Supp. 2008) (stating that rule 4.1(a) "still prohibits only statements that are materially false"). Model Rule 3.3(b) requires only that information "related to the proceedings" be disclosed to the tribunal. MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2007).

apply only if there is a sufficiently close relationship between the lawyer's actions and the client's alleged crime or fraud.[25] Essentially, disclosure is only required if the lawyer is directly counseling or assisting in the crime or fraud or if there is a close causal connection between the client's crime or fraud and the underlying litigation. Thus, despite the statutory provisions criminalizing certain acts, the constellation of ethical rules relating to client crime or fraud may not actually require a lawyer to disclose a client's immigration status, but, instead, may obligate the lawyer to protect this otherwise confidential information.

Lawyers representing employers will also be affected by the immigration status of opposing parties.[26] If immigration status is not relevant to the pending litigation, lawyers representing employers might consider whether it is appropriate to seek access to this information.[27] Further, the way in which these disclosure issues are decided will have larger implications for the justice system. If the risks and costs of disclosure are too high, undocumented workers will be deterred from seeking enforcement of their rights or forced to drop litigation once started. This chilling effect might also undermine the policies of employment laws that may, as a result, go under enforced. Additionally, lawyers might be forced to alter their client relationships so as to avoid learning information they might later have to disclose.

Despite this Article's conclusion that the ethical rules do not mandate disclosure of a client's immigration status, the rules might permit the disclosure and some lawyer may want to exercise this discretion to reveal. For example, an attorney might believe that disclosure would make her client more credible or preempt certain strategic benefits gained by the opposing party. In order to assist lawyers in addressing these decisions, this Article will briefly explore whether the decision to disclose belongs to the lawyer or the client and the extent of the lawyer's obligation to counsel the client and to obtain informed consent prior to disclosure.

Part I of this Article analyzes the initial ethical question whether undocumented workers seeking employment-related civil remedies will be able to avail themselves of legal representation, or whether the limitation on

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25. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2007) (stating that a lawyer cannot counsel or assist a client in perpetrating a crime or fraud); *id.* R. 4.1(b) (stating that a lawyer shall disclose only when necessary to avoid assisting with a client's crime or fraud); HAZARD & HODES, *supra* note 24, at 5-6 to 5-7 ("Rules 3.3(a)(3) and 4.1(b) are of like effect, for together they provide that a lawyer must disclose material facts to a tribunal or to a third party, even if the information would otherwise be confidential, when such action is necessary to avoid either participating in or passively assisting a client's fraud through silence.").

26. While this Article raises some ethical issues that lawyers for employers might face, the main focus is on the ethical issues involved in representing undocumented employees.

27. For a discussion of ethical limitations on the employer, see *infra* notes 230-44 and accompanying text.

assisting clients in the commission of a crime or fraud will bar representation. After concluding that there is likely no bar to representation in this context, the Article then examines how undocumented status affects decisions made during the course of the representation. Part II explores the development of the law regarding relevancy of immigration status in the context of civil litigation. In particular, this Part focuses on a comparison of the law before and after the Supreme Court decision in *Hoffman* and then examines the development of law by lower courts post-*Hoffman*. Part III then explores lawyers' obligations to protect or disclose immigration status and contrasts lawyers' ethical obligations if immigration status is determined to be relevant to the proceedings with instances in which immigration status is not relevant to the proceedings. Finally, Part V examines the ethical obligations of lawyers who determine that it would be strategically beneficial to the case to disclose a client's immigration status.

In the current climate of hostility toward immigrants, and undocumented immigrants in particular, lawyers representing undocumented clients need to be mindful of the implications of disclosure. An improperly made disclosure could have catastrophic consequences for a client, including deportation, criminal charges, and the inability to reenter the country legally. Given these potential harmful consequences, lawyers should be cognizant of their ethical obligations at all stages of legal proceedings, and should keep clients informed about and prepared to address immigration status issues.

I. IMPACT OF UNDOCUMENTED STATUS ON ATTORNEY-CLIENT RELATIONSHIP

Under current jurisprudence, undocumented workers are entitled to some legal remedies for workplace violations. For lawyers seeking to represent undocumented workers in this context, an initial ethical question is whether the rules of professional responsibility limit such representation. Specifically, the inquiry of this Part is whether Rule 1.2(d), which prohibits an attorney from assisting a client in criminal or fraudulent conduct, categorically bars an attorney from counseling or representing an undocumented worker in employment-related civil litigation. This Part proceeds by first examining the meaning of 1.2(d) and then analyzing its application to typical scenarios in which undocumented workers seek the assistance or representation of a lawyer. This Part will then move to an analysis of the broader policy implications of various interpretations of 1.2(d) and conclude that, in most instances, 1.2(d) does not prohibit undocumented workers from seeking the advice, counsel, and representation of an attorney in employment-related civil litigation.

Rule 1.2(d) states:

> [a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may

> counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[28]

By its plain language, the rule distinguishes between directing, suggesting or assisting in criminal or fraudulent conduct and providing the client with information about the law and predicted legal consequences.[29]

On its face, the application of this rule seems quite simple. If the conduct in question is the filing of a lawsuit to enforce existing employment rights, this conduct, in and of itself, is not criminal or fraudulent. However, the more complex issue is whether the representation indirectly amounts to counseling or assisting a client to engage in a crime or fraud. In analyzing this question it is necessary to initially explore what, if any, crime or fraud is at issue and whether or not any of the crimes could be construed as "continuing offenses."[30] Once these parameters are defined, the Article then examines whether or not representation in employment-related civil matters amounts to "assisting" and

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28. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2007). Prior to adoption of the Model Rules of Professional Conduct, the ABA Model Code of Professional Responsibility stated that "a lawyer shall not counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." MODEL CODE OF PROF'L RESPONSIBILITY at DR 7-102(A)(7) (1981). This rule was much broader in its application as "illegal" could be construed as a larger category of actions than merely criminal.

29. HAZARD & HODES, *supra* note 24, at 5-37 to 5-38;

> [I]t is frequently the case that educating the client about the law may function as the equivalent of suggesting or assisting in its violation. It is therefore important to note that the explicit phrasing of the rule appears to deal with this overlap directly and clearly by indicating that communicating 'the law' is always acceptable, and by itself is not to be considered suggestion or assistance.

Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1588 (1995); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 9 (2007) (noting that even if the client uses the advice of the lawyer in the course of criminal or fraudulent actions it does not by itself make the lawyer "a party to the course of action").

30. By "continuing offense" I mean to refer to that group of offenses that criminal law defines as ongoing. *See* United States v. Midstate Horticultural Co., 306 U.S. 161, 166 (1939) ("[A continuing offense is a] continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy. Where such an act or series of acts runs through several jurisdictions, the offense is committed and cognizable in each."); State v. Maidwell, 50 P.3d 439, 441 (Idaho 2002) (defining a continuing offense as "a continuous, unlawful act or series of acts set in motion by a single impulse and operated by unintermittent force") (citing State v. Barlow's, Inc., 729 P.2d 433, 436 (Idaho Ct. App. 1986)); State v. Ramirez, 633 N.W.2d 656, 660 (Wis. Ct. App. 2001) (defining a continuing offense as "'one which consists of a course of conduct enduring over an extended period of time'" (quoting John v. State, 291 N.W.2d 502 (Wis. 1980)); *see also* J. Michael Callan & Harris David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332, 363 (1976) (defining a continuing crime as one "which, though committed in the past, has ramifications or effects which continue into the present or future"). *But see* Nancy E. Stuart, *Child Abuse Reporting: A Challenge to Attorney-Client Confidentiality*, 1 GEO. J. LEGAL ETHICS 243, 253 (1987) (arguing that the definition articulated by Callan & David is too narrow and should instead include continuing acts that are crimes in the future).

is thus prohibited under Rule 1.2(d).

Undocumented workers can be criminally liable for a number of different actions which, for ease of analysis, can be grouped into two broad categories: those related to entry and continued presence in the United States; and those related to obtaining and maintaining employment. In terms of those criminal activities related to entry and presence in the country, while mere presence in the United States is not currently a crime,[31] entry and presence in the United States after a deportation order has been entered is a criminal offense.[32] Additionally, entering the country without inspection or entering by use of false or misleading representations[33] and willful failure to register as an alien after thirty days are crimes.[34] Further, it is a crime to knowingly forge, alter, make, obtain, possess, or accept false immigration documents for entry into or as evidence of a lawful stay or employment in the United States.[35] In terms of criminal or fraudulent activity related to work, using a false Social Security number for the purpose of obtaining any payment or any other benefit is a felony.[36] It is not currently a crime to work without any legal documents, but it is grounds for removal.[37]

Of those acts that constitute a criminal offense, are any of them considered "continuing crimes"? If so, the ongoing nature of the offense might impact the analysis of whether or not a lawyer's work on employment-related civil litigation could be construed as "assisting" the client in a crime or fraud. Courts have found that entering without inspection or entering with false documents and using a false Social Security number to obtain a benefit are not "continuing crimes."[38] The crime of entering by eluding examination or immigration

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31. Unlawful presence in the United States, in and of itself, is not currently a crime, but it is a deportable offense. 8 C.F.R. § 287.3 (2007); *see also* Gates v. L.A. Superior Court, 238 Cal. Rptr. 592, 603 (Ct. App. 1987) (explaining that aliens' being in the United States in violation of the immigration laws is a civil offense and exclusively within the federal domain).

32. 8 U.S.C. § 1326(a) (2000). A person found to have committed an offense under this statute shall be imprisoned for a period of ten years. *Id.* § 1326(b)(3).

33. *Id.* §§ 1325(a)(2)-(3) (defining as criminal the entry into the country by eluding examination as well as entry by use of false or misleading representation). A person found to have committed an offense under this statute can be fined or imprisoned not more than two years, or both. *Id.* § 1325(a)(3).

34. *Id.* §§ 1302, 1306 (stating that any alien who willfully fails to register after thirty days can be guilty of a misdemeanor and fined up to $1000 or imprisoned up to six months or both).

35. 18 U.S.C. § 1546(a) (2000). A person found to have committed an offense under this statute shall be fined or imprisoned not more than ten years for the first offense. *Id.*

36. 42 U.S.C. §§ 408(a)(7)-(8) (2000). A person can be fined or imprisoned for not more than five years, or both, for such an offense. *Id.*

37. 8 U.S.C. § 1227(a)(1)(B) (Supp. V 2006).

38. United States v. Payne, 978 F.2d 1177, 1180 (10th Cir. 1992) (finding that falsely representing a social security number is not a continuing offense); United States v. Rincon-Jimenez, 595 F.2d 1192, 1194 (9th Cir. 1979) (finding that entering by eluding examination

officers has been held to be "consummated at the time an alien gains entry through an unlawful point and does not submit to these examinations."[39] Based upon this analysis, once an immigrant reaches a place of repose within the country, the misdemeanor of improper entry is concluded. Similarly, using a false Social Security number in order to obtain a benefit has been held to be completed when the false representation is made and is not considered a continuing crime.[40] However, there could be numerous separate crimes if an individual were to make numerous representations utilizing a false Social Security number.

In contrast, willful failure to register as an alien after thirty days and entry and presence in the United States after a deportation order have been found to be continuing crimes.[41] Additionally, while there is no specific case analyzing whether all, or part, of 18 U.S.C. § 1546 amounts to a "continuing crime," related case law supports an interpretation that at least some acts under § 1546 could be construed as continuing crimes. Section 1546 makes it a crime to knowingly forge, counterfeit, alter or falsely make immigration documents for entry or as evidence of authorized stay or employment in the U.S. and to utter, use, attempt to use, possess, obtain, accept, or receive such immigration documents for entry or as evidence of authorized stay or employment in the United States.[42] Employing the analysis set forth by the Supreme Court in *Toussie v. United States*, the doctrine of continuing offenses should be applied in only limited circumstances.[43] *Toussie* requires that, in order to constitute a continuing offense, the explicit language of the substantive criminal statutes must compel such a conclusion or the nature of the crime must be such that

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or inspection was not a continuing crime, but instead one that was completed at the time an unauthorized alien gains entry without inspection); United States v. Joseph, 765 F. Supp. 326, 330 (E.D. La. 1991) (finding that the crime of using a false social security number with the intent to deceive is completed when the false representation is made).

39. *Rincon-Jimenez*, 595 F.2d at 1193-94; *see also* United States v. Pruitt, 719 F.2d 975, 978 (9th Cir. 1983) ("A violation of 8 U.S.C. § 1325 occurs only at the time of entry and does not continue thereafter."); Gates v. L.A. Superior Court, 283 Cal. Rptr. 592, 602-03 (Ct. App. 1987) (citing *Rincon-Jimenez* for the proposition that a violation of 8 U.S.C. § 1325(a)(2) has been held to be "consummated at the time an alien gains entry through an unlawful point and does not submit to these examinations").

40. *Payne*, 978 F.2d at 1180-81 (finding that using a false social security number for tax-evasion purposes, with intent to deceive, was not a continuing offense); *Joseph*, 765 F. Supp. at 330 (finding that use of a false social security number on a credit application for a bank loan, with intent to deceive, was not a continuing offense).

41. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1047 n.3 (1984) (finding that willful failure to register after thirty days constitutes a continuing crime); United States v. Ruelas-Arreguin, 219 F.3d 1056, 1061 (9th Cir. 2000) (finding that a violation of § 1326 constitutes a "continuing offense").

42. 18 U.S.C. § 1546 (2000).

43. 397 U.S. 112, 115 (1970) (analyzing the doctrine of continuing offense in the context of statute of limitations issues and explaining that the doctrine should apply only in limited circumstances because of the tension that exists between the statute of limitations and the continuing-offense doctrine).

Congress intended that it be treated as a continuing crime.[44] Of all of the acts prohibited by this statute, possession is the only one that implies an ongoing activity. The other actions such as uttering, obtaining, using or accepting appear more likely to be construed as completed upon the act constituting the crime. There are many cases involving "possession" offenses and no matter the divergent circumstances, each court found that possession is a "continuing offense."[45] Thus, in addition to willful failure to register after thirty days and entry and presence after a deportation order, it also appears that possession of immigration documents for the purposes identified in the statute might be construed as a continuing crime.

Further, because the ethical rules address fraudulent, as well as criminal, actions of the client, the lawyer should explore what, if any, actions of a client could be considered fraudulent. The rules define fraudulent as "conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive."[46] Fraud typically consists of a false representation, whether oral, written or based in conduct that creates an untrue or misleading impression in the mind of another with the intent that the person would rely upon the false representation.[47] Certainly, entering without

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44. *Id.* at 115-16 (construing a statute and regulation that required male citizens between the ages of 18 and 26 to register for the draft).

45. *See* United States v. Winnie, 97 F.3d 975, 976 (7th Cir. 1996) (finding unlawful possession of a cheetah traded in violation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora was a continuing offense); United States v. Blizzard, 27 F.3d 100, 101 (4th Cir. 1994) (finding that the crime of receiving and concealing stolen government property was a continuing offense); United States v. Jones, 533 F.2d 1387, 1391 (6th Cir. 1976) (finding that possession of a firearm constituted a continuing offense); United States v. Cunningham, 902 F. Supp. 166, 168 (N.D. Ill. 1995) (finding that possession of stolen mail was a continuing offense).

46. MODEL RULES OF PROF'L CONDUCT R. 1.0(d) (2007).

47. 9 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 32:4, at 212-13 (1992) ("[I]n very general terms [fraud] can be said to comprise anything calculated to deceive, including all acts, omissions, and concealments involving a breach of legal or equitable duty, trust, or confidence justly reposed, resulting in damage to another or by which an undue and unconscionable advantage is taken of another."). For examples of how some states define fraud, see *Weinstein v. Weinstein*, 882 A.2d 53, 62-63 (Conn. 2005):

> "Fraud consists in deception practiced in order to induce another to part with property or surrender some legal right, and which accomplishes the end designed. . . . The elements of a fraud action are: (1) a false representation was made as a statement of fact; (2) the statement was untrue and known to be so by its maker; (3) the statement was made with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment. . . ."

Id. (quoting Mattson v. Mattson, 811 A.2d 256, 259 (Conn. App. Ct. 2002)); *see also* Vigil v. Fogerson, 126 P.3d 1186, 1197 (N.M. Ct. App. 2005) ("[F]raud is defined as 'a false representation, knowingly or recklessly made, with the intent to deceive, on which the other party acted to his [or her] detriment.'"(quoting Robertson v. Carmel Builders Real Estate, 92 P.3d 653, 662 (N.M. Ct. App. 2004))); McCarthy v. Wani Venture, 251 S.W. 3d 573, 585 (Tex. Ct. App., 2007) ("[A]ctual fraud can be the concealment of material facts *or* the failure to disclose a material fact.").

inspection, with false papers or obtaining employment with false documents might be construed as fraudulent activity.

Based upon the fact that some of the actions of the undocumented worker might constitute either a crime or a fraud, the issue is whether or not legal representation of an undocumented worker in an employment-related civil case would amount to "assisting" in any of these criminal or fraudulent acts. In analyzing this question, it is helpful to think about a continuum at one end of which are those instances where there exists an obvious connection between the client's crime or fraud and the lawyer's actions or inactions. The most extreme examples are those in which the lawyer directly participates in the client's crime[48] or directly advises a client to commit a crime or fraud.[49] In these instances, Rule 1.2(d) would bar representation. On the other end of the spectrum would be an example in which the client commits a crime or fraud that is so wholly unrelated to the representation that it is obvious Rule 1.2(d) would not prohibit the attorney's representation. For example, assume a client who is undocumented seeks compensation under the Fair Labor Standards Act, and the state counterpart, for wages owed for completed work. In the course of representation, the client discloses to his attorney that he previously has been violent toward his wife. Even assuming that his actions would constitute an

48. *See, e.g.*, Townsend v. State Bar of Cal., 197 P.2d 326, 327-29 (Cal. 1948) (lawyer was suspended for three years for advising his client to make a fraudulent conveyance to frustrate a judgment and prepared the deed knowing it was to be used in a fraudulent fashion and backdated it to facilitate the fraud); People v. Theodore, 926 P.2d 1237, 1242 (Colo. 1996) (lawyer drove client to family home in violation of restraining order issued against client); Fla. Bar v. Brown, 790 So. 2d 1081, 1083, 1089 (Fla. 2001) (lawyer who, at client's request, solicited campaign-contribution checks from subordinate lawyers and delivered them to a corporate client and premium billed the client as reimbursement suspended for ninety days); Attorney Grievance Comm'n v. Sheinbein, 812 A.2d 981, 989, 1001 (Md. 2002) (lawyer who assisted his son/client in fleeing to Israel after committing a murder disbarred); *In re* Berglas, 790 N.Y.S.2d 119 (App. Div. 2005) (lawyer who submitted false filing to INS in order to give the New York City office jurisdiction over the matter suspended for one year); Disciplinary Counsel v. Cirincione, 807 N.E.2d 320, 323, 326 (Ohio 2004) (lawyer who helped client obtain rental housing in violation of court ordered conditions for client's release from jail suspended for six months).

49. Regardless of whether actual assistance is rendered, a lawyer may never advise a client to engage in criminal or fraudulent conduct. *See, e.g.*, People v. Gifford, 76 P.3d 519, 520, 522 (Colo. App. 2003) (lawyer who advised client to pay wife to recant testimony in criminal case disbarred); Statewide Grievance Comm. v. Somers, No. CV 980585853S, 1999 WL 732978 (Conn. Super. Ct. 1999) (lawyer who counseled witnesses to testify falsely disbarred); Fla. Bar v. Boland, 702 So. 2d 229 (Fla. 1998) (lawyer who told client not to comply with a court-ordered child-visitation schedule suspended for two years); *In re* Holden, 982 P.2d 399 (Kan. 1999) (lawyer who advised client to remove child from jurisdiction in violation of court order indefinitely suspended); State *ex rel.* Counsel for Discipline v. Horneber, 708 N.W.2d 620, 622 (Neb. 2006) (lawyer who counseled client to violate a court order to convey title to property as part of marriage dissolution suspended for two years); *In re* Edson, 530 A.2d 1246 (N.J. 1987) (lawyer disbarred for advising clients to invent evidence in defense of drunk driving case).

assault, nothing prohibits his representation in the claim for unpaid wages[50] because Rule 1.2(d) recognizes a distinction between assisting the client in the commission of a crime or fraud and merely being aware that the client has or is committing a crime or fraud.[51]

A gray area exists in between these extremes—instances in which a lawyer's actions can be construed as "passively assisting"[52] the client in the commission of a crime or fraud.[53] Consider the following factual scenarios and how they implicate the underlying policies of Rule 1.2(d).[54]

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50. In this context, the lawyer should still consider her obligations under Rule 1.6 to keep this confidential, in the absence of an exception. This ultimately may cause a conflict of interest, but the fact that the client has committed a crime in and of itself does not mean that the lawyer is barred from representing that client in a wholly unrelated case.

51. In analyzing the application of Model Rule 1.2(d), courts and regulatory bodies have found no violation for counseling a client where the lawyer provides the client broad advice or provides advice for a client who has committed some prior bad act. *See, e.g.*, State Bar of Ariz. Comm. on the Rules of Prof'l Conduct, Op. 2000-04 (2000) (opining that a lawyer may ethically advise a client to tape record a telephone conversation in which one party has not given consent to the recording as long as the lawyer concludes that such taping is not prohibited by state or federal law).

Also, courts have found no violation for assistance where the lawyer recognizes the crime or fraud and takes steps to correct or remedy it, or where the lawyer relied upon the opinion of other counsel or conducted his own research into the facts and law and could argue that he did not have knowledge. *See, e.g.*, *In re* Tocco, 984 P.2d 539, 543 (Ariz. 1999) (lawyer who did not deliberately omit assets from bankruptcy schedules not subject to discipline); Iowa Supreme Court Bd. of Prof'l Ethics v. Jones, 606 N.W.2d 5, 8 (Iowa 2000) (lawyer who had no evidence a current client's transaction with former client was fraudulent other than that the current client's story sounded "incredible" did not knowingly assist the current client's fraud, but lawyer misstatements and omissions in persuading former client to loan money to current client did constitute misrepresentation, which resulted in suspension of the lawyer's license); *In re* Claussen 14 P.3d 586, 595 (Or. 2000) (lawyer who misrepresented client's withdrawal of assets as in the ordinary course of business after legal research gave lawyer a basis for so opining did not assist a client's fraud); *In re* Fink, 764 A.2d 1208, 1209, 1211 (Vt. 2000) (lawyer who incorrectly advised client that she could sign her ex-husband's name on a car title following a divorce did not knowingly assist client fraud).

52. The term "passively assisting," as used in this context, denotes a form of assistance that does not directly assist or further a client's crime or fraud, but may do so indirectly.

53. However, even passive assistance, such as withholding information from a court or the government, may violate Model Rule 1.2. *See, e.g.*, People v. Casey, 948 P.2d 1014 (Colo. 1997) (forty-five day suspension for lawyer who failed to inform court that client facing trespassing charge was using someone else's identity); *In re* Price, 429 N.E.2d 961 (Ind. 1982) (lawyer withheld information from government to assist client in obtaining Medicaid benefits illegally). *But see* Utah State Bar Ethics Advisory Op. Comm., Op. 97-02 (1997) (lawyer's failure to give law-enforcement authorities telephone number of client accused of crime does not amount to assisting client in committing crime).

54. In this Part, I talk specifically about whether or not the client's actions constitute crimes as opposed to fraud. It is certainly the case that many of the client's actions would likely be construed as fraud both in the manner of entry and the method of obtaining employment. However, I do not think that calling the action a fraud as opposed to a crime changes the analysis meaningfully.

A. *Hypothetical One: Client Enters with Proper Immigration Documentation and Is Not Asked to Provide Work Authorization Papers*

On one end of the spectrum, a client enters with a lawful visa, but does not obtain proper work authorization. The employer hires the employee without asking for papers and thereafter fails to pay the client for work performed. In this instance, the client has not committed a crime; he entered lawfully, and working without papers itself is not a criminal act.[55] Further, since the employer did not ask about the client's immigration status it is unlikely that the client's actions would be construed as fraudulent.[56] In the absence of actual criminal or fraudulent conduct, the lawyer's representation cannot be construed as assisting in a crime or fraud.

B. *Hypothetical Two: Client Enters Without Proper Documentation and Is Not Asked to Provide Work Authorization Papers*

Moving along the spectrum, suppose the client enters the country by evading inspection, the employer hires the client without asking for papers and thereafter fails to pay the client for work performed. In this example, the client

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55. The employer, on the other hand, could be liable for not complying with the employment-authorization verification mandates set forth in the 1986 Immigration Reform and Control Act (IRCA). *See* 8 U.S.C. § 1324(a)(1)(B) (2000) (establishing what is now commonly known as the I-9 requirements). Also, in the absence of immigration reform at the national level, states have passed an unprecedented number of bills related to immigration. *See* Press Release, Nat'l Conference of State Legislatures, Federal Gridlock on Immigration Reform Leads States to Action (Nov. 29, 2007), *available at* http://www.ncsl.org/programs/press/2007/pr112807.htm ("As of November 16, 2007, roughly 1562 pieces of legislation related to immigrants and immigration had been introduced among the 50 state legislatures. Of these bills, 244 became law in 46 states. . . . State legislators have introduced roughly two and a half times more bills in 2007 than in 2006. The number of enactments from 2006 (84) has more than tripled to 246 in 2007.").

Many of these bills create employer sanctions. *See, e.g.*, H.B. 2779, 48th Leg., 1st Reg. Sess. (Ariz. 2007) (prohibiting employers from knowingly or intentionally hiring undocumented workers and requiring all employers to use the Basic Pilot Program to determine employees' legal status); H.B. 729, 105th Gen. Assem., Reg. Sess. (Tenn. 2007) (providing for administrative procedures against employers who knowingly hire illegal immigrants, including the temporary suspension of the employer's business license); S.B. 70, 2007 Leg., Reg. Sess. (W. Va. 2007) (making it unlawful for any employer to knowingly employ an unauthorized worker and requiring employers to verify a prospective employee's legal status or authorization to work. The law also creates penalties for employing unauthorized workers, including fines, jail sentences and revocation of business licenses).

56. There is an argument that by holding oneself out for work, the individual is implicitly representing that she is authorized to work and if not so authorized is committing a fraudulent act. However, given the reality that many undocumented workers are in the workforce despite employers' knowledge of their status, and given the fact that federal law places the burden on the employer to verify employment authorization, holding oneself out for work does not necessarily mean that the employee is implicitly representing that she is lawfully authorized to work.

did commit a crime of entry without inspection,[57] which courts have found to be a noncontinuing crime, complete upon entry.[58] If the client thereafter seeks assistance in the wage-and-hour case, does 1.2(d) prohibit a lawyer from counseling or representing the client? There is no ongoing crime or fraud; the crime was completed upon entry and there is no crime or fraud related to the employment because the employer did not ask for papers from the employee.[59] Thus, 1.2(d) would not prohibit a lawyer from counseling or representing a client in this situation.

C. *Hypothetical Three: Client Enters Lawfully but Uses a False Social Security Number to Obtain Employment*

As the crime becomes more closely connected to the employment, the 1.2(d) analysis is a bit less clear. Assume the client enters lawfully, but uses a fraudulent Social Security number to obtain employment and the employer thereafter fails to pay him for hours worked. Does a lawyer's representation of the client in a wage-and-hour claim in this context assist him in criminal or fraudulent conduct?[60]

It is a crime to use a false Social Security number to obtain benefits[61] but the crime is completed when the false representation is made.[62] Thus,

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57. 8 U.S.C. § 1325 (2000).

58. United States v. Rincon-Jimenez, 595 F.2d 1192, 1194 (9th Cir. 1979) (finding that a violation of 8 U.S.C. § 1325 is consummated at the time of entering the United States and is not considered a continuing offense).

59. While employers in the past may not have asked for documents, given the increasing criminalization of an employer's failure to ask for and document the immigration status of clients, as well as stepped-up enforcement, this practice may be waning. There have been a number of states that have passed statutes requiring an employer to obtain immigration information on each employee. *See* 8 U.S.C. § 1325 (2000).

60. This example also has the potential to raise Rule 11 issues for the lawyer representing the employee. Rule 11 of the Federal Rules of Civil Procedure states:

> [b]y presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery . . . .

FED. R. CIV. P. 11(b). As part of the filing of a legal action, the lawyer may be required to provide a social security number on court papers such as case-designation sheets. If the lawyer provides the false social security number that the client is using, he or she could be subjected to sanctions under Rule 11 for asserting factual contentions that are not truthful.

61. 42 U.S.C. §§ 408(a)(7)(A)-(8) (Supp. V 2006). A person can be fined or imprisoned for not more than five year or both for such offense.

62. *See* United States v. Payne, 978 F.2d 1177, 1180 (10th Cir. 1992) (finding that using a false social security number for tax evasion purposes, with intent to deceive, was not a continuing offense); United States v. Joseph, 765 F. Supp 326, 330 (E.D. La. 1991) (finding that use of a false social security number on a credit application for a bank loan, with intent to deceive, was not a continuing offense).

representation of the client to obtain wages he is due does not directly assist him in that completed crime. There are arguments however that the representation indirectly assists the client to remain unlawfully in the United States by providing financial assistance. And, while unlawful presence in the United States is not currently a crime,[63] it may amount to fraud. Is this type of indirect assistance what Rule 1.2(d) was designed to prohibit?

Analyzing the nexus between the lawyer's actions and the client's criminal or fraudulent activity helps to explore this question.[64] While the lawyer in this example has not directly caused the client to remain in the United States, there still exists a potential causal link between the representation and the presence. How close does the connection between litigation for past due wages and the client's unlawful presence in the United States have to be to bar the provision of advice and representation to clients in this context? If the rule were interpreted to prohibit anyone who committed a crime from seeking legal services on an unrelated civil matter, the interpretation would run contrary to deeply rooted concepts of access to justice.[65] Further, the connection between the lawyer's actions and the client's crime in this context seems too remote to bar representation in light of the uncertainty of both the outcome and the consequence of a recovery. There is no guarantee that the lawyer will be successful in her attempt to recover wages for the client and no necessary link between the recovery of money and the client's continued unlawful presence.[66] So, while there is some factual causal proximity[67] between the lawyer's conduct and the client's crime or fraud in this example, the link appears too uncertain and tenuous to construe 1.2(d) as prohibiting a lawyer's advice and representation.[68]

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63. *See* H.R. 4437, 109th Cong. §§ 201, 203 (2005) (proposing to make unlawful presence in the United States an "aggravated felony").

64. Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669, 671-72 (1981) (explaining that there needs to be a nexus between the assistance and the actual crime or fraud for 1.2(d) to bar attorney representation).

65. *See infra* notes 70-78 and accompanying text.

66. If the 1.2(d) analysis depended upon whether the money recovered in litigation would directly support the client to remain in the United States, lawyers would have to inquire, prior to accepting a case, how money recovered in litigation would be used. Such an interpretation of Rule 1.2(d) seems implausible.

67. Hazard, *supra* note 64, at 672 (referring to the lack of a nexus between the lawyer's conduct and the client's criminal or fraudulent acts as a lack of "causal proximity").

68. The analysis offered above in hypothetical three would be similar even if the client was engaged in an ongoing crime. For example, assume a client enters the country after having been previously deported. The client obtains employment, without presenting documents, and thereafter seeks legal assistance to recover wages for work performed. Similar to the hypothetical above, the lawyer may discuss the legal consequences of any proposed course of conduct with a client. As such, the lawyer would be able to advise the client that entry and presence in the United States after a deportation order is a crime. The question then is whether the lawyer's representation in wage-and-hour litigation assists in the

D. *Hypothetical Four: Client Enters Lawfully but Uses and Still Possesses False Immigration Documents to Obtain Employment*

On the far end of the continuum would be the situation in which the client is committing an ongoing crime that is related to the employment situation. Suppose the client enters lawfully but thereafter uses false immigration documents to obtain employment and still possesses the documents, which is a continuing crime.[69] The client seeks the lawyer's advice and representation to recover damages and pursue reinstatement for a discriminatory termination. In this hypothetical, there are several steps the lawyer might take to comply with Rule 1.2(d). First, since it could be considered an ongoing crime to possess false immigration documents, the ethically prudent lawyer should advise the client that possession of such documents is illegal and recommend that the client no longer retain possession of them.[70] The lawyer could then explain to the client that the ethical rules would not permit her to bring a claim seeking reinstatement based on the false immigration documents.[71] If the client had since obtained lawful immigration status, then the lawyer could proceed with the representation, including a claim for reinstatement. If not, then she could

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client's criminal conduct. As described above, the analysis would depend upon how close a connection exists between the crime of entry and presence in the United States and the recovery of wages. While arguments exist on both sides, it is likely that the link between the lawyer's representation and the client's ongoing crime would be too tenuous to prohibit representation under Rule 1.2(d).

69. 18 U.S.C. § 1546(a) (2000); *see also supra* notes 42-45 and accompanying text.

70. Rule 1.2(d) states that "a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2007). Thus it is entirely permissible for the lawyer to explain to the client the illegal nature of some conduct and to counsel that the conduct cease. For a thoughtful discussion of when counseling can cross the line into assistance, see Pepper, *supra* note 29. However, lawyers cannot counsel or assist in the obstruction of justice. Model Rule 8.4 states that it is professional misconduct for a lawyer to: "(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice." MODEL RULES OF PROF'L CONDUCT R. 8.4 (2007); *see also* Office of Disciplinary Counsel v. Klaas, 742 N.E.2d 612, 614 (Ohio 2001) (per curiam) (suspending lawyer for one year with six months for telling a former client to "clean up his act" based on lawyer's knowledge that the FBI was going to initiate a drug raid).

71. In practical terms, after the Supreme Court's decision in *Hoffman*, it would be hard to argue for reinstatement on the merits, unless the client had lawful immigration papers. To date, courts have approved only those requests for reinstatements that are conditioned upon an undocumented worker's obtaining proper work authorization within a specified period of time. *See, e.g.*, Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 902-03 (1984) (approving the NLRB's order that conditioned reinstatement of the injured workers upon proof of "legal readmittance to the United States"); NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50, 56-57 (2d Cir. 1997) (approving order to reinstate workers if "they present within a reasonable time, INS Form 1-9 and the appropriate supporting documents").

proceed with only the claim for damages based on the discriminatory firing on the grounds that representation in a claim for damages would not further the crime of possession of false immigration documents.

In addition to the application of 1.2(d) to these hypotheticals, construing the rules of professional responsibility so as to deny lawyers the ability to represent undocumented workers could conflict with established legal and public policy principles. Our legal system is premised on the notion that the law should be knowable and that law is, by nature, public information.[72] One of the lawyer's roles is to provide clients access to the law so long as providing access is done within the bounds of the law.[73] In fact, the preamble to the Model Rules of Professional Conduct talks about the lawyer's obligation to assure access to the legal system.[74] If Rule 1.2(d) were interpreted so broadly as to prohibit a lawyer from representing an undocumented worker in employment-related civil litigation, undocumented workers might be legally entitled to relief but unable to access the legal system.

While the legal system does recognize the integral relationship between rights and remedies,[75] having a substantive right without the ability to enforce is not unprecedented.[76] Immunity from suit, standing limitations, narrower standards for private enforcement of civil rights, and legislation prohibiting access to federal courts are all examples where remedies have been restricted by the courts or Congress.[77] However, each of these limitations, whether

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72. Pepper, *supra* note 29, at 1547.

73. *Id.* at 1547-48.

74. As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. . . . In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. . . . [A]ll lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice . . . .

MODEL RULES OF PROF'L CONDUCT pmbl. 6 (2007).

75. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23, *109) ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded. . . . [E]very right, when withheld, must have a remedy, and every injury its proper redress.").

76. Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 666 (1987) (explaining that courts have erected procedural barriers to obtaining remedies in various contexts, but, at the same time, have supported the underlying substance of the right); *see also* David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1202 (identifying an ongoing debate among constitutional scholars about whether rights and remedies are best understood as separate legal concepts or as being "inextricably intertwined").

77. Rudovsky, *supra* note 76, at 1200 ("Over the past three decades, the Supreme Court (and in recent years, the Congress) has restricted civil rights remedies through a series of complex and controversial measures, including expanded immunities from suit, narrower standards for standing and for private enforcement of civil rights legislation, exceptions to

created by the courts or Congress, has independent rationales underlying it that do not relate to the attorney-client relationship.[78] Rule 1.2(d), on the other hand, is a rule of professional responsibility designed to keep the provision of legal services within proper bounds.[79] As such, the examples from other areas of law are not determinative of the rights without a remedy argument in this context.

It could be argued that because an undocumented worker intentionally ignores legal obligations, other remedies afforded by the legal system should be foreclosed to that individual. Like with the equitable doctrine of unclean hands, wrongdoers should not be able to avail themselves of legal protections when they have otherwise disregarded the law. On the other hand, however, the legal system is full of rights and protections, particularly procedural protections, that apply regardless of whether the underlying litigant broke the law. For example, prisoners are entitled to challenge the conditions of their confinements as well as access the courts for general civil matters, such as divorce,[80] and criminal defendants are entitled to a whole host of procedural protections designed to preserve their rights.[81] Thus, a concern about clean hands would be addressed better by congressional action that defines or limits the substantive rights of undocumented immigrants rather than through rules of professional responsibility.

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the exclusionary rule, limitations on remedies in criminal cases and federal habeas corpus, and direct federal court door-closing legislation.").

78. For example, standing limitations are designed to promote separation of powers, serve judicial efficiency, improve judicial decision making, and serve the value of fairness. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 61-62 (3d ed. 2006). Sovereign immunity doctrine is designed to create efficiency by limiting litigation, preserve the unhampered exercise of governmental discretion, and further separation of powers by limiting judicial review. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 611-12 (4th ed. 2003).

79. HAZARD & HODES, *supra* note 24, at 5-6 (stating that Rule 1.2(d) is "part of an important constellation of rules directed at keeping the scope of legal services provided to clients within proper bounds").

80. *See* Bounds v. Smith, 430 U.S. 817, 821-22 (1977) (finding that prisoners have a constitutional right of access to the courts); White v. Kautzky, 494 F.3d 677, 679-80 (8th Cir. 2007) (finding that "meaningful access" to the courts includes the ability to bring actions "seeking new trials, release from confinement, or vindication of fundamental civil rights" (quoting *Bounds*, 430 U.S. at 827)); Walbert v. Walbert, 567 N.W.2d 829, 832 (N.D. 1997) (finding that denial of an incarcerated person's request to appear at a divorce hearing by telephone deprived him of his due process right to have reasonable access to the courts).

81. For example, the Fourth Amendment contains an exclusionary rule, Weeks v. United States, 232 U.S. 383 (1914); Boyd v. United States, 116 U.S. 616 (1886), an expectation of privacy, Katz v. United States, 389 U.S. 347 (1967), and a requirement of probable cause, United States v. Harris, 403 U.S. 573 (1971) (search warrant); Henry v. United States, 361 U.S. 98 (1959) (arrest warrant). The Fifth Amendment contains a privilege against self-incrimination, Miranda v. Arizona, 384 U.S. 436 (1966) (interrogation); Hoffman v. United States, 341 U.S. 479 (1951) (trial). The Sixth Amendment preserves the right to counsel in certain criminal cases, Gideon v. Wainwright, 372 U.S. 335 (1963).

In sum, while lawyers representing undocumented workers in employment-related civil litigation should be mindful of 1.2(d) prohibitions, it is unlikely that the rule would bar a lawyer's representation of such clients. A lawyer may have a sense of uneasiness representing an undocumented worker, but the rules of professional responsibility do not define a lawyer's role as that of a police officer.[82] While lawyers are prohibited from assisting a client in criminal or fraudulent action, lawyers are not barred from representing an undocumented worker in employment-related civil litigation for which the worker is entitled to relief because the immigration-related crimes or fraudulent actions are most sensibly understood as not sufficiently related to the underlying legal claim.

II. THE RELEVANCE OF IMMIGRATION STATUS TO THE UNDERLYING LITIGATION

The question of whether to protect or disclose immigration status is a difficult one. The legal analysis of a lawyer's ethical obligation regarding disclosure of a client's immigration status initially depends upon whether the information is relevant to the pending litigation. This Part examines the development of the law on the relevance of immigration status in the context of employment-related civil litigation. Specifically, it will explain the state of the law prior to the passage of the Immigration Reform and Control Act of 1986 (IRCA), the import of IRCA's passage, the impact of the Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB*, and the development of law post-*Hoffman*.

The question of relevance arises in two different contexts in these cases: first in the discovery stage and second at trial as evidence is being introduced. Pursuant to Federal Rule of Civil Procedure 26(b), "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."[83] "Relevant," in the discovery stage, is defined very broadly[84] and includes information that may not be admissible at trial but that

82. Part of the uneasiness stems from the fact that the ethical issues raised in this Article are but a symptom of the larger underlying problem—namely, what the United States will do about the millions of undocumented workers who contribute to our economy on a daily basis. In the absence of meaningful immigration reform, the ethical issues raised in this Article are timely and crucial, but they do not address the larger, unresolved, vexing problem of meaningful immigration reform.

83. FED. R. CIV. P. 26(b)(1); *see also* Manning v. Gen. Motors, 247 F.R.D. 646, 651 (D. Kan. 2007) ("Relevancy is broadly construed, and a request for discovery should be considered relevant if there is 'any possibility' that the information sought may be relevant to the claim or defense of any party." (citing Owens v. Spring/United Mgmt. Co., 221 F.R.D 649, 652 (D. Kan. 2004))); Jackson v. AFSCME Local 196, 246 F.R.D 410, 412 (D. Conn. 2007) ("Information that is reasonably calculated to lead to the discovery of admissible evidence is considered relevant for the purposes of discovery.").

84. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters that may aid a party in the preparation or presentation of his

might lead to the discovery of admissible evidence.[85] Once at trial, the question of what is relevant is governed by Federal Rule of Evidence 401, which defines "relevant evidence" as evidence that tends to make a fact at issue in trial more or less probable than it would have been in the absence of the evidence.[86] The standard of relevance is more stringent at the trial stage, and the information allowed into evidence at trial will necessarily be more narrow than that allowed to be explored in the discovery stage.[87]

Lawyers representing undocumented immigrants in employment-related civil litigation should be prepared to address issues of relevance in both the pretrial and trial stages.[88] The distinction is critical to understanding the lawyer's ethical obligations. If the information is determined relevant to the litigation, then it will be discoverable by, or disclosed to, the other side unless it is privileged.[89] If it is not relevant to the litigation, then the information will be

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case. *See* Engl v. Aetna Life Ins. Co., 139 F.2d 469, 472 (2d Cir. 1943); Mahler v. Pa. R. Co., 8 Fed. R. Serv. 33.351 (E.D.N.Y. 1945).

85. The rule reads, "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1). Subsection (b) was intended to create a broad scope of examination and allows not only for the discovery of evidence for use at trial but also inquiry into matters that are themselves inadmissible as evidence but that might lead to the discovery of such evidence. FED. R. CIV. P. 26 annot.

86. FED. R. EVID. 401.

87. Dominion Exploration & Prod., Inc. v. Waters, 972 So. 2d 350, 361 (4th Cir. 2007) ("Not only may discovery be had on any relevant matter involved in a pending action, but it may be had of any matter even if inadmissible at trial, which is reasonably calculated to lead to the discovery of admissible evidence."); Lee v. State, 141 P.3d 342, 347 (Alaska 2006) ("[D]iscovery rules are to be broadly construed and 'relevance for purposes of discovery is broader than for purposes of trial.'" (quoting Hazen v. Municipality of Anchorage, 718 P.2d 456, 461 (Alaska 1986))); Catrone v. Miles, 160 P.3d 1204, 1212 (Ariz. Ct. App. 2007) ("'The requirement of relevancy at the discovery stage is more loosely construed than that required at trial.'" (quoting Brown v. Superior Court, 670 P.2d 725, 730 (Ariz. 1983))).

88. In many instances, questions of relevance will be raised at the pretrial and trial stage through motions for protective orders or motions to compel the production of evidence. *See, e.g.*, Rivera v. NIBCO, Inc., No. CIV-F-99-6443, 2006 U.S. Dist. LEXIS 16967, at *21-22 (E.D. Cal. Mar. 31, 2006) (analyzing whether immigration status is relevant to the underlying case through a motion for a protective order); Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499, 501-02 (W.D. Mich. 2005) (deciding whether immigration status is relevant to claims under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act by ruling on Plaintiff's motion for a protective order); Cortez v. Medina's Landscaping, No. 00 C 6320, 2002 U.S. Dist. LEXIS 18831, at *2 (N.D. Ill. Sept. 30, 2002) (raising the question of relevance of immigration status through a motion to compel discovery); De La Rosa v. N. Harvest Furniture, 210 F.R.D. 237, 238-39 (C.D. Ill. 2002) (raising the question of relevance of immigration status through a motion to compel discovery); Zeng Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192-93 (S.D.N.Y. 2002) (using a motion to compel discovery to ascertain the relevance of immigration status).

89. For a detailed discussion of the lawyer's ethical obligations if immigration status is relevant to the underlying proceedings, see *infra* Part IV.

kept confidential[90] and cannot be disclosed unless the lawyer is permitted or mandated to do so pursuant to the Model Rules of Professional Conduct.[91]

The law regarding the interplay between immigration status and employment-related civil claims has evolved over time. Prior to 1986 and the passage of the IRCA, laws governing employment remedies and those relating to the control of immigration were largely separate.[92] Instead of regulating undocumented labor, federal immigration laws focused on the admission, classification, and naturalization of noncitizens.[93] In fact, seeking employment in the United States as an undocumented worker was not illegal,[94] and most courts interpreting the rights of undocumented workers found that they were still entitled to statutory protections in the workplace.[95]

In 1986, Congress passed the IRCA, which established an extensive employment-verification system,[96] designed to deny employment to

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90. The term "relevant," as used in this Part, is limited to the definition under Federal Rule of Civil Procedure 26(b) relating to discovery and Federal Rule of Evidence 401 concerning relevant evidence at trial. While the term "relevant" sounds similar to the term "relating to" used in Model Rule 1.6(a) to define "confidentiality of information," the terms have different meanings. For a detailed explanation of the difference between these terms and the relationship between the two, see *infra* notes 169-73 and accompanying text.

91. For a detailed discussion of the lawyer's ethical obligations if immigration status is not relevant to the underlying proceedings, see *infra* Part IV.

92. *See* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892-94 (1984) (finding that the immigration laws "as presently written" expressed only a "peripheral concern" with the employment of undocumented workers) (quoting De Canas v. Bica, 424 U.S. 351, 360 (1976))); *see also* Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 979 (stating that prior to employer sanctions, immigration laws were focused on immigrants' entry and border crossing); Ho & Chang, *supra* note 10, at 478-79 (explaining that prior to passage of the Immigration and Nationality Act (INA), immigration laws were focused on the terms and conditions under which immigrants would be classified and admitted into the country).

93. *Cf.* Ho & Chang, *supra* note 10, at 479 n.16 (noting, however, that there were other immigration laws that were designed to regulate the labor market in discrete ways, such as the Chinese Exclusion Act, which was designed to protect domestic workers from having to compete with the Chinese labor market, and the Immigration Act of 1924, which contained preferences within the quota system for those with job skills in specific sectors of the economy).

94. Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1124 (7th Cir. 1992) (Cudahy, J., dissenting) ("Once an alien has crossed the border, however, employment is not an additional offense (in fact, it is no crime at all).").

95. *See* Ho & Chang, *supra* note 10, at 479 (referring to cases supporting protection under Title VII, the National Labor Relations Act, the Fair Labor Standards Act, the Farm Labor Contractor Registration Act, and the Migrant and Seasonal Agricultural Worker Protection Act); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 211 ("Before IRCA, courts and executive-branch agencies generally enforced labor and employment laws without regard for the immigration status of the employee.").

96. 8 U.S.C. §§ 1324(a)(1)(A)-(B) (2000). At the same time, Congress created new provisions barring employers from discriminating against applicants or employees because of their national origin or citizenship status. *Id.* § 1324b(a)(1). Despite these new provisions

immigrants who were not lawfully present in the United States or who were not lawfully authorized to work in the United States.[97] The statute also made it a crime for an unauthorized immigrant to subvert the employer-verification system by tendering fraudulent documents[98] and made it unlawful for employers to knowingly hire undocumented workers.[99] Under IRCA, in order to enforce these provisions, employers must complete forms verifying the immigration status of employees.[100]

Despite prohibitions on the employment of undocumented workers and corresponding sanctions, IRCA's legislative history illustrates Congress's intent not to diminish the protections afforded undocumented workers under existing labor and employment statutes.[101] To do otherwise might adversely

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designed to address undocumented workers, the legislative history clearly illustrates that passage of this bill was in no way intended to diminish the already existing labor law protections afforded to such workers. *See* H.R. REP. NO. 99-682(II), at 8-9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5757, 5758 ("[T]he committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies such as the Occupational Safety and Health Administration, the Wage and Hour Division of the Department of Labor, the Equal Employment Opportunity Commission, the National Labor Relations Board, or Labor arbitrators, in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.").

97. 8 U.S.C. § 1324a(h)(3) (2000) (defining "unauthorized alien" for the purpose of the statute).

98. *Id.* § 1324c(a)(2).

99. *Id.* § 1324a(f)(1) (making employers who violate IRCA subject to criminal prosecution). Despite the new provision making it criminal for employers to hire undocumented workers, only a small percentage of arrests made in 2007 involved criminal charges against those who hired such workers. *See* Spencer S. Hsu, *Immigrant Crackdown Falls Short; Despite Tough Rhetoric, Few Employers of Illegal Workers Face Criminal Charges*, WASH. POST, Dec. 25, 2007, at A3 (citing a 2007 report by the Department of Homeland Security that found that while arrest rates had gone up to nearly four times the previous year's level, only 2 percent of the arrests involved charges against individuals who had hired undocumented workers—"[f]ewer than 100 owners, supervisors or hiring officials were arrested in fiscal 2007, compared with nearly 4,900 arrests that involved illegal workers, providers of fake documents and others, the figures show").

100. 8 U.S.C. § 1324a(b)(1) (2000) (requiring the completion of I-9 forms designed to verify immigration status); *see also* Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 500 (2004) ("In 1986, Congress passed the Immigration Reform and Control Act (IRCA), which deputized private employers in the public effort to control 'illegal immigration.'").

101. It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law.

H.R. REP. NO. 99-682(I), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662.

affect the wages and employment conditions of lawful residents.[102] Courts generally followed this intent and continued to extend workplace protections to undocumented workers.[103] Because undocumented workers were generally protected under labor and employment statutes, the immigration status of the worker was not relevant.

This jurisprudence remained largely consistent until 2002, when the Supreme Court decided *Hoffman Plastic Compounds, Inc. v. NLRB*.[104] The issue before the Court was whether the National Labor Relations Board (NLRB) could award back-pay to an undocumented worker harmed by the employer's unfair labor practice.[105] In a 5-4 decision, the Court decided that, by passing IRCA, Congress intended to bar certain legal remedies to undocumented workers under the National Labor Relations Act (NLRA) if the remedy could be construed as encouraging one to evade existing immigration laws.[106] Specifically, the Court held that undocumented immigrant workers are not entitled to claim back-pay under the NLRA in light of federal immigration policies set forth in IRCA.[107] The Court found that the NLRB did not have discretion to provide a remedy that conflicted with another federal policy, namely the immigration policy of deterring illegal immigration.[108]

This decision marked another step in the evolving jurisprudence surrounding the rights of undocumented workers. Prior to 2002, the only Supreme Court case involving undocumented workers and labor and employment statutes was the pre-IRCA decision in *Sure-Tan, Inc. v. NLRB*.[109] In *Sure-Tan*, the Court found that undocumented workers were "employees" as defined under the NLRA but concluded that workers who "voluntarily" left the

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102. *Id.*

103. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 884 (1983) (holding that undocumented workers were considered employees under the National Labor Relations Act); Rios v. Enter. Ass'n Steamfitters Local Union 638, 860 F.2d 1168, 1172-73 (2d Cir. 1988) (permitting undocumented workers remedies under Title VII prior to the passage of the IRCA); *In re* Reyes, 814 F.2d 168, 170 (5th Cir. 1987) (finding that both undocumented and documented workers are covered under the Fair Labor Standards Act); Local 512, Warehouse & Office Workers' Union v. NLRB, 795 F.2d 705, 716 (9th Cir. 1986) (finding that undocumented workers are entitled to the protections afforded under the NLRA); Bevles Co. v. Teamsters Local 986, 791 F.2d 1391, 1392-93 (9th Cir. 1986) (upholding an arbitrator's award of back-pay and reinstatement to undocumented workers prior to passage of IRCA); Donovan v. Burgett Greenhouses, Inc., 759 F.2d 1483, 1485-86 (10th Cir. 1985) (allowing for the enforcement of the FLSA on behalf of undocumented workers); *see also* Ho & Chang, *supra* note 10, at 484-85.

104. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

105. *Id.* at 146-47.

106. *Id.* at 149-50.

107. *Id.* at 151-52.

108. *Id.* at 149.

109. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 894-96 (1984) (finding that the NLRA was violated when undocumented workers were reported to the Immigration and Naturalization Service (INS) as retaliation for having voted for a union).

country were not eligible for an award of back-pay because they were not available to work, as required by the statute.[110] Unlike the decision in *Hoffman*, the Court found that protecting undocumented workers under the NLRA would assist in the enforcement of immigration laws.[111] However, the majority in *Hoffman* did not rely upon *Sure-Tan* in reaching its conclusion and instead relied upon the changed "legal landscape"[112] that came about as a result of the passage of IRCA.[113] The Court focused its analysis of IRCA on the provisions that prohibit employers from knowingly hiring or employing unauthorized workers,[114] with a particular emphasis on the criminal fraud by employees who use fraudulent documents.[115]

Since 2002, lower courts have been analyzing the scope and impact of *Hoffman* as applied to other types of employment law claims. Some courts have been asked to address the question of relevance directly, often in the pretrial stage,[116] while other courts have been asked to address whether undocumented

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110. *Id.* at 892-93, 903. After *Sure-Tan*, the circuits split on the question of eligibility for back-pay under the NLRA for undocumented workers who were in the U.S. after discharge from employment. *Compare* Hoffman Plastic Compounds, Inc. v. NLRB, 237 F.3d 639 (D.C. Cir. 2001) (en banc) (allowing an award of back-pay to an undocumented worker in the U.S.), *and* NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50, 57 (2d Cir. 1997) (allowing an award of back-pay to an undocumented worker where employer was aware of worker's status), *and* EEOC v. Hacienda Hotel, 881 F.2d 1504, 1517 (9th Cir. 1989) (reasoning that the District Court did not err in finding that plaintiffs in a Title VII case were entitled to an award of back-pay), *and* Rios v. Enter. Ass'n Steamfitters Local Union 638, 860 F.2d 1168, 1173 (2d Cir. 1988) (finding that plaintiffs in a Title VII case, who have remained in the country, are eligible for back-pay as of the time of the violation), *and* Local 512, Warehouse & Office Workers' Union v. NLRB, 795 F.2d 705, 719 (9th Cir. 1986) (finding that undocumented workers who are in the U.S. remain eligible for back-pay), *and* Bevles Co. v. Teamsters Local 986, 791 F.2d 1391, 1393 (9th Cir. 1986) (finding that an arbitrator's decision granting reinstatement and back-pay to undocumented workers was not reviewable because it was not in manifest disregard of the law), *with* Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1115 (7th Cir. 1992) (finding undocumented workers who remain in the country are ineligible for back-pay).

111. *Sure-Tan*, 467 U.S. at 893-94 ("If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws.").

112. *Hoffman*, 535 U.S. at 147.

113. *Id.* at 147-48.

114. *Id.* at 148.

115. *Id.*; *see* Wishnie, *supra* note 100, at 506-07 (asserting that the majority's focus was on the use of fraudulent documents by workers, as evidenced by "its repeated invocation of the fraudulent document provisions of immigration law, but also in its attempt to align its holding with prior decisions denying reinstatement or back-pay 'to employees found guilty of serious illegal conduct in connection with their employment' and who 'had committed serious criminal acts'" (citing *Hoffman*, 535 U.S. at 148)).

116. *See, e.g.*, Rivera v. NIBCO, Inc., No. CIV-F-99-6443, 2006 U.S. Dist. LEXIS 16967 (E.D. Cal. Mar. 31, 2006); Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499, 501 (W.D. Mich. 2005); Garcia-Andrade v. Madra's Cafe Corp., No. 04-71024, 2005 U.S. Dist.

workers are entitled to certain legal relief[117] or even have standing to bring lawsuits.[118] In those cases where courts are deciding the relevance of immigration status to the underlying litigation, courts have consistently analyzed three factors: the type of relief requested by the plaintiff;[119] the nature of the underlying substantive claims;[120] and how prejudicial the court views the disclosure when compared to the probative value, if any.[121] Courts have

LEXIS 22122 (E.D. Mich. Aug. 3, 2005); Colindres v. Quietflex Mfg., No. H-01-4319, 2004 U.S. Dist. LEXIS 27982 (S.D. Tex. Apr. 19, 2004); Cortez v. Medina's Landscaping, No. 00 C 6320, 2002 U.S. Dist. LEXIS 18831 (N.D. Ill. Sept. 30, 2002); Flores v. Amigon, 233 F. Supp. 2d 462 (E.D.N.Y. 2002); De La Rosa v. N. Harvest Furniture, 210 F.R.D. 237 (C.D. Ill. 2002); Zeng Lui v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191 (S.D.N.Y. 2002); Pontes v. New Eng. Power Co., No. 03-00160A, 2004 Mass. Super. LEXIS 340 (Mass. Dist. Ct. Aug. 17, 2004); Cabrera v. Ekema, 695 N.W.2d 78 (Mich. Ct. App. 2005); Llerena v. 302 W. 12th St. Condo., No. 102490/03, 2004 WL 2793176 (N.Y. Sup. Ct. Oct. 7, 2004); Asgar-Ali v. Hilton Hotels Corp., 798 N.Y.S.2d 342 (Sup. Ct. 2004).

117. *See infra* notes 130-39 and accompanying text for a discussion of whether or not undocumented workers are entitled to various substantive rights.

118. *See, e.g.*, Martinez v. Mecca Farms, Inc., 213 F.R.D. 601, 604-05 (S.D. Fla. 2002) (finding that undocumented farm workers are not precluded from having standing to sue under the Migrant and Seasonal Agricultural Worker Protection Act).

119. *See, e.g.*, Rivera v. NIBCO, Inc., 384 F.3d 822, 825-26 (9th Cir. 2004) (finding that immigration status is relevant to back-pay and front-pay damages under *Hoffman*); Flores v. Limehouse, No. 2:04-1295-CWH, 2006 U.S. Dist. LEXIS 30433, at *6-7 (D.S.C. May 11, 2006) (finding that IRCA does not prohibit undocumented aliens from bringing a claim under RICO); Trejo v. Broadway Plaza Hotel, No. 04 Civ. 4005, 2005 U.S. Dist. LEXIS 17133, at *2-3 (S.D.N.Y. Aug. 16, 2005) (concluding that immigration status is not relevant because not seeking back-pay); *De La Rosa*, 210 F.R.D. at 239 (finding that immigration status is not relevant to back-pay because back-pay would only the period between termination and reinstatement); Pontes v. New Eng. Power Co., 18 Mass. L. Rep. 183, 2004 WL 2075458, at *2 (Mass. Super. Ct. Aug. 19, 2004) (finding that immigration status is not relevant to a claim for impaired earning capacity based upon a work injury because the analysis does not implicate what the plaintiff previously did or what job the plaintiff intends to do in the future).

120. *See, e.g.*, *Galaviz-Zamora*, 230 F.R.D. at 502 (finding that immigration status is not relevant to damages for unpaid wages, nor to standing, class certification, or credibility); *Cortez*, 2002 U.S. Dist. LEXIS 18831, at *2 (finding that immigration status does not bar recovery of unpaid wages); *Amigon*, 233 F. Supp. 2d at 464 (determining that immigration status does not preclude a claim for unpaid wages and overtime under the Fair Labor Standards Act); *Liu*, 207 F. Supp. 2d at 192-93 (denying defendant's request to discover plaintiff's immigration status in a claim for back-pay); *Llerena*, 2004 WL 2793176, at *1-2 (finding that immigration status is not relevant to a case involving tort and state labor law violations).

121. *See, e.g.*, *Galaviz-Zamora*, 230 F.R.D. at 502 (finding that the prejudicial impact of disclosure far outweighs its probative value); Ponce v. Tim's Time, Inc., No. 03 C 6123, 2005 U.S. Dist. LEXIS 20263 (N.D. Ill. Sept. 14, 2005) (finding that even though there was evidence that plaintiff made false statements to hide immigration status that may have been relevant for impeaching or attacking credibility, the potential prejudice to plaintiff outweighed the possible probative value); *Garcia-Andrade*, 2005 U.S. Dist. LEXIS 22122, at *6 (finding plaintiffs' Fifth Amendment rights bar defendants from requiring documentation of plaintiffs' immigration statuses); *Amigon*, 233 F. Supp. 2d at 464-65 (finding that the potential for prejudice by allowing the disclosure of immigration status far outweighs its

overwhelmingly decided to prohibit the disclosure of immigration status in the context of employment-related civil litigation, often citing the highly prejudicial impact of the disclosure compared to its relatively small probative value.[122]

In those cases where courts address the rights of undocumented workers to pursue certain civil remedies, there are many other variables. However, in separating the cases by subject matter, some underlying trends can be identified. Cases that involve claims for unpaid wages typically find that undocumented workers are entitled to recover an award for work performed.[123] For cases involving the availability of damages under the FLSA or the NLRA, courts typically find that status is not relevant to liability, though it may be relevant to the damages portion of the case.[124] Cases involving claims for lost wages due to an injury, on the other hand, make a few distinctions. Many cases find that an undocumented worker is entitled to lost wages but find that immigration status is relevant to the amount of wages that can be recovered.[125] Other courts, relying on the argument that there is no federal preemption, find that undocumented workers can recover lost wages they would have earned.[126]

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minimal probative value); *Liu*, 207 F. Supp. 2d at 192-93 (stating that the risk of injury to the plaintiff of the disclosure outweighs the need for disclosure); *Pontes*, 2004 WL 2075458, at *3.

122. *See, e.g.*, Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064 (9th Cir. 2004) (concluding that immigration status does not have to be disclosed because of the substantial and particularized harm of the discovery—namely, the chilling effect that disclosure can have on the ability to enforce rights); EEOC v. City of Joliet, 239 F.R.D. 490, 492-93 (N.D. Ill. 2006) (concluding that the potential damages that could result from disclosure of immigration status, namely the chill on plaintiffs' enforcement of their Title VII rights, far outweigh any minimal legitimate probative value); EEOC v. First Wireless Group, Inc., 225 F.R.D. 404, 406 (E.D.N.Y. 2004) (prohibiting the disclosure of immigration status based on a finding that the unacceptable burden on the public interest that would result from deterring plaintiffs from seeking relief outweighs the potential relevance).

123. *See, e.g.*, Chellen v. John Pickle Co., 446 F. Supp. 2d 1247 (N.D. Okla. 2006); Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295 (D.N.J. 2005); Martinez v. Mecca Farms, Inc., 213 F.R.D. 601 (S.D. Fla. 2002); Gomez v. Falco, 792 N.Y.S.2d 769 (App. Div. 2004).

124. *See, e.g.*, Renteria v. Italia Foods, Inc., No. 02 C 495, 2003 U.S. Dist. LEXIS 14698, at *19-20 (N.D. Ill. Aug. 21, 2003) (finding plaintiffs not entitled to back-pay under FLSA for retaliatory discharge because this would contravene the policies embodied in IRCA, but they are entitled to compensatory damages); *In re* Tuv Taam Corp., 340 N.L.R.B. 756, 759-60 (2003) (granting back-pay conditionally and leaving for the compliance stage a determination of whether any of the discriminatees were lawfully entitled to be present and employed in the United States).

125. Madeira v. Affordable Hous. Found., Inc., 315 F. Supp. 2d 504, 506-08 (S.D.N.Y. 2004); Echeverria v. Lindner, No. 018666/2002, 2005 WL 1083704, at *12 (N.Y. Sup. Ct. Mar. 2, 2005); Celi v. 42d St. Dev. Project, Inc., No. 37491/01, 2004 WL 2812902, at *3, 2004 (N.Y. Sup. Ct. Nov. 9, 2004); Cano v. Mallory Mgmt., 760 N.Y.S.2d 816 (Sup. Ct. 2003).

126. *See, e.g.*, Balbuena v. IDR Realty LLC, 845 N.E.2d 1246, 1259-60 (N.Y.2006); Majlinger v. Cassino Contracting Corp., 802 N.Y.S.2d 56, 66 (App. Div. 2005); Tyson

Several other cases distinguish between U.S. and home country earnings if the plaintiff is undocumented.[127] Various courts have addressed the impact of undocumented status on Title VII claims post-*Hoffman*. A couple of courts have questioned the applicability of *Hoffman* to the Title VII context altogether,[128] while others found that while *Hoffman* may limit the back-pay remedy, it does not foreclose other remedies available under Title VII.[129] Another case found that once an undocumented worker obtains legal status she may be eligible for all remedies except back-pay for the period of time she was undocumented.[130] Worker compensation cases consistently find that undocumented workers are eligible for benefits because there is no federal preemption.[131] A couple of cases limit the type of worker compensation

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Foods, Inc. v. Guzman, 116 S.W.3d 233, 244 (Tex. Ct. App. 2003). *But see* Veliz v. Rental Serv. Corp. USA, Inc., 313 F. Supp. 2d 1317, 1335-36 (D. Fla. 2003) (finding that undocumented status precludes an award of lost U.S. wages).

127. Hernandez-Cortez v. Hernandez, No. 01-1241-JTM, 2003 U.S. Dist. LEXIS 19780, at *19 (D. Kan. Nov. 4, 2003) (finding that an undocumented alien can only recover money based on country of origin wages); Rosa v. Partners in Progress, Inc., 868 A.2d 994, 1000 (N.H. 2005) (holding that if defendant knew or should have known that plaintiff was undocumented then the undocumented worker can recover U.S. wages, but if the defendant did not know or had no reason to know then the undocumented worker can only recover damages based upon country of origin wages); Jallow v. Kew Gardens Hills Apts. Owners, 803 N.Y.S.2d 18 (Sup. Ct. 2005); Sanango v. 200 E. 16th St. Hous. Corp., 788 N.Y.S.2d 314, 321 (App. Div. 2004), *overruled by Balbuena*, 812 N.Y.S.2d 416.

128. Rivera v. NIBCO, Inc., 364 F.3d 1057, 1066-70 (9th Cir. 2004) (suggesting that *Hoffman* may not apply in the Title VII context because of the differences between Title VII and the NLRA); De La Rosa v. N. Harvest Furniture, 210 F.R.D. 237, 239 (C.D. Ill. 2002) (noting that *Hoffman* was not dispositive in addressing the question of whether undocumented workers are entitled to back-pay under Title VII).

129. Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003) (suggesting that *Hoffman* precludes undocumented workers from receiving back-pay under Title VII, but does not foreclose other remedies available to plaintiffs); *see also* Nancy Montwieler, *EEOC: EEOC Limits Undocumented Workers' Relief Based on Recent Supreme Court Decision*, 126 Daily Lab. Rep. (BNA), at A2 (July 1, 2002) ("[T]he *Hoffman* decision in no way calls into question the settled principle that undocumented workers are covered by the federal employment discrimination statutes . . . ."). *But see* Morejon v. Terry Hinge & Hardware, No. B162878, 2003 Cal. App. Unpub. LEXIS 10394, at *23-25 (Cal. Ct. App. Nov. 4, 2003) (finding plaintiff barred from bringing discrimination claim because of unclean hands doctrine for use of false documents); Crespo v. Evergo Corp., 841 A.2d 471, 476-77 (N.J. Super. Ct. App. Div. 2004) (barring undocumented worker from economic and noneconomic damages in state anti-discrimination action because of status).

130. *Escobar*, 281 F. Supp. 2d at 897.

131. *See, e.g.*, Safeharbor Employer Serv. I, Inc. v. Velazquez, 860 So. 2d 984, 986 (Fla. Dist. Ct. App. 2003) (finding plaintiff is not barred from workers' compensation because of undocumented status as there is no federal preemption); Earth First Grading v. Gutierrez, 606 S.E.2d 332, 334 (Ga. Ct. App. 2004) (finding plaintiff entitled to workers' compensation benefits as federal law does not preempt award); Cont'l PET Techs. v. Palacias, 604 S.E.2d 627, 631 (Ga. Ct. App. 2004) (finding plaintiff entitled to workers' compensation because no federal preemption); Wet Walls, Inc. v. Ledezma, 598 S.E.2d 60. 63 (Ga. Ct. App. 2004) (finding plaintiff entitled to workers' compensation because no federal preemption); Correa v. Waymouth Farms, Inc., 664 N.W.2d 324, 329-30 (Minn.

benefits that an undocumented worker is entitled to receive.[132] The holdings of these cases in turn determine whether or not status is relevant to the underlying action.

The current jurisprudential framework provides no clear answer to the question of whether immigration status is relevant to the underlying proceeding. However, the trends outlined above provide some guidance as to the factors often considered.

III. BALANCING CONFIDENTIALITY AND DISCLOSURE OBLIGATIONS

Once a determination is made that representation is permissible, lawyers will have to grapple with the decision of whether to protect or disclose immigration status. This analysis hinges upon a determination as to whether immigration status is relevant to the underlying civil action. If immigration status is relevant to the underlying litigation, the information will be discoverable unless the client is entitled to claim a privilege. If, on the other hand, immigration status is not relevant to the underlying litigation, the information will remain confidential[133] unless the lawyer is mandated or chooses to disclose it. This Part will explore the balancing of these obligations when immigration status is relevant and irrelevant to the underlying claims.

A. *Immigration Status Determined Relevant to Underlying Litigation*

If immigration status is determined to be relevant to the underlying litigation, then the information generally will be discoverable in the pretrial stage pursuant to Federal Rules of Civil Procedure 26(b)[134] and admissible at

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2003) (finding IRCA does not preempt undocumented workers from receiving state workers' compensation benefits).

132. *See, e.g.*, De Jesus Uribe v. Aviles, No. B166839, 2004 Cal. App. Unpub. LEXIS 9698, at *12-13 (Cal. Ct. App. Oct. 26, 2004) (finding undocumented workers may not be eligible for vocational rehabilitation benefits but that plaintiff was entitled to workers' compensation regardless of his immigration status); Cherokee Indus., Inc. v. Alvarez, 84 P.3d 798, 801 (Okla. Civ. App. 2003) (finding that status alone does not deprive an alien from all worker compensation benefits, but claimant may not be eligible for vocational rehabilitation or medical treatment by a specific doctor).

133. It is important to note that information not relating to the representation is not considered confidential. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2007). However, the terms "relevant" to the litigation and "relating" to the representation are distinct, with "relating to the representation" being broader. Because of this, information can be related to the representation and thus confidential, but not relevant to the underlying litigation. For a detailed explanation of the difference, see *infra* notes 169-73 and accompanying text.

134. FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter . . . .").

the trial stage pursuant to Federal Rules of Evidence 401.[135] One way in which immigration status could be protected from discovery and precluded from admission into evidence is through a claim of privilege.[136] In this context, the most likely claim of privilege would be a client's claim of privilege against self-incrimination.[137]

The privilege against self-incrimination is found in the Fifth Amendment to the United States Constitution and can be claimed in criminal and civil proceedings, whether formal or informal, including administrative, judicial, investigatory, or adjudicatory proceedings.[138] The privilege is invoked by an individual [139] in instances where providing a response might be incriminatory.[140] Generally, the privilege may be used whenever information, sufficiently relevant to civil liability to be discoverable, provides even a clue that might point a government investigator toward evidence of criminal conduct.[141] In fact, courts have recognized a claim of privilege based solely on an assertion that the evidence would provide a "link in the chain" of prosecution.[142]

Individuals can invoke the privilege in response to a question presented on the witness stand,[143] but may also invoke the privilege at many stages in civil

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135. FED. R. EVID. 401 (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). Of course at trial there can be many different things that bar the admission of evidence, but it must, at a minimum, be relevant to the proceedings in order to be admissible.

136. Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 CORNELL INT'L L.J. 27, 59 (2008).

137. The privilege against self-incrimination derives from the Fifth Amendment to the Constitution. U.S. CONST. amend. V.

138. Kastigar v. United States, 406 U.S. 441, 444 (1972); *see also* United States v. U.S. Coin & Currency, 401 U.S. 715, 718 (1971) (civil forfeiture proceedings); *In re* Gault, 387 U.S. 1, 49 (1967) (delinquency proceedings); Bigby v. U.S. Immigration & Naturalization Serv., 21 F.3d 1059, 1060-61 (11th Cir. 1994) (deportation proceedings); Gonzales v. McEuen, 435 F. Supp. 460, 470 (C.D. Cal. 1977) (school disciplinary proceedings).

139. But, as in the criminal context, the privilege can only be asserted by individuals, not by corporations. Fisher v. United States, 425 U.S. 391, 424-26 (1976); Hale v. Henkel, 201 U.S. 43, 69-70 (1906).

140. Heidt, *supra* note 19, at 1065.

141. *Id.*; *see also* Martin I. Kaminsky, *Preventing Unfair Use of the Privilege Against Self-Incrimination in Private Civil Litigation: A Critical Analysis*, 39 BROOK. L. REV. 121, 122 (1972); Marjorie S. White, *Plaintiff as Deponent: Invoking the Fifth Amendment*, 48 U. CHI. L. REV. 158, 160 (1981).

142. Hoffman v. United States, 341 U.S. 479, 486 (1951). The privilege may be used even if the invokers realize that they would not likely be prosecuted for the conduct they would be forced to reveal. United States v. Johnson, 488 F.2d 1206, 1209 (1st Cir. 1973); United States v. Miranti, 253 F.2d 135, 139 (2d Cir. 1958).

143. Capitol Prod. Corp. v. Hernon, 457 F.2d 541, 542 (8th Cir. 1972).

cases, including responses to discovery requests.[144] The privilege must be invoked in response to a specific question or request for discovery and allows individuals to refuse to: submit answers to allegations in the complaint;[145] respond to interrogatories;[146] respond to requests for admissions;[147] answer questions at depositions;[148] or respond to requests to produce documents.[149]

Both the employer and employee in an employment-related civil case brought by an undocumented worker might have reason to claim the Fifth Amendment privilege. For the employee, since it is unlawful to enter the country without inspection, to present false documents upon entry, or to use false documents to obtain employment, information sought through discovery or questions asked at trial could lead to criminal liability. Under IRCA, employers can be criminally liable for knowingly hiring undocumented workers.[150] An employee could engage in discovery regarding the employer's general practice of employee verification and the specifics of other employee immigrant workers, the answers to which could lead to criminal liability.[151]

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144. *See, e.g.*, SEC v. Thomas, 116 F.R.D. 230, 231-34 (D. Utah 1987); United States v. Second Nat'l Bank of Nashua N.H., 48 F.R.D. 268, 271 (D.N.H. 1969).

145. De Antonio v. Solomon, 42 F.R.D. 320, 322 (D. Mass. 1967).

146. Gordon v. FDIC, 427 F.2d 578, 580 (D.C. Cir. 1970); Backos v. United States, 82 F.R.D. 743, 744 (E.D. Mich. 1979); United States v. 47 Bottles, More or Less, Each Containing 30 Capsules of Jenasol R.J. Formula '60,' 26 F.R.D. 4, 5-6 (D.N.J. 1960); Paul Harrigan & Sons, Inc. v. Enter. Animal Oil Co., 14 F.R.D. 333, 335 (E.D. Pa. 1953).

147. *Gordon*, 427 F.2d at 580-81; FDIC v. Logsdon, 18 F.R.D. 57, 58 (W.D. Ky. 1955); United States v. Fishman, 15 F.R.D. 151, 152 (S.D.N.Y. 1953); Mayo v. Ford, 184 A.2d 38 (D.C. 1962); Simkins v. Simkins, 219 So. 2d 724, 725-27 (Fla. Dist. Ct. App. 1969).

148. Wehling v. Columbia Broad. Sys., 608 F.2d 1084, 1084-87 (5th Cir. 1979), *reh'g denied*, 611 F.2d 1026 (5th Cir. 1980); *In re* Folding Carton Antitrust Litig., 609 F.2d 867, 869-73 (7th Cir. 1979); *In re* Master Key Litig., 507 F.2d 292, 292-94 (9th Cir. 1974); Justice v. Laudermilch, 78 F.R.D. 201, 202-03 (M.D. Pa. 1978); *In re* Penn Cent. Sec. Litig., 347 F. Supp. 1347, 1348 (E.D. Pa. 1972); Alioto v. Holtzman, 320 F. Supp. 256, 257 (E.D. Wis. 1970); Duffy v. Currier, 291 F. Supp. 810, 812, 814 (D. Minn. 1968); De Antonio v. Solomon, 41 F.R.D. 447, 449 (D. Mass. 1966); Lowe's of Roanoke, Inc. v. Jefferson Standard Life Ins. Co., 219 F. Supp. 181, 183-90 (S.D.N.Y. 1963); Nat'l Discount Corp. v. Holzbaugh, 13 F.R.D. 236, 237 (E.D. Mich. 1952).

149. Henry v. Sneiders, 490 F.2d 315, 316-17 (9th Cir. 1974), *cert. denied*, 419 U.S. 832 (1974); *In re* Turner, 309 F.2d 69, 70 (2d Cir. 1962); De Antonio v. Solomon, 42 F.R.D. 320, 321, 323 (D. Mass. 1967).

150. 8 U.S.C. § 1324a(a)(1)(A) (Supp. V 2006) (making it illegal to knowingly hire an illegal alien); *see also id.* § 1324a(a)(2) (stating an employer is criminally liable for continuing employment of an illegal alien). IRCA includes an extensive employee verification system designed to deny employment to undocumented workers. *Id.* § 1324a(b)(1). As part of the verification process, employers are required to complete forms for each employee. *Id.* § 1324a(b)(1).

151. Eric Schnapper, *Righting Wrongs Against Immigrant Workers*, 39 TRIAL 46, 54 (2003) (explaining that if the employer asserted a defense under *Hoffman Plastic Compounds*, an employee "would be entitled to engage in discovery regarding the employer's prior knowledge of his or her immigration status. Proof of an employer's general practices and knowledge regarding other immigrant workers would also be relevant evidence").

What is the consequence of claiming the Fifth Amendment privilege against self-incrimination?[152] For many years, there was no consequence, as the Supreme Court found it impermissible to burden the asserter of the privilege in the civil context.[153] However, this changed in 1976 with the Supreme Court's decision in *Baxter v. Palmigiano*, in which the Court permitted a negative inference to be drawn from an individual's refusal to testify.[154] Currently, courts have discretion to dismiss the action in its entirety,[155] but this discretion is not unlimited and dismissal is not automatic.[156] The court has to balance any prejudice to other civil litigants against the potential harm to the party claiming the privilege if compelled to choose between a civil action and protecting against prosecution. The balance must be weighed to safeguard the Fifth Amendment privilege and should be upheld unless defendants have substantial need for particular information and there is no other less burdensome and effective means of obtaining it.[157] In addition to dismissing the entire action, courts can dismiss certain claims,

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Issues also might be raised under Rule 11 of the Federal Rules of Civil Procedure if the employer claims, as a defense, that the employee is undocumented. Under Rule 11, the lawyer for the employer can only raise this defense if the assertion is based upon "knowledge, information, and belief." FED. R. CIV. P. 11(b). There are instances where this assertion could be in direct conflict to the employer's representation on the I-9 form that "to the best of his/her knowledge" the plaintiff was not an undocumented alien. *See* Schnapper, *supra*, at 54.

152. This discussion proceeds upon the assumption that the Fifth Amendment privilege was not effectively resisted. In order to resist the assertion of the privilege, the challenger must show that the response would not incriminate or the crime for which the invoker's response incriminates is barred by the attachment of jeopardy, the running of the statute of limitations, or past grants of immunity. *See* Heidt, *supra* note 19, at 1071-80 (detailing each of the ways in which an opponent can resist the invocation of the privilege).

153. *See, e.g.*, Lefkowitz v. Turley, 414 U.S. 70, 71-74, 83 (1973) (canceling of government contracts); Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 392 U.S. 280, 282, 284-85 (1968) (government employment); Spevack v. Klein, 385 U.S. 511, 514 (1967) (attorney discipline); Garrity v. New Jersey, 385 U.S. 493, 494-98 (1967) (police employment).

154. 425 U.S. 308, 316 (1976); *see also* Hasbro, Inc. v. Serafino, 958 F. Supp. 19, 24-25 (D. Mass. 1997) (adverse inferences may be drawn from defendant's assertion of Fifth Amendment privilege where there is other probative evidence in civil RICO suit); United States v. Bonanno Organized Crime Fam., 683 F. Supp. 1411, 1444 (E.D.N.Y. 1988) (adverse inference may be drawn from assertion of privilege in civil cases). *But see* Avirgan v. Hull, 932 F.2d 1572, 1580 (11th Cir. 1991), *cert. denied*, 502 U.S. 1048 (1992) (invocation of privilege does not give rise to inference sufficient to avoid summary judgment).

155. *See* Hiley v. United States, 807 F.2d 623, 628 (7th Cir. 1986); Mount Vernon Sav. & Loan Ass'n v. Partridge Assoc., 679 F. Supp. 522, 529 (D. Md. 1987); Stop & Shop Co. v. Interstate Cigar Co., 110 F.R.D. 105, 108 (D. Mass. 1986).

156. Wansong v. Wansong, 478 N.E.2d 1270, 1272 (Mass. 1985).

157. SEC v. Graystone Nash, Inc., 25 F.3d 187, 192 (3d Cir. 1994); United States v. Parcels of Land, 903 F.2d 36, 44-45 (1st Cir. 1990); Black Panther Party v. Smith, 661 F.2d 1243, 1266 (D.C. Cir. 1981); Wehling v. CBS, 608 F.2d 1084, 1088 (5th Cir. 1980).

postpone or stay proceedings until the criminal statute of limitations runs, or preclude the use of certain evidence.

Given this discretion, it is difficult to predict the precise consequence of an undocumented worker claiming the privilege.[158] However, lawyers should advise clients that pleading the Fifth Amendment privilege against self-incrimination might result in the dismissal of the action, or that certain claims or evidence might be barred in the process of litigation. Ultimately, once informed of the consequences, this is a decision for the client to make.[159]

One other possible privilege that could be raised in this scenario is the attorney-client privilege.[160] The privilege is applicable only: in a formal legal proceeding; in response to an attempt to compel testimony in the discovery or trial stage; and if what is being compelled is testimony about information passing between lawyer and client.[161] The privilege will only protect otherwise relevant information from discovery when the opposing party asks the client what she told her lawyer about her immigration status,[162] or the opposing party

158. Clients might be concerned that if they claim their Fifth Amendment privilege against self-incrimination the employer will make assumptions about their status and report them to the Bureau of Immigration and Customs Enforcement (BICE). While this risk does exist, employers also face the risk of incriminating themselves if they knew, or should have known, that the employee lacked proper work authorization. *See* Schnapper, *supra* note 151, at 54.

159. Model Rule of Professional Conduct 1.2(a) states, "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007). Objectives are defined as those decisions that directly affect the ultimate resolution of the case or the substantive rights of the client. *See* ANNOTATED MODEL RULES OF PROF'L CONDUCT 30-31 (5th ed. 2003) [hereinafter ANNOTATED MODEL RULES]. The claim of a client's privilege against self-incrimination afforded by the Fifth Amendment could impact the ultimate resolution of the case and affect the client's substantive rights.

160. Dean Wigmore's classic statement of the privilege, as reformulated in a modern legal ethics text, contains eight elements: 1) where legal advice is sought; 2) from a professional legal advisor in his capacity as such; 3) the communications relating to that purpose; 4) made in confidence; 5) by the client; 6) are at the client's instance permanently protected; 7) from disclosure by himself or the lawyer; 8) except if the privilege is waived. *See* GEOFFREY HAZARD, SUSAN KONIAK & ROGER CRAMTON, THE LAW AND ETHICS OF LAWYERING 206 (3d ed. 1999). Compare Restatement section 68, which permits invocation of the privilege where: "1. a communication; 2. [is] made between privileged persons; 3. in confidence; 4. for the purpose of obtaining or providing legal assistance for the client." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000).

161. HAZARD & HODES, *supra* note 24, at 9-28.

162. As stated by Professors Hazard and Hodes, "[n]either the traditional nor the modern formulation of the privilege directly protects against compelled disclosure the substance of the underlying confidential communication; only the content *of the communication* between client and lawyer is protected. Thus a client may be compelled to testify about the underlying facts of an occurrence or transaction (unless able to refuse under the Fifth Amendment, for example), but not whether those facts were related to the client's lawyer." *Id.* at 9-26. This distinction between the communication and the facts underlying the communication has long been established in the law. *See* Upjohn Co. v. United States,

asks the lawyer directly.[163] In most instances, lawyers for the opposing party will simply ask the client directly where they are from, whether or not they are documented, and how they entered the United States. Thus, the attorney-client privilege is unlikely to be invoked in this context to protect against disclosure.

If it were determined to be applicable, there is one exception that bears mention, the crime/fraud exception. Under this exception, the attorney-client privilege does not protect communications in furtherance of a crime or fraud.[164] In ascertaining the applicability of the exception, a distinction is made between communications made in the course or furtherance of fraud, which are not protected, and communications about a fraud after its completion, which are protected.[165] In the context of an undocumented worker who seeks a lawyer to help on an employment-related civil claim, the exception would be inapplicable in most instances because the client would be seeking legal advice after the completion of the crime or fraud.[166]

In sum, if immigration status is relevant to the underlying proceedings, the information will likely be discoverable and admissible at trial unless the client claims a privilege. The most likely applicable privilege would be the Fifth Amendment privilege against self-incrimination, while the attorney-client privilege might be applicable in very limited instances. Clients should be advised of the consequences of claiming a privilege and lawyers should then proceed based upon their informed decision. If, on the other hand, immigration status is not relevant to the underlying proceeding, the lawyer's ethical obligations are much different.

B. *Immigration Status Determined Not Relevant to Underlying Litigation*

If immigration status is not relevant to the underlying proceedings, there can be a tension between the protection afforded confidential information and specific instances where a lawyer may be mandated to disclose otherwise confidential information under the rules. The initial question is whether the immigration status of an undocumented worker seeking employment-related

449 U.S. 383, 386, 395 (1981).

163. A lawyer must assert the attorney-client privilege whenever it is not frivolous to do so. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-385 (1994). Once a court rules that the privilege does not apply and subsequently orders disclosure, a lawyer is relieved of her ethical duty to claim the privilege. Once the ethical constraint is lifted, disclosure becomes mandatory under Rule 1.6(b)(6). HAZARD & HODES, *supra* note 24, at 9-33.

164. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 (2000).

165. HAZARD & HODES, *supra* note 24, at 9-41 to 9-42.

166. For a more detailed discussion of whether or not a lawyer is assisting the client in a crime or fraud by representing them in an employment-related civil case as well as whether any of these offenses constitute "continuing crimes," see *supra* Part II.

civil assistance is confidential.[167] If the information is confidential, a lawyer must keep it confidential unless disclosure is mandated or permitted. There are two rules that involve the lawyer's obligation to disclose information if the client is engaged in a crime or fraud.[168] Rule 3.3(b) addresses a lawyer's obligation to disclose facts to the tribunal, while Rule 4.1(b) addresses a lawyer's obligation to disclose facts to a third party. This Part will initially discuss the confidentiality provisions under Rule 1.6, then explain the parameters of Rules 3.3(b) and 4.1(b) respectively, and, finally, examine how lawyers balance confidentiality mandates with potential disclosure obligations when representing an undocumented worker in employment-related litigation.

Pursuant to Rule 1.6, all information "relating to the representation," whether it comes from the client or another source, is confidential.[169] Even information not itself protected, but that may lead to discovery of protected information by a third person, is included in the definition.[170] Rule 1.6(a) creates a presumption of confidentiality that operates without the necessity of a client request and includes information in the public domain.[171]

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167. *See infra* notes 176-78 and accompanying text.

168. Rules 4.1(b) and 3.3(b) each involve a balancing of various interests. Rule 4.1(b) involves the balance between two important values in the law of lawyering: maintaining confidentiality of client information and ensuring that lawyers represent client interests only within the bounds of the law and do not become participants in wrongdoing. MODEL RULES OF PROF'L CONDUCT R. 4.1(b) (2007). Rule 3.3(b) is a balance between duties to the client and duties to the tribunal. Based on the language and interpretation of Rule 3.3(b), where there is a danger that the tribunal will be misled, a lawyer may be required to forsake his client's immediate and narrow interests in favor of the interest of the administration of justice. *Id.* R. 3.3(b).

169. *Id.* R. 1.6 cmt. 3.

170. *Id.* R. 1.6 cmt. 4.

171. HAZARD & HODES, *supra* note 24, at 9-60. For a critique of the inclusion of information in the public domain under the definition of confidentiality, see Allan W. Vestal, *Former Client Censorship of Academic Scholarship*, 43 SYRACUSE L. REV. 1247, 1247-48 (1992) (describing a former client who threatened to report the author to the disciplinary authorities for publishing an article that contained public information about a case). For cases involving the disclosure of information generally known, see, for example, *In re* Anonymous, 654 N.E.2d 1128, 1129 (Ind. 1995) (finding that lawyer violated Rule 1.6 by disclosing information relating to representation of client, even though information "was readily available from public sources and not confidential in nature"); Lawyer Disciplinary Bd. v. McGraw, 461 S.E.2d 850, 851 (W. Va. 1995) ("The ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it."); State Bar of Ariz. Comm. on the Rules of Prof'l Conduct, Op. 2000-11 (2000) ("[T]he lawyer is required to maintain the confidentiality of information relating to representation even if the information is a matter of public record."). *But cf. In re* Sellers, 669 So. 2d 1204, 1206 (La. 1996) (finding that lawyer violated Rule 4.1 by failing to disclose existence of collateral mortgage to third party because "mortgage was filed in the public record, disclosure of its existence could not be a confidential communication, and was not prohibited by Rule 1.6"); *In re* Detention of Williams, 22 P.3d 283, 286 (Wash. Ct. App. 2001) (stating that the fact that client gave social security records to lawyer did not render such documents "confidential" under Rule 1.6 and therefore "undiscoverable"). To contrast the public domain inclusion, see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §

While this appears to be straightforward, the term "relating to the representation," as used in 1.6(a), raises interesting questions because this analysis assumes that immigration status is not "relevant" to the litigation. Thus, in order to fully understand the lawyer's confidentiality obligations, the distinction between "relating to the representation" and "relevant to the litigation" needs to be explored.

In this context, the two terms are quite distinct and, based upon both the plain meaning of the terms as well as how they are applied in this context, "relating to the representation" should be construed as much broader than "relevant to the litigation." In terms of the plain meaning, the representation of a client entails all of the work that a lawyer does on behalf of a client to achieve their identified goals, whereas litigation refers only to the scope of the action that was filed in court. Thus, issues relating to the representation will inevitably be broader than issues relating only to the litigation.

The import of this distinction becomes clear when applied to lawyers representing undocumented workers. In order to be effective in representing immigrant clients in employment-related litigation, lawyers need to know the workers' status[172] since status impacts the array of remedies available to the client. Once the lawyer knows a client's status, she can, if the client desires, craft the case in a way that will make immigration status not relevant.[173] For example, if the worker has a claim under the NLRA for wrongful discharge, she can pursue all relief except back-pay and reinstatement. In this context, the information must be considered related to the representation, for without it, the lawyer can not effectively represent the client. However, once armed with the information, the lawyer can make strategic decisions about ways to pursue the litigation so that status is not relevant to the legal claims presented. Thus, pursuant to Rule 1.6(a), as applied in this context, the term "relating to the representation" is broader than "relevant to the litigation."

Assuming that status, and the related questions, are confidential, does Rule 1.6 permit a lawyer to disclose this information? Pursuant to Rule 1.6, in order for lawyers to be permitted to disclose confidential client information, lawyers either need express or implied authorization to do so, unless one of the exceptions to the confidentiality rule applies. Both informed consent and implied authorization are part of the very definition of confidentiality under 1.6(a).[174] The rule permits disclosure of client information when "impliedly

59 (2000), under which information that is generally known is not confidential.

172. For these purposes, the term "status" includes the fact of lawful immigration documentation as well as the manner of entry and of obtaining employment. Because information about lawful immigration documentation, manner of entry and of obtaining employment all impact the legal relief a client may be entitled to, such information should be considered related to the proceedings.

173. *See* Schnapper, *supra* note 151, at 54 (explaining that plaintiffs should be able to avoid discovery requests about immigration status by limiting the relief requested).

174. *See* HAZARD & HODES, *supra* note 24, at 9-6 to 9-7.

authorized . . . to carry out the representation."[175] Comments to the rule state that impliedly authorized disclosures depend upon the circumstances of the particular case, but may include the admission of a fact that cannot properly be denied, a disclosure that facilitates the satisfactory resolution of a matter, or the disclosure of information to other lawyers in the firm.[176]

However, implied authorization does not include information that adversely affects the material interests of the client,[177] privileged information or information that would prejudice the client.[178] Given the grave risks that accompany disclosure of status, entry or employment information, and the potential privilege involved, attorneys representing undocumented workers in employment-related litigation are highly unlikely to be impliedly authorized to disclose this information.

Pursuant to Rule 1.6(a), "lawyer[s] shall not reveal information relating to the representation of a client unless the client gives informed consent."[179] Informed consent is defined in the rules as an "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[180] While there may be some instances in which a client makes a strategic decision to disclose,[181] the more common scenario will likely be a desire to keep the information confidential.

In the absence of implied authorization or informed consent to disclose, Rule 1.6 mandates that the information be kept confidential unless one of six express exceptions applies.[182] In interpreting Rule 1.6 and its exceptions, the

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175. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2007).

176. *Id.* R. 1.6 cmt. 5; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 61 (2000) (permitting disclosures that advance the interests of clients).

177. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 01-421 (2001).

178. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 98-411 (1998).

179. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2007).

180. *Id.* R. 1.0(e). This definition was added to the terminology section of the rules in 2002 upon the recommendation of the Ethics 2000 Commission and replaced the prior term which was "consent after consultation." HAZARD & HODES, *supra* note 24, at 2A-6 to 2A-7. ABA's House of Delegates accepted this recommendation, not as a substantive change, but as a way to adopt a more frequently used and easily understood term. *See* ABA Report to the House of Delegates, No. 401 (Aug. 2001), Model Rule 1.6, Reporter's Explanation of Changes.

181. See *infra* Part V for a discussion of those instances in which clients might want to strategically disclose and the corresponding obligations of the lawyer in that context.

182. A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure

rules provide that disclosures are to be limited in order to avoid divulging information that ought to remain confidential.[183] And, the exceptions to the rule simply permit, but do not require, disclosure.[184]

In the absence of a court order,[185] none of the six exceptions permits the disclosure of immigration status and related client actions. There is no potential for death or substantial bodily harm;[186] the issues do not involve the lawyer's compliance with the rules of professional conduct;[187] and there is no dispute between the lawyer and the client related to the representation.[188] Adopted by the ABA House of Delegates in 2003, the remaining two exceptions involve

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> legal advice about the lawyer's compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or (6) to comply with other law or a court order.

MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2007). Rule 1.6(b)(2) and (b)(3) were added in 2003 and are not yet in effect in many states. HAZARD & HODES, *supra* note 24, at 9-7 to 9-8.

183. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 14 (2007) (explaining the lawyer may disclose information only "to the extent" the lawyer "reasonably believes necessary" to carry out the purpose of the exception).

184. *Id.* R. 1.6 cmt. 15. However, some states have adopted versions of Rule 1.6 that use the term "shall" as opposed to "may" when addressing the exception to the general rule of confidentiality. *See, e.g.*, ILL. RULES OF PROF'L CONDUCT R. 1.6(b) (2007) ("A lawyer shall reveal information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm."); WIS. RULES OF PROF'L CONDUCT FOR ATTORNEYS R. 1.6 (2007) ("A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another."); N.M. RULES OF PROF'L CONDUCT R. 1.6 (B) (2007) ("To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, a lawyer should reveal such information to the extent the lawyer reasonably believes necessary."); PA. PROF'L CONDUCT R. 1.6(b) (2007) ("A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.").

185. If a court orders disclosure and all of the lawyer's challenges to that order have failed, then an otherwise permissive disclosure option becomes mandatory. *See* HAZARD & HODES, *supra* note 24, at 9-109.

186. Rule 1.6(b) states, "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm . . . ." MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2007).

187. Rule 1.6(b) states, "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: . . . (4) to secure legal advice about the lawyer's compliance with these Rules . . . ." *Id.* R. 1.6(b)(4).

> 188. A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: . . . (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client . . . .

Id. R. 1.6(b)(5).

disclosure to prevent a client from committing a crime or fraud resulting in substantial injury to the financial interests of a third party,[189] or to mitigate damages that flow from such crime or fraud.[190] These exceptions appear inapplicable to the undocumented-worker dilemma, because there is no substantial injury to the financial interests of a third party.[191] Additionally, in order for this exception to apply, the lawyer has to be involved in the client's crime or fraud.[192] It is unlikely that mere representation of an undocumented worker in a civil-employment matter would rise to the level of involvement contemplated by this exception.

Thus, pursuant to the Model Rules, assuming that immigration status constitutes confidential information under Rule 1.6 and that no exceptions apply, the lawyer must not disclose this information unless another rule mandates disclosure. Rules 3.3(b) and 4.1(b) both have mandatory disclosure provisions. Rule 3.3(b) states, "A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the

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189. A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: . . . (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services . . . .

Id. R. 1.6(b)(2). Scholars have noted that the scope of the rule is narrowed by two limitations: it must be the client's crime or fraud that threatens another with financial ruin and it only applies if the client has used or is using the lawyer's services in furtherance of the scheme. HAZARD & HODES, *supra* note 24, at 9-8.

190. A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: . . . (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(3) (2007). For a description of the history leading to the 2003 adoption of (b)(2) and (b)(3), see HAZARD & HODES, *supra* note 24, at 9-89 to 9-97.

191. Arguably, the government is losing some tax dollars if undocumented workers fail to pay taxes, but this incorrectly assumes that all undocumented workers fail to pay taxes, and, even if some portion of workers do not, it would be hard to argue that this shortfall is bringing the government to the brink of financial ruin. *See* Karen Brooks, *The Give-and-Take of Illegal Immigration Study: Their Taxes Lift State, But Services Drain Counties*, DALLAS MORNING NEWS, Dec. 8, 2006, at 1A (citing to a report that found that, while illegal immigrants cost Texas $1.16 billion in services, they pay $1.58 billion in taxes and fees every year for a profit of $420 million); Shikha Dalmia, *Immigrants Contribute More to the Economy Than They Take—(Illegal Immigrants Pay)*, L.A. BUS. J., May 22, 2006, at 51 (stating that eight million of the approximately twelve million illegal aliens in the United States file personal income taxes); Eduardo Porter, *Here Illegally, Working Hard and Paying Taxes*, N.Y. TIMES, June 19, 2006, at A1 (explaining that many of the undocumented workers in the United States who get regular pay checks pay taxes).

192. Both Rule 1.6(b)(2) and Rule 1.6(b)(3) require lawyer involvement. Thus, if a lawyer simply discovers a client's planned or ongoing fraud, she is not permitted to disclose information despite a desire to do so. HAZARD & HODES, *supra* note 24, at 9-91.

proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."[193] Rule 3.3(b) places upon lawyers an obligation to disclose certain criminal or fraudulent conduct.[194] While this requirement creates a tension between a lawyer's duty to her client and her duty to the tribunal, it is the duty to the tribunal and the administration of justice that is favored in the balance.[195] The obligation to disclose this information applies even if the information would otherwise be protected by Rule 1.6.[196] Despite the rule's broad reach, there are some limits to the rule's initial application. First, the rule governs only the conduct of a lawyer who is representing a client in adjudicative, and ancillary, proceedings.[197] Furthermore, the lawyer must

193. MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2007). In 1983, when the Model Rules of Professional Conduct were first promulgated, there were four specific duties of candor to the tribunal set out in Rule 3.3(a). RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY 643 (2005). The second duty required a lawyer to disclose information when silence would be tantamount to assisting a client's crime or fraud. *Id.* Based upon the recommendations of the Ethics 2000 Commission, Rule 3.3 was revised. HAZARD & HODES, *supra* note 24, at 29-5. The duty to disclose information when silence would amount to assisting a client's crime or fraud was eliminated and a more general duty was imposed under Rule 3.3(b). *Id.*

For an explanation of the specific reasons for the changes made by the Ethics 2000 Commission, see Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 465-66 (2002), which explains:

> The Commission deleted paragraph (a)(2) of the present rule, and addressed the lawyer's duty to disclose crime or fraud in connection with an adjudicative proceeding more generally in a new paragraph (b). . . . The new paragraph (b) provides that a lawyer who knows that any person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding, shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A new comment identifies the type of conduct sought to be reached under the rule: 'bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official, or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so.' New commentary describes remedial measures short of disclosure, including remonstrating with the client, consulting with the client about the lawyer's duty of candor to the tribunal, and withdrawal from the representation.

194. MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2007)*; see* HAZARD & HODES, *supra* note 24, at 29-6 ("Lawyers are not all-purpose 'truth police'; the duties of candor are therefore imposed only where the lawyer can be said to have contributed [even if unwittingly] to the court's being led astray.").

195. According to Professors Hazard and Hodes, "In these situations, the conception of lawyer as 'officer of the court' is given its maximum force." HAZARD & HODES, *supra* note 24, at 29-4.

196. MODEL RULES OF PROF'L CONDUCT R. 3.3(c) (2007) ("The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.").

197. *Id.* R. 3.3 cmt. 1 ("This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. . . . It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition.").

have knowledge of the criminal or fraudulent conduct, and the information must be related to the proceeding.[198]

Rule 4.1(b) states that "[i]n the course of representing a client a lawyer shall not knowingly: . . . fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."[199] A companion to Rule 4.1(a), which prohibits a lawyer from lying, Rule 4.1(b) requires a lawyer to correct material misstatements or deliberate omissions of others under certain circumstances.[200] Designed to address a lawyer's silence in the face of a client's ongoing crime or fraud, Rule 4.1(a) places an affirmative obligation upon the lawyer to disclose information where the disclosure is necessary to avoid misleading a third party.[201] There are some specific substantive limits on Rule 4.1's application. First, the disclosure obligations do not apply unless the misstatement or omission is material to the proceeding.[202] Second, the disclosure must be necessary to avoid assisting a criminal or fraudulent act.[203] Finally, the rule applies only if disclosure is permitted under Rule 1.6 and is not allowed where doing so would violate confidentiality obligations under Rule 1.6.[204]

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198. *Id.* R. 3.3 cmt. 12.

199. *Id.* R. 4.1. For a description of the changes made to Rule 4.1 by the Ethics 2000 Commission, see Love, *supra* note 193, at 466, which states:

> "The Commission made no change in the text of Rule 4.1 ('Truthfulness in Statements to Others') but clarified the duty imposed by paragraph (b) (a lawyer may not knowingly 'fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure would be prohibited by Rule 1.6'). This duty is identified in commentary as a 'specific application' of the general duty set forth in Rule 1.2(d), . . . and it is most frequently invoked where a client's wrong-doing involves a lie or misrepresentation to a third party. The commentary explains the remedial measures the lawyer may be required to take to avoid assisting client crime or fraud, subject to the lawyer's duty of confidentiality to the client under Rule 1.6.

200. HAZARD & HODES, *supra* note 24, at 37-3.

201. In some jurisdictions, Rule 4.1(b) may have broader application as some jurisdictions have defined fraud and misrepresentation to include "mere nonfeasance," a "failure to disclose material facts even absent prior creation of the misapprehension." *Id.* at 37-12.

202. *Id.* at 37-8.

203. MODEL RULES OF PROF'L CONDUCT R. 4.1(b) (2007). For examples of cases in which lawyers have either directly participated in a client's crime or fraud or advised the client to commit a crime or fraud, see *supra* notes 48-49 and accompanying text. For examples of cases in which lawyers are merely aware that the client has committed or is committing a crime or fraud, see *supra* note 51 and accompanying text.

204. MODEL RULES OF PROF'L CONDUCT R. 4.1(b) (2007). Rule 4.1(b) does not require disclosure of confidential information even to avoid assisting a client's crime or fraud. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-375 (1993) (opining that a lawyer representing a client in a bank examination is under no duty to disclose weaknesses in client's case or otherwise reveal confidential information to third parties, unless the lawyer becomes a party to the fraud).

This final limitation on Rule 4.1 is not without detractors. Professors Hazard and Hodes argue that Rule 4.1(b) does not comport with the other model rules that address fraud and misrepresentation, including Rules 1.2(d), 1.6(b), and 3.3(a), in that Rule 4.1(b) appears to

In analyzing the disclosure obligations under both Rule 3.3(b) and Rule 4.1(b), the applicable limitations can be grouped into three distinct categories: the relationship between the criminal or fraudulent act and the pending case; the relationship between the lawyer's actions and the client's alleged crime or fraud; and the relationship between the mandatory-disclosure rules and the confidentiality rules.

The categorization of these limitations gives rise to a series of questions regarding the applicability of disclosure obligations under both rules. First, do the alleged criminal or fraudulent acts have the requisite connection to the pending action? Pursuant to Rule 3.3(b), only information "related to the proceedings" must be disclosed to the tribunal.[205] The use of the term "related to" under Rule 3.3(b) is very different from the use of the term "related to" under Rule 1.6(a).[206] The comments to Rule 3.3(b) help to define "related to the proceedings" by specifically identifying "criminal or fraudulent conduct that undermines the integrity of the adjudicative process."[207] The comments further define the term by identifying the following conduct that would be implicated by Rule 3.3(b): "bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participants in the proceeding; unlawfully destroying or concealing documents or other evidence; or failing to disclose information to the tribunal when required by law to do

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give automatic preference to the confidentiality provisions of Rule 1.6 and neglects the complexity of the relationship between the confidentiality and justice obligations. HAZARD & HODES, *supra* note 24, at 37-3 to 37-4. The authors argue for a saving interpretation of the rules:

> Silence assists client fraud in situations to which Rule 4.1(b) applies; the lawyer must therefore speak up to avoid providing the assistance that is forbidden by Rule 1.2(d). According to Rule 4.1(b), the lawyer may not speak *if* prevented from doing so by Rule 1.6; however, Rule 1.6 does *not* prevent her from speaking, *because she is required by law—Rule 1.2(d)—to speak*.

Id. at 37-14. Thus, the action would fall under the "other law" exception to Rule 1.6(b)(6) and disclosure would be permitted. *Id.* at 37-15. The authors believe that a lawyer can "maintain total confidentiality only when he has not yet drafted any offending papers and has not advanced his client's scheme by his silence." *Id.* In this situation, "the lawyer has knowledge only of a possible future fraud and may not warn the potential victim under any version of Rule 1.6." *Id*.

Several jurisdictions have amended Rule 4.1(b) to require disclosure of information even if it is protected by Rule 1.6. *See, e.g.*, THE MD. LAWYERS' RULES OF PROF'L CONDUCT R. 4.1 (2002); N.J. RULES OF PROF'L CONDUCT R. 4.1 (2006). *See generally* ANNOTATED MODEL RULES, *supra* note 159, at 415; Morgan Cloud, *Privileges Lost? Privileges Retained?*, 69 TENN. L. REV. 65, 92 (2001) (asserting that many dilemmas created by "contradictory and far from self-explanatory commands" of Rules 1.2, 1.6, 1.8, 1.16, 3.3, and 4.1 could be "resolved by permitting disclosures to prevent or rectify harms suffered by third parties because of crimes or frauds committed by the lawyers' clients").

205. MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2007).

206. For an analysis of the term "relating to" under Rule 1.6(a), see *supra* notes 169-73 and accompanying text.

207. MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 12 (2007).

so."[208] Rule 3.3(b) is concerned with the rules of the game and the mechanics of trial, as opposed to the substance of the underlying claims.[209] When applied to the undocumented-worker context, criminal or fraudulent acts that the undocumented worker may have engaged in involving his or her entry or employment in the United States do not "relate to the proceedings" nor undermine the integrity of the adjudicative process as proscribed by Rule 3.3(b). Thus, the lawyer representing the undocumented worker would not have an obligation to disclose to the tribunal.

Pursuant to Rule 4.1(b), only "material facts" have to be disclosed to third parties.[210] Given that the application of these rules arises in instances where immigration status has been determined not to be relevant to the underlying proceedings, it is extremely likely that the disclosure provisions of 4.1(b) do not apply. On the other hand, the term "material" arguably could be construed more broadly than "relevant." If this were the case, then the lawyer would have to proceed to analyze the additional limitations imposed by Rules 3.3(b) and 4.1(b).

Second, are the lawyer's actions sufficiently related to the client's alleged crime or fraud? Rule 4.1(b) states that a lawyer shall disclose otherwise confidential information when "necessary to avoid assisting" a crime or fraud.[211] Thus, the question raised under Rule 4.1(b) is whether representing an undocumented immigrant in employment litigation is "assisting" the client in a crime or fraud. As analyzed in Part II, it is unlikely that mere representation of an undocumented worker in an employment-related civil matter would amount to assisting in the commission or furtherance of a crime.[212]

Finally, each rule references its interrelation with Rule 1.6, meaning that a lawyer must also interpret the application of confidentiality rules. Rule 3.3(c) expressly states that the disclosure of information is required even if the information would otherwise be protected by Rule 1.6,[213] while Rule 4.1(b)

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208. *Id.*

209. Rule 3.3(b) deals with other frauds outside of the area of evidentiary frauds, such as bribes, intimidation or unlawful communications with a witness, juror, court official or other participant in the proceeding, unlawfully [sic] destruction or concealment of documents or other evidence or failure to disclose information to the tribunal when required by law to do so.

ROTUNDA & DZIENKOWSKI, *supra* note 193, at 664.

210. MODEL RULES OF PROF'L CONDUCT R. 4.1(b) (2007); *see also* HAZARD & HODES, *supra* note 24, at 37-8 ("[R]epresentations that do not go to the heart of the matter may be considered to be 'not material.'"). For an argument that lawyers should not be required to correct immaterial falsehoods that have no bearing on the issues before the court, even if made in the courtroom setting, see W. William Hodes, *Two Cheers for Lying (About Immaterial Matters)*, PROF. LAWYER, May 1994, at 4.

211. MODEL RULES OF PROF'L CONDUCT R. 4.1(b) (2007).

212. *See supra* Part II.

213. MODEL RULES OF PROF'L CONDUCT R. 3.3(c) (2007).

states that the lawyer may resist disclosure of material information if it is otherwise protected by Rule 1.6.[214]

In order to understand the contours of a lawyer's ethical obligations, it is helpful to apply these rules to the same hypotheticals employed in Part I.

1. *Hypothetical One: Client Enters with Proper Immigration Documentation and Is Not Asked to Provide Work Authorization Papers*

In the first hypothetical, assume a client enters with a lawful visa, but does not obtain proper work authorization. The employer hires the employee without asking for work-authorization papers and thereafter fails to pay the client for work performed. Does a lawyer who represents this client in a wage-and-hour claim have an obligation to disclose any information to the tribunal under Rule 3.3(b) or to a third party under Rule 4.1(b)? In this instance, the client has not committed a crime; he entered lawfully, and working without valid work-authorization papers is not itself a crime.[215] Further, since the employer did not ask about the client's immigration status, it is unlikely that the client's actions would be construed as fraudulent.[216] Under these facts, there is no obligation to disclose under Rule 3.3(b), because the client has not engaged, is not currently engaging, and does not intend to engage in criminal or fraudulent activity. There is also no obligation to disclose under Rule 4.1(b), because the obligation to disclose exists only when such disclosure is necessary to avoid assisting in a criminal or fraudulent act of the client. If the client has not engaged in a crime or fraud, then there is no obligation to disclose.

2. *Hypothetical Two: Client Enters Without Proper Documentation and Is Not Asked to Provide Work Authorization Papers*

In the second hypothetical, the client enters the country by evading inspection. The employer hires the client without asking for papers and then fails to pay the client for work performed. The lawyer agrees to represent the client in a wage-and-hour case. In this situation does the lawyer have an obligation to disclose the client's crime or fraud to third parties under Rule 4.1(b) or to the tribunal under Rule 3.3(b)?

In this example, the client did commit the crime of entry without

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214. *Id.* R. 4.1(b).

215. The employer could be liable, both civilly and criminally, for not obtaining an I-9 form and not ensuring that the employee was lawfully permitted to work. *See, e.g.*, 8 U.S.C. § 1324a(e)(4)(A) (2000) (subjecting to civil fines employers who hire, recruit or refer for a fee, or employ aliens knowing the aliens are unauthorized aliens); *id.* § 1324a(f)(1) (subjecting to criminal penalties employers who hire, recruit or refer for a fee, or employ aliens knowing the aliens are unauthorized aliens).

216. For a response to the argument that holding oneself out for work is an implicit representation of proper authorization to work and thus constitutes fraud, see *supra* note 56.

inspection,[217] which courts have found to be a noncontinuing crime, complete upon entry.[218] However, the employee did not commit a crime or engage in fraud related to the employment because the employer did not ask for papers from the employee.[219] Since the client has committed a crime, the next inquiry is whether the crime is a "material fact" or "related to the proceedings." Since both documented and undocumented workers are entitled to compensation for hours worked but not compensated,[220] information related to the client's entry into the country would not be relevant to the wage-and-hour claims.[221] If status is not relevant to the claim, the mode of entry or the method of obtaining a job are unlikely to be considered "material facts" as required by Rule 4.1(b). Further, the unlawful mode of entry into the country, in and of itself, does not relate to the proceedings nor undermine the adjudicative process as required by Rule 3.3(b). Thus, disclosure to a third party or to the tribunal would not be mandated.

3. *Hypothetical Three: Client Enters Lawfully but Uses a False Social Security Number to Obtain Employment*

In the third hypothetical, the client enters lawfully, but uses a fraudulent Social Security number to obtain employment and the employer thereafter fails to pay him for hours worked. The analysis in this hypothetical is very similar to hypothetical two. In this case, if the lawyer represents this client in a wage-and-hour claim, does the lawyer have any disclosure obligations to third parties under Rule 4.1(b) or to the tribunal under Rule 3.3(b)? As described above, the

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217. *See* 8 U.S.C. § 1325(a) (2000).

218. United States v. Rincon-Jimenez, 595 F.2d 1192, 1193-94 (9th Cir. 1979) (finding that a violation of 8 U.S.C. § 1325 is consummated at the time of entering the United States and is not considered a continuing offense).

219. The employer, on the other hand, may face criminal or civil liability. *See supra* note 151 and accompanying text.

220. *See, e.g.*, Gabu Than Chellen v. John Pickle Co., 446 F. Supp. 2d 1247, 1276-78 (N.D. Okla. 2006); Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 320-25 (D.N.J. 2005); Martinez v. Mecca Farms, Inc., 213 F.R.D. 601, 604-05 (S.D. Fla. 2002); Gomez v. Falco, 792 N.Y.S.2d 769, 769 (App. Div. 2004).

221. Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499, 500-02 (W.D. Mich. 2005) (finding that immigration status is not relevant to damages for unpaid wages, nor to standing, class certification, or credibility); Cortez v. Medina's Landscaping, No. 00 C 6320, 2002 U.S. Dist. LEXIS 18831, at *1-*3 (N.D. Ill. Sept. 30, 2002) (denying a motion to compel discovery concerning the plaintiff's citizenship status in a case where unpaid wages for work, but not back-pay, is at issue); Flores v. Amigon, 233 F. Supp. 2d 462 (E.D.N.Y. 2002) (determining that immigration status is undiscoverable in a claim for unpaid wages and overtime for time worked under the Fair Labor Standards Act); Zeng Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192-93 (S.D.N.Y. 2002) (denying discovery of plaintiff's immigration status on the grounds that it is not relevant to a claim for unpaid wages for time worked); Llerena v. 302 W. 12th St. Condo., 799 N.Y.S.2d 161 (Sup. Ct. 2004) (refusing to compel evidence relating to immigration status in a case involving tort and state labor law remedies for unpaid wages for time worked).

client in this case has committed a completed crime. It is a crime to use a false Social Security number to obtain benefits,[222] and the crime is completed when the false representation is made.[223]

The crime and/or fraud of using a false Social Security number to obtain work is more closely related to the employment, but the ethical rules require that it be a "material fact" or "related to the proceedings" in order for there to be any disclosure obligations. Again, courts have found that both documented and undocumented workers are entitled to compensation for hours worked.[224] Thus, status is unlikely to be considered a material fact, and even if it were found to be a "material fact" pursuant to Rule 4.1(b), there would still need to be a connection between the lawyer's assistance on the case and the client's crime or fraud for third-party disclosure to be required.

The question then becomes: Does the lawyer's representation in the wage-and-hour case assist the client in the commission or furtherance of using a false Social Security number? On the one hand, it could be argued that a suit for wages assists in obtaining the benefits of the false representation. However, the nexus between the use of fraudulent papers and legal assistance to recover wages is quite tenuous, since the crime or fraud of using the false Social Security number is completed when the number is used to obtain employment. Further, the law currently permits undocumented workers, even if they use false papers to obtain employment, to recover wages for completed work. Thus, even if the lawyer's representation in this context is indirectly being used to recover money that could not have been earned absent the crime or fraud, lawyers still must balance this against their duties of loyalty, confidentiality, and zealous service.[225] Thus, so long as the representation is within the bounds of the law, it seems problematic to interpret the rules such that lawyers would be required to consider the ways in which their representation might indirectly encourage behavior that is offensive or illegal.

Finally, regardless of the analysis above, Rule 4.1 prohibits a lawyer from disclosing material information to third parties if the information is otherwise protected by Rule 1.6. As explained previously, none of the express exceptions to Rule 1.6 are likely to apply in this context.[226] Thus, disclosure to a third party under Rule 4.1 would be prohibited.

Similarly, disclosure to a tribunal, in most instances, would not be required under Rule 3.3(b). In and of itself, the use of a fraudulent Social Security

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222. 42 U.S.C. §§ 408(a)(7)-(8) (2000). A person can be fined, or imprisoned for not more than five years, or both, for such offense. *Id.* § 408(a).

223. United States v. Payne, 978 F.2d 1177, 1180 (10th Cir. 1992) (finding that falsely representing a Social Security number is not a continuing offense); United States v. Joseph, 765 F. Supp. 326, 330 (E.D. La. 1991) (finding that the crime of using a false Social Security number with the intent to deceive is completed when the false representation is made).

224. *See* cases cited *supra* note 220.

225. HAZARD & HODES, *supra* note 24 at 2-6 to 2-7.

226. *See supra* notes 182-92 and accompanying text.

number to obtain a job may subject the client to criminal and civil liability, but it does not relate to the proceedings nor undermine the integrity of the adjudicative process as those terms are defined in Rule 3.3(b). If the client decides to take steps related to the proceedings that would undermine the adjudicative process, such as lying under oath or presenting false documents, then the lawyer would have to follow the disclosure obligations set forth in Rule 3.3(b).

4. *Hypothetical Four: Clients Enters Lawfully but Uses and Still Possesses False Immigration Documents to Obtain Employment*

In the final hypothetical, the client is committing an ongoing crime that is related to the employment situation. The client enters lawfully, but thereafter uses false immigration documents to obtain employment and still possesses the documents. The employee seeks the lawyer's assistance for a discriminatory termination. The lawyer agrees to represent the client after advising the client that possession of false immigration documents is unlawful and explaining to the client that she will not seek reinstatement or back-pay in the claim.[227] Does the lawyer have an obligation to disclose the information about false work papers to a third party under Rule 4.1(b) or to the tribunal under Rule 3.3(b)?

Possession of false immigration documents to obtain work is likely to be considered a continuing crime.[228] Since these are cases in which immigration status has been determined not to be relevant to the underlying proceedings, the lawyer would be barred from disclosing it to third parties under Rule 4.1(b) because it is not a "material" fact.[229] Even if it were determined that status was related or material to the proceeding, Rule 4.1 still requires there to be a relationship between the crime or fraud and the lawyer's actions. Specifically, the lawyer shall disclose confidential information only when necessary to avoid assisting in the commission or furtherance of the client's crime or fraud. So long as the lawyer advises the client that possession of such documents is illegal, does not seek reinstatement or back-pay, and seeks only compensatory damages, it is difficult to construe the lawyer's representation of the client in a claim for discriminatory termination as furthering the client's use of false papers to obtain employment. Further, disclosure under Rule 4.1(b) to third parties would be barred because the related information is confidential under Rule 1.6 and no exceptions apply.

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227. *See supra* notes 69-71 and accompanying text.

228. *See supra* notes 42-45 and accompanying text; *see also* 18 U.S.C. § 1546(a) (Supp. V 2006).

229. If status is relevant, as it may be in some discriminatory-termination cases, or in some aspects of a discriminatory-termination case (e.g., damages), then status could be required to be disclosed in discovery and at trial unless the employee asserts a privilege. *See supra* Part III.A.

Pursuant to Rule 3.3(b), is the use of false immigration documents to obtain work "related to the proceedings"? As discussed above in hypothetical three, the use of false immigration documents to obtain work might subject the client to criminal and civil liability, but it does not, by itself, relate to the proceedings nor undermine the integrity of the adjudicative process as those terms are defined in Rule 3.3(b). If the client decided to make false statements under oath or present false evidence, and the lawyer was unable to dissuade the client, the lawyer would be required to comply with the disclosure requirements set forth in 3.3(b).

Thus, Rule 4.1(b) does not appear to mandate disclosure to third parties in any instance because of the Rule 1.6 limitations. Disclosure to a tribunal under Rule 3.3(b) would only be mandated if status were determined to be "related to the proceedings." Given the meaning of "related to the proceedings" and the fact that these issues will arise only where status is found not relevant to the underlying claim, a mandated disclosure to the tribunal pursuant to Rule 3.3(b) would seem to occur only if the client took some subsequent action in the context of the proceedings that affected the integrity of the adjudicative process, such as lying on the stand or presenting false evidence. However, if counseled appropriately, disclosure to the tribunal under Rule 3.3(b) should not be necessary.

Though the hypotheticals above focus on the ethical obligations of lawyers representing employees, the ethical rules also impact lawyers representing employers.[230] For a lawyer representing an employer, ethical issues are most likely to arise when the lawyer inquires about the employee's immigration status, either during discovery or at trial. In order to assess the ethical limitation, the lawyer first needs to assess whether immigration status is relevant to the underlying litigation. If the question of relevance has not been decided by a court, or if a court has decided that status is relevant, inquiry into the opposing party's immigration status would likely be permissible and ethical. If, however, immigration status is not relevant to the underlying litigation, several ethical rules might limit inquiry by the employer's attorney.

The first limitation stems from Rule 4.4(a) which states that "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person."[231] Where immigration status is not relevant, the question is whether the employer has a "substantial purpose" to inquire. Given the information's lack of substantive consequence to the litigation, the inquiry

230. In addition to ethical limitations, the employer may take action that raises the specter of potential criminal liability. For example, if the employer signed an I-9 form verifying that the employee was documented, but either knew, or had reason to know, that the employee lacked lawful status, the employer might subject himself to criminal liability for knowingly hiring an undocumented worker. *See* 8 U.S.C. § 1324a(a) (2000) (subjecting employers who violate IRCA to criminal prosecution).

231. MODEL RULES OF PROF'L CONDUCT R. 4.4(a) (2007).

likely lacks "substantial purpose" and instead is likely being used to gain unfair advantage in the litigation. Further, Rule 8.4(d) states that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."[232] The comments help define the parameters of this rule and state that "[a] lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice."[233] When immigration status is not considered relevant, intentional inquiry into such information may reflect bias or prejudice based upon national origin. And, if the inquiry deters the employee from proceeding with her claims, it could be construed as prejudicial to the administration of justice.

A second, but somewhat related, limitation can be found in Rule 3.4(d), which states that a lawyer shall not, "in pretrial procedure, make a frivolous discovery request."[234] Again, if a court has determined that immigration status is not relevant to the underlying litigation, inquiry by the employer's attorney as to the employee's immigration status could be viewed as a frivolous discovery request under Rule 3.4(d).

A third limitation involves the use of threats of criminal prosecution as a way to gain advantage in a civil action. This could happen expressly if the employer threatens to report the worker to police or immigration officials. It could also arise implicitly through questions about immigration status in the civil case. Under the old Model Code of Professional Responsibility, a lawyer could not "present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."[235] While this prohibition does not expressly exist in the Model Rules of Professional Conduct,[236] there are, nonetheless, limitations on the use of such a threat to

232. *Id.* R. 8.4(d).

233. *Id.* R. 8.4 cmt. 3. Further, while there is no explicit language in the rules themselves about harassment, the preamble to the Model Rules states that "[a] lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others." *Id.* pmbl. 5.

234. *Id.* R. 3.4(d).

235. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-105(A) (1980). Some states have retained the old Model Code approach. *See, e.g.*, CONN. RULES OF PROF'L CONDUCT R. 3.4(7) (1986); D.C. RULES OF PROF'L CONDUCT R. 8.4(g) (1990); ILL. RULES OF PROF'L CONDUCT R. 1.2(e) (1990); ME. BAR RULES R. 3.6(c) (1986); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 4.04(b)(1) (1989).

236. *See* HAZARD & HODES, *supra* note 24, at 40-8 (explaining that the omission was deliberate because its inclusion was viewed as redundant); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 718 (1986) (explaining that the drafters of the Model Rules deliberately omitted DR 7-105(A)'s language based upon the belief that "extortionate, fraudulent, or otherwise abusive threats were covered by other, more general prohibitions in the Model Rules and thus that there was no need to outlaw such threats specifically").

advance a civil claim.[237] Based upon a Formal Opinion of the ABA Committee on Ethics and Professional Responsibility, a threat to bring criminal charges to advance a civil claim

> would violate the Model Rules if the criminal wrongdoing were unrelated to the client's civil claim, if the lawyer did not believe both the civil claim and the potential criminal charges to be well-founded, or if the threat constituted an attempt to exert or suggest improper influence over the criminal process.[238]

In this context, since it has already been determined that immigration status is not relevant to the underlying litigation, immigration status may not be sufficiently related to the claim to insulate the lawyer from improper ethical conduct.[239] Further, in the absence of a relationship between the threat and the underlying claim, the actions of the employer's lawyer might be construed as extortion, which is a disciplinary offense under Rule 8.4.[240] The Model Penal Code defines extortion as obtaining the property of another through threats, including threats to accuse another of a criminal offense.[241] However, if the employer has an honest belief that the charges are well founded, the actions would not constitute extortion.[242] Thus, what the employer knew, or didn't know, might impact the analysis. In most instances, the employer would be inquiring about immigration status to gain an advantage in the litigation and thus would know, or believe, that the employee lacked legal status. If this were the case, the employer's actions would not likely rise to the level of extortion.

However, if the employer threatens criminal prosecution, without any

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237. For an exploration of when threatening criminal action may be an ethics violation, see ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-383 (1994) (examining whether a lawyer can use the threat of filing a disciplinary complaint or report against opposing counsel to obtain advantage in a civil case); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-363 (1992) (examining when a threat to bring criminal charges for the purpose of advancing a civil claim would violate the ethics rules).

238. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-363 (1992).

239. For a discussion of the purpose behind the relatedness requirement, see *id.* ("A relatedness requirement avoids exposure to the charge of compounding . . . . It also tends to ensure that negotiations will be focused on the true value of the civil claim, which presumably includes any criminal liability arising from the same facts or transaction, and discourages exploitation of extraneous matters that have nothing to do with evaluating that claim.").

240. MODEL RULES OF PROF'L CONDUCT R. 8.4 (2007) ("It is professional misconduct for a lawyer to: . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.").

241. MODEL PENAL CODE § 223.4(2) (2001).

242. While the lawyer's actions might not rise to the level of extortion, if the lawyer uses even a well-founded threat of criminal charges merely to harass a third person, the lawyer's actions could violate Rule 4.4(a), which states, "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person." MODEL RULES OF PROF'L CONDUCT R. 4.4(a) (2007); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-363 (1992).

actual intent to proceed with such a claim, the lawyer's actions could violate Rule 4.1, which imposes upon lawyers a duty to be truthful when dealing with others.[243] And, even if the lawyer's actions do not amount to extortion because they are based upon an honest belief that the charges are well founded, if his purpose in making the threat is merely to harass a third person, his actions could constitute a violation of Rule 4.4(a).[244]

In sum, disclosure obligations pursuant to the Model Rules will vary depending upon whether immigration status is relevant to the underlying proceedings. If status is relevant, the information will be disclosed during the course of the litigation unless a privilege applies. Undocumented workers may opt to claim their Fifth Amendment privilege against self-incrimination as opposed to risking disclosure of their status.[245] If status is not relevant to their underlying claim, disclosure to a third party pursuant to Rule 4.1(b) is prohibited since the information is confidential under Rule 1.6. Disclosure to a tribunal pursuant to Rule 3.3(b) is limited to those instances in which status is determined to be "related to the proceedings." Given that status is not relevant to the proceedings, if the client does not utilize that information in a way that undermines the integrity of the adjudicative process, then the lawyer will not be obligated to disclose the information to a tribunal. Finally, the ethical rules also may limit an employer's ability to inquire about an employee's immigration status. If the inquiry lacks "substantial purpose" or is merely a "frivolous" discovery request, the lawyer's actions may be impermissible. Further, a lawyer's actions may be ethically improper if the inquiry amounts to an implied threat of criminal prosecution and the criminal allegations are not related to the civil case. Thus, lawyers for both the employer and employee should be mindful of ethical limitations as they undertake representation in this context.

IV. STRATEGIC DECISION TO DISCLOSE

In the absence of permissive or mandatory disclosure pursuant to the ethical rules, lawyers might consider whether disclosure of immigration status would be strategically beneficial to the case. In such instances, what can and should lawyers do? To address this question, this Part will first examine the overall decision-making paradigm set forth in the Model Rules and then ask whether the disclosure of immigration status, pursuant to the rules, is a lawyer

243. MODEL RULES OF PROF'L CONDUCT R. 4.1 (2007) ("In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person . . . .").

244. *Id.* R. 4.4(a) ("[A] lawyer shall not us[e] means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . ."); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-363 (1992) ("A lawyer who uses even a well-founded threat of criminal charges merely to harass a third person violates Rule 4.4.").

245. For a description of the potential consequences to the plaintiff of claiming the Fifth Amendment privilege, see *supra* notes 159-64 and accompanying text.

or client decision. After analyzing this paradigm, this Part will examine how strategic disclosure decisions are affected by confidentiality rules. Finally, this Part will address the lawyer's counseling and communication obligations.

In most instances, disclosure of immigration status exposes the client to grave risks without any comparable benefit in return.[246] However, there may be some limited instances in which disclosure could work to a client's advantage. This advantage could play out in relation to the judge as well as the opposing party. For example, disclosing status up front might give your individual client more credibility before the judge: if the client is telling the truth about status, he or she is probably telling the truth about the issues in the pending litigation. Such disclosure would also serve to educate the judge and others about undocumented workers and their plight. In terms of the opposing party, if the client discloses early in the litigation, it shows that he or she is not afraid of the disclosure and thus takes away much of the opposing party's leverage in negotiations.[247] In terms of a trial strategy, a client's immigration status could be used as part of a theory of the case or a storytelling device to explain that even though this person is very vulnerable, he or she is seeking a legal remedy because the harm done was so great. Finally, for lawyers working closely with the immigrant day laborer community, disclosure could be used as an organizing tool to show that some individuals stepped forward, pursued relief even though they were afraid, and ultimately succeeded in court.

Assuming the lawyer believes that disclosure of immigration status might be beneficial to the client's case, who gets to make the ultimate decision about disclosure? Rule 1.2(a) states that "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."[248] As

246. *See supra* notes 9-11 and accompanying text (describing some of the potential dangers that could accompany disclosure of immigration status).

247. Some clients determine that money is more important to them than a deportation order because they are willing to go back and forth across the border. In such instances, what might be better for individual clients might not be better for the larger client community. While the possibility of differing interests of individual clients and the larger community raise interesting questions about the scope and nature of a lawyer's advice, such inquiry is beyond the scope of this Article.

248. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007). For a discussion of the historical development of ethical limitations on the allocation of decision-making authority, see Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049, 1053-57 (1984). For a description of the specific changes made to Rule 1.2(a) in 2002, see Love, *supra* note 193, explaining:

> The Commission was concerned that the current formulation sends conflicting signals: on the one hand it might be read to require consultation with the client before the lawyer takes any action; and on the other it suggests that the lawyer is not obliged to abide by the client's decisions with respect to the 'means,' as opposed to the 'objectives,' of the representation. After considering and rejecting a number of alternative formulations, the Commission decided to add a new sentence to clarify that '[a] lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation,' and to leave the resolution of disagreements with clients about means to be worked out within a framework

defined, the objectives of the representation are those decisions that directly affect the ultimate resolution of the case or the substantive rights of the client.[249] Means of the representation, on the other hand, refer to those decisions that are procedural or tactical in nature.[250] The rule is designed to allocate primary responsibility for decision making in these two categories, with clients making those decisions that relate to "objectives" and lawyers making those decisions that relate to "means," after consultation with the client.[251] Despite the attempt to distinguish between "objectives"[252] and "means,"[253] the rule does not always provide a lawyer clear guidance on which

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> defined by the law of agency, the right of the client to discharge the lawyer, and the right of the lawyer to withdraw from the representation if the lawyer has a fundamental disagreement with the client. To emphasize the lawyer's obligation to consult, a cross reference to Rule 1.4 ('Communication') was added to the text.

Id. at 447.

249. *See, e.g.*, Blanton v. Womancare Inc., 696 P.2d 645, 650-51 (Cal. 1985) (finding that decisions that would impair substantive rights differ from procedural decisions "both in the degree to which they affect the client's interest, and in the degree to which they involve matters of judgment which extend beyond technical competence"); Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 97-37 (1997) (holding that the decision about whether to join a third party in civil action is an issue relating to the objectives of representation and is therefore a matter for the client to decide). One scholar has described the attorney-client relationship as similar to a joint venture in which each venturer presumptively takes on certain tasks, but without a sharp dividing line between their responsibilities. Maute, *supra* note 248, at 1066-69.

250. ANNOTATED MODEL RULES, *supra* note 159, at 30-31.

251. HAZARD & HODES, *supra* note 24, at 5-13. For examples of cases distinguishing between "objectives" and "means," see United States v. Beebe, 180 U.S. 343, 352 (1901) (finding that decision whether to settle belongs to client rather than lawyer); Hawkeye-Sec. Ins. Co. v. Indemnity Ins. Co., 260 F.2d 361, 363 (10th Cir. 1958) (finding that decision whether to appeal belongs to client rather than lawyer). Failure to respect this allocation of decision-making responsibility constitutes a breach of professional responsibility on the part of the lawyer. *See, e.g.*, Silver v. State Bar, 528 P.2d 1157, 1161-62 (Cal. 1974) (lawyer disciplined for dismissing appeal without client's consent and with a view to his own gain); *In re* Stern, 406 A.2d 970, 972 (N.J. 1979) (lawyer disciplined for settling matter over client's objection); *In re* Paauwe, 654 P.2d 1117, 1120 (Or. 1982) (lawyer disciplined for appealing case without client consent).

252. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007). This rule is subject to a few limitations, such as the limitation that the objectives must be lawful. HAZARD & HODES, *supra* note 24, at 5-14. If, however, proper specific objectives are identified by the client and explained to the lawyer, a lawyer's failure to pursue them will constitute a violation of Rule 1.2(a). *See, e.g.*, People v. McCaffrey, 925 P.2d 269, 271 (Colo. 1996) (finding that lawyer's delay in filing suit until statute of limitations lapsed violated Rule 1.2(a)); *In re* Hagedorn, 725 N.E.2d 397, 399-400 (Ind. 2000) (holding that lawyer hired to assist clients in adopting a child failed to take steps to effectuate adoption, thereby violating Rules 1.1, 1.2(a), 1.3, and 1.4).

253. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007) ("A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation."). Thus, there may be circumstances in which the lawyer could make a decision that a particular means or objective would be approved by the client, in the absence of an explicit discussion. HAZARD & HODES, *supra* note 24, at 5-13 to 5-14. The choice of means is still subject to mandatory "consultation" with the client as provided for in Rule 1.4. *See* MODEL

decisions concern the objectives and which concern the means of the representation.[254] As such, Rule 1.2(a) has been subject to criticism,[255] and various scholars have proposed alternative models of decision making.[256]

RULES OF PROF'L CONDUCT R. 1.4 (2007).

254. *See* Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 324 (1987) ("[T]hat which is often thought to be an end might really be a means; that which is assumed to be just a means could be an end to a particular client."). This distinction will be difficult to adhere to where procedure begins to blend into substance. For example, some tactical decisions are so crucial to the litigation that they impact the objectives of the representation and clients will want to make the decision. HAZARD & HODES, *supra* note 24, at 5-14 to 5-14.1 ("[D]isagreement is especially likely where the lines between an 'objective' and 'means' to achieving that objective are most indistinct. In order to resolve certain commonly arising allocation questions of this sort, Rule 1.2(a) specifies important decisions that are to remain under the exclusive control of the client."). Given this blurring of the express delineation, Professors Hazard and Hodes have suggested that "[t]he more a decision marks a critical turning point in the representation, whether for tactical, strategic, economic, or even political and moral reasons, the more the lawyer should defer to the client." *Id.* at 5-17.

255. *See, e.g.*, DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 266-67 (1991) (criticizing courts and professional standards that allocate decisions regarding the "ends" of the representation to clients and those concerning the "means" to lawyers); DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 154 (1974) (suggesting a participatory model of client counseling in which clients are active decision makers in addressing their problems and share control and decision-making responsibility with the lawyer); Arnold I. Siegel, *Abandoning the Agency Model of the Lawyer-Client Relationship: A New Approach for Deciding Authority Disputes*, 69 NEB. L. REV. 473 (1990); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 43 (1979) (arguing that the distinction which purportedly gives the lawyer control over procedural and tactical decisions and clients control over the subject matter of the litigation is inappropriate).

256. BINDER ET AL., *supra* note 255, at 268 (proposing that lawyers should defer to clients "whenever a lawyer using 'such skill, prudence, and diligence as other members of the profession commonly possess and exercise,' would or should know that a pending decision is likely to have a *substantial legal or nonlegal impact on a client*"(quoting W. PROSSER & W.P. KEETON, THE LAW OF TORTS 185-93 (1984))). In terms of the technical or means-based decisions, Binder, Bergman and Price state that such issues are "generally for [the lawyer] alone to decide, even though they may have a substantial impact," unless that impact is "*beyond that normally associated with the exercise of lawyering skills and crafts.*" *Id.* at 270 (emphasis added). Finally, the authors explain that "[i]n counseling clients, lawyers should provide clients with a reasonable opportunity to identify and evaluate those alternatives and consequences that similarly situated clients usually find pivotal or pertinent." *Id.* at 275. ROSENTHAL, *supra* note 255, at 154 (suggesting a participatory model of client counseling in which clients are active decision makers in addressing their problems and share control and decision-making responsibility with the lawyer); Siegel, *supra* note 255, at 515-27 (proposing the development of an informed consent doctrine that would account for the interests of the client, lawyer, and the public).

Additionally, various authors have written about decision making between the lawyer and client in specific contexts. *See, e.g.*, Thomas F. Geraghty & Will Rhee, *Learning from Tragedy: Representing Children in Discretionary Transfer Hearings*, 33 WAKE FOREST L. REV. 595 (1988) (discussing decision making in the context of representing children); Ann Southworth, *Lawyer-Client Decisionmaking in Civil Rights and Poverty Practice: An Empirical Study of Lawyers' Norms*, 9 GEO. J. LEGAL ETHICS 1101, 1131-47 (1996)

So where does the disclosure of immigration status fall on the spectrum between objectives and means? Whether and when to disclose immigration status does not necessarily fall squarely into either definition, but could be categorized as either.[257] Assuming that one's client is an undocumented worker who is seeking relief in which immigration status is not relevant, disclosure of immigration status should not impact the ultimate resolution of the legal case and might be construed as a procedural or tactical decision. In those cases in which immigration status is relevant, disclosure could directly affect the ultimate resolution of the case or the substantive rights of the client.[258] Regardless of whether status is relevant or not, disclosure may have many collateral consequences. For example, the client may be at risk of criminal prosecution, deportation, or being barred from reentry into the United States.[259] In terms of the litigation, while disclosure may not ultimately determine the merits of the litigation, it could, in certain contexts, result in dismissal of the

(examining lawyer-client decision making in the context of poverty law and civil rights practices); Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1 (1998) (exploring the attorney-client decision-making paradigm in the context of criminal defense); Tracy N. Zlock, *The Native American Tribe as a Client: An Ethical Analysis*, 10 GEO. J. LEGAL ETHICS 159 (1996) (addressing the problem of allocation of decision-making authority when representing Native American tribes).

257. What if, for example, there is a disagreement between the lawyer and the client regarding who gets to make this decision? Rule 1.2 does not specify an exact procedure for resolving such a disagreement. The lack of specificity is due in part to the "varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons." MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 2 (2007). If, after consultation with the client, there is no mutually agreeable solution, the lawyer could characterize the disagreement as fundamental and seek permission to withdraw from the representation. *Id.* R. 1.16(b)(4). The client could also discharge the lawyer if unsatisfied with the service being provided. *Id.* R. 1.16(a)(3).

258. Of course there are other ethical rules that would impact whether or not a lawyer can disclose or must disclose in this situation. For a detailed discussion of ethical limitations when immigration status is relevant to the case, see *supra* Part III.A.

259. *See* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064 (9th Cir. 2004), *cert. denied*, 544 U.S. 905 (2005) ("While documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution."). For a description of potential criminal liability, see *supra* notes 31-37 and accompanying text. Finally, a client who is found to have been in the United States unlawfully for a year or more and who thereafter seeks re-admission into the United States will be barred from admission for ten years. 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2000).

action.[260] And, if the immigrant fears disclosure, the decision to disclose by the lawyer might force the client to voluntarily dismiss the action. Given the potential impact upon the client and the potential impact on the resolution of the case, the decision to disclose should be made by the client after consultation with the lawyer.[261]

This analysis assumes that the strategic decision to disclose is simply a matter of who gets to decide. However, given that the information to be disclosed is confidential information,[262] the lawyer must grapple with the interplay between the rules that govern who gets to decide and the confidentiality rules. The rule of confidentiality is one of the fundamental rules of professional conduct for lawyers.[263] This rule requires lawyers to keep all information "relating to the representation" confidential, unless the information falls within a small number of closely defined circumstances.[264] A strategic decision to disclose immigration status does not fall within the exceptions to the confidentiality rule[265] and should not trump a client's expectation of confidentiality. Thus, in order to disclose for strategic purposes, the lawyer must have the client's consent, either express or implied.

In trying to obtain client consent, lawyers should be guided by Rule 1.4, which delineates communication obligations.[266] Rule 1.4(a) specifically

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260. A general practice of permitting such discovery might deter litigation by documented workers concerned that their immigration status could later change, or that litigation might lead to revelation of immigration problems of relatives or friends. The specter of deportation arouses considerable fear among some immigrant groups; the chilling effect of discovery orders could deter legal action simply because the potential plaintiffs did not fully understand the relationship between their immigration status and civil litigation.

Schnapper, *supra* note 151, at 54.

261. Such a position is not without support. There are a series of cases in which courts have decided, in the context of an ongoing professional relationship, that the client's judgment should prevail even in matters of tactics, procedure, or drafting of documents. *See, e.g.*, State v. Ali, 407 S.E.2d 183, 189 (N.C. 1991) ("[W]hen counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship."); Olson v. Fraase, 421 N.W.2d 820, 829-30 (N.D. 1988) (explaining that the lawyer had a duty to follow client's reasonable instructions to prepare documents to create joint tenancy, despite honest belief that instructions were not in client's best interest); Cultum v. Heritage House Realtors, Inc., 694 P.2d 630 (Wash. 1985); Olfe v. Gordon, 286 N.W.2d 573 (Wis. 1980) (determining that a lawyer may not ignore client's wish to obtain certain type of collateral); Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 97-48 (1997) (finding that a lawyer who thinks client is mistaken in wanting to take particular legal action is obligated to either follow client's instructions or withdraw from representation).

262. *See supra* notes 176-78 and accompanying text.

263. HAZARD & HODES, *supra* note 24, at 9-6 ("As a matter of professional ethics and discipline, lawyers are obligated—with only a few narrowly drawn exceptions—to preserve their clients' confidences inviolate.").

264. *See supra* notes 176-78, 181-99 and accompanying text.

265. *See supra* notes 181-99 and accompanying text.

266. MODEL RULES OF PROF'L CONDUCT R. 1.4 (2007).

identifies those decisions that clients need to be consulted on[267] and creates an affirmative duty to discuss with clients decisions that require their informed consent[268] as well as a duty to reasonably consult about the means by which their objectives are to be accomplished.[269] "Reasonably" implies that the lawyer's obligation to consult will vary depending upon the circumstances.[270] The lawyer will have to weigh the importance of the action and the feasibility of consulting with the client prior to acting.[271]

Assuming that the disclosure can happen only if the client agrees to waive the confidentiality mandate, what is the attorney obligated to communicate to the client to assist in the decision-making process? According to the Model Rules, the client "should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued."[272] In order to participate intelligently in decision making, the rules contemplate that clients' decisions are "based upon an understanding of the risks and benefits that may result from disclosure and nondisclosure."[273] In particular, when a lawyer is aware of facts that may jeopardize the client's objectives in seeking representation, the lawyer must

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267. As originally promulgated, Rule 1.4(a) simply stated that "[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." ROTUNDA & DZIENKOWSKI, *supra* note 193, at 117. In 2002, the Rule was amended to identify five specific requirements. MODEL RULES OF PROF'L CONDUCT R. 1.4(a) (2007). Section (b) is designed to make operational the obligations implicit in Rule 1.2, which requires that the lawyer consult with clients about the means utilized to achieve clients' objectives. HAZARD & HODES, *supra* note 24, at 7-7.

268. MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 2 (2007).

269. *Id.* R. 1.4(a) states, "A lawyer shall . . . reasonably consult with the client about the means by which the client's objectives are to be accomplished . . . ."

270. HAZARD & HODES, *supra* note 24, at 7-5 (finding that the duty of the lawyer to communicate with the client under Rule 1.4 is qualified by the concept of reasonableness). Thus, whether or not a lawyer has a duty to consult requires a context-sensitive analysis based on objective factors.

271. MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 3 (2007). If the lawyer is impliedly authorized to act in certain situations, the obligation to consult is alleviated. COMM'N ON EVALUATION OF THE RULES OF PROF'L CONDUCT, REPORT TO THE ABA HOUSE OF DELEGATES (2001) (explaining changes to Model Rule 1.2).

272. MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 5 (2007).

273. ANNOTATED MODEL RULES, *supra* note 159, at 93; *see, e.g.*, Attorney Grievance Comm'n v. Snyder, 793 A.2d 515 (Md. 2002) (finding that in failing to explain implications of DWI case adequately to client and incorrectly advising her that she need not appear in court for initial appearance which resulted in her arrest, attorney committed misconduct). Accordingly, a lawyer must explain the legal effect of entering an agreement or executing a legal document. *See, e.g.*, *In re* Morse, 470 S.E.2d 232 (Ga. 1996) (disciplining attorney for asking client to sign agreement settling worker's compensation claim without explaining its legal effect); *In re* Ragland, 697 N.E.2d 44 (Ind. 1998) (finding attorney violated professional conduct rules in failing to explain impact of settlement and indemnity agreement); *see also In re* Flack, 33 P.3d 1281 (Kan. 2001) (finding that by failing to meet individually with clients to explain estate plans, and relying on nonlawyer staff to explain plans to clients, attorney violated Rule 1.4(b)).

apprise the client of those facts and their legal implications in order for the client to make an informed decision about alternatives.[274] In order to be effective, the lawyer should provide advice regarding the risks and benefits of a certain action in language appropriate to the client's level of sophistication.[275] A lawyer who is relying upon client consent to justify an action and has not actually received that consent, or has not communicated sufficiently with the client, may be subject to discipline.[276]

In the context of waiving the confidentiality mandate and disclosing the client's immigration status, the lawyer needs to explain the risks and benefits of disclosing the information in a way that can be understood by the client. Given the potential ramifications, it may be advisable to explain not only the legal consequences related to the ongoing litigation, but also some of the nonlegal consequences that could accompany disclosure. Once this information has been

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274. *See, e.g.*, *In re* Sullivan, 727 A.2d 832 (Del. 1999) (finding improper the acts of a lawyer who failed to file a brief which resulted in dismissal of appeal and, more than a year later, sent a letter to client informing her there were "no claims pending" in her case); *In re* Cable, 715 N.E.2d 396 (Ind. 1999) (finding that in failing to inform client that he was too busy to handle appeal, lawyer neglected to explain matter to the extent reasonably necessary to allow client to make informed decisions about representation); Attorney Grievance Comm'n v. Cassidy, 766 A.2d 632 (Md. 2001) (finding misconduct by a lawyer who was hired to draft and record deed but failed to tell client he had been suspended, which was vital information because the law requires certification by a lawyer to record deed); *In re* Howe, 626 N.W.2d 650 (N.D. 2001) (finding that attorney's conduct in failing to explain to client he was not following through with his commitment to reduce award to judgment resulted in client's inability to make informed decision to secure alternate counsel to complete matter before interest rate was locked and constituted misconduct).

275. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (2007); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 62 (2000) ("When the question concerns the lawyer's duty to the client, the client's consent is effective only if given on the basis of information and consultation reasonably appropriate in the circumstances.").

276. *See* HAZARD & HODES, *supra* note 24, at 9-65 ("[I]f a lawyer who is relying on client consent to justify disclosure of client information has not actually received consent, or has not communicated sufficiently with the client, the lawyer may be subjected to discipline."); *see also, e.g.*, *In re* Winkel, 577 N.W.2d 9, 11 (Wis. 1998) (finding that failure to inform clients about risk of criminal prosecution if clients surrendered business assets to bank and law firm without arranging to pay subcontractor bills amounted to failure to explain matter to clients to extent reasonably necessary to permit them to make informed decision); ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 02-425 (2002) (explaining that for lawyer and client to agree to retainer provision calling for binding arbitration of disputes regarding fees and malpractice claims, lawyer must fully apprise client of advantages and disadvantages of arbitration, including informing client that arbitration normally results in client's waiver of significant rights, such as right to jury trial, broad discovery, and appeal).

provided to a client, the client can then make an informed decision about whether waiving confidentiality and disclosing immigration status is in his or her best interest.

In sum, if a lawyer believes disclosure would be beneficial to a client's case, the lawyer should utilize the decision-making paradigm set forth in Rule 1.2. The lawyer must also be mindful that immigration status is considered confidential information and that the confidentiality mandates of Rule 1.6 apply. Thus, in the absence of exceptions permitting disclosure, the lawyer generally must counsel the client and obtain the client's informed consent in order to disclose an undocumented worker's status.

V. CONCLUSION

A legislative solution to the ongoing immigration debates may be reached in the near future. However, until that time, undocumented workers will continue to work, and some will inevitably confront legal issues related to their labor and employment. In light of these realities, courts will continue to define the scope of rights and remedies for undocumented workers post-*Hoffman*. Lawyers confronting these issues will continue to wrestle with issues related to the representation of undocumented workers and the disclosure of immigration status in the course of representation.

This Article concludes that Rule 1.2(d), which prohibits a lawyer from assisting a client in criminal or fraudulent conduct, generally does not bar an attorney from counseling or representing an undocumented worker in employment-related civil litigation.[277] What lawyers do with information about immigration status in the course of litigation depends in part upon the relevance of status to the underlying litigation and the client's choices surrounding disclosure. If immigration status is not relevant to the underlying proceedings, lawyers will not be obligated to disclose status. In those instances where immigration status is relevant to the underlying proceedings, lawyers should counsel their clients on the use of the Fifth Amendment privilege against self-incrimination as a way to protect this information. Finally, strategic decisions regarding disclosure of immigration status are decisions to be made by the client after being counseled on the risks and benefits of disclosure. In light of the potential harmful consequences of an unwitting disclosure, lawyers should undertake representation of undocumented workers in labor and employment litigation mindful of the ethical issues that will inevitably arise.

277. *See supra* Part II.